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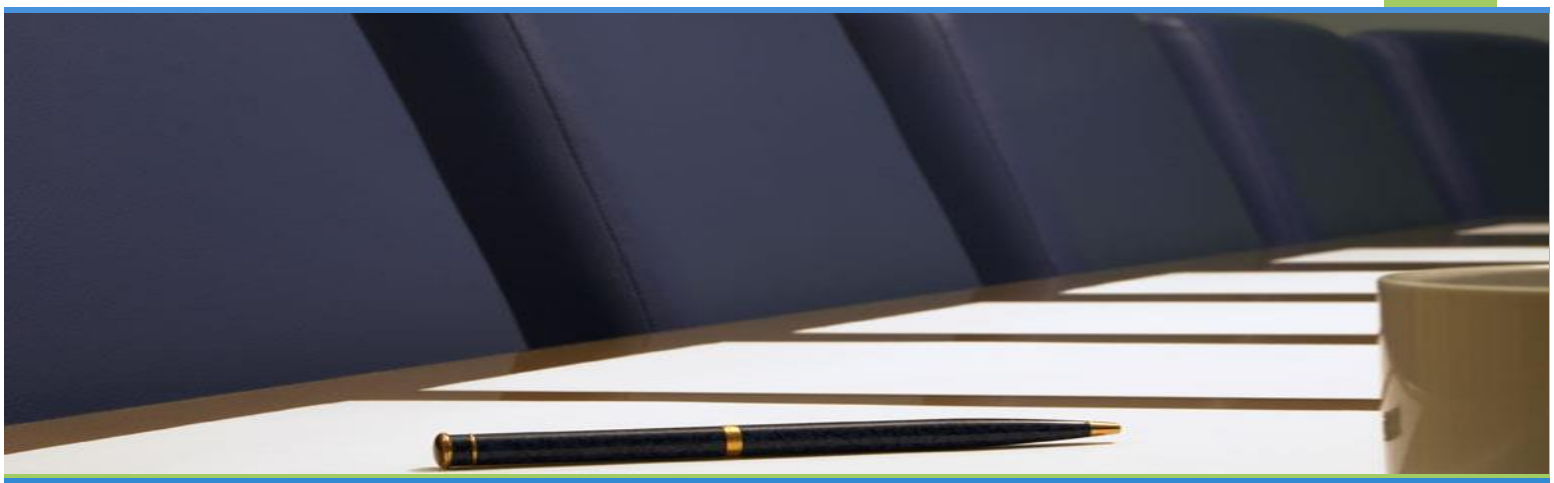

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Third District Court Of Appeals Reverses Holding on Statute of Limitations for Florida Foreclosures: The Impact of *Deutsche Bank Trust Company Americas, as Trustee v. Beauvais*

On April 13, 2016, Florida's Third District Court of Appeal (Third District) issued its *en banc* opinion in *Deutsche Bank Trust Company Americas, as Indenture Trustee for American Home Mortgage Investment Trust 2006-2 v. Beauvais*, __ So. 3d __, No. 3D14-575 (Fla. 3d DCA Apr. 13, 2016), holding that "dismissal of a foreclosure action accelerating payment on one default does not bar a subsequent foreclosure action on a later default if the subsequent default occurred within five years of the subsequent action," regardless of whether the prior action was dismissed with or without prejudice. The decision was a complete reversal of its prior ruling, and has helped to further clarify the status of the statute of limitations defense for foreclosure matters.

The Decision in *Beauvais*

Beauvais executed a promissory note for $1,440,000, which was secured by a mortgage, and failed to make the installment payment due on Oct. 1, 2006, or any subsequent payments, thus defaulting on the note and mortgage. The note holder filed a foreclosure action against Beauvais on Jan. 23, 2007, accelerating the amount due on the loan (the Initial Action). The case was dismissed without prejudice after the note holder failed to appear at a case management conference in 2010. Thereafter, presumably in reliance on the dismissal itself, the note holder took no action to decelerate the loan. In 2011, title to the property transferred to the condominium association, Aqua Master Association, Inc. (the Association), after it filed a foreclosure action for unpaid condominium assessments.

Deutsche Bank, which acquired Beauvais' note and mortgage, filed a second foreclosure action on Dec. 12, 2012 (the Second Action). The Association answered, contending that because the balance owed on the note was accelerated and due on Jan. 23, 2007, Florida's five year statute of limitations for mortgage foreclosure actions ran before the Second

Action was filed. The trial court agreed, ruling that the Initial Action triggered the statute of limitations for the entire balance of the loan.

On appeal, the parties disputed whether the dismissal of the Initial Action automatically decelerated the loan, or whether the lender was required to take independent action to effectuate a deceleration. Initially, the Third District agreed with the Association, holding that if a mortgagee did not decelerate a loan following an involuntary dismissal without prejudice of a mortgage foreclosure action, no new payments were due, no new default occurred, and the five-year statute of limitations barred any action on the mortgage. This decision was in conflict with other court of appeals decisions. Accordingly, the court granted rehearing *en banc* and, on rehearing, several *amici* weighed in, including Fannie Mae, Freddie Mac, The Business Law Section of the Florida Bar, and The Real Property Probate & Trust Law Section of The Florida Bar. The Third District withdrew its prior opinion and entered a revised opinion holding that deceleration automatically occurred on dismissal of the Initial Action, regardless of whether the dismissal was with or without prejudice.

In reaching its decision, the Third District provided several rationales:

First, the Third District considered the Florida Supreme Court's decision in *Singleton v. Greymar Association*, 882 So. 2d 1004 (Fla. 2004), which held that res judicata does not bar successive foreclosure suits where the second action is based on a separate, subsequent default. The Supreme Court reasoned that a subsequent default creates a new and independent right in the mortgagee to accelerate the note. Thus, the Third District reasoned that the Court in *Singleton* rejected the proposition that acceleration of a promissory note precludes a mortgagee from filing a second action and extended this logic from the context of res judicata to the statute of limitations defense. Moreover, the Third District noted that the decision in *Singleton* did not differentiate between dismissals with or without prejudice, but instead concluded that dismissals with prejudice only "preclude[d] the lender from recovering on the underlying defaulted installment and returns the lender and the borrower to the status quo which permits the lender to file subsequent foreclosure actions based on subsequent defaults."

Second, the Third District recognized that after a dismissal, the parties are returned to the same position as if a suit had never been filed. Accordingly, where an initial foreclosure case is filed, and then subsequently dismissed, the mortgagor and mortgagee are returned to their prior positions as if no acceleration occurred.

Third, the Third District concluded that the terms of the mortgage and the general practice within the mortgaging industry confirm that no affirmative action was necessary to decelerate the mortgage. Specifically, the mortgage itself provided that notwithstanding acceleration, the mortgagor could cure the default, not by paying the entire accelerated amount due, but by bringing the loan current. Moreover, the mortgage and note additionally provided that the mortgagee's failure to act would not act as a waiver of its rights. Thus, "[b]ecause the installment nature of the loan at issue did not terminate following acceleration and foreclosure . . . the bank was under no obligation to take any affirmative action to reinstate the installment nature of the loan or to 'decelerate.'"

The Third District's decision is consistent with those of other district courts in Florida that have addressed this issue. For example, the First District, in *Nationstar Mortgage, LLC v. Brown*, 175 So. 3d 833, 834-35 (Fla. 1st DCA 2015), held that the statute of limitations did not bar a subsequent action after a foreclosure case was dismissed without prejudice. The Fourth District reached the same conclusion in *Evergrene Partners, Inc. v. Citibank, N.A.*, 143 So. 3d 954, 956 (Fla. 4th DCA 2014), as did the Fifth District in *Hicks v. Wells Fargo Bank, N.A.*, 178 So. 3d 957, 959 (Fla. 5th DCA 2015).

Conclusion

Despite the current agreement by the district courts of appeal, the issue of whether subsequent foreclosure actions can be barred by the statute of limitations when an initial action is dismissed with or without prejudice remains unsettled in Florida.

Currently, the applicability of the statute of limitations to subsequent defaults following a dismissal *with prejudice* is

pending review in the Florida Supreme Court in *Bartram v. U.S. Bank Nat'l Ass'n*, 160 So. 3d 892 (Fla. 2014) (granting review). In *Bartram*, the Fifth District concluded that a borrower's subsequent default following dismissal of a foreclosure action with prejudice created a new cause of action for purposes of the statute of limitations notwithstanding the prior acceleration of the mortgage. Oral Argument was held on Nov. 4, 2015, and a decision is expected to be issued soon.

Although the Florida Supreme Court still needs to weigh in, the holding in *Beauvais* is a significant step toward clarity on this issue. Now that the Third District has reversed its decision, it is in line with other courts of appeals that have addressed this issue within the state. This unanimity in the intermediate Florida appellate courts will, hopefully, be persuasive and lead the Supreme Court to similarly hold that subsequent foreclosure actions are not barred by the statute of limitations. However, until this issue is resolved by the Supreme Court, lenders should, if possible, continue to consult with counsel to ensure that any subsequent action is filed within the appropriate limitations period.

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