IN THE DISTRICT COURT OF APPEAL OF FLORIDA,
THIRD DISTRICT
CASE NO. 3D14-0575 (L.T. NO. 12-49315)

DEUTSCHE BANK TRUST COMPANY AMERICAS, etc.,

Appellants,
v.

HARRY BEAUVAIS, et al.,

Appellees.

ON APPEAL FROM THE CIRCUIT COURT OF FLORIDA,
ELEVENTH JUDICIAL CIRCUIT

BRIEF OF *AMICUS CURIAE* THE BUSINESS LAW SECTION OF THE FLORIDA BAR

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IDENTITY AND INTEREST

The Business Law Section of The Florida Bar ("BLS") consists of almost six thousand members of The Florida Bar, and includes lawyers who routinely represent lenders as well as those that routinely represent borrowers. Using its expertise in business law, the BLS assists the Florida Legislature in drafting laws of interest to the public and the business community. The BLS likewise serves the Bar by producing sophisticated CLE (continuing legal education) programs on the panoply of issues faced by business law practitioners.

The BLS promotes the principles of duty and service to the public, emphasizes the importance of pro bono services, and promotes inclusion and mentoring. The BLS has an active mentoring program - the Fellows Program - which annually selects exceptional young attorneys for participation in a program which integrates them into the BLS's activities (the costs of participating in the program are subsidized by the BLS), and the BLS recently launched a Scholar's Program to support the engagement of students from Florida's twelve law schools who are interested in a career in business law.

While not routinely engaged in the practice of filing *amicus* briefs, the BLS has in the past filed briefs when requested to do so by courts or when a particular issue risked creating uncertainty in the practice of business law. The BLS takes very seriously this Court's request that the BLS provide its views on the issues

facing the Court, but asks the Court to note that the BLS may not be able to fully comment on all the issues posed by the Court due to its not having expertise in one or more areas.

Additionally, and due to the diversity of the practices of its membership and the corresponding diverse views arising therefrom, the BLS seeks only to answer the questions posed as an honest broker of the majority of the practices of its members, and does not take a position as to which party should prevail in this appeal. Finally, the BLS thanks the Court for the opportunity to assist in the determination of this case.

The filing of this brief was approved by The Florida Bar.[1]

[1] The Executive Council of the BLS approved the filing of this brief. Pursuant to Standing Board Policy 8.10, the Board of Governors of The Florida Bar (typically through its Executive Committee) must review a section's amicus brief and grant approval before a brief can be filed with the Court. Although reviewed by the Board of Governors, the amicus brief will be submitted solely by the BLS and supported by the separate resources of this voluntary organization--not in the name of The Florida Bar, and without implicating the mandatory membership dues paid by Florida Bar licensees.

SUMMARY OF ARGUMENT

The Court invited the BLS and others to address the following issues:

1. Where a foreclosure action has been dismissed with the note and mortgage still in default:

    a. Does the dismissal of the action, by itself, revoke the acceleration of the debt balance thereby reinstating the installment terms?

    b. Absent additional action by the mortgagee can a subsequent claim of acceleration for a new and different time period be made?

    c. Does it matter if the prior foreclosure action was voluntarily or involuntarily dismissed, or whether the dismissal was with or without prejudice?

    d. What is the customary practice?

2. If an affirmative act is necessary by the mortgagor to accelerate a mortgage, is an affirmative act necessary to decelerate?

3. In light of *Singleton v. Greymar Assocs.*, 882 So. 2d 1004 (Fla. 2004), is deceleration an issue or is deceleration inapplicable if a different and subsequent default is alleged?

The BLS adopts the Summary of the Case set forth by The Real Property and Trust Law Section of The Florida Bar in its *amicus* brief, and further states it takes no position generally on the facts of this case or specifically on the outcome of this case, i.e., whether the claims in this case are barred by the statute of limitations or other law or which party should prevail.

The BLS summarizes its argument as follows:

Florida law holds that dismissal of a foreclosure lawsuit with a mortgage containing an optional acceleration clause decelerates the default under the note and mortgage. The Florida Supreme Court has held that a mortgagee may claim a default for a new period, and thus claim a new acceleration in a new action. This supreme court opinion makes no distinction whether the prior action was voluntarily or involuntarily dismissed. The customary practice of members of the BLS that represent lenders in suits to collect on notes and foreclose on mortgages arising from residential loans is to accelerate through the filing of suit and decelerate through dismissal of the lawsuit. Under the form of residential mortgage most commonly used in Florida, borrowers have the contractual option to force deceleration and cure the default through the payment of outstanding arrearages.

Accordingly, an "affirmative act" is necessary to decelerate under Florida law but no Florida law holds that dismissal fails to constitute an "affirmative act." On the other hand, Florida case law other than the panel opinion holds by implication that dismissal decelerates a previously accelerated note and mortgage. No Florida authority draws a distinction between voluntary or involuntary dismissals.

Finally, *Singleton v. Greymar Associates*, 882 So. 2d 1004 (Fla. 2004), states by implication that deceleration is not an issue if a different date of default is alleged in the subsequent suit.

ARGUMENT

1. Where a foreclosure action has been dismissed with the note and mortgage still in default:

    a. Does the dismissal of the action, by itself, revoke the acceleration of the debt balance thereby reinstating the installment terms?

To begin, Florida law holds there are two types of acceleration clauses: absolute and optional. Acceleration is automatic under absolute acceleration clauses, but further acts are required to accelerate a debt under an optional acceleration clause. *See Cook v. Merrifield*, 335 So. 2d 297, 299 (Fla. 1st DCA 1976). The acceleration clause in this case is an optional acceleration clause.

There are two ways in Florida to accelerate a note and mortgage with an optional acceleration clause. The method many lenders historically employed was to accelerate pursuant to the terms of the note and mortgage itself, i.e., a "contractual acceleration." This was typically done by sending written notice of acceleration of the debt.

A more common method is to have the filing of the foreclosure lawsuit serve as the acceleration of the debt. As explained by this Court in *Delandro v. America's Mortg. Servicing, Inc.*, 674 So. 2d 184, 186 (Fla. 3d DCA 1996):

> The mortgage note in this case allowed the lender the option to accelerate when the mortgage was in default, but acceleration was not automatic. Consequently it was necessary for the lender to take some affirmative step to accelerate the mortgage. *Pici v. First Union National Bank*, 621 So. 2d 732, 733-34 (Fla. 2d DCA), *review denied*,

> 629 So. 2d 132 (Fla. 1993). The complaint in this case indicates that the acceleration took place on February 9, 1994, when the lender filed the mortgage foreclosure complaint and stated, in paragraph 11, that "Plaintiff declares the full amount payable under the note and mortgage to be due."

The custom and practice among most of the BLS practitioners is to allow the filing of the lawsuit serve as acceleration of the note and mortgage. This Court's panel opinion reflects that acceleration in this case took place no later than the date of the filing of the lawsuit, and the Record on Appeal seems to indicate acceleration in this case was by the filing of the foreclosure lawsuit. *See* R. 6, ¶7.

It stands to reason that a mortgage with an optional acceleration clause that is accelerated through the filing of suit is automatically decelerated if the suit is dismissed, no matter whether the suit is dismissed with prejudice or dismissed without prejudice. In other words, the lender's right to accelerate is not "irrevocably exercised" in those cases with optional acceleration clauses. This position has been adopted by other district courts of appeal, and seems to be the majority rule. *See Nationstar Mortg., LLC v. Brown*, --- So. 3d ----, 2015 WL 4999017 (Fla. 1st DCA 2015); *Olympia Mortg. Corp. v. Pugh*, 774 So. 2d 863, 866–67 (Fla. 4th DCA 2000). Based solely on the law without application of facts, it appears that the prior dismissal in this case decelerated the prior acceleration.

The BLS expresses no opinion on whether dismissal in a case with an absolute acceleration clause decelerates an accelerated debt.

b. Absent additional action by the mortgagee, can a subsequent claim of acceleration for a new and different time period be made?

The Florida Supreme Court answered this question in the affirmative in *Singleton v. Greymar Associates*, 882 So. 2d 1004 (Fla. 2004), and held that dismissal with prejudice in a mortgage foreclosure action does not bar, on res judicata grounds, a subsequent foreclosure suit. The BLS recognizes this issue is again squarely before the Florida Supreme Court in *U.S. Bank Nat. Ass'n. v. Bartram*, 140 So. 3d 1007 (Fla. 5th DCA 2014) *review granted*, *Bartram v. U.S. Bank Nat. Ass'n*, Nos. SC14–1265, SC14–1266, SC14–1305, 2014 WL 4662078 (Fla. Sept. 11, 2014). However, the BLS is not aware of any principled reason to depart from existing case law.

c. Does it matter if the prior foreclosure action was voluntarily or involuntarily dismissed, or whether the dismissal was with or without prejudice?

The BLS believes that according to existing case law, it does not matter whether the dismissal of a foreclosure action was with or without prejudice when it comes to the issue of whether the subject loan was decelerated. *See Nationstar Mortg., LLC v. Brown*, --- So. 3d ----, 2015 WL 4999017 (Fla. 1st DCA 2015).

The BLS expresses no opinion whether the result would be the same in a case with an absolute acceleration clause.

d. What is the customary practice?

In the experience of the BLS, the customary practice appears to be acceleration of "optional acceleration" loans through the filing of suit and not through acceleration notices. Accordingly, the customary practice amongst the BLS's members appears to be based on *Singleton* and that filing of a new suit is permitted on a mortgage that contains an optional acceleration clause, whether the prior suit was terminated by voluntary dismissal or otherwise.

2. If an affirmative act is necessary by the mortgagee to accelerate a mortgage, is an affirmative act necessary to decelerate?

The answer to the question first depends on whether it is the mortgagee or the mortgagor that seeks to decelerate. Absent a requirement in the contract between the mortgagor and mortgagee, Florida law does not impose specific requirements on a mortgagee in order to decelerate a mortgage with an optional acceleration clause. On the other hand, the form residential mortgage most often used in Florida allows a mortgagor to pay past due installments and bring the loan "current" and thus decelerate the note and mortgage.

The response to the Court's question is complicated by the fact that many opinions on the subject do not discuss whether the acceleration clauses in those cases are absolute or optional. However, the BLS is not aware of Florida authority requiring specific acts other than dismissal in order for a mortgagee to decelerate a mortgage.

And while it is not clear from the Nevada Supreme Court opinion of *Cadle Co. II, Inc. v. Fountain*, 281 P.3d 1158 (Table) (Nev. 2009), the text of the opinion seems to indicate that the acceleration in that case was through notice prior to filing suit as the court stated: "[o]n November 18, 1996, CIT exercised its right to accelerate the remaining balance due on respondent's promissory note and it filed a complaint in the Second Judicial District Court of the State of Nevada, Washoe County, seeking to judicially foreclose on the deed of trust securing the note." *Cadle*, 281 P.3d at *1.

In other words and had acceleration been accomplished through the filing of suit, the *Cadle* court would have written that ". . . CIT exercised its right to accelerate the remaining balance due on respondent's promissory note by filing a complaint in the Second Judicial District Court . . ." The BLS further notes Nevada is a "deed of trust" jurisdiction that does not have a judicial foreclosure process to protect borrowers, and *Cadle's* applicability to judicial foreclosure states such as Florida is uncertain.

Again, the BLS expresses no opinion whether the answer to the Court's question would be the same in a case with an absolute acceleration clause.

3. In light of *Singleton v. Greymar Assocs*., 882 So. 2d 1004 (Fla. 2004), is deceleration an issue or is deceleration inapplicable if a different and subsequent default is alleged?

By holding that a lender may file suit on an installment mortgage within five years of the last payment due on the mortgage, the *Singleton* court answers the question by implication. Specifically and by holding that subsequent foreclosure suits are permitted so long as within the statute of limitations, the Florida Supreme Court has implied that the prior suits were decelerated by the dismissal.

CONCLUSION

For the reasons set forth above, the BLS believes the *en banc* Court should revisit the panel opinion and hold that dismissal, whether voluntary or involuntary, has no impact on the deceleration of a previously accelerated note and mortgage.

CERTIFICATE OF SERVICE

I CERTIFY that a true copy of this brief was served, this 12th day of October, 2015 via electronic mail to the following:

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CERTIFICATE OF FONT COMPLIANCE

I certify that this brief complies with the font requirement of rule 9.210 (a) (2), Florida Rules of Appellate Procedure.

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