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Financial Services Litigation | Alert

November 2016

In *Bartram*, Florida Supreme Court Holds That Statute of Limitations Does Not Bar the Filing of a Second Mortgage Foreclosure Action

On Nov. 3, 2016, the Florida Supreme Court issued its long-awaited decision in *Bartram v. U.S. Bank National Association*, No. SC14-1265, 2016 WL 6538647 (Fla. Nov. 3, 2016), bringing much-needed clarity to the outstanding question of whether the dismissal of a mortgage foreclosure action more than five years after it was filed bars the lender from filing a new foreclosure action under Florida's five-year statute of limitations for breach of contract claims.

Due to Florida's large volume of foreclosure cases during the national foreclosure crisis, foreclosure actions have frequently taken five years or more to wind their way through the court system, only to be dismissed for reasons unrelated to the merits of the case. In those circumstances, borrowers have commonly argued that because the filing of the action has the effect of "accelerating" the loan—*i.e.*, making the full balance of the loan due and payable—the five-year statute of limitations begins to run as to the entire amount of the loan at the time the action is filed. Under this reasoning, the dismissal of the case more than five years after it was filed results in a new foreclosure action being permanently barred. Lenders countered that the filing of a foreclosure action does not change the installment nature of the debt, in which in a new and separate default occurs each time the borrower misses a monthly payment. Therefore, lenders argued, a new foreclosure action is not time barred, so long as the missed monthly payment forming the basis of the new action falls within the five-year limitations period.

In *Bartram*, the Florida Supreme Court sided with lenders, holding that "absent a contrary provision in the residential note and mortgage, dismissal of the foreclosure action against the mortgagor has the effect of returning the parties to their pre-foreclosure complaint status, where the mortgage remains an installment loan and the mortgagor has the right to continue to make installment payments without being obligated to pay the entire amount due under the note and mortgage." *Bartram*, 2016 WL 6538647 at *1. Accordingly, if the borrower defaults again after the action is dismissed and fails to cure the default, the lender is not barred from filing a second or subsequent foreclosure action if "the alleged subsequent default occurred within five years of the subsequent foreclosure action." *Id.*

Pertinent Facts

In 2005, the petitioner, Lewis Bartram, obtained a $650,000 loan secured by a mortgage on his real property in St. Johns County, Florida. *Id.* at *2. The mortgage was a standard form residential mortgage with terms common in mortgages throughout the United States, including a provision requiring the lender to send a notice to the borrower advising them of any default and giving them the opportunity to cure it before the filing any foreclosure action, and further advising the borrower of their right under the mortgage to reinstate the loan after acceleration. *Id.* at *2-3. Concerning the right to reinstatement, the mortgage specifically provides that, if the borrower pays all past-due amounts prior to the entry of a final judgment of foreclosure, and satisfies other conditions, the mortgage "shall remain fully effective as if no acceleration had occurred." *Id.* at *3.

Bartram ceased making payments on his mortgage on Jan. 1, 2006, which resulted in U.S. Bank, N.A. (the Bank) filing a foreclosure complaint on May 16, 2006. *Id.* In 2011, after the case had been pending for nearly five years, the action was dismissed after the Bank failed to appear for a case management conference, which the Bank did not appeal. *Id.*

Approximately a year after the dismissal, and six years after the filing of the Bank's foreclosure action, Bartram filed a cross-claim seeking a declaratory judgment against the Bank in a separate foreclosure action involving a second mortgage on the Property. The cross-claim sought "to cancel the Mortgage and quiet title to the Property, asserting that the statute of limitations barred the Bank from bringing another foreclosure action." *Id.* at *4. Bartram's argument was essentially that Florida's five-year statute of limitations ran from the filing of the Bank's prior foreclosure action and had expired, thereby barring the Bank from bringing another foreclosure action. The trial court agreed with Bartram and entered summary judgment in his favor, cancelling the note and mortgage and releasing the Bank's lien on Bartram's property. *Id.*

On appeal, the Florida Fifth District Court of Appeal reversed, holding that the Bank was not barred by the statute of limitations from filing a new foreclosure action against Bartram merely because more than five years had passed since the original acceleration. *See U.S. Bank Nat'l Ass'n v. Bartram*, 140 So. 3d 1007 (Fla. 5th DCA 2014).

In reaching this result, the Fifth District relied primarily on the Florida Supreme Court's earlier decision in *Singleton v. Greymar Associates*, 882 So. 2d 1004, 1008 (Fla. 2004), which concluded that the doctrine of *res judicata* does not bar filing a subsequent foreclosure action based on a later event of default, which "create[s] a new and independent right in the mortgagee to accelerate payment on the note . . ." *Id.* at 1008. According to *Singleton*, "[w]hile it is true that a foreclosure action and an acceleration of the balance due based on 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." 882 So. 2d at 1007 (emphasis added). Analyzing *Singleton*, the Fifth District concluded that its reasoning applied to the statute of limitations and the doctrine of *res judicata*, explaining:

> Based on *Singleton*, a default 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 its merits. Therefore, we conclude that a foreclosure action for default in payments after the order of dismissal in the first foreclosure action is not barred by the statute of limitations . . . provided the subsequent foreclosure action on the subsequent defaults is brought within the limitations period.

Bartram, 140 So. 3d at 1013-14. In its opinion, however, the Fifth District also certified the issue for review by the Florida Supreme Court as one of great public importance, and the Court granted review.

The Florida Supreme Court's Decision

In an opinion by Justice Pariente, the Florida Supreme Court approved the Fifth District's decision, relying heavily on

Singleton and its progeny.[1] The Court held that "with each subsequent default, the statute of limitations runs from the date of each new default providing the mortgagee the right, but not the obligation, to accelerate all sums then due under the note and mortgage." *Bartram*, 2016 WL 6538647 at *8. This was because, "after the dismissal, the parties are simply placed back in the same contractual relationship as before, where the residential mortgage remained an installment loan, and the acceleration of the residential mortgage declared in the unsuccessful foreclosure action is revoked." *Id.* The Court also found that whether the dismissal of the previous foreclosure action was with prejudice or without prejudice was not material to the statute of limitations analysis, explaining that "each subsequent default accruing after the dismissal of an earlier foreclosure action creates a new cause of action, regardless of whether that dismissal was entered with or without prejudice." *Id.* at *9.

The Court stated that its conclusion was "buttressed" by the reinstatement provision of Bartram's mortgage, which "by its express terms granted the mortgagor, even after acceleration, the continuing right to reinstate the Mortgage and note by paying only the amounts past due as *if no acceleration had occurred*." *Id.* (original emphasis). Therefore "even after the optional acceleration provision was exercised through the filing of a foreclosure action . . . the mortgagor was not obligated to pay the accelerated sums due under the note until final judgment was entered and needed only to bring the loan current . . . to avoid foreclosure." *Id.* at *10. "Stated another way, despite acceleration of the balance due and the filing of an action [for] foreclosure, the installment nature of a loan secured by such a mortgage continues until a final judgment of foreclosure is entered . . . ." *Id.* (quoting *Beauvais*, 188 So. 3d at 947).[2]

Bartram's argument, by contrast, followed "to its logical conclusion," would mean that "acceleration of the loan was effective before final judgment" and that the "mortgagor-borrower would owe the accelerated amount [even] after the dismissal, effectively rendering the reinstatement provision a nullity . . . ." *Id.* The fact that the installment nature of the loan would terminate meant that the lender would be permitted "only one opportunity to enforce the mortgage despite the occurrence of any future defaults." *Id.* The Court stated: "In considering the law, the facts, and equity, Bartram's position simply has no validity." *Id.* at *11. The Court therefore concluded that upon the dismissal of an original foreclosure action, irrespective of whether the action was dismissed with or without prejudice, the parties are returned to "the same contractual relationship with the same continuing obligations." *Id.* (quoting *Singleton*, 882 So. 2d at 1007).

Takeaways

The Court's decision in *Bartram* resolves an important issue in Florida and provides long-awaited clarity to this heavily ligated statute of limitations defense in the Florida courts. *Bartram* clarifies that a dismissal, with or without prejudice, in a foreclosure action involving a standard form residential mortgage with a reinstatement provision simply returns the parties to their pre-foreclosure relationship. Following the dismissal, the Borrower is given an opportunity to continue making his or her monthly payments, and the lender retains the right to file a new foreclosure action based on any default occurring within the statute of limitations. Whether a different result would have been reached if the contract lacked a reinstatement provision remains an open question to be decided another day. With this decision, however, the backlog of most foreclosure cases pending in the Florida courts can now proceed with borrowers and lenders knowing the precise application of the statute of limitations defense.

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[1] *See, e.g., Deutsche Bank Tr. Co. Ams. v. Beauvais*, 188 So. 3d 938 (Fla. 3d DCA 2016) (*en banc*).

[2] The Florida Supreme Court noted that its holding was also consistent with the views of the Real Property Probate & Law Section of The Florida Bar, The Business Law Section of The Florida Bar, and the Federal National Mortgage Association and the Federal Home Loan Mortgage Corporation, as expressed in their amici briefs filed in *Beauvais*, which addressed the same issue. *Id.* at 1 n.2.

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