63,757

IN THE SUPREME COURT OF FLORIDA

FILED

JUN 13 1983

SID J. WHITE
CLERK, SUPREME COURT
By _____ Chief Deputy Clerk

ROBERT DAVID and LORETTA G. DAVID, his wife,

Petitioners,

vs.

SUN FEDERAL SAVINGS AND LOAN ASSOCIATION,

Respondent.

CASE NO. _____

JURISDICTIONAL BRIEF OF PETITIONERS

CYNTHIA S. TUNNICLIFF
GEORGE N. MEROS, JR.
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ATTORNEYS FOR PETITIONERS

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STATEMENT OF THE CASE AND FACTS

This statement of the case and facts employs only those facts found in the trial court order and the decision of the District Court (pages 10 and 1 in appendix, respectively).

On September 18, 1980, Petitioners, Mr. and Mrs. David, entered into a contract for the purchase of a home in Killearn Estates owned by Mr. and Mrs. Brown. The property cost $71,622. The Davids were to pay part in cash and assume approximately $35,000 in indebtedness owed to Respondent SUN FEDERAL. Respondent held a mortgage on the property to secure its debt.

The closing took place on November 3, 1980. The sellers, Mr. and Mrs. Brown, hired Title Searchers Inc., to handle the transaction. During the closing, Title Searchers collected the October, 1980, and November, 1980, mortgage payments from the closing proceeds to send to Respondent. After the closing, however, Title Searchers misplaced the file and failed to send the October and November payments to Respondent. The failure to remit the payments resulted solely from the negligence of Title Searchers, and not from any fault of the Davids.

On December 1, 1980, Mr. David went to Respondent's offices to make his first mortgage payment. The bank refused payment and informed Mr. David that two days earlier it had accelerated the loan for failure to make the October and November payments. Prior to December 1, the Davids never received any notice from Respondent that the payments had not been made, and that Respondent had requested immediate payment. What had in fact

occurred was that Respondent had written the Browns, who still resided in the house, demanding past due payments. The letter, however, was discarded without having been opened. Similarly, the letter to the Browns advising of acceleration was discarded unopened. Thus, prior to December 1, no one had notice of the bank's demand or acceleration.

Shortly thereafter, on the same day of December 1, Mr. David contacted Title Searchers, who recovered the file and tendered to Respondent the October and November payments. The bank rejected the tender. The bank later advised the Davids that it would reinstate the loan at 12.5% interest, in stark contrast to the 7.5% interest that they had contracted to assume--a 60% increase. [1]

The trial court entered a final judgment holding that while the Davids were not personally liable for the note, their newly purchased home was subject to the mortgage securing the note. The court held further that unless the Browns pay $35,486.10, plus costs and attorneys' fees to Sun Federal, the David's home must be sold at foreclosure. The District Court of Appeal, First District, affirmed.

INTRODUCTION

The District Court grounded its decision on two express holdings. First, the Court held: "Given no fault by either

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[1] The fact that Sun Federal had offered to reinstate the loan in exchange for a whopping increase in the interest rate is found in Judge Ervin's dissent, but this Court has made clear that facts brought out in dissent are presumptively valid and can support a jurisdictional petition, unless they are at odds with the facts found by the majority. Commerce National Bank in Lake Worth v. Safeco Insurance, 284 So.2d 205 (Fla. 1973). The fact set forth above is consistent with the majority opinion.

party, equity will not interfere with the enforcement of Sun Federal's contractual rights" (APP at 2). Second, by stating that a "creditor does not have an obligation to continuously search the public record for transactions or to follow up every inquiry concerning mortgaged property" (APP at 2), the Court held that a bank can accelerate the due date of a note without providing actual and effective notice to the party tendering payment on the note. These two express holdings are in direct conflict with decisions of this Court and of the Second and Third District Courts of Appeal.

A. The District Court's Decision Expressly and Directly Conflicts With River Holding Co. v. Nickel, 62 So.2d 702 (Fla. 1952)

River Holding Co. v. Nickel, 62 So.2d 702 (Fla. 1952), is remarkably similar to the present case. The facts reveal that on December 31, 1951, the buyer and seller closed the purchase of real property encumbered by a mortgage. At the time of closing, the December 15th payment had not been paid. The buyer was under the mistaken impression that no payment was due until January 15. Accordingly, the buyer went to the offices of the mortgagee's agent on January 22 to make the first payment, but was told that the note had been withdrawn. Shortly after learning of this problem, the buyer again went to the mortgagee and tendered past due payments. The offer was rejected, however, and the trial court entered judgment foreclosing the mortgage.

This Court reversed on two distinct grounds. First, citing "the sincere, honest and diligent efforts of [the buyer] to pay

his obligation", the Court held that equity should deny a mortgagee's right to foreclose if the payor diligently seeks to cure a default by tendering past obligations. 62 So.2d at 704. Importantly, the Court made no mention of fault and thus did not base its holding on the fault of either party. Second, the Court held that "in order to accelerate the due date of a note such decision of the owner thereof must be disclosed to the payor in some effective manner before payment is tendered, . . ." Id. (Emphasis in original.) Notice "in some effective manner" has been clarified to mean actual notice. Campbell v. Werner, 232 So.2d 252, 256 (Fla. 3rd DCA 1970).

The conflict between the decision under review and this Court's decision in River Holding is apparent and two-pronged. In this case, the Court held that because neither the Davids nor Sun Federal was at fault, it could not prevent the enforcement of Sun Federal's foreclosure rights. The Court viewed the David's good faith tender of past due payments as immaterial. In River Holding, to the contrary, the Supreme Court found that when a buyer honestly and diligently attempts to cure a default by tendering past obligations, a court can--and should--deny the right of foreclosure.

The second prong of conflict with River Holding is equally obvious. Here, the District Court held that Sun Federal was entitled to accelerate the note even though the payor, the Davids, tendered full payment before receiving any notice of the acceleration. But in River Holding, the Court held that a mortgagee must give the payor of a note actual notice before

being entitled to accelerate. The present decision is thus in express and direct conflict with River Holding.

B. The District Court's Decision Expressly and Directly Conflicts with St. Martin v. McGee, 82 So.2d 736 (Fla. 1955), and Schechtman v. Grobbel, 226 So.2d 1 (Fla. 2nd DCA 1969)

Both St. Martin v. McGee, 82 So.2d 736 (Fla. 1955) and Schechtman v. Grobbel, 226 So.2d 1 (Fla. 2nd DCA 1969), expressly hold that "foreclosure of a mortgage will be denied when the breach of the mortgage contract is merely a technical one and such breach does not place the security in jeopardy." 226 So.2d at 3. The District Court's decision directly conflicts with this holding because it approves foreclosure in spite of the uncontested facts demonstrating that the David's breach was merely technical and did not place Sun Federal's security in jeopardy.

In St. Martin, the mortgagor breached the mortgage contract by failing to keep the secured property in repair. In Schechtman, the mortgagor breached by failing to pay escrow taxes to the mortgagee in addition to regular payments of principal and interest. The breach in each case was deemed merely technical because there was no evidence to suggest that the mortgagor could not or would not keep all payments current. Similarly, the security in each case had not been placed in jeopardy by the breach. Accordingly, the Second District and Supreme Court held

that "[e]quity will not suffer a foreclosure and forfeiture under these circumstances." 226 So.2d at 3; 82 So.2d at 737.

The operative facts in this case are the same. The failure to make the October and November mortgage payments was merely a technical breach because the Davids stood ready, and did indeed tender, all past due payments on December 1. Moreover, the fact that the David's property is worth twice as much as the balance of the note, and the fact that Sun Federal offered to reinstate the loan, proves that the bank's security was always fully intact. Notwithstanding these uncontroverted facts, the First District upheld Sun Federal's right to foreclose, thereby creating express and direct conflict with St. Martin and Schechtman.

C. The District Court's Decision Expressly and Directly Conflicts With Lieberbaum v. Surfcomber Hotel Corp., 122 So.2d 28 (Fla. 3rd DCA 1960)

To reiterate, the District Court's decision holds that "[g]iven no fault by either party, equity will not interfere with the enforcement of Sun Federal's contractual rights". Manifestly, this decision binds all persons in the First Appellate District to the rule that equity will not deny foreclosure unless the chancellor specifically finds the mortgagee to be at fault. This holding is in direct conflict with Lieberbaum v. Surfcomber Hotel Corp., 122 So.2d 28 (Fla. 3rd DCA 1960), as further explained by Clark v. Lachenmeier, 237 So.2d 583 (Fla. 2nd DCA 1970), which hold that a chancellor can indeed deny foreclosure if acceleration would work an

unconscionable result, regardless of the relative fault of the parties.

In Lieberbaum, the Third District held unequivocally that:

> There can be no doubt of the right of a chancellor to deny foreclosure based upon an acceleration where there are substantial equities which render the acceleration unconscionable.

122 So. 2d at 28-29. The Court also made clear that the "unconscionability" to which it referred was an unconscionable result:

> The plaintiffs seek the aid of a Court of Equity for the purpose of bringing about an unconscionable result. Circumstances may exist where withholding the right to accelerate is appropriate. Were this not so, there could never be occasion for the enforcement of equitable doctrines.

Id. Furthermore, Lieberbaum and Clark v. Lachenmeier have defined the elements of unconscionability [2] to include not only an inequitable result, but also an acceleration where the default neither harms the mortgagee nor impairs its security. Clark, 237 So.2d at 585.

The above holdings fit precisely the facts of this case. As already noted, the David's technical default caused no harm to Sun Federal because of their immediate willingness to bring the note current. Sun Federal's security, twice the value of the balance of the note, was clearly never in jeopardy. And of

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[2] Unconscionability, of course, is a question of law and thus properly the subject of decisional conflict. See §672.2-302, Fla. Stat. (1981).

overriding importance, Sun Federal's acceleration of the note, in spite of the Court's admission that the Davids were not at fault, would mean that the Davids would lose their home--all because of an innocent misunderstanding. The First District's decision that it could not redress such a patently unjust result is in direct conflict with Lieberbaum and Clark.

D. Because This Case Involves Issues of Statewide Importance and Basic Justice, This Court Should Exercise its Discretion and Accept Jurisdiction

In accord with the Committee Notes to Rule 9.120, Florida Rules of Appellate Procedure, Petitioners present two key reasons why the Court should accept jurisdiction of this case.

First, the issues here directly affect literally thousands of property owners and their lenders, making the case one of statewide importance. This brief has demonstrated that as a result of the First District's decision, lending institutions in North Florida can accelerate and foreclose a mortgage regardless of diligent, good faith efforts to bring a note current, and without having to provide effective notice to the payor of the note. Also, lenders in this Appellate District can accelerate and foreclose even if the default is merely technical and the security remains intact. Correspondingly, chancellors in equity are now precluded from denying foreclosure unless the mortgagee is found to be at fault. But homeowners and lenders in all other Districts, as a result of River Holding and the other cases cited above, are bound by wholly contradictory rules. In a state with a booming population and a precariously fragile real estate

market, such an irreconcilable conflict of decisions is destabilizing.

Apart from its statewide implications, the First District's decision is simply not fair. Though entirely blameless, the Davids face the imminent loss of their new home. They have been deprived of the protection of those equitable principles designed to redress such unfairness. This Court must accept jurisdiction to ensure that the safeguard of equity be applied consistently to the Davids and to all citizens of Florida.

CONCLUSION

Petitioners respectfully request that this Court accept jurisdiction and reconcile the direct conflict created by the decision of the First District Court of Appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by regular U.S. Mail to JOHN C. LOVETT, ESQUIRE, Post Office Box 1876, Tallahassee, Florida 32302 this 11th day of June, 1983.

Cynthia S. Tunnicliff
Attorney