DISMISSAL OF FORECLOSURE ACTION DOES NOT BAR SECOND ACTION MORE THAN 5 YEARS LATER

After a rare *en banc* oral argument, the court withdrew its earlier opinion and released a new *en banc* decision holding that dismissal of a foreclosure action accelerating payment on one default does not time-bar a subsequent foreclosure action on a later default. Importantly, the decision holds that there is no distinction between a 'with' or 'without prejudice' dismissal.

In a split decision after rehearing en *banc*, the Florida Third District Appeal has withdrawn its December 2014 opinion in *Deutsche Bank Trust Company Americas v. Beauvais ("Beauvais I")*[1]. In *Beauvais* I, the court had held that dismissal of a foreclosure action with prejudice did not decelerate a previously accelerated mortgage, and, that as a result, a new action to foreclose the mortgage filed more than five years after initial mortgage acceleration was time-barred.

In withdrawing *Beauvais I*, the six-member majority found that under the Florida Supreme Court's *Singleton v. Greymar Assocs., 882 So. 2d 1004 (Fla. 2004,)* **"successive foreclosure suits, regardless of whether or not the mortgagee sought to accelerate payments on the note in the first suit," were not barred if the second suit was predicated on a new default because a "subsequent and separate alleged default create[s] a new default and independent right in the mortgagee to accelerate payment on the note in a subsequent foreclosure action," and therefore mandated reversal, *regardless of whether the prior foreclosure action was dismissed with or without prejudice*.**

In *Beauvais* I, the court interpreted *Singleton as* holding that a dismissal *with prejudice* serves as an adjudication on the merits, reversing prior acceleration as a matter of law. More specifically, the *Beauvais* I decision stated that the *Singleton* court operated from the premise that dismissal with prejudice is an adjudication on the merits, that this meant that the loan was never properly in default, the parties were returned to their original contractual relationship, and duties and the right to accelerate never arose. It logically followed that after reversal of acceleration in this fashion, the loan could be reaccelerated following a subsequent default, and the previous action did not create the *res judicata* defense at issue in the *Singleton* case.

But in *Beauvais*, the lender accelerated and filed a foreclosure action which ended in a dismissal without prejudice after counsel failed to appear at a court-mandated conference. The lender did not take action to reinstate the case or otherwise

regarding the mortgage for two years —six years after filing the original action and more than six years after accelerating the mortgage.

In holding the new action was time barred, *Beauvais* I attempted to harmonize *Singleton* by differentiating between a dismissal *with prejudice, i.e.,* an adjudication on the merits, and a dismissal *without prejudice,* generally not reaching the merits. The *Beauvais* I court concluded that absent an affirmative action to reinstate the installment terms or otherwise decelerate the mortgage, the acceleration prior to filing the initial suit stood and the statute of limitations continued to run on the accelerated mortgage, barring the new action filed six years after filing the first action. The court reasoned that affirmative action is generally necessary to *accelerate* a mortgage, and that therefore, the full amount continued to be due absent affirmative action to *reverse* that acceleration.

Beauvais I ran counter to other decisions as well as common lender foreclosure practices. For example, there was no industry procedure or legal precedent to guide "de-acceleration" as the decision seemed to suggest, and, it was unclear whether simple reinstatement without a formal process would accomplish the same thing. Moreover, while a lender could wait more than the statutory period after the first missed payment to bring a foreclosure action and use a subsequent missed payment as the basis for a new cause of action, *Beauvais* I seemed to counsel against dismissing any foreclosure case before completing the process.

In withdrawing *Beauvais* I and substituting the new 6-4 opinion, the majority also relied on several other decisions which had interpreted *Singleton* in upholding the right of a lender to file a new foreclosure action based upon subsequent defaults, including *Evergrene Partners, Inc. v. Citibank, N.A.*, 143 So. 3d 954, 956 (Fla. 4th DCA 2014), *Nationstar Mortg., LLC v. Brown*, 175 So. 3d 833, 834-35 (Fla. 1st DCA 2015) and U*.S. Bank Nat'l Ass'n v. Bartram*, 140 So. 3d 1007,1014 (Fla. 5th DCA 2014), review granted, 160 So. 3d 892 (Fla. Sept. 11, 2014)("Based on *Singleton*, 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 its merits.")

In the new opinion, the majority states that with respect to a prior dismissal, "whether a dismissal is with or without prejudice is irrelevant to a lender's right to file subsequent foreclosure actions on subsequent defaults."

A carefully crafted and equally long dissent authored by Judge Scales argues that (1) the equitable principles of *res judicata* on which the *Singleton* court relied are

inapplicable in an analysis under the statute of limitations, and (2) that the majority decision is not consistent with the Florida statute of limitations law. Judge Scales suggests that when the first foreclosure action's dismissal order and the parties' contract documents are silent as to whether the dismissal has effected reinstatement, the court should "consider relevant and highly probative, contemporaneous and post-dismissal factors to determine whether the prior case's adjudication actually reinstated the installment nature of the loan, including… whether the lender's internal records treated the loan as being reinstated; ….how the lender characterized the loan for reporting purposes to any regulator; …if, when, and how the lender communicated reinstatement to the borrower; …how the lender treated any post-dismissal installment payments tendered by the borrower;….and the nature of any other post-dismissal communications between the lender and borrower."

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[1] *Deutsche Bank & Trust Co. America v. Beauvais*, 40 Fla. L. Weekly D1 (Fla. 3d DCA Dec. 17, 2014)