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Consumer Finance Litigation

Florida's Third District Court of Appeal Reverses Earlier Decision in *Beauvais* and Holds That Statute of Limitations Does Not Bar a Subsequent Foreclosure Action Based on a Later Default

Action Item: Florida's Third District Court of Appeal finds that Florida's statute of limitations for foreclosure actions does not bar a second foreclosure action filed on a subsequent payment default occurring within the five-year statutory period preceding the commencement of the second action. The decision in *Beauvais* should provide some reassurance to lenders that a dismissal of a first foreclosure action, regardless of whether dismissed with or without prejudice, does not bar a subsequent foreclosure action based on a later default.

In a landmark ruling, the Third District Court of Appeal in Florida ("Third District"), after a rehearing *en banc,* reversed its previous opinion in *Deutsche Bank Trust Co. Americas v. Beauvais,* 40 Fla. L. Weekly D1, 2014 WL 7156961 (Fla. 3rd DCA Dec. 17, 2014), and held that successive foreclosure suits, regardless of whether or not the lender sought to accelerate late payments on the promissory note in the first suit, are not barred if the second suit is predicated on a new default that occurred within five years of the second suit. That is, even if a foreclosure action is dismissed with or without prejudice,[1] the parties are put back in the status quo that existed prior to the filing of the dismissed action, leaving the lender free to accelerate and foreclose on subsequent defaults. *Deutsche Bank Trust Co. Americas v. Beauvais,* No. 3D14-575 (Fla. 3d DCA April 13, 2016) (Scales, J., dissenting).

Case Background

In *Beauvais,* the bank commenced a foreclosure action on January 23, 2007, which was later dismissed without prejudice because the bank failed to appear at a case management conference. The bank filed a second foreclosure action on December 28, 2012, more than five years later, based on a different default from the first action. The bank alleged in its complaint in the second action that Harry Beauvais failed to pay an installment payment due on October 1, 2006, *"and all subsequent payments."* The complaint joined a number of entities with potential interests in the property including Aqua Master Association, Inc. ("Aqua"), the condominium association.

Aqua asserted as an affirmative defense that the second foreclosure action was barred by the five year statute of limitations governing mortgage foreclosures. According to Aqua, the bank's cause of action for foreclosures accrued in 2007 when the bank's predecessor in interest accelerated the balance due on the loan by filing a prior suit to collect on a September 1, 2006 default, and because the bank failed to pursue foreclosure within five years of that acceleration/accrual after the first suit was dismissed, the instant action was time barred. The trial court agreed and granted judgment in Aqua's favor, and the bank appealed. A three-judge panel of the Third District affirmed the ruling of the trial court and narrowly held that, absent an affirmative withdrawal of acceleration, a lender's acceleration of a note and mortgage that occurred in a first foreclosure action which was later *involuntarily* dismissed *without prejudice* would bar a subsequent action filed more than 5 years later. The bank requested the Third District to rehear the appeal.

The Third District Reverses After Rehearing *En Banc*

The Third District, sitting *en banc,* reversed its prior decision and the trial court's judgment based on the Florida Supreme Court's decision in *Singleton v. Greymar Associates,* 882 So. 2d 1004 (Fla. 2004).

The Third District agreed with *Singleton's* holding that "even a dismissal with prejudice which adjudicates the merits of a first filed foreclosure action only precludes the lender from recovering on the underlying defaulted installment and returns the lender and borrower to the status quo which permits the lender to file subsequent foreclosure actions based on subsequent defaults." *See Singleton,* 882 So. 2d at 1007. In applying *Singleton,* the Third District held that (1) multiple actions for individual defaults with accompanying accelerations are permitted; (2) the statute of limitations does not bar a bank from instituting a new foreclosure action based on a different date of default; and (3) a dismissal with or without prejudice is irrelevant to a lender's right to file subsequent foreclosure actions on subsequent defaults.[2]

In addition, the Third District found that a lender is under no obligation, contractually or legally, to decelerate the loan following a dismissal. This is because paragraph 19, the reinstatement provision, of the mortgage itself confirms that the installment nature of the loan continues even after acceleration and the filing of a foreclosure action. In other words, despite acceleration of the balance due and the filing of an action to foreclose, the installment nature of a loan secured by such a mortgage continues until a final judgment is entered and no action is necessary to reinstate it via a notice of 'deceleration' or otherwise. However, even if an affirmative act were required to reinstate its installment nature, the Third District held that the failure to do so following a dismissal of a first action does not preclude the second action because paragraph 12 of the mortgage clearly states that a lender's failure to act will not work as a waiver of its rights under the mortgage and note. The Third District stated that this interpretation of the mortgage contract, regarding acceleration and deceleration, is in accord with Florida and national mortgage industry practices.

The Third District also analyzed decisions of other states and concluded that the view in *Singleton* does not make Florida an outlier in the law. Citing a joint amicus brief, the Third District found that, of the jurisdictions that have considered this issue, only a few have addressed whether some affirmative act is necessary to decelerate an accelerated loan following a dismissal of a foreclosure action. Of the fifteen states, like Florida, which require judicial intervention to foreclose, only New York courts have determined that some affirmative act following dismissal must be taken to "decelerate" an accelerated loan. By contrast, at least one Indiana court, in a nearly identical situation to *Singleton,* has cited with approval and relied on *Singleton.* The remaining cases in other states are largely undecided on this issue. While there are some courts across the country that have adopted a different reasoning than in Florida, the Third District stressed that the point is that Florida's Supreme Court has rejected that different analysis.

Conclusion

The Third District was split 6-4 in reaching this decision and its ruling reflects that "there is hardly a consensus on this area of law outside of Florida and by no stretch of the imagination can Florida be labeled as an 'outlier' on this point." Thus, as Judge Wells aptly pointed out in her majority opinion, "while we do not question that several courts across the country have adopted reasoning different from that accepted in Florida, the point is *our* Supreme Court has rejected that different analysis." *See Singleton,* 882 So. 2d. 1006. Rather, for both legal and equitable reasons, "*Singleton* chose to conclude a subsequent default created a new right to accelerate, making the dismissal of the prior action for acceleration—with or without prejudice—non-determinative if a different and subsequent claim." Simply put, 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, regardless of whether the first action was dismissed with or without prejudice.[3]

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1. The Third District held that a loan is decelerated upon dismissal (whether with or without prejudice), and thus concluded that the issue of whether the case is dismissed with prejudice or without prejudice is not an issue in a subsequent foreclosure based on a different and subsequent alleged default.
2. "Whether voluntarily dismissed or dismissed with or without prejudice the result is the same: upon dismissal, acceleration of a note and mortgage is abandoned with the parties returned to the status quo that existed prior to the filing of the dismissed action, leaving the lender free to accelerate and foreclose on subsequent defaults."
3. "It is the fact that the bank alleged the failure to pay the October 1, 2006 installment payment *'and all subsequent payments'* that makes the instant case fall within the rule as set out herein."

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