IN THE SUPREME COURT OF THE STATE OF FLORIDA

COMMUNITY FEDERAL SAVINGS AND LOAN ASSOCIATION OF THE PALM BEACHES, Plaintiff/Petitioner, v. RICHARD G. ORMAN and JOYCE W. ORMAN, his wife, FIRST AMERICAN BANK OF PALM BEACH COUNTY and WILCOX GALLERY OF HOMES, etc., Defendants/Respondents.	Fourth District Court of Appeal Case No. 83-639 JANUARY TERM 1984 Supreme Court Case No. 65266

PETITIONER COMMUNITY FEDERAL'S JURISDICTIONAL BRIEF PURSUANT TO FLA. R. APP. P. §9.120(d)

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CITATIONS OF AUTHORITY

STATEMENT OF FACTS

Petitioner COMMUNITY FEDERAL filed with the Fourth District Court of Appeal on May 2, 1984 its Notice to Invoke Discretionary Jurisdiction of the Supreme Court pursuant to Article V, section 3(b)(3) of the Constitution of the State of Florida and Florida Rule of Civil Procedure 9.030(a)(2). Petitioner seeks to invoke the jurisdiction of this court on the grounds that the decision of the Fourth District Court of Appeal rendered in this cause February 29, 1984[1], (App. A), and its Order denying Community Federal's attorney's fees, expressly and directly conflicts with decisions of other District Courts of Appeal and the Supreme Court on the same question of law. The necessary facts are as follows.

This is a mortgage foreclosure. On January 18, 1982 Plaintiff COMMUNITY FEDERAL filed against Defendants ORMAN an action to foreclose a mortgage on real property located in Palm Beach County, Florida. (R.111). In its Complaint COMMUNITY FEDERAL alleged the breach of the terms of the note and mortgage by failure to make the payment due September 10, 1981 and all subsequent payments, as required by the terms of the mortgage. (R.112). Also, COMMUNITY FEDERAL claimed a mortgage lien on the mortgaged property to secure payment of principal, interest, attorneys' fees and any additional sums which it might advance subsequent to filing the Complaint for payment of taxes, insurance or other expenses for the pro-

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[1] Petitioner's Motion for Rehearing was denied by Order of the Fourth District Court of Appeal rendered April 4, 1984. A copy of Petitioner's Motion for Rehearing and Order thereon are incorporated in the Appendix as Exhibits "B" and "C".

tection, preservation or maintenance of the mortgaged property.

Defendants ORMAN answered COMMUNITY FEDERAL'S Complaint and interposed similar equitable defenses (R.136, 140, 142). The ORMANS' defenses, in essence, were based upon the property being homestead, having substantial equity, and Defendant RICHARD ORMAN entrusting the responsibility of drawing the checks to make the mortgage payments to his secretary who threw away the checks and embezzled the money with which to pay the mortgage.

The action was tried before the Court on February 18, 1983. In its Final Judgment (R.228, App.D) the Court dismissed COMMUNITY FEDERAL'S Complaint for foreclosure on the condition that Defendants ORMAN pay Plaintiff by the time specified in the Order all sums required to bring the note and mortgage current to the date of payment. The sums the Court ordered to be paid included installments of principal and interest, penalty interest, late charges, and monies advanced by Plaintiff for payment of taxes and insurance. As a further condition the Court ordered Defendants ORMAN to pay no later than the specified time COMMUNITY FEDERAL'S attorneys' fees and costs for the foreclosure action. If the Defendant failed to pay all amounts required of them to be paid within the time allowed, the judgment provided that on motion after notice the Court would enter an amended final judgment foreclosing the mortgage and fixing a date of sale. It is from this Final Judgment that COMMUNITY FEDERAL appealed to the Fourth District Court of Appeal.

The Fourth District Court of Appeal, in a 2 to 1 decision, affirmed the trial court as a result of the "cumulative effects of the facts

and circumstances of the case." (App.A, p.3). In its Opinion the District Court of Appeal described at length these facts and circumstances that resulted in acceleration and foreclosure of the mortgage and which illustrated, as the District Court of Appeal said, "the slings and arrows of a borrower's misfortune." (App.A, p.2). Nowhere in these circumstances, however, did the District Court of Appeal suggest that the lender engaged in any any misconduct or do "'...anything but what is should have done.'" The District Court of Appeal also denied (App.E) COMMUNITY FEDERAL'S Motion for Attorneys' Fees (App.F).

It is from these decisions of the appellate court that Petitioner COMMUNITY FEDERAL seeks to invoke the discretionary jurisdiction of the Supreme Court.

ARGUMENT

I. THE DECISION OF THE DISTRICT COURT OF APPEAL IN THE INSTANT CASE IS IN EXPRESS AND DIRECT CONFLICT WITH DECISIONS OF OTHER DISTRICT COURTS OF APPEAL AND THE SUPREME COURT ON THE SAME QUESTION OF LAW BECAUSE ACCELERATION AND FORECLOSURE WERE DENIED IN A MORTGAGE FORECLOSURE PROCEEDING ON EQUITABLE GROUNDS EVEN THOUGH THERE WAS NO CONDUCT OF THE MORTGAGEE THAT CONTRIBUTED TO THE MORTGAGOR'S DEFAULT.

The law in Florida is settled that an acceleration clause in an installment note and mortgage confers a contract right upon the holder of the note or mortgage which he may elect to invoke upon default and may seek its enforcement. Federal Home Loan Mortgage Corp. v. Taylor, 318 So.2d 203, 207(1st DCA Fla.1975), Campbell v. Werner, 232 So.2d 252, 255(3d DCA Fla.1970). Because it is essential that the validity of contracts be safeguarded and they be enforced in the event of a breach, a contract for acceleration of a mortgage indebtedness should not be impaired or abrogated, or the remedy afforded denied, except upon pleading and proof of facts and circumstances that are considered sufficient grounds in law to support the Court's action - not what may be the Court's own dictates of conscience or natural justice and what the Court conceives to be right and just in a particular case. Campbell v. Werner, supra at 256.

Many years ago the Supreme Court of Florida recognized in Home Owners Loan Corp. v. Wilkes, 178 So. 161(Fla.1938), 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 borrower's health, good fortune, or ill fortune, or the regularity of his employment.

More recently this position was recognized by the Court in New England Mutual Life Ins. Co. v. Luxury Home Builders, Inc., 311 So.2d 160(3d DCA Fla.1975).

In that case the Court opined:

> 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 indebtedness for a default and to foreclose therefor...."Such an agreement (for acceleration) is not prohibited by statute, nor is it against public policy; it is not in the nature of a forfeiture nor a hard contract which it would be unconscionable to enforce."....A contract right, which by constitutional provision is immune to impairment by legislative action, should not be impaired or abrogated by a court.

It is recognized, of course, that there are equitable grounds upon which acceleration and foreclosure may be denied. These grounds are discussed in detail in Campbell v. Werner, supra at 256, 257. An examination of this decision reveals that after acceleration any equitable defense, to be successful, necessarily must be coupled with some conduct of the mortgagee which contributed to the default. See, Campbell v. Werner, supra at 256, 257.[2]

The Court in David v. Sun Federal Sav. & Ln. Assn., 429 So.2d 1277 (1st DCA Fla.1983) went so far as to hold that even if there was no fault on behalf of the mortgagor, a mortgagee not at fault would not be denied acceleration and foreclosure. See, id. In David v. Sun Federal Sav. & Ln. Assn., supra, the mortgagor appealed a judgment providing that the lender and mortgagee, Sun Federal, properly accelerated a note and that foreclosure was appropriate. In that case the Davids contracted to purchase a home with an assumable mortgage

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2 It should be noted this is not a case where the mortgagors were technically in default. Mortgage provisions concerning payment of interest, installments or principal, taxes and insurance are conditions directed to preservation of the security since an investor certainly may insist that his security be kept intact or that his loan will mature. Clark v. Lachenmeier, 237 So.2d 583 (2d DCA Fla.1970).

from a party named Brown. A title company was to serve as closing agent, handling the funds placed in escrow. One of the mortgage payments was overdue and another payment was eminent - both were to be paid from the escrow funds. After the closing the title company misflied the closing documents and never made the payments it was to make. The lender demanded the past due payments from Brown, who still resided in the home. The demand letter, as well as a subsequent acceleration letter to Brown, were discarded unopened.

The appellate court affirmed acceleration and foreclosure. In support of its decision the court reasoned:

> This court is faced with a dispute between two parties, neither of which is at fault. Given no fault by either party, equity will not interfere with the enforcement of Sun Federal's contract rights. Id.[3]

The Court further examined the exhaustive catalogue of situations in Campbell v. Werner, supra, where equity prevents acceleration of an obligation and foreclosure to enforce it. None of those circumstances was found to be present. Id. at 954.

In the instant case the District Court noted that the mortgagors ORMAN admittedly were in default at the time of acceleration (App.A., p.1) and opined that:

> The slings and arrows of a borrower's misforture 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 innumberable other disasters which can, and do, befall homeowners, each tragedy as poignant as the one before us now.

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[3] See, also, August Tobler, Inc. v. Foolsby, 67 So.2d 537(Fla.1953). Where the equities are equal the law will prevail. Id. at 539.

Nevertheless, the District Court proceeded to affirm the trial court's denial of acceleration and foreclosure on equitable grounds that involved only misfortune or hardship to the mortgagor and no misconduct of the mortgagee or other conduct of the mortgagee contributing to the mortgagor's default. In fact, the District Court recognized that the trial court announced it (trial court) was not suggesting that the lender "did anything but what is should have done". Moreover, another portion of the trial record at conclusion of the trial further substantiates this finding:

> The Court: I don't think, for the record, that the bank has handled the matter in anything but a professional, business-like manner. They did give -- on the record at least gave these people an opportunity to straighten out the matter before they finally decided to send the acceleration letter. Now, whether or not your clients in fact received those communications is a question that the court will have to determine. But you're right, most of those cases that you're talking about deal with some kind of inequitable action on behalf of the bank who is attempting to accelerate. We don't have that situation here. (R.104).

As is evident, the decision in the instant case is in express and direct conflict on the same question of law with Campbell v. Werner, supra, Home Owners Loan Corp. v. Wilkes, supra, and David v. Sun Federal Sav. & Ln. Assn., supra.[4] The instant case, in essence, elevates a borrower's misfortune and hardship to the status of being solely sufficient equitable grounds to deny acceleration and foreclosure in direct conflict with Campbell v. Werner, supra and Home Owners Loan Corp. v. Wilkes, supra. Moreover, even if both mortgagors ORMAN are considered to be utterly blameless, a fact

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4 The District Court itself tacidly recognized apparent conflict of its decision with prior decisions in concluding:

> While we are not naive enough to suppose the lender will be content with our reasoning, we do believe an explanation was demanded in view of existing law which might indicate a contra-result.

of which the District Court attributed to only one of the co-tenants, the decision is still in express and direct conflict with David v. Sun Federal Sav. & Ln. Assn., supra, which held that when neither mortgagee nor mortgagor are at fault equity will not interfere with acceleration and foreclosure of a mortgage. Id. at 1278.

II. THE DECISION OF THE DISTRICT COURT OF APPEAL IN THE INSTANT CASE IS IN EXPRESS AND DIRECT CONFLICT WITH DECISIONS OF OTHER DISTRICT COURTS OF APPEAL ON THE SAME POINT OF LAW BECAUSE THE DISTRICT COURT OF APPEAL DENIED ATTORNEY'S FEES TO COMMUNITY FEDERAL AS MORTGAGEE EVEN WHERE, ALTHOUGH FORECLOSURE AND ACCELERATION WERE DENIED, THE MORTGAGORS WERE IN DEFAULT UNDER THE NOTE AND MORTGAGE, THE MORTGAGE IN THE INSTANT CASE PROVIDED FOR ATTORNEY'S FEES AND COMMUNITY FEDERAL'S ACTIONS AS MORTGAGEE WERE PRECIPITATED BY THE MORTGAGORS' DEFAULT.

The mortgage deed in the instant case (R.212)(App.G) in paragraph sixteen (16) provided reasonable attorney's fees to the mortgagee that were incurred because of the failure of the mortgagor to perform, comply with or abide by the stipulations, agreements, conditions and covenents of the promissory note and mortgage deed. Likewise, the mortgage note (R.211) (App.H) provided that if the mortgage became in default and was placed in the hands of attorneys for collection, the makers would pay a reasonable attorney's fee for making such collection.

In the instant case, the trial court denied acceleration and foreclosure on the condition, in part, that COMMUNITY FEDERAL's attorney's fees be paid. Although this decision of the trial court was affirmed by the Fourth District Court of Appeal, COMMUNITY FEDERAL's Motion for Attorney's Fees on appeal was denied.

It is undisputed that the mortgagors were in default in the instant case and the District Court so recognized. Nevertheless, the District Court failed to award attorney's fees to COMMUNITY FEDERAL on appeal even though there was no evidence of wrong-doing on the part of such mortgagee. By reason thereof the decision of the District Court conflicts with Schechtman v. Grobbel, 226 So.2d 1 (2nd DCA Fla. 1969), Brady v. Edgar, 415 So.2d 141 (5th DCA Fla. 1982) and Rockwood v. DeRosa, 279 So.2d 54 (4th DCA Fla. 1973).

On an attorney's fee provision very similar to the mortgage deed in the instant case, Schechtman v. Grobbel, supra, reversed the trial court's denial of fees, even though acceleration and foreclosure were denied, where the mortgagors were in default and the record reflected no evidence of wrong-doing by the mortgagees. Id., at 4. In similar circumstances, except no requirement of the issue of the mortgagees' wrong-doing was discussed, the court in Brady v. Edgar, supra, reversed the denial of fees and remanded to the trial court for an award of attorney's fees in the trial court as well as on appeal. The court in Rockwood v. DeRosa, supra, did likewise. See, id.

CONCLUSION

This Court should exercise its discretion to grant jurisdiction in the instant case due the the express and direct conflict of the decision with decisions of other district courts of appeal and the Supreme Court on the same question of law. The questions presented are of great importance to the people of the State of Florida and their mortgage lendors. The result of the decision is irreconcilable statements of law between courts in an important field which inevitably will cause uncertainty and confusion to the bar, the trial courts and the district courts of appeal. As the Court said in Sroczyk v. Fritz, 220 So.2d 908 (Fla.1969), it is just such areas of uncertainty in the law developed by inconsistent judicial opinions that makes necessary the conflict jurisdiction of the Supreme Court. Id, at 911. See, Williams v. Duggan, 153 So.2d 726 (Fla.1963).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished to RONALD SALES, Esquire, Attorney for Defendants/Respondents, Suite 300-F, 1551 Forum Place, West Palm Beach, Florida 33401; to EDNA L. CARUSO, Esquire, Attorney for Defendants/Respondents, Suite 4-B, 1615 Forum Place, West Palm Beach, Florida 33401; to CHARLES PIGOTT, ESQUIRE, Attorney for Defendant/Respondent, at Plaza 1551, Building 100, 1551 Forum Place, West Palm Beach, Florida 33402; and to EVAN I. FETTERMAN, Esquire, Attorney for Defendant/Respondent, at 321 Northlake Boulevard, North Palm Beach, Florida 33408, by mail delivery this 14th day of May, 1984.

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