GT GreenbergTraurig

Alert

Litigation | May 2014

Statute of Limitations Update in Florida Foreclosure Actions: Fifth District Court of Appeals Holds that Each Default Creates a New Case of Action

I. The Opinion

On April 25, 2014, the Fifth District Court of Appeals issued an important opinion in *U.S. Bank Nat'l Ass'n v. Bartram*, No. 5D12-3823, 2014 WL 1632138 (Fla. 3d DCA Apr. 25, 2014), holding that "a default occurring after a failed foreclosure attempt creates a new cause of action for statute of limitations purposes, even where acceleration had been triggered and the first case was dismissed on the merits." *Id.* at *6. In other words, if a lender's foreclosure action is dismissed, and five years pass, the lender can still go ahead and bring another one—so long as the borrower defaults sometime after the first action was brought. The statute of limitations will not bar the action. This is the first time that a Florida appellate court has explicitly held that each default triggers a new cause of action for foreclosure. We expect that this decision will have a positive practical impact in allowing lenders and mortgage servicers to dismiss a foreclosure action and re-default a borrower without fear of having a second foreclosure action being dismissed on statute of limitations grounds.

In *Bartram*, although the Bank's initial foreclosure action was involuntarily dismissed, Bartram and the Bank were still both defendants in a separate foreclosure action brought by Bartram's ex-wife (who owned a note and mortgage on the same property pursuant to a divorce action). Bartram filed a crossclaim against the Bank in his ex-wife's action, seeking declaratory relief and to quiet title. "He argued that because more than five years had passed since he had defaulted on the accelerated note and

mortgage, the statute of limitations[1] barred the Bank from now enforcing its rights under the note and mortgage." *Id*. The trial court agreed. It quieted title in *Bartram*, granted summary judgment against the Bank, and canceled the note and mortgage. *Id.*

The Fifth DCA reversed the trial court, concluding that, even though five years had passed since the Bank's foreclosure action, it was not barred from subsequently enforcing its rights under the note and mortgage, so long as Bartram defaulted sometime after the institution of the first action. Any "subsequent and separate alleged default 'created a new and independent right in the mortgagee to accelerate payment on the note in a subsequent foreclosure action.'" *Id.* at *6 (quoting *Singleton v. Greymar Associates*, 882 So. 2d 1004 (Fla. 2004)). New defaults present new causes of action. *Id.*

From *Res Judicata* to Statutes of Limitations—the Fifth DCA Extends the *Singleton* Rationale:

In *Singleton*, the Florida Supreme Court held that "a dismissal with prejudice in a mortgage foreclosure action does not necessarily bar," on the grounds of *res judicata*, "a subsequent foreclosure action on the same mortgage." *Singleton*, 882 So. 2d at 1005. In *Singleton*, like in *Bartram*, a mortgagee's foreclosure action was dismissed for failure to appear at a case management conference. *Id.* The mortgagee then brought a second foreclosure action based on defaults that occurred after the defaults alleged in the first action. Both the trial court and Fourth DCA rejected the mortgagor's argument that the second suit was barred by *res judicata*.

The Fourth DCA's *Singleton* decision conflicted with the Second DCA's opinion in *Stadler v. Cherry Hill Developers, Inc.*, 150 So. 2d 468 (Fla. 2d DCA 1963). The Florida Supreme Court certified the conflict, and resolved it: "We agree with the Fourth District that when a second and separate action for foreclosure is sought for a default that involves a separate period of default from the one alleged in the first action, the case is not necessarily barred by *res judicata*." *Id.* at 1006–07. Although "a foreclosure action and an acceleration of the balance due based upon the same default may bar a subsequent action on that default, an acceleration and foreclosure predicated upon subsequent and different defaults present a separate and distinct issue." *Id.* at 1007 (emphasis added). The same result obtains even where in the first action, the mortgagee sought to accelerate the entire debt. *Id.* at 1008.

The Court's reasoning was grounded as much in sense, as in precedent. It reasoned that, where a mortgagor prevails in a foreclosure action, "the mortgagor and mortgagee are simply placed back in the same contractual relationship with the same continuing obligations. Hence, an adjudication denying acceleration and foreclosure under those circumstances should not bar a subsequent action a year later, if the mortgagor ignores her obligations on the mortgage and a valid default can be proven." *Id.* at 1007. Accordingly, the "seeming variance from the traditional law of *res judicata*"—permitting a second foreclosure action on the same debt between the same parties—"rests upon a recognition of the unique nature of the mortgage obligation and the continuing obligations of the parties in that relationship." *Id*. The Court could simply "find no valid basis for barring mortgagees from challenging subsequent defaults on a mortgage and note solely because they did not prevail in a previous attempted foreclosure based upon a separate alleged default." *Id.* at 1008. "In this case," the Court concluded, "the subsequent and separate alleged default created a new and independent right in the mortgagee to accelerate payment on the note in a subsequent foreclosure action." *Id.*

The *Bartram* court concluded that "*Singleton's* analysis is equally applicable to the statute of limitations issue." *Bartram*, 2014 WL 1632138, at *5. The conclusion only followed from the rationale of *Singleton*,

[1] Fla. Stat. § 95.11(2)(c) sets a five-year limitation on "[a]n action to foreclose a mortgage."

that "the subsequent and separate alleged default 'created a new and independent right in the mortgagee to accelerate payment on the note in a subsequent foreclosure action.'" *Id.* (quoting *Singleton*, 882 So. 2d at 1008).

II. Sister Courts of Appeal Support the Bartram Rationale

Bartram noted two state-court decisions that recently applied *Singleton*. In *Star Funding Solutions, LLC v. Krondes*, 101 So. 3d 403 (Fla. 4th DCA 2012), the court affirmed a dismissal of a foreclosure action, and wrote *"only to address the impact of the dismissal with prejudice on any subsequent act of default of the terms of the mortgage . . . A new default, based on a different act or date of default not alleged in the dismissed action, creates a new cause of action." Bartram*, 2014 WL 1632138, at *4 (quoting *Star Funding*, 101 So. 3d at 403. Similarly, in *PNC Bank, N.A. v. Neal*, the First DCA affirmed a dismissal of a foreclosure action, "but point[ed] out that the dismissal with prejudice of PNC Bank's foreclosure action . . . does not preclude PNC Bank from instituting a new foreclosure action based on a different act or a new date of default not alleged in the dismissed action." 2013 WL 5779048, at *1 (Fla. 1st DCA Oct. 25, 2013). In addressing these cases, the *Bartram* court concluded, "[w]hile neither *Star Funding* nor *PNC* [*v. Neal*] mentions a statute of limitations issue, their language suggests that the First and Fourth District Courts would apply Singleton to a statute of limitations analysis because, given their conclusion that each new default creates a new cause of action, the statute of limitations would only begin to run when the new cause of action accrued." *Bartram*, 2014 WL 1632138, at *5.

III. Federal Court Opinions Have Reached the Same Conclusions as Bartram

No Florida state courts other than *Bartram* have applied *Singleton* to the statute of limitations issue. But three reported opinions from the Southern and Middle District Courts of Florida have, and have reached the same conclusion: *Kaan v. Wells Fargo Bank, N.A.,* 2013 WL 5944074 (S.D. Fla. Nov. 5 2013); *Dorta v. Wilmington Trust Nat'l Ass'n*, 2014 WL 1152917 (M.D. Fla. Mar. 24, 2014); *Romero v. Suntrust Mortg., Inc.*, 2014 WL 1623703 (S.D. Fla. Apr. 22, 2014). In all three federal cases, (1) a lender's original foreclosure action was dismissed; (2) a borrower subsequently sought to quiet title, alleging that the lenders involved should be barred by the statute of limitations from any further enforcement of the note or mortgage; (3) the court applied *Singleton* to conclude that the statute of limitations does not bar a second foreclosure action based on subsequent defaults; and (4) the court dismissed a plaintiff's quiet title action for failure to state a claim.[2]

IV. Future Implications

Although there is no current conflict among the District Courts of Appeal as to the statute of limitations issue, the *Bartram* court certified the following question to the Florida Supreme Court as being of great public importance: "does acceleration of payments due under a note and mortgage in a foreclosure action that was dismissed pursuant to rule 1.420(b), Florida Rules of Civil Procedure, trigger application of the statute of limitations to prevent a subsequent foreclosure action by the mortgagee based on all payment defaults occurring subsequent to the dismissal of the first foreclosure suit?" *Bartram*, 2014 WL 1632138, at *6.

[2] See also *Lopez v. HSBC Bank USA, N.A.*, No. 14-cv-20798-UU (S.D. Fla. Apr. 28, 2004) (in an unpublished order, relying on *Kaan* and *Dorta* to dismiss a quiet title action).

It remains to be seen whether the Florida Supreme Court will accept jurisdiction. We will continue to follow *Bartram*, to determine what action, if any, the Florida Supreme Court takes and will update accordingly. To date, *Singleton* has been interpreted to hold that "if the mortgagee's foreclosure action is unsuccessful for whatever reason, the mortgagee still has the right to file later foreclosure actions—and to seek acceleration of the entire debt—so long as they are based on separate defaults." *Dorta*, 2014 WL 1152917, at *6 (emphasis added). We have no reason to believe that the Florida Supreme Court would depart from the reasoning set forth in Bartram and the cases on which Bartram relies. While there is no guarantee that the Florida Supreme Court would not answer the certified question to prevent a subsequent foreclosure action based on the statute of limitations expiring, a contrary holding would cut against the sound principle that each new default creates a new and independent right in the lender, stemming from the unique and continuing obligation to make payments in a lender-borrower relationship.

Going forward, we expect *Bartram* to have a positive impact on the lender's ability to file a second foreclosure action based on a new default when the first foreclosure action has been dismissed. To that end, *Bartram's* rationale precludes a borrower from obtaining a windfall on a second foreclosure action that has been filed more than five years after acceleration. *Bartram* should also help to expedite the resolution of the many outstanding foreclosure cases in Florida, whether through judgment or settlement, where the statute of limitations is at issue. Greenberg Traurig will continue to monitor how *Bartram* is interpreted, including any appellate review by the Florida Supreme Court.

This *GT Alert* was prepared by **Michele L. Stocker**, **Cory W. Eichhorn** and **Richard B. Rosengarten**. Questions about this information can be directed to:

- Michele L. Stocker | +1 954.768.8271 | stockerm@gtlaw.com
- Cory W. Eichhorn | + 1 954.768.8263 | eichhornc@gtlaw.com
- Richard B. Rosengarten | +1 954.768.8226 | rosengartenrich@gtlaw.com
- Or your Greenberg Traurig attorney

Albany
+1 518.689.1400

Amsterdam
+31 (0) 20 301 7300

Atlanta
+1 678.553.2100

Austin
+1 512.320.7200

Boca Raton
+1 561.955.7600

Boston
+1 617.310.6000

Chicago
+1 312.456.8400

Dallas
+1 214.665.3600

Delaware
+1 302.661.7000

Denver
+1 303.572.6500

Fort Lauderdale
+1 954.765.0500

Houston
+1 713.374.3500

Las Vegas
+1 702.792.3773

London*
+44 (0) 203 349 8700

Los Angeles
+1 310.586.7700

Mexico City+
+52 (1) 55 5029 0000

Miami
+1 305.579.0500

New Jersey
+1 973.360.7900

New York
+1 212.801.9200

Northern Virginia
703.749.1300

Orange County
+1 949.732.6500

Orlando
+1 407.420.1000

Philadelphia
+1 215.988.7800

Phoenix
+1 602.445.8000

Sacramento
+1 916.442.1111

San Francisco
+1 415.655.1300

Seoul∞
+82 (0) 2 369 1000

Shanghai
+86 (21) 6391.6633

Silicon Valley
+1 650.328.8500

Tallahassee
+1 850.222.6891

Tampa
+1 813.318.5700

Tel Aviv^
+972 (0) 3 636 6000

Warsaw~
+48 22 690 6100

Washington, D.C.
+1 202.331.3100

West Palm Beach
+1 561.650.7900

White Plains
+1 914.286.2900