IN THE SUPREME COURT OF FLORIDA

VINCENT P. CRAVERO; DOROTHY C. CRAVERO,

Defendants/Defendants,

v.

Case No.: SC03-1671
DCA Case No.: 4D02-2243

LPP MORTGAGE LTD., f/k/a LOAN PARTICIPANT PARTNERS, LTD., a TEXAS LIMITED PARTNERSHIP,

Respondent/Plaintiff,
_____/

RESPONDENT'S ANSWER BRIEF

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TABLE OF CONTENTS

TABLE OF CITATIONS

CASES

STATUTES

OTHER AUTHORITIES

RULES

PRELIMINARY STATEMENT

Respondent/Plaintiff LPP Mortgage Ltd., is referred to in this brief as "plaintiff" or "LPP." Defendants/Defendants Vincent and Dorothy Cravero are referred to as "defendants" or "Craveros."

The record is designated by volume number and page number as follows: R1:1-24 (volume 1, pages 1 through 24).

STATEMENT OF THE CASE AND OF THE FACTS

This is a second appeal from a final summary judgment entered in favor of defendants and against plaintiff in a mortgage foreclosure action. After the Fourth District Court of Appeal reversed, defendants petitioned this court for discretionary review, contending the Fourth District's decision expressly conflicted with decisions from other courts. This court accepted jurisdiction.

Plaintiff in this case is the successor in interest of loans that the federal Small Business Administration ("SBA") made to the Cravero Brothers Produce Company ("the corporation"). R1:1-24. In 1992, the corporation executed two 17-year promissory notes in favor of the SBA. R1:9-10, 17-18. Vincent and Dorothy Cravero personally guarantied the corporate loans. R1:120-125. The Craveros then executed mortgages in favor of the SBA to secure their guaranties. R1:11-14, 19-22. There was no mortgage directly securing the corporate promissory notes.

The corporate notes and personal mortgages each contain separate optional acceleration clauses. R1:17, 21. The corporation defaulted on the loans and on February 15, 1995, the SBA sent the corporation demand letters declaring the notes in default and accelerating the notes. R1:155, 159-60. The demand letters did not mention the Craveros' personal mortgages and did not state that the mortgages were being accelerated. R1:155, 159-60. The record does not reveal any other action taken by the SBA to accelerate the mortgages.

In May 2001, the notes, mortgages and guaranties were assigned to LPP. R1:15-16, 23-24. Several months later, in September 2001, LPP filed suit to foreclose on the mortgages. R1:1-24. LPP did not sue on the promissory notes or the guaranties, and the corporate borrower was not made a party to the foreclosure action. R1:1-24.

The Craveros moved for summary judgment, arguing plaintiff's suit was barred by Florida's five-year statute of limitations. R1:144-160. The trial court granted that motion, dismissing the case and entering judgment in defendants' favor. R1:180. Plaintiff appealed and the Fourth District Court of Appeal reversed. R1:196-98; LPP Mortgage Ltd. v. Cravero, 851 So. 2d 897, 898 (Fla. 4th DCA 2003). This court accepted discretionary jurisdiction to review this matter upon defendants' petition for discretionary review based on an alleged conflict among the district courts of appeal.

SUMMARY OF ARGUMENT

The Fourth District Court of Appeal correctly reversed the trial court's order granting defendants' amended motion for summary judgment. The trial court erred in applying Florida's statute of limitations because these loans were originally made by the SBA, an agency of the federal government. Pursuant to federal law, there is no limitations period on a mortgage foreclosure action by the government. Plaintiff, as the assignee of the SBA, is entitled to the benefit of the federal limitations law. Accordingly, since there is no limitations action applicable to this mortgage foreclosure case, the action could not be time-barred even if the SBA accelerated in 1995 as defendants contend.

Defendants' claim that the Fourth District's decision expressly conflicts with decisions of other Florida District Courts of Appeal is incorrect because those cases do not address the same or similar fact patterns and their holdings are different and distinguishable. As such, even though this court preliminarily accepted jurisdiction based upon an alleged conflict, now that the matter has been fully briefed this court should dismiss this appeal for lack of jurisdiction. Alternatively, the court should affirm the decision of the Fourth District because it was correct.

The Fourth District's reversal of the summary judgment entered in defendants' favor can also be affirmed because Florida's five-year statute of

limitations had not run by the time plaintiff filed its foreclosure action because neither plaintiff nor its predecessor accelerated the mortgages upon which it sued. The statute of limitations on plaintiff's claims did not begun to run until 2001 when plaintiff filed suit. As such, the trial court erred in dismissing the case and entering judgment in defendants' favor and the Fourth District's reversal of summary judgment should be affirmed on this ground.

Defendants' laches argument fails because laches cannot bar a claim timely brought within the applicable statute of limitations, as was done here. Moreover, defendants never pled nor proved this defense below so it cannot serve as a basis to reverse the Fourth District's decision.

Similarly, defendants' argument that plaintiff's foreclosure action was barred because plaintiff failed to register with the Florida Department of State fails. Plaintiff had no obligation to register with the Florida Department of State because it was not "transacting business" in Florida as that term is defined in the registration statute. Even if plaintiff was required to register, its failure to do so would have justified only a stay of the lower court action, not a dismissal. Accordingly, this argument does not present any basis for reversing the Fourth District's decision and that decision should be affirmed if this appeal is not dismissed.

ARGUMENT

I. STANDARD OF REVIEW

The Fourth District Court of Appeal reviewed the lower court's grant of summary judgment. As such, the Fourth DCA was required to assess, on a *de novo* basis, whether defendants met their heavy burden of establishing irrefutably that plaintiff could not prevail. See, Reeves v. North Broward Hospital District, 821 So.2d 319, 321 (Fla. 4th DCA 2002) (summary judgment review is *de novo*); Gasch v. Harris, 808 So.2d 1260, 1261 (Fla. 4th DCA 2002) (same); Hervey v. Alfonso, 650 So. 2d 644, 645-46 (Fla. 2d DCA 1995) (movant's burden is to establish irrefutably that nonmovant cannot prevail). The DCA was obligated to review the matter in the light most favorable to plaintiff as the non-moving party, and was obligated to reverse summary judgment if the slightest doubt exists. Reeves, 821 So. 2d at 321. Moreover, even if the facts were uncontroverted, summary judgment was improper where different inferences can be drawn reasonably from those facts. Gomes v. Stevens, 548 So. 2d 1163, 1164 (Fla. 2d DCA 1989). The DCA had to view every possible inference in plaintiff's favor as the party opposing summary judgment. Staniszeski v. Walker, 550 So. 2d 19, 20 (Fla. 2d DCA 1989). This court should determine that the Fourth DCA's decision to reverse the summary judgment granted in defendants' favor was correct and should be upheld.

II. LPP, A PRIVATE ASSIGNEE, ACQUIRED THE MORTGAGES WITH THE SAME RIGHTS AND RESPONSIBILITIES HELD BY THE ASSIGNOR, INCLUDING AN UNLIMITED STATUTE OF LIMITATIONS FOR ENFORCEMENT

The Fourth District Court of Appeal correctly reversed the summary judgment granted in defendants' favor because otherwise defendants would have received a windfall simply because the Small Business Administration ("SBA") assigned its rights under the mortgages to plaintiff, a private entity. In reaching its decision, the Fourth District followed cases which based their rationale "on the rather universally followed proposition that an assignee stands in the shoes of the assignor and has all the rights enjoyed by the assignor." Cravero, 851 So. 2d at 898 (citing Dubbin v. Capital Nat'l Bank of Miami, 264 So. 2d 1 (Fla. 1972); Dove v. McCormick, 698 So.2d 585 (Fla. 5th DCA 1997)).

In seeking to overturn the Fourth District's decision, defendants argue that the "universally followed proposition" -- that an assignee stands in the shoes of the assignor, does not apply when one of the rights enjoyed by the assignor is an unlimited statute of limitations. Pet. Brf. at 7-9. According to defendants, a private entity that acquires a mortgage by assignment from the government cannot acquire an unlimited statute of limitations because the doctrine of sovereign immunity does not extend to a private entity seeking to enforce a private right. Pet. Brf. at 7-9. In support of this proposition, defendants cite Lovey v. Escambia

County, 141 So. 2d 761 (Fla. 1st DCA 1962), and claim that Cravero's holding directly conflicts with Lovey. Pet. Brf. at 12. Although this court has accepted jurisdiction preliminarily based on conflict, the following will show that Cravero is entirely consistent with the law in Florida regarding the rights of an assignee. There is no conflict with Lovey or any other Florida decision.[1]

A. The law governing assignment of a contract is controlling, not the law on sovereign immunity

This is a mortgage foreclosure action involving mortgages given to the federal government and subsequently assigned to the Plaintiff. In order to define the precise rights plaintiff acquired when it took an assignment of the mortgages, including any limitation on the remedies available under the mortgages such as a limitation on the time in which plaintiff must enforce its rights, it is necessary to determine the rights held by the SBA under the mortgages before the assignment. Accordingly, the starting point of the analysis is 28 U.S.C. § 2415 because that is the statute which dictates the statute of limitations applicable to actions by the government. Under 28 U.S.C. § 2415(a), the government has a six year statute of limitations in which to bring an action for money damages but courts have

[1] In cases where the Supreme Court accepts jurisdiction based on an asserted conflict, and upon closer examination it is apparent that no conflict exists and review was improvidently granted, it is appropriate to dismiss the petition. See, Kennedy v. Kennedy, 641 So.2d 408 (Fla. 1994); Curry v. State of Florida, 682 So.2d 1091 (Fla. 1996).

consistently held that under 28 U.S.C. § 2415, the government has an unlimited time in which to commence a foreclosure action. See, United States of America v. Begin, 160 F.3d 1319, 1321 (11th Cir. 1998) (government "may bring a foreclosure action on a mortgage securing the promissory note 'at any time,'" quoting United States v. Alvarado, 5 F.3d 1425, 1428 (11th Cir. 1993)); see, also, United States v. Thornburg, 82 F.3d 886, 894 (9th Cir. 1996) ("Congress has left no gap in the law concerning the right of the United States to foreclose on a mortgage without being subject to a limitation period").[2]

While defendants' admit that the mortgages could be foreclosed at any time while held by the SBA, they argue that the doctrine of sovereign immunity precludes LPP from acquiring the contractual rights held by the government. Not only have they failed to explain why the doctrine of sovereign immunity is relevant, defendants ignore Florida law governing the effect of an assignment of a mortgage which governs the outcome of this case.

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[2] 28 U.S.C. § 2415(c) states: "Nothing herein shall be deemed to limit the time for bringing an action to establish the title to, or right of possession of, real or personal property." Many courts have interpreted § 2415(c) as an unlimited statute of limitations for foreclosure actions. See, United States v. Dos Cabezas Corp., 995 F.2d 1486, 1489-90 (9th Cir. 1993); UMLIC VP LLC v. Matthias, 234 F. Supp. 2d 520, 525 (D. V.I. 2002); United States v. Freidus, 769 F.Supp. 1266, 1273 (S.D.N.Y 1991); United States v. Edwards, 765 F. Supp. 1215, 122 (M.D. Pa. 1991); Curry v. United States, 679 F. Supp. 966, 970 (N.D. Cal. 1987). Other Court have concluded that there is no statute of limitations because §2415(a) only applies to money damages and Congress has not otherwise prescribed a statute of limitations for foreclosures. See, Alvarado at 1430 (collecting cases).

28 U.S.C. § 2415 is silent regarding the rights of an assignee. In the absence of express statutory direction regarding the effect of an assignment on the contractual rights assigned, this court must look to the common law governing assignments. As one court has observed: "where a statute is silent, the courts 'fill in the inevitable statutory gaps' by relying on the common law. On the subject of assignments, the common law 'speaks in a loud and consistent voice: An assignee stands in the shoes of his assignor.'" Dove at 585, 589 (quoting F.D.I.C. v. Bledsoe, 989 F.2d 805 (5th Cir. 1993)).[3] Whether one looks to common law principles governing contractual assignments generally, as the Fourth District did in Cravero, or looks to Florida Statutes governing the rights of an assignee under a mortgage assignment, the result is the same -- the assignee receives the identical rights under the contract that the assignor enjoyed. Specifically, §701.01 of the Florida Statutes states:

> Any mortgagee may assign and transfer any mortgage made to her or him, and the person to whom any mortgage may be assigned or transferred may also assign and transfer it, and that person or her or his assigns or subsequent assignees may lawfully have, take and pursue the same means and remedies which the mortgagee may lawfully have, take or pursue for the foreclosure of a mortgage and for the recovery of the money secured thereby.

§ 701.01, Fla. Stat. (2003) (emphasis added).

Section 701.01 codifies the legal principle affirmed in Cravero, and "universally followed" that an the assignee stands in the shoes of the assignor and has all rights enjoyed by the assignor." Cravero, 851 So. 2d at 898. Florida has consistently adhered to the

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[3] Defendants originally cited Dove as a basis for this court's discretionary jurisdiction. Dove involved the viability of a borrower's rescission rights under 15 U.S.C § 1635 (TILA) and not the statute of limitations available to a private assignee under 28 U.S.C. §2415, so it is not factually or legally similar. Dove, 698 So. 2d at 587-588. Nonetheless, Dove quotes Bledsoe approvingly for the general proposition that an assignee acquires all rights of its assignor. Id. at 589. Further, the Dove court applies the analysis relating to the rights of an assignee to conclude that the RTC's immunity from liability under TILA was acquired by a private mortgagee assignee. Id. Although not directly on point, and therefore not an appropriate basis for "conflict" jurisdiction, the analysis and inferences drawn from Dove are entirely consistent with and support the legal rationale in Cravero.

law governing the assignment of contracts generally and the assignment of mortgages specifically, and Cravero is no exception. See, Dubbin, 264 So.2 3 ("an assignee of a mortgage receives only those rights and benefits as are available to its assignor"; citing Marion Mortgage Co. v. Grennan, 143 So. 761 (Fla. 1932));[4] see, also, Florida Land Holdings v. McMillen, 186 So. 188, 191 (Fla. 1939) ("As a general rule an assignee of a mortgage has all the rights thereunder that his assignor had …."); Rose v. Teitler, 736 So.2d 122 (Fla. 4th DCA 1999) (that an assignment "transfers to the assignee all the interests and

[4] Defendants cite Dubbin, noting that its adherence to the law governing assignments was cited by the Fourth District in Cravero, but states that the transferee can acquire "no greater rights than its transferor." Pet. Brf. at 10. Plaintiff does not seek to acquire "greater" rights than the SBA. On the contrary Plaintiff advocates, and Cravero held, that plaintiff is entitled to the identical rights enjoyed by the SBA, its assignor.

rights of the assignor in and to the thing assigned" is "well established"); Dove at 589; State v. Family Bank of Hallandale, 667 So. 2d 257, 259 (Fla. 1st DCA 1995) ("The law is well established that an unqualified assignment transfers to the assignee all the interests and rights of the assignor in and to the thing assigned. The assignee steps into the shoes of the assignor …").

Accordingly, Florida Statutes §701.01 governing the rights of an assignee under a mortgage, and longstanding principles of Florida common law adopting the "universally followed proposition" that an "assignee stands in the shoes of the assignor," support the 4th DCA's conclusion that plaintiff is entitled to all of the benefits afforded the SBA under the mortgage contracts, including the extended statute of limitations for enforcement.

Defendants' discussion regarding the history, purpose and limitations of the common law doctrine of sovereign immunity and the application of the phrase *nullus tempus occurit regi*- that "time does not run against the kings" is not relevant here for several reasons. Pet. Brf. at 8. First, Plaintiff has never claimed that it is "immune" from the statute of limitations. Rather, the reason that the five-year statute of limitations under state law does not apply is because Plaintiff is entitled to the *unlimited* statute of limitations applicable to the mortgages which it acquired by assignment from the government. This is the result required by Florida Statutes §701.01; the result required by Florida law governing contractual assignments; the holding of the majority of cases which have addressed the issue; and the basis upon which Cravero was decided.

The reason why defendants believe that the application of the doctrine of sovereign immunity governs plaintiff's rights under the mortgages is unclear but it is obviously intended to create conflict jurisdiction when none exists. They urge this court to overturn Cravero on the theory that it directly conflicts with Lovey, the "venerable case cited in other jurisdictions" for the proposition that an assignee cannot enforce a private right under the doctrine of sovereign immunity. Pet. Brf. at 7. This is an argument defendants make for the first time to this court. They never argued to the Fourth District that an adverse decision would create a conflict with any other decision of the courts of appeal in Florida. See, Pet. Ans. Brief to the 4th DCA. Now, according to defendants, failure to overturn Cravero

> would require rejecting Lovey, despite broad reliance on Lovey, even in other jurisdictions [and that] [s]uch a decision would put Florida at odds with a number of both state and federal courts that have decided the question of the scope of the applicability of sovereign immunity to a private transferee asserting a private benefit.

Pet. Brf. at 12-13.

Lovey however, involved facts which are not remotely similar to the facts of this case. The Lovey court analyzed § 337.31, Fla. Stat., which provides that when a county constructs and maintains a road for a period of four years, there is a conclusive presumption that the road has been dedicated to the public. Lovey, at 763. The appellants there owned property upon which a road was constructed. They argued that the property, which had previously been owned by the federal government, was not subject to a claim for a prescriptive easement or adverse possession because the doctrine of adverse possession does not apply to the sovereign. Id. The Lovey court concluded that § 337.31 is not "one of prescription or adverse possession" but rather is a statute relating to the formal dedication of an easement. Id. at 764-765. The rule of law announced in Lovey, therefore, involves the

statutory criteria for declaring a public easement, something not remotely at issue in Cravero. In its analysis of the appellants' defense, the Lovey court discussed the proposition that one cannot acquire rights in land owned by the government by virtue of adverse possession or prescription and further discussed the origin and purpose of sovereign immunity. Id. at 764. It did not address contractual rights acquired under a mortgage assignment. It did not address 28 U.S.C. § 2415 or the point of law announced in Cravero -- "an assignee stands in the shoes of the assignor." Cravero, 851 So.2d at 898. Defendants cannot extrapolate a general proposition -- i.e. that the doctrine of sovereign immunity does not extend to a private assignee seeking to enforce private rights -- in a context which is entirely different, in an effort to create a conflict under Florida law. This is a mortgage foreclosure action and not an adverse possession case and defendants' intended analogy does not apply.

The doctrine of sovereign immunity and any limitation on the enforcement of private rights is also irrelevant because the relevant statute -- 28 U.S.C. § 2415, does not provide for any such distinction between the enforcement of public or private rights which, according to the defendants, is at the heart of sovereign immunity under common law. Section 2415 effectively waived any immunity from the statute of limitations by replacing that immunity with a year statute of limitations applicable to the government when pursuing certain contract or tort claims and an unlimited statute of limitations when pursuing claims to recover real estate. As set forth in the legislative history, Congress recognized that government litigation often "arises out of activity which is similar to commercial activity" as many claims "asserted by the Government are almost indistinguishable from claims made by private individuals against the Government." See, P.L. 89-505 89th Cong. 2nd Sess. 1966 Senate Report No. 1328 p. 2505. Defendants' theory that neither the government or a private successor to the government are entitled to rely on an extended statute of limitations if the underlying lawsuit does not promote a "public purpose" fails to address the fact that Congress enacted the statutes of limitations contained in §2415, knowing that the government is often involved in litigation which is "almost indistinguishable" from claims typically made by private individuals. Hence, any historical distinction between enforcement of a private right or public right under the common law doctrine was not retained in §2415 and therefore was eliminated. See, Holmes County School Board v. Duffell, 651 So. 2d 1176, 1179 (Fla. 1995) (legislative branch presumed to know existing law when it enacts a statute). Under the statute, the government can enforce its rights within the applicable time frames the same as private litigants whether those rights are characterized as "private" or "public."[5] Because courts have consistently and universally relied on the language of 28 U.S.C. § 2415 in defining the rights passed on to a private entity upon assignment of a mortgage originally held by the government, the statute would need to expressly address the distinction between a private right and a public right for defendants' argument to be viable.

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[5] Defendants argue for the first time that 28 U.S.C. § 2415(c) does not apply to foreclosure actions whether brought by the government or a private party, apparently believing that the section relates to real estate related actions other than foreclosure. See, Pet. Brf. at § IV(C)(6) at p. 32. Courts, including Cravero, have not agreed. See, Dos Cabezas; Matthias; Freidus; Edwards; Curry.

B. Enforcement of a mortgage is not a personal right incapable of assignment

Defendants appear to argue that the SBA's enforcement rights under the mortgages are not assignable under contract principles because the enforcement rights are "personal" to the SBA. Pet. Brf. at 25. To support this argument, defendants cite Wamco, III, LTD., v. First Piedmont Mortgage Corp., 856 F. Supp. 1076 (E.D. Va. 1994), which reiterated the general rule that "an assignment

ordinarily carries with it all rights, remedies and benefits which are incidental to the thing assigned, *except those which are personal to the assignor and for his benefit only.*" Id. at 1086 (emphasis in original). The Wamco court found that the language of FIRREA, (12 U.S.C. § 1821), expressly limited its extended statute of limitations to the Resolution Trust Corporation ("RTC"), making it *personal* and not assignable under the general rule. Id. Defendants reliance on this language to support their contention that the extended enforcement rights under the mortgages here are *personal* rights to the SBA under § 2415 and cannot be transferred to LPP (Pet. Brf. at 26) fails for several reasons. First, unlike FIRREA, § 2415 does not contain language purporting to limit its application to the RTC or a receiver. Compare 28 U.S.C. § 2415 and 12 U.S.C. § 1821(d)(14).

Defendants' argument also fails because, as stated in Federal Financial Company v. Gerard, 949 P.2d 412 (Wash. App. 1998), "reliance upon the Wamco decision is misplaced. Both the Virginia Supreme Court and the Fourth Circuit, the circuit in which the Wamco federal district sits, have rejected that ruling. It has no continued vitality." Id. at 416.6 In Gerard, the court analyzed which "personal" rights are incapable of assignment. Id. Not finding an answer under Washington state law, the Gerard court agreed with a Texas supreme court decision that defined "personal rights" as those which constitute "accrued causes of action that may be asserted independently of ownership of the property." Id. The Gerard court concluded the extended statute of limitations is not a personal right because it confers no benefit independent of the asset to which it relates. Id. Likewise here the extended statute of limitations that the SBA enjoys confers no personal benefit independent of the mortgages to which it is applied and thus it is not a "personal" right that cannot be assigned.

Florida law is consistent because under Florida law "contract rights can be assigned unless they involve obligations of a personal nature, or there is some public policy against the assignment or such assignment is specifically prohibited by contract." Brunswick Corporation v. Creel, 471 So. 2d 617, 618 (5th DCA 1985) (citing 4 Fla.Jur. Assignments § 4). General principles of contract law suggest that "personal" obligations are those which would "materially change the duty of the obligor." See, Restatement (Second) of Contracts § 317. In the instant case, the mortgages provide for the remedy of foreclosure upon default of the underlying obligations which they secure -- the guaranties. There is nothing "personal" about the requirement that the Craveros pay money to the holder of the mortgages, whether the holder is the SBA or plaintiff. There is likewise no material change to the contractual rights

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[6] Union Recovery Limited Partnership v. Horton, 252 Va. 418, 424 (Va. 1996) (expressly following Bledsoe, the court stated: "We do not concur in the view expressed in Wamco and adopt the view taken by the majority of other federal and state jurisdiction. We find that application of the common law, even without reference to the public policy this would promote, mandates the application of the longer limitations period."). See, also, Federal Financial Company v. Hall, 108 F.3d 46, 50 (4th Cir. 1997) (relying on Virgina law, court rejected Wamco).

and obligations under the mortgages, whether the mortgage holder is LPP or SBA. Accordingly, defendants' assertion that the extended statute of limitations is a non-assignable "personal right" of the SBA is without merit.

Defendants apparently believe that they will be prejudiced if the Plaintiff receives the benefit of its bargain. However, the express terms of the mortgages state that they are governed by federal law under which the mortgagors are not entitled "to claim or assert any local or state law to defeat the obligation incurred in obtaining or assuring such Federal benefit or assistance."[7] Under principles of Florida contract law, there was no material change to the obligation when LPP is substituted as the mortgagee in place of the SBA and because the mortgage contracts the Craveros signed contemplate that they will be subject to an extended statute of limitations under federal law**,** they cannot have been prejudiced by virtue of surprise or unintended consequence. In fact, under contract principles, it is plaintiff who will be prejudiced if it does not obtain all of the SBA's rights under the mortgages and defendants incur a windfall. Had the mortgages stayed with SBA and it sued in 2001, defendants would not have been able to argue the statute of limitations barred their claims and judgment surely would have been entered against them. The fortuitious fact that the SBA assigned the mortgages to plaintiff should not enable defendants to effectively rid themselves of their mortgage and guaranty obligations and the law does support defendants' efforts in this regard.

III. PLAINTIFF'S ACTION WAS TIMELY AND NOT BARRED BY FLORIDA'S STATUTE OF LIMITATIONS

In moving for summary judgment below defendants argued that plaintiff's action to foreclose the personal mortgages was time-barred because it was filed more than five years after the SBA demanded payment on the corporate notes. The trial court granted defendants' motion. R1:180. Even though the Fourth District's reversal was not based upon this state law ground, its decision to reverse the summary judgment can be affirmed on this ground, which was fully briefed to the trial and appellate courts and is dispositive. See, Savoie v. State, 422 So. 2d 308, 310 (Fla. 1982) (once court accepts jurisdiction to resolve conflict, it has jurisdiction over all issues); Savona v. Prudential Ins. Co., 648 So. 2d 705, 707 (Fla. 1995) (court has discretion to decide issues unrelated to conflict where fully briefed and dispositive).

As explained in section II above, federal law on limitation of actions applies to this case rather than the state statute of limitations upon which the trial court apparently relied. Nonetheless, even assuming the state statue of limitations governs, the trial

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[7] R1:14. The mortgages state: "In compliance with section 101.1(d) of the Rules and Regulations of the Small Business Administration [13 C.F.R. 101.1(d), this instrument is to be construed and enforced in accordance with applicable Federal law." Id. at ¶ 9. The applicable provision, now codified at 13 C.F.R. 101.106(d) states: "No person… that applies or receives any benefit or assistance form the SBA, or that offers any assurance or security upon which SBA relies for the granting of such benefit or assistance, *is entitled to claim or assert any local or state law to defeat the obligation incurred in obtaining or assuring such Federal benefit or assistance."* Id. (emphasis added).

court applied it incorrectly to the uncontroverted facts of this case. Plaintiff's foreclosure action was timely brought even under state law and therefore the Fourth District's reversal of summary judgment should be affirmed.

Florida's five-year statute of limitations on a mortgage foreclosure action "does not begin to run until the last payment is due unless the mortgage contains an acceleration clause." Locke v. State Farm Fire and Casualty Co., 509 So. 2d 1375, 1377 (Fla. 1st DCA 1987). In this instance, the last payment due under the corporate notes was not until October 2010; nonetheless the payment date on the notes is irrelevant for two reasons. First, the link between the corporate notes and the personal mortgages is once-removed because the mortgages here did not actually secure the corporate notes. Instead, the mortgages were executed not by the corporate borrower under the notes, but instead by the Craveros individually. The mortgages secured not the corporate notes, but the Craveros' individual unconditional guaranties. R1:11-14, 19-22, 120-25. Thus, acceleration of the corporate notes is not relevant to acceleration of the personal mortgages.

Second, the mortgages contain their own optional acceleration clauses and therefore the "unless the mortgage contains an acceleration clause" exception applies here. R1:13, 21, ¶ 3. Where the mortgage contains its own optional acceleration clause, the statute of limitations does not begin to run until acceleration of the mortgage. In such instances, "no acceleration occurs until the holder of the mortgage exercises his right to accelerate." Id. The record in this case shows that only the corporate notes were accelerated, not the personal mortgages. In its 1995 correspondence to the corporate borrower and one of the guarantors, the SBA stated only that it was accelerating the corporate notes. R1:155, 159-60.[8] The SBA never said it was accelerating the mortgages or even mentioned the mortgages. R1:155, 159-60. There is no record evidence that the personal mortgages were accelerated before suit was filed in 2001.

Dissatisfied with the result that derives from these undisputed facts and principles, defendants advance what can be deemed an "automatic acceleration" theory -- that the personal mortgages were automatically accelerated when the corporate notes were accelerated even though plaintiff nor its predecessor ever accelerated the mortgages themselves. Defendants contend the mortgages' language somehow requires this result -- "The Mortgages' acceleration clauses declare them to be due when the Notes are due." Pet. Brf. at 17 (issue statement). They also claim a "time-barred action does in fact defeat an action to foreclose a mortgage securing that debt *when the mortgage specifically states that it does*." Pet. Brf. at 18 (emphasis added); see, also, Pet. Brf. at 20 ("because the acceleration clause in each Mortgage references its respective Note, asserting that the Mortgages are due when the Notes are due."). The mortgages here say no such thing.

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[8] The SBA sent a demand letter to Vincent Cravero which referenced his guaranty. This letter stated only that the notes were being accelerated; Cravero's mortgage was not mentioned and in fact the letter did not even specifically demand payment under the guaranty. R1:160. The record does not reveal that a similar demand letter was even sent to the other guarantor, Dorothy Cravero.

Instead, the mortgages actually specify as follows: "This instrument is given to secure *a guaranty* for the payment of a promissory note" and "the obligation hereby secured matures seventeen (17) years from the date of the Note." R1:11, 19 (emphasis added). The mortgages then specify that upon default, "the entire indebtedness hereby secured shall become immediately due, payable, and collectible without notice, *at the option of the mortgagee or his assigns* . . . ." R1:13, 21 (emphasis added). Because the mortgages contain optional acceleration clauses, "no acceleration occurs until the holder of the mortgage exercises his right to accelerate." Id. Here, neither the SBA nor the plaintiff affirmatively accelerated the mortgages until suit was filed in 2001.

Despite the lack of explicit acceleration of the mortgages, the trial court apparently agreed with defendants' automatic acceleration argument. R1:149, 151 (arguing the "loans" were accelerated); R1:180. Yet this theory contradicts the mortgages' optional language and the case law: where a mortgage contains an optional acceleration clause, "no acceleration occurs until the holder of the mortgage exercises his right to accelerate." Locke, 509 So. 2d at 1376; see, also, KRC Enterprises, Inc. v. Soderquist, 553 So. 2d 760 (Fla. 2d DCA 1989) (mortgage clause was optional where it specified if sums not promptly paid when due, "the aggregate sum mentioned in said promissory note shall become due and payable forthwith or thereafter at the option of the mortgagee").

Defendants' argument about construing simultaneously-executed documents together does not save their "automatic acceleration" argument. Pet. Brf. at 18-19. Simply because documents were executed together as part of the same transaction does not mean that exercise of remedies under one document automatically triggers the exercise of other remedies under another document. In arguing the guaranties reference the notes, so that acceleration of the notes accelerated the guaranties and mortgages (Pet. Brf. at 19-20), defendants gloss over and render superfluous the mortgages' language that they secure the guaranties. R1:11-14, 19-22. No word or part of an agreement is to be treated as redundant or surplusage if it can be given meaning consistent with reason and the practical aspect of the transaction between the parties. Herian v. Southeast Bank, 564 So. 2d 213, 214 (Fla. 4th DCA 1990); Singer v. Singer, 706 So. 2d 914, 915 (Fla. 4th DCA 1998). Here, by their own terms the personal mortgages secured the personal guaranties, not the corporate notes.

When the documents are viewed in the context of the transaction, it is clear the lender's rights under the personal guaranties and corresponding mortgages are separate from its remedies under the corporate notes. The guaranties here are unconditional -- the lender could proceed against the guarantors personally to collect money owed on the corporate debt even without exhausting all remedies against the corporate borrower and even if the corporate note were somehow invalid. R:1:122-25. If the SBA had the right to pursue the personal unconditional guaranties regardless of any pursuit of the corporate notes, surely it (and its assignee) could pursue the personal mortgages that secured those guaranties regardless of any action (or inaction) on the corporate notes.

The record reveals that the trial court's decision on this issue might have been based on a faulty premise. During the course of issuing its ruling, the court indicated that if suit on the notes was time-barred then there is no debt due and there would be no basis

to sue on the mortgages. R2:12-13. This is factually and legally erroneous. Again, the mortgages did not even secure the notes. Moreover, even if the notes' acceleration were relevant, an action for mortgage foreclosure survives even if the underlying debt action on the note is unenforceable due to the statute of limitations. E.g., Swanson v. Bennett, 25 So. 2d 207, 209 (Fla. 1946); Alvarado, 5 F.3d 1425, 1428-29. Remedies contained in mortgages and obligations they secure are separate and can be exercised independently. See, e.g., Alvarado, 5 F.3d at 1428-29 (creditor's right to seek satisfaction of debt from property is separate and independent of right to seek satisfaction from debtor; creditor can pursue one remedy without pursuing the other; even if statute of limitations bars money judgment on debt, it does not extinguish underlying debt obligation so lender can seek to foreclose mortgage securing otherwise unenforceable debt). As the Eleventh Circuit explained, "the creditors' right to seek satisfaction of the debt from the property is independent of his right to seek satisfaction from the debtor"; these are separate remedies and a creditor can pursue one without pursuing the other. Id. at 1429. "The life of a mortgage of real estate is not measured by that of the obligation which it is given to secure . . . ." Id.

Even if the statute of limitations operates to bar an action for a money judgment on the debt, it does not extinguish the underlying debt obligation. Id. As a result, a lender can seek to foreclose a mortgage securing an otherwise unenforceable debt. Id.; see, also, Monte v. Tipton, 612 So. 2d 714, 716 (Fla. 2d DCA 1993) (lender filed foreclosure action *15 years* after default; court held statute of limitations did not bar foreclosure claim where mortgage contained optional acceleration and no acceleration occurred until just before suit was filed; (presumably any action of the note would have been time-barred)).

In this instance, plaintiff did not sue on the corporate notes (or the guaranties) for a money judgment; instead it sued only to foreclose the mortgages. R1:1-24. The corporate borrower that signed the notes was not even made a party to the foreclosure action. R1:1-24. Based on the foregoing principles, even if an action on the corporate notes or the Cravero guaranties might have been time-barred, plaintiff's foreclosure action against the Craveros was still viable.

In deciding that the personal mortgages were automatically accelerated when the corporate notes were accelerated in 1995, the lower court either improperly resolved conflicting inferences about the effect of SBA's demand letters (which accelerated the notes but did not mention the mortgages) or it improperly accepted defendants' "automatic acceleration" theory as a matter of law. Since the theory does not hold up under the facts or the applicable legal principles, and since the court could not resolve conflicting fact inferences on summary judgment, the Fourth District's decision reversing that judgment should be affirmed. See, Gomes, 548 So. 2d at 1164 (summary judgment cannot be entered if different inferences can be drawn from same facts); Staniszeski, 550 So. 2d at 20 (every possible inference must be viewed in non-movant's favor).

In support of their argument that the statute of limitations on the note and mortgage must be the same, defendants cite a few distinguishable federal decisions but none support their automatic acceleration theory. For instance, in Smith v. FDIC, 61 F.3d

1552 (11th Cir 1995), the note in question contained an optional acceleration clause.[9] There is no indication in the opinion whether the mortgage also contained a separate acceleration clause. Further, the parties did not argue that the statute of limitations may have accrued at a different time on the note than it did on the mortgage. In fact, in Smith the court held that material issues of fact existed regarding if and when acceleration ever occurred. Id. at 1562-63. Thus, nothing in Smith supports defendants' claim that the statute of limitations on the note and mortgage must be the same and summary judgment was proper.

Furthermore, Smith is not only distinguishable, but it contains an error. Citing Monte and Locke, the Smith court stated "when the *promissory note* secured by the mortgage contains an optional acceleration clause, the statute of limitations begins to run on the date acceleration is invoked." Smith, 61 F.3d at 1161 (emphasis added). What those cases actually say is the statute of limitations begins to run upon acceleration when *the mortgage* contains an optional acceleration clause. Monte, 612 So. 2d at 716; Locke, 509 So. 2d at 1377.

The Harmony Homes, Inc. v. U.S., 936 F. Supp. 907 (M.D. Fla. 1996) case defendants cite is also inapposite. The court there never addressed any argument that the statute of limitations on a note and mortgage must run at the same time where the note and mortgage contain separate acceleration clauses. The Harmony Homes court simply reiterated unobjectionable principles – the statute of limitations begins to run against the mortgage at the time the right to foreclose accrues; and the right to foreclose accrues when the mortgage is accelerated. Id. at 911-12. Rather than answer it, the propositions in Harmony Homes simply beg the question in this case – when were the personal mortgages accelerated?

Not only is plaintiff unaware of any binding authority to support the defendant's automatic mortgage acceleration theory, but authorities in other contexts favor the conclusion that a note and mortgage in the same transaction can be accelerated at different times. For instance, given the teachings of Swanson and Alvarado, since the corporate notes and personal mortgages in this case provide the plaintiff with separate remedies, it should be legally possible for the lender to do what it in fact did here -- accelerate the notes but not the mortgages. Swanson, 25 So. 2d at 209 (action for foreclosure survives time-barred action on debt); Alvarado, 5 F.2d at 1428-29 (action under note and mortgage are separate remedies; mortgagee can foreclose on mortgage securing otherwise unenforceable debt). Although the facts in these cases differ somewhat from those in this matter, the distinguishing features do not change the principles upon which the holdings are based -- that a time-barred debt action does not automatically defeat an action to foreclose the mortgage securing that debt. Given these principles, there is no reason an acceleration of a corporate note should automatically trigger acceleration of a personal mortgage that contains its own distinct acceleration clause.

Cases in other contexts are also instructive. Courts are periodically called upon to evaluate the effect of conflicting note and mortgage acceleration provisions. For example, sometimes a note contains an automatic acceleration provision but the mortgage contains an optional acceleration clause. See, e.g., Loiacono v. Goldberg, 240 A.D.2d 476, 477, 658 N.Y.S.2d 138, 140 (1997). In

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[9] Defendants refer to this as the Grady v. Smith case. Pet. Brf. at 18.

Loiacono, the lender sued to foreclose on the mortgage more than six years after the note default. The borrowers argued the action was time-barred due to the note's automatic acceleration provision. The court held that since the mortgage contained an optional acceleration provision, the recovery of installment payments due within six years of commencing the action were not time-barred. Id. at 477, 658 N.Y.S.2d at 140. See, also, Grier v. MHC Realty Corp., 274 So. 2d 21 (Fla. 4th DCA 1973) (court based commencement of statute of limitations on longer period provided by mortgages' optional acceleration clause rather than shorter period provided by note's automatic acceleration clause); KRC Enterprises, Inc. v. Soderquist, 553 So. 2d 760 (Fla. 2d DCA 1989) (mortgage clause was optional where specified if sums due not promptly paid when due, "the aggregate sum mentioned in said promissory note shall become due and payable forthwith or thereafter at the option of the mortgagee").

By implication, such cases suggest that it is possible to accelerate a note without accelerating the mortgage and the statute of limitations can run on the note and mortgage at different times. This should be especially true here where the personal mortgages did not even directly secure the corporate notes.10 Again, plaintiff does not dispute that the foregoing cases have distinguishing features; the general legal propositions for which they stand, however, are nonetheless instructive. This is especially so since defendants have not cited any relevant any controlling precedent finding acceleration of a corporate note always automatically triggers acceleration of a personal mortgage where the note and mortgage contain separate optional acceleration clauses and only the note was explicitly accelerated.

Given the authorities that treat note and mortgage provisions separately even in the same loan transaction, the trial court erred when it necessarily decided as a matter of law that acceleration of the notes also accelerated the mortgages and started the statute of limitations running in 1995. Since there was no other record evidence that the SBA or plaintiff affirmatively accelerated the mortgages at any time before the complaint was filed in 2001, the trial court should have resolved any inference on the acceleration of the mortgages and the running of the statute of limitations in plaintiff's favor and it erred when it granted defendants summary judgment. As a result, the Fourth District's decision reversing the summary judgment can be affirmed on these grounds.

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[10] In both Grier and KRC, the mortgage acceleration provisions specified that they controlled notwithstanding anything contained in the notes. Grier, 274 So. 2d at 22; KRC, 553 So. 2d at 761. No such language appears in the mortgages here and further the note and mortgage acceleration clauses in this case were both optional and therefore not conflicting. Nonetheless, Grier and KRC provide additional examples of the fact that the statute of limitations can begin to run at different times under the note and mortgage and a mortgage foreclosure claim may begin to accrue at a later date than an action on the note might accrue.

IV. THE FEDERAL GOVERNMENT'S UNLIMITED STATUTE OF LIMITATIONS APPLIES TO THIS ACTION

A. Section 2415's silence regarding assignment of the government's rights requires the court to look to the law of assignments, not the state statute of limitations

As set forth in section II(A) above, plaintiff is entitled to enforce the same rights under the mortgage contracts as its assignor, the SBA. Whether one arrives at this conclusion based on a theory that § 2415(c) constitutes a federal statute of limitations which is *unlimited*, or whether one concludes that there is no federal statute of limitation because the statute is silent, it is a distinction without a difference; the end result is the same. Even assuming that § 2415(c) is not in fact a statute of limitations, defendants' erroneous assumption that the five-year statute of limitations to foreclose a mortgage under Florida law automatically applies because 28 U.S.C. § 2415 is silent as to the statute of limitations applicable to foreclosure actions is contrary to cases which have addressed the issue from a state law perspective. Not one of the decisions defendants cite support their argument. Rather, all of these decisions support plaintiff's position that the state statute of limitations is irrelevant. The fact that Congress has not specifically assigned a time limit in which a foreclosure action must be commenced does not affect the rights of an assignee. The effect of the statutory silence regarding both the effect of the assignment and the appropriate statute of limitations, is the application of state law regarding *assignments*. Defendants erroneously cite Hall, 108 F.3d 46 (4th Cir. 1997), as support for their argument that the state law to be applied is the state statute of limitations, (when in fact it is the state law governing assignments). In Hall, the Fourth Circuit held that the extended statute of limitations under FIRREA applied to an assignee and stated, "we look to state law, . . . to determine the statute of limitations governing the rights of assignees of the RTC . . . [and] in this case, state law happens to bring us by a different path to the same result that the Bledsoe cases reach through application of federal common law." Id. at 50. (emphasis added). In Remington Investments, Inc. v. Kadenacy, 930 F. Supp. 446 (C.D. Cal. 1996) -- a case also erroneously cited by defendants to support their argument that the state statute of limitations applies rather than state law governing assignments, the court held that where the statute is silent the court "should look to state law regarding the rights and benefits that pass to an assignee." Id. at 450-451. The Remington Investments court concluded that under California law, the assignee acquired the extended statute of limitations. Id.

Likewise, in Gerard, 949 P.2d 412, the Washington court analyzed state law relating to assignments and concluded an extended statute of limitations was not a "personal" right and accordingly it transferred to the private assignee. Id. at 416. In Global Financial Services. Inc. v. Duttenhefner, 575 N.W. 2d 667 (N.D. 1998), the North Dakota supreme court also agreed with the reasoning of Gerard and Hall on the law of assignment and concluded that the extended statute of limitations applied to a private assignee. Id. at 671.; accord LR1-A Limited Partnership v. Patterson, Inc., 1997 WL 1146319, *3 (D. N.H. 1997) (court applied New Hampshire's rule regarding assignee rights and not the state statute of limitations). Florida's law on the effect of an assignment similarly requires that an extended statute of limitations applies to plaintiff.

B. An assignee of a mortgage is subject to the extended statute of limitations under the Bledsoe rationale

The overwhelming majority of courts that have examined the issue have concluded that a private assignee acquiring a note

and mortgage from the government by assignment is entitled to enforce the instrument pursuant to the government's extended statute of limitations. The Fourth District is no exception and expressly found persuasive the rationale articulated in Matthias: "We agree with the reasoning of UMLIC, which is on all fours, as well as the cases on which UMLIC was reasoned." Cravero, 851 So. 2d at 698. The Matthias court premised its holding on the rationale of Bledsoe, 989 F.2d 805, 809-11, the seminal case on the issue. Matthias, 234 F. Supp.2d at 525. See, also, Tivoli Ventures, Inc. v. Bumann, 870 P.2d 1244, 1246 (Colo. 1994) ("The right of a private party assignee to seek recovery pursuant to the federal statute of limitations has been upheld by nearly every court that has examined the issue" (collecting cases)); WRH Mortgage Inc. v. Butler, 684 So.2d 325, 327 (Fla. 5th DCA 1996) (court applied federal statute of limitations (12 U.S.C. § 1821) to assignee of mortgage held by RTC rather than state statute of limitations); Cadle Company II, Inc. v. Stamm, 633 So.2d 45, 46 (Fla. 1st DCA 1994) (relying on Bledsoe rationale, court held private assignee from FDIC acquired extended statute of limitation under 12 U.S.C. § 1821). The Bledsoe court based its decision on statutory construction as well as public policy, finding that because 28 U.S.C. § 2415 is silent as to the effect of assignment, it is appropriate to apply the common law principle that an assignee stands in the shoes of the assignor. Bledsoe, 989 F.2d at 809-11. The Bledsoe court also found that under the policy rationale enunciated in D'Oench Duhme & Co. v. FDIC, 315 U.S. 447 (1942), refusing to extend the federal statute of limitations to assignees of the FDIC and FSLIC will "serve only to shrink the private market for the assets of failed banks. It would require the FDIC to hold onto and prosecute all notes for which the state statute of limitations has expired because such obligations would be worthless to anyone else." Id. at 810.

C. The Fourth District was correct in finding *Matthias* persuasive

Defendants advance several arguments in an effort to discredit Bledsoe and it progeny. First, defendants argue that Matthias, found persuasive by the Fourth District, violates public policy because it creates an unreasonable restraint on alienation. Pet. Brf. at 27. The hypothetical scenario supporting defendants' public policy argument -- that such a rule would allow a private assignee to foreclose a mortgage after holding it for 100 years, it is not a scenario at issue here. Plaintiff filed its mortgage foreclosure action four months after acquiring the mortgages from the SBA in May 2001. R1:15, 23-23. Further, equitable principles such as estoppel are always available to a court in a foreclosure action to "alleviate [the] harsh operation" that might result in such extreme cases. State v. Family Bank of Hallandale at 257, 259. There is no logical reason why a government, holding a mortgage for commercial purposes, is entitled to an unlimited statute of limitations, but a private entity acquiring that same mortgage is not. While defendants argue that the government "is presumed to be operating for the benefit of the public" (see, Pet. Brf. at 27), as set forth in section II above, the unlimited statute of limitations applies regardless of the government's purpose in holding the mortgage.

Lastly, defendants' public policy argument that it would be unfair to impose an unlimited statute of limitations in this case "simply because at one time the mortgage was held by a governmental agency" (Pet. Brf. at 27), ignores the facts of this case. Defendants' executed contracts in favor of the SBA and the SBA was entitled to foreclose at any time irrespective of the state statute of limitations. This was the basis of defendants' agreement and there is no prejudice if this contractual right is enforced by another

party. As a matter of public policy, extending the statute of limitations to private assignees does not restrain commerce, as argued by the defendants. Rather, it facilitates and expands the private market for investment in the assets of failed banks, a result supported by the Bledsoe line of cases. Such a policy maintains the value and marketability of commercial paper held by the government because otherwise, private entities would have no incentive to purchase these assets as they could not realize on their investment. Accordingly, public policy favors the position of the plaintiff in this case.

Next, defendants argue that the Fourth District's reliance on Matthias is "misplaced" because unlike Florida law, the Matthias Court "found that there is no concept of separation of the promissory note and the guarantees from the mortgage" and that such a finding "fatally distinguishes Matthias from the instant case." Pet. Brf. at 14. Defendants misconstrue Matthias. In that case, the borrower defended the foreclosure action on the basis that the mortgage was never assigned, claiming that the transfer of the note to the SBA was insufficient to transfer the rights under the personal guaranty and mortgage securing the guaranty. In dispensing with this defense, the court held that no separate assignment of the mortgage was required for the SBA to become the holder of the mortgage because:

> in the Virgin Islands, no separate document specifically assigning and transferring the mortgage which secures a note is required to accompany the assignment of the obligation, because the mortgage automatically follows the note. I found, therefore, that . . . the Mortgages securing their personal guaranty traveled with the Enterprise Note when it was assigned to the SBA. . .

Id. at 523. There is no "fatal distinction" between the facts of Matthias or the law in Florida. Under Florida law a mortgage likewise follows the note. See, Holmes v. Dunning, 133 So. 557 (Fla. 1931). Here there is no dispute that the mortgages were assigned to plaintiff by the SBA. R1:15, 23-24.

D. The Fourth District was correct in finding *Bledsoe* persuasive

Defendants next attempt to discredit Bledsoe by claiming that it only applies to monetary damages, has been "severely questioned," has been undermined by the Supreme Court in O'Melveny & Myers v. FDIC, 512 U.S. 79 (1994), and is irrelevant because it only applies to a receiver under 12 U.S.C § 1821. Pet. Brf. at 28-30.

1. The *Bledsoe* rationale applies equally to an action to collect on a note or an *in rem* action to foreclose a mortgage

Defendants argue that the rationale and holding of Bledsoe, and the multitude of case that have followed it does not apply because Bledsoe involved a private assignee's collection on a note rather than foreclosure of a mortgage. Pet. Brf. at 28. They advance no sound reason for this proposition. If a private assignee of the federal government obtains an extended statute of limitations for enforcing the obligation, it necessarily follows that the assignee obtains the extended period for enforcing the mortgage. Under Florida law, the mortgage follows the underlying debt. See, Dunning, 133 So. at 558. It makes little sense for a private assignee to be able to enforce an obligation it took by assignment from the federal government but cannot foreclose a mortgage securing that obligation.

2. *Bledsoe* is the majority rule and the analysis extends to §2415; *O'Melveny* does not dictate the application of Florida's statute of limitations

Defendants attempt to distinguish the Bledsoe line of cases by arguing that many of them interpret 12 U.S.C. § 1821 and are therefore irrelevant.[11] Pet. Brf. at 34. Again, they offer no sound reason why the cases addressing the effect of an assignment of the federal government's rights under FIRREA, do not equally apply under § 2415. As noted in Section IIB, one court has found that language in FIRREA might limit the application of the extended statute of limitations to the RTC in its capacity of a receiver. See, Wamco 856 F. Supp. at 1086. While the Wamco analysis has since been rejected, if anything, §2415 is broader than

[11] Defendants also attempt to distinguish Thornburg, 82 F.3d 886, which held that the SBA had an extended statute of limitations under § 2415 when it acquired a note and mortgage by assignment from a private Bank for collection. Id. at 891. Defendants suggest that the holding, following Bledsoe, is limited to assignments made for collection purposes only and reaffirms that only a sovereign is entitled to the extended statute of limitations. Pet. Brf. at 26. On the contrary, the 9th circuit stated an assignment for collection purposes simply presents an "*even more compelling* situation for the application of the common law rule than the factual predicate for the Bledsoe line of cases." Thornburg, 82 F.3d at 891 (emphasis added).

FIRREA with respect to the rights of an assignee. There is no language in § 2415 which would limit its application to a particular holder. Defendants have not advanced any basis to differentiate the analysis relating to the effect of an assignment under FIRREA or § 2415. Each of the cases interpreting FIRREA are germane to the analysis here. The majority view expressed by the cases following Bledsoe, whether interpreting § 2415 or § 1821, support the conclusion that plaintiff acquired the mortgages with the same defenses available to the SBA. See, section IVB and cases cited therein.

Lastly, defendants' claim that O'Melveny undermines Bledsoe. Pet. Brf. at 29. Even if true, this does not result in the application of Florida's five-year statute of limitations. As set forth in section IV(A) above, cases which have addressed the issue from a state law perspective, have found that the extended statute of limitations applies to the assignee of the federal government regardless of whether Bledsoe relied on *federal* common law and public policy arguments. The end result is the same despite the Supreme Court's decision in O'Melveny cautioning against public policy arguments because state law on the law of assignments applies. See, Global Financial, 575 N.W. at 671 ("We agree with the interpretation of the Hall and Gerard courts about the impact of O'Melveny on the question whether an assignee of the RTC is entitled to the benefit of the federal statute of limitations. Accordingly, we look to our state law to decide the question in this case. We need go no further than the North Dakota law of assignment for the answer").

V. THERE IS NO REQUIREMENT OR NEED TO ENGAGE IN A PREEMPTION ANALYSIS BEFORE CONCLUDING THAT AN EXTENDED STATUTE OF LIMITATIONS APPLIES

As set forth in section IV, above, regardless of whether § 2415(c) constitutes an express statute of limitations (i.e. unlimited), which directly conflicts with Florida's five-year statute of limitations, or whether §2415(c) is silent on the issue, the result is the same. If there is in fact no federal statute expressly providing for an unlimited statute of limitations, the statute's silence only means that the court is required to look to Florida law to fill in the gaps. A review of Florida common law governing the assignment of contracts and Florida statutory law under § 701.01, Fla. Stat., specifically governing the assignment of a mortgage, leads to the same conclusion. The assignees' rights are identical to the rights held by the assignor. The SBA could have foreclosed the mortgages in 2002 and accordingly, plaintiff's commencement of a mortgage foreclosure is not time barred either. Defendants, however, theorize that the Fourth District was required to engage in a preemption analysis before arriving at this inevitable conclusion. Pet. Brf. at 36.

If one follows this "preemption requirement" theory to its logical conclusion, however, it fails. Because real estate is by necessity located in a state and because all states have statute of limitations governing foreclosure, such a theory would mean that, absent a finding that § 2415(c) is an express unlimited statute of limitations creating a direct conflict with Florida's five-year statute of limitations, the state statute of limitations would always control. Defendants have cited no authority for this proposition. Rather, they claim that WRH requires a preemption analysis prior to concluding that the extended statute of limitations applies. Pet. Brf. at 36. In WRH, as in Cravero, the court held that the private assignee of a mortgage originally given to the Resolution Trust Corporation (deemed an agent of the United States when acting as a receiver of a failed financial institution) was not subject to

Florida's five-year statute of limitations in which to commence its foreclosure action. In so holding, the WRH court concluded that 12 U.S.C. § 1821 preempts § 95.281, Fla. Stat. Id. at 328-329. Defendants reason that the Fourth District's silence on any preemption analysis renders it suspect and creates a conflict sufficient to invoke this court's jurisdiction.[12] Pet. Brf. at 37-38.

The reason that the Fourth District did not engage in a preemption analysis is that such an analysis was not necessary to its holding. In WRH, the court interpreted 12 U.S.C. § 1821(d)(14)(a) which provides in relevant part: "[T]he

[12] Florida's constitution requires that conflict jurisdiction be predicated on a "direct" and "express" conflict, which cannot occur when a court is silent on an issue. There is no conflict with WRH and it is appropriate to dismiss the petition. See, n.2 *supra*.

applicable statute of limitations with regard to any action brought by the Corporation . . . shall be . . . the longer of . . . six-year period beginning on the date the claim accrues; or . . . the period applicable under State law." Id. Thus, the federal statute in question in WRH expressly directs that the *statute of limitations* under state law applies if the period is longer than the period allowed under the federal statute. Significant here, the trial court in WRH had reasoned that the mortgage foreclosure action was barred by § 95.281, Fla. Stat., which it characterized as a statute of repose and *not* a statute of limitations which is expressly preempted by the federal statute. WRH, 684 So. 2d at 325. The trial court apparently concluded that the federal statute would only preempt a state statute of limitations. Id. at 326. The Fifth District in WRH, however, noted that it was not necessary to categorize Florida's statute as a statute of repose or a statute of limitations because "regardless of the designation given the statute, the provisions of the statute are preempted by 12 U.S.C. § 1821." Id. In sum, the only reason that the WRH court analyzed preemption principles at all is because the trial court had misapplied the law relating to preemption. WRH did not, as defendants suggest, hold that a preemption analysis is required each time a court determines whether a state or federal statute of limitations applies to foreclosure actions. Pet. Brf. at 36-37.

The statute at issue in Cravero (28 U.S.C. § 2415(c)) does not require the court to look at the applicable statute of limitations under state law and compare it to federal law and then choose the longer of the two. Consistent with this, the scope of the preemption doctrine was not the basis of the trial court's decision in Cravero and accordingly was not an issue addressed by the Fourth District. The federal government can foreclose a mortgage irrespective of the statute of limitations for such actions applicable within the state in which the property is located, and the Fourth District was not required to analyze the issue again.

VI. PLAINTIFF CAN FORECLOSE THE MORTGAGES EVEN IF SUIT ON THE CORPORATE NOTES IS TIME-BARRED SO FLORIDA LAW HAS NO EFFECT ON APPLICATION OF THE FEDERAL STATUTE OF LIMITATIONS

Defendants claim the federal statute of limitations is inapplicable where there is no remedy available to plaintiff under Florida law, citing Dove. Pet. Brf. at 39. Yet the Dove court simply held that a borrower's expired affirmative defense of recission under the Truth in Lending Act ("TILA") could not be brought as a recoupment defense after the statute of limitations on the recission claim had expired. Id. at 588. This was because the Florida Supreme Court so held based on the principle that "where a right and remedy are created by the same statute, the limitations of the remedy are treated as limitations of the right." Id. This mortgage foreclosure case does not involve rights and remedies created by TILA or any other statute and thus Dove has no application here on this point.

Even if it was supported, defendants' argument that application of a federal statute of limitations depends upon the viability of the state law action does not help them here. According to defendants, the guaranties are unenforceable and therefore plaintiff has no remedy upon which a federal statute of limitations could be applied. Pet. Brf. at 39. In support, defendants repeat their argument, made for the first time before the Fourth District, that their guaranties do not purport to be collateral for the indebtedness, only the notes. Pet. Ans. Brf. in the 4th DCA at p.19; Pet. Brf. at 40. This is not even accurate since the guaranties "unconditionally

guarantee[] to Lender, its successors and assigns, the due and punctual payment when due . . . of the principal of and interest on and all other sums payable, or stated to be payable, with respect to the note of the debtor." R1:122, 124. Thus, the guaranties guaranteed payment of the indebtedness -- the principal, interest and other sums payable -- as reflected in the corporate notes.

In any event, this is a distinction without a difference. Defendants claim the Alvarado and Monte cases upon which plaintiff relies "have not examined the critical distinction between collateral of the indebtedness and collateral of the guaranty of the time-barred note." Pet. Brf. at 42, n.19. Although the cases plaintiff relies on did not involve guaranties, their controlling legal principle -- that a lender can sue to foreclose a mortgage even if suit on the underlying notes is time-barred -- should apply here with greater force since the mortgages plaintiff seeks to foreclose are one-step removed from the time-barred notes. See, *supra*, at section III above. Moreover, defendants cite no cases examining this so-called critical distinction, if it even exists.

Defendants also are simply wrong when they contend "the guarantors' legal liability under the Guarantees does not extend beyond the Notes. If there is not an action on the Notes, then there is no claim available on the Guarantees." Pet. Brf. at 41. To the contrary, as discussed in section III above, the guaranties here were unconditional; the lender could seek repayment of the debt due under corporate notes from the guarantors even if it did not exhaust any remedies against the corporate borrower and even if the notes are invalid for any reason. R1:122-24. As such, even if the notes are unenforceable or invalid because an action on them is time-barred, the lender still had a right to sue under the guaranties or to foreclose the mortgages securing those guaranties because they contain different remedies which the lender did not seek to enforce until suit was filed in 2001.

Defendants further make the circular argument that any suit on the notes or guaranties is barred by 28 U.S.C. § 2415(a), so "no basis exists to foreclose the Mortgages, which are collateral only of the Guarantees." Pet. Brf. at 43. This argument relies upon defendants' premise that the mortgages are unenforceable under Florida law, and therefore federal law prohibits any revival of the cause of action. Yet the mortgages are enforceable under Florida law, as discussed in section III *supra*, so application of 28 U.S.C. § 2415(a) gets defendants nowhere. Defendants' circular argument also depends upon their mistaken mantra -- that "the Guaranties . . . stated that they would pay the Notes, not the underlying obligation, and not the indebtedness." Pet. Brf. at 44. But again defendants misread the guaranties' language which specify defendants are obligated to pay the principle, interest and other amounts due as referenced in the notes (R1:122, 124) -- this is a promise to pay the amounts due under the corporate notes, not a promise to pay only the notes (whatever that might mean). There is no evidence that the parties intended defendants' tortured and restrictive interpretation of the guaranty obligations and the instruments' language does not support it. Rather, under the documents even if the lender can no longer pursue the Craveros personally under the notes or guaranties, the Craveros through their business borrowed thousands of dollars and if they cannot or will not pay it back, the mortgages permit the lender to pursue the collateral they pledged.

Since plaintiff brought its mortgage foreclosure action within five years of its acceleration of the mortgages, the action was timely under Florida law and the trial court erred in entering summary judgment for defendants. The Fourth District's reversal of that erroneous summary judgment can be affirmed on state law grounds.

VII. STATUTORY LACHES IS INAPPLICABLE AND THE RECORD CONTAINS NO EVIDENCE SUFFICIENT TO AFFIRM THE JUDGMENT BASED ON COMMON LAW LACHES

Although the trial court did not base its decision on statutory laches, defendants apparently claim this is an alternative basis to set aside the Fourth District's reversal of summary judgment, citing § 95.11(6), Fla. Stat. (2002). Pet. Brf. at 22. Under that statute laches bars an action unless it is commenced within the same time provided for legal actions. § 95.11(6), Fla. Stat. (2002). As argued above, the statute of limitations in this action has not yet expired so statutory laches is inapplicable. See, Gevertz v. Gervertz, 566 So. 2d 541, 543 n.5 (Fla. 3d DCA 1990) (laches does not come into play until the statute of limitations has expired).

Further, defendants never pled common law laches, which could be used in an appropriate case to bar an action before the statute of limitations expires. R1:80-81. Had it been pled, defendants would have had the burden to show, by very clear and positive evidence, their lack of knowledge that plaintiff would pursue the mortgages, Smith v. Branch, 391 So. 2d 797, 798 (Fla. 2d DCA 1980), and undue prejudice as a result of the delay, Appalachian, Inc. v. Olsen, 468 So. 2d 266, 269 (Fla. 2d DCA 1985). Defendants cite no record evidence to support such a defense so the erroneous summary judgment cannot be affirmed on the alternative basis of either common law or statutory laches.

Although plaintiff made these same arguments against laches in the briefs before the Fourth District Court of Appeal, defendants have not addressed those arguments here by explaining how this defense was pled or proven or why laches applies when an action is timely-brought under the applicable statute of limitations.

VIII. PLAINTIFF WAS NOT REQUIRED TO REGISTER WITH THE FLORIDA DEPARTMENT OF STATE AND FOURTH DISTRICT'S REVERSAL OF SUMMARY JUDGMENT CANNOT BE REVERSED ON THIS ALTERNATIVE BASIS

In a final attempt to justify the trial court's decision, defendants contend plaintiff's foreclosure action was barred because it was not registered to do business in Florida. Pet. Brf. at 46. The trial court already rejected this argument, and properly so. R2:4. Plaintiff was only required to register with the Department of State if it was "doing business" in Florida. §§ 620.9101-.9105, Fla. Stat. (2003). In this instance plaintiff is not doing business in Florida and defendants point to no evidence to the contrary; they just insist that bringing a foreclosure action is "doing business." Pet. Brf. at 46. Yet defendants cite no legal authority that suggests suing to foreclose a mortgage causes plaintiff to be in the business of buying or selling real estate or that it constitutes transacting business in Florida. To the contrary, just as foreign corporations suing to foreclose mortgage interests in the state are not "transacting business" in Florida, neither are foreign partnerships. See, § 607.1501(2)(h), Fla. Stat. (2003) (enforcing mortgages and security interests is not "transacting business" under foreign corporation registration statute); § 620.9104(h), Fla. Stat. (2003) (foreign limited liability partnership's foreclosing mortgages is not "transacting business" within meaning of §§ 620.9101-.9105, Fla. Stat. (requiring filing of statement of qualification before transacting business in State)). Although defendants contend "LPP has admitted to conducting business in Florida without being registered with the Florida Department of State" (Pet. Brf. at 46) this is not even accurate. Plaintiff did not admit it was conducting business in Florida; instead it admitted only that it "has not registered as a foreign limited partnership with the Florida Department of State." (R.1:117-119 (request number 12). Since plaintiff was not obligated to register in order to bring its foreclosure action, this admission is irrelevant and does not help defendants' argument.

Moreover, plaintiff's failure to register to do business, even if required, does not affect the validity of the mortgages. § 620.179(3), Fla. Stat. (2003) (failure of foreign limited liability partnership to register does not impair validity of any mortgage); § 620.9103(2), Fla. Stat. (2003) (failure of foreign limited liability partnership to file statement does not affect validity of any contract). Thus, even if defendants had established this defense, at most it would have required a stay of the proceedings pending plaintiff's registration, not the entry of judgment in defendants' favor. C.f., § 607.1502(3), Fla. Stat. (2003) (court can stay proceedings to determine if foreign corporation required to register and pending registration). Accordingly, this argument does not present an alternative basis to set aside the Fourth District's reversal of the erroneous summary judgment.

CONCLUSION

This appeal should be dismissed for lack of jurisdiction or the Fourth District Court of Appeal's decision should be affirmed.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Initial Brief has been served via First Class U.S. Mail this _____day of April, 2004, upon E. Scott Golden, and Donielle Mason, 644 S.E. Fourth Avenue, Ft. Lauderdale, FL 33301, attorneys for Vincent and Dorothy Cravero.

_____
Anne S. Mason

CERTIFICATE OF COMPLIANCE WITH RULE 9.210(a)(2)

I hereby certify that the font type and size used in this brief is Times New Roman 14 point and that this complies with Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

_____
Anne S. Mason

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