

Reverses Dismissal of ReFiled Foreclosure Action Citing Bartram

The District Court of Appeal of the State of Florida, Fourth District, recently reversed the dismissal of a mortgage foreclosure action based on res judicata and the statute of limitations, holding that the Florida Supreme Court's recent ruling in *Bartram v. U.S. Bank National Association* and its progeny controlled.

In so ruling, the Court confirmed that a second foreclosure action is not barred by the statute of limitations or res judicata where continuing payment defaults occurred within the five years preceding the filing of the second foreclosure action.

A copy of the opinion is available at: [Link to Opinion](#).

A mortgagee filed a foreclosure action in September 2015. The complaint alleged that the borrower had defaulted by failing to make the payment due on Nov. 1, 2009 and all payments coming due thereafter.

The trial court appointed an attorney ad litem to represent the unknown heirs of the deceased borrower, who filed an answer raising the statute of limitations as a defense on the basis that more than five years had passed since the default and a previous foreclosure case filed in 2011 was dismissed without prejudice in May 2013.

An amended complaint was filed, to which no response was filed, and the case proceeded to trial, at which nobody appeared for the defendants.

The trial court took the matter under advisement and three days later entered an order of dismissal, reasoning that the dismissal of the first foreclosure action barred a second action based on the same default of Nov. 1, 2009.

The mortgagee moved for rehearing, which was denied. The mortgagee then appealed.

Relying on the Florida Supreme Court's 2016 holding in *Bartram*, the Appellate Court explained that the decision "clarified a few points of law regarding the effect of prior dismissals of foreclosure proceedings with regards to res judicata and the statute of limitations defense."

The Appellate Court recognized that, under *Bartram*, “each default in monthly payments creates a continuing cause of action.” The Appellate Court noted that the Supreme Court’s ruling was supported by “the standard language in residential mortgages granting reinstatement of the mortgage after default, and its agreement with the position of the Real Property Law Section of the Florida Bar that ‘[t]he lender’s right to accelerate is subject to the borrower’s continuing right to cure.’”

The Appellate Court also recognized that the Florida Supreme Court in *Bartram* concluded that “the dismissal of the foreclosure action [has] the effect of revoking the acceleration.” The Appellate Court then concluded, based on one of its own post-*Bartram* rulings and two post-*Bartram* rulings of its sister First and Second District Courts of Appeal with similar facts, that regardless of whether the default dates were the same in both actions, because each default creates a new cause of action, the trial court erred by dismissing the case when defaults occurred within five years of the filing of the second foreclosure action. Accordingly, the trial court’s dismissal was reversed, and the matter was remanded to the trial court to calculate the amount due under the note based on defaults which accrued within five years before the second suit was filed.