FLA. 3RD DCA REVERSES PRIOR 'FORECLOSURE STATUTE OF LIMITATIONS' RULING IN BEAUVAIS

Withdrawing and substituting its prior opinion in *Deutsche Bank Trust Co. America v. Beauvais*, 40 Fla. L. Weekly D1 (Fla. 3d DCA Dec. 17, 2014), the District Court of Appeal of the State of Florida, Third District, on April 13 held that:

1. Under Florida law, 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; and
2. Whether a dismissal is with or without prejudice is irrelevant to a lender's right to file subsequent foreclosure actions on subsequent defaults; and
3. The mortgagee in this case was under no obligation, contractually or legally, to "decelerate" this loan following dismissal; and
4. Under Florida Statute § 95.281(1)(a), the date of termination of the mortgage can be determined from the face of a recorded document, and is five years after that maturity date.

A copy of the opinion is available at: **Link to Opinion.**

A mortgagee appealed from a final summary judgment denying foreclosure of a mortgage securing a $1,440,000 promissory note. The complaint filed by the mortgagee on Dec. 18, 2012, alleged a payment default on Oct. 1, 2006, "and all subsequent payments."

The complaint, in addition to naming the borrower, joined the condominium owners association (COA) for the premises at issue. By the time this action was commenced, the borrower no longer held title to the condominium securing payment of this loan, his interest having been foreclosed and title transferred in 2011 to the COA to satisfy outstanding condominium assessments. The borrower, with no interest in the property, did not contest the foreclosure. Instead, the COA — then the title holder of the property — filed an answer and affirmative defenses in which it alleged that the instant action was barred by the five-year statute of limitations governing mortgage foreclosures. See § 95.11(2)(c), Fla. Stat. (2013).

According to the COA, the mortgagee's cause of action for foreclosure accrued in 2007 when the mortgagee's predecessor in interest accelerated the balance due on the loan by filing a prior suit to collect on a Sept. 1, 2006 default, and because the

mortgagee failed to pursue foreclosure within five years of that acceleration and accrual after the first suit was dismissed, the instant action was time barred.

The trial court agreed and granted judgment in favor of the COA, holding that the prior foreclosure complaint specifically declared the full amount payable under the note and mortgage and the mortgagee's right to accelerate was exercised by the filing of the prior lawsuit. It further held that since more than five years elapsed between the acceleration and the filing of the second foreclosure suit, the action was barred by the statute of limitations. See § 95.11(2)(c), Fla. Stat. The trial court held that the mortgage was null and void, canceled the note and mortgage, and quieted title to the property.

The mortgagee appealed and the Third District Court of Appeal reversed under the Florida Supreme Court's decision in *Singleton v. Greymar Associates*, 882 So. 2d 1004 (Fla. 2004), as well as multiple other opinions rendered by the Fourth District Court of Appeal, the First District Court of Appeal, and the Fifth District Court of Appeal. See *Evergrene Partners, Inc. v. Citibank, N.A.*, 143 So. 3d 954, 956 (Fla. 4th DCA 2014) (concluding that the statute of limitations would not bar foreclosure of an accelerated loan where an earlier, voluntarily dismissed foreclosure had been brought to enforce the same loan accelerated for a separate default); see also *Nationstar Mortg., LLC v. Brown*, 175 So. 3d 833, 834-35 (Fla. 1st DCA 2015) (the statute of limitations did not bar an action to foreclose an accelerated loan brought more than five years after a prior action to foreclose on the same accelerated loan had been brought but then voluntarily dismissed without prejudice); *Hicks v. Wells Fargo Bank, N.A.*, 178 So. 3d 957, 959 (Fla. 5th DCA 2015) (Bank is not precluded from filing a new foreclosure action based on different acts or dates of default not previously alleged, provided that the subsequent foreclosure action on the subsequent defaults is brought within the statute of limitations period found in section 95.11(2)(c), Florida Statutes").

The Third District Court of Appeal analyzed the facts of the case in accordance with *Singleton*, and held that under Florida law a 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.

The Third District emphasized that "[i]t is the fact that the bank alleged the failure to pay the Oct. 1, 2006 installment payment 'and all subsequent payments' that makes the instant case fall within the rule as set out herein."

The Court also held that whether a dismissal is with or without prejudice is irrelevant to a lender's right to file subsequent foreclosure actions on subsequent defaults, because under Singleton, subsequent defaults allow for subsequent accelerations regardless of the nature of a prior dismissal.

The Third District also analyzed the language of the underlying note and mortgage, and held that the mortgagee in this case was under no obligation, contractually or legally, to "decelerate" the loan following dismissal because the mortgage itself confirms that the installment nature of the loan continues even after acceleration, borrowers have a right to reinstate after acceleration but before final judgment, and the mortgagee's failure to act does not work as a waiver of its rights.

The Court concluded that after the 2010 dismissal without prejudice of the predecessor mortgagee's foreclosure action, the parties returned to the status quo that existed prior to the filing of the dismissed complaint.

As a matter of Florida law, the Court held, the mortgagee's 2012 foreclosure action — which was based on breaches that occurred after the breach that triggered the first complaint — was not barred by the statute of limitations.

The Court further reversed the portion of the trial court's order which declared the mortgage null, void, and cancelled, and quieted title to the property in favor of the COA. In so ruling, the Third District held that the Florida Legislature, by its express language, provided that the mortgage lien under section 95.281(1)(a) would terminate five years after a maturity date that can be determined from the face of a recorded document.

According to the Court, the face of the recorded mortgage in the instant case reveals a maturity date of March 1, 2036. Therefore, the Third District held that, pursuant to section 95.281(1)(a), the mortgage lien remains valid until March 1, 2041, five years from the date of maturity as reflected in the recorded mortgage securing the obligation.