STATUTE OF LIMITATIONS SAGA CONTINUES IN FLORIDA

The Second District Court of Appeals joins the Third District in affirming a final judgment of foreclosure in favor of the bank in an action based on a breach date that falls outside the five-year statute of limitations under Florida Statute 95.11(2)(c), beginning the second chapter of the statute of limitations saga.

The Second District Court issued an opinion in Bolletieri Resort Villas Condominium Assoc. v. The Bank of New York Mellon, et al., in which the Court affirmed the lower court’s final judgment of foreclosure in favor of BONY, even though the foreclosure action was filed on January 13, 2013, based on a September 1, 2007 default date. The Court held that THE ACTION WAS NOT BARRED BY THE FIVE-YEAR STATUTE OF LIMITATIONS BECAUSE THE BANK ALSO SOUGHT RECOVERY FOR FAILURE TO PAY THE SEPTEMBER 1, 2007, PAYMENT AND “ALL SUBSEQUENT PAYMENTS.” Citing Singleton v. Greymar Assocs. (Fla. 2004), the Court held that although the initial default occurred more than five years ago, it was undisputed that the borrower had failed to make subsequent payments and thus, “[e]ach ‘alleged default create[s] a new and independent right in the mortgagee to accelerate payment on the note in a subsequent foreclosure action.’”

The Second District Court’s opinion in Bolletieri Resort Villas is consistent with decisions from the Third District Court of Appeals, including Dhanasar v. JPMorgan Chase Bank, N.A., and Collazo v. HSBC Bank U.S.A., N.A. In Dhanasar, the Third District affirmed a judgment in favor of the bank in a foreclosure action filed in August 2013, which was based on an April 2008 default date. Citing its newly released Beauvais decision, the Third District Court held that “[b]ecause the Bank’s complaint specifically alleged that Dhanasar had failed to pay the April 2008 payment and all subsequent payments, and the action was filed within five years of a default payment, we agree with the trial court’s conclusion that the action survived the asserted statute of limitations bar. We followed this analysis in Deutsche Bank Trust Co. Americas v. Beauvais, (en banc), and it is entirely applicable to the facts at hand.”

The Third District reached a similar decision in Collazo, with the exception that the Court remanded the case for the trial court to exclude from the judgment monthly payments that were due more than five years before the complaint was filed.
The Second District and the Third District’s decisions, however, conflict with the Fifth District Court’s decision in Hicks v. Wells Fargo Bank, N.A. In Hicks, the Fifth District Court held that the trial court erred in not dismissing a foreclosure action that was filed in 2013 based on a default date from 2006. Specifically, the Court stated that while the bank had the right to bring a second foreclosure action, “the suit must still be based on an act of default within the five-year statute of limitations period” The Court in Bolletieri Resort Villas, certified the existence of a conflict in its opinion.

Alas, while it initially appeared that the Third District’s withdrawal of its opinion on rehearing and issuance of a new decision in Deutsche Bank Trust Co., Americas v. Beauvais resolved the statute of limitations issue in Florida, it appears to have only resolved the first chapter. Now, almost two years after the initial decision in Deutsche Bank Trust Co., Americas v. Beauvais was issued, the Florida circuit courts are grappling with a new statute of limitations question aimed at the more practical question of whether a plaintiff can bring a foreclosure action based on a breach date that occurred more than five years ago. Once again, the answer to that question depends on whether the case is in the Third District, Fifth District or, joining in the debate, the Second District.

The silver lining for lenders, however, is that these cases, at the very least, make clear that there is no need to move the breach date (even for only one month) prior to bringing a new foreclosure action.