When does the "foreclosure clock" start ticking?

Jonathan Foxx [*]

One of the cases I have been monitoring is *U.S. Bank NA v Bartram*, which had been argued before the Florida Supreme Court ("Supreme Court"). The issue at bar concerns the statute of limitations for filing a foreclosure suit. I think this case is being watched closely not only because of its impact on Florida's statute of limitation provisions but also because of its wider, national implications.

In early November 2016, the Supreme Court ruled that *each monthly default on a mortgage loan payment resets the five-year statute of limitations for filing a foreclosure suit*. This ruling affirms a lower court's decision, which stemmed from a foreclosure action in Ponte Vedra, Florida.

The Supreme Court affirmed a Fifth District Court of Appeal ("Appeals Court") ruling that the statute of limitations was reset each time the borrower failed to make a payment to U.S. Bank NA on the mortgage.

This is a long, winding, and somewhat complicated case with tons of citations and plenty of positions taken via *amici curiae*. I wish only to hit on a few salient observations. I will conclude with a view of the remarks of one of the Justices, who concurred as to "result only," which means that the Justice agreed with the decision made by the majority of the court, but stated different (or additional) reasons as the basis for the decision.

Now, the big question that the Supreme Court needed to answer was:

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> If there is a default on a loan, causing an acceleration thereof, where the lawsuit to foreclose has been dismissed and a five-year statute of limitations has run out, is the lender permanently prevented from subsequent foreclosure proceedings because of the statute of limitations?

Here is a meta-outline:

- Loan defaults,
- Lender accelerates,
- Foreclosure lawsuit,
- Foreclosure dismissed, and
- Five-year statute of limitations elapses.

Or, to put the question more precisely into the framework of the litigation:

> Does acceleration of payments due under a residential note and mortgage with a reinstatement provision in a foreclosure action that was dismissed trigger application of the statute of limitations to prevent a subsequent foreclosure action by the mortgagee based on payment defaults occurring subsequent to dismissal of the first foreclosure suit?

The Supreme Court answered in the negative.

Let me provide some background.

This dispute began with a 2006 foreclosure lawsuit against Lewis Bartram after he stopped making payments on the mortgage. In April 2011, with Bartram's suit still in litigation, his ex-wife Patricia Bartram filed a suit to foreclose her mortgage, naming her ex-husband, the bank and the homeowners' association as defendants.

To provide some dates and actions:

- November 14, 2002: Lewis Bartram and Patricia Bartram purchase real property in St. Johns County, Florida
- November 5, 2004: marriage is officially dissolved, with the divorce court ordering Lewis to purchase Patricia's interest in the property, pursuant to their prenuptial agreement
- February 16, 2005: Bartram obtains $650,000 loan through Finance America, LLC, and Finance America subsequently assigns the mortgage to U.S. Bank, with March 1, 2035 as the designated maturity date of the note
- February 17, 2005: Bartram executes a $120,000 second mortgage to Patricia to buy her interest in the real property, in accordance with the prenuptial agreement, thus she ends up with a recorded interest in the same real property as the Bank
- January 1, 2006: mortgage goes into default
- May 16, 2006: U.S. Bank files complaint to foreclose

- December 12, 2006: Lewis Bartram files answer to the complaint
- December 19, 2006: U.S. Bank moves for final summary judgment of foreclosure, which does not appear to have been denied
- February 23, 2009: U.S. Bank files renewed motion for summary judgment
- March 24, 2009: motion denied
- February 2, 2010: U.S. Bank files a third motion for summary judgment, which was never heard
- January 11, 2011: Plantation at Ponte Vedra Homeowners' Association files a complaint seeking to foreclose its claim of lien for homeowners' assessments and other charges
- April 1, 2011: Patricia Bartram initiates a separate action by filing a complaint seeking to foreclose the mortgage she received from Lewis Bartram in connection with their divorce proceedings
- May 5, 2011: trial court dismisses case without prejudice as a result of U.S. Bank's failure to appear at a noticed status conference, and U.S. Bank does not appeal the dismissal
- August 29, 2011: the trial court denies Bartram's motion, citing its lack of jurisdiction in the matter since May 5, 2011
- February 4, 2012: Patricia Bartram's foreclosure action is transferred to the same judicial division where the Association's foreclosure was pending, which is the same court that had dismissed U.S. Bank's foreclosure
- April 26, 2012: Lewis Bartram files a crossclaim against U.S. Bank in Patricia Bartram's foreclosure action, seeking a declaratory judgment finding U.S. Bank's mortgage to be unenforceable under the statute of limitations and cancelling it as an illegitimate cloud on title
- May 24, 2012: Lewis Bartram files a motion for default against the bank for failure to respond to his crossclaim, but the trial court never rules on this motion
- July 31, 2012: the trial court enters final summary judgment in Lewis Bartram's favor on his crossclaim
- September 12, 2012: after trial court denies U.S. Bank's motion for rehearing, U.S. Bank appeals the entry of final judgment to the Appeals Court
- April 25, 2014: Appeals Court certifies a question to the Supreme Court on the application of statute of limitations, and reverses the trial court's ruling, holding that 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. Therefore, a foreclosure action for default in payments occurring after the order of dismissal in the first foreclosure action is not barred by the statute of limitations.
- September 11, 2014: Supreme Court enters an order accepting jurisdiction
- November 3, 2016: Supreme Court approves the Appeals Court's decision and answers the certified question in the negative.

It is after July 31, 2012 that this matter starts to get really interesting. Bartram then moved for summary judgment on his crossclaim. The trial court found no genuine issue as to any material fact, granted summary judgment, quieted title in Bartram, found the bank had no further ability to enforce its rights under the mortgage and note that were the subject matter of the bank's dismissed foreclosure action,

and cancelled the mortgage and note. In doing so, the trial court released the bank's lien on the property. At this point, the bank subsequently filed a motion for rehearing, and after the trial court denied the bank's motion, it appealed to the Appeals Court.

Along the twists and turns of this matter, five years into the litigation the trial court dismissed the case without prejudice when the lender itself did not show up for a case management hearing. The feature of "without prejudice" essentially means that no rights or privileges of the party involved are considered to be lost or waived, or, put otherwise, in a judgment of dismissal "without prejudice" ordinarily indicates the absence of a decision on the merits and leaves the parties free to litigate the matter in a subsequent action, as though the dismissed action had not been started. But U.S. Bank did not appeal the dismissal. Subsequently, the trial court ruled that the mortgage was cancelled because the Bank had let the case sit for more than the five years allowed by the statute of limitations.

The foreclosure suit having been dismissed, Bartram then filed a claim seeking declaratory judgment because it had been more than five years since his default and the statute of limitations had run out. It is relevant and should be noted that the statute of limitations had been reduced from 20 years to 5 years in 1974. I'll explain the relevance of the timeframe below. Bartram argued that the clock began to run when he first defaulted in January 2006 and the bank accelerated the loan.

A word about the proverbial "clock running out." In Florida, the statute of limitations for foreclosure of a mortgage is five years, which begins when the last requirement of the claim occurs; or, apropos of this litigation, at the time of the acceleration. So, presumably a lender has five years to sue to collect on a defaulted debt.

Bartram's position could be reduced to two points:

1. Is this a matter of the fallacy called "begging the question," which in this instance occurs because the question begs its own answer as it explicitly assumes that there can in fact be "payment defaults" after the acceleration of all future payments due under a note and mortgage; and,

2. Howsoever the first point is answered, it only resolves one of the issues necessary to decide this case, in Bartram's view, which is whether or not the dismissal of an action to foreclose an accelerated mortgage can serve as the basis for avoiding the statute of limitations in a subsequent suit.

As it turns out, the trial court sided with Bartram, but the Appeals Court then reversed the ruling and certified the question of whether the acceleration of payments under a loan actually does trigger the statute of limitations.

Understand that if the Supreme Court did not uphold the Appeals Court's ruling, it would not be an overstatement to observe that such a holding would surely lead to a huge increase in such litigation! And

the lower court admitted as much, when it stated that its "decision will likely be determinative of hundreds, if not thousands, of ongoing disputes between lienholders and owners of Florida real estate, most of which are currently pending before the state courts of Florida."

The Appeals Court held that *a lender can accelerate its mortgage more than once, and, if the lender accelerates and the case is later dismissed, the lender can still re-accelerate the loan and foreclose the mortgage*. Further, although the lender may re-accelerate and re-foreclose, it may not be able to seek the collection of payments which are older than five years, but it can still collect on all those payments which are not five years or older on all future payments. Of course, Bartram's argument was sort of the reverse: the cause of action for default of future installment payments accrued upon acceleration which triggered the statute of limitations; therefore, the lender did not and indeed could not revoke the acceleration after the dismissal and re-file its case after the expiration of the five-year limitation.

In its decision, the Appeals Court stated that its ruling was based on the Supreme Court's ruling in *Singleton v. Greymar Associates*, a September 2004 decision which found that "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."

So, there was an involuntary dismissal of the initial foreclosure action against Bartram, which, as such, returned the parties back to the same contractual relationship with the same obligations, and this meant that Bartram had the opportunity to continue making payments and the lender would have retained the right to accelerate the payments through a foreclosure suit in the event of another default.

At this point, I think we can pretty much guess the outcome. After all, this is about lending, mortgages in particular, and if Bartram prevailed banks could not collect on billions in dollars of defaulted loans with Bartram-like scenarios!

There are some observers of this litigation who believe a decision in favor of Bartram would create an environment that encourages new filings in previously dismissed cases as well as many more voluntary dismissals in the face of errors, omissions, and oversights. But, even more important, if the five-year statute of limitations starts again when each mortgage payment is missed, it is asserted that the Supreme Court's ruling would effectively be extending the five-year limitation throughout the life of the loan. Given a 30-year term mortgage, that would be 30 years plus 5 years, or up to 35 years!

I wonder about how such a ruling would impact the contract between the lender and borrower, since mortgage contracts are contracts of adhesion, that is, these are contracts that are drafted by one party in a position of power, leaving the weaker party to either sign the boilerplate contract or seek services elsewhere, or, to put it more bluntly, the weaker party must "either take it or leave it." After all, mortgage contracts use acceleration as a lawful response to default. A court will often be predisposed to favor the weaker party in such contracts, if there is ambiguity. But, baring clear violations of law, a court is not supposed to renegotiate terms to a contract if there really is no ambiguity.

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And here's the actual language in the acceleration clause in Bartram's contract, in relevant part:

> Upon reinstatement by Borrower, this Security Instrument and obligations secured hereby shall remain fully effective as if no acceleration had occurred.

The Appeals Court relied on its previous legal reasoning in the above-mentioned decision in *Singleton v. Greymar* Associates, where it said every default gives rise to a new and independent cause of action and right to accelerate payment of the debt, which applied the reasoning to preclude homeowners' *res judicata* defenses of foreclosure suits. These *res judicata* defenses are used in matters that have been adjudicated by a court and may not be pursued further by the same parties. In other words, if a foreclosure suit had been previously dismissed on a technicality, a homeowner could not use the argument that the issue had already been adjudicated. To quote the Singleton case, "when a second and separate action for foreclosure is sought for a default that involves a separate period of default from the one alleged in the first action, the case is not necessarily barred by res judicata."

Will this matter somehow be reheard by the Florida Supreme Court? Or, will it be taken for review by the U. S. Supreme Court? On both possibilities, I tend to think the answer is No. In a sense, we should not be surprised by the outcome. After all, some state and federal courts have already viewed the *Singleton res judicata* decision as a basis for statute of limitations interpretation. Maybe once that threshold was crossed, the outcome in Bartram seemed predictable.

Now, going to the law in Florida since January 1, 1975, which was the day the 1974 statute of limitations amendments went into effect, the Appeals Court noted that once the remedy for breach of a promissory note is barred at law, the corresponding remedy on a mortgage securing its repayment is similarly barred. Additionally, the law had long been settled that the exercise of an optional acceleration clause would "accelerate the maturity of the debt" and that "the institution of a suit for foreclosure is the exercise of the option of the mortgagee to declare the whole of the principal sum and interest secured by the mortgage due and payable." In furtherance of its view, the Appeals Court noted that "not a single appellate decision existed in the state of Florida holding that acceleration could be reversed under any circumstances, much less in order to avoid the absolute bar of a statute of limitations. As a result, the legislature could not possibly have anticipated that the law would be applied in a way that allows a claimant to extend or otherwise avoid the statute of limitations by allowing an accrued claim for foreclosure to be dismissed."

Thus, since the enactment of the 1974 amendments, the Appeals Court stated that "every decision of this Court has approached a question regarding its application in the same way – by seeking to interpret it in accordance with legislative intent."

The Appeals Court also applied the "legislative intent in light of the law as it existed in 1974" to whether once the five-year statute of limitations has expired on an accelerated promissory note and mortgage, the mortgage is a valid encumbrance under Florida law. In the Appeals Court's view, "once the remedy of

mortgage foreclosure is barred, the lien ceases to exist as a matter of law and the mortgage holder has no claim against (or any right to) the property." The underpinning to this view is based on how the Appeals Court has interpreted Florida law in the application of the lien theory of mortgages, which simply means that a mortgage is merely a type of personal property that provides the right to have the real estate security auctioned off in satisfaction of the underlying debt once the mortgage is adjudicated to be enforceable by a Florida court. So, "once a claim for foreclosure of an accelerated mortgage has been found to be barred by the statute of limitations, the mortgage (which is merely a right to a judicially sanctioned foreclosure sale) can no longer be said to exist and serves no legal purpose whatsoever."

With respect to the legislative history, Bartram viewed the Appeals Court's opinion to be "misguided," resulting from its failure to consider the "limited nature" of the Singleton holding and the fundamental differences between the doctrine of *res judicata* and the statute of limitations, to wit, that the former is judicially created while the latter is legislatively enacted. But the Appeals Court asserted that the Singleton decision was explicitly limited to the defense of *res judicata* and its holding was narrow, taking the position that "a dismissal with prejudice in a mortgage foreclosure action does not necessarily bar a subsequent foreclosure action on the same mortgage." Therefore, the decision in Singleton was based on the equitable nature of foreclosure proceedings and the uncontroversial and well-settled rule that *res judicata* should not be applied inflexibly where it would cause an injustice. But, opined the Appeals Court, "nothing in the [Singleton] opinion suggests that the Court's discussion in dicta of the relationship between acceleration and a cause of action for foreclosure should be extended beyond the confines of the doctrine of res judicata and the particular facts before the Court."

Having asserted that the Appeals Court failed to consider the differences between the defenses of *res judicata* and the statute of limitations, Bartram concluded that "the lower court failed to inspect the language of the statute and did not conduct an analysis of legislative intent." According to Bartram, taking the foregoing arguments into consideration, among other things, leads to certain conclusions, some of which are:

(1) the legislature could not have intended that the Singleton reasoning be applied to statute of limitations as it is presumed to know the law when it enacts a statute and no cases applying anything like Singleton's reasoning existed in 1974;

(2) a claim for foreclosure of a mortgage payable in installments accrues at the latest at the time of acceleration;

(3) once the statute of limitations begins to run on the entire debt, the only way the statute won't bar any action on a mortgage is a finding that one of the conditions in the statute of limitations clause occurred; and

(4) the equitable principles supporting the result in Singleton are not relevant to this case because the legislative intent of the 1974 amendments was to simultaneously bar equitable and legal

remedies on the same subject matter and because statute of limitations have always been applied without regard to particular equities.

Having given consideration to the contract language, the Supreme Court determined that the Appeals Court properly extended its reasoning in Singleton to the statute of limitations context in a mortgage foreclosure action. Given that the Bank's initial foreclosure action was involuntarily dismissed, the dismissal returned the parties back to "the same contractual relationship with the same continuing obligations."

As I've stated above, this meant that Bartram and the Bank's prior contractual relationship gave Bartram the opportunity to continue making his mortgage payments, and gave the Bank the right to exercise its remedy of acceleration through a foreclosure action if Bartram subsequently defaulted on a payment separate from the default upon which the Bank predicated its first foreclosure action. Thus, the Bank's attempted prior acceleration in a foreclosure action, though involuntarily dismissed, did not trigger the statute of limitations to bar future foreclosure actions based on separate defaults.

A final word about concurring as to the "result only."

Justice Lewis of the Supreme Court felt "troubled" by the expansion of Singleton to potentially any case involving successive foreclosure actions. He observed that "other courts in this State have already broadly applied Singleton – a decision involving *res judicata* and dismissal with prejudice – to cases that were either dismissed for lack of prosecution or voluntarily dismissed by the note-holder, as well as to cases that concern the statute of limitations, without careful consideration of the procedural distinctions of each case."

At its narrowest, observed the Justice, Singleton simply held that "when a second and separate action for foreclosure is sought for a default that involves a separate period of default from the one alleged in the first action, the case is not necessarily barred by res judicata."

In fact, he stated categorically that Singleton left several matters unanswered, which I will enumerate, as follows:

1. What constitutes a valid new default after the initial round of default, acceleration, foreclosure filing, and dismissal;

2. How the fact-finder determines that a valid new default has occurred; and

3. What conditions constitute valid new default, including whether the lender must reinstate the original note and mortgage terms in the interim or serve a second notice of intent to accelerate.

Furthermore, the Supreme Court in no way addressed the effect of the involuntary dismissal on the statute of limitations.

Justice Lewis brought the concept of "deceleration" into the matter. He believed the decision failed to address evidentiary concerns regarding how to determine the manner in which a mortgage may be reinstated following the dismissal of a foreclosure action, as well as whether a valid "subsequent and separate" default occurred to give rise to a new cause of action. Instead of addressing these concerns, opined the Justice, the Supreme Court "flatly holds that the dismissal itself – for any reason – "decelerates" the mortgage and restores the parties to their positions prior to the acceleration without authority for support."

The core of the Justice's expressed concern can perhaps be elucidated into the following reasoning:

- There is no evidence contained in the record before the Supreme Court to show whether the parties tacitly agreed to a "de facto reinstatement" following the dismissal of the previous foreclosure action.

- The mortgage itself did not create a right to reinstatement following acceleration and the dismissal of a foreclosure action.

- The contractual right to reinstatement under the terms of this mortgage existed only under specific conditions, which do not appear to have been satisfied in the record before the Supreme Court.

- Parties, particularly those as sophisticated as the banks and other lenders that routinely engage in such litigation, should be required to present evidence that the mortgage was actually decelerated and reinstated, rather than require courts to fill in the blank and assume that deceleration automatically occurred upon dismissal of a previous foreclosure action.

In the view held by Justice Lewis, the expansion of the Singleton holding that *res judicata* "does not necessarily" bar the filing of successive foreclosure actions to the statute of limitations "ignores critical distinctions between these two doctrines, at a serious cost to the statute of limitations and the separation of powers." As long recognized in Florida, *res judicata* "is a doctrine of equity not to 'be invoked where it would defeat the ends of justice.'" However, held the Justice, "equity follows the law;" therefore, "equitable principles are subordinate to statutes enacted by the Legislature, including the statute of limitations."

This position, the Justice asserted, is an untenable extension of an equitable, judicial doctrine into an area of law expressly governed by legislative action and "veers perilously close to violating the separation of powers."

So, in the view of Justice Lewis, the majority opinion of the Supreme Court failed to recognize these concerns and justified "the imposition of Singleton's equitable focus onto the statute of limitations by simply reviewing the decisions of federal and Florida courts that have reached this same conclusion without acknowledging the critical distinctions" between *res judicata* and the statute of limitations.

It seems that the Justice was arguing against acting out of expediency, given that there are legitimate concerns regarding the need to avoid encouraging delinquent borrowers from abusing the lending process by remaining in default after an initial foreclosure action is dismissed.

The Justice concluded that these legitimate policy concerns should not outweigh the established law of the State of Florida. Given the narrow holding of Singleton, the Justice "fear[s] that its expansion today to a case involving a previous dismissal (presumably) without prejudice and no clear reinstatement of the mortgage terms in either the note or the facts of this limited record will lead to inequitable results."

We will give Justice Lewis the last word:

> "Just as the courts should not encourage mortgage delinquency, so too should they avoid encouraging lenders from abusing Florida law and Floridians by 'retroactively reinstating' mortgages after many of those lenders initially slept on their own rights to seek foreclosures."

Further Reading:
Lewis Brooke Bartram, Petitioner, vs. U.S. Bank National Association, et., et al, Respondents, Supreme Court of Florida, No. SC14-1265

U. S. Bank National Association, Etc., Appellant, vs. Patricia J. Bartram, Etc., et al, Appellee, District Court of Appeal, State of Florida Fifth District, Case No. 5D12-3823

Lewis Bartram, Patricia Bartram & The Plantation at Ponte Vedra, Inc., Petitioners, vs. U.S. Bank, N.A., Respondent, on Appeal from the Fifth District Court of Appeal, Patricia Bartram's Initial Brief, in the Supreme Court of Florida