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THE DISTRICT COURT OF APPEAL
FIFTH DISTRICT, STATE OF FLORIDA

U.S. BANK NATIONAL ASSOCIATION, ETC.,

Appellant,

vs.

LEWIS BROOK BARTRAM, ET AL.,

Appellee.

APPEAL NO.: 5D12-3823
Lower Case No.: CA11-0528

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

APPELLANT'S REPLY BRIEF

Richard C. Swank
Florida Bar No. 172855
rswank@bakerdonelson.com
BAKER, DONELSON, BEARMAN,
CALDWELL & BERKOWITZ, PC
Bank of America Center
390 North Orange Avenue
Post Office Box 1549
Orlando, FL 32802
Telephone: (407) 422-6600
Telecopier: (407) 841-0325
Attorney for Appellant,
U.S. Bank National Association

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I. Introduction

Because neither the lower court, nor Appellee Lewis Bartram ("Bartram"), nor Appellee The Plantation at Ponte Vedra, Inc. ("PPV")[1] have presented binding Florida precedent supporting the lower court's order granting summary judgment, this case ultimately comes down to a duel between persuasive authority. On the one hand, Appellant U.S. Bank National Association ("U.S. Bank") has presented recent Florida Supreme Court precedent holding that subsequent defaults of a mortgage constitute new defaults, even where a prior acceleration has been attempted. The Supreme Court came to this conclusion after analyzing the unique nature of the installment mortgage contract and the inequities in permitting the borrower to avoid his obligation because of a prior failed attempt to foreclose. Though *Singleton* dealt with this factual scenario in a res judicata context, the reasoning behind its holding applies equally to statutes of limitations. The only difference between the two is the passage of time.

On the other hand, the lower court and Appellees applied a string of Florida precedent perpetuating decades-old dicta. Even with that, not a single one of these cases - not even the Third District's recent *Spencer* case - mandated dismissal of a

[1] Appellee Patricia Bartram did not file an answer brief within the extended period of time she obtained from the Court, so Appellant U.S. Bank assumes she will not file a brief.

foreclosure on statute of limitations grounds after an attempted acceleration in a previous foreclosure. None of these cases analyzed the underlying rationale of imposing an irreversible acceleration to trigger the statute of limitations. These cases especially did not, as the Florida Supreme Court did in *Singleton*, examine the inequity of permitting a borrower to avoid a $650,000.00, thirty-year mortgage commitment because a prior foreclosure was dismissed on procedural grounds.

Because there is no case directly on point, and no binding precedent supporting the lower court's order, this Court must decide which line of persuasive authority should be employed in this context. Appellant U.S. Bank submits that a holding that an attempted acceleration irreversibly triggers the running of the statute of limitations works a great inequity on the holders of these mortgage obligations. Such a holding would ultimately also work inequity upon borrowers, because lenders could no longer take any chance at delaying a foreclosure.

The statute of limitations was tolled in any event by the filing of Patricia Bartram's suit before the statute had run and before the court had dismissed the prior Foreclosure Action. Patricia Bartram's suit put Appellee Bartram's mortgage at issue, so it was continually under the jurisdiction of a circuit court from the filing of the Foreclosure Action to the present. Since the lower court action is ongoing, the statute of limitations has not run. Appellant U.S. Bank would therefore request that this Court reverse the lower court's order granting summary

judgment and remand with instructions that U.S. Bank's mortgage and note be reinstated.

II. Arguments Common to Both Answer Briefs

A. The Rationale behind *Singleton* Applies Equally in a Statute of Limitations Context.

Both Appellee Bartram (Bartram AB at 15), and Appellee PPV (PPB AB at 28),[2] argue that the Florida Supreme Court's opinion in *Singleton v. Greymar Assocs.*, 882 So. 2d 1004 (Fla. 2004) should not apply to the case at bar because *Singleton* examined acceleration and foreclosure in a res judicata, rather than statute of limitations, context. Examination of *Singleton*, however, reveals that the Florida Supreme Court's reasoning would apply equally to statutes of limitations.

The key to application of this reasoning in both contexts is the Supreme Court's disapproval of *Stadler v. Cherry Hill Dev. Inc.*, 150 So. 2d 468 (Fla. 2d DCA 1963). *Stadler* took the view that once acceleration was elected, it irreversibly put all further payments at issue. *See id.* at 472. This is the same rationale underlying the concept that an acceleration irreversibly starts the clock running for statute of limitations purposes. *See, e.g. Greene v. Bursey*, 733 So. 2d 1111, 1114-15 (Fla. 4th DCA 1999); *Locke v. State Farm Fire & Cas. Co.*, 509 So.

[2] Appellant U.S. Bank will refer to Appellee Bartram's answer brief as (Bartram AB at [pg.#]) and Appellee PPV's answer brief as (PPV AB at [pg. #]).

2d 1375, 1377 (Fla. 1st DCA 1987). Both Appellees and the lower court depend on this concept for their arguments. (Bartram AB at 10); (PPV AB at 16-19.)

However, *Singleton* rejects *Stadler*'s rationale and cautions against taking such an inflexible view. *See* 882 So. 2d at 1007. The Supreme Court holds that a subsequent default, even where there has been a previous attempted acceleration, can constitute a new cause of action. *See id*. The Court recognizes in *Singleton* that there are circumstances under which a default and acceleration in a prior foreclosure case are not adjudicated in favor of the lender. *See id*. In *Singleton*, as here, the prior foreclosure case was dismissed after counsel failed to appear at a case management conference. *See id*. at 1005. The Supreme Court held in such cases that, "the mortgagor and mortgagee are simply placed back in the same contractual relationship with the same continuing obligations." *See id*. at 1007.

Appellant U.S. Bank's argument dovetails with this reasoning. It is clear in the context of this case that the prior foreclosure court did not adjudicate or otherwise determine the issues of default or acceleration. Appellees' arguments to the contrary notwithstanding (PPV AB at 33), the court made no finding that an effective default, and, accordingly, acceleration occurred. *See, e.g. Olympia Mortgage Corp. v. Pugh*, 774 So. 2d 863, 866 (Fla. 4th DCA 2000) ("The issue is whether there has already been a default which if decided in favor of the mortgagee, would entitle the mortgagee to elect to accelerate and foreclose in

accordance with the note and mortgage."). Regardless of whether "deceleration" or some other term is used, there was no effective acceleration, because there was no adjudication of default. It was **not** "undisputed that, in this case, acceleration occurred no later than when the Bank filed the prior action on May 11, 2006." (Bartram AB at 9.) Since there was no finding of acceleration, the parties were put back in the same posture as before. If Bartram failed to pay a future installment of his mortgage, it would constitute a new default, for purposes of both res judicata and statute of limitations. At the very least, the factual dispute about whether there was an effective acceleration precluded summary judgment.

B. *Spencer's* Holding Did Not Rely upon a Statute of Limitations Defense.

Both Appellees contend that the Third District case of *Spencer v. EMC Mortg. Corp.*, 97 So. 3d 257 (Fla. 3d DCA 2012) constitutes precedent in the case at bar. (Bartram AB at 22; PPV AB at 20.) PPV acknowledges that *Spencer* is persuasive. (PPV AB at 21-22.) Bartram, however, asserts that *Spencer* is controlling. (Bartram AB at 25.) Bartram contends that a "plain reading" of *Spencer* shows that the Third District relied upon the statute of limitations as an alternate holding because of its comments about "other procedural and substantive deficiencies." *Id.* (quoting *Spencer*, 97 So. 3d at 258).

On the contrary, a plain reading of *Spencer* shows that the Third District never reached the question of statute of limitations. The "deficiencies" language aside, the Third District reversed and remanded "based upon the lender's failure to prosecute it." 97 So. 3d at 258. Though the court engaged in a discussion of the statute of limitations issue, it commented only that the second case was "*likely* barred"[3] by the statute. *Id*. at 260 (emphasis added). The court went on to comment: "It is difficult to imagine how [the lender] . . . could prevail against [borrower's] testimony on acceleration . . . *but this of course would have been for the trial court to resolve*." *Id*. (emphasis added).

It is axiomatic that an appellate court may only address the rulings of the trial court based on the record before it. *See Altchiler v. State, Dept. of Prof. Reg.*, 442 So. 2d 349, 350 (Fla. 1st DCA 1983); *St. Joseph Land and Dev. Co. v. Fla. State Bd. of Trustees of Internal Improvement Trust Fund*, 365 So. 2d 1084, 1087 (Fla. 1st DCA 1979). An appellate court is not the place to present or decide evidence. *See Altchiler*, 442 So. 2d at 350 (quoting *Hillsborough Cty. Board of Cty. Commissioners*, 424 So. 2d 132, 134 (Fla. 1st DCA 1982)).

The Third District's observation that the trial court had not resolved evidentiary issues with respect to acceleration and the statute of limitations shows

[3] The Third District also comments in a footnote about the "likelihood" that the statute of limitations applies. *Spencer*, 97 So. 3d at 261 n. 4. Bartram cites this language in his answer brief. (Bartram AB at 26.)

that its discussion of those issues could only be dicta. The Third District was precluded from ruling upon that issue because the trial court had not.

Since it is clear from *Spencer* that its holding was not based upon the acceleration and statute of limitations issues, it is worth considering whether it is persuasive, as Appellee PPV contends. It is not. First, in its dicta discussion, the majority's opinion cites without discussion only the case of *Monte v. Tipton*, 612 So. 2d 714 (Fla. 2d DCA 1993). As argued in Appellant's initial brief, *Monte* is of little or no help on this issue. (IB at 29.) The Second District specifically held in that case that the statute of limitations did *not* apply and therefore would not support reversal of summary judgment in the lender's favor. *See id*. at 716. Further, the court in *Monte* cited *Locke v. State Farm Fire & Cas. Co*., 509 So. 2d 1375 (Fla. 1st DCA 1987), thus perpetuating a trail of nonbinding dicta ultimately culminating in *Spencer*. (IB at 27.)

Second, and most importantly with respect its persuasive quality, the Third District in *Spencer* engaged in no analysis of the implications of starting an irreversible statute of limitations clock based upon a prior foreclosure where default was not adjudicated. The Florida Supreme Court does engage in such analysis in *Singleton*, including the inequity of permitting a borrower to avoid a thirty-year mortgage commitment because of a prior unsuccessful foreclosure. *See Singleton*, 882 So. 2d at 1007-08.

In his concurrence in *Spencer*, Judge Schwartz is clearly troubled by these implications. 97 So. 3d at 261-62, Schwartz, J. concurring. Though admitting he was constrained to concur in the majority's holding, Judge Schwartz described the outcome as "distasteful" and stated that that concurrence "pain[ed] [him] deeply." *Id*. This was because "the appellant ha[d] managed to remain in the mortgaged premises without payment for over fifteen years…." *Id*. Because neither *Spencer* nor any other in that line of cases is binding authority in the current context, Florida's courts are able to address this issue to avoid the inequitable situation set forth by the case below.

C. Treating an Attempted Acceleration as Irreversible Results in Great Inequity.

The instant case provides an almost textbook example of why making an attempted acceleration the irreversible trigger starting the statute of limitations is so inequitable, particularly in the current foreclosure climate. Both Appellees and the initial foreclosure court have portrayed foreclosure counsel as negligent and dilatory in the prior Foreclosure Action. (Bartram AB at 33); (PPV AB at 35.) Yet Appellee PPV acknowledges that foreclosure counsel *twice* tried to move for summary judgment. (PV AB at 5.) The foreclosure court denied U.S. Bank's first motion for summary judgment on March 23, 2009. *See* PPV Appendix 2. The court then denied U.S. Bank's second motion on March 22, 2010. *See id*. In each

case, the foreclosure court denied U.S. Bank's motion in part because Bartram's ex-wife had raised a defense of priority. *See id*. This defense later became the basis for Patricia Bartram's case below.

In fact, it is unclear from this record whether the court in the Foreclosure Action could have entered summary judgment. If Patricia Bartram was asserting that her mortgage was superior to Appellant U.S. Bank's, a foreclosure of her mortgage should have been asserted as a compulsory claim. At best, the foreclosure court could have entered partial summary judgment against Appellee Bartram. However it denied U.S. Bank's two motions in total. Such orders are not appealable. *See Reeves v. Fleetwood Homes of Fla., Inc*., 889 So. 2d 812, 821-22 (Fla. 2004); *Int'l Ship Repair and Marine Svcs., Inc. v. Aleman*, 38 So. 3d 821, 823 (Fla. 2d DCA 2010).

Regardless, a little over a year later - and *after* Patricia Bartram had already filed the case below - the foreclosure court dismissed the case as a sanction because foreclosure counsel failed to show up for, apparently, a single case management conference. (PPV AB at 6.) It is true that U.S. Bank never appealed this order. Thus, the propriety of the judge's ruling is not an issue in this case. But since Appellees have introduced this issue, it should be pointed out that there is scant evidence that the events of the other case were completely foreclosure counsel's fault. The record is silent whether foreclosure counsel failed to attend

another hearing, or meet some other deadline. *See, e.g. Alsina v. Gonzalez*, 83 So. 3d 962 (Fla. 4th DCA 2012). It is also silent as to whether there might have been some other factor - such as settlement discussions - that might have delayed the case. The record only shows that counsel missed one conference, so the foreclosure court dismissed the case unilaterally.

In this and similar cases, an irreversible acceleration trigger would put an undue amount of pressure on the parties because of the potential a mortgage may be invalidated. Any number of events outside the plaintiff's control could serve to delay the case for months if not years. For example, the court's foreclosure docket could be overwhelming. The borrower may engage in multiple questionable defenses or other dilatory tactics. The borrower may file bankruptcy.[4]

Unfortunately, it would not be unusual in Florida's foreclosure climate and its hundreds of thousands of cases for a case to stretch out longer than five years. As Judge Schwartz observed in *Spencer*, the borrower had remained on that property for *fifteen years* without making a payment. *See Spencer*, 97 So. 2d at 261-62, Schwartz, J. concurring. Then, if, at any time after the five years from the original default letter or complaint filing (whichever the court determined started

[4] § 95.051, Fla. Stat. (2012) provides that statutes of limitations may be tolled under certain circumstances relating to bankruptcy. However, the statute does not provide that the limitations period would be tolled for a period of time equal to the delay before the end of the bankruptcy. In other words, a two year bankruptcy delay would not tack two years onto the limitations period.

the clock), the foreclosure court dismissed the case, the mortgage would automatically be invalid. True, the order of dismissal could be appealed. But the standard of review of an order such as that levied in the instant case as a sanction would be the very high threshold of abuse of discretion. *See Iaconis v. Ward*, 989 So. 2d 687, 688 (Fla. 4th DCA 2008). A dismissal ostensibly without prejudice should not be imbued with such power.

As Appellee Bartram points out, the purpose of a statute of limitations is to bring finality to a proceeding and conserve judicial labor. But the "irreversible acceleration rule" ignores the reality of the current foreclosure climate and, especially, the "unique nature of the mortgage obligation and the continuing obligations of the parties in that relationship." *Singleton*, 882 So. 2d at 1007 It has the inequitable effect of making every foreclosure suit "all or nothing" as soon as the default and acceleration letter is sent.

It must also be pointed out that such a rule would have the effect of making lenders far more aggressive in foreclosures because once the die was cast, there would be no turning back. A lender could not chance delaying the case because of the risk that this delay could end up ultimately invalidating the mortgage.[5]

[5] Of course, aggressive tactics was one of the reasons Florida's legislature passed Fla. House Bill 87, which provides additional protections to the homeowner in the foreclosure process. *See* Fla. CS/CS HB 87 (2013).

The rule set forth in *Singleton* and *Olympia* is more equitable. Absent an adjudication of a default and valid acceleration, a subsequent failure to pay an installment in the multi-year contract constitutes a new default. The statute of limitations defense is preserved because the lender could be precluded from seeking any payments more than five years overdue.

The Florida Supreme Court in *Singleton* anticipated this argument and recognized that it would be inequitable for a party who had prevailed for technical reasons in one foreclosure proceeding to avoid paying after subsequent defaults:

> If res judicata prevented a mortgagee from acting on a subsequent default even after an earlier claimed default could not be established, the mortgagor would have no incentive to make future timely payments on the note. The adjudication of the earlier default would essentially insulate her from future foreclosure actions on the note - merely because she prevailed in the first action. Clearly, justice would not be served if the mortgagee was barred from challenging the subsequent default payments solely because he failed to prove the earlier default.

Singleton, 882 So. 2d at 1007-08. Though *Singleton* was decided on the issue of res judicata, the equitable principle would be the same. The only difference is the passage of time. To permit a borrower to avoid paying a 30-year obligation simply because of a delay in adjudication of an earlier case would work a great injustice, not to mention create an incentive to cause such a delay.

III. Appellee Bartram's Answer Brief

A. Public Policy Disfavors the Inequity of Permitting Bartram to Avoid his Mortgage Obligation.

Appellee Bartram attempts to convince this Court that application of a five-year statute of limitations after an attempted acceleration in this case reaches constitutional dimensions because of the sanctity of contracts. (Bartram AB at 11.) This is somewhat ironic, since such a finding essentially permits Bartram to avoid a $650,000.00 commitment that he agreed to pay over a period of 30 years - a commitment memorialized in a contract he freely admits he entered. Bartram's constitutional argument provides no compelling reason for affirmance.

Bartram bases his constitutional argument primarily on the mortgage's reinstatement provision. (Bartram AB at 3; 10-11; 14.) Bartram argues that, under the explicit language of the contract, steps may be taken to undo an acceleration once it has been attempted, but this must include reinstatement. *See id*. Bartram contends that this is essentially the only way to undo the acceleration. *See id*. at 11-12. Bartram quotes the reinstatement language from the mortgage on page 3 of his brief. *See id* at 3.

Bartram's reliance on this language is puzzling. The conditions in the language as quoted may *only* be fulfilled by the borrower. In other words, Bartram argues that once he has defaulted and the lender has attempted acceleration, any future attempt to collect the debt after a failed attempt at foreclosure would be

solely at *his* discretion. Bartram's interpretation of this language is interesting, but cannot be correct.

The reinstatement language Bartram cites in his brief permits the borrower to reinstate the loan under certain conditions to *prevent* the lender from going forward with foreclosure on the mortgage. (Bartram AB at 3.) The borrower pays the amounts due, the mortgage obligation is reinstated, and payments go forward. *See id*. Such a provision is not intended to be a weapon for the borrower to avoid payment. Ostensibly, a borrower could use the provision to reinstate a mortgage after a foreclosure court had made a finding of invalidity, as Bartram suggests. But this would be a rare borrower, indeed.

Appellee Bartram's reinstatement argument parallels Appellee PPV's similar assertion that Bartram actually benefitted by not controverting the lender's prior assertion of default and acceleration. (PPV AB at 5.) As PPV's argument goes, because Bartram did not contest U.S. Bank's allegations with respect to default and acceleration, these were conclusively proven in the prior Foreclosure Action. (PPV AB at 5, 33, 44-45.) This argument ignores two important points: 1) The order dismissing the Foreclosure Action without prejudice did not rule on the merits or adjudicate any of the issues in the case; and 2) It is undisputed that the lower court did not have the pleadings in the prior Foreclosure Action before it when ruling on Bartram's Motion for Summary Judgment. *See infra*.

Regardless, Bartram should not be able to benefit from his failure to act in the Foreclosure Action, particularly when U.S. Bank is being penalized for the same reason. This is exactly the kind of inequity against which the Florida Supreme Court cautioned. Under both Appellees' scenarios, it is to the borrower's benefit to simply stop paying his mortgage and take his chances. *See, e.g. Singleton*, 882 So. 2d at 1007.

B. Appellant U.S. Bank's Interpretation of the Case Law Would Not Undermine Statutes of Limitations.

Bartram argues that to adopt Appellant U.S. Bank's argument would essentially invalidate the concept of a statute of limitations. (Bartram AB at 31.) Bartram's argument in this respect misconstrues Appellant's argument and *Singleton*'s rationale. Appellant has argued not that the statute of limitations is invalid, but that an attempted acceleration - without an adjudication - should not serve as the irreversible trigger of the statute.

Bartram argues that to adopt Appellant's arguments would lead to "endless, repetitive" litigation. (Bartram AB at 31.) However, Bartram then reviews *Singleton*'s discussion of equity and acknowledges results must be "guided by fundamental fairness." *Id*. at 32. Few things are less fair than permitting a borrower to avoid paying a 30-year obligation because a prior foreclosure was dismissed without adjudication.

As argued *infra*, the current foreclosure climate, and the realities of prosecuting a foreclosure case, present unique challenges. Because of the overwhelmed court dockets, and the stall tactics of foreclosure defendants, a five year delay in a case is unfortunately no longer unusual. Under Bartram's rationale, dismissal of a foreclosure case at any point past the five-year window would automatically invalidate a mortgage.

Adoption of the *Singleton* rationale, however, protects both parties. In *Singleton*, the Supreme Court quoted with approval the opinion in *Capital Bank v. Needle*, 596 So. 2d 1134 (Fla. 4th DCA 1992), in which the Fourth District observed that a failed foreclosure action could bar the lender from litigating the same default. *See Singleton*, 882 So. 2d at 1007. In other words, a lender could be barred from recovering from past defaults, but would not be barred from litigating subsequent defaults. The borrower is protected from having to pay where a default was not proven, but the lender would not lose its entire interest on a 30-year obligation. This result is far more equitable than the one Bartram proposes.

C. Appellant U.S. Bank Did Not "Daisy-Chain" Foreclosure Actions because Appellant Did Not File the Case Below and the Circuit Court Continuously Exercised Jurisdiction over Bartram's Mortgage.

Appellee Bartram asserts that Appellant U.S. 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." (Bartram AB at 33.) Thus, U.S. Bank "Could Not 'Daisy-Chain' **Its** Foreclosure Actions…." *Id*. (emphasis added). Bartram completely misconstrues Appellant's argument, not least because U.S. Bank never filed a second foreclosure action - Patricia Bartram did.

Bartram argues that the lower court properly exercised jurisdiction over his declaratory judgment cross-claim, which related to the validity of his mortgage. (Bartram AB at 37.) If this is true, then the lower court properly exercised jurisdiction over Bartram's mortgage, as well, when Patricia Bartram filed her foreclosure action. Patricia Bartram filed her foreclosure action long before the statute of limitations had run. (Vol. III, Pg. 384.)

Even assuming *arguendo* that the prior attempted acceleration had started the clock, a circuit court has continuously exercised jurisdiction over the issues related to Bartram's mortgage from the filing of the original Foreclosure Action to the present. Analogous to the worker's compensation cases Appellant U.S. Bank presented in its initial brief, the statute of limitations could not run because there was no time at which Bartram's mortgage was not under the jurisdiction of a court. If after the circuit court in the lower case exercised jurisdiction and U.S. Bank had the subsequent ability to defend its mortgage, then that ability did not suddenly vanish when the foreclosure court dismissed the original action without

adjudication. The lower court's acceptance of jurisdiction over Bartram's mortgage preserved U.S. Bank's interest in that mortgage. The statute of limitations therefore did not run.

IV. Appellee PPV's Answer Brief

A. PPV's Case Law on Statute of Limitations Is Not Controlling and Not Persuasive

Appellant U.S. Bank argued in its initial brief that no controlling Florida precedent supports the lower court's order. Despite Appellees' arguments to the contrary, that contention has not been refuted. As discussed *infra*, the discussion of the statute of limitations in *Spencer* was not an alternate holding. The trial court in that case never resolved the evidentiary question that would have permitted the appellate court to reach that issue. So any discussion of that issue was pure dicta.

Appellee PPV's remaining cases, *Burney v. Citigroup*, 244 S.W. 3d 900 (Tex. App. 2008), *EMC Mortg. Corp. v. Patella*, 279 A.D.2d 604 (N.Y. App. Div. 2001) and *Federal Nat'l Mortg. Ass'n v. Mebane*, 208 A.D. 2d 892 (N.Y. App. Div. 1994), are not applicable because none of them are Florida precedent. Though they may have superficial factual or procedural similarities, they cannot be applied to the case below because these other states have different laws relating to foreclosure.

For example, Texas foreclosure law requires additional procedures to accelerate a mortgage. *See Burney*, 244 S.W.3d at 903. Further, Texas' statute of

limitations is only 4 years. *See id*. By comparison, New York's statute of limitations for foreclosures is six years. *See Patella*, 279 A.D.2d at 605; *Mebane*, 208 A.D.2d at 894. The difference in the duration of the respective statutes of limitations alone is sufficient to make these cases inapplicable, since the reasoning behind them is unquestionably influenced by the addition or subtraction of a year.

Another factor distinguishing *Patella* and *Mebane* from the instant case is that the law of acceleration, default and the statute of limitations is apparently "well settled" in New York. *Patella*, 279 A.D.2d at 605. That is hardly the case in Florida, where no court has issued an opinion similar to those supporting *Patella*. Appellee PPV also fails to discuss whether New York has a case similar to *Singleton*, which casts doubt on the "irreversible acceleration" foundation for these outcomes. Had the lower case been filed in New York, the outcome might have been clear. Since it was not, the New York cases are unhelpful.

B. The Record before the Lower Court Was Insufficient for It to Grant Summary Judgment.

Appellant U.S. Bank argued in its initial brief that the lower court's order was inappropriate in part because Bartram had failed to overcome the heightened burden for summary judgment when the non-movant has not filed an answer. (IB at 10.) Appellee PPV attempts to counter that argument by contending that the lower court had a sufficient record before it in part because "[r]eference to the

pleadings filed in the 2006 Foreclosure Action . . . was all that was required to establish that the limitations period had expired." (PPV AB at 42-43.) Appellee PPV then goes on to contend that: "Obviously, the fact that U.S. Bank accelerated the indebtedness due in 2006, alleged the factual basis for its pleading filed in the 2006 Foreclosure Action and brought the 2006 Foreclosure Action. . . all support the lower court's action in granting Bartram's Motion for Summary Judgment." (AB at 44.)

In other words, Appellee PPV contends that Bartram's mere reference to the pleadings in the Foreclosure Action was sufficient in this case, but then contends that the content of those pleadings was necessary for summary judgment. Obviously, both cannot be true. Appellee PPV must not be as confident that mere reference to the pleadings in the Foreclosure Action would be sufficient before this Court, since Appellee twice moved to supplement the record with the pleadings themselves. *See, e.g*. PPV's Appendix 2. Appellant certainly makes copious reference to the contents of these documents in its brief. (PPV AB at 3-6, 18.)

Appellee PPV argues that lack of these documents in the record does not matter, because "the same judge that granted Bartram's motion for summary judgment…presided over the 2006 Foreclosure Action and was entitled to take judicial notice of these pleadings." (PPV AB at 45.) However, there is no indication in the record that the lower court took judicial notice of anything. It is

undisputed that these pleadings were not a part of the record before the lower court. That the lower court granted summary judgment without them - and, according to Appellee PPV, based on the judge's knowledge of documents outside the record - only emphasizes that this was a rush to judgment.

CONCLUSION

Appellees Bartram and PPV have failed to contradict Appellant U.S. Bank's contention that there is no binding Florida precedent supporting the lower court's order granting summary judgment. Therefore, this case comes down to examination of dueling persuasive authority. The Florida Supreme Court's reasoning in *Singleton* takes into account the realities of foreclosure litigation and the nature of the mortgage installment contract. Its holding that a subsequent default may constitute a new cause of action affords both parties to the transaction equity.

Further, it is undisputed that at all times after the filing of the prior Foreclosure Action, Appellee Bartram's mortgage was subject to the jurisdiction of a circuit court. Since Bartram's mortgage was always at issue, the statute of limitations could not run. For both these reasons, and those expressed in Appellant U.S. Bank's initial brief, the lower court's order should be reversed with instructions to reinstate Bartram's mortgage.

Respectfully submitted this this 25th day of July, 2013.

/s/ Richard C. Swank
Richard C. Swank, Esquire

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by electronic on July 25, 2013, to:

Lawrence C. Rolfe, Esq.
lcr@rolfelaw.com
Brett H. Burkett, Esq.
bhb@rolfelaw.com
Rolfe & Lobello, P.A.
P.O. Box 40546
Jacksonville, FL 32203
Counsel for Patricia J. Bartram

Thomas Pycraft, Jr.. Esq.
tom@pycraftlaw.com
service@pycraftlaw.com
Pycraft Legal Services
3505 US 1 South, Suite 2
St. Augustine, FL 32086
Counsel for Lewis Bartram

T. Geoffrey Heekin, Esq.
gheekin@jax-law.com
Catherine Remler Michaud, Esq.
cmichaud@jax-law.com
Heekin, Malin & Wenzel, P.A.
P.O. Box 477
Jacksonville, FL 32201
Counsel for The Plantation at Ponte Vedra, Inc.

/s/ Richard C. Swank
Richard C. Swank, Esquire

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing complies with the font requirements of Fla. R. App. P. 9.100(l).

/s/ Richard C. Swank
Richard C. Swank, Esquire