PUBLICATION

Bartram Affirmed: Florida Supreme Court Provides Guidance for Filing a Successive Foreclosure Action Post Dismissal

Authors: Eve Alexis Cann
November 03, 2016

Nearly a year after hearing oral argument on the matter, the Supreme Court of Florida affirmed the decision of the Fifth District Court of Appeal in *Bartram v. U.S. Bank, N.A.*, SC14-1265 (Fla. Nov. 3, 2016), holding that a lender is not barred from filing a subsequent foreclosure action based on a payment default after a first foreclosure action is involuntarily dismissed, provided that the subsequent default occurred within five years of the newly-filed action. The court limited its holding to cases that were involuntarily dismissed and where the mortgage at issue contains a clause granting the mortgagor the right to reinstate after acceleration. However, the court determined that whether the initial foreclosure action was dismissed with or without prejudice was immaterial to its conclusion. *Id.* at 20.

In reaching its conclusion, the court analyzed and reaffirmed its prior holding in *Singleton v. Greymar Associates*, 882 So. 2d 1004 (Fla. 2004), where the court held that res judicata did not bar a second foreclosure action which alleged a subsequent and separate default from that alleged in first foreclosure action. The court analyzed the subsequent Florida appellate court and federal court opinions applying *Singleton* to statute of limitations cases. The court found it significant that the mortgage at issue contained a provision entitling the borrower to reinstate after acceleration of the debt at any time before a foreclosure judgment. Quoting the Third District Court of Appeal, the *Bartram* court stated "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 of foreclosure is entered and no action is necessary to reinstate it via a notice of 'deceleration' or otherwise." *Bartram* at 21–22 (quoting *Deutsche Bank Trust Co. Americas v. Beauvais*, 188 So. 3d 938, 947 (Fla. 3d DCA 2016)).

The court ultimately concluded that "[t]he Fifth District properly extended our reasoning in *Singleton* to the statute of limitations context in a mortgage foreclosure action." *Bartram* at 25. The court reasoned that "the dismissal returned the parties back to 'the same contractual relationship with the same continuing obligations.'" *Id*. "Therefore, the Bank's attempted prior acceleration in a foreclosure action that was involuntarily dismissed did not trigger the statute of limitations to bar future foreclosure actions based on separate defaults." *Id*.

The decision leaves open whether this holding applies to cases that are voluntarily dismissed. However, just yesterday, the court accepted jurisdiction of a statute of limitations case where a prior foreclosure was voluntarily dismissed by the mortgagee. *Bollettieri Resort Villas Condo. Ass'n, Inc. v. Bank of New York Mellon*, 198 So. 3d 1140 (Fla. 2d DCA 2016), *review granted*, SC16-1680 (Fla. Nov. 2, 2016). Additionally, the decision leaves unclear how to allege a separate default in a subsequent foreclosure action. The opinion seems to contradict itself as to the effect of the dismissal on the outstanding installment payments. On one hand, it seems to hold that the mortgage loan is reinstated by the involuntary dismissal such that all installment payments that came due up to the time of the dismissal are wiped clean, and the borrower can resume making monthly mortgage payments as of the date of dismissal (*Bartram* at 23). While later in the opinion, it states that the parties are restored to their pre-foreclosure complaint status, which would suggest that the borrower must cure all past defaults less than five years old to reinstate the loan (*Id*. at 24). Finally, the opinion draws a distinction between involuntary dismissals with and without prejudice in relation to the "mortgagee's ability to

collect on past defaults." *Id*. at 20. Therefore, when a post-dismissal cause of action for foreclosure accrues and what past payments are at issue in it are open questions.

Industry Impact: What It Means for Servicing

The *Bartram* decision is not final until the time to file a motion for rehearing expires, or if one is filed, it is ruled upon. Assuming this is the final decision, mortgage servicers may immediately file new foreclosure actions on any loans that are in default where there was a prior foreclosure action that was involuntarily dismissed and the mortgage at issue contains a clause permitting reinstatement after acceleration. This will likely result in the initiation of a round of new foreclosure actions, reigniting an industry which has slowed down significantly over the past few years with thousands of loans that had been in a holding pattern due to prior dismissals. Servicers should consult counsel to determine what default date to allege in their complaint given that the opinion is unclear as to when a new cause of action accrues and what past defaults will be at issue in the new action.