O/a 5-11-84

IN THE SUPREME COURT OF FLORIDA



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

# PETITIONERS' BRIEF ON THE MERITS

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## PRELIMINARY STATEMENT

Petitioners, ROBERT and LORETTA DAVID, will be referred to as the Davids or Petitioner.

Respondent, SUN FEDERAL SAVINGS AND LOAN ASSOCIATION, will be referred to as the Association, Sun Federal or Respondent.

The Record on Appeal will be referred to by the symbol (R: ), followed by the appropriate page number.

## STATEMENT OF THE CASE AND FACTS

In September, 1980, Petitioners were looking for a home to purchase in Tallahassee. Since Mr. David was on a fixed retirement income, it was essential that any home Petitioners purchase have a low interest assumable mortgage (R: 103). The Davids found a home in Killearn Estates they were interested in buying from Mr. and Mrs. Brown. The real estate agent specifically called the mortgagee, Sun Federal, to confirm that the loan was assumable (R: 84). On September 18, 1980, Petitioners entered into a contract for the purchase of the Brown's home for $71,622. The Davids were to assume an approximate $35,000 mortgage and pay the remainder of the purchase price in cash.

The sellers hired Title Searchers, Inc. to handle the closing of the transaction (R: 115). Prior to the date of closing, Title Searchers requested and obtained a status letter from the mortgagee, Sun Federal (R: 115). Ms. Heather Crum, an employee of Title Searchers, informed an employee of Sun Federal of the closing date and verified the loan balance. Ms. Crum specifically inquired as to the amount of the mortgage payments due Sun Federal which were to be collected at the closing, including the late fee for October (R: 122).

During the closing on November 3, 1980, Title Searchers collected the October, 1980 and November, 1980 payments from the closing proceeds. The seller's closing statement shows the

October payment as a charge against the seller and the buyer's closing statement shows the November payment as a charge against the buyer (R: 451; 452). After the closing, however, Title Searchers misplaced the file and failed to send the October and November payments to Respondent (R: 126, et seq.). The failure to remit the payments resulted solely from the negligence of Title Searchers and not from any fault of the Davids.

On November 6, 1980, Respondent sent Mr. and Mrs. Brown written notice that the loan was in default and demanded prompt payment (R: 429). The Browns, assuming that any correspondence from Sun Federal was no longer any of their concern, threw the unopened notice in the trash (R: 430). Similarly, the Browns disregarded and left unopened the notice of acceleration sent by Respondent on November 28, 1980 (R: 430).

On December 1, 1980, Mr. David went to a Sun Federal branch office to make his December mortgage payment, the first payment due on his new home (R: 109). It was only then that he discovered that the loan was in default and that Respondent had declared the total amount of the indebtedness due and payable. Petitioners had never been notified that the loan was in default or that the Respondent was accelerating the maturity date (R: 432). Mr. David notified Title Searchers, who discovered the misplaced file and tendered the October payment with the late fee and the November payment (R: 430). Respondent refused to accept the payments as untimely and sued to foreclose the mortgage. (R: 1) Respondent later advised the Davids that it would

reinstate the loan at 12.5% interest compared to the 7.5% they had contracted to assume.

At trial, the parties stipulated to the facts recited previously and as follows: The Browns were in default on their loan to the Respondent on numerous occasions prior to the closing on November 3, 1980 (R: 433). Indeed, Respondent had on one previous occasion notified the Browns that it was accelerating the maturity date and demanded payment of the indebtedness in full (R: 433). Subsequently, however, Respondent allowed the Browns to reinstate their loan by paying the two monthly installments plus the late fee (R: 434).

After a review of the stipulation and testimony, the trial court entered a Final Judgment holding that while Petitioners were not personally liable for the debt their newly acquired home was subject to the mortgage securing the debt. (R: 475) Consequently, if the Browns did not pay the $35,486.10 plus costs and attorneys fees, the Davids' home would be sold at foreclosure (R: 475). The Court found that Respondent had not committed any act nor made any representation which was intended to mislead, deceive or misinform Petitioners with respect to their rights under the note and mortgage. The Court also found that Respondent had acted properly and had not breached any obligation or duty to any party. Consequently, the trial court concluded that because there was no evidence of "fault" on the part of Respondent, there was no basis for denying Respondent's right of foreclosure.

The Davids appealed, contending that the trial court applied an erroneous standard requiring proof of fault by the mortgagee and had abused its discretion in allowing foreclosure under the particular circumstances of this case. The District Court affirmed, holding that when neither party is at fault, equity will not interfere with the mortgagee's right to foreclose. It thereby became the law in the first appellate district that in order for equity to aid a mortgagor facing foreclosure, it must be shown that some act or omission of the mortgagee was the cause of the mortgagor's default. Judge Ervin wrote a vigorous dissent in which he contended that it was error for the trial judge not to consider certain well-established equitable principles. Judge Ervin stated that foreclosure should have been denied because of the general unconscionability of the result; the security was never impaired, there was a good faith effort to pay the amounts due and the mortgagor never received actual notice of the default.

Petitioner sought review in this Court. The decision is in direct and irreconcilable conflict with numerous opinions of this Court and other District Courts of Appeal which set out the various equitable principles which are employed to avoid an inequitable and unconscionable result of foreclosure. The Court entered its order accepting jurisdiction and this brief is filed pursuant thereto.

## POINT ON APPEAL

WHETHER THE LOWER COURT ERRED AS A MATTER OF LAW IN REQUIRING EVIDENCE OF FAULT AS A PREREQUISITE FOR THE IMPOSITION OF EQUITY AS A DEFENSE TO FORECLOSE.

The trial court found that Sun Federal had not acted improperly or breached any obligation to the Petitioners. The Final Judgment is therefore based upon a mistaken conclusion that equity will not prevent a foreclosure when there is no act or omission by the mortgagee which caused the mortgagor's default. In other words, there must be some evidence of fault on the part of the mortgagee to give rise to a defense of equity by the mortgagor. In affirming, the First District Court of Appeal held "Given no fault by either party, equity will not interfere with the enforcement of Sun Federal's contractual rights."

The law does not require a mortgagee to prove fault on the part of the mortgagor as a prerequisite for a court to prevent foreclosure on equitable grounds. The cases have established definite equitable principles which are applicable and binding on the trial court. In Campbell v. Werner, 232 So.2d 252 (Fla. 3rd DCA 1970), the Court stated that a mortgagor's right to foreclose would be abrogated upon ". . . proof of facts or circumstances which are regarded in law as sufficient grounds to support such action by the court." The Court noted that the trial court is bound by the established equitable principles applicable to foreclosure actions and is not free to disregard them when, as here, their application is appropriate.

It was error for the trial court not to consider the following equitable principles:

UNCONSCIONABLE OR INEQUITABLE RESULT

A foreclosure should be denied when an acceleration of the due date would be an inequitable or unjust result and the circumstances would render the acceleration unconscionable. Delgado v. Strong, 360 So.2d 73 (Fla. 1978); LaBoutique of Beauty Academy v. Meloy, 436 So.2d 396 (Fla. 2nd DCA 1983); Wooten v. Matheson, 440 So.2d 1007 (Fla. 5th DCA 1983); Amerifirst Federal Savings and Loan Association of Miami v. Century 21 Commodore Plaza, Inc., 416 So.2d 45 (Fla. 3rd DCA 1982); Federal Home Loan Mortgage Corporation v. Taylor, 318 So.2d 203 (Fla. 1st DCA 1975); Clark v. Lachenmeier, 237 So.2d 583 (Fla. 2nd DCA 1970); Lieberbaum v. Surfcomber Hotel Corporation, 122 So.2d 28 (Fla. 3rd DCA 1960).

A typical example of the application of such equitable principle is found in Federal Home Loan Mortgage Corporation v. Taylor. The mortgagors in Taylor were stationed in the Philippines on military duty. The September mortgage payment was received in October and returned. Each succeeding month, payment was made for the preceding month and returned until the following April when the mortgagor gave up in frustration. The mail

service between the Philippines and Okaloosa County, Florida, severely hampered the parties' ability to communicate effectively. Under those facts, the Court determined that it would be

> unconscionable to precipitate the maturity of the entire balance of over $14,000 which could only result in the loss of mortgaged property through foreclosure, all because of a technical default of one month's installment which well could arise from excusable misunderstanding and lack of effective and timely communication. (Emphasis added)

Just as in Taylor, the default here was merely technical and arose from excusable misunderstanding and lack of effective communication.

The instant case is factually similar to the case of Lieberbaum v. Surfcomber Hotel Corporation, 122 So.2d 28 (Fla. 3rd DCA 1960). In Lieberbaum, a schedule of payments was given to the Hotel bookkeeper and checks for the correct amounts were drawn but unsigned with specific instructions that the checks were to be signed and delivered when due. These instructions were not carried out in a timely manner. The mortgagee knew of the hotel manager's authority to sign checks and the availability of funds and on no occasion indicated he had not received payment nor asked for payment. In affirming the trial court's refusal to accelerate and foreclose, the Court stated:

> Plaintiffs could have secured payment by a single demand and prevented acceleration and possible forfeiture.

> To grant plaintiff's relief prayed for herein would be to assist them in securing an inequitable result under the circumstances existing in this case. This, a Court of Equity will not do.

The instant case is also factually similar to Schechtman v. Grobbel, 226 So.2d 1 (Fla. 2nd DCA 1969), where the Court refused to allow acceleration where escrowed money was mistakenly paid to a bank rather than to mortgagees. The Court in Schechtman, stated that "Equity will not suffer a foreclosure and forfeiture under these circumstances."

In a recent case, LaBoutique of Beauty Academy v. Meloy, the Second District affirmed a trial court decision denying foreclosure because foreclosure would be unjust and unconscionable. In LaBoutique, the mortgagor's check for the mortgage payment was dishonored by the bank because a tenant's check which the mortgagor had credited to his account had been returned for insufficient funds. The mortgagor then deposited cash to cover the dishonored check. This deposit, however, was not credited to his account in a timely manner, causing his check for the mortgage payment to be dishonored a second time. The Second District in affirming denial of foreclosure stated that ". . . our courts have consistently noted that acceleration will be denied where the default is merely technical or where the overall equities of a particular case warrant such a result."

No clearer case for the application of the above-stated principles could be made than under the facts of the instant

case. There was a mere technical default and a clearly unconscionable result. It should be emphasized that the courts in the above-cited cases speak of inequitable results occasioned by foreclosure. In the instant case, Petitioners did not in any way contribute to payments being late. Indeed, the payments were made at closing and were simply not forwarded to Sun Federal, but through no fault of Petitioners. Yet, the result occasioned by someone else's inadvertent failure to forward the escrowed mortgage payments to the mortgagee is disastrous to the Petitioners. Petitioners are faced with the possibility of losing their newly acquired home at a foreclosure sale or, at the very least, having to lose the benefit of their contract to assume the mortgage at a favorable rate by being forced to refinance at today's interest rate in order not to lose their home. The record clearly indicates that Petitioners purchased the property because of its assumable mortgage since Mr. David was in poor health and could not afford to pay today's interest rates. Petitioners are, therefore, literally "wiped out" by actions of third parties of which they had no knowledge nor control and under circumstances in which they did everything correctly, even to the point of going to the bank on December 1, 1980 to make their first mortgage payment.

DEFAULT WHICH DOES NOT PLACE THE SECURITY IN JEOPARDY

Courts have consistently held that foreclosure should be denied even though there is a default when the security for the mortgage is never placed in jeopardy. St. Martin v. McGee, 82 So.2d 736 (Fla. 1955); Brady v. Edgar, 415 So.2d 141 (Fla 5th DCA 1982); Woodcrest Apartments, Ltd. v. IPA Realty, etc., 397 So.2d 364 (Fla. 1st DCA 1981); First Federal Savings and Loan Association of Englewood v. Lockwood, 385 So.2d 156 (Fla. 2nd DCA 1980); Schechtman v. Grobbel, 226 So.2d 1 (Fla. 2nd DCA 1969); Overholser v. Theroux, 149 So.2d 582 (Fla. 3rd DCA 1963).

In Schechtman v. Grobbel, the default occurred by the failure of the mortgagor to pay escrow taxes to the mortgagee in addition to regular payments of principal and interest. In denying foreclosure, the Court concluded:

> 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.

In a recent Fifth District Court case, Wooten v. Matheson, the Court unequivocally affirmed the trial court denial of foreclosure because the ". . . security for the mortgage had not been impaired or put in jeopardy."

As pointed out in Judge Ervin's dissent in this case, one means of determining whether the security is impaired is to establish the value of the security and then the balance

remaining on the note and mortgage. If the security far exceeds the balance due, then it is reasonable to assume it is not impaired. Petitioners paid $71,662 on November 3, 1980 and the balance due on the loan at the time of acceleration was $31,362.29.

It is evident that Respondent is not concerned about its security, but rather about the low interest it was receiving on the loan. Respondent advised Petitioners that it would reinstate the loan at 12.5% interest, a significantly higher rate than the Davids assumed. Consequently, Respondent's own acts are inconsistent with its attempts at foreclosure.

PETITIONERS DID NOT RECEIVE ACTUAL NOTICE OF RESPONDENT'S INTENT TO ACCELERATE

The case law clearly establishes that notice of intent to accelerate must be made in an effective manner to the mortgagor before the overdue payment is tendered. In River Holding v. Nickel, 62 So.2d 702 (Fla. 1952), the Court stated:

> While there is much in appellant's case to appeal to a court of conscience on general principles, we have held in previous cases of this kind that when a holder of a note secured by a mortgage decides to exercise his option to declare all remaining payments due and payable, such decision must be brought home to the defendant in some effective manner before payment is tendered, otherwise the option is defeated. Clay v. Girdner, 103 Fla. 135, 138 So. 490. See also Fegers v. Pompano Farms, Inc., 104 Fla. 123, 139 So. 201.

See also Kreiss Potassium Phosphate Company v. Knight, 124 So. 751 (Fla. 1929) and Central Home Trust Company v. Lippincott, 392 So.2d 931 (Fla. 5th DCA 1981).

In the instant case, Petitioners were never notified of the mortgagee's intent to accelerate before they tendered payment on December 1, 1980. Although notice was sent to the Browns, that cannot be presumed to be notice to Petitioners nor did Petitioners have actual notice of the mortgagee's intent to accelerate. Moreover, Sun Federal knew that the mortgage had been assumed. Title Searchers had informed Sun Federal that the closing would take place on November 3 and that the October and November mortgage payments would be made at the closing. Sun Federal should have inquired of Title Searchers to whom notification of their intent to accelerate should be sent.

The Court in this case felt that without some action on the part of the mortgagee to cause the default, the established equitable principles were inapplicable. To the contrary, it was error for the trial court not to consider and apply the established equitable principles enumerated above. Assuming the court did appropriately consider such principles, it abused its discretion in not applying those principles to prevent foreclosure in this case. Canakaris v. Canakaris, 382 So.2d 1197 (Fla. 1980). This Court in Canakaris defined the parameters of discretion as follows:

> The trial court's discretionary power is subject only to the test of reasonableness, but that test requires a

> determination of whether there is logic and justification for the result. The trial courts' discretionary power was never intended to be exercised in accordance with whim or caprice of the judge nor in an inconsistent manner. Judges dealing with cases essentially alike should reach the same result. Different results reached from substantially the same facts comport with neither logic nor reasonableness.

In the instant case, the trial court abused its discretion in failing to apply those established, equitable principles to produce a result consistent with the result obtained by their prior application to similar facts. There was at best a technical default not occasioned by any act of Petitioners, the security was admittedly never in jeopardy, and Petitioners never received actual notice of Respondent's intent to accelerate so as to have an opportunity to cure the default. The result of foreclosure under these circumstances is inequitable and unconscionable.

## CONCLUSION

The principles of equity set out in the cases cited in this brief were established to prevent the precise result of this case - to prevent a family from losing its home and fortune because of inadvertent mistakes and lack of effective communication which in no way impaired the mortgagee's security.

This Court should apply those proven equitable principles, quash the decision of the District Court and reverse the judgment. Alternatively, the Court should remand with directions to consider Petitioners' equitable defenses irrespective of the issue of fault.

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 U.S. Mail, to JOHN C. LOVETT, ESQUIRE, Post Office Box 1876, Tallahassee, Florida 32302; ALEX D. LITTLEFIELD, JR., ESQUIRE, 2562 Executive Center Circle, East, Suite 131, Montgomery Building, Tallahassee, Florida 32301; and JOHN L. and MARGARET BROWN, 8605 Coach Road, Tallahassee, Florida 32308, this 21st day of February, 1984.

Cynthia S. Tunnicliff