FL APPELLATE CT HOLDS NOTICE OF ASSIGNMENT NOT A CONDITION PRECEDENT TO FORECLOSURE

In a split two-one decision, Florida's Second District Court of Appeal affirmed the decision reached below and held that Fla. Stat. 559.715's notice of assignment provision does not create a condition precedent to foreclosure. The case is*Brindise v. U.S. Bank, N.A.,* 2D14-3316, 2016 Fla. App. LEXIS 653 (Fla. 2d DCA Jan. 20, 2015). The Second DCA further certified the following question to the Florida Supreme Court as a matter of great public importance:

"IS THE PROVISION OF WRITTEN NOTICE OF ASSIGNMENT UNDER SECTION 559.715 A CONDITION PRECEDENT TO THE INSTITUTION OF A FORECLOSURE LAWSUIT BY THE HOLDER OF THE NOTE?"

The opinion in *Brindise* is unlikely to be the last word on the issue. However, the opinion offers the most in-depth treatment of the issue from an appellate court in Florida to date.

Fla. Stat. 559.715 is contained within the Florida Consumer Collection Practices Act ("FCCPA") and provides as follows:

"Assignment of consumer debts. — This part does not prohibit the assignment, by a creditor, of the right to bill and collect a consumer debt. However, the assignee must give the debtor written notice of such assignment as soon as practical after the assignment is made, but at least 30 days before any action to collect the debt. The assignee is a real party in interest and may bring an action to collect a debt that has been assigned to the assignee and is in default."

In *Brindise,* the parties had extensively briefed the issue of whether mortgage foreclosure is an "action to collect" a "consumer debt", but the majority declined to expressly rule on the issue which it characterized as a "briar patch" that was ultimately not critical to reaching a ruling.

Instead, the majority opinion based its decision on six arguments:

1. The language of Fla. Stat. 559.715 contains no language expressly making it a condition precedent to suit. The majority compared the language with various other statutory conditions precedent to observe

that, “The Legislature knows how to create a condition precedent. Because the Legislature declined to be more specific when enacting section 559.715, we will not expand the statute to include language the Legislature did not enact.”

2. That Fla. Stat. 559.715 applies only where the assignee assigns the right to bill and collect payments but retains some rights in the loan (for example when the owner of a loan retains the services of a third party debt collector), as opposed to an assignment of the entirety of the debt. The court held that was not the case in the instant action, where U.S. Bank proved it was the owner and holder of the original promissory note.
3. Since Fla. Stat. 559.715 is subject to administrative enforcement, making it a condition precedent is not necessary to permit Fla. Stat. 559.715 to accomplish its purpose. Contrary to the allegations that the statute would be toothless if not a condition precedent, the requirements of Fla. Stat. 559.715 can plainly be enforced administratively.
4. The Court rejected the borrower’s reliance on *Gann v. BAC Home Loans Servicing LP*, 145 So. 3d 906 (Fla. 2d DCA 2014) because the opinion merely held that a litigant stated a claim under Fla. Stat. 559.72(9), and did not speak to whether Fla. Stat. 559.715 was a condition precedent.
5. The Court also rejected the borrower’s reliance on *Burt v. Hudson & Keyse, LLC*, 138 So. 3d 1193 (Fla. 5th DCA 2014), an opinion of the Fifth District Court of Appeal that reversed a summary judgment because, amongst other things, a genuine issue of material fact allegedly existed as to a Fla. Stat. 559.715 defense. The Second District Court of Appeal observed that nothing in the opinion stated Fla. Stat. 559.715 was a condition precedent, and that because the case involved a credit card debt (which the court characterized as the “quintessential” consumer debt), and not a mortgage foreclosure, it was factually distinguishable.
6. The Court looked to the mortgage, and the parties’ agreement therein at paragraph 20 that the note “can be sold one or more times without prior notice”. Thus, the Court held, “as a matter of contract, section 559.715 is inapplicable.” The majority held that the contarct provided instead that pre-suit notice would be given in accordance with paragraph 22 of the Mortgage, which the borrower did not contend on appeal was improperly done. This holding provided a separate and independent basis for affirming the trial court.

The dissent disagreed and held that Fla. Stat. 559.715 does create a condition precedent to foreclosure. The dissent based its decision on the following arguments:

1. The dissent held that a residential foreclosure action is typically an action to collect a consumer debt because it seeks to collect the promissory note and foreclosure the mortgage lien and therefore, was not, as U.S. Bank had argued, merely an action to enforce a security interest.
2. The dissent held that the language requiring the notice "must" be made "at least 30 days before" an action to collect the debt is filed was clear intent by the legislature that Fla. Stat. 559.715 be treated as a condition precedent, even though that language is dissimilar from the more express language found in well recognized conditions precedent to suit.
3. The dissent held that the intent and purpose of the FCCPA were better served by making it a condition precedent because it would encourage compliance.
4. Finally, the dissent disagreed with the majorities reading of both *Burt* and the terms of the mortgage and held that *Burt* does stand for the proposition that Fla. Stat. 559.715 is a condition precedent and the terms of the mortgage are not in conflict with Fla. Stat. 559.715 and therefore do not excuse compliance.

Both the majority and dissent are well thought out opinions, and they show that excellent legal minds can differ in opinion on the issue. A divided Florida Supreme Court on the issue would therefore not come as a surprise. However, on balance, the majorities statutory interpretation seems more grounded and less influenced by nebulous policy considerations, which frankly do not trump the unambiguous text of the statute itself. If/when the Florida Supreme Court visits the issue, it will certainly have the attention of both delinquent borrowers and their lenders.

A copy of the Second District Court of Appeal's decision can be found here.