O/a 5-11-84

IN THE SUPREME COURT OF FLORIDA

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

PETITIONERS' REPLY BRIEF

JAMES M. DONOHUE
Henry, Buchanan, Mick and English, P.A.
Post Office Drawer 1049
Tallahassee, Florida 32302
(904) 222-2920

-and-

CYNTHIA S. TUNNICLIFF
GEORGE N. MEROS, JR.
Carlton, Fields, Ward, Emmanuel, Smith & Cutler, P.A.
Post Office Drawer 190
Tallahassee, Florida 32302
(904) 224-1585

Attorneys for Petitioners

TABLE OF CONTENTS

TABLE OF CITATIONS

CORRECTED FACTS

Sun Federal misstates the facts in several important respects. Petitioners will correct the misstatements, not by offering an alternative view, but rather by detailing the facts as found by the District Court of Appeal.

(1) Sun Federal suggests that the Davids were at fault in this transaction. Not so. The District Court found that "[t]his Court is faced with a dispute between two parties, neither of which is at fault" (A. 8).

(2) Sun Federal maintains that the trial court applied equitable principles to this case, and that the District Court held that those principles had been properly applied. Both statements are untrue. The trial court never mentions the word "equity" in its six-page final judgment. And contrary to Respondent's contention, the conclusion that acceleration was not unconscionable does not address the equities of the case. When read in context, the conclusion of law discloses that the court was concerned only with whether the bank had committed some affirmative act sufficient to excuse the mortgagor's non-performance. Acts amounting to a waiver, estoppel or unconscionable (that is, blameworthy) conduct would have excused non-performance. The court thus held as follows: "Defendants' contentions that the Association has waived the right to accelerate; that it is estopped from accelerating; and that acceleration was unconscionable are without merit." (A. 5)

(Emphasis added.) In this context, the Court used "unconscionability" in its classic contract sense--overreaching or unscrupulous conduct by the contracting party. Hence, rather than considering the equities of the situation as a whole, the court limited its focus to whether the bank was at fault in the transaction. The District Court similarly failed to consider equitable principles, as evidenced by its actual holding: "[g]iven no fault by either party, equity will not interfere with the enforcement of Sun Federal's contractual rights". In dissent, Judge Ervin confirmed that the trial court did not "properly tak[e] into account well established equitable precepts", and that "[t]here were a number of equitable considerations which the lower court apparently did not entertain in reaching its result." (A. 9).

(3) Regrettably, Sun Federal injects non-record matters into this appeal and hints that Petitioners have a viable remedy against the negligent title company. Sun Federal knows this to be false, and knows further that Petitioners' only remedy lies in equity.

INTRODUCTION

> Courts of equity came into being in order to provide a forum for the granting of relief in accordance with the broad principles of right and justice in cases where the restrictive technicalities of the law prevented the giving of relief. Inherent in equity jurisprudence is the doctrine that equity will always move to prevent an injustice engendered by fraud, accident or mistake.

Hedges v. Lysek, 84 So.2d 28, 31 (Fla. 1955).

Through no fault of their own, the Davids face the loss of their home due to a mistake. This Court and the district courts of appeal have consistently applied equity to prevent such injustice.

This reply will show that: (1) the two most recent Florida cases support the Davids' position on appeal; (2) long-standing equitable principles should have been applied to deny acceleration and foreclosure; (3) this Court's decision in River Holding Co. v. Nickel is dispositive and mandates reversal; and (4) the commercial lending and housing industries are fostered by interaction with equitable precepts.

FLORIDA'S MOST RECENT DECISIONS SUPPORT THE DAVIDS

Two decisions, rendered after Petitioners filed their initial brief, demonstrate that the First District erred in permitting foreclosure. In Rice v. Campisi, ___ So.2d ___, 9 FLW 496 (Fla. 3rd DCA, Feb. 28, 1984), Mr. Campisi sent his mortgage payment by mail to the mortgagee, Mr. and Mrs. Rice. Through no

fault of Mr. Campisi, the post office sent payment to the wrong address and later returned it unopened. Mr. Campisi learned of the foreclosure proceeding and thereafter sent the mortgage payment by certified mail, but the Rices returned the check. The Third District affirmed the trial court judgment denying acceleration. Importantly, the Court rejected the notion advanced by Sun Federal and accepted by the First District that equity applies only when the mortgagee is at fault.[1] Rather, the Third District recognized that this Court in River Holding Co. v. Nickel and the district courts of appeal have established that equity will intercede when acceleration would be unfair:

> Our affirmance of the trial court's refusal to foreclose is not based upon the narrow doctrine of estoppel. . .
>
> . . .
>
> Our affirmance flows from the broader equitable considerations recognized in River Holding Co. v. Nickel, 62 So.2d 702 (Fla. 1952), Lieberbaum v. Surfcomber Hotel Corp., 122 So.2d 28 (Fla. 3rd DCA 1960), Overholser v. Theroux, 149 So.2d 582 (Fla. 3rd DCA 1963), and La Boutique of Beauty Academy, Inc. vs. Meloy, 436 So.2d 396 (Fla. 2nd DCA 1983). If the payment in the present case was late, its tardiness was beyond the control and knowledge of the appellees; they

---

[1] Lest there remain any doubt that the Court properly exercised jurisdiction in this case, all doubt is dispelled by Rice v. Campisi. Rice denied acceleration even though neither the mortgagee nor the mortgagor was at fault. The First District's holding below is in direct conflict: "Given no fault by either party, equity will not interfere with the enforcement of Sun Federal's contractual rights."

> should not, therefore, be made to bear the penalty of acceleration.

9 FLW at 496 (emphasis added).

As in Rice, the Davids had no knowledge or control over the tardiness of their mortgage payments. They should not, therefore, bear the penalty of acceleration.

Just one day after the Rice decision, the Fourth District confirmed that equity will deny acceleration to prevent unfairness, even when the mortgagee is blameless. In Community Federal Savings and Loan Association v. Orman, ___ So.2d ___, 9 FLW 503 (Fla. 4th DCA, Feb. 29, 1984), the mortgagor signed three monthly payment checks and gave them to his bookkeeper for delivery to the mortgagee. The bookkeeper embezzled the checks. The mortgagee sent notices of non-receipt of payment and default to the bookkeeper who, understandably, concealed them from the mortgagor. The mortgagee instituted foreclosure proceedings despite attempts to bring the note current. In affirming the denial of acceleration, the Court first cited language (language on which, parenthetically, Sun Federal relies heavily) from Federal Home Loan Mortgage Corp. v. Taylor, 318 So.2d 203 (Fla. 1st DCA 1975), to the effect that the terms of a mortgage are not contingent on the mortgagor's health or good fortune. The Court then, however, brought that language into perspective:

> The above statement of the law speaks in absolutes, but that same case in the very next paragraph makes it clear that there are exceptions in an equitable proceeding such as

> this. There are many credible decisions that have denied foreclosure, because they would produce unjust, unconscionable or inequitable results, . . .

9 FLW at 504 (emphasis added). After noting that the mortgagee properly exercised its rights, the Court held that acceleration should nonetheless be denied because it would be unfair.

Feeling constrained to determine only whether Sun Federal was at fault in this transaction, the trial court and First District failed to consider the overall equities of the David's plight. Rice and Community Federal show this to be error.

THIS CASE FITS WITHIN WELL-ESTABLISHED PRINCIPLES OF EQUITY

Sun Federal's assertion that this case does not fit within established equitable principles is wrong. Petitioners' initial brief proves that at least three equitable principles apply to the present circumstances. This Court reaffirmed the vitality of one of these in Delgado v. Strong, 360 So.2d 73 (Fla. 1978). There, the Court held that equity may deny foreclosure "where breach of the mortgage was merely a technical one and such breach did not place the security in jeopardy." Id at 75. This rule fits squarely here. Sun Federal concedes that its security was not jeopardized by the Davids' mistaken default (Resp brief at 20). With regard to what constitutes a "technical" breach, Sun Federal protests that the failure to pay a monthly mortgage payment, even if caused by mistake and followed by good-faith efforts to correct the mistake, is not a technical breach. The

law is to the contrary. If the failure to pay is followed by a mortgagor's good-faith efforts and present ability to pay its obligations, Florida regards the default as technical:

> Here, the trial judge was well within his discretion in concluding 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 the 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.

Federal Home Loan Mortgage Corp. v. Taylor, 318 So.2d at 208 (emphasis added). Accord, River Holding Co. v. Nickel, 62 So.2d 702 (Fla. 1952); La Boutique of Beauty Academy, Inc. v. Meloy, 436 So.2d 396 (Fla. 2nd DCA 1983).

Perhaps most importantly, Sun Federal's own actions reveal that they regarded the Davids' default as technical. Far from concerned about its security, Sun Federal offered to reinstate the loan in exchange for a whopping increase in the interest rate. If Sun Federal had actually been concerned about the integrity of its loan or the Davids' ability to pay, it would not have been willing to assume the risk that the Davids could afford a greatly increased monthly payment. This fact prompted Judge Ervin to remark:

> One could well wonder, then, whether the Association's decision to accelerate was motivated more by a desire to discontinue carrying a mortgage at an interest rate far less than that currently prevailing, than it

> was by any genuine concern that the default caused its security to be impaired.

By its words and actions, Sun Federal confesses that the Davids' default was technical and that its security remains intact. The trial court and First District erred in ignoring the principles in Delgado v. Strong.

RIVER HOLDING CO. CONTROLS THIS CASE

The Court need look no further than its decision in River Holding Co. v. Nickel to decide this appeal. The facts of both cases are remarkably similar. In both, parties contracted to buy property and assume existing mortgages. In both, mortgage payments were not paid as a result of innocent misunderstandings during the assumption process. In River Holding, the new mortgagor went to the bank to make his first payment but was told that the note had been "withdrawn." Here, when Mr. David tendered his first payment, the bank refused it. In both cases, the mortgagors received notice of acceleration after they made good-faith efforts to bring their notes current. This Court denied foreclosure in River Holding for two reasons. First, because of "the sincere, honest and diligent efforts of appellant to pay his obligation as it matured--a quality much to be commended" Id at 704. Second, because "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.)

Indisputably, the Davids made sincere, honest and diligent efforts to pay their obligations. Contrary to the assertion that the Davids were not entitled to notice of acceleration because they were not technically the mortgagor, River Holding makes clear that the payor--not just the technical mortgagor--must receive effective notice. The Davids, while perhaps not the mortgagor, were indeed the payor entitled to effective notice. They received no such notice. River Holding mandates reversal.

APPLICATION OF EQUITABLE PRINCIPLES ENHANCES THE LENDING AND HOUSING INDUSTRIES

Respondent asks this Court to restrict the use of equity in foreclosure cases because it yields inconsistent results and retards the lending industry. Sun Federal greatly underestimates the social value of equity. Its principles lend flexibility and common sense to the marketplace. To illustrate, courts frequently utilize the equitable contract doctrine of substantial performance--which in effect alters or modifies contractual rights--to ensure fairness among contracting parties. While Sun Federal might assert that courts should not thus interfere with private contractual rights, the evidence is overwhelming that the doctrine of substantial performance promotes vigorous and healthy commercial exchange. A chancellor performs the same function in denying foreclosure on equitable grounds. Without equity's ability to intercede, homeowners would be subject to the draconian penalty of losing their homes at any

time, due solely to an innocent misunderstanding. Such an unyielding rule would discourage persons from purchasing a home until they accumulated enough wealth to be able to redeem it at foreclosure. Young families, specially those with moderate to low incomes, would be reluctant to enter the housing market--a problem already besetting the industry. This consumer reluctance, in turn, could serve to depress the need for borrowing. Hence, equity stabilizes rather than retards; it instills confidence rather than unpredictability. Its precepts should have been applied in this case to promote these goals.

Respectfully submitted,

JAMES M. DONOHUE
Henry, Buchanan, Mick and
English, P.A.
Post Office Drawer 1049
Tallahassee, Florida 32302
(904) 222-2920

-and-

CYNTHIA S. TUNNICLIFF
GEORGE N. MEROS, JR.
Carlton, Fields, Ward, Emmanuel,
Smith & Cutler, P.A.
Post Office Drawer 190
Tallahassee, Florida 32302
(904) 224-1585

BY: George N. Meros Jr.

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 20th day of April, 1984.

George M. Hertz, Jr.