2023 WL 4037628

District Court of Appeal of Florida, Sixth District.

Gregory MAKI and
Elizabeth Maki, Appellants,
v.
NCP BAYOU 2, LLC, Appellee.

Case No. 6D23-643
|
June 16, 2023

Synopsis

Background: Lender on first mortgage loan filed action seeking to foreclose its mortgage securing that loan. Assignee, which had been assigned prior judgment against borrowers on a junior home equity line of credit (HELOC), as well as the HELOC note, filed counterclaim and a cross claim seeing to foreclose the HELOC mortgage due to borrowers' failure to pay the final judgment. The Circuit Court, 20th Judicial Circuit, Lee County, James Shenko, J., granted assignee's motion for summary judgment and denied borrowers' motion, and borrowers appealed.

[Holding:] The District Court of Appeal, Mize, J., held that statute of limitations on foreclosure claim began to run on date predecessor in interest exercised its option to accelerate all payments due under the HELOC note.

Reversed and remanded.

West Headnotes (12)

[1] Mortgages and Deeds of Trust

The statute of limitations on a mortgage foreclosure action does not commence until a default in payment of the final installment, unless the mortgage contains an acceleration clause. Fla. Stat. Ann. § 95.11(2)(c).

[2] Mortgages and Deeds of Trust

When a mortgage secures a promissory note that contains an optional acceleration clause, and the holder of the note exercises its right to accelerate all future payments due under the note, the statute of limitations for the action to foreclose the mortgage begins to run on the date that the lender exercises its right to accelerate the payments due under the note. Fla. Stat. Ann. § 95.11(2)(c).

[3] Commercial Paper

A debt instrument may include an automatic acceleration clause by which the entire indebtedness automatically becomes due immediately upon default without any action by the lender; such an acceleration is self-executing, requiring neither notice of default nor some further action to accelerate the debt.

[4] Mortgages and Deeds of Trust

In a case involving a debt instrument containing an automatic acceleration clause, the statute of limitations to foreclose a mortgage securing such debt instrument begins to run immediately upon the default. Fla. Stat. Ann. § 95.11(2)(c).

[5] Mortgages and Deeds of Trust

Statute of limitations on action by assignee of judgment under home equity line of credit (HELOC) and corresponding mortgage to foreclose on the mortgage began to run on date predecessor in interest exercised its option to accelerate all payments due under the HELOC note and was not extended or tolled; borrowers' continuing failure to pay the judgment was a new and different obligation than the obligation under original note, which had been merged into the judgment. Fla. Stat. Ann. § 95.11(2)(c).

[6] **Mortgages and Deeds of Trust**

The statute of limitations on an action to foreclose a mortgage securing an accelerated debt begins to run when the lender exercises its right to accelerate the debt. Fla. Stat. Ann. § 95.11(2)(c).

[7] **Mortgages and Deeds of Trust**

A lender is entitled to elect its remedies, and an unsatisfied monetary judgment on the note does not bar a subsequent action to foreclose the mortgage.

[8] **Mortgages and Deeds of Trust**

A lender may choose to initially bring only an action on the promissory note without sacrificing its right to later bring a mortgage foreclosure action, but bringing an action solely on a note and obtaining a final judgment for the amount owed under the note does not extend the statute of limitations period for a later filed action to foreclose the mortgage. Fla. Stat. Ann. § 95.11(2)(c).

[9] **Mortgages and Deeds of Trust**

Until the mortgage debt is actually satisfied, the recovery of a judgment on the obligation secured by a mortgage, without the foreclosure of the mortgage, although merging the debt in the judgment, has no effect upon the mortgage or its lien, does not merge it, and does not preclude its foreclosure in a subsequent suit instituted for that purpose.

[10] **Mortgages and Deeds of Trust**

The recovery of a judgment on a promissory note secured by a mortgage, without foreclosure of the mortgage, merges the promissory note in the judgment, but it has no effect on the mortgage.

[11] **Mortgages and Deeds of Trust**

When a judgment is obtained on a note secured by a mortgage without a foreclosure of the mortgage, the mortgage is not merged into the judgment; the judgment does not preclude a subsequent action to foreclose the mortgage, but neither does it extend the statute of limitations period on a mortgage foreclosure action that exists separate and apart from the judgment. Fla. Stat. Ann. § 95.11(2)(c).

[12] **Mortgages and Deeds of Trust**

When a lender accelerates an installment debt and brings an action to collect it, and the action is dismissed, the dismissal revokes the acceleration and places the parties back in the same contractual relationship they had before the acceleration where the mortgage remains an installment loan and the debtor has the right to continue to make installment payments without being obligated to pay the entire amount due under the note and mortgage; in such a case, where an acceleration was revoked and the debtor's right and obligation to make installment payments was put back in place, there can be a subsequent default on that reinstituted obligation that starts the running of a new statute of limitations period. Fla. Stat. Ann. § 95.11(2)(c).

Appeal from the Circuit Court for Lee County. James R. Shenko, Judge. Lower Tribunal No. 19-CA-007826

Attorneys and Law Firms

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Ben H. Harris, III, of Jones Walker LLP, Miami, for Appellee.

Opinion

MIZE, J.

***1** Appellants Gregory and Elizabeth Maki (collectively, the "Makis") appeal the final judgment of foreclosure entered by the trial court in favor of Appellee NCP Bayou 2, LLC ("NCP").[1] We reverse.

Background and Procedural History

The Makis obtained two loans that were secured by mortgages on their home (the "Property"). In 2002, the Makis took out a mortgage (the "First Mortgage Loan"). In 2005, the Makis obtained a home equity line of credit (the "HELOC Loan"). To obtain the HELOC Loan, the Makis signed a Home Equity Line of Credit Agreement and Disclosure (the "HELOC Note") and a mortgage (the "HELOC Mortgage") to secure repayment of the HELOC Note. Both the First Mortgage Loan and the HELOC Loan were assigned to different lenders over the years, with the First Mortgage Loan ultimately being assigned to Wilmington Savings Fund Society ("Wilmington"), and the HELOC Loan ultimately being assigned to Multibank 2009-1 RES-ADC Venture, LLC ("Multibank").

The Makis failed to make the payment due on the HELOC Note in June 2013 and failed to make all the subsequent payments that came due thereafter. In October 2014, Multibank sent default letters to each of the Makis. The default letters informed the Makis that Multibank was exercising its right under the HELOC Note to accelerate all amounts due under the note and that, therefore, the entire principal and all other amounts due under the note were immediately due and payable. In each of the default letters, Multibank demanded that the Makis pay all principal and all other amounts due under the HELOC Note within thirty days of receipt of the letters.

In December 2014, after the Makis failed to pay the amount owed on the HELOC Note, Multibank filed a complaint against the Makis to recover the amounts owed under the HELOC Note (the "Prior Lawsuit"). Multibank only sought a monetary judgment for the amounts due under the HELOC Note. Multibank did not assert a claim to foreclose the HELOC Mortgage. Multibank later amended its complaint to add a claim for unjust enrichment.

After conducting a trial, the trial court in the Prior Lawsuit entered a final judgment in favor of Multibank and against the Makis for all amounts due under the HELOC Note. The final judgment was entered on January 3, 2017. In March 2018, Multibank filed notice that it had assigned the final judgment to NCP. Multibank subsequently assigned the HELOC Mortgage to NCP as well.

In November 2019, Wilmington filed an action against the Makis to foreclose its mortgage securing the First Mortgage Loan. Wilmington included NCP as a defendant as the junior lien holder. In December 2019, NCP responded by filing a counterclaim against Wilmington and a crossclaim against the Makis seeking to foreclose the HELOC Mortgage due to the Makis' failure to pay the final judgment entered in the Prior Lawsuit in January 2017. The Makis responded with an answer asserting various affirmative defenses.

***2** NCP filed a motion for summary judgment. The motion was initially heard before a trial judge that was not the judge assigned to the division in which the case was pending.[2] That judge denied the motion without prejudice so that the motion could be reset for hearing before the judge assigned to the case. Before the motion for summary judgment was scheduled for another hearing, the Makis filed a motion to amend their answer to assert a statute of limitations defense under section 95.11(2)(c), Florida Statutes, which the trial court granted.[3] The Makis followed up that motion with a motion for summary judgment based on, among other things, the statute of limitations defense.

After a hearing on both parties' motions for summary judgment before the judge assigned to the case, the trial court issued an order granting NCP's motion and denying the Makis' motion. The trial court subsequently entered a final judgment of foreclosure ordering the Property to be sold at a foreclosure sale. The Makis filed a motion for rehearing, which the trial court denied. This appeal followed.[4]

Analysis

The Makis raise five issues on appeal, including that NCP's foreclosure action was barred by the statute of limitations set forth in section 95.11(2)(c), Florida Statutes. We agree with the Makis on this point.[5]

Whether NCP's foreclosure action was barred by the applicable statute of limitations is a question of law that we review de novo. *Snow v. Wells Fargo Bank, N.A.*, 156 So. 3d 538, 541 (Fla. 3d DCA 2015).

[1] [2] [3] [4] Section 95.11(2)(c), Florida Statutes, mandates that an action to foreclose a mortgage shall be commenced within five years. "The statute of limitations on a mortgage foreclosure action does not commence until

a default in payment of the final installment, unless the mortgage contains an acceleration clause." *Snow*, 156 So. 3d at 541. When a mortgage secures a promissory note that contains an optional acceleration clause, and the holder of the note exercises its right to accelerate all future payments due under the note, the statute of limitations for the action to foreclose the mortgage begins to run on the date that the lender exercises its right to accelerate the payments due under the note. *See id.*; *Greene v. Bursey*, 733 So. 2d 1111, 1114–15 (Fla. 4th DCA 1999); *Monte v. Tipton*, 612 So. 2d 714, 716 (Fla. 2d DCA 1993).[6]

***3** **[5]** In this case, NCP's predecessor in interest, Multibank, exercised its option to accelerate all payments due under the HELOC Note in October 2014. Therefore, the statute of limitations on the action to foreclose the HELOC Mortgage began to run in October 2014 and expired in October 2019, approximately two months before NCP filed its action to foreclose the HELOC Mortgage in December 2019.

[6] In its Answer Brief, NCP argues that the HELOC Note required a final payment of all sums due and owing under the note on the maturity date of January 15, 2016 and that, therefore, the statute of limitations did not begin to run until that date. However, as noted above, when a lender exercises its option to accelerate all future payments due under a note, those payments then become due immediately upon the acceleration – not when the payments would have otherwise been due had the lender not accelerated the future payments. Accordingly, the statute of limitations on an action to foreclose a mortgage securing an accelerated debt begins to run when the lender exercises its right to accelerate the debt. *See Snow*, 156 So. 3d at 541; *Greene*, 733 So. 2d at 1114–15; *Monte*, 612 So. 2d at 716.

[7] **[8]** NCP also argues that a creditor holding a note secured by a mortgage is not required to pursue a monetary judgment on the note and a foreclosure of the mortgage simultaneously. A lender is entitled to elect its remedies and an unsatisfied monetary judgment on the note does not bar a subsequent action to foreclose the mortgage. This is correct, but it does not change the fact that the statute of limitations on a mortgage foreclosure action begins to run when the lender accelerates the debt secured by the mortgage. A lender may choose to initially bring only an action on the promissory note without sacrificing its right to later bring a mortgage foreclosure action, but there is simply no legal authority for the proposition that the lender bringing an action solely on a note and obtaining a final judgment for the amount owed under the note extends the statute of limitations period for a later filed action to foreclose the mortgage.

[9] **[10]** **[11]** NCP cites *Klondike, Inc. v. Blair*, for the proposition that:

> [U]ntil the mortgage debt is actually satisfied, the recovery of a judgment on the obligation secured by a mortgage, without the foreclosure of the mortgage, although merging the debt in the judgment, has no effect upon the mortgage or its lien, does not merge it, and does not preclude its foreclosure in a subsequent suit instituted for that purpose.

211 So. 2d 41, 43 (Fla. 4th DCA 1968) (quoting 37 Am. Jur. *Mortgages*, § 523). This proposition of law is correct, but it does not help NCP's case. As the Fourth District Court of Appeal noted, the recovery of a judgment on a promissory note secured by a mortgage, without foreclosure of the mortgage, merges the promissory note in the judgment, *but it has no effect on the mortgage*. When a judgment is obtained on a note secured by a mortgage without a foreclosure of the mortgage, the mortgage is *not* merged into the judgment. The judgment does not preclude a subsequent action to foreclose the mortgage, but neither does it extend the statute of limitations period on a mortgage foreclosure action that exists separate and apart from the judgment.

NCP also argues that a lender satisfies the statute of limitations for a mortgage foreclosure action by showing separate and continuing defaults, some of which fall within five years of the filing of the complaint. *See Bank of Am., N.A. v. Graybush*, 253 So. 3d 1188, 1192 (Fla. 4th DCA 2018) ("Alleging and proving separate and continuing defaults, some of which fall within five years of the filing of the complaint, satisfies the statute of limitations."). NCP asserts that the Makis' failure to pay the judgment was a continuing default under the HELOC Note that continued after the initial default on the note. But that is not correct. The note having been extinguished and merged into the judgment, the obligation to pay the judgment was a new and different obligation than the original note. The Makis' failure to pay the judgment was a failure to pay the judgment, not a default under the note. This conclusion is apparent from section 95.11, which creates a separate statute of limitations period of twenty years for "an action on a judgment or decree of a court of record in this state," while the statute of limitations period for an action to recover on a promissory note is five years. *Compare* § 95.11(1), Fla. Stat. (2018) *with* § 95.11(2)(b), Fla. Stat. (2018). There is a separate statute of limitations for an action to collect a judgment because such an action is

not the same cause of action as the action that was brought to obtain the judgment.

***4** **[12]** NCP also points to cases in which it contends that courts allowed subsequent foreclosure actions on new defaults on a debt that occurred after a prior lawsuit to collect the debt was dismissed. *See e.g. Bartram v. U.S. Bank Nat'l Ass'n*, 211 So. 3d 1009 (Fla. 2016); *Deutsche Bank Tr. Co. Americas v. Beauvais*, 188 So. 3d 938, 944 (Fla. 3d DCA 2016). Based on these cases, NCP asserts that an initial acceleration does not bar a subsequent action based on subsequent payment defaults. However, as the Florida Supreme Court found, when a lender accelerates an installment debt and brings an action to collect it, and the action is dismissed, the dismissal revokes the acceleration and places the parties back in the same contractual relationship they had before the acceleration "where the mortgage remains an installment loan and the [debtor] has the right to continue to make installment payments without being obligated to pay the entire amount due under the note and mortgage." *Bartram*, 211 So. 3d at 1019; *see also Beauvais*, 188 So. 3d at 946. In such a case, where an acceleration was revoked and the debtor's right and obligation to make installment payments was put back in place, there can be a subsequent default on that reinstituted obligation that starts the running of a new statute of limitations period. However, none of that happened in this case. In this case, the action on the note brought by NCP's predecessor in interest was not dismissed, the acceleration was never revoked, the parties were never put back in their original contractual relationship with the Makis having the right and obligation to make installment payments on the HELOC Note, and there was no "subsequent default" on such reinstituted installment payments. The opposite happened here. NCP's predecessor in interest succeeded on its claim for a judgment on the HELOC Note and the note was then merged into the final judgment. The statute of limitations on the action to foreclose the mortgage – which is a separate action from an action to collect the amounts owed on a note or an action to enforce a judgment – began to run in October 2014 and no event occurred that tolled or reset the statute of limitations.

Conclusion

NCP's mortgage foreclosure action was barred by the statute of limitations contained in section 95.11(2)(c), Florida Statutes. The trial court erred as a matter of law by concluding otherwise and granting NCP's motion for summary judgment. The final judgment of foreclosure is reversed and this case is remanded to the trial court for further proceedings consistent with this opinion.

REVERSED and REMANDED.

NARDELLA and SMITH, JJ., concur.

All Citations

--- So.3d ----, 2023 WL 4037628, 48 Fla. L. Weekly D1223

Footnotes

1 This case was transferred from the Second District Court of Appeal to this Court on January 1, 2023.

2 It appears that a senior judge covered the initial hearing on NCP's motion for summary judgment.

3 NCP asserts in its Answer Brief that the trial court should not have considered the statute of limitations defense in deciding its motion for summary judgment because that defense was not included in the Makis' answer that was pending at the time NCP filed its motion for summary judgment. However, the trial court granted the Makis' motion to amend their answer to assert the statute of limitations defense and did consider the defense in deciding the motion for summary judgment. NCP did not file a cross-appeal. Therefore, the trial court's decision to allow the Makis to argue the statute of limitations defense in opposition to NCP's motion for summary judgment is not at issue in this appeal.

4 The Makis did not seek a stay of the foreclosure sale pending appeal. The foreclosure sale occurred on September 1, 2022. NCP submitted the winning bid and currently holds title to the Property.

5 We find no merit to the other arguments raised by the Makis.

6 The HELOC Note at issue in this case contained an optional acceleration clause. A debt instrument may also include an automatic acceleration clause by which the entire indebtedness automatically becomes due immediately upon default

without any action by the lender. "Such an acceleration is self-executing, requiring neither notice of default nor some further action to accelerate the debt." *Snow*, 156 So. 3d at 541. In a case involving a debt instrument containing an automatic acceleration clause, the statute of limitations to foreclose a mortgage securing such debt instrument begins to run immediately upon the default. *See id.*

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