IN THE SUPREME COURT OF FLORIDA

ROBERT DAVID, et ux.,	*	
	*	
Petitioners,	*	
	*	
vs.	*	CASE NO. 63,757
	*	
SUN FEDERAL SAVINGS AND LOAN ASSOCIATION,	*	
	*	
Respondent.	*	
	*	

ANSWER BRIEF OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

INTRODUCTION

Petitioners, Robert and Loretta David, will be referred to as Petitioners. Respondent, Sun Federal Savings and Loan Association, will be referred to as the Association.

The Record on Appeal consists of two portions, as shown in the initial index and the supplemental index. Portions of the Record contained in the initial index will be referred to as (R:_____). Portions of the Record contained in the supplemental index will be referred to as (RS:_____).

The Appendix to this brief will be referred to as (A. _____).

All underlining emphasis is supplied unless otherwise indicated.

RESTATEMENT OF THE CASE AND FACTS

Petitioners' statement of the facts omits certain facts relevant to this appeal and places incorrect emphasis on others. The facts pertinent to the instant appeal are exhaustively set out in the trial court's findings of fact and in its final order and judgment, reproduced in the appendix to this brief. (RS:475-480; A.1-6). Petitioners have disregarded and contradicted those findings in their characterizations of the basic transactions which gave rise to this foreclosure action.

Petitioners did purchase a home subject to a mortgage in favor of the Association. That mortgage was two months in default when they took title. As a result, the Association exercised its contract right to declare the entire mortgage balance immediately due and payable. (RS:478; A.4). This foreclosure action ensued.

Petitioners' difficulties are the consequence of the negligence of <u>their</u> agent, a title company not currently before this Court. Due to this negligence, a mortgage they thought they were assuming was never actually assumed. (RS:480; A.6). The title company negligently failed to deliver payments to the Association and negligently failed to notify the Association that the closing of the transaction had taken place. (RS:477; A.3). The Association, as found by the trial judge, was unaware of the identity or existence of Petitioners. (RS:479; A.5).

Petitioners have crossclaimed against the title company, Title Searchers, Inc., and have filed a third party complaint against a title insurance company for which Title Searchers wrote policies. (RS:140-180). Those actions were not resolved in the action which is the subject of this appeal.

Petitioners contend, based on the District Court's characterization of the facts, that they were entirely without fault in this matter. The trial court did not make any such finding. Although Petitioners may not have known the mortgage was two months in default, the title company, which was responsible for the defaults, was found to be their agent. The trial court found:

> 8. Subsequent to the execution of the contract, Defendants Brown employed Title Searchers, Incorporated ("Title Searchers") as closing agent to close the purchase and sale of the Property. Defendants David did not object to the selection of Title Searchers as closing agent.
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> * * *
>
> 13. After the closing on the Property on November 3, 1980, Title Searchers misplaced its file on the closing and did not deliver to the Association the mortgage payments collected at closing.
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> * * *
>
> 21. The Association never authorized Defendants Brown, Defendants David or Title Searchers to make late payments on the loan. The failure to remit the October and November, 1980 payments prior to acceleration resulted solely from the negligence of Title Searchers, and not from reliance upon any act or omission of the Association.
>
> * * *

* * *

> 23. Title Searchers, Inc. was at all material times the agent of the Defendants Brown and David and was not the agent of the Association for any purpose.
>
> (RS:477-479; A.3-5).

Petitioners state that they were never notified that the loan was in default and that the Association had accelerated the debt. They imply that because a routine inquiry as to the mortgage balance had been made to the Association before closing, the Association should have known to look to the Petitioners for payment. In fact, the vast majority of such inquiries never result in mortgage assumptions (R:163), and the Association never knew of Petitioners' existence or identity. The trial court found:

> 24. The Association had no notice or knowledge, other than constructive notice from the public records, that the Property had been conveyed by Defendants Brown to Defendants David and that there had been an attempt by Defendants David to assume the subject indebtedness.
>
> (RS:476; A.2).

The trial court also concluded, due to the title agent's negligent failure to transmit the assumption "package" to the Association, that the Petitioners' assumption of the mortgage never occurred. (RS:480; A.6). Thus, no contractual relationship ever existed between Petitioners and the Association.

The Association gave notice, by certified mail, to the only mortgagors with whom it had a contractual relationship, and then accelerated the debt in the normal course of business:

> 6. The October 1, 1980, payment on the Note and Mortgage was not made to the Association when due.
>
> * * *
>
> 9. The November 1, 1980, payment on the Note and Mortgage was not made to the Association when due.
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> * * *
>
> 14. On November 6, 1980, the Association sent a written notice to Defendants Brown stating that the loan was in default and requesting a prompt and immediate payment thereof.
>
> * * *
>
> 15. Upon receipt of this notice, Defendant John L. Brown threw it in the trash unopened.
>
> * * *
>
> 16. On November 28, 1980, the Association accelerated the loan, declared the balance due and immediately payable and by written notice to Defendants Brown notified them that the Association had accelerated the indebtedness and declared it due and immediately payable.
>
> * * *
>
> 17. The letter of November 28, 1980, was received by the Browns and thrown in the trash.
>
> (RS:477.478; A.3,4).

Petitioners imply that a valid tender of past due payments was made to the Association. The trial court findings establish that no complete tender was made:

> 18. On December 1, 1980, Defendant Robert L. David went to a branch office of the Association and attempted to make the December 1, 1980, mortgage payment. The payment was refused. Defendant Robert David was later notified that the loan was in default and had been accelerated.
>
> * * *
>
> 19. Defendant Robert David notified Title Searchers that there was a problem with the loan transfer. Title Searchers then delivered a package of assumption documents and funds representing the October and November, 1980 payments to the Association on December 1, 1980.
>
> (RS:478; A.4).

When Petitioner David attempted to make the December, 1980, payment, both the October and November payments, plus late charges, were overdue, and his tender was incomplete. The funds that Title Searchers attempted to deliver to the Association consisted of the October and November payments, and did not include late charges or the December payment. (R:107,137). In addition to being incomplete, the attempted tenders were made on December 1, 1980, after the loan was accelerated. (RS:478; A.4).

Petitioners offer as relevant the fact that the Association had previously accepted late payments from their

mortgagors, the Browns. That fact has no relevance to Petitioners' appeal given the court's finding that,

> 20. The Association made no statements or representations to any party which could be considered authority or permission to not make loan mortgage payments when due.
>
> (RS:478; A.4).

The trial judge concluded, based on his factual findings, that the debt evidenced by the note was properly accelerated, and judgment was entered in favor of the Association. He found that the Association did nothing which was intended to, could or did mislead any party as to their rights under the note and mortgage; that the Association made no representation which was relied on by any party and resulted in late payments being made; and that the Association's actions were at all times proper. He found that no waiver or estoppel had occurred and that acceleration was not unconscionable. (RS:479,480; A.5,6).

Petitioners appealed to the First District Court of Appeal which held, in a three paragraph opinion, that the trial judge was correct in concluding that on the facts of this case, equity would not interfere with enforcement of the promissory note and mortgage. Petitioners then petitioned this Court for review.

ARGUMENT

THE TRIAL COURT'S JUDGMENT OF FORECLOSURE IS FULLY SUPPORTED BY THE RECORD AND IS IN ACCORDANCE WITH LAW

Both the record and established equitable principles support the judgment of foreclosure in this case. Petitioners argue essentially that a trial court is vested with unbridled discretion to deny foreclosure whenever it is "unconscionable." This is not the law, as represented by this Court's decisions or by those of the district courts of appeal.

At the time Petitioners took title to the subject property, the mortgage was over two months in arrears. By its terms, the mortgage granted the Association the option to accelerate when any one payment was 30 days in default. (R.476; A.7).

The option to accelerate the maturity of a debt upon default in payment of principal and interest is a contract right which protects the lender's most fundamental expectation: receipt of payment. Acceleration will be denied in equity only when there is a defense adequate in law to bar enforcement of the promissory note. Campbell v. Werner, 232 So.2d 252 (Fla. 3d DCA 1970); Delgado v. Strong, 360 So.2d 73 (Fla. 1978). Equitable principles established by years of judicial decisions represent specific circumstances which courts regard as adequate to bar acceleration and fore-

closure. The trial court properly found that none of those principles were applicable in this case. The District Court agreed.

To accept Petitioners' theory of "unconscionability" would introduce uncertainty into the necessary commercial enterprise of lending money for the purchase of real property. As stated by the Campbell court:

> I can conceive of nothing that would tend more to bring the State of Florida into disrepute than to have the impression go out into the financial and commercial world that the courts of Florida failed to respect and enforce the obligation of contracts.
>
> Id. at 256 (quoting U.S. ex rel Vermont Ins. Co. v. City of Cocoa, 17 F.Supp. 59, 60, (S.D. Fla. 1936)).

Even if a trial court were, as Petitioners suggest, granted freewheeling discretion to deny whichever foreclosures it conceived to be unfair, the trial court in this case has already exercised its discretion and found Petitioners' contention of unconscionability to be "without merit." (RS:479; A.5). This Court's decision in Delgado v. Strong, supra, 360 So.2d 73, reiterates the well-settled rule that an appellate court cannot reweigh the evidence and substitute its judgment on a discretionary matter for that of the trial court.

The trial court's exercise of discretion in this case is well supported by the record. Petitioners' contention that they were without fault is not correct; the trial court found that the title company which failed to make two monthly mortgage payments acted as their agent. (RS:478,479; A.4,5). Acts of Petitioners' agent in failing to make payment are imputed to them. Benson v. Seestrom, 409 So.2d 172 (Fla. 2d DCA 1982).

Petitioners' argument really boils down to the contention that the pending foreclosure sale (and their consequent need to refinance at current interest rates)[1] will work a hardship on them. Unfortunate as this may be, precedents in this state establish that it is not a basis to deny foreclosure. Campbell v. Werner, 232 So.2d 252 (Fla. 3d DCA 1970).

Now that Petitioners have submitted their argument on the merits, it is more apparent that this Court lacks jurisdiction to consider this case. Petitioners' contend that the trial judge abused his discretion in ruling against them. In keeping with the holding in this Court's most recent foreclosure case, Delgado v. Strong, 360 So.2d 73 (Fla. 1978), the District Court in this case refused to reweigh the

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[1] Under the foreclosure judgment, as is customary, Petitioners may avoid a foreclosure sale by paying the balance due. (RS:480; A.6). This is known as the "equity of redemption." Pierson v. Bill, 138 Fla. 104, 189 So. 679 (Fla. 1939).

evidence and affirmed that the trial judge had correctly exercised his discretion. Jurisdiction in this Court might exist only if the First District had reevaluated the evidence and reversed the trial court in this matter. That was the jurisdictional basis upon which this Court accepted the Delgado case.

This Court's decision in Canakaris v. Canakaris, 382 So.2d 1197 (Fla. 1980), a case cited by Petitioners, sets out the test for review of a judge's discretionary decision. That test defeats Petitioner's efforts in this Court, as in the District Court:

> Discretion, in this sense, is abused when the judicial action is arbitrary, fanciful, or unreasonable, which is another way of saying that discretion is abused only where no reasonable man would take the view adopted by the trial court. If reasonable men could differ as to the propriety of the action taken by the trial court, then it cannot be said that the trial court abused its discretion.
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> Id. at 1203.

The following portions of this brief consider the specific equitable principles which the trial court's judgment is alleged by Petitioners to have violated.

A. THE RESULT IN THIS CASE WAS NOT UNCONSCIONABLE, NOR DID IT FALL WITHIN THE TYPES OF CASES IN WHICH ESTABLISHED EQUITABLE PRINCIPLES WILL DENY ACCELERATION AND FORECLOSURE

In asserting that the trial court did not consider the principle that foreclosure may be denied when acceleration would be inequitable or unconscionable, Petitioners disregard the trial judge's finding that the "[d]efendants' contention . . . that acceleration was unconscionable [is] without merit." (RS:479; A.5) It is difficult to imagine a more direct ruling.

Petitioners fail to discuss Campbell v. Werner, 232 So.2d 252 (Fla. 3rd DCA 1970), although they cite that case for the proposition that the trial court below was bound to do equity. While Campbell (which is also the case cited by the District Court in its opinion) contains the general statement that a court of equity may deny acceleration and foreclosure when it would be "unconscionable," that case actually holds:

> A contract for acceleration of a mortgage indebtedness should not be abrogated or impaired, or the remedy applicable thereto denied, except upon defensive pleading and proof of facts or circumstances which are regarded in law as sufficient grounds to prompt or support such action by the court.
>
> Id. at 256.

In Campbell, the complaint alleged that the mortgagors failed to pay an installment of interest and principal when

it became due and that the mortgagees had elected to accelerate. In their motion to dismiss, defendant mortgagors recited that they were ready and willing to pay amounts which they had defaulted, plus attorneys' fees and costs. The trial court then ordered the defendants to bring the mortgage into good standing by paying and denied the mortgagees their right to accelerate.

The District Court reversed and discussed the proper method of balancing the respective rights of the parties in such a situation. The Court's analysis started with the fundamental principle that an acceleration clause in a note or mortgage "confers a contract right upon the mortgagee which he may elect to enforce, upon a default." Id. at 255. Such a clause ...

> ... is not prohibited by statute, nor is it against public policy; it is not in the nature of a forfeiture nor a hard contract which it would be unconscionable to enforce, because an investor may very properly insist that his security shall be kept intact or that the loan shall mature.
>
> Id. at 255, citing Treb Trading Co. v. Green, 135 So. 510 (Fla. 1931).

Safeguarding the validity of contracts, and assuring the right of enforcement thereof, is an obligation of the courts which has constitutional dimensions. Id. at 256. (See also, ART. I, §10, U.S. Constitution; Declaration of Rights, ART.

I, §10 Florida Constitution; New England M.L. Ins. Co. v. Luxury Home Bldrs. Inc., 311 So.2d 160 (Fla. 3d DCA 1975).

Only under certain clearly defined circumstances may a court of equity refuse to foreclose a mortgage. This is the real import of Campbell -- although providing equitable relief in a proper case is discretionary with the trial judge, were that discretion not guided by fixed principles, the degree of uncertainty injected into contractual relations would be intolerable. Equity cannot therefore look solely to the result in determining whether to grant relief, but must apply rules which confer some degree of predictability on the decision-making process.[2]

The Campbell court set out a catalog of situations which courts have traditionally recognized as permitting relief from foreclosure. It observed that neither a defendant's

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[2]As stated by the Campbell court:

> In the early history of equity jurisprudence when the chancellor was the mouthpiece of the crown and his prerogatives and duties were loosely understood and his decrees could not be resisted, he sometimes acted on the dictates of conscience and what appeared to be natural justice, but today the rules and maxims governing courts of equity are as definite and certain as those governing other tribunals and by them the chancellor is bound rather than by what he conceives to be right and just in a particular case.
>
> Id. at 256. (Citations omitted.)

willingness to cure a default nor the fact that the property had been improved were acceptable grounds for denying a mortgagee's contractual rights:

> [W]illingness of a mortgagor to cure a default, after notice that the mortgagee has exercised his election to declare the entire mortgage indebtedness due for such default, is not a circumstance which is recognized in law or equity as a ground for denying acceleration and foreclosure.
>
> Id. at 257.

The trial court's denial of foreclosure was reversed.

In the instant case a trial judge applied established equitable principles to the facts, and the District Court confirmed that those principles were properly applied and the correct result reached. The cases cited by Petitioners in support of their argument all fall within the Campbell catalog of recognized discretionary exceptions to foreclosure.[3] As was noted in the First District's opinion, this case does not.

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[3] "Foreclosure on an accelerated basis may be denied when the right to accelerate has been waived or the mortgagee estopped to assert it, because of conduct of the mortgagee from which the mortgagor (or owner holding subject to a mortgage) reasonably could assume that the mortgagee, for or upon a certain default, would not elect to declare the full mortgage indebtedness to be due and payable or foreclose therefore; or where the mortgagee failed to perform some duty upon which the exercise of his right to accelerate was conditioned; or where the mortgagor tenders payment of defaulted items, after the default but before notice of the mortgagee's election to accelerate has been given (by actual notice or by filing suit to foreclose for the full amount of the mortgage indebtedness); or where there was intent to make timely payment, and it was attempted, or steps taken to accomplish it, but nevertheless the payment was not made due to a misunderstanding or excusable neglect, coupled with some conduct of the mortgagee which in a measure contributed to the failure to pay when due or within the grace period." Id. at 256, 257.

In a primary case relied upon by Petitioners, Federal Home Loan Mortgage Corp. v. Taylor, 318 So.2d 203 (Fla. 1st DCA 1975), the trial judge declined to foreclose the mortgage of a serviceman stationed overseas who attempted to make payments through the mail, but who was thwarted by the bank's refusal of each payment for being one month late. The District Court affirmed, but noted that the trial judge had specifically found, "that it would not be equitable to allow foreclosure of said property because this action is the result of both parties' conduct." Id. at 205. Taylor fits squarely within the exception to foreclosure which is allowed when a mortgagor attempts to make payment and fails to pay through a misunderstanding, and there is some conduct by the mortgagee which contributes to the failure to pay. It was the trial court in Taylor that determined that equity should be applied. The District Court held only that the trial court had not abused its discretion in so holding.

A misunderstanding resulting in failure to pay on time, standing alone, will not defeat acceleration. The duty to pay rests on the debtor, who must seek out his creditor, Jacobs v. Automotive Repair Center, Inc., 137 So.2d 263 (Fla. 1st DCA 1962), and there is no requirement that a creditor seek out the maker of the mortgage and give him an opportunity to cure a default. Motel Management Co., Inc. v. Winger, 335 So.2d 9 (Fla. 4th DCA 1976). In the instant case, there was no misunderstanding as to how, when or where the two

payments due on the mortgage were to be made, and the trial court found that the Association had done nothing to mislead or deceive any party. (RS:479; A.5).

Lieberbaum v. Surfcomber Hotel Corp., 122 So.2d 28 (Fla. 3d DCA 1960), the second case relied on by Petitioners, is likewise within the Campbell catalog. Its holding supports the decision reached in the present case. In that case, as in Taylor, supra, there was a misunderstanding about payment. The defendant mortgagors claimed that plaintiffs were barred from relief by their inequitable conduct and the trial judge agreed. The mortgagee in Lieberbaum not only knew the identity of the property owner and had dealt with him in the past, but also never made any demand for payment. The trial court found that plaintiff knew from past experience that some excusable oversight had caused the non-payment and that its failure to make demand contributed to the mortgagor's failure to pay. In the instant case, the Association did demand payment, from the only mortgagors of whom it had knowledge and with whom it had a contractual relationship. It in no way contributed to Petitioners failure to render payment when due.

More importantly, the Lieberbaum court did not reweigh any evidence or overturn any findings of the trial judge. Its decision affirmed that the trial court's judgment was adequately supported by findings of fact:

> Findings of fact were included in the final decree and reference to the record reveals that these findings are based upon sufficient competent evidence. They are therefore binding upon an appellate court.
>
> Id. at 29.

The District Court in this case has already performed the type of review discussed in Lieberbaum and reached the same result by affirming the chancellor's decision.

In the remaining two cases cited by Petitioners on this point, Schechtman v. Grobbel, 226 So.2d 1 (Fla. 2d DCA 1969) and La Boutique of Beauty Academy v. Meloy, 436 So.2d 396 (Fla. 2d DCA 1983), the District Court simply affirmed that the lower court had not erred in denying foreclosure. In Schechtman, a technical breach of a mortgage contract occurred when the mortgagor paid tax monies into an escrow account rather than directly to the mortgagee. Unlike the present case, the court found that, "at no time were the principal and interest payments in default," Id. at 2. The District Court affirmed that in those circumstances relief from foreclosure was within the trial judge's discretion.

La Boutique, supra, 436 So.2d 96, is equally inapposite to the present case. In La Boutique, the District Court specifically found that the facts fell within the recognized catalog of situations permitting relief from foreclosure, and affirmed the chancellor's decision. Because the mortgagee had consistently accepted late payments, the court found the mortgagor had been led to believe that acceleration would not

occur upon late payment. Id. at 399. Thus the case fit the estoppel exception outlined in Campbell, 323 So.2d at 256.

In the subject case, the trial court found that the Association "made no statements or representations to any party which could be considered authority or permission to not make loan mortgage payments when due," (RS:478; A.4), that the Association "never authorized defendant Brown, defendant David or Title Searchers to make late payments," and that the failure to remit the October and November, 1980, payments did not result from reliance on any act or omission of the Association. (RS:478; A.4).[4] The trial court also found that the Association had no knowledge of the existence of Petitioners. (RS:479; A.5).

Thus, Petitioners have failed to demonstrate an abuse of the trial court's discretion. This case is not within any of the established principles of equity under which the chancellor's discretion comes into play. Even if it were, that discretion has been properly exercised in favor of the Association.

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[4] The acceptance of late payments does not, as suggested by the dissent in the District Court, ipso facto divest a mortgagee of the right to foreclose. Such conduct is of legal significance only when it reaches a level where the mortgagor could reasonably assume, because of past dealings, that the mortgagee would not accelerate or foreclose. Campbell, 232 So.2d at 256. The Association had no course of dealings with the Petitioners here, and the trial court clearly found that no estoppel or waiver had occurred.

B. THIS CASE DOES NOT FALL WITHIN THE PRINCIPLE THAT FORECLOSURE OF A MORTGAGE MAY BE DENIED IF THE SECURITY IS NOT IN JEOPARDY

Petitioners assert that the trial court should have denied foreclosure because the failure to make two months' payments did not place the security for the debt in jeopardy. Were the rule as Petitioners claim it to be, no mortgage could be foreclosed so long as the value of the mortgaged property exceeded the balance due on the note, regardless of the mortgagor's failure to pay.

The actual rule stems from this Court's decisions in cases such as St. Martin v. McGee, 82 So.2d 736 (Fla. 1955) and Delgado v. Strong, 360 So.2d 73 (Fla. 1978), dealing with breaches of mortgage clauses other than those requiring payment of principal and interest. Those cases concern covenants intended to preserve the mortgaged property as security for the debt.

In St. Martin, the only default alleged was failure of the mortgagors to keep the property in proper repair. The trial judge denied foreclosure after finding that the property actually had been improved, and thus the security for the mortgage was not impaired. This Court affirmed, finding substantial evidence to support the trial court's decision.

In Delgado, there was a technical default when the mortgagors failed to have the mortgaged property insured for approximately one month. The trial court found that, although this was merely a technical default, the mortgagees

were justified in believing that the security for their mortgage had thereby been placed in jeopardy. Foreclosure was allowed. The District Court reversed, finding that foreclosure would be unjust because only a "harmless technical breach" had occurred. Id. at 76. On review, this Court reinstated the judgment of foreclosure. The Court reasoned that the District Court's decision was an obvious and impermissible reevaluation of the evidence and an interference with the trial court's discretion.

A mortgage is given to secure the payment of a principal sum, with interest, at a given time in the future. Other covenants, directed to preservation of the security for the mortgage, are generally included. These include requirements for payment of taxes, maintenance of insurance and keeping the property in good repair. See, Treb Trading Co. v. Green, 102 Fla. 238, 135 So. 510 (Fla. 1931). If one of these covenants is breached (a "technical" breach), and yet the trial court finds that no impairment of the security has occurred, equitable principles allow the trial judge, in his discretion, to deny acceleration and foreclosure. Delgado, 360 So.2d at 75.

. Failure to make timely payment is not a mere "technical" breach of a covenant intended to preserve the security; it goes to the heart of the agreement between a mortgagor and mortgagee. "The obligation of a mortgagor to pay and the right of a mortgagee to foreclosure in accordance with the

terms of the note and mortgage are absolute." Federal Home Loan Mortgage Corp. v. Taylor, 318 So.2d 203, 207 (Fla. 1st DCA 1975). An investor has the right to insist not only that his security be kept intact but also that the loan shall mature. Treb Trading Co., 135 So. at 512.

Not one of the seven cases cited on this point stands for the proposition Petitioners advance, that a trial court may not enforce acceleration and foreclosure of a mortgage unless the security has been impaired.[5] Such a rule was rejected in a case factually similar to this one.

In Guynn v. Brentmoore Farms, Inc., 253 So.2d 136 (Fla. 1st DCA 1971), the mortgagor failed to pay an annual interest

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[5] Other cases cited by Petitioners also involve breaches of covenants intended to preserve the security, rather than breaches of the agreement to pay principal and interest. Brady v. Edgar, 415 So.2d 141 (Fla. 5th DCA 1982) (no abuse of trial court's exercise of discretion in denying foreclosure where security not impaired and defaults went to insurance and taxes); Schechtman v. Grobbel, 226 So.2d 1 (Fla. 2d DCA 1969) (payment of taxes to an escrow account rather than directly to the mortgagee, no default in principal or interest). Two cases cited by Petitioners involve "due on sale" clauses and are thus inapplicable here. Woodcrest Apartments, Ltd. v. IPA Realty, Etc., 397 So.2d 364 (Fla. 1st DCA 1981); First Federal Savings and Loan Ass. of Englewood v. Lockwood, 397 So.2d 364 (Fla. 1st DCA 1981). (Both have been overruled, Fidelity Federal Savings and Loan Assn. v. De La Cuesta, ____ U.S. _____, 102 S.Ct. 3014 (1982). The remainder of Petitioners' cases are factually inapposite. Overholser v. Theroux, 149 So.2d 582 (Fla. 3d DCA 1963) (conduct of the mortgagee regarding application of an insurance draft to payments engendered chaos and confusion as to mortgagor's duties and foreclosure would thus be inequitable); Wooten v. Matheson, 440 So.2d 1007 (Fla. 5th DCA 1983) (one paragraph decision containing no factual recitation, and affirming that the trial judge did not abuse his discretion in denying acceleration and foreclosure).

and principal installment when due. The mortgagees elected to accelerate the balance. In its answer, the mortgagor alleged that no harm had been done to the security, and it simulanteously paid to the registry of the court monies sufficient to cover the late payment plus attorney's fees. The mortgagor also filed an affidavit stating that it had relied on a third party to make payment. The trial judge entered judgment dismissing the foreclosure complaint, finding that "it would be unconscionable to allow the acceleration and foreclosure ...." Id. at 137.

The District Court reversed. It observed that there was no confusion about the time or place of making payment, that the mortgagor knew the payment was due and depended on his nominee to make it, and that "[i]n no instance is a single material act or fact alleged to have been taken by the mortgagees that resulted in detriment to the mortgagor." Id. at 138.

In this case, when Petitioners' title agent failed to make two monthly payments, a material default, indeed the most fundamental default, occurred under the mortgage. The Association then had an absolute right to accelerate, which it exercised only after giving notice and opportunity to cure default to the parties the trial court found to be its mortgagors -- the Browns. No abuse of discretion in the trial court's judgment has been demonstrated.

C. THE ASSOCIATION PROPERTY EXERCISED ITS RIGHT TO ACCELERATE

Petitioners understandably do not make much of this point. They contend that the trial judge did not consider the rule announced by this Court in River Holding v. Nickel, 62 So.2d 702 (Fla. 1952), that acceleration may be defeated if notice of intent to accelerate is not brought home to the mortgagor before payment is tendered. The trial judge in the subject case determined that the attempted assumption never occurred (RS:480; A:6). The Petitioners thus had no contractual relationship with the Association and no right to notice. The trial court also found that the Association did provide notice to its mortgagors, the Browns. (RS:477,478; A.3,4).

Petitioners' argument assumes and states, without record citation, that a valid tender of payment was made by Petitioners. Such is not the case. The findings of facts show that on December 1, 1980, Robert David tendered the December payment. At that time, however, payments for October, November and December together with late charges, were due. Mr. David's attempted tender was therefore incomplete.[6] Petitioners' title agent subsequently delivered funds for the October and November, 1980, payments to the Association but

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[6]"'Tender' has a definite legal signification," and "a mere offer to pay is not a tender of money." Kreiss Potassium Phosphate Co. v. Knight, 124 So. 751, 754 (Fla. 1929). Offer of a sum less than the amount due is not a valid tender. See, Fla. Jur. 2d, Payment and Tender.§1.

did not include the December payment. (RS:478). Each of these attempted tenders occurred after the debt had been accelerated on November 28, 1980.

The record in this case clearly reflects that the Association took reasonable steps to notify its borrowers of the default and the election to accelerate. Certified letters were forwarded to the last known owner of the property at the property address. Both the letter notifying of the default and the acceleration letter were received and thrown into the trash unopened. (RS:477,478; A.3,4).

A mortgagee's responsibility in acceleration is best stated in Kreiss Potassium Phosphate Co. v. Knight, 124 So. 751 (Fla. 1929), where the Court said:

> The complainant could not just in his own mind determine to exercise the option and make it effective against the defendant. It was incumbent upon him to either communicate his decision in some way to defendant or manifest his election by some outward act.
>
> Id. at 754.

This is exactly what the Association did. It manifested its election by the outward act of declaring the indebtedness due and immediately payable and forwarding notices thereof to the last known property owner. Notice was given notwithstanding the provision on the face of the note waiving notice of non-payment. (RS:476; A.2).

The trial court has determined that the Association had no notice or knowledge, other than constructive notice from the public records, that the property had been conveyed by the Browns to Petitioners and that there had been an attempt by Petitioners to assume the indebtedness evidenced by the note. (RS:479; A.5). The attempted assumption was ineffective since the assumption papers were not delivered to the Association (RS:477,478; A.3,4), and no contractual relationship between the Association and the Davids was ever established. (RS:480; A.6). The Association, although it sent blank assumption forms to Petitioners' title agent, had no knowledge of Petitioners' identity. (RS:479; A.5). Thus, Petitioners' contention is that the Association should have given notice to unknown parties with whom it had no contractual relationship.

In accordance with the trial court's findings, the only source of Petitioners' identity would have been an examination of the public records. To require a mortgagee, either individual or institutional, to check the public records to determine ownership of its collateral is unreasonable and impractical. Instead, the Association forwards "status letters" and "assumption packages" when requested, and is informed of the transfer of property when the assumption package is returned. In the subject case, no assumption

package was returned, and the Association never became aware of the identity of Petitioners.[7]

Petitioners have neither a legal nor a factual basis for their notice argument. Their reliance on River Holding, 62 So.2d 702, is completely misplaced. In that case, this Court found that a valid tender had occurred. The opinion contains no indication that any notice or demand was even attempted by the mortgagee before accelerating the debt, or that the mortgagee was unaware of the identity of the property owner.

A mortgagee has no duty to give a mortgagor an opportunity to cure a default. Motel Management Co., Inc. v. Winger, 335 So.2d 9 (Fla. 4th DCA 1976); Campbell v. Werner, 232 So.2d 252 (Fla. 3d DCA 1970). A recent Third District case cites the rule correctly: "[T]he law does not require a mortgagee to notify a mortgagor of his intent to exercise his option (to accelerate) prior to instituting a foreclosure suit, but requires only that the option be exercised, as it was here, prior to tender of amounts due from the mortgagor."

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[7] At page 13 of their initial brief Petitioners state, without record citation, that "Sun Federal knew that the mortgage had been assumed." This is untrue. The Association does not follow up on every status letter or assumption package which is sent. The reason is disclosed in the testimony of Phillip W. May, an officer of the Association. Mr. May stated that the Association receives five or six requests per day for status letters, or approximately 110 per month. Of those requests received, only about 20 percent are actually returned with the loan assumption package to transfer the loan. Simple mathematics indicates that a large number of status letter requests never ripen into a transfer of the property. (R:163).

Millet v. Perez, 418 So.2d 1067 (Fla. 3d DCA 1982). This is the same rule announced in River Holding.

River Holding is not concerned with what constitutes valid notice of acceleration (again there is no indication that any notice was given in that case), it is concerned with what constitutes a valid exercise of the right to accelerate. If acceleration is optional, (see, Cook v. Merrifield, 335 So.2d 297 (Fla. 1st DCA 1976)), valid tender of past due payments will defeat acceleration if made before the decision to exercise the option has been manifested in some way. Kreiss Potassium Phosphate Co. v. Knight, 124 So. 571 (Fla. 1929). As stated in Kreiss, "the complainant could not just in his own mind determine to exercise the option and make it effective against the defendants." Id. at 754.

In this case, the Association manifested its exercise of the option by notice to its mortgagor. No valid tender of defaulted payments was ever made, and the incomplete tender attempted by Petitioners was made after the option to accelerate had been properly elected. River Holding does not, therefore, compel a reversal of the trial court's judgment.

CONCLUSION

Petitioners portray themselves as having been put out of their home by the actions of the Association. In fact, they have simply lost a bargain through the negligence of their agent. Their real remedy, their actions against the title agent and the title insurance company, is still to be resolved. As former real estate agents, Petitioners presumably were familiar with real estate transactions. (R:140).

Petitioners have been adjudged not personally liable on the debt secured by the mortgage, and they retain an equity of redemption in the disputed property. (RS:480; A.6). The trial court's judgment in this case is not arbitrary, fanciful or unreasonable, and it is fully supported by factual findings. The "superior vantage point of the trial judge" in deciding the matters at issue here should be recognized, and the writ discharged by approval of the decision under review. Canakaris, 382 So.2d at 1203.

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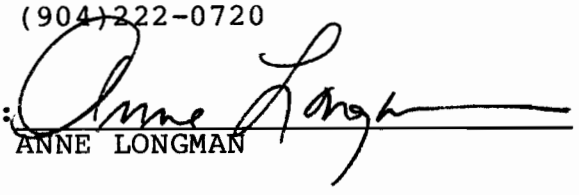
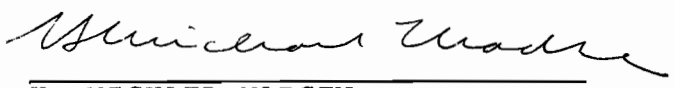
By: 
ANNE LONGMAN

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Answer Brief has been furnished by U.S. Mail to James M. Donohue, Esq., P. O. Drawer 1049, Tallahassee, Florida 32302; Cynthia S. Tunnicliff, Attorney at Law, P. O. Drawer 190, Tallahassee, Florida 32302, this 29th day of March, 1984.



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