IN THE SECOND DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA

Case No. 2D14-2610
Lower Court Case No. CA-13-783

WILLIAM W. HOWELL and
JULIE ANN HOWELL,

Appellants,

vs.

SUNTRUST BANK;
MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC.;
MERSCORP, INC.;
and U.S. BANK, NATIONAL ASSOCIATION,

Appellees.

ON APPEAL FROM THE CIRCUIT COURT OF THE TWELFTH
JUDICIAL CIRCUIT IN AND FOR SARASOTA COUNTY

APPELLEES' ANSWER BRIEF

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PRELIMINARY STATEMENT

In this Answer Brief, the Appellants, William W. Howell and Julie Ann Howell, will be referred to as "Appellants." Appellees, SunTrust Bank, Mortgage Electronic Registration Systems, Inc., MERSCORP, Inc., and U.S. Bank, National Association, will be referred to collectively as "Appellees." The following symbols will be used to refer to the record on appeal:

Portions of the Appellants' Initial Brief will be cited as (I.B. at ___).

Documents contained in the Record on Appeal will be cited as (R. at ___).

STATEMENT OF THE ISSUES ON APPEAL

Although Appellants assert that there are three issues on appeal, (I.B. at 7–8), in reality, there is a single issue on appeal. That issue is simply whether the trial court correctly held that the Appellants' Complaint failed to state a cause of action, which as noted below, is a pure issue of law to be decided by this Court. Appellants identify as two additional issues: (1) whether the statute of limitations found in § 95.11(2)(c) extinguishes the mortgage debt at issue after a prior foreclosure action accelerating the debt was dismissed; and (2) whether a dismissal of a prior foreclosure action, not on the merits, affects the statute of limitations analysis. These purported issues on appeal, however, are merely subparts of the Appellants' argument that their Complaint stated a cause of action.

STATEMENT OF FACTS

This appeal arises from the trial court's Order dismissing the Appellants' Complaint for failure to state a cause of action (the "Dismissal Order"). (R. at 73–74, 138). The Complaint filed by the Appellants in this matter purported to state two causes of action, one for Quiet Title and one for Declaratory Judgment. (R. at 3–56). The Complaint sought to invalidate two mortgages held on the Appellants' property (the "Property"). Specifically, the Appellants' Complaint sought to invalidate the Mortgage recorded in the Official Records of Sarasota County at Instrument # 2007053665, and the related Assignment of Mortgage recorded at Instrument # 2011068049 (the "First Mortgage"). (R. at 10, 12). Appellants also sought to quiet title to the Property free and clear of the Mortgage recorded at Instrument # 2006064560, the Modification of Security Agreement recorded at Instrument # 2007053662, and the Subordination Agreement recorded at Instrument #2007053663 (the "Second Mortgage") (collectively the "Mortgages"). (R. at 10, 12).

In support of their claims, Appellants' Complaint alleged that the First Mortgage was accelerated on February 14, 2008, through the filing of a prior mortgage foreclosure action under Case No. 2008 CA 002478 in Sarasota County,

Florida (the "Foreclosure Action"). (R. at 13).[1] Appellants then alleged that, because the First Mortgage was accelerated more than five years before the initiation of this lawsuit, the five-year statute of limitations under Fla. Stat. § 95.11(2)(c) bars the enforcement of the First Mortgage. (R. at 12, 14). Notably, Appellants do not allege that any acceleration ever occurred with respect to the Second Mortgage, but nonetheless asks that title be quieted and the Second Mortgage.

On January 17, 2014, the Appellees filed their Motion to Dismiss Plaintiffs' Complaint with Prejudice (the "Motion to Dismiss"), which demonstrated that the statute of limitations contained in Fla. Stat. § 95.11(2)(c) did not act to bar the enforcement of either of the Mortgages in any subsequent suit. On February 20, 2014, a hearing was held on the Appellees' Motion to Dismiss before Magistrate Deborah Bailey. (R. at. 71–72). At that hearing, Appellants advanced the argument that the Mortgages were invalid because of a prior acceleration and dismissal in the Foreclosure Action, which occurred more than five years prior to the time the Appellants filed their Complaint. (R. at 97). Magistrate Bailey, however, finding no legal merit in the Appellants' position, recommended that the

[1] Although Appellants argued to the trial court below, and continue to argue to this Court that the dismissal of the Foreclosure Action was based upon a lack of prosecution, the Complaint does not state how the prior foreclosure action was dismissed, or even that the prior action was dismissed at all. Furthermore, the record is devoid of any indication that the Foreclosure Action was dismissed for lack of prosecution, other than the bald representations of Appellants' counsel.

Complaint be dismissed with prejudice (the "Recommended Order"). (R. at 73–74).

On March 3, 2014, the Appellants filed their Exceptions to the Recommended Order the Magistrate Entered on February 20, 2014 (the "Exceptions"). After the filing of the Exceptions, the Fifth District Court of Appeal decided the case of *U.S. National Bank Association v. Bartram*, 140 So. 3d 1007 (Fla. 5th DCA 2014), which addressed the exact causes of action raised by the Appellants in their Complaint. Accordingly, on April 29, 2014, Appellees filed a Supplemental Memorandum of Law in Support of the Motion to Dismiss with Prejudice (the "Supplemental Memo"), which apprised the lower court of the additional developments in the case law. (R. at 123–131).

Appellants responded to the Supplemental Memo on May 17, 2014, and the Exceptions were called up for hearing before Judge Kimberly Bonner on May 20, 2014. (R. at 132–136, 137). At this hearing, the Appellants sought to distinguish the *Bartram* decision based upon the fact that the instant matter involved a dismissal for lack of prosecution,[2] while *Bartram* involved a dismissal on the merits. Judge Bonner, however, rejected the Appellants' arguments and overruled the Exceptions to Magistrate Bailey's Recommended Order, and Judge Bonner adopting the Recommended Order the following day. (R. at 138).

[2] Again, this fact is not alleged in the Complaint.

On May 29, 2014, the Appellants filed a Notice of Appeal. (R. at 139–141).

SUMMARY OF ARGUMENT

Appellants' Initial Brief first argues that the acceleration of the note underlying the First Mortgage, followed by the running of the five-year statute of limitations for mortgage foreclosures, bars enforcement of the Mortgages in any subsequent action by Appellees. This argument, however, is against the great weight of the case law on this issue, which specifically holds that each event of default under the terms of a note and mortgage represents a new opportunity to accelerate the balance due and owing and a new opportunity to file a foreclosure action. In fact, each court to have addressed the issue has rejected the Appellants' position that the acceleration of a debt, through the filing of a foreclosure action, bars any subsequent action more than five years later based upon different defaults. Thus, the Appellants' arguments are unsupportable, and the trial court's Dismissal Order should be affirmed.

Next, Appellants attempt to distinguish the numerous cases decided against them by pointing out that the prior Foreclosure Action in this matter was dismissed for lack of prosecution, which did not operate as an adjudication on the merits. Despite this contention, as shown below, courts have uniformly applied the same logic in dismissing quiet title complaints based upon the five-year statute of limitations in Fla. Stat. §95.11(2)(c), regardless of whether the dismissal of the

prior foreclosure action occurred on the merits or not. Thus, the distinction raised by Appellants has already been rejected by courts considering the issue.

Finally, Appellants argue that the Mortgages are extinguished by virtue of Fla. Stat. § 95.281(1)(a), which sets forth a statute of repose for the enforcement of liens, including mortgages. As noted below, however, the time periods set forth in Fla. Stat. § 95.281 for the calculation of the statute of repose are unaffected by the acceleration of the amounts due and owing on the notes underlying the Mortgages, and the Appellants have failed to cite to a single case that would suggest that acceleration advances the date of accrual of the statute of repose.

The Appellants have therefore failed to demonstrate that their Complaint stated a cause of action. Because the Appellants have not shown any error in the trial court's Dismissal Order, the lower should be affirmed.

ARGUMENT

A. Standard of Review

The sole issue before the Court in this appeal is whether the lower court properly dismissed the Appellants' Complaint. "Whether a complaint should be dismissed is a question of law." *Knox v. Adventist Health Sys./Sunbelt, Inc.*, 817 So. 2d 961, 962 (Fla. 5th DCA 2002). "The de novo standard of review is applied when considering an order granting a motion to dismiss." *Mazer v. Orange Cnty.*, 811 So. 2d 857, 859 (Fla. 5th DCA 2002). When considering a motion to dismiss,

the trial court is confined to the four corners of the complaint. Fla. R. Civ. P. 1.140(b)(6); *Fresh Capital Fin. Servs., Inc. v. Bridgeport Capital Servs., Inc*. 891 So. 2d 1142 (Fla. 4th DCA 2005). The facts alleged must be accepted as true, and all reasonable inferences must be drawn in favor of the pleader. *Id*. at 1445. Moreover, Florida Rule of Civil Procedure 1.110(b)(2) requires that Appellants make "a short and plain statement of the ultimate facts showing that the pleader is entitled to relief." *Clark v. Boeing Co.*, 395 So. 2d 1126, 1229 (Fla. 3d DCA 1981). Pleadings must contain ultimate facts supporting each element of the cause of action—simple conclusions are insufficient. *Id.*

Furthermore, Florida is a fact-pleading jurisdiction. *See Continental Baking Co. v. Vincent*, 634 So. 2d 242 (Fla. 5th DCA 1994) ("Florida's pleading rule forces counsel to recognize the elements of their cause of action and determine whether they have or can develop the facts necessary to support it, which avoids a great deal of wasted expense to the litigants and unnecessary judicial effort."). A party does not properly plead a cause of action by alleging conclusions of law that merely track the language of the statute and lack factual allegations. *See Ginsberg v. Lennar Fla. Holdings, Inc.*, 645 So. 2d 490, 501 (Fla. 3d DCA 1994).

Additionally, exhibits "attached to a pleading shall be considered a part thereof for all purposes." Fla. R. Civ. P. 1.130(b). "[W]hen considering a motion to dismiss, a trial court is required to consider any exhibit attached to, or

incorporated in the pleading." *Bott v. City of Marathon*, 949 So. 2d 295, 296 (Fla. 3d DCA 2007). "[I]f an attached document negates the pleader's cause of action or defense, the plain language of the document will control and may be the basis for a motion to dismiss. *Health Application Sys., Inc. v. Hartford Life & Acc. Ins. Co.*, 381 So. 2d 294, 297 (Fla. 1st DCA 1980).

B. The Mortgages Are Not Invalidated by the Five-Year Statute of Limitations in Fla. Stat. § 95.11(2)(c).

1. *Appellants Fail to Allege any Prior Acceleration by SunTrust Bank with Regard to the Second Mortgage.*

As an initial matter, it is important to note that Appellants entire Initial Brief is dedicated to the argument that the First Mortgage on the Property is somehow unenforceable due to a prior acceleration of the mortgage debt underlying the First Mortgage and the subsequent passing of five years. (I.B. at 12). This was also the sole theory advanced by the Appellants at the trial court in support of their causes of action against the Appellees. (R. at 90). Importantly, however, the Appellants do not allege in their Complaint that the debt underlying the Second Mortgage was ever accelerated. Instead, other than alleging that SunTrust may claim an interest in the Property by virtue of the Second Mortgage, Appellants fail to allege a single fact that would tend to support the notion that the Second Mortgage is invalid.

Therefore, it cannot be disputed that the trial court's Dismissal Order should be affirmed as against SunTrust for failure to state a cause of action relative to the

Second Mortgage. Nonetheless, even if Appellants had alleged facts in their Complaint regarding the Second Mortgage or acceleration of the debt underlying the Second Mortgage, for the reasons stated below, the Appellants' Complaint would still be subject to dismissal with prejudice.

2. *Fla. Stat. § 95.11(2)(c) Has No Effect on the Appellees' Ability to Bring a Foreclosure Action Based upon Subsequent Defaults.*

In their Initial Brief, Appellants first argue that the Mortgages should be invalidated based on the fact that more than five years has passed since a default and acceleration was initially declared on their mortgage debt. *See* I.B. at 12. Every Florida court to have addressed this argument, however, has expressly rejected the Appellants' argument.

In *U.S. Bank Nat'l Ass'n v. Bartram*, 140 So. 3d 1007, 1014 (Fla. 5th DCA 2014), the Fifth District Court of Appeal rejected the exact position taken by the Appellants in this matter. In *Bartram* the borrower was the subject of a 2006 foreclosure suit, which was later dismissed due to the failure of counsel for the plaintiff to attend a court-ordered case management conference. *Id.* at 1109. It was undisputed that the plaintiff accelerated the total amount due and owing in the 2006 foreclosure suit. After five years had passed from the filing of the initial foreclosure action, the borrower filed a two-count lawsuit against the bank seeking quiet title and declaratory relief. *Id.* The trial court granted summary judgment in favor of the borrower on these claims and nullified the mortgage. *Id.*

On appeal, however, the Fifth District reversed the lower court, and in doing so, rejected the same position advanced by the Appellants. *Id.* at 1014. Specifically, the Fifth District stated:

> Based on *Singleton,* a default occurring after a failed foreclosure attempt creates a new cause of action for statute of limitations purposes, even where acceleration had been triggered and the first case was dismissed on its merits. Therefore, we conclude that ***a foreclosure action for default in payments occurring after the order of dismissal in the first foreclosure action is not barred by the statute of limitations found in section 95.11(2)(c), Florida Statutes,*** provided the subsequent foreclosure action on the subsequent defaults is brought within the limitations period.

Id. (Emphasis added).

The court in *Bartram* began its analysis by examining *Singleton v. Greymar Associates*, 882 So. 2d 1004 (Fla. 2004), in which the Florida Supreme Court held that "dismissal with prejudice in a mortgage foreclosure action does not necessarily bar, on res judicata grounds, a subsequent foreclosure action on the same mortgage even if the mortgagee accelerated the note in the first suit." *Id.* at 1010. In quoting *Singleton*, the court also noted that "the subsequent and separate alleged default created a new and independent right in the mortgagee to accelerate payment on the note in a subsequent foreclosure action." *Id.* at 1012. The Fifth District further rejected the borrowers' reliance on any case law that pre-dated *Singleton*, finding that "that the cases cited by Bartram and the HOA pre-date *Singleton* and, therefore, are not controlling." *Id.* at 1010. Thus, because each event of default

under the note and mortgage created a new right in the mortgagee to accelerate and foreclose, the *Bartram* court held that "a foreclosure action for default in payments occurring after the order of dismissal in the first foreclosure action is not barred by the statute of limitations found in section 95.11(2)(c), Florida Statutes, provided the subsequent foreclosure action on the subsequent defaults is brought within the limitations period." *Id.*

Most recently, in *Evergrene Partners, Inc. v. Citibank, N.A.*, 143 So. 3d 954 (Fla. 4th DCA 2014), *reh'g denied*, (Aug. 27, 2014), the Fourth District Court of Appeal expressly agreed with and adopted the holding in *Bartram*. In *Evergrene*, the borrowers executed a promissory note and mortgage in 2006, which were later acquired by Citibank. *Id.* at 955. After the borrowers defaulted on their payment obligations, Citibank filed a mortgage foreclosure action in August of 2007, which accelerated the payments due under the note. *Id.* Later, in May 2012, Citibank voluntarily dismissed the foreclosure case. *Id.* The borrowers then transferred the property to the plaintiff, Evergrene Partners, which filed an action for cancellation of the mortgage based solely on the grounds that "the five-year statute of limitations had run on their enforcement; therefore, as the mortgages were no longer enforceable, they became a could on Evergrene's title." *Id.* The trial court, however, dismissed the case for failure to state a cause of action, and the plaintiff appealed. *Id.*

On appeal, the Fourth District, affirmed the trial court's dismissal of the action, and in doing so, expressly relied upon *Bartram* in finding that the subsequent foreclosure suit was not barred by the statute of limitations where acceleration initially occurred more than five years prior. *Id.* at 956. Consequently, the court held that "the claims of acceleration and subsequent acts of default have never been adjudicated on their merits in this case, and any acts of default still within the statute of limitations may be raised in a subsequent suit." *Id.*

Additionally, the United States District Courts in Florida have issued several opinions reaching holdings that are identical to those reached *Bartram* and *Evergrene Partners*. For example, in *Romero v. SunTrust Mortgage, Inc.*, 1:13-CV-24491-UU, 2014 WL 1623703 (S.D. Fla. Apr. 22, 2014), the court held that the statute of limitations did not invalidate a mortgage in situations "such as the current action where (1) the note is secured by a mortgage on a subject property; (2) the party who has exercised its right to accelerate brings a cause of action to enforce the note or foreclose on the mortgage; and (3) that cause of action is dismissed for any reason." Likewise, in *Dorta v. Wilmington Trust Nat'l Ass'n*, 5:13-CV-185-OC-10PRL, 2014 WL 1152917 (M.D. Fla. Mar. 24, 2014), the Middle District of Florida held that "it is clear that Wilmington has not lost its right to enforce the Note and the Mortgage (and in turn neither document is invalid)

simply because its first foreclosure action was dismissed." *Id.* at *6. *Dorta* also held that "[b]ecause Ms. Dorta has failed to properly allege that the December 21, 2007 foreclosure action invalidates the Note and the Mortgage and bars any future attempts to enforce both, she has failed to properly allege a cloud to her title on the Subject Property. *Id.* at *7. Thus, the court in *Dorta* dismissed the plaintiffs' claims for quiet title with prejudice. *Id.*

Other federal courts are in agreement, and have unanimously dismissed ***with prejudice*** quiet title and declaratory judgment complaints seeking to invalidate a mortgage based upon a prior acceleration and running of the statute of limitations under Fla. Stat. § 95.11(2)(c). *See*, *e.g.*, *Rodriguez v. Bank of Am., N.A.*, 13-CIV-23980, 2014 WL 4851777 (S.D. Fla. Sept. 30, 2014) (dismissal with prejudice); *Smathers v. Nationstar Mortg., LLC*, 5:14-CV-415-OC-30PRL, 2014 WL 4639136 (M.D. Fla. Sept. 16, 2014) (same); *Diaz v. Deutsche Bank Nat'l Trust Co.*, 14-22583-CIV, 2014 WL 4351411 (S.D. Fla. Sept. 2, 2014) (same); *Espinoza v. Countrywide Home Loans Servicing, L.P.*, 14-20756-CIV, 2014 WL 3845795 (S.D. Fla. Aug. 5, 2014) (same); *Verdecia v. Bank of New York as Tr. for Certificate Holders CWABS, Inc.*, 13-62035-CIV, 2014 WL 3767668 (S.D. Fla. July 31, 2014) ("For the reasons stated in *Kaan*, *Dorta*, *Bartram*, and *Evergrene Partners*, this Court concludes that the note and mortgage on Plaintiffs' property are not unenforceable, and thus Plaintiffs fail to state a claim to quiet title.").

The Appellants' Complaint in this matter contains allegations that are identical to those raised by the plaintiffs in *Bartram* and *Evergrene Partners*, and the federal courts that have considered similar matters. In their Complaint, Appellants alleged that "U.S. Bank, or its predecessor in interest, accelerated the amounts due under the terms of the Mortgage and related Note at a time no later than February 14, 2008 when U.S. Bank's predecessor in interest filed a foreclosure lawsuit in Sarasota County . . . ." (R. at 7–8, at ¶ 21). Appellants' Complaint further claimed that, as a result of this acceleration, "Defendants' interests in the Property by virtue of the recorded Mortgages are no longer enforceable and are time barred under Florida Statute § 95.11(2)(c)." (R. at 7, at ¶ 19). Based on these allegations, Appellants asserted claims against the SunTrust, U.S. Bank, and MERS for both Quiet Title and Declaratory Judgment, and sought to invalidate the Mortgages held on the Property. (R. at 10).

These allegations and causes of action, however, are identical to the allegations expressly rejected in both *Bartram* and *Evergrene Partners*. As those cases held, the prior acceleration of the Appellants' First Mortgage by U.S. Bank's predecessor in interest through the filing of a foreclosure action, followed by the subsequent dismissal of that action, does not operate to bar any subsequent

foreclosure action based upon a default occurring within the limitations period.[3] As noted in *Bartram*, each and every missed monthly payment by the Appellants constitutes a separate event of default and grants the Appellees a new opportunity to accelerate the balance due and file a foreclosure action. *See* 140 So. 3d at 1014. Thus, the fact that the balance of the First Mortgage was previously accelerated has not effect at all on Appellees' right to accelerate and institute a new foreclosure action, as long as the new acceleration and foreclosure are based upon a default occurring within the five-year limitations period.

Because the Mortgages may be enforced against the Appellants' for any defaults occurring within the limitations period, Appellants' Complaint does not state a valid basis for quieting title to the Property, or for seeking a declaratory judgment. Therefore, the trial court correctly dismissed the Appellants' Complaint with prejudice.

3. *Whether the Prior Dismissal of a Foreclosure Suit Was a Dismissal on the Merits Is Irrelevant*.

Appellants next assert that, because the dismissal in the prior Foreclosure Action was a dismissal for lack of prosecution under Florida Rule of Civil Procedure 1.420(e), which is not a dismissal on the merits, the instant case is

[3] As noted previously, the Appellants' Complaint does not contain any allegation whatsoever that an acceleration occurred on the Second Mortgage held by SunTrust Bank. Accordingly, Appellants' Complaint fails to state any facts at all in support of their claim that the Second Mortgage is invalid.

distinguishable from prior precedents. (I.B. at 29). This argument, however, is not supported by the case law, which has applied the same rationale in dismissing actions to quiet title regardless of whether the dismissal of the prior foreclosure action was on the merits.

In *Evergrene Partners*, the prior foreclosure action at issue in that case was disposed of through the filing of a voluntary dismissal, which did not act as an "adjudication on the merits." 143 So. 3d at 956. In considering what effect an adjudication that is not on the merits might have, *Evergrene Partners* held that "the claims of acceleration and subsequent acts of default have never been adjudicated on their merits in this case, and any acts of default still within the statute of limitations may be raised in a subsequent suit."[4] *Id.* Thus, the distinction relied upon by Appellants has already been rejected by the Fourth District Court of Appeal. Similarly, in *Poole v. Aurora Loan Servs., LLC*, 2014 WL 3378344, at *1 (S.D. Fla. June 30, 2014) the court applied the same reasoning advanced in *Evergrene Partners* to a dismissal based on lack of prosecution. *Id.* at *1. Other federal courts considering this argument have also rejected any distinction based upon whether the adjudication occurred on the merits. *See*, *e.g.*, *Matos v. Bank of*

[4] It is indisputable that "a voluntary dismissal without prejudice is not an adjudication on the merits." *Chassan Prof'l Wallcovering, Inc. v. Victor Frankel, Inc.*, 608 So. 2d 91, 93 (Fla. 4th DCA 1992). Accordingly, for the purposes of the Appellants' argument, a voluntary dismissal is the equivalent of a dismissal for lack of prosecution.

New York, 14-21954-CIV, 2014 WL 3734578 (S.D. Fla. July 28, 2014) ("***A voluntary or even involuntary dismissal*** of a lender's earlier foreclosure action does not invalidate the note and mortgage and does not preclude a subsequent foreclosure action for subsequent defaults of payments."); *Ros v. LaSalle Bank Nat'l Ass'n*, 14-CIV-22112, 2014 WL 3974558 (S.D. Fla. July 18, 2014) (voluntary dismissal).

Here, Appellants' argument that this matter is distinguishable from the great weight of the case law rejecting their position because the dismissal of the prior Foreclosure Action was not a dismissal "on the merits" is simply unsupportable. The courts addressing Appellants position have consistently applied the same logic in dismissing claims similar to those raised by Appellants, regardless of whether the previously dismissed foreclosure suit was dismissed on the merits or not. In fact, the court in *Poole* addressed a dismissal for lack of prosecution—the very same type of dismissal involved in this case—yet reached the exact same result. 2014 WL 3378344, at *1. Thus, this Court should reject Appellants' attempts to draw any distinction whatsoever from the fact that the dismissal in the Foreclosure Action might have been due to lack of prosecution.

4. *Appellants' Initial Brief Miscomprehends the Effect of a Statute of Limitations*.

Appellants also fail to recognize that a statute of limitations is merely an procedural affirmative defense that may be raised to a cause of action. *See Houck*

Corp. v. New River, Ltd., Pasco, 900 So. 2d 601, 603 (Fla. 2d DCA 2005) ("A 'statute of limitations' is a procedural statute that prevents the enforcement of a cause of action that has accrued. . . . It does not determine the underlying merits of the claim but merely cuts off the right to file suit on that claim."); *Attache Resort Motel, Ltd. v. Kaplan*, 498 So. 2d 501, 503 (Fla. 3d DCA 1986) (characterizing the statute of limitations a "procedural bar to prosecuting a claim").

Additionally, under the plain language of Fla. Stat. § 95.11, the time frames set forth therein only govern when an action "shall be commenced." As noted in *Diaz v. Deutsche Bank Nat'l Trust Co.*, 14-22583-CIV, 2014 WL 4351411 (S.D. Fla. Sept. 2, 2014):

> A "statute of limitations" is a procedural statute that prevents the enforcement of a cause of action that has accrued . . . Conversely, a "statute of repose"—like that of § 95.281(1)—establishes an ultimate date when the lien or mortgage terminates and is no longer enforceable whether a claim has accrued by that date or not.

(quoting *Matos*, 2014 WL 3734578, at *3). Accordingly, a statute of limitations does nothing more than provide a defendant with an affirmative defense in the event that a lawsuit is filed based upon a cause of action that accrued outside the statute of limitations. *Id.* Thus, "Section 95.11(2)(c) does not change the life of the lien or cancel the debt. Rather, it "merely precludes an action to collect on the debt after five years." *Diaz*, 2014 WL 4351411, at *2.

Because a statute of limitations only acts an affirmative defense to a lawsuit when the underlying claim has accrued outside the limitations period, even if the statute of limitations did bar a lawsuit based upon a default occurring more than five years prior, the statute of limitations would have no effect whatsoever on the actual underlying rights contained in the Mortgages. Therefore, any reliance on the five-year statute of limitations contained in Fla. Stat. § 95.11(2)(c) as a basis to extinguish the rights and obligations contained in the Mortgages must be rejected. Consequently, the trial court correctly dismiss Appellants' Complaint and held that the statute of limitations cannot support a cause of action to quiet title to the Appellants' Property.

5. *The Statute of Limitations Has No Effect on the Other Rights and Obligations Contained in the Mortgages*.

The Appellants' Initial Brief, and arguments made to the trial court, also ignore the fact that there are rights and obligations contained in the Mortgages other than the obligation to make timely monthly payments. For example, the First Mortgage states that "[i]f all or any party of the Property or any Interest in the Property is sold or transferred . . . without Lender's prior written consent, Lender may require immediate payment in full of all sums secured by this Security Instrument." (R. at 45, ¶ 18). Thus, even if a suit based upon certain payment defaults were time barred, nothing about the statute of limitations would affect the right of U.S. Bank, as the Lender, to receive full payment of the outstanding debt

upon a sale of any portion of the Property. *See Rodriguez v. Bank of Am., N.A.*, 13-CIV-23980, 2014 WL 4851777 (S.D. Fla. Sept. 30, 2014) ("Assuming arguendo, that the statute of limitations here has also tolled, BANA could still enforce the lien in the event that the mortgagee sells the property before the statute of repose passes."). Additionally, the First Mortgage contains obligation on the part of the Appellants to not "destroy, damage or impair the Property, allow the Property to deteriorate or commit waste on the Property." (R. at 41, ¶ 7). This obligation on the part of the Appellants would be similarly unaffected by the Appellants payment defaults.

Despite the existence of these additional rights and obligations, Appellants have not and cannot claim that these rights have somehow been extinguished simply because they have a procedural defense to a foreclosure action based upon certain payment defaults more than five years old. These additional rights and obligations continue regardless of whether the Appellants make timely payments as required under paragraph 1 of the First Mortgage. (R. at 37, ¶ 1). For example, a cause of action under the due-on-sale clause of the First Mortgage, would not accrue until the Appellants actually sold the Property, and similarly, a cause of action based upon Appellants' possible failure to maintain the property would not accrue until Appellants failed to maintain the property in accordance with this obligation.

Therefore, the statute of limitations does not have any effect on the actual validity of the Mortgages themselves, or on the ability of Appellees to enforce the Mortgages through a foreclosure action should the Appellants fail to comply with the obligations contained therein.

C. Fla. Stat. § 95.281 Does Not Invalidate the Mortgages.

Next, Appellants purport to rely upon Fla. Stat. § 95.281(1), which is the statute of repose governing the life of a lien, in support of their claims. Fla. Stat. § 95.281(1) states, in pertinent part:

> (1) The lien of a mortgage or other instrument encumbering real property, herein called mortgage, except those specified in subsection (5), shall terminate after the expiration of the following periods of time:
> . . .
>
> (a) If the final maturity of an obligation secured by a mortgage is ascertainable from the record of it, 5 years after the date of maturity.

"Fla. Stat. § 95.281(1), a statute of repose, governs the duration of a mortgage lien and provides that the lien terminates five years after the date of maturity of the obligation secured by the mortgage." *Diaz*, 2014 WL 4351411, at *2.

In applying, Fla. Stat. § 95.281(1)(a), courts have rejected the position that acceleration of the balance due and owing on a note and mortgage alters the date on which the statute of repose arises. In *Rodriguez v. Bank of Am., N.A.*, 13-CIV-23980, 2014 WL 4851777 (S.D. Fla. Sept. 30, 2014), the plaintiffs advanced the

argument that the mortgage lien on their property was invalid under Fla. Stat. § 95.281(1)(a). *Id.* at *1. The court held simply that:

> [I]n this case, § 95.281 is the applicable statute for the lien, and its statute of repose expires five years after the final maturity date contained in the recorded mortgage—October 1, 2036. See Am. Compl., Ex. 2. Accordingly, the lien continues to exist until October 1, 2041, when the statute of repose will bar its enforcement.

Id. at *4. Thus, the court held that the statute of repose for enforcement of the mortgage was unaffected by the acceleration of the note and mortgage. *Id.* The same result was reached in *Matos v. Bank of New York*, where the court noted that, even though the note had been accelerated, "[t]he statute of repose for the First Mortgage expires on September 1, 2041—five years after the maturity date contained in the recorded mortgage." 2014 WL 3734578, at *3.

Although Appellants argue that Fla. Stat. § 95.281 bars the enforcement of the Mortgages, this argument must fail because the statute of repose set forth in § 95.281 is unaffected by the acceleration of the Appellants' debt. Specifically, the First Mortgage on the Appellants' Property has a stated maturity date of April 1, 2037. (R. at 35). Accordingly, the statute of repose for the enforcement of the First Mortgage does not accrue until April 1, 2042—five years after the First Mortgage's stated maturity date. Moreover, the Second Mortgage has a stated maturity date of "twenty (20) years from the date of this Mortgage." Because the Second Mortgage is dated March 10, 2006, after including the additional five years

contained in Fla. Stat. § 95.281, the statute of repose would not accrue on the Second Mortgage until March 10, 2031. As such, Appellants cannot claim any right to extinguish the Mortgages under Fla. Stat. § 95.281.

Furthermore, Appellants fail to cite to a single case that would stand for the proposition that the statute of repose in Fla. Stat. § 95.281 is affected by the acceleration of the underlying debt. To the contrary, this Court in *Houck* suggested that the statute of repose is unaffected by acceleration, and that the statute of limitations and statute of repose operate independently. *See Houck Corp.*, 900 So. 2d at 603 ("The trial court determined that the sections do not conflict because section 95.281 is a statute of repose that prescribes the enforceable life of a mortgage lien but does not direct the limitation period for filing a foreclosure action. We agree.").

Thus, nothing in Fla. Stat. § 95.281 acts to bar the enforcement of the Mortgages at issue in this matter. This statute merely sets the outer limit of the enforceability of the Mortgages based upon their stated maturity dates, neither of which is even close to accruing. Because Fla. Stat. § 95.281(1)(a) cannot support Appellants' causes of action, the trial court properly dismissed the Appellants' claims and held that the Complaint failed to state a cause of action. (R. at 73–74, 138).

D. Appellants Have Not Challenged the Lower Court's Denial of Leave to Amend.

"[A]n issue not raised in an initial brief is deemed abandoned and may not be raised for the first time in a reply brief." *J.A.B. Enterps. v. Gibbons*, 596 So. 2d 1247, 1250 (Fla. 4th DCA 1992). Even "isolated references" are insufficient to preserve an issue on appeal. *Caldwell v. Fla. Dep't of Elder Affairs*, 121 So. 3d 1062, 1064 (Fla. 1st DCA 2013) (holding that an argument raised only by footnote had been waived).

Appellants have failed to make any argument in their Initial Brief that the lower court erred by not granting them an opportunity to amend their Complaint to state additional facts. To the contrary, Appellants argue only that their Complaint, as drafted, stated a cause of action. *See* (I.B. at 10–12). It is also apparent from the face of the record in this matter that the dismissal of the Appellants' Complaint with prejudice was based on the trial courts' determination that the grounds stated in the Complaint were legally insufficient, not that the Appellants had failed to state enough facts to support a claim. Furthermore, Appellants never raised the issue of whether leave to amend should be granted with the trial court, and consideration of the issue of amendment for the first time on appeal would be improper. Accordingly, the Appellants have abandoned or waived any such argument.

CONCLUSION

The Appellants' Complaint filed with the lower court failed to state a cause of action for Declaratory Judgment or to Quiet Title. Appellants allege only that, because their mortgage debt was accelerated more than five years ago through the filing of the Foreclosure Action, and the Foreclosure Action was subsequently dismissed, the Mortgages held by the Appellees are invalid. As demonstrated above, however, every Florida court to address the issue raised by the Appellants has held that enforcement of a note and mortgage are unaffected by a prior acceleration. Despite the Appellants' attempts to distinguish this matter from previously decided cases based upon the fact that the Foreclosure Action not was dismissed on the merits, a review of the applicable case law reveals very clearly that courts have dismissed claims similar to Appellants' claims regardless of the basis of the prior dismissal. Finally, Appellants' attempts to argue that Fla. Stat. § 95.281(1)(a) invalidated the Mortgages is without merit. The statute of repose set forth in § 95.281 is unaffected by the acceleration of the amounts due and owing.

Therefore, the trial court did not err in dismissing the Appellants' Complaint with prejudice because the legal theory advanced by the Appellants is simply unsupportable under Florida law. Because the Complaint fails to state a cause of action, the lower court should be affirmed.

CERTIFICATE OF COMPLIANCE

I hereby certify that this Answer brief has been computer generated using Times New Roman 14-point font, in compliance with the requirements of Fla. R. App. P. 9.210(a).

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 6th day of October, 2014, a true copy of the within was delivered via electronic case filing to:

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