

IN THE CIRCUIT COURT OF THE TWENTIETH JUDICIAL CIRCUIT  
IN AND FOR COLLIER COUNTY, FLORIDA  
CIVIL ACTION

CASE NO. 15-CA-1170

21st MORTGAGE CORPORATION,

Plaintiff,

vs.

MARY JEAN ZISKA, UNKNOWN SPOUSE  
OF MARY JEAN ZISKA, et al,

Defendants.

\_\_\_\_\_/

DATE TAKEN: August 25, 2015

TIME: 10:20 a.m. to 10:40 a.m.

PLACE TAKEN: Collier County Courthouse  
3301 Tamiami Trail East  
Naples, FL 34112

BEFORE: Magistrate David Friedman

REPORTED BY: Maria A. Fruchey  
Court Reporter

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A P P E A R A N C E S:

For the Plaintiff:

MARK HERNANDEZ, ESQ.  
Quintairos, Prieto, Wood  
& Boyer, P.A.  
255 South Orange Avenue  
Suite 900  
Orlando, FL 32801

For Defendants:

LINDA K. YERGER, ESQ.  
Yerger Tyler, P.A.  
1570 Shadowlawn Drive  
Naples, FL 34104

\* \* \* \* \*

1           (Thereupon, the following proceedings were  
2 had:)

3           THE MAGISTRATE: We are starting a little early  
4 on 15-CA-1170, 21st Mortgage Corporation versus Mary  
5 Jean Ziska.

6           Counsel, make your appearances, please.

7           MR. HERNANDEZ: Attorney Mark Hernandez for the  
8 plaintiff.

9           MS. YERGER: Good morning, Your Honor. Linda  
10 Yerger for the defendant, Mary Jean Ziska.

11           THE MAGISTRATE: For both of your mutual  
12 benefit or benefits, we will take a look at the  
13 motion and the response, and unless I'm mistaken,  
14 what struck me is, that based upon the allegations in  
15 the complaint, this isn't really about the case  
16 that's pending before the Florida Supreme Court, and  
17 whether a new default can sidestep the statute of  
18 limitations argument because the prior dismissal was  
19 not with prejudice.

20           Doesn't this just come down to the complaint  
21 alleges a new default date, which falls within --  
22 excuse me -- that still falls outside the statute of  
23 limitations? The new default date in the plaintiff's  
24 complaint is August 1, 2010.

25           MR. HERNANDEZ: Yes, Your Honor.

1 THE MAGISTRATE: And the complaint was filed  
2 June 26th.

3 MR. HERNANDEZ: 2015. It would be within the  
4 five years.

5 THE MAGISTRATE: Oh, my math is off by two  
6 months.

7 MR. HERNANDEZ: Yes.

8 THE MAGISTRATE: So let me hear the arguments.

9 MS. YERGER: Okay. This is our Motion to  
10 Dismiss. It is based on 95.112(c) and it's based on  
11 the five-year statute of limitations on a foreclosure  
12 action.

13 What it really stems down to is not on the face  
14 of this complaint, even though on a Motion to Dismiss  
15 you look at the face of the complaint, but 21st  
16 Century Mortgage Corporation is the new successor in  
17 interest, so to speak. They have all the assignments  
18 recorded attached to the verified complaint, and it  
19 attaches the original mortgage that Ms. Ziska signed  
20 on November 2nd of 2006, the Option 1, which is the  
21 same mortgage that was attached to the initial  
22 complaint and foreclosure, which was Residential  
23 Funding Company versus Ziska. That docket number is  
24 08-CA-1272.

25 That alleged in that complaint for foreclosure,

1 default date of September 1, 2007 -- it did a  
2 contractual right of acceleration. It was a  
3 voluntary dismissal without prejudice on March 14th  
4 of 2011. And what this new complaint is is just the  
5 next servicer that picks up the complaint of  
6 foreclosure.

7 They do allege a different default date, but  
8 the argument is, once you have an original default  
9 date, you've identified the default date, and then  
10 you accelerate that default date without an  
11 adjudication on the merits. Therefore, you can't  
12 argue res judicata, which is what you were getting to  
13 on the Bartrum and Singleton cases, is that we are  
14 still with the original default date and the  
15 acceleration time period.

16 They would have had to file by the filing date,  
17 which would have been 2013, by my math, because that  
18 case was filed in 2008. So they still have to stick  
19 by that original default. And we believe their time  
20 marked based on that.

21 The only cases that they cited in their  
22 response was the Singleton and the Bartrum case. And  
23 the distinction, Bartrum is one that's up at the  
24 Supreme Court. They certified that question. I  
25 think that oral argument is scheduled for November in

1 that case.

2 I would like to hand up the Beauvais case. I  
3 did cite that in my Motion to Dismiss. If I may  
4 approach?

5 THE MAGISTRATE: Please.

6 MS. YERGER: Thank you.

7 The Beauvais case is a Third DCA case, 2014.  
8 The Bartrum case, although in their response they are  
9 saying it's a different district, it's the Fifth  
10 District --

11 THE MAGISTRATE: Can I assume you never took a  
12 French class in your life?

13 MS. YERGER: Did I get it right or wrong? I  
14 killed it, right?

15 THE MAGISTRATE: Beauvais. It's okay.

16 MS. YERGER: Terrible. Sorry about that.

17 Anyway, this case also deals with this very  
18 similar case to ours; that there is a previous  
19 mortgage lender that had filed a foreclosure action  
20 with American Home Mortgage Investment. It was  
21 defaulting the debtor in 2006 and then they dismissed  
22 the complaint.

23 And what happened, there was another  
24 intervening case. The homeowners' association took  
25 title, but then the subsequent server, Deutsche Bank,

1       tried to file a second foreclosure action. And the  
2       Third DCA in that case -- I think it was the Third  
3       DCA -- yes, the Third DCA said, no, you can't because  
4       there was not an adjudication on the merits as in the  
5       Bartrum and the Singleton cases.

6               Actually, this case goes over a very nice  
7       distinction between the Bartrum and Singleton case.  
8       It just says that res judicata is not an issue in the  
9       instant case because of the dismissal of the initial  
10      action without prejudice. And it relates back to,  
11      again, the default date, and it goes on to say that  
12      the -- it goes into the Bartrum and the Singleton  
13      apply, the res judicata argument, but in this case,  
14      the foundational element of Bartrum and Singleton was  
15      that each default creates a new cause of action and  
16      that's why the actual -- the Fifth Circuit certified  
17      the question. That is what is up before the Supreme  
18      Court, do the acceleration payments in a foreclosure  
19      action that was dismissed pursuant to Rule 1.420(b)  
20      of the Florida Rules of Civil Procedure trigger  
21      application of the statute of limitations to prevent  
22      a subsequent foreclosure action. That is what is up  
23      on appeal, but this Third Circuit, which has been  
24      supported by our Second DCA, is that they felt that  
25      in this particular case the Deutsche Bank accelerated

1 the debt and the terms of mortgage and the note.  
2 There was no reinstatement, there was no  
3 modification, there was no adjudication,  
4 acceleration, and there was not a deceleration just  
5 because there was an involuntary dismissal without  
6 prejudice.

7 Therefore, the acceleration -- and there is  
8 no -- basically, no new cause of action because all  
9 of the debt was -- all future debt was accelerated as  
10 of the previous filing in 2008, declared under  
11 that -- our previous foreclosure hearing under  
12 Residential Funding.

13 Therefore, based on this case and this filing,  
14 we believe that this present filing is beyond the  
15 statute of limitations and cannot foreclose, doesn't  
16 distinguish the lien. That is 95.281 of the statute  
17 to repose and they address that issue as well.

18 This is just merely the issue of foreclosing  
19 the real estate. The lien remains in effect  
20 accordingly.

21 Thank you.

22 THE MAGISTRATE: Let me ask you, so if the lien  
23 is in effect, but the statute has run on any cause of  
24 action for foreclosure, does that mean, on a  
25 pragmatic level, that the borrower doesn't have to



1 make any mortgage payments, but if they want to sell  
2 the property, because it's a valid lien, then they  
3 would have to fork over all the money?

4 MS. YERGER: They would have to pay it. The  
5 lien remains in effect. It's a valid lien. And if  
6 it's upside down or whatever, they have to deal with  
7 it on a sale or an HOA. Some other lien could  
8 foreclose it out. It stands as a valid lien until  
9 after five years after the expiration of the mortgage  
10 according to the statute of repose, 95.281.

11 THE MAGISTRATE: Okay. Go ahead, sir.

12 MR. HERNANDEZ: Good morning, Your Honor.

13 Plaintiff's position is that the statute of  
14 limitations is not proper for a motion to dismiss.  
15 Based on the case law that I have reviewed, statute  
16 of limitations is appropriate for an affirmative  
17 defense. And being an affirmative defense, that  
18 should be pled in an answer and dealt with at a  
19 summary judgment or final judgment hearing.

20 Essentially, a motion to dismiss is more of a  
21 technical issue. If there is an issue with the  
22 complaint, it shouldn't be an issue regarding any  
23 type of affirmative defense that the defendant can,  
24 in fact, bring.

25 Opposing counsel did bring up Singleton and

1 Bartrum. In those cases, the courts do say  
2 essentially every month is a new breach. Yes, in  
3 those two cases, the first dismissal was with  
4 prejudice and Beauvais does distinguish it.

5 However, I do want to bring to the Court's  
6 attention that Beauvais is up for rehearing on  
7 November 12th. So that case law can change in a  
8 couple of months.

9 I do have a case from the Southern Federal  
10 District of Florida, Summerlin versus James Jackson,  
11 and it's a federal case, but it does -- here's a  
12 copy. May I approach, Your Honor?

13 THE MAGISTRATE: Yes.

14 MR. HERNANDEZ: Essentially, Your Honor, this  
15 case dealt with 559.715, but it also deals with  
16 statute of limitations. And in it it says that an  
17 overwhelming amount of authority supports the  
18 plaintiff's position. However, with Beauvais,  
19 essentially the loan exception supports defendant's  
20 argument. After careful review of case law, the  
21 court finds that the state and federal courts in  
22 Florida have found that a mortgagee's prior exercise  
23 of his right to accelerate all payments and bring a  
24 foreclosure action will not begin the limitation  
25 period as to the entire mortgage -- that is an

1 important part, as to the entire mortgage -- just  
2 because the prior foreclosure was voluntarily  
3 dismissed without prejudice.

4 So this, in fact, is a -- this shows that even  
5 the federal courts say Beauvais is essentially an  
6 outlier. And the majority of federal and state  
7 courts don't see a distinction between with or  
8 without prejudice when the first foreclosure is  
9 dismissed.

10 Additionally, Beauvais is persuasive authority.  
11 It's not binding on this Court. I did also want to  
12 bring to the Court's attention that the borrower was,  
13 in fact, discharged in bankruptcy February 17th of  
14 2015. So in that instance, the plaintiff is  
15 proceeding on an in rem judgment.

16 There have been a couple -- I don't have the  
17 cases with me. Patel in the bankruptcy court, in the  
18 Middle District, has said that if the borrower  
19 surrenders a property or is discharged in bankruptcy,  
20 they cannot take overt acts to delay the foreclosure  
21 action.

22 THE MAGISTRATE: Doesn't the four corners  
23 doctrine prohibit me from taking that argument into  
24 account today?

25 MR. HERNANDEZ: Yes, Your Honor.

1 Well, based on that, we would say that  
2 Beauvais, being it's up for rehearing in November, it  
3 is technically a case law that might change in a  
4 couple of months.

5 Singleton and Bartrum have been prevailing case  
6 law regarding the statute of limitations. And it's  
7 our position that the new breach of August -- the new  
8 breach was August 1, 2010. And being that the  
9 plaintiff did provide notice of that new breach,  
10 technically, the complaint was filed within the  
11 required time of five years from that date of the  
12 breach that's within the complaint.

13 THE MAGISTRATE: Again, in this particular  
14 case, the prior dismissal was a voluntary dismissal  
15 by the plaintiff?

16 MR. HERNANDEZ: Yes, it was.

17 THE MAGISTRATE: Not an involuntary by the  
18 court?

19 MR. HERNANDEZ: No. It was a voluntary  
20 dismissal without prejudice.

21 THE MAGISTRATE: Anything else?

22 MR. HERNANDEZ: Nothing else. I want to  
23 emphasize, and I mentioned before, that the statute  
24 of limitations is more of an affirmative defense and  
25 not appropriate for a motion to dismiss hearing.

1 THE MAGISTRATE: Anything else, Ms. Yerger?

2 MS. YERGER: On the case that was handed  
3 over -- on Summerlin, it notes on the second page  
4 under defendant's default -- it indicates on  
5 September 2014 the plaintiff sent the demand letter  
6 and the notice of default identifying the default of  
7 2010.

8 What becomes important when you read all this  
9 case law is, you have to have -- it's a two-punch  
10 combo. You have to have the default and then the  
11 acceleration. That is what triggers the five-year  
12 statute of limitations. It doesn't necessarily go  
13 back to date of default.

14 In our particular case that I cited, that had  
15 the acceleration date when the compliant was filed  
16 and identified what the default date was in 2007. So  
17 that started the five-year statute of limitations in  
18 2008.

19 In this particular case, in Summerlin, when  
20 they have identified the default date of 2010, but  
21 they don't give the notice of acceleration until  
22 2014, that is when the five-year statute of  
23 limitations begins to run. So it doesn't go back to  
24 your 2010 date. There is a -- I have cited that in  
25 my brief. It goes into the distinction between you

1 have to have both the default -- it's not just a  
2 default. A default does not trigger the five-year  
3 statute of limitations. You must have the default  
4 with the acceleration.

5 THE MAGISTRATE: You're saying that a cause of  
6 action for default in Florida -- that the cause of  
7 action accrues not necessarily when the default date  
8 occurs but only if the notice of acceleration, if  
9 required by a mortgage, is also sent?

10 MS. YERGER: Absolutely. Default date is not  
11 the triggering of the five-year statute of  
12 limitations. It's the notice from the lender or the  
13 filing of the complaint. Either one of those  
14 triggers the acceleration.

15 THE MAGISTRATE: And you said there is case law  
16 to support that?

17 MS. YERGER: I have cited that.

18 THE MAGISTRATE: You have cited it in your  
19 motion?

20 MS. YERGER: I have.

21 THE MAGISTRATE: On that basis you want to  
22 distinguish the Southern District opinion?

23 MS. YERGER: It's a timing issue they have  
24 cited here, Your Honor, and it's only because they go  
25 back and they indicate that the default was 2010

1 and -- again, I haven't had time to read the entire  
2 case, but I'm just pointing that out.

3 THE MAGISTRATE: Then this opinion -- in your  
4 view, this entire opinion would be dictum because the  
5 acceleration occurred in 2014 anyway?

6 MS. YERGER: Right. It's a distinction.

7 THE MAGISTRATE: Why did they write the  
8 opinion?

9 MS. YERGER: I think they are writing a  
10 distinction. This is federal -- again, I haven't had  
11 a chance to really review the entire action or  
12 opinion but -- in every case -- actually, you have to  
13 apply the facts of every case in a particular  
14 circumstance.

15 THE MAGISTRATE: Really? Is that what judges  
16 have to do?

17 Okay. Anything else?

18 MS. YERGER: I wanted to find that case.

19 THE MAGISTRATE: It's in your motion, 8/4/2015.  
20 I see you have a section here about the cause of  
21 action accrues when the last element has occurred,  
22 and in my recollection, the notice of acceleration is  
23 not part of a cause of action. Even if it's required  
24 by a mortgage, it's a condition precedent. Okay.  
25 And that's not a cause of action. That's not an

1 element of the cause of action. So I'm not sure  
2 that -- okay. I do see a case that you may have been  
3 looking at.

4 MS. YERGER: Your Honor, when you talk about  
5 the acceleration -- we are talking about the statute  
6 of limitations in this particular case.

7 THE MAGISTRATE: Okay.

8 MS. YERGER: You are talking about the ability  
9 to foreclose a property and what the conditions  
10 precedent are on those mortgages is different.

11 THE MAGISTRATE: All right. In this particular  
12 case, we have a voluntary dismissal by the plaintiff  
13 without prejudice, and subsequently, if I understand  
14 what's happened, the mortgage is now in the hands of  
15 21st Mortgage, a new holder, a new assignee, and  
16 based upon a new default date of August of 2010, they  
17 claim a new default entitles them to foreclose. What  
18 remains can be a valid lien on the property.

19 And it seems an aberration, at the least, that  
20 the holder of the mortgage would be prohibited from  
21 collecting any money while they have a valid lien,  
22 and the borrower could remain in the property for  
23 years without making a single payment, but the lien  
24 is still valid with respect to whether it must be  
25 addressed if and when the property is sold by the



1 borrower. Seems to me that's a matter of public  
2 policy that the Court needs to address.

3 In my view, the borrower should not be entitled  
4 to a free house to the extent that no payments would  
5 be due to the lender if and until the property were  
6 sold. And I certainly expect that the Florida  
7 Supreme Court is going to rule, as this Summerlin  
8 court did, that it's appropriate for the new default  
9 date to trigger a new statute of limitations.

10 So I'm going to deny the Motion to Dismiss and,  
11 parenthetically, I'm going to find that while the  
12 plaintiff has correctly asserted that in large part,  
13 statute of limitations arguments are best heard or  
14 best resolved on a summary judgment standard, where  
15 the complaint itself makes clear that the dates  
16 trigger a statute of limitations defense, then it is  
17 appropriate to rule on it at the pleading level,  
18 which is where we're at today.

19 So I will ask the plaintiff to prepare the  
20 recommended order in Word format and send it to my  
21 assistant within five business days denying the  
22 Motion to Dismiss and requiring the defendant to file  
23 an answer within 20 days of the date of the  
24 recommended order and adoption.

25 Thank you both for your arguments.

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(Thereupon, the hearing concluded at 10:40  
a.m.)

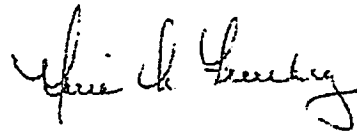
CERTIFICATE

STATE OF FLORIDA       )  
COUNTY OF COLLIER    )

I, MARIA A. FRUCHEY, Court Reporter do hereby certify that the foregoing proceedings were taken before me at the time and place as stated in the caption hereto at Page 1 hereof; that the foregoing transcription, consisting of pages numbered 1 through 19, inclusive, is a true record of my stenographic notes taken at said proceedings.

I FURTHER CERTIFY that I am neither of counsel nor solicitor to any of the parties involved nor interested in the event of the cause.

DATED, this 7th day of September, 2015.



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MARIA A. FRUCHEY  
Court Reporter

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