IN THE SURPEME 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, et al.,

Respondents.

BRIEF OF RESPONDENTS ORMAN ON JURISDICTION

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CITATIONS OF AUTHORITY

PREFACE

This is a Petition to invoke this Court's discretionary jurisdiction to review a Fourth District Court of Appeal's decision. Petitioner was the Appellant/Plaintiff (hereinafter "the Federal") in the lower courts and Respondents were Appellees/Defendants (hereinafter the "Ormans"). The following symbol will be used:

(A)-Petitioner's Appendix

STATEMENT OF THE CASE

The Federal sued the Ormans to foreclose a first mortgage on their former marital homeplace occupied by Mrs. Orman. Th Ormans pled affirmative defenses that the court ought to exercise its equitable jurisdiction to deny acceleration of maturity.

The affirmative defense was that the Ormans' homestead was worth far in excess of the mortgage balance (the property was worth $110,000 to $120,000 and the parties' equity was $50,000); that Mr. Orman entrusted the responsibility of drawing checks to make the mortgage payments to his secretary who wrote out the checks which he signed but she threw the checks away and drew checks payable to herself or to fictitious payees so as to embezzle the money which should have been comprised in the checks she drew to pay the mortgage payments; when Mr. Orman learned of his secretary's criminality, he tendered payment of the mortgage payments in arrears, but the Federal refused the tender unless he would agreed to execute a renewal note with an interest rate of fourteen percent, the interest rate in the note in foreclosure

being only eight and a half percent; and the Ormans renewed the tender.

At the hearing, the Federal admitted there had been no impairment of the security:

> THE COURT: Equitably speaking. And how is the bank going to be the loser if the court requires as a condition of the nonacceleration that all of the bank's costs be paid, including your attorney's fees and the costs and all the rest of it? Is there any real impairment of security?
>
> MR. BARNER: I can't say that there is because we have the first mortgage of about 50, a little over $50,000 and the property is probably worth more than that. I can't say that there's any impairment.

The trial court entered a final judgment dismissing the mortgage foreclosure, conditioned that the Ormans pay all principal, interest, penalty interest, and late charges, real estate taxes, and insurance in the amount of $9,491, pay attorney's fees of $5,100, and costs of $1,005.39, all of which they paid. The Federal appealed.

STATEMENT OF THE FACTS

The facts are those set forth in the Fourth District's decision as follows (A Ex. A, p.1): The divorced borrowers owned the subject residence, in which the ex-wife resided, as tenants in common. Since 1974 the ex-wife had religiously made all the payments on this 8-1/2% mortgage, but in 1981 another judge, who had presided over their marriage dissolution, ordered the ex-husband to assume that burden which he did for several months.

Thereafter the next three monthly checks, signed by the ex-husband and drawn by his bookkeeper were never sent to the institutional lender. Without any knowledge on the part of either the ex-husband or the ex-wife, the bookkeeper embezzled the ex-husband's funds. Likewise, the initial notices of non-receipt of payments and of default were not received by either co-owner because the same dishonest bookkeeper was receiving the mail and concealing it from the ex-husband. As a consequence, the note was in default and mortgage foreclosure proceedings commenced accompanied by repeated attempts by the co-owners to bring the loan current.

The Fourth District affirmed the dismissal of the mortgage foreclosure stating (A Ex. A, p.3):

> . . .we are of the opinion that the cumulative effects of the facts and circumstances of this case support affirmance. First of all, the decision of the trial court inevitably comes to us clothed with a presumption of correctness. Second, this is an equitable proceeding and the trial judge's findings and conclusion comport with fairness and good conscience. Thus, as the Supreme Court noted in DELGADO v. STRONG, 360 So.2d 73 (Fla. 1978), the trial court having exercised its discretion in denying a mortgage foreclosure, it would be error for a district court to reverse it, absent an abuse of discretion. Third, the occasion of an embezzlement by a third party employee is most unusual and compelling. Fourth, one of the co-tenants, who resides on this property, was utterly blameless and could not even be held responsible for the obviously poor choice of bookkeeper. Fifth, and perhaps most important, there is competent substantial evidence in the record to support the theory that both the borrowers were without knowledge of

> any arrearage for most of the period of the default. Last, there had been a long unblemished record of timely monthly payments.

ARGUMENT

POINT I

THE FOURTH DISTRICT'S DECISION DOES NOT DIRECTLY CONFLICT WITH OTHER FLORIDA CASES EVEN THOUGH THERE WAS NO "MISCONDUCT" ON THE PART OF THE MORTGAGEE.

The Fourth District specifically limited its decision to the cumulative facts in the case at hand (A Ex. A, p.4):

> . . .it must be stressed that this opinion is limited to all of its cumulative facts and circumstances, no one, or less than all, of which should be offered as excuses for failure to meet financial obligations in subsequent cases.

The Fourth District's decision does not directly conflict with the cases cited by the Federal. Those cases do not hold that the only time acceleration and foreclosure will be granted is when there is misconduct on the part of the mortgagee.

The Federal's argument is that however compelling the circumstances may be in favor of a mortgagor, the court must always accelerate maturity, however harsh that would be, unless the mortgagee has somehow contributed to the default. If this argument were accepted, equity courts would be obliged to accelerate maturity slavishly, no matter what the circumstances might be if the mortgagee had not contributed to the default. This is against reason and it is not the law. In BRADY v. EDGAR, 415 So.2d 141 (Fla. 5th DCA 1982), the court held at page 142:

> This appeal challenges the trial court's denial of acceleration by the mortgagees in a foreclosure.
>
> On the facts of the case we find no abuse in the exercise of the trial court's discretion to deny acceleration and foreclosure where the security was not impaired, notwithstanding that the trial court found the mortgagors in default for failure to maintain hazard insurance and to timely pay real estate taxes. (Emphasis added)

In the present case, the Federal agreed that its security was never impaired. Moreover, it was paid all sums in arrears, attorney's fees and costs. There are situations in which the trial court ought to exercise its discretion to deny acceleration of maturity on equitable grounds even though the mortgagee does not contribute to the default, and this is one. As the court stated:

> But how many situations do you have where the bookkeeper embezzles the money?

In OVERHOLSER v. THEROUX, 149 So.2d 582 (Fla. 3d DCA 1963) and CLARK v. LACHENMEIER, 237 So.2d 583 (Fla. 2d DCA 1970), the courts stated:

> A court of equity has the power of relieving a mortgagor from the effect of an operative acceleration clause in a mortgage where the default of the mortgagor is the result of some unconscionable or inequitable conduct of the mortgagee, or where no harm is done to the security by virtue of the default, and in view of the circumstances the court considers it to be unjust and inequitable to order foreclosure because of a merely unharmful breach of a condition of the mortgage. (Emphasis added)

In OVERHOLSER, the court also held:

> . . . The court may also relieve a mortgagor from the effect of the acceleration clause where the default is caused by the confusion or mistake of the mortgagor acting in good faith, or where the mortgagor is technically in default because of unusual circumstances. (Emphasis added)

In LaBOUTIQUE OF BEAUTY ACADEMY, INC. v. MELOY, 436 So.2d 396 (Fla. 2d DCA 1983) and ALTHOUSE v. KENNEY, 182 So.2d 270 (Fla. 2d DCA 1966), the court held that a court of equity may refuse to foreclose a mortgage when to do so would be unjust and unconscionable.

In RICE v. CAMPISI, 3d DCA, 9 FLW 496, the Third District affirmed denial of acceleration and foreclosure of a mortgage, stating:

> 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. 3d DCA 1960), OVERHOLSER v. THEROUX, 149 So.2d 582 (Fla. 3d DCA 1963), and La BOUTIQUE OF BEAUTY ACADEMY, INC. v. MELOY, 436 So.2d 396 (Fla. 2d DCA 1983). If the payment in the present case was late, its tardiness was beyond the control and knowledge of the appellees; they should not, therefore, be made to bear the penalty of acceleration. In so holding we do not recede from the sound public policy contained in CAMPBELL v. WERNER, 232 So.2d 252 (Fla. 3d DCA 1970) we merely distinguish this case upon its extraordinary facts and the equitable principles espoused in the cited cases.

Therefore, the Third District has distinguished its own decision in CAMPBELL v. WERNER, supra, upon which the Federal so heavily relies, in the RICE case, a case similar to the one at bar. CAMPBELL v. WERNER held that because of the essentiality of

safeguarding the validity of contracts and their enforcement, a contract for acceleration of a mortgage should not be impaired except upon proof of certain facts or circumstances sufficient to deny acceleration. The court set forth in its decision conduct that had been held by certain cases to be sufficient. The court did not state that those were the only situations that would support denial of acceleration. Once again, that this is true is supported by the Third District's later decision in RICE v. CAMPISI, supra. In any event, CAMPBELL v. WERNER does not hold that there must be misconduct on the part of the mortgagee, as the Federal contends.

The Federal also strongly relies upon DAVID v. SUN FEDERAL SAV. AND LOAN ASS'N., 429 So.2d 1277 (Fla. 1st DCA 1983) as demonstrating conflict. This reliance is misplaced because DAVID is a case in which the trial court exercised its discretion to accelerate maturity and the appellate court upheld the exercise of that discretion. In the present case, the trial court exercised its discretion in refusing to accelerate, and that exercise of discretion should be upheld. The trial court has a discretion to accelerate maturity or not based on the equities.

The final case with which the Federal claims there is a direct conflict is HOME OWNERS LOAN CORP. v. WILKES, 178 So.2d 161 (Fla. 1938). There is no conflict. The trial court did not deny acceleration in the present case because of the "borrower's health, good fortune, or ill fortune, or the regularity of his employment".

To summarize, the Fourth District's decision is totally consistent with Florida law. The three cases relied upon by the Federal do not hold that acceleration must be granted if there is no misconduct of the mortgagee, (i.e.), "conduct of the mortgagee that contributed to the mortgagor's default".

POINT II

THE FOURTH DISTRICT'S ORDER DENYING THE FEDERAL ATTORNEY'S FEES DOES NOT DIRECTLY CONFLICT WITH OTHER FLORIDA CASES.

The Federal was awarded attorney's fees in the trial court. The Federal chose to appeal, thus forcing the Ormans to pay attorney's fees to defend the appeal. The Federal was unsuccessful in its appeal. Certainly the appellate court had the sound discretion to refuse to award attorney's fees to the Federal under those circumstances. The issue of attorney's fees on appeal is not controlled by the fact that attorney's fees were awarded in the trial court, but is addressed to the appellate court's sound discretion. THORNTON v. THORNTON, 433 So.2d 682 (Fla. 5th DCA 1983). In this case as stated, supra, although the Ormans were in default and therefore the Federal was entitled to attorney's fees in the trial court, the Federal chose to appeal further, and unsuccessfully. Therefore, the appellate court had the discretion to deny attorney's fees.

In SCHECHTMAN v. GROBBELL, 226 So.2d 1 (Fla. 2d DCA 1969) and ROCKWOOD v. DeROSA, 279 So.2d 54 (Fla. 4th DCA 1973), cited by the Federal, the appellate court merely held that the mortgagee should have been awarded attorney's fees in the trial court. In the present case, the Federal was awarded attorney's

fees in the trial court. In BRADY v. EDGAR, supra, another case cited by the Federal, the appellate court merely exercised its jurisdiction to award attorney's fees on appeal. It did not hold that attorney's fees had to be awarded in every instance. There is no direct conflict between the denial of attorney's fees to the Federal, which as discretionary, and other Florida appellate decisions.

CONCLUSION

There is no direct conflict, therefore, this Court doe not have jurisdiction to hear the merits of this proceeding.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been mailed to: FREEMAN W. BARNER, 2001 Broadway, 6th Floor, Riviera Beach, FL 33404; EVAN I. FETTERMAN, 321 Northlake Blvd., NPB, FL 33408; CHARLES PIGOTT, Plaza 1551, Bldg. 100, 1551 Forum Place, WPB, FL 33401; this 8th day of JUNE, 1984.

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