IN THE SUPREME COURT OF FLORIDA

CASE NO. SC14-1265
(Consolidated with Case Nos.
SC14-1266 and SC14-1267)

LEWIS BROOKE BARTRAM,
THE PLANTATION AT PONTE VEDRA,
INC., and GIDEON M.G. GRATSIANI,

Appellants,

vs.

U.S. BANK NATIONAL ASSOCIATION,

Appellees.

On Appeal from the Fifth District Court of Appeals of Florida
L.T. Case No. 5D12-3823

REPLY BRIEF OF LEWIS BROOKE BARTRAM

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I. Introduction

In attempting to force the square peg of a res judicata precedent into the round hole of the instant statute of limitations appeal, Respondent U.S. Bank, N.A. ("U.S. Bank") attempts in its Answer Brief to convince this Court to misread its decision in *Singleton v. Greymar Assocs.*, 882 So. 2d 1004 (Fla. 2004), and to undo settled legal principles regarding accrual of causes of action for purposes of the running of the statute of limitations. There is no logical or legal support for its contentions. The Court should clarify once and for all the limited reach of *Singleton* and end its misapplication to eviscerate the statute of limitations. The Court should reject an interpretation of the accrual of a cause of action to foreclose on an accelerated mortgage debt that would place Florida apart from practically every other state that has considered the issue, and which would improperly invade the Legislature's sphere.

II. U.S. Bank Misreads this Court's Narrow *Singleton* Decision and Tries to Reinvent Accrual of a Mortgage Foreclosure Cause of Action

The Initial Briefs of both Petitioner Lewis Brooke Bartram ("Bartram") and co-Petitioner The Plantation at Ponte Vedra, Inc. contain extensive quotations from and analysis of the actual language of *Singleton*, including the express limitations on its intended reach. U.S. Bank chooses to forego a review of what was actually said and held in *Singleton*. Instead, it concocts the novel concept that, although it concededly elected to accelerate Bartram's mortgage debt and sue him for the entire

note balance rather than just unpaid installments, its acceleration was "ineffective" or "incomplete" or "unconsummated" because it did not obtain a final judgment against Bartram.[1] Accordingly, to U.S. Bank, the failure to obtain a judgment means that no acceleration was ever effectuated in the first instance and therefore the cause of action for foreclosure that it brought had not accrued for purposes of the statute of limitations. *See* U.S. Bank Answer Br. at § IV(A).

The fatal deficiencies with such arguments are manifest. U.S. Bank and its amici refuse to recognize that, under settled and long-standing Florida law, the act of acceleration accrues a cause of action for a borrowers' unpaid balance and begins the running of the statute of limitations. *See, e.g., Snow v. Wells Fargo Bank, N.A.*, --- So. 3d ---, 2015 WL 160326 at *3 (Fla. 3d DCA Jan. 14, 2015) ("[a] cause of action on an accelerated debt accrues, and the statute of limitation commences, when the lender exercises the acceleration option and notifies the borrower of this exercise"), *citing Greene v. Bursey*, 733 So. 2d 1111, 1115 (Fla. 4th DCA 1999),

[1] U.S. Bank did not obtain a final judgment due to the involuntary dismissal of its foreclosure action for failure to attend a case management conference that was noticed by the trial court with the warning that failure to appear "may result in the case being dismissed **without prejudice**." R. III: 433 (emphasis added). U.S. Bank's assertion at page 4 of its Answer Brief, in complete contradiction to what it acknowledges representing to the Fifth District (at page 4 of its Initial Brief to the Fifth District, U.S. Bank correctly stated that the trial court "entered an Order of Dismissal without prejudice"), that this dismissal was nonetheless with prejudice, is incorrect.

and *Monte v. Tipton*, 612 So. 2d 714 (Fla. 2d DCA 1993). *See also Travis Co. Mayes*, 36 So. 2d 264, 265 (Fla. 1948) ("[t]he law is well settled that the Statute of Limitations begins to run against a mortgage at the time the right to foreclose accrues"); *Smith v. F.D.I.C.*, 61 F.3d 1552, 1561 (11th Cir. 1995) ("[w]hen the promissory note secured by the mortgage contains an optional acceleration clause, the foreclosure cause of action accrues, and the statute of limitations begins to run, on the date the acceleration clause is invoked or the stated date of maturity, whichever is *earlier*") (emphasis in original).[2]

Singleton says nothing about the statute of limitations. Nor could it, since both the first and the second action in *Singleton* were brought within five years of the initial default. Instead, *Singleton* merely holds that, for the distinct purposes of res judicata, an ineffective acceleration may not place the entire balance at issue. Confirming this context, this Court provided two examples of an ineffective acceleration that have no pertinence here – proof by the borrower that there was no default or waiver by the lender. *Singleton*, 882 So. 2d at 1007. Below, the Fifth District expressly found that there was "no question" of U.S. Bank's effective and

[2] Florida Statutes § 95.031(1) also rejects U.S. Bank's position, providing that "[a] cause of action accrues when the last element constituting the cause of action occurs. For the purposes of this chapter, the last element constituting a cause of action on an obligation or liability founded on a negotiable or nonnegotiable note payable on demand or after date with no specific maturity date specified in the note … **is the first written demand for payment**…" (emphasis added).

"successful acceleration" of Bartram's mortgage and creation of a ripe obligation for the entire loan balance. *U.S. Bank, N.A. v. Bartram*, 140 So. 3d 1007, 1009 (Fla. 5th DCA 2014). Therefore, even under the *Singleton* res judicata analysis, U.S. Bank's acceleration of Bartram's mortgage was effective and the entire loan balance was placed at issue. When U.S. Bank's foreclosure action accrued, however, is not informed by *Singleton* because it has nothing to do with the statute of limitations.

III. A Cause of Action Accrues at the Time of Acceleration of the Debt and the Statute of Limitations Begins to Run

In its Answer Brief, U.S. Bank utterly disregards the central issue presented by this appeal – when does a cause of action for an accelerated mortgage debt accrue, thus commencing the running of the statute of limitations. However, its supporting amicus, American Legal and Financial Network ("ALFN"), correctly cites *Travis Co.* and *City of Riviera Beach v. Reed*, 987 So. 2d 168, 170 (Fla. 4th DCA 2008), for the straightforward proposition that the statute of limitations begins to run in a mortgage action at the time the right to foreclose accrues, which occurs when an action can be brought. *See* ALFN Br. at 8-9.

Here, there is no dispute that U.S. Bank could bring its action against Bartram when it, in fact, did so, filing a Complaint that accelerated Bartram's debt and

sought liability for the entire obligation.[3] R. III: 469, ¶ 9. Once that happened, the statute of limitations indisputably began to run and it expired five years later, after the dismissal without prejudice of its foreclosure action.[4] Whether, in those circumstances, a subsequent action by U.S. Bank would have been barred by the doctrine of res judicata is irrelevant. A subsequent action is barred by the five year statute of limitations, and no warping of *Singleton* can change that dispositive fact.[5]

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[3] The Third District recently recognized in *Deutsche Bank Trust Co. Americas v. Beauvais*, --- So. 3d ---, 2014 WL 7156961 at *8 (Fla. 3d DCA Dec. 17, 2014), that acceleration ends installment payments and thus the possibility of a default for failure to make a monthly payment after acceleration also ends, holding that, "[w]ithout a new payment due, there could be no new default, and therefore no new cause of action."

[4] To be sure, as U.S. Bank emphasizes in § IV(B) of its Answer Brief, Bartram had a contractual right to reinstate the mortgage after acceleration – a right **not** belonging to U.S. Bank. Omitted from U.S. Bank's flimsy analysis is the obvious fact that a right to reinstate that was not exercised cannot prevent the accrual of a cause of action or the running of the statute of limitations, in the same manner that a borrower's right to satisfy a mortgage by payment does not negate a lender's cause of action for breach.

[5] In *Beauvais*, the Third District additionally held, as urged in Bartram's Initial Brief, that "a voluntary dismissal without prejudice of an action on an accelerated debt does not, by itself, constitute a deceleration." *Beauvais*, 2014 WL 7156961 at *10. Here, U.S. Bank's action was **involuntarily** dismissed without prejudice. Moreover, as held elsewhere, it is not the prejudicial nature of the dismissal that matters for deceleration purposes, but whether the dismissal was the product of an affirmative act by the foreclosing lender and whether that act was communicated to the borrower. *See, e.g., EMC Mortgage Corp. v. Patella*, 720 N.Y.S.2d 161, 162-63 (N.Y. App. Div. 2001) (affirming dismissal of second foreclosure action because "the dismissal of the prior foreclosure action by the court [for failure to appear at a status conference] did not constitute an affirmative act by the lender revoking its

IV. Equity Cannot Save U.S. Bank

In apparent recognition that its right to foreclose on Bartram's mortgage is barred by settled statute of limitations jurisprudence, U.S. Bank and its amici seek solace in the refuge of purported "equity" to countermand the legislatively established limitations period. They complain of how unfair it would be for Bartram to benefit from U.S. Bank's sleeping on its rights and its apparent disinterest in pursuing a claim against Bartram for more than five years after it chose to accelerate the mortgage and seek recovery of the entire debt. *See* U.S. Bank Answer Br. at § IV(D). As explained in the Petitioners' various Initial Briefs, the equities do not rest with U.S. Bank, which has only itself to blame for the predicament in which it placed itself. Moreover, equity is itself a misplaced concept that pertains to res judicata, not the statute of limitations.

After all, the very premise of a statute of limitations is to bar a plaintiff's claim that is presumably valid and valuable. The Legislature determines the statute of limitations and it is for courts to apply them, not to toll them for asserted equitable reasons. Indeed, the Legislature amended the statute of limitations to

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election to accelerate"); *Murphy v. HSBC Bank USA*, 2014 WL 1653081 at *10 (S.D. Tex. Apr. 23, 2014) (to allow a lender "to unilaterally 're-accelerate' … would make a nullity of the statute of limitations"); *Cadle Co. II, Inc. v. Fountain*, 281 P.3d 1158, 2009 WL 1470032 at *1 (Nev. 2009) (lender's "voluntary dismissal did not decelerate the mortgage because it was not accompanied by a clear and unequivocal act memorializing that deceleration") (quoted by *Beauvais*).

enact a discovery rule for sexual assault victims because courts had no authority to toll the statute of limitations to preserve such claims absent legislative authorization beyond that provided for in Fla. Stat. § 95.051.[6] *See Hearndon v. Graham*, 767 So. 2d 1179, 1185 (Fla. 2000); *Wiley v. Roof*, 641 So. 2d 66 (Fla. 1994). If sexual assault victims have no right to equitable tolling, neither do dilatory lenders, particularly where there is no contention that there was anything done by Bartram that caused U.S. Bank's claim to be barred by the statute of limitations.

Predictably, U.S. Bank and its amici suggest a parade of horribles if lenders are not judicially rescued by this Court so they can accelerate mortgages, file foreclosure actions, fail to pursue them, and re-start the process endlessly for 30 years. Suffice it to say that practically all other states in the union to consider the issue (*see* Bartram's Initial Brief's discussion of foreign law at its § IV, pages 24 through 34) have managed to get along without such an unprincipled, judicially invented bail-out for dilatory lenders.

Stripped of the hyperbole offered by U.S. Bank and its amici, this is a simple – albeit important – statute of limitations case. The cause of action for foreclosure

[6] Neither the dismissal nor pendency of any prior action is included in the legislative list of tolling events. *See HHC Health Services of Florida, Inc. v. Hillman*, 906 So. 2d 1094, 1098 (Fla. 2d DCA 2004) (statute of limitations barred second lawsuit notwithstanding filing and dismissal of earlier lawsuit because "the legislature has made clear its intent to exclude all tolling exceptions not listed in" Fla. Stat. § 95.051), *review denied*, 904 So. 2d 430 (Fla. 2005).

accrued at the time of acceleration, when the statute of limitations began to run. The mortgage was never reinstated – U.S. Bank never sought its reinstatement, is not permitted contractually to reinstate it, and certainly never communicated to Bartram an intention to reinstate it. Consequently, the statute of limitations expired five years after accrual of the cause of action, and subsequent to the involuntary dismissal of the foreclosure action. Any further effort to foreclose on Bartram's mortgage is therefore time-barred. Nothing in *Singleton* or any other decision of this Court supports a contrary result.

V. The Statute of Repose Does Not Salvage U.S. Bank's Mortgage

In the alternative to its argument that an involuntary dismissal automatically reinstated the mortgage, U.S. Bank and its amici assert that, even if foreclosure of Bartram's mortgage is barred by the statute of limitations, it can still cloud title to the property by virtue of the mortgage lien statute of repose. *See* U.S. Bank Answer Br. at § IV(F) and amicus briefs of ALFN and US Financial Network. The Court should reject U.S. Bank's attempt to compromise the free alienation of property, an effort that contravenes fundamental law and public policy.

U.S. Bank's statute of repose argument fails for two separate reasons. First, even accepting its analysis that the statute of repose is available to cloud title once a mortgage foreclosure action is time-barred, the facts of this case establish that the mortgage lien terminated at the same time that a foreclosure action became time-

barred – five years from acceleration. Second, the law in Florida is properly construed to preclude a mortgage lien from having further force and effect once the underlying obligation to pay the mortgage note has become unenforceable and, hence, extinguished. Each reason is discussed separately below.

A. The mortgage lien terminated five years after acceleration

The statute of limitations on a mortgage foreclosure action is five years. Fla. Stat. § 95.11(2)(c). Meanwhile, the statute of repose provides that a mortgage lien terminates either five years after the date of maturity "[i]f the final maturity of an obligation secured by a mortgage **is ascertainable from the record of it**," Fla. Stat. § 95.281(1)(a) (emphasis added), or 20 years after the date of the mortgage if the final maturity "is not ascertainable from the record of it." Fla. Stat. § 95.281(1)(b). The key, therefore, is whether the date of maturity is ascertainable from the record.

Here, because U.S. Bank's acceleration of the maturity date of Bartram's mortgage is ascertainable from the record, the statute of repose for the mortgage lien coincides with the statute of limitations for the foreclosure action – five years. For the same reasons that a mortgage foreclosure action is time-barred, so too is the mortgage lien, thus supporting the trial court's entry of summary judgment in favor of Bartram's quiet title cross-claim against U.S. Bank.

Bartram adopts the argument made at page 19 of the Amici Curiae Brief filed by Florida Alliance of Consumer Protection, Brevard County Legal Aid, and

Consumer Umbrella Group of Florida Legal Services that "ascertainable from the record of it" in the statute of repose must mean "capable of being learned or found out" from the record of the mortgage. *See also CCM Pathfinder Palm Harbor Mgmt., LLC v. Unknown Heirs of Gendron*, --- So. 3d ---, 2015 WL 248796 at *4 (Fla. 2d DCA Jan. 21, 2015) ("[a] maturity date is 'ascertainable from the record of it' if the maturity date can be determined by reading the public records"). It is clear that the acceleration of the maturity date of Bartram's mortgage by U.S. Bank is ascertainable from the record of the mortgage in the official county records.

Bartram's mortgage, of course, was recorded. R. III: 469, ¶ 4. The date of maturity is expressly stated in the recorded mortgage. R. III: 475. When U.S. Bank commenced the 2006 foreclosure action, and accelerated the maturity date of the mortgage through the allegations of the filed Complaint (R: III: 469, ¶ 9), it also recorded a Notice of Lis Pendens. R: III: 470, 512. By doing so, U.S. Bank made the accelerated maturity date[7] ascertainable from the official records of the county. Anyone performing a title search on Bartram's property and mortgage would be on record notice of U.S. Bank's lawsuit against him and the acceleration of the maturity date, and there is constructive notice of that fact. *See, e.g., Mayfield v. First City*

[7] "When a lender elects to accelerate payment on a note, the lender accelerates the maturity of the note itself." *Casino Espanol de la Habana, Inc. v. Bussel*, 566 So. 2d 1313, 1314 (Fla. 3d DCA 1990), *review denied*, 581 So. 2d 163 (Fla. 1991), *citing Erwin v. Crandall*, 175 So. 862, 863 (Fla. 1937).

Bank of Florida, 95 So. 3d 398, 400 (Fla. 1st DCA 2012) (recorded documents provide constructive notice of their contents, even if not actually seen), *review denied*, 116 So. 3d 1261 (Fla. 2013). The statutory requirements for the five year statute of repose for terminating a mortgage lien have thus been met.

No reported Florida state court decision has considered the question of whether the acceleration of final maturity through a complaint and a recorded notice of lis pendens make the accelerated maturity date ascertainable for purposes of the statute of repose. *But see Amador v. Bank of New York, Inc.*, 2013 WL 6157932 at *3-4 (S.D. Fla. Nov. 8, 2013) (dismissing quiet title action where borrower relied on notice of lis pendens in prior foreclosure action, and holding that it could not be ascertained whether the lender exercised its option to accelerate in the original foreclosure action and, if it had, the maturity date would no longer be ascertainable from the record of the mortgage). The trial judge's reasoning in *Amador* should be rejected. U.S. Bank's acceleration of the mortgage maturity date to the date of the filing of its foreclosure action is, in fact, readily ascertainable by one who reads the county records, as a result of the recording of the Notice of Lis Pendens.

B. There can be no mortgage lien if there is no obligation to pay the underlying mortgage note

Even if the Court accepts *Amador* and concludes that the accelerated maturity date is not ascertainable from the county records, that does not lead to the conclusion that U.S. Bank still has a mortgage lien with which it can cloud title to

Bartram's property. Rather, this Court has held that, absent an enforceable underlying promissory note, there is no mortgage. Absent a mortgage, no valid mortgage lien can exist. As a result, because U.S. Bank cannot enforce Bartram's former obligation to pay his promissory note due to the expiration of the statute of limitations, it should not be permitted to assert the continuing existence of a mortgage lien related to that unenforceable note.

As a starting point, the right to alienate property is protected by the Florida Constitution, at Article 1, Section 2. The Legislature has further observed that "the public policy of this state favors the marketability of real property and the transferability of interests in real property free of title defects or unreasonable restraints on alienation." Fla. Stat. § 689.28(1). Reading the statute of repose to impair the marketability of real property (potentially for decades) when the underlying mortgage is time-barred is just such an unreasonable restraint on alienation that is contrary to public policy.

U.S. Bank and its amici would have this Court conclude that, even though any foreclosure of the mortgage is barred exclusively as a result of its own dilatory conduct in failing to pursue its own foreclosure action, it is still permitted to cloud title through a mortgage lien arising from an unenforceable mortgage. Such a proposition is plainly contrary to the public policy of this state. It is also inconsistent with this Court's pronouncements recognizing the incidental nature of a

mortgage lien, in contrast to the controlling factor of whether there is an enforceable underlying debt or obligation. *See, e.g., Downing v. First Nat'l Bank of Lake City*, 81 So. 2d 486, 488 (Fla. 1955) ("[a] mortgage executed as security for the payment of a negotiable instrument is a mere incident of and ancillary to such note"), *quoting Scott v. Taylor*, 58 So. 30, 31-32 (Fla. 1912); *Johns v. Gillian*, 184 So. 140, 143 (Fla. 1938) ("a mortgage is but an incident to the debt, the payment of which it secures"). Thus, this Court has long established that "[i]t is well settled in this and other jurisdictions that there can be no mortgage unless there is a debt to be secured thereby or some obligation to pay money." *Nelson v. Stockton Mortgage Co.*, 130 So. 764, 766 (Fla. 1930). *See also Kilcoyne v. Golden Beach Corp.*, 136 So. 350, 352 (Fla. 1931) ("[w]ithout a debt there can be no lien, and without a lien there can be no foreclosure"); *Kremser v. Tonokaboni*, 356 So. 2d 1331, 1332 (Fla. 3d DCA 1978) ("[t]here being no debt or obligation upon which the mortgage could rest, the mortgage could not have been foreclosed … and was thus unenforceable").

Recently, the logic behind this long line of authorities was put into action in *In re Brown*, 2014 WL 983532 (Bankr. M.D. Fla. Feb. 11, 2014), where U.S. Bank was the mortgagee and, after commencing and having dismissed two actions to foreclose on a recorded mortgage, it filed a third foreclosure action more than five years after accelerating the loan in the first action. The court, applying Fla. Stat. § 95.281, held that, by virtue of the acceleration of the recorded mortgage, the

mortgage lien was extinguished five years from the accelerated maturity date. *Id.* at *1.

U.S. Bank relies on *Houck Corp. v. New River, Ltd., Pasco*, 900 So. 2d 601 (Fla. 2d DCA 2005). In *Houck*, the Second District affirmed the trial court's entry of summary judgment in favor of the borrower on statute of limitations grounds because the lender's foreclosure action was brought more than five years after the loan matured. *Id.* at 602-03. The Second District then went on opine (without citing to any authority or public policy, and disregarding this Court's extensive precedent discussed above) that, because the maturity date was not ascertainable from the recorded mortgage, even though the statute of limitations to file a foreclosure action expired five years from maturity, the mortgage lien was enforceable for 20 years from the date of the mortgage, per Fla. Stat. § 95.281(1)(b). *Id.* at 605. It reached this conclusion despite the fact that the lender "had no legal recourse to collect the debt secured by the mortgage" due to the expiration of the statute of limitations. *Id.*

The flaw with the reasoning in *Houck* regarding the statute of repose is that, once the lender "had no legal recourse to collect the debt secured by the mortgage," *id.*, then this Court's authorities direct that, "[w]ithout a debt there can be no lien." *Kilcoyne*, 136 So. at 352. A debt which one has no legal recourse to collect should be deemed a non sequitur. Absent an ability to collect, there is no debt, and "[w]ithout a debt there can be no lien." *Id.*

The Court should reject the anomalous result that would be engendered by *Houck*, and which would be an unreasonable restraint on alienation in violation of Florida public policy. As a matter of logic, public policy and this Court's own analysis, U.S. Bank should not be permitted to maintain a lien on an unenforceable mortgage for decades to come. Instead, the statute of repose for mortgage lien termination should be harmonized with the statute of limitations for mortgage foreclosure actions. Moreover, as discussed earlier, the legal and practical reality is that an acceleration of the mortgage debt does indeed create a new maturity date for a debt – a debt that will no longer be enforceable after the expiration of the statute of limitations. Where a recorded notice of lis pendens gives record notice of the new, accelerated maturity date, this date on which full payment has become due is "ascertainable from the record" as a matter of law and as a matter of public policy.

VI. Conclusion

For the reasons discussed in the Initial Brief and herein, the Fifth District should be reversed and the ruling of the trial court should be reinstated.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Reply Brief of Lewis Brooke Bartram was served via electronic mail, this 17th day of March 2015, to the parties on the attached service list:

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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.

By: /s/Daniel F. Blonsky