In the District Court of Appeal
Fifth District of Florida

CASE NO. 5D12-3823

(Circuit Court Case No. CA11-0528)

U.S. NATIONAL BANK ASSOCIATION
Defendant-Appellant,

v.

LEWIS BROOKE BARTRAM,
Defendant-Appellee.

ON APPEAL FROM THE SEVENTH JUDICIAL
CIRCUIT IN AND FOR ST. JOHNS COUNTY, FLORIDA

LEWIS BARTRAM'S ANSWER BRIEF

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STATEMENT OF THE CASE AND FACTS

A. Nature of the Case

This appeal stems from a grant of summary judgment in favor of Appellee, Lewis Brooke Bartram. The trial court properly applied the statute of limitations when it entered judgment in Bartram's favor.

Appellant, U.S. National Bank Association, will be referred to as the "Bank." Appellee, Lewis Bartram will be referred to as "Bartram." The record will be cited as "Vol. _, Pg. __."

B. Course of Proceedings and Facts

The Bank appeals Bartram's successful summary judgment holding that the statute of limitations barred the Bank from enforcing a mortgage against Bartram's homestead property. (Vol. III, Pg. 443-444).

The Bank admits it accelerated the mortgage on Bartram's homestead property when it filed suit against him in a prior foreclosure action on May 16, 2006. *Id*. at 344. The Bank also admits that the trial court in that prior action dismissed the suit on May 5, 2011, when the Bank failed to appear at a court-ordered case management conference. *Id*. at 345. The order of dismissal, without prejudice, did not mention the Bank's acceleration of the mortgage, nor did it purport to adjudicate any issue as to the acceleration of the mortgage. *Id*. The order of dismissal also did not purport to reinstate the mortgage. *Id*. At the time the trial

court dismissed the prior action, that case was almost five years old. (Vol. VI, Pg. 647).

Bartram did not exercise his contractual right to reinstate the mortgage. (Vol. III, Pg. 443-444). Nor, as the Bank admits, did the final order of dismissal find the Bank's acceleration invalid by way of estoppel, unclean hands, payment, unconscionability, or waiver. (Vol. III, Pg. 345). Simply put, the trial court never made any finding at all as to the acceleration. (Vol. III, *passim*). The Bank did not appeal the dismissal of the prior action, or seek rehearing or relief from that dismissal. (Vol. II, Pg. 292).

In this new action, filed by his former wife, Bartram sought summary judgment on his cross-claim against the Bank for declaratory judgment, arguing that because the Bank had slept on its rights for more than five years after it accelerated the mortgage, the statute of limitations barred its attempt to enforce the mortgage. *Id*. At hearing, the Bank did not argue that its prior acceleration was ineffective, or had been waived, or been withdrawn. (Vol. III, Pg. 533–534). Nor did the Bank argue that there was any fact they could plead in an answer which might defeat the summary judgment. *Id*. Instead, the Bank simply argued that the prior dismissal was "not dispositive." *Id*.

Notably, the Bank's right to accelerate and Bartram's right to reinstate are both defined by the agreement between the parties. The contractual acceleration

right is described in Paragraph 7 of the Note. (Vol. III, Pg. 420). And the contractual right of reinstatement—contained in Paragraph 18 of the mortgage—would have required Bartram to meet certain conditions in order to reinstate his mortgage:

> Those conditions are that Borrower: (a) pays Lender all sums which then would be due under this Security Instrument and the Note as if no acceleration had occurred; (b) cures any default of any other covenants or agreements; (c) pays all expenses incurred in enforcing this Security Instrument, including, but not limited to, reasonable attorneys' fees, property inspection and valuation fees, and other fees incurred for the purpose of protecting Lender's interest in the Property and rights under this Security Instrument; and (d) takes such action as Lender may reasonably require to assure that Lender's interest in the Property and rights under this Security Instrument, and Borrower's obligation to pay the sums secured by this Security Instrument, shall continue unchanged.

(Vol III, Pg. 362) The Bank does not contend that Bartram did any of these things in order to reinstate the mortgage. (Vol. III, Pgs. 339–354).

C. Disposition in the Lower Tribunal

On July 31, 2012, the lower court entered Summary Judgment in Bartram's favor. (Vol. III, Pg. 443-444). The lower court denied the Bank's Motion for Rehearing on August 16, 2012. (Vol. III, Pg. 524). This appeal followed.

SUMMARY OF ARGUMENT

This appeal requires the Court to address the following questions:

1. Florida has a five year statute of limitations which applies to mortgage foreclosure actions. The statute begins to run at the time of acceleration. Where the Bank had accelerated the mortgage more than five years ago, could it avoid the statutory bar and file a subsequent suit to enforce the mortgage?
2. The prior foreclosure suit was dismissed because the Bank disobeyed a court order setting a case management conference, and didn't bother to attend. Did the Bank's disobedience or the resulting dismissal have any effect on its prior acceleration of the mortgage?
3. Both acceleration and reinstatement are contractual rights defined in the mortgage contract. Can a trial court, by dismissing the action, unilaterally reinstate the loan in derogation of the mortgage contract between the parties?
4. Florida law limits the application of *res judicata* in foreclosure actions. Is it right to impose a corresponding limitation on the application of the statute of limitations, that would allow lenders unlimited bites at the foreclosure apple?

Bartram urges this Court to answer each of these questions in the negative, and affirm the judgment of the trial court.

ARGUMENT

I. STANDARD OF REVIEW AND JURISDICTION

Bartram agrees with the Bank that the applicable standard of review is *de novo*, and that this Court has jurisdiction. *Gee v. U.S. Bank Nat'l Ass'n*, 72 So. 3d 211, 213 (Fla. 5th DCA 2011).

II. THE TRIAL COURT'S ORDER GRANTING SUMMARY JUDGMENT WAS PROCEDURALLY PROPER AND FACIALLY VALID.

A. The order need not recite findings of fact or conclusions of law for this Court to review it under a *de novo* standard.

The Bank's opening salvo against the trial court's order granting summary judgment is to question the procedural sufficiency of the face of the order. The Bank's attack on this point fails, because the order is both procedurally proper and facially valid.

Procedurally, the Bank complains that the order does not contain "findings of fact and conclusions of law." (Initial Brief, p. 12). But that is not a legally sufficient basis to reverse an order granting summary judgment, and the Bank has pointed to no legal authority to show it could be. The Bank's reliance on *Featured Properties, LLC v. BLKY, LLC*, 65 So. 3d 135 (Fla. 1st DCA 2011), is misplaced because that case involved an order entered after an evidentiary hearing where the trial court sat as the finder of fact. Obviously, where a trial court makes findings of fact at an evidentiary hearing, the resulting order should state what those findings

are. But a trial court cannot weigh evidence or judge credibility at a summary judgment hearing—it can only cite what material facts are disputed or not:

> The trial court's role in summary judgment proceedings is not one of weighing the evidence or passing on the credibility of witnesses. Instead, it is a means of efficiently disposing of those actions in which there are no genuine issues of material fact and the moving party is entitled to receive a judgment as a matter of law.

Quilling v. County of Sumter, 726 So. 2d 795 (Fla. 5th DCA 1999). And the rule governing summary judgments only dictates the form of the order if the order partially grants summary judgment, and in such a case, the order must only state which facts remain in dispute, if it can. Fla. R. Civ. P. 1.510 (d) (governing "Case[s] Not Fully Adjudicated on Motion").

Besides the lack of support in the law, the Bank's argument also defies common sense. The rule provides that the motion for summary judgment must "state with particularity the grounds upon which it is based and the substantial matters of law to be argued and shall specifically identify" the summary judgment evidence relied upon. Fla. R. Civ. P. 1.510(c). Armed with such information, the appellate court can easily conduct a *de novo* review because it need not defer to the trial court's findings. *Gee* 72 So. 3d at 213. ("This Court reviews an order granting summary judgment *de novo*.")

Furthermore, the face of the record makes it plain how the trial court arrived at its ruling, more than enough for purposes of this Court's review. The Bank's argument on that point is wholly without merit.

B. The record reveals no facts the Bank could have pled in any answer that could have defeated Bartram's motion for summary judgment.

The Bank also argues that summary judgment was premature because it had not yet answered the cross-claim. But that argument fails, because the Bank does not identify a single fact it could have pled to defeat Bartram's summary judgment. At hearing, the Bank failed to identify a single material fact it might dispute. (Vol. III, Pgs. 533–534). In its motion for rehearing, it failed to identify a single material fact it might dispute. (Vol. III, Pgs. 339–354). And in its initial brief, it failed to identify a single material fact it might dispute. (Initial Brief, *passim*). By so doing, it has failed to identify any harmful error that would be necessary for this court to reverse. *See Nat'l Union Fire Ins. Co. v. Blackmon*, 754 So. 2d 840, 843 (Fla. 1st DCA 2000) ("[T]he test for harmful error in a civil case ... is 'whether, but for such error, a different result may have been reached.'") In this case, to warrant reversal, the Bank would have to show some fact it could have pled that would have changed the result. This, the Bank has not even tried to do.

The Bank's reliance on cases like *Howell v. Ed Bebb, Inc.*, 35 So. 3d 167 (Fla. 2d DCA 2010) and *BAC Funding Consortium Inc. ISAOA/ATIMA v. Jean-Jacques*, 28 So. 3d 936, 937-38 (Fla. 2d DCA 2010) is misplaced, because in those

cases, the appealing parties did identify some specific fact that would have defeated summary judgment. Unlike this case, "at hearing on the motion for summary judgment, Howell noted issues of material fact that could be raised in an answer to the complaint." *Howell,* 35 So. 3d at 169.[1] In *BAC Funding*, "the record before the trial court reflected a genuine issue of material fact as to U.S. Bank's standing to foreclose the mortgage at issue." *BAC Funding*, 28 So. 3d at 938. But in this case, the record reveals no fact the Bank could have pled to defeat Bartram's summary judgment. The Bank has therefore failed to demonstrate any error that could possibly warrant reversal.

III. THE ENTRY OF SUMMARY JUDGMENT WAS PROPER BECAUSE U.S. BANK'S MORTGAGE WAS UNENFORCEABLE UNDER THE APPLICABLE STATUTE OF LIMITATIONS.

Like these procedural arguments, the Bank's substantive legal arguments fail under even the lightest scrutiny. For example, by omitting just three words, the Bank turns a quotation from *Singleton v. Greymar Associates,* 882 So. 2d 1004 (Fla. 2004) on its head to make it sound like a failed foreclosure plaintiff has essentially no limits on the number of times it can "try, try again." A deeper analysis of the Bank's mischaracterization of *Singleton* comes later, but first it is important to understand the law that actually does apply.

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[1] Undersigned Attorney Michael Wasylik was trial counsel who made the argument on behalf of Howell at that hearing.

A. A five-year statute of limitations, triggered by acceleration, applies to enforcement of mortgages.

The five-year statute of limitations set forth in Section 95.281(1)(b), Fla. Stat., applies to mortgage foreclosures. *Houck Corp. v. New River, Ltd., Pasco,* 900 So. 3d 601, 603 (Fla. 2d DCA 2005). That limitations period begins to run when the mortgagee properly accelerates the mortgage after a default. *Greene v. Bursey,* 733 So. 2d 1111 (Fla. 5th DCA 1999). But that acceleration is a contractual, not a common-law right, and the mortgagee may not accelerate unless the mortgage contract contains a provision allowing the acceleration. *Reed v. Lincoln*, 731 So. 2d 104, 106 (Fla. 5th DCA 1999) (The payment obligation "may not be accelerated in the absence of an acceleration provision."). When the contract does contain such a clause—like the agreement in this case—then the acceleration is effective when the mortgagee takes some clear action indicating its intent to accelerate, such as filing a suit declaring the entire amount due and owing. *Central Home Trust Co. of Elizabeth v. Lippincott*, 392 So. 2d 931, 933 (Fla. 5th DCA 1980).

It is undisputed that, in this case, acceleration occurred no later than when the Bank filed the prior action on May 11, 2006. (Vol. III, Pg. 351). Since that acceleration was valid, it triggered the statute of limitations. *Central Home Trust,* 392 So. 2d at 933.

B. Dismissal of the Bank's prior action could not "decelerate" the mortgage.

The Bank makes the novel argument—relying wholly on its misreading of *Singleton*—that the involuntary dismissal of its private action somehow "decelerated" the mortgage, and rescuing the Bank from the effect of the expired limitations period. But there is no case, in Florida or any other jurisdiction, that allows a mortgagee to escape the statute of limitation by losing a then-pending suit to enforce the mortgage. Such a nonsensical rule would defeat the policy purposes of having a statute of limitations, and give incentives for mortgage lenders to waste judicial resources by intentionally losing their own foreclosure suits to reset the statute of limitations at their own whim. *See Major League Baseball v. Morsani*, 790 So. 2d 1071, 1074-75 (Fla. 2001) ("A prime purpose underlying statutes of limitation is to protect defendants from unfair surprise and stale claims.").

The core of the Bank's argument is the notion that the involuntary dismissal of the prior action "decelerated" the mortgage. (Vol. III, Pg. 349). But the Bank had to put quotes around the word "decelerated" because no such term exists with respect to mortgages, especially inuring to the benefit of an unsuccessful mortgagee.

Instead, the borrower on a mortgage loan may have a contractual right of reinstatement. But because such a right is contractual in nature, it can only be imposed when the contractual conditions are satisfied. *Old Republic Ins. Co. v.*

Lee, 507 So. 2d 754 (Fla. 5th DCA 1987) (reversible error for trial court to reinstate mortgage where contractual window to do so had expired). In other words, acceleration is an arrow that, once loosed, cannot be easily recalled.

The enforcement of both the acceleration and reinstatement contractual rights, including all their limitations, "is an obligation of the courts which has constitutional dimensions." *David v. Sun Federal Savings & Loan Ass'n*, 461 So. 2d 93, 94 (Fla. 1984); see *See* Art. I, § 10, Fla. Const. ("No bill of attainder, ex post facto law or law impairing the obligation of contracts shall be passed."); Art. I § 10, U.S. Const. ("No State shall…pass any… Law impairing the Obligation of Contracts"). Because the enforcement of those provisions—and their limitations—rise to a constitutional dimension, neither the trial court nor the parties can arbitrarily refuse to enforce them, especially for technical failures such as refusing to attend a case management conference. *David v. Sun Federal*, 461 So. 2d at 94. If the Bank chose to accelerate, that acceleration was valid unless a proper equitable defense applied. *Id*. And if the parties—as they did here—contracted to limit the reinstatement right with conditions and requirements, then the trial court would not be free to simply disregard those and impose a reinstatement without Bartram meeting those conditions. *Id*.; *Old Republic*, 507 So. 2d at 744.

And because the parties to the mortgage contract have carefully defined their mutual remedies in the event of an alleged breach—acceleration and its twin,

reinstatement, both with concurrent conditions for imposing them—the trial court had no choice but to hold the parties to the benefit of their bargain. *Seaside Cmty. Dev. Corp. v. Edwards*, 573 So. 2d 142, 147 (Fla. 1st DCA 1991) ("Generally, where the parties to a contract have agreed upon a remedy in the event of a breach, their agreement will control, provided the remedy is 'mutual, unequivocal and reasonable.'"). Accordingly, the trial court properly recognized that the Bank had met all the conditions required for a valid acceleration—an acceleration it had no right to deny—and Bartram had not met the conditions required to undo the acceleration through reinstatement—conditions that the trial court also lacked the right to deny. So too, this Court should recognize the proper acceleration and lack of reinstatement, and hold that the Bank properly accelerated the mortgage, which acceleration remained in effect even though the trial court involuntarily dismissed the first action.

IV. THE BANK MISCONSTRUES THE APPLICABLE PRECEDENT.

The Bank's entire argument fails because it completely depends on misreading the *Singelton*, *Olympia*, and *Spencer* cases.

A. *Singleton* does not and cannot "decelerate" the loan in this case.

Singleton, a case addressing the issue of *res judicata*, is the cornerstone of the Bank's faulty argument that trial-court victory by a mortgage borrower not only has no consequences for the mortgagee, it actually inures to the benefit of the

mortgagee. The Bank derives this odd notion from an incomplete quotation of the case—deleting three words which, when restored, show that *Singleton's* scope is much more limited than the Bank argues. Here is that quote, with the three missing words restored in italics:

> *In those instances*, the mortgagor and mortgagee are simply placed back in the same contractual relationship with the same continuing obligations. Hence, an adjudication denying acceleration and foreclosure under those circumstances should not bar a subsequent action a year later if the mortgagor ignores her obligations on the mortgage and a valid default can be proven.

Singleton, 882 So. 2d at 1007. Those three words, carefully omitted in the Bank's quotation—(Initial Brief, p. 15)—eviscerate the argument that every failed foreclosure suit automatically restores the parties to the pre-acceleration *status quo*. Only under "those instances" would such restoration occur. *Id*. So what, then, are "those instances" that would defeat acceleration? The *Singleton* court identified them:

> For example, a mortgagor may prevail in a foreclosure action by demonstrating that she was not in default on the payments alleged to be in default, or that the mortgagee had waived reliance on the defaults.

Singleton, 882 So. 2d at 1007. In the first example, acceleration could not occur because the contractual right to accelerate only triggers when a default exists—no default, no acceleration. In the second example, waiver is an equitable defense to acceleration that the mortgagor must prove—again, barring the

mortgagee from having the right to accelerate in the first place. Critically, *Singleton* requires the mortgagor to “demonstrate”—or prove—those defenses, and the case must end with “an adjudication denying acceleration and foreclosure.” *Id*.

It makes sense to limit the scope of any rule that would impinge upon the mortgagee’s contractual right of acceleration. A broad rule involuntarily revoking the mortgagee’s acceleration whenever the mortgagee failed, for any reason, to obtain a judgment of foreclosure, would impair the obligation of contracts, in violation of both the federal and state constitutions. *See* Art. I, § 10, Fla. Const. (“No bill of attainder, ex post facto law or law impairing the obligation of contracts shall be passed.”); Art. I § 10, U.S. Const. (“No State shall…pass any… Law impairing the Obligation of Contracts”). In Florida, it is a “well-accepted principle that virtually no degree of contract impairment is tolerable.” *Pomponio v. Claridge of Pompano Condo., Inc*., 378 So. 2d 774, 780 (Fla. 1979). Where mortgagee has the contractual right to accelerate, and all preconditions have been met, the automatic revocation of that acceleration would unconstitutionally impair the contract between the parties.

Likewise, an automatic revocation of a properly-accelerated mortgage, even where the mortgagee had not performed any of the contractual conditions required for the mortgagee to obtain a reinstatement of the loan, would nullify those contractual conditions governing reinstatement, and impair the contract between

the parties. Therefore, the rule in *Singleton* must, by definition, be limited to those cases where a court adjudicates that an acceleration was not properly accomplished or where the contractual prerequisites to acceleration had not been met.

In this case, there was no adjudication denying acceleration. (Vol. III, p. 345). Instead, the case was dismissed on procedural grounds—the failure of the Bank's counsel to attend a case management conference. *Id*. That dismissal did not act as an adjudication on the merits—if it had, the issue before this Court would be one of *res judicata*, rather than the statute of limitations.

B. *Singleton* does not apply because it resolved the issue of *res judicata*, not statute of limitations.

Singleton, unlike the case at bar, addresses the legal doctrine of *res judicata,* a judicially-created doctrine protecting the finality of judgments as to any issue fully litigated by parties to a dispute. *Engle v. Liggett Group, Inc*., 945 So. 2d 1246, 1260 (Fla. 2006). By contrast, a statute of limitations is a legislatively-enacted prohibition against the litigation of stale claims. *Major League Baseball v. Morsani*, 790 So. 2d 1071, 1074–75 (Fla. 2001) ("…fixed limitations on actions are predicated on public policy and are a product of modern legislative, rather than judicial, processes.")

Legally, the two are distinct because one bars the re-litigation of claims that have already been decided by final judgment, preventing parties from taking two bites at the same apple. *Ayala v. Gonzalez*, 984 So. 2d 523, 524 (Fla. 5th DCA

2008)("Every litigant is entitled to one bite at the apple. Two bites is unfair.") In effect, the *Singleton* case established that, where a court adjudicates that the mortgagee has failed to validly accelerate, each subsequent payment is a different apple, from which the litigants may each take one bite.

But if *res judicata* deals with apples, then the statute of limitations necessarily deals with oranges. As opposed to *res judicata*, which is triggered only when a cause of action becomes final, the statute of limitations begins to run when the cause of action first accrues. *Houck Corp*., 900 So. 2d at 603 (Fla. 2d DCA 2005). (statute of limitations is a "procedural statute that prevents the enforcement of a cause of action that has accrued."); *Greene*, 733 So. 2d at 1114 ("The statute of limitations begins to run from the time the cause of action accrues.").

Analyzing whether a cause of action has accrued, because the last piece of the puzzle has fallen into place, is a wholly different question from whether a matter has been fully litigated between the parties. In the former, judicial labor is complete, and cannot be re-opened. In the latter, judicial labor cannot even begin because the plaintiff does not yet have a claim to litigate.

The instant case is a useful example. Reading *Singleton* as the Bank would urge, then the first foreclosure suit it filed, seeking repayment of the entire balance, was premature. The claim itself would have been frivolous. But no one, not even the Bank, contends the acceleration was improper, or invalid, or didn't occur. The

Bank admits it filed a claim seeking the entire amount, and that its intent at the time the claim was filed was to accelerate the entire mortgage. The last piece of the puzzle had fallen into place, the Bank was allowed to file its claim, and there is no adjudication to the contrary.[2] But if the prior action had been litigated to final judgment on the merits by these parties, *res judicata* would apply to bar any re-litigation of the same issues or actions on the same default.

Indeed, because the prior dismissal was without prejudice, it cannot possibly raise *res judicata* concerns. Here, the Court dismissed the first case without prejudice due to the Bank's failure to attend a case management conference. (Vol. III, Pg. 345). "Dismissals are generally without prejudice where the case is not being disposed of on the merits." *Smith v. St. Vil*, 714 So. 2d 603, 604 (Fla. 4th DCA 1998). The prior dismissal could not have been with prejudice, because when a court dismisses a case with prejudice for failure to follow procedural requirements, the court must first analyze the factors set forth by the Florida Supreme Court in *Kozel v. Ostendorf*, 629 So. 2d 817, 818 (Fla. 1993).[3] Dismissal

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[2] Ironically, under *Singleton*, if the trial court in the prior action had adjudicated the acceleration to be invalid, then the Bank could simply have filed on a subsequent default and this issue would not be before this Court.

[3] The post-dismissal order (Vol. III, Pg. 345) characterizing the dismissal as "with prejudice" is neither binding nor correct, because it was entered more than ten days after initial dismissal order and thus the trial court lacked jurisdiction to re-dismiss the case. In any event, "[i]t is apparent that the trial court's order[s] of dismissal in the first case [were] entered as a sanction for failure to proceed and [were] not ...

without prejudice "means that the action can be initiated again at some point in the future, *provided the statute of limitations has not expired*." *Taylor v. State*, 65 So. 3d 531, 535 (Fla. 1st DCA 2011)(emphasis added). The trial court therefore properly conducted a statute of limitations, rather than *res judicata*, analysis.

C. The dicta in *Olympia* does not apply because the Bank did not voluntarily dismiss the prior action.

The Bank also relies on *Olympia Mortgage Corp. v. Pugh*, 774 So. 2d 863 (Fla. 4th DCA 2000), to support its proposition that a failed initial attempt to foreclose automatically reinstates the mortgage despite the wishes of the mortgagee. But the Bank has hung its hat on language from *Olympia* that is facially incorrect, inapplicable to the instant case, and in any event, dicta.

The Bank claims that any failure of a foreclosure plaintiff automatically results in an involuntary revocation of the acceleration. (Initial Brief, p. 21). The dicta in question involves a hypothetical fact pattern not found in that case:

> Although Olympia sought to accelerate, *had Olympia gone through with the suit and lost on the merits*, then the court would have necessarily found that the Pughs had not defaulted on the payments due to date.

Olympia at 866. (Emphasis added.) But the hypothetical addressed did not occur in that case: *Olympia* did not lose the case on the merits; it voluntarily dismissed. That language was dicta because it was not necessary for the holding of

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adjudication[s] on the merits." *Ludovici v. McKiness*, 545 So. 2d 335, 337 (Fla. 3d DCA 1989)(reversing dismissal of second action on *res judicata* grounds).

the case. Simply put, the Court did not need to explore what would have happened in an involuntary dismissal to reach its ultimate holding. *See, e.g., U.S. v. Crawley*, 837 F.2d 291, 292-93 (7th Cir.1988) (defining dictum as "a statement in a judicial opinion that could have been deleted without seriously impairing the analytical foundations of the holding-that, being peripheral, may not have received the full and careful consideration of the court that uttered it."); *cited by Sturdivant v. State*, 84 So. 3d 1053, 1057 (Fla. 1st DCA 2010) (Thomas, J., dissenting)[4]; *Doherty v. Brown*, 14 So. 3d 1266, 1267 (Fla. 1st DCA 2009) ("[A] purely gratuitous observation or remark made in pronouncing an opinion and which concerns some rule, principle, or application of law not necessarily involved in the case or essential to its determination is obiter dictum, pure and simple."), *citing Bunn v. Bunn*, 311 So. 2d 387 (Fla. 4th DCA 1975); *Cobb v. State*, 511 So. 2d 698, 700 (Fla. 3d DCA 1987) (Baskin, J., specially concurring) ("Judicial pronouncements which are obiter dicta in character more often serve to confound than to clarify the jurisprudence of this State.")

And the Bank falsely claims that *Singleton* approved this language from *Olympia*. It did not. Specifically, *Singleton* approved only the ultimate holding in *Olympia*: "We agree with the position of the Fourth District that [a second case

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[4] Judge Thomas's dissent in *Sturdivant* contains a thorough analysis of the law governing dicta versus alternative holdings. *Id*. at 1057. For brevity, only highlights of that analysis are included here.

involving a separate default] is *not necessarily* barred by res judicata." *Singleton*, at 1006–07. (Emphasis added.) But at the same time, the *Singleton* court showed it did not agree with the *Olympia* dictum that every failed foreclosure automatically revokes an acceleration, because it limited that finding to "those instances" where the mortgagor proves there was no default or the existence of a waiver. *Id*. at 1007. *Singleton* leaves room for those cases, like this one, where the original acceleration was undisturbed. Neither *Singleton* nor the actual holding in *Olympia* expand "those instances" to all instances of foreclosure failure.

It is also notable that the dictum in *Olympia* is facially incorrect. It assumes that the only way to defeat a foreclosure is to disprove the default and therefore defeat the acceleration. Obviously, a dismissal for disobedience of a court's order—as in this case—or for lack of prosecution, or other grounds not related to the underlying merits would not require a court to have "necessarily found that the [borrower] had not defaulted on the payments due to date." *Olympia* at 866. The only finding necessary for such a dismissal would be related to the noncompliance of the plaintiff. *See, e.g, Kozel*, 629 So. 2d at 818 (explaining necessarily factual findings for dismissal of an action due to disobedience of a court order). In this case, there was no finding that the acceleration was defective, or that the default was disproven. Hence, there was no finding that would require any court to

conclude that the original acceleration had failed. The facts of this case show the precise opposite.

Notably, the *Olympia* case suggests—despite the constitutional dimensions of both acceleration and reinstatement—that the holder of a mortgage can unilaterally reinstate a properly-accomplished acceleration without following the reinstatement conditions imposed by the mortgage contract, and without notice to the borrower of the reinstatement. How, for example, would a borrower know to resume regular payments until the lender had expressly notified the borrower of the reinstatement? Even suggesting that the lender could waive acceleration, it would inequitably prejudice the borrower to hold him liable for a default on a subsequent installment he did not know was due, because he was under the belief the loan was still accelerated and he was required to pay the debt in full.

Even disregarding all that, *Olympia* cannot possibly govern this case because of a simple, but critical difference: the mortgagee in *Olympia* dismissed its first foreclosure *voluntarily*. *Olympia*, 774 So. 2d at 864–65. The *Olympia* court concluded that a voluntary dismissal was tantamount to waiver: “By voluntarily dismissing the suit, Olympia in effect decided not to accelerate payment on the note and mortgage at that time.” *Id*. at 866.[5]

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[5] The *Olympia* court merely assumes but does not explain the equivalence between a voluntary dismissal and a waiver of acceleration. Unless undisclosed contractual language in that case expressly provided that a voluntary dismissal reinstated the

But unlike *Olympia*, the Bank in this case did not voluntarily waive its acceleration. The trial court dismissed the prior action *involuntarily*. So, unlike *Olympia*, the Bank can not be said to have "decided not to accelerate payment"—it is undisputed that they made no such decision at all. So while *Olympia* might arguably stand for the proposition that a mortgagee may sometimes waive its acceleration rights, the Bank in this case did not make any such election.

D. *Spencer* is controlling precedent that shows the statute of limitations bars enforcement of the mortgage.

There appears to be only one Florida case directly on point with the instant case, *Spencer v. EMC Mortg. Corp.*, 97 So. 3d 257 (Fla. 3rd DCA 2012). In *Spencer*, the Third District Court reversed and remanded the entry of a summary judgment of foreclosure, "with directions to enter a judgment dismissing the foreclosure case based on the lender's failure to prosecute it, *among other procedural and substantive deficiencies*." *Id*. at 258. (Emphasis added.)

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loan, that line is a complete *non sequitur*. A lender might voluntarily dismiss an action for any number of reasons that have nothing to do with acceleration. By way of illustration, a foreclosure action may have multiple counts, including counts to reform the legal description of the property in the mortgage document. It could find itself at trial, without evidence of the desired description, and choose to voluntarily dismiss rather than suffer a loss on the merits. This precise fact pattern happened on a case the undersigned was defending just days before the date of this brief. And in such a fact pattern, there is no logical reason the voluntary dismissal should have any impact on the acceleration. So it cannot be said that all dismissals automatically reinstate the loan. Yet this is what the Bank urges this Court to believe.

In *Spencer*, the original mortgagee filed its first foreclosure action in 1998. *Id*. After that mortgagee went into bankruptcy, EMC bought its assets, including the loan in question. *Id*. EMC suffered an involuntary dismissal of the first action for lack of prosecution in November 2002. *Id*. EMC filed a second foreclosure action, which eventually also languished due to lack of prosecution. *Id*. Part of the record included an affidavit by EMC that the default and acceleration took place on July 1, 1997—more than five years before the filing of the second suit. *Id*. at 260.

The *Spencer* opinion featured a three-part analysis, addressing three issues in specifically identified sections: A) lack of prosecution, B) statute of limitations, and C) facially incorrect computations. *Id*. at 259–261. It found in Mrs. Spencer's favor on each of those three issues, *Id*.—and declined to address a fourth issue, insufficient proof of lost instrument, as that issue was "moot" in light of the other holdings. *Id*. at 261.

As to the statute of limitations issue, the *Spencer* court found:

> But for the dismissal for failure to prosecute, Ms. Spencer would be entitled to a remand for fact-finding regarding the date of acceleration… *It is difficult to imagine how EMC*—which acquired the loan years after default and the filing of the first foreclosure action—*could prevail against Ms. Spencer's testimony on acceleration…*

Id. at 260–61. (*citing to Monte v. Tipton*, 612 So. 2d 714, 716 (Fla. 2d DCA 1993)). And the concurrence makes it clear that this would have resulted in a judgment for Mrs. Spencer:

> Far from establishing the right to that relief beyond genuine issue on the statute of limitations defense, the record contains unrebutted affirmative evidence from the plaintiff's representative that a prior owner of the mortgage had appropriately accelerated it, thus triggering the limitations period under section 95.11(2)(c), Florida Statutes (2012), well more than five years before the commencement of this action. If anything, only the appellant was entitled to judgment on this record.
>
> As someone—probably either St. Thomas More or George Costanza—must have said, the law is the law. Notwithstanding the distasteful consequences of applying it in this case, it must be served.
>
> *Id*. at 262 (Schwartz, J., concurring) (internal citations omitted).

Both the main opinion and the concurrence in *Spencer* are inconsistent with the Bank's theory that any failure to obtain judgment in foreclosure automatically reverses an acceleration, because if so, no "factual finding" as to acceleration would be necessary. Instead, *Spencer* is consistent with the language in *Singleton* explaining that such a failure would defeat acceleration only in those instances where the borrower proved a waiver or a lack of default. And because it appears that *Spencer* is the only case analyzing the application of a statute of limitations after an initial acceleration and an involuntary dismissal on procedural grounds, the trial court was bound to follow it. *Weiman v. McHaffie*, 470 So. 2d 682 (Fla. 1985) (in the absence of interdistrict conflict, district court decisions bind all Florida trial courts). Because the trial court correctly followed controlling law, its decision was correct and this Court should affirm it.

The Bank implicitly admits that *Spencer* eviscerates its argument, but tries to brush off the controlling provision as mere dicta. (Initial Brief, pp. 33–34). But a plain reading of Spencer shows it is not dicta. In order to be dicta, the portion of the analysis regarding the statute of limitations would need to be, in effect, a "purely gratuitous" remark, and not relied on to reach the ultimate result. *Bunn*, 311 So. 2d at 389. But the *Spencer* court relied on all three parts of its analysis to reach the result that it did, stating in the opening paragraph that its decision was based not only on the lack of prosecution, but also "other procedural and substantive deficiencies." *Spencer*, 97 So. 3d at 258. Those other deficiencies were the second and third parts of the analysis: the facially erroneous computations and the application of the statute of limitations. *Id*. at 260–61. Had the court not relied on those issues to reach the outcome, it would have treated them the same way it treated the lost-note argument, as "moot." *Id*. at 261. It did not. *Id*.

Furthermore, the structure of the opinion shows that the trial court did not casually remark on the issue. Instead, it was one of three equally-treated subsections of the "Analysis" portion of the opinion. Of the four issues raised by Mrs. Spencer, the court decided to analyze three of them—including the statute of limitations argument. *Id*. at 260.

The *Spencer* court clearly regarded the second section of its analysis, on limitations—as well as the third, on the facially incorrect computations—as

alternative holdings. Such alternative holdings are not dicta; they are binding authority. *Paterson v. Brafman*, 530 So. 2d 499, 501 (Fla. 3d DCA 1988) ("The fact that this was an alternative holding of the court does not detract from its binding authority.")[6]; *Clemons v. Flagler Hosp., Inc*., 385 So. 2d 1134, 1136 n. 3 (Fla. 5th DCA 1980) (where a decision "rests on two or more grounds, none can be relegated to the category of obiter dictum."); *citing Parsons v. Federal Realty Corp*., 105 Fla. 105, 143 So. 912 (1932).

Any remaining doubt as to the importance of the argument should be dispelled by footnote 4 of the opinion:

> In view of the likelihood that this action is barred by the applicable statute of limitations, a party may question whether any motion for attorney's fees and costs may now be pursued. We conclude that such a motion may proceed…

Id. at n. 4. The court had no question about how the law of limitations applied—the only question was the factual one of whether the acceleration first occurred on July 1, 1997, or later, when the mortgagee first filed its action. *Id*. The dismissal of the first foreclosure action did not defeat the effect of the acceleration. *Id*. at 260.

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[6] Judge Schwartz, who wrote the opinion in *Paterson*, was also on the panel and wrote the concurrence in *Spencer*. He was surely familiar with the import of the alternative holding and would have indicated if he thought the analysis was dicta rather than a binding alternative holding.

The limitations language in the *Spencer* opinion was not dicta; it was central to the case and directed the result reached by the trial court. The Bank's argument about involuntary revocation of the acceleration cannot survive an application of *Spencer*, and so the trial court's holding on this point was correct. This Court should affirm.

E. *Bartram's* Case Law Supports the Lower Court's Entry of Summary Judgment.

In its initial brief, the Bank attempts to distinguish the cases Bartram relied on before the trial court. Each of those cases, however, is consistent with the final outcome of the trial court in this case.

1. *Conner v. Coggins*, 349 So. 2d 780 (Fla. 1st DCA 1977)

The Bank dismisses *Conner's* statement regarding the acceleration clause as pure dicta. *Conner v. Coggins*, 349 So. 2d 780, 781 (Fla. 1st DCA 1977). But *Connor* accurately states Florida law, that the five-year mortgage statute of limitations begins to run when the loan is accelerated. *See Spencer*, 97 So. 3d 257, 262; *Monte*, 612 So. 2d 714, 716; and *Smith v. FDIC*, 61 F. 3d 1552, 1561 (11th Cir. 1995). Thus, in the instant case, the five-year statute of limitations began to run against the Bank when it accelerated the mortgage by filing the original foreclosure action.

2. *Locke v. State Farm, Fire & Cas. Co.*, 509 So. 2d 1375 (Fla. 1st DCA 1987)

Despite the Bank's denial of *Locke's* application to the instant case, *Locke* clearly indicates that the statute of limitations on a mortgage with an acceleration clause begins to run when the loan is accelerated. *Locke v. State Farm, Fire & Cas. Co*., 509 So. 2d 1375, 1377 (Fla. 1st DCA 1987). In *Locke*, the mortgage at issue contained an optional acceleration clause and the mortgage was not accelerated until the Complaint was filed. *Id.* at 1377. Thus, the passage of more than five years from default to complaint was not problematic, because the mortgage was not at accelerated until the complaint was filed. *Id.* In the instant case, the mortgage was accelerated (at the latest) on May 16, 2006, thus trigging the statute of limitations.

3. *Monte v. Tipton*, 612 So. 2d 714 (Fla. 2d DCA 1993)

Monte is directly on point, because it addresses the statute of limitations in mortgage foreclosure. It reaffirms that when a mortgage contains an optional acceleration clause, the statute is trigged upon acceleration. *Monte,* 612 So. 2d 714, 716. The mortgage in this case contains an acceleration clause, so the statute of limitations began to run (at the latest) when the Bank filed its original foreclosure complaint on May 16, 2006.

4. ***Reed v. Lincoln*, 731 So. 2d 104 (Fla. 5th DCA 1999)**

Bartram agrees that *Reed* is only partially on point, as the loan documents in that case did not contain an acceleration clause. *Reed v. Lincoln*, 731 So. 2d 104, 106 (Fla. 5th DCA 1999). Even so, *Reed* offers this Court useful guidance. In *Reed*, the loan went into default in 1990 and suit was brought on April 1, 1996. *Id.* at 105. The defendants argued that the subject note was automatically accelerated upon default and the five year statute of limitations barred the action. *Id.* The trial court agreed, holding that the five-year limitations period began upon default. *Id*. This Court held that default and acceleration were not synonymous, and because there was no acceleration clause in the contract that would automatically accelerate the mortgage upon default, the statute of limitations did not begin to run at default. *Id.* at 106.

Reed guides this Court because it underscores the concept that acceleration is a contractual right, and the courts are not free to revise the agreement of the parties regarding that right. In this case, the Bank asks the Court to disregard the express language of the contract governing acceleration and reinstatement. This, the Court cannot constitutionally do. *Pomponio,* 378 So. 2d at 780.

5. ***Greene v. Bursey*, 733 So. 2d 1111 (Fla. 5th DCA 1999)**

The Bank argues that *Greene* should not apply because it did not involve acceleration. *Greene v. Bursey*, 733 So. 2d 1111 (Fla. 5th DCA 1999). But like

Reed, the *Greene* case provides useful guidance. *Greene* clearly explains that the statute of limitations begins to run from the time the cause of action accrues and that a cause of action accrues when the last element constituting the cause of action occurs. *Id.* at 1114, citing § 95.031, Fla. Stat. (1997); § 95.031(1), Fla. Stat. (1997); *Bauld v. J.A. Jones Constr. Co*., 357 So. 2d 401 (Fla. 1978). In *Greene*, it was undisputed that the subject loan had never been accelerated. *Greene*, 733 So. 2d 1111, 1115. Here, no one disputes that the Bank accelerated the loan on May 16, 2006—the only dispute is the legal effect of the subsequent dismissal on that acceleration.

6. *Smith v. FDIC*, 61 F. 3d 1552 (11th Cir. 1995)

Of the cases supporting Bartram's Motion for Summary Judgment in the trial court, *Smith*, a federal case applying Florida law, may be the most pertinent. *Smith*, 61 F.3d 1552. The subject loan documents in *Smith* contained an optional acceleration clause. *Id*. at 1562. The mortgagors defaulted by failing to make timely payment. *Id.* at 1555. Later, a second lien holder foreclosed and moved to quiet title. *Id.* at 1566. In that quiet title action, the FDIC counterclaimed for foreclosure. *Id.*

The *Smith* court noted that under Florida law: "[T]he foreclosure cause of action accrues, and the statute of limitations begins to run, on the date the acceleration clause is invoked or the stated date of maturity, whichever is *earlier*."

Id. at 1561. (Emphasis in original.) The question before the *Smith* court was the specific date the acceleration, and therefore the accrual of the cause of action, occurred. In *Smith*, the date of the acceleration was unclear, so summary judgment was not appropriate. *Id*.

In contrast, this case involves no dispute as to when the initial acceleration took place, just whether it remained in effect after the Bank lost its first attempt to foreclose. But *Smith* does reinforce that the acceleration date is where the measurement must begin.

F. The Bank's misinterpretation of controlling case law would also undermine the public policy supporting statutes of limitations.

If this Court were to adopt the Bank's argument, then Florida law would not have virtually no bar to endless, repetitive litigation of virtually identical mortgage foreclosure claims, without end. This is because *res judicata* may never apply—*Singleton*, 882 So. 2d at 1007—and because the statute of limitations, under the Bank's argument, would essentially never apply either. A foreclosure plaintiff could lose any number of times, and simply file again, free of any limitations either from its prior losses or the passage of time.

But endlessly-multiplying lawsuits of this kind violate the rule espoused in *Mims v. Reid*, 98 So. 2d 498 (Fla. 1957), a rule "founded on the plainest and most substantial justice—namely, that litigation should have an end, and that no person should be unnecessarily harassed with a multiplicity of suits." If neither *res*

judicata nor the statute of limitations bar the suit under appeal, then lenders across the state would be free to file foreclosure suits—even frivolous ones—lose them or drop them, and simply file anew, without any constraint whatsoever: exactly the type of harassing multiplicity the Florida Supreme Court warned against in *Mims*.

As noted in *Singleton*, foreclosure is an equitable action and results must be guided by fundamental fairness. *Singleton*, 882 So. 2d at 1008. Nothing could be less fair to the parties, and the court system too, as litigation without end. And so, too, there could be no greater threat to the judicial system than limitless filing of cases already causing an immense backlog. *Nudel v. Flagstar Bank, FSB*, 52 So. 3d 692, 695 (Fla. 4th DCA 2010) ("…the foreclosure division… has an extraordinary backlog of cases.").

And the Bank's interpretation flies directly in the face of the specific public policy underpinning the statute of limitations itself. As expressed in *Morsani*, 790 So. 2d 1075 (Fla. 2001), time limits on claims are essential to the ends of justice:

> they afford parties needed protection against the necessity of defending claims which, because of their antiquity, would place the defendant at a grave disadvantage. In such cases *how resolutely unfair it would be to award one who has willfully or carelessly slept on his legal rights an opportunity to enforce an unfresh claim* against a party who is left to shield himself from liability with nothing more than tattered or faded memories, misplaced or discarded records, and missing or deceased witnesses. Indeed, in such circumstances, the quest for truth might elude even the wisest court.

Id. (Emphasis added).

The Bank, having slept on its rights, asks this Court to remove all safeguards against such unfair results. Few parties could be less deserving, and few causes could be less worthy. This Court should refuse to cast off restraint as the Bank urges, and instead protect safeguards to justice like the one at issue.

V. THE BANK COULD NOT "DAISY-CHAIN" ITS FORECLOSURE ACTIONS TO TOLL THE RUNNING OF THE STATUTE.

The Bank wrongly argues that the filing of the first action tolled the statute of limitations, and that tolling effect was still in place when it filed the second foreclosure action. The argument is not only wrong, it borders on the frivolous because it: 1) relies on rules and statutes from 1959 which have since been amended; 2) is factually incorrect on this record; 3) derives from cases exclusively applicable to petitions for benefits in worker's compensation claims; and, 4) flies in the face of recent, clear precedent from the Florida Supreme Court.

Section 95.051(1), Fla. Stat., delineates the exclusive list of conditions that can "toll" the running of the statute of limitations. *Major League Baseball v. Morsani*, 790 So. 2d 1071, 1075 (Fla. 2001). The filing of a prior lawsuit is not among those exclusive conditions listed in the statute. *Id*. The list in § 95.051(1) is exclusive. *Id*.; *citing* § 95.051 (2), Fla. Stat. The Bank's argument would require this Court to ignore both the statute and *Morsani*, which it cannot do.

Furthermore, "[I]t is well settled in civil cases that, when an action is dismissed for lack of prosecution, the time during which it is pending does not toll

the statute of limitations and cannot be deducted from the total elapsed time in computing that statute." *Kinsey v. Skyline Corporation*, 395 So. 2d 626, 627 (Fla. 1st DCA 1981) *citing Hamilton v. Largo Paint & Decorating, Inc*., 335 So. 2d 623 (Fla. 2nd DCA 1976). The holdings of *Morsani*, *Kinsey*, and *Hamilton* compel this court to conclude that the first foreclosure did not toll the statute of limitations.

The Bank's reliance on *Klosenski v. Flaherty*, 116 So. 2d 767 (Fla. 1959), is misplaced. That case involved a question over whether the statute of limitations could run after the filing of a complaint but before service of process. *Id*. In holding that the statute had not run because the complaint was timely filed, the *Klosenski* court expressly relied on the application of rules and laws that have been radically amended since:

> It should be noted that, since the repeal of § 95.01, Fla. Stat., by Ch. 29737, Laws of Florida, Acts of 1955, F.S.A., the provisions of Rule 1.2, Fla.Rules Civ.Proc., are controlling, so that the statute of limitations is tolled by the filing of the complaint in a civil action.

Id. at 760–70. Rule 1.2 is no longer in effect, and Chapter 95 has now been amended to include the exclusive list of tolling events described in *Morsani*.

The Bank also relies on a series of worker's compensation case to argue that it could daisy-chain foreclosure complaints to toll the limitations period, effectively without limit. This argument fails because it relies on the unique application of the statutory scheme governing worker's compensation claims, and

because the Bank had not yet filed its second foreclosure when the first was already dismissed.

Each of the cases proffered by the Bank deal with petitions for benefits in worker's compensation claims: *McWilliams v. Americana Dutch Hotel*, 595 So. 2d 253 (Fla. 1st DCA 1992); *Airey v. Wal-Mart/Sedgwick*, 24 So. 3d 1264 (Fla. 1st DCA 2009); *Rice v. Reedy Creek Improvement Dist*., 924 So. 2d 882 (Fla. 1st DCA 2006); *Longley v. Miami-Dade School Board*, 82 So. 3d 1098 (Fla. 1st DCA 2012); *McBride v. Pratt & Whitney*, 909 So. 2d 386, 388 (Fla. 1st DCA 2005). Unlike regular civil claims, a worker's compensation claim may involve multiple petitions for different benefits arising out a single workplace injury. *See generally*, Chapter 440, Fla. Stat. And the limitations period for worker's compensation claims, along with a separate tolling provision, are found in § 440.19, Fla. Stat. In pertinent part, that statute provides:

> (1) Except to the extent provided elsewhere in this section, all employee petitions for benefits under this chapter shall be barred unless the employee, or the employee's estate if the employee is deceased, has advised the employer of the injury or death pursuant to s. 440.185(1) and *the petition is filed within 2 years after the date on which the employee knew or should have known that the injury or death arose out of work performed in the course and scope of employment.*
>
> (2) *Payment of any indemnity benefit or the furnishing of remedial treatment, care, or attendance pursuant to either a notice of injury or a petition for benefits shall toll the limitations period set forth above for 1 year from the date of such payment.* This tolling period does not

> apply to the issues of compensability, date of maximum medical improvement, or permanent impairment.
>
> (3) The filing of a petition for benefits does not toll the limitations period set forth in this section unless the petition meets the specificity requirements set forth in s. 440.192.
>
> *Id*. (Emphasis added.)

Each of the cases the Bank cites are worker's compensation claim cases interpreting the application of § 440.19, Fla. Stat. The Bank, in seeking to apply the tolling provision in § 440.19 to foreclosure cases, demands this Court stretch too far.

The Bank's argument that the two foreclosure actions overlapped is also factually incorrect. The trial court dismissed the prior foreclosure action on May 5, 2011. (Vol. III, Pg. 346). But the Bank did not even attempt to begin a second foreclosure until almost a year later, March 6, 2012, when it mailed Bartram a purported notice of default letter. (Vol. III, Pg. 347). The Bank never actually filed a second foreclosure action before the trial court granted Bartram's Motion for Summary Judgment in the order on appeal here. (Vol. III, Pgs. 346–347). So even though the Bank glosses over this fact in the Initial Brief (Initial Brief, Pg. 35), it cannot claim that it filed a second foreclosure action while the first was still pending—because it did not.

VI. THE LOWER COURT PROPERLY EXERCISED JURISDICTION OVER BARTRAM'S DECLARATORY JUDGMENT CROSSCLAIM.

Florida Statutes grant exclusive original jurisdiction to the circuit courts:

- In all actions at law not cognizable by the county courts;
- In all cases in equity including all cases relating to juveniles except traffic offenses as provided in chapters 316 and 985; and,
- In all actions involving the title and boundaries of real property.

§ 26.012 (2) (a), (c), and (g), Fla. Stat. The rules of civil procedure authorize filing of claims as cross-claims:

> A pleading may state as a crossclaim any claim by one party against a co-party… relating to any property that is the subject matter of the original action.

1.170 (g), Fla. R. Civ. P.

To trigger jurisdiction under the declaratory judgment act, the moving party must show that he is in doubt as to the existence or nonexistence of some right or status, and that he is entitled to have such doubt removed. *Kelner v. Woody*, 399 So. 2d 35 (Fla. 3d DCA 2012).

The Bank should know that the *Kelner* holding has no application to this case. Its argument, that Bartram was not in doubt of his rights under the mortgage, is completely unsupported by the facts. The very fact that the Bank has chosen to appeal to this Court demonstrates that Bartram's rights are in doubt.

In sum, the Bank's fallacious argument states that Bartram's post-judgment motion in the first foreclosure action to cancel removed any doubt as to his rights when the prior court denied the motion. (Initial Brief, pp. 36–37). But the first trial court denied the motion solely on procedural grounds—namely, it lacked jurisdiction to consider the merits after the involuntary dismissal. (Vol. II, p. 266–67). Because that court never reached a decision on the merits, the doubt as to Bartram's rights under the mortgage was never resolved. *Id*. Yet somehow, the Bank tries to twist that procedural denial around and call it a "prior adjudication on the issue" and portray the cross-claim as as a "collateral attack on the prior judgment." (Initial Brief, p. 37). There was no prior adjudication and no prior judgment—merely a dismissal for the Bank's failure to comply with the trial court's case management order.

The Bank fails to show how such a procedural denial could possibly resolve the doubt in Bartram's mind about the statute of limitations. Its failure to do so exposes the fallacy—even the frivolity—of the argument. This Court should not allow the Bank to lead it astray.

CONCLUSION

The applicable statute of limitations was five years and applied when the loan was accelerated. The loan was accelerated more than five years before Bartram sought to quiet title. The loan was not and could not have been "un-accelerated." The Bank failed to initiate a second foreclosure action before the five years had run. The trial court therefore properly applied the law and the facts and did not err in granting summary judgment. Accordingly, the trial court's judgment should be affirmed.

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