

## **FLORIDA COURT HOLDS FORECLOSURE ACTION TIME-BARRED, DEFAULT OCCURRED OUTSIDE 5-YEAR SOL**

The District Court of Appeal of the State of Florida, Fifth District, recently reversed a final judgment of foreclosure in the mortgagee's favor, holding that based on the default date alleged in the complaint, the default date alleged in a prior foreclosure suit as to the same loan, and the dismissal without prejudice of the prior foreclosure action, the mortgagee's foreclosure claim was barred by Florida's five-year statute of limitations.

However, in so ruling, the Fifth District also held that the mortgagee was "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."

A copy of the opinion is available at: [Link to Opinion](#).

The plaintiff mortgagee sued to foreclose its mortgage and reestablish the lost note in January 2013. The complaint alleged that the borrowers failed to make the payment due on June 1, 2006 and all subsequent payments and that the mortgagee had accelerated the loan.

The borrowers in their answer raised the affirmative defense that the complaint was barred by subsection 95.11(2)(c), Florida Statutes, which provides a five-year statute of limitations for mortgage foreclosure actions. The mortgagee did not reply to this affirmative defense.

At the trial, counsel for the parties stipulated to the following facts: (a) the borrowers defaulted on June 1, 2006; (b) the prior note holder sued to foreclose on Sept. 8, 2006, but that case was voluntarily dismissed in 2008; (c) in 2011, the current note holder sent a notice of intent to accelerate to the borrowers; and (d) the current note holder then filed the second foreclosure action in 2013.

The trial court entered a final judgment of foreclosure in the mortgagee's favor, and the borrowers appealed.

On appeal, the Fifth District noted that the dispositive facts were not disputed, then reasoned that "[b]ecause the earlier voluntary dismissal was not an adjudication on the merits ... [the] Bank was entitled to bring a later

suit to foreclose on the note and mortgage. However, the suit must still be based on an act of default within the five-year statute of limitations period.”

Because the parties stipulated that the mortgagee’s complaint was filed in 2013 based upon a June 1, 2006 default, the Court concluded that the trial court “erred when it failed to dismiss the foreclosure complaint with prejudice based on a default that occurred outside of the five-year statute of limitations period.”

Importantly, however, relying upon the Florida Supreme Court’s decision in *Singleton v. Greymar Associates*, 882 So. 2d 1004 (Fla. 2004) and its progeny, **the Fifth District rejected the borrowers’ argument that the mortgagee was “forever barred from bringing an action to foreclose” because the “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.”**

**As the Fifth District held, “[t]his is because a ‘subsequent and separate alleged default create[s] a new and independent right in the mortgagee to accelerate payment on the note in a subsequent foreclosure action.’ ”**

The final judgment of foreclosure was reversed and remanded with directions to dismiss the complaint.