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IN THE FLORIDA SUPREME COURT

CASE NO.: SC14-1265
SC 14-1266
SC-14-1305
L.T. CASE NO.: 5D12-3823, CA11-528

LEWIS BARTRAM,

Petitioner,
v.

U.S. BANK NATIONAL ASSOCIATION, ETC., et al.,

Respondent.

AMICUS CURIAE BRIEF OF BRADFORD AND CHERI LANGWORTHY AND THE TICKTIN LAW GROUP, P.A. FILED IN SUPPORT OF THE PETITIONER

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ARGUMENT

I. THE STATUTE OF LIMITATIONS SHOULD NOT BE DISTURBED.

Florida Statute § 95.11(2)(c) provides that the time within which a cause of action must be commenced regarding a mortgage foreclosure action is five years. *Farmers & Merchants & Bank v. Reide*, 565 So. 2d 883 (Fla. 1st DCA 1990); *WRH Mortgage, Inc. v. Butler*, 684 So. 2d 325, 327 (Fla. 5th DCA 1996).

In the case of a mortgage with an optional acceleration clause, if the mortgagee should opt to use the privilege and give Notice of Acceleration, the filing of the Complaint must be within five years of the Notice. *See Ruhl v. Perry*, 390 So. 2d 353 (Fla. 1980).

The five year Statute of Limitations has been held to begin to run when the mortgagee accelerates payment of the entire amount due and owing under the Mortgage and Note by filing the foreclosure Complaint. *Spencer v. EMC Mortgage Corp*., 97 So. 3d 257, 260-61 (Fla. 3d DCA 2012). Once the five-year Statute of Limitations has run, a foreclosure action should be time-barred. *Houck Corp. v. New River, LTD. Pasco,* 900 So. 2d 601, 603 (Fla. 2d DCA 2005).

If the mortgage or the promissory note provide for acceleration of the entire debt if notice is provided, and the holder of the note makes the affirmative act of

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sending a notice of default and acceleration, the holder should not then be permitted to reset his entire clock by saying that he did not mean it.

Yet, this Court is now being asked to not only make the Notice of Acceleration revocable, but worse, it is being asked to assume a revocation simply because the holder of the note filed a Notice of Voluntary Dismissal.

This is inconsistent with the fact that a Notice of Voluntary Dismissal does not act as a revocation of the Notice of Acceleration when a holder of a mortgage note files a Notice of Voluntary Dismissal and then again files a new foreclosure action before the 5 year Statute of Limitations passes.

Rightly so, if a mortgagee should see fit to voluntarily dismiss its case, it should be permitted to file suit again without serving a new notice of acceleration, as the one filed prior to the first suit is in effect. In this scenario, when it helps the mortgagee, there is no assumption that the filing a Notice of Voluntary Dismissal vitiates the original Notice of Acceleration.

By suggesting that the Notice of Voluntary Dismissal should act as a rescission of a Notice of Acceleration if the five year Statute of Limitations should pass, the Bank is asking this Court to side with the Banks, whichever way gives the Banks the greatest advantage. In other words, if the mortgagee should file a new suit before the five year Statute of Limitations passes, there is no need to file a new Notice of Acceleration, and the mortgagee wins. If the mortgagee sits on its rights,

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and permits the five year Statute of Limitations to pass, then, the Statute of Limitations does not apply, as it is assumed that the Notice of Acceleration was rescinded by the service of the Notice of Voluntary Dismissal.

This is reminiscent of the old unfair gamble of flipping a coin. Heads the mortgagee wins, and tails, the mortgagor loses.

The holders of secured promissory notes are sophisticated investors and businesspeople who have a full understanding of the ramifications and affects on homeowners of a Notice of Acceleration of a mortgage debt. They do not need extra protections to be built into the law to assure that their debts are litigated in time, and if they are not litigated within five years from that notice, that they are excused from their own affirmative acts of serving a notice which made the entire note payable.

Once the mortgage has been accelerated, the holders of the promissory notes should not be permitted to un-ring that bell to start over again. Worse, this Court should not now carve out an exception where the law will be that we should all simply disregard the notice which was served with full knowledge that the promissory note was being accelerated.

Moreover, even if this Court were to determine that the filing of a Notice of Voluntary Dismissal is tantamount to the withdrawal of the Notice of Acceleration, such a decision will leave the issue of the Statute of Limitations confusing for

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similar situations which are slightly different. For instance, if the mortgagee filed no Notice of Voluntary Dismissal in a mortgage foreclosure case, and instead went forward through a trial, only to lose. There are probably tens of thousands of cases with such a result, where the trial judge indicated for no good reason that the Final Judgment in favor of the mortgagor is "without prejudice." This would leave the question of whether this is to be treated the same as though there were a Notice of Voluntary Dismissal filed. In this scenario, the mortgagee failed to file any document which could be treated as a voluntary withdrawal of the Notice of Acceleration. If the mortgagee failed to file a second suit before the five year Statute of Limitations passes, this Court should not create a way to favor the mortgagee? The case was tried and completed and no new suit was filed within more than five years. There is no reason to un-do the Notice of Acceleration which was permitted to languish.

Then, there are those suits for mortgage foreclosure which went through a trial after the loan was accelerated, where the trial court granted a Final Judgment for the mortgagor "with prejudice." Then, if the mortgagee should again sit on its rights and permit the five year Statute of Limitations to pass, hopefully, this Court will not determine, as an operation of law, that the Notice of Acceleration was without meaning.

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The fact of the matter is that the mortgagees are not in need of more than five years from the date that they first accelerate their loans. The actions they bring are in equity and their original actions should not take five years to come to a conclusion. In the event that the mortgagees should then need to refile, they have time to go forward again and again to get the prosecution right within the generous five year Statute of Limitation.

Considering that the mortgagees are the ones in control of their own destiny as to when to first serve their Notice of Acceleration, to start their clock, there should be no need for them to be given an exception by which they are assumed to have withdrawn their original Notice of Acceleration.

This is especially true when one looks at the ramifications to the exception which the banks now wish to impose.

With the tens of thousands of properties around the State of Florida which have already been through an unsuccessful suit for foreclosure, the banks are asking that the doors to the Court remain open just in case the banks later wish to file suit for foreclosure again, irrespective of the five year Statute of Limitations.

This is exactly why we have a Statute of Limitations. It is to put an end to litigation. Moreover, when it comes to real property it is against the public policy of the State for real property to not be alienable.

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The thousands and thousands of homeowners who have been through the process must be able to sell their properties or at least refinance to make improvements. Until this issue is resolved in their favor, there will remain a glut of unalienable homes for untold years ahead.

In *Iglehart v. Phillips,* 383 So. 2d 610, 614 (Fla.1980), this Court held:

> The rule against unreasonable restraints on the use of property concerns restraints of such duration that they prevent the free alienation of property... The test which should be applied with respect to restraints on alienation is the test of reasonableness. The validity or invalidity of a restraint depends upon its long-term effect on the improvement and marketability of the property. Once that effect is determined, common sense should dictate whether it is reasonable or unreasonable.

For the banks to be permitted to willy-nilly accelerate their loans and then when they lose their cases, by operation of law, have those Notices of Acceleration nullified, would unreasonably tie up the properties around the State of Florida.

Of all the Statutes of Limitations, this one regarding mortgage foreclosure is one of the most extremely necessary limits to endless encroachments to real property.

Where the banks have accelerated their loans, prosecuted a foreclosure action and chose to file a Notice of Voluntary Dismissal or otherwise failed to refile within five years of the service of the Notice of Acceleration, they should not be permitted to maintain the right to file suit whenever it suits them in the future.

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All the other citizens of the State of Florida live in the structure of the Statute of Limitations. Those entities who know the law and fail to respect it enough to simply refile in a timely fashion should not have new and inventive mechanisms of the law cut out for them, so that they may be unaffected by the Statute of Limitations and act irresponsibly late with impunity.

CONCLUSION

For the foregoing reasons, the Fifth District's decision should be reversed and the summary judgment entered by the Seventh Judicial Circuit Court in favor of Petitioner Bartram on his cross-claim against Respondent U.S. Bank, N.A. should be reinstated. Moreover, this Court is asked to clarify the reach of its decision, should it decide that a Notice of Voluntary Dismissal is tantamount to a withdrawal of a Notice of Acceleration that the same result would not apply where a Final Judgment is entered instead by the trial court.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief was prepared in Times New Roman 14-point font, in compliance with Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

__/s/_ Peter Ticktin _____
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DESIGNATION OF EMAIL ADDRESS(ES) FOR SERVICE
(Pursuant to Rule 2.516 Fla. R. Jud. Admin.)

The undersigned attorneys of The Ticktin Law Group, P.A., hereby designate the following Email Address(es) for service in the above styled matter. Service shall be complete upon emailing to the following email address(es) in this Designation, provided that the provisions of Rule 2.516 are followed.

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SERVICE IS TO BE MADE TO EACH AND EVERY EMAIL ADDRESS LISTED IN THIS DESIGNATION AND TO NO OTHERS.

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I HEREBY CERTIFY that a true and correct copy of the foregoing has been emailed this **1st day of December 2014**, to **DINEEN PASHOUKOS WASYLIK, ESQUIRE**, service@ip-appeals.com, DPW Legal, Attorney for Lewis Bartram, P.O. Box 48323, Tampa, Florida 33646-0120, **CECI CULPEPPER BERMAN, ESQUIRE**, cberman@BHAppeals.com, Brannock & Humphries, Attorney for Lewis Bartram, 100 S. Ashley Drive, Suite 1130, Tampa, Florida 33602, **ALICE MARIA VICKERS, ESQUIRE**, alicevickers@flacp.org., Attorney for MRI Florida Alliance for Consumer Protection, 623Beard Street, Tallahassee, Florida 32303-6321, **LYNN DRYSDALE, ESQUIRE**, lynn.drysdale@jaxlegalaid.com, Attorney for MRI National Association of Consumer Advocates, 126 W. Adams Street, Jacksonville, Florida 32202-3849, **KIMBERLY LA. SANCHEZ, ESQUIRE**, Kimberlys@clsmf.org, Florida Consumer Umbrella Group, 122 E. Colonial Drive, Suite 200, Orlando, Florida 32801-1219 and to **JOEL S. PERWIN, ESQUIRE,** jperwin@perwinlaw.com, Attorney for the Plantation at Ponte Vedra, Joel S. Perwin, P.A., 169 W. Flagler Street, Suite 1422, Miami, Florida 33131, **DANIEL F. BLONSKY, ESQUIRE,** koffey@coffeyburlington.com, Coffey Burlington, P.L., Attorney for Lewis Brooke Bartram, 2601 South Bayshore, Drive, Penthouse, Miami, Florida 33133 and to **EVE A. CANN, ESQUIRE,** mstarks@bakerdonelson.com,

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