w/o o/a

IN THE SUPREME COURT OF FLORIDA
Tallahassee, Florida

Case No. 65,266

COMMUNITY FEDERAL SAVINGS AND LOAN ASSOCIATION OF THE PALM BEACHES,

Petitioner,

v.

RICHARD G. ORMAN and JOYCE W. ORMAN, his wife; FIRST AMERICAN BANK OF PALM BEACH COUNTY; and WILCOX GALLERY OF HOMES, a Florida corporation,

Respondents.
_____/

BRIEF OF AMICUS CURIAE FLORIDA LEAGUE OF FINANCIAL INSTITUTIONS

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CITATION OF AUTHORITIES

PREFACE

The parties will be referred to by their proper names.

ISSUE PRESENTED

Did the Court err in denying foreclosure of a mortgage because the obligor entrusted his secretary to keep the mortgage current and the secretary, instead of making the payments, embezzled the funds.

STATEMENT OF THE CASE AND FACTS

The statement of the case and of the facts as set forth by the Petitioner in its initial brief on the merits is adopted herein.

ARGUMENT

I. Issue Presented

DID THE COURT ERR IN DENYING FORECLOSURE OF A MORTGAGE BECAUSE THE OBLIGOR ENTRUSTED HIS SECRETARY TO KEEP THE MORTGAGE CURRENT AND THE SECRETARY, INSTEAD OF MAKING THE PAYMENTS, EMBEZZLED THE FUNDS?

In denying foreclosure of the mortgage held by Community Federal, the Circuit Court and District Court failed to apply three long standing principles of law which are directly applicable to the facts of the instant case and which would establish that Community Federal is entitled to the relief sought.

The first principle to be applied to the instant case relates to the rights of the mortgagee to foreclose and was set forth by this Court in 1938. In the case of Home Owners Loan Corporation v. Wilkes, this Court recognized that:

> The obligation of the mortgagor to pay or the mortgagee to foreclose in accordance with the covenants in the note and mortgage are all absolute and none of them are made contingent on the borrowers health, good fortune, or ill fortune, or the regularity of his employment.

178 So. 161 at 163 (Fla. 1938).

This is a principle that has been repeatedly recognized by the courts of this state. Most recently this position was applied by the Court of Appeals for the Third District in New England Mutual Life Insurance Company v. Luxury

Home Builders, Inc., 311 So.2d 160 (Fla. 3rd DCA 1975), holding that:

> Financial inability of a mortgagor (or of his grantee) resulting from personal or business misfortune as a reason for defaulting, is not ground for a court to deprive a mortgagee of his contract right to accelerate the balance of a mortgage indebtness for a default and to foreclose therefor.

311 So.2d at 163. Also see, Federal Home Loan Mortgage Corporation v. Taylor, 318 So.2d 203, 207 (Fla. 1st DCA 1975).

Thus, a mortgagee may exercise his well established right to enforce an acceleration clause in an installment note or mortgage upon default. Treb Trading Company v. Green, 102 Fla. 238, 135 So. 510 (1931); Federal Home Loan Mortgage Corporation v. Taylor, supra; New England Mutual Life Insruance Company v. Luxury Home Builders, Inc., supra. This is a right which the courts are loath to deny unless there exists some compelling equities in favor of the mortgagor which compels a denial of acceleration. Generally, these equities involve some conduct of the mortgagee which contributes to the default or which provides the basis for an estoppel.

As set forth by the court in the case of Campbell v. Werner, 232 So.2d 252 (Fla. 3rd DCA 1970):

> . . . 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. The decisions disclose that foreclosure on a accelerated basis may be denied where 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 therefor; 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.

232 So.2d at 256, 257.

A review of the facts as they exist in the instant case establish that there is absolutely no conduct on the part of the mortgagee which falls into the categories described in the Campbell case or which provide any grounds for an estoppel or denial of the relief sought. Community Federal did everything required of it under the contract and under the law, in a timely manner and in accordance with prudent business practices. At no time were the mortgagors misled or provided any basis

upon which they could assume that Community Federal would not exercise the remedies available to it under the mortgage.

Additionally, it must be recognized that this is not a case where the mortgagors are merely technically in default by failing to meet a condition of the contract that does not impair the mortgagee's security. Mortgage provisions concerning payment of interest, installments of principle, taxes and insurance are conditions directly related to the preservation of the security and the mortgagee may insist that the security be kept intact or claim maturity of the loan. Clark v. Lachenmeier, 327 So.2d 583 (Fla. 2d DCA 1970). The failure of the Ormans to meet their obligations under the contract directly effects the preservation of the security and places Community Federal in the position of being forced to accelerate and claim a default in order to protect is security.

Certainly, if conditions such as illness, death, unemployment or other personal or business misfortune are insufficient grounds to deny foreclosure, the facts surrounding the instant case should not result in a different conclusion, especially when one considers the equities as discussed below. Thus, the second and third principles ignored by the Circuit and District Courts become important.

In considering the equities existing under the facts of this case, both the Circuit Court and District Court failed to apply two well established equitable principles that would require denial of the relief sought by the Ormans.

First, there exists the well established rule that:

> Where one of two inncent parties must suffer through the act of third person, the loss should fall upon the one whose conduct created the circumstances which enabled the third party to perpetrate the wrong or cause the loss. Niccolls v. Jennings, 92 So.2d 829, 832, 833 (Fla. 1957).

Presented in the instant case is a situation where the acts and omissions of the Ormans, primarily those of Mr. Orman, contributed directly to the loss.

Mr. Orman placed responsibility for the payment of the installments due under the mortgage and note with his secretary. She was given complete responsibility to prepare the mortgage payment checks and mail them, as well as for obtaining Mr. Orman's mail from his former marital home. However, instead of completing these duties, Mr. Orman's secretary did not pay the bills but embezzld the funds. Mr. Orman not only failed to keep any apparent check on his secretary, but also ignored warnings from his secretary's estranged spouse that there was a possibility of embezzlement. Under these circumstances it can only be said that Mr. Orman's negligence and failure to properly supervise his own affairs resulted in the default.

Additionally, both Mr. and Mrs. Orman ignored repeated notices advising of the default by not reviewing their mail. They delayed in attempting to cure the default even after notice was received and the funds became available to effect such a cure. Finally, in curing the default checks were tendered from an account which contained insufficient funds to pay the checks. Under these circumstances the

only reasonable conclusion is that the Orman's neglegected their obligations and, by their own conduct, directly contributed to the resulting loss. To deny foreclosure and place to burden for the loss upon Community Federal is totally contrary to all equitable principles. The Ormans created the circumstances which caused the loss and equitable principles should not be applied to reverse the injury. Hill v. Lumas, 123 So.2d 365 (Fla. 3d DCA 1960).

Even if one concludes that the defaults were not due to the actions or omissions of the Ormans, a second equitable principle should be applied that would result in the identical conclusion that Community Federal's right to foreclose cannot be denied. As stated by the First District Court of Appeal in the case of David v. Sun Federal Savings and Loan Association, 429 So.2d 1277 (Fla. 1st DCA 1983).

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

Involved in the Sun Federal case were a set of factual circumstances which clearly established that neither the mortgagor nor the morgagee were responsible for the default. Instead, responsibility for the default rested upon a title company who, in serving as closing agent, held fund in escrow to pay one mortgage payment that was overdue and another that would immediately become due. However, the title company misfiled the closing documents and never completed its obligations with regard to the mortgage

payments. Subsequent demands by the lender were ignored, including the discarding unopened of a demand letter from the morgagee.

Despite an absence of fault on the part of the mortgagor, the District Court recognized its inabiliby to interfere with the contractual rights of mortgagee when there is no action on the part of the mortgagee causing the default. Just as the Sun Federal Court recognized that the creditor in that case has no obligation "to continously search the public record for transactions or to follow every inquiry concerning mortgaged property," 429 So.2d at 1278, the creditor in the instant case, Community Federal, has no obligation to see that a borrower properly tends to his or her affairs or that its interest is not adversely affected as the result of a dissolution of marriage. Nor should the lender be forced to assume the risk that a borrower will fail to prudently handle his or her own affairs or otherwise meet the obligations required of them under the mortgage contract. To hold otherwise would be totally contrary to accepted principles of law and equity and prior decisions of this Court. See, August Tobler, Inc. v. Goolsby, 67 So.2d 537 (Fla. 1953).

Finally, to deny foreclosure in circumstances such as these would place the courts of this state in the posture of altering contractual obligations freely entered into. As recognized by the court in New England Mutual Life Insurance Company v. Luxury Home Builders, Inc.: "A contract

right, which by constitutional provision is immune to impairment by legislative action, should not be impaired or abrogated by a court." 311 So.2d 163, accord, Home Owners Loan Corporation v. Wilkes, 178 So.2d at 163. This conclusion is based upon the underlying concept recognized by the courts of this state of the essentiality of safeguarding the validity of contracts, and the rights of enforcement thereof. Federal Home Loan Mortgage Corporation v. Taylor, 318 So.2d 207; Campbell v. Werner, 232 So.2d at 256.

To place upon the financial institution the burden of assuming the risk for the myriad of circumstances that may affect the ability of a borrower to meet the terms of the contract can only serve to impair the willingness such entities to continue to enter into mortgages on reasonable terms and at reasonable rates of interest. These considerations were recognized by the District Court of Appeal in the case of Campbell v. Werner where the court stated: "It would be difficult to estimate the extent of the adverse effect on land sales involving deferred payments and on mortgage financing in this state that would result if courts were to hold that acceleration clauses contained in promissory notes and mortgages will not be enforceable where a mortgagor, after notice of the mortgagee's election to accelerate for such default, offers to make the defaulted payment . . ." 323 So.2d at 257.

Well recognized are the uncertainties in today's financial markets and the fluctuation of interest rates has already

placed financial institutions in the position of being subject to changing conditions beyond their control. To place the additional burden of assuming the risk of the personal or business misfortunes that may render a borrower unable to meet his obligations under a mortgage contract can only serve to make the lending market even more precarious, or result in additional costs which can only ultimately fall upon all the mortgagors of this state. In a state such as Florida where its continued growth may depend, in part, upon the availablity of financing for the purchase of homes, establishing a rule that can only serve service to impair the ability and desire of financial institutions to enter the home mortgage market would be contrary to any legitimate public purpose. The Fourth District Court of Appeals itself recognized this when, in its opinion, the court stated: "The slings and arrows of the borrower's misfortune are normally not enough to defeat the clear legal contractual rights of a lender. Were we to hold otherwise, we might well call a permanent halt to all mortgage lending, for there are innumerable other disasters which can, and do, befall homeowners, each tragedy as piognant as the one before us now." The rules of law and equity set forth above, as well as the reasoning and purpose behind those rules, require reversal of the decision of the Fourth District Court of Appeals.

CONCLUSION

Based upon the legal and equitable priciples set forth herein, the opinion of the District Court of Appeal for the Fourth District should be reversed.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by U. S. Mail to Ronald Sales, Esquire, Sales and Weissman, P.A., 1551 Forum Place, Suite 300 F, West Palm Beach, Foorida 33402; Charles M. Pigott, Esquire, Johnson and Bakst, P.A., Building 100, Plaza 1551, 1551 Forum Place, West Palm Beach, Florida 33402; Freeman W. Barner, Jr., Esquire, Barnett Bank Building, 2001 Broadway, 6th Floor, Riveria Beach, Florida 33404; Joyce W. Orman, 315 Cascade Lane, Palm Beach Shores, Florida 33404 and Evan I. Fetterman, Esquire, 321 Northlake Boulevard, North Palm Beach, Florida 33408 this 10th day of December, 1984.

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