THIRD REFILED FORECLOSURE ACTION NOT BARRED BY RES JUDICATA OR SOL

The District Court of Appeal of the State of Florida, First District, recently affirmed the trial court's entry of a final judgment of foreclosure, holding that because the complaint included at least some installment payments within five years of the filing of the complaint, the action was not barred by res judicata or the statute of limitations.

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

Husband and wife borrowers defaulted on their mortgage loan in December 2008. The mortgagee filed a foreclosure action in February 2010, but voluntarily dismissed the case in December 2011.

The mortgagee filed a second foreclosure action in February 2013 based on the same default date of December 2008, but again voluntarily dismissed the case in April 2013.

The note and mortgage were sold and assigned in September 2013 and the new servicer sent an acceleration letter to the borrowers. The new servicer then filed a third foreclosure action in April 2014, again based on the same default date of December 2008.

The borrowers raised the defense of res judicata by operation of Rule 1.420, which provides that a second voluntary dismissal "operates as an adjudication on the merits … based on or including the same claim." The borrowers also raised the defense that Florida's five-year statute of limitations for foreclosures contained in section 95.11(2)(c), Florida Statutes, barred the third foreclosure action.

The third foreclosure action went to trial and the court entered judgment in the plaintiff mortgagee's favor, but refused to award interest, late fees and "other sums" because the plaintiff mortgagee failed "to prove amounts for these items." The borrowers appealed.

On appeal, the borrowers argued that the third foreclosure action resulting in the final judgment of foreclosure was barred by Rule 1.420(a)(1) and the statute of limitations.

The Appellate Court began by discussing Rule 1.420's "two dismissal rule[,]" but noted that under the Fourth District Court of Appeal's decision in *Olympia Mortgage Corp. v. Pugh*, the rule "itself does not actually preclude subsequent actions" because "it is the doctrine of res judicata which bars subsequent suits on the same cause of action."

The Court then cited the Florida Supreme Court's 2004 decision in *Singleton v. Greymar Associates*, which held that "the doctrine of res judicata does not necessarily bar successive foreclosure suits, regardless of whether or not the mortgagee sought to accelerate payments on the note in the first suit. … **[T]he subsequent and separate alleged default created a new and independent right in the mortgagee to accelerate payment on the note in a subsequent foreclosure action."**

Relying on *Olympia Mortgage* and *Singleton*, the Appellate Court reasoned that because there was no dispute that the borrowers stopped paying in December 2008 and also that no payments were made thereafter, the third foreclosure action "was not barred as res judicata, even in light of rule 1.420(a), because **the open-ended series of defaults included different missed payments at issue in each suit."**

The Appellate Court also rejected the borrowers' argument that the third foreclosure action was barred by the statute of limitations based on the Florida Supreme Court's recent 2016 decision in *Bartram v. U.S. Bank*, which held that its analysis in *Singleton* applied equally to the statute of limitations, and **"with each subsequent default, the statute of limitations runs from the date of each new default providing the mortgagee with the right, but not the obligation, to accelerate all sums then due under the note and mortgage."**

Applying *Singleton*, the Appellate Court concluded that **the voluntary dismissal of the first two foreclosure actions did not bar a third foreclosure action "because the causes of action are not identical. The additional payments missed by the time the third action was filed, which were not bases for the previous actions because they had not yet occurred, constitute separate defaults upon which the third foreclosure action may be based. Additionally, acceleration of the note occurred at a different time."**

Because *Singleton* clarified that "enforcement of the note via a foreclosure action is not barred by res judicata for the defaults occurring after" dismissal of the second foreclosure action in April 2013, and the third foreclosure action "was not barred by the statute of limitations" since "each missed payment constituted a new default[,]" restarting the five-year statute of limitations on that default, the final judgment of foreclosure was affirmed.