IN THE SUPREME COURT OF FLORIDA

ROBERT DAVID and LORETTA G. DAVID, his wife,

Petitioners,

v. CASE NO. 63,757

SUN FEDERAL SAVINGS AND LOAN ASSOCIATION,

Respondent.

JURISDICTIONAL BRIEF OF RESPONDENT

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STATEMENT OF THE CASE AND FACTS

The facts relevant to the instant appeal are exhaustively described in the Findings of Fact by the trial court in its Final Order and Judgment, a true and correct copy of which is included with this brief as Exhibit "A". Petitioners' recitation of the facts is misleading in certain respects; it omits certain relevant facts and places emphasis incorrectly on other facts.

The dispute between Petitioners and Respondent (the "Association") resulted from a real estate closing which was handled in a negligent manner by a title company. The Association held a first mortgage on the property which was the subject of the transaction. 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. As a result of the title company's negligence, the Association was unaware of the identity or existence of Petitioners. The failure of the title company to make payments to the Association when due resulted in the acceleration of the indebtedness in accordance with the terms of the Promissory Note evidencing the debt.

The Association gave notice that payments had not been received to the sellers of the property, but the notices were

discarded without being opened. The sellers did not inform Petitioners of their receipt of these notices. The Association had no notice or knowledge, other than constructive notice from the public records, that the property had been conveyed by the sellers to the Petitioners and that there had been an attempt by them to assume the subject indebtedness. (Exhibit "A", Finding no. 24).

Based upon this recitation of facts, certain points should be emphasized:

1. The failure of the Association to receive payments or notice of the identity of Petitioners resulted solely from the negligence of the title company.

2. The Association gave notice to the only parties of which it had knowledge. The notices were received and discarded. Petitioners argue that no one had notice of the demand or acceleration. This is false. All the Association can do is give notice; it cannot make the recipient read the notice.

3. The trial court found, and there was no appeal from the finding that, the title company was acting at all all times as the agent of Petitioners. The negligence of their own agent caused their loss, not any other party and not the Association.

INTRODUCTION

The issue before the District Court was whether equity would interfere with the enforcement of the promissory note and mortgage based on the facts of the case. The District Court held that equity would not interfere. The District Court's opinion is extremely brief, consisting of only three (3) paragraphs. The first paragraph recites the nature of the appeal; the second paragraph reviews the facts. The third paragraph contains the District Court's holdings, and there are only two. First, the District Court held that:

> Given no fault by either party, equity will not interfere with the enforcement of Sun Federal's contractual rights.

The second holding is this:

> A creditor does not have an obligation to continuously search the public records for transactions or to follow up on every inquiry concerning mortgaged property.

These statements are good law, grounded in logic and reason, and do not conflict at all with holdings of other District Courts.

A. THE DISTRICT COURT'S DECISION DOES NOT CONFLICT WITH RIVER HOLDING CO. V. NICKEL, 62 So2d. 702, (Fla. 1952).

Petitioners assert that the District Court decision expressly and directly conflicts with River Holding Co. v. Nickel, 62 So.2d 702 (Fla. 1952). This is incorrect. Petitioners fail to inform the court that in River Holding

Co. the lender was guilty of conduct which had the effect of confusing the borrower as to when payments were due. In River Holding Co. a mortgage was assumed by a purchaser of property. The purchaser went to the bank which held the mortgage to inquire about its payment and received incomplete and misleading information with respect to payments due. As a result, the purchaser failed to pay the next monthly payment coming due and the note was accelerated. The significant distinction is that there was conduct on the part of the lender which tended to and did confuse and mislead the purchaser of the property. Considering the situation of balancing equities between a sincere, honest and diligent debtor and a deceitful lender the court in River Holding Co. correctly ruled for the debtor.

The instant action is fundamentally different, in that the Association did not engage in any conduct which was designed to or did mislead, deceive or misinform any party. The sole cause of the dispute was the negligence of the Petitioners' agent; the Association had no part in that negligence.

Petitioners assert that the District Court's decision is further in conflict with the River Holding Co. determination that "in order to accelerate the due date of the note, such decision of the owner thereof must be disclosed to the payor in some effective manner before payment is tendered." The District Court did not hold to the contrary. In River Holding Co. no notice was given to any party. In the case at bar, notice was given to the only payor of which the Associa-

tion had notice. The fact that the payor threw the notice in the trash unopened does not change the fact that notice was given. To require the Association to give notice to the Petitioners would be to require the Association to do the impossible; that is, give notice to an unknown party. If the Association is required to give notice to a payor "in some effective manner" it seems there should be a like obligation on the part of Petitioners to give notice to the Association of their existence "in some effective manner". This was not done.

For these reasons, the District Court's decision does not conflict with River Holding Co., supra.

B. THE DISTRICT COURT DECISION IS NOT IN CONFLICT WITH EITHER ST. MARTIN V. McGEE, 82 So.2d 736 (Fla. 1955) OR SCHECHTMAN V. GROBBEL, 226 So.2d 1 (Fla. 2d DCA 1969).

St. Martin v. McGee, 82 So.2d 736 (Fla. 1955) does not stand for the proposition advanced by Petitioners. In St. Martin a mortgagee sought to foreclose alleging that the mortgagor had failed to "keep the building on said land in proper repair." The lower court found, to the contrary, that the property had been kept in a good state of repair and its value had been enhanced because of improvements made thereon. The court did not refuse foreclosure because only a technical breach had occurred; the court refused foreclosure because no breach had occurred. Even casual scrutiny of St. Martin

demonstrates that it does not stand for the proposition advanced by Petitioners.

On the other hand, Schechtman v. Grobbel, 226 So.2d 1 (Fla. 2nd DCA 1969) does hold as Petitioners assert; foreclosure should be denied when the breach of a mortgage contract is merely technical. In Schechtman, a mortgagor was required to make monthly payments of city and county taxes into escrow. The clause in the mortgage requiring the tax excrow did not require that it be paid to the mortgagee, only that an escrow payment be made. One time, instead of making the escrow tax payment to the mortgagee, the escrow tax money was paid into a special tax account which the mortgagors opened in a bank. There was never a delinquency in the payment of principal and interest nor was there a failure to pay the tax escrow. The sole dispute was that the tax escrow was not paid to the mortgagee.

When the default was declared, all principal and interest payments had been made when due and all escrow payments had been made. The court correctly held that if this was a default, it was a mere technical default, and equity would not allow foreclosure in such a case.

The default in the instant action is more than a mere technical one. It is failure to pay principal and interest as and when such payments come due. The entire purpose of a mortgage is to secure timely payment of the indebtedness secured thereby. In Clark v. Lachenmeier, 237 So.2d 583

(Fla. 2d DCA 1970), a case advanced by Petitioners, the Court stated:

> The Florida decisions recognize the right of a mortgagee to accelerate upon default of conditions directed to the preservation of the security, such as the payment of interest, installments of principal, taxes and insurance "because an investor may very properly insist that his security shall be kept intact or that the loan shall mature." Treb. Trading Co. v. Green, 1931, 102 Fla. 238, 135 So. 510; 22 Fla.Jur., Mortgages, §212.

Petitioners assert that there can be no more substantial breach of a mortgage than failure to pay the underlying debt. The default in the instant action was not merely technical, it was substantial. There is no conflict, express or direct, with either St. Martin or Schechtman.

C. THE DISTRICT COURT DECISION IS CONSISTENT WITH LIEBERBAUM V. SURFCOMBER HOTEL CORP., 122 So.2d 28 (Fla. 3rd DCA 1960)

Petitioners continue to advance cases in which a lender was guilty of improper conduct as being in conflict with the decision by the District Court in the instant action, even though the District Court and the trial court expressly found that the Association was not guilty of such conduct. Another one of these cases is Lieberbaum v. Surfcomber Hotel Corp., 122 So.2d 28 (Fla. 3rd DCA 1960), involving a dispute over a late payment. Foreclosure was denied as a result of conduct of the mortgagee. The court upheld the lower court's finding that:

> The evidence is clear that Plaintiffs knew, from past experience, that some excusable oversight was the cause for non-payment of the January 25, 1959 installments. Plaintiffs could have secured payment by a single demand and prevented acceleration and possible foreclosure.

It also appears in Lieberbaum that the holder of the mortgage had ulterior motives:

> It is clear from this record that Lieberbaum was desirous of regaining possession of the two hotels and that he believed acceleration would render it impossible for the defendants to protect their equity in the hotels.... Lieberbaum, supra, page 29.

There has been no such finding in the instant action. To the contrary, the Association tried to secure payment. It sent a notice of late payment and demand which was received by the payor and thrown in the trash. It then sent a notice of acceleration which was also received and discarded. Lieberbaum, supra, is radically different from the instant appeal.

In the same portion of their argument, Petitioners assert that the District Court is in conflict with Clark v. Lachenmeirer, supra, where the court denied foreclosure as a result of the exercise of a "due-on-sale" clause. No due-on-sale clause is involved in the instant action. In addition, Clark, supra, recognizes the right of a lender to accelerate upon non-payment of the debt. The nature of the instant action and the situation in Clark are entirely different. There is no conflict between the District Court's decision and either Lieberbaum, supra, or Clark, supra.

D. JURISDICTION SHOULD NOT BE ACCEPTED ON THE BASIS OF THE STATEWIDE IMPORTANCE OF THIS ACTION.

Petitioners urge that this action should be accepted by the court since it involves issues of statewide importance

and basic justice. The Association does not demean the issues before the Court as unimportant. To the contrary, the Association understands that for the parties concerned this is an extremely important and significant action. But in the context of judicial review by the Supreme Court of Florida, the issues presented by this action are neither unique nor difficult. A promissory note was accelerated in accordance with its terms because of the failure by any party to make payments thereon as and when due. The failure resulted from the negligence of Petitioners' agent. The Association has sought in this action to recover its debt. This is not an issue of extreme importance except as between the parties concerned. Further, the facts in the instant action are not commonplace. It is doubtful that the public will be served by a further consideration of this singular controversy.

The District Court's decision does not, as Petitioners urge, give lending institutions a free rein to accelerate debts on technical defaults and without notice to the proper parties. Traditional principles of equity will continue to prevent foreclosure where actions of the lender are unfair, unjust, deceptive or misleading. Nothing in this regard has been changed by the District Court's decision. What may result from the District Court's decision is that potential purchasers of property will be more careful regarding the agent to whom they entrust real estate closings. The loss which Petitioners may incur resulted solely from the

negligence of their own agent. The District Court's decision has correctly applied equitable principles in this action and is consistent with the law of Florida.

E. CONCLUSION

For the reasons stated above, the Association requests that the Supreme Court find there is not proper jurisdiction for the instant appeal.

Respectfully submitted,

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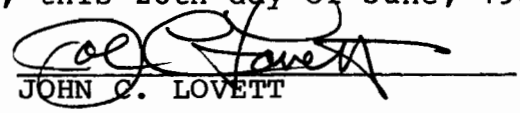
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Jurisdictional Brief of Respondent has been furnished by U. S. Mail to Cynthia S. Tunnicliff and George N. Meros, Jr., Carlton, Fields, Ward, Emmanuel, Smith & Cutler, P.A., P. O. Drawer 190, Tallahassee, Florida 32302 and James M. Donohue, Esq., Henry, Buchanan, Mick and English, P.A., P. O. Drawer 1049, Tallahassee, Florida 32302, this 28th day of June, 1983.



JOHN C. LOVETT