IN THE SUPREME COURT OF FLORIDA
Tallahassee, Florida

Case No. 65,266

COMMUNITY FEDERAL SAVINGS AND LOAN ASSOCIATION OF THE PALM BEACHES,

Petitioner,

vs.

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

Respondents.
_____/

Petitioner's Brief on the Merits

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PREFACE

The parties will be referred to by their proper names. The following symbol will be used:

R - Record.

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ISSUE II

DID THE COURT ERR IN DENYING COMMUNITY FEDERAL ATTORNEYS' FEES ON APPEAL?

STATEMENT OF THE FACTS

The facts as set forth by the Fourth District Court of Appeal, presumably in a light most favorable to the Ormans, were as follows: The Ormans were divorced and owned a home as tenants in common. Mrs. Orman lived in the home and Mr. Orman had been ordered by the court to make the mortgage payments. Mr. Orman relied on his bookkeeper to make the mortgage payments, having signed checks for those payments, and the bookkeeper never sent the checks to Community Federal. The bookkeeper embezzled the money and neither Mr. or Mrs. Orman received letters or notices sent by Community Federal because the same bookkeeper went through the mail and concealed these items. After Community Federal failed

to receive three monthly payments it accelerated the mortgage and sued to foreclose.

The facts as shown by the record are as follows: Mr. Orman is a professor of public administration at Florida Atlantic University (R 18). Mrs. Orman is working on her PhD (R 109). At a time when he and his wife were separated and his wife was living in the home, a temporary relief order required him to make the mortgage payment (R 19). The parties were married during this entire time, contrary to the statement in the opinion of the Fourth District that they were divorced (R 19). In January, 1981, he employed one Karla Carter to answer his telephone, handle general correspondence, and pay his bills (R 19). Karla prepared checks and he signed checks for the months of September, October and November of 1981, to make these mortgage payments (R 20). He still received mail at the marital home, even though he was not living there, and sometimes Karla would pick up his mail and sometimes his wife would drop off his mail (R 25). He never notified Community Federal of a change in address (R 33).

In the first week of November he noticed things were not right and discovered Karla had been embezzling funds

from him, signing his name on checks, and charging things to his credit cards (R 21-22).

When he discovered this in November he knew he was in trouble with his creditors (R 23). He wrote letters to Community Federal and his other creditors telling them of the embezzlement, and that he thought he could be current in January (R 23). He received no response to that letter (R 24).

He threatened to press charges against Karla and her husband repaid him $2,700 (all he claimed she took) in November, however he did nothing about this mortgage other than send the letter telling Community Federal he would take care of it in January (R 23-24). Community Federal, after sending two letters and twice monthly notices, accelerated on December 14, 1981 (R 82-83, 222).

Karla's husband, from whom she was separated, testified that prior to the mortgage going into default, he had warned Mr. Orman that his wife was getting money from somewhere, not from him, and he assumed "...that she might be tapping the till some" (R 71). He said Mr. Orman responded "there's no way and I keep an eye on it" (R 71). Mr. Orman's version of this conversation was that Karla's

husband did ask him in September if he was giving Karla money and he told her husband he was not. He assumed Karla was getting her money from a fellow she was living with (R 94).

Mrs. Orman was living in the house at the time, however she testified that she never received the notices or letters indicating the mortgage was in default, until she received the notice that it was being accelerated (R 37-40). She worked, and she knew Karla would pick up her husband's mail at this address, and she just assumed her husband was receiving his mail. Some of her mail would be opened and her payments to utilities were sometimes late because of someone going through her mail (R 44-45).

Charles Smith, an officer of Community Federal, testified as to three letters from Community Federal to the Ormans informing them of the delinquency in their mortgage dated November 11, 1981, November 30, 1981 and December 14, 1981, which letters were introduced into evidence as plaintiff's exhibit 6 (R 222, 82). In addition, Community Federal sent two notices every 30 days to the Ormans indicating their mortgage was in arrears (R 83).

At the conclusion of the trial before the court, the court stated:

> The Court: I don't think, for the record, that the bank has handled the matter in anything but a professional, businesslike 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.... (R 103)

Nevertheless the court denied foreclosure on the condition that the Ormans bring the mortgage current and pay Community Federal's attorneys' fees and costs (R 228).

Community Federal appealed to the Fourth District, which affirmed and denied attorneys fees.

ARGUMENT

ISSUE I

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?

The opinion of the Fourth District, although erroneous, was honest. The statements in the opinion demonstrate that it was contrary to the law. For instance, the Fourth District stated:

> The slings and arrows of a 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 home-owners, each tragedy as poignant as the one before us now. For example, the untimely death of a principle bread winner, the onset of a crippling and monstrously expensive disease, loss of employment and bankruptcy all come immediately to mind --- and there must be a host of others. The law then is clear, "[t]he obligation of a mortgagor to pay and the right of a mortgagee to foreclose in accordance with the terms of the note and mortgage are absolute and are not contingent on the mortgagor's health, good fortune . . . or other personal circumstances . . . ." Federal Home Loan Mortgage Corporation v. Taylor, 318 So.2d 203, 207 (Fla. 1st DCA 1975).

The Fourth District recognized that the death of the breadwinner, the loss of employment and bankruptcy, or serious family illness cannot avoid the consequences of allowing a mortgage to go into default. The Fourth District implied that those tragedies were less deserving of relief than what happened to Mr. and Mrs. Orman in the present case. The situations are incomparable. What occurred in the present case, without dispute, is that Mr. Orman turned over the responsibility of his financial affairs to a woman who had been working for him a few months. He did not bother changing his address so that his mail continued to arrive at his former home. He and his wife both entrusted the secretary to go through their mail, resulting in mail being opened and bills going unpaid. Mr. Orman had even

been warned by his secretary's estranged husband that he was not giving the secretary any money and it was a mystery as to where she was getting it.

The mortgage went into default if a payment was not made within 30 days of its due date. Community Federal wrote them letters and sent twice monthly notices. Finally, after three payments had not been made, Community Federal accelerated in a letter dated December 14, 1981 (R 213). This was at least 30 days after Mr. Orman discovered in November that his secretary was stealing his money and not paying his bills. Rather than make inquiry about the status of his mortgage, he simply sent Community Federal a form letter he sent to all his creditors stating he would take care of it in January.

Mrs. Orman handled her own affairs in the same careless manner. She found her mail opened, discovered she was not receiving utility bills and therefore falling in arrears, but she was unconcerned. Mr. and Mrs. Orman are not uneducated or stupid. Mr. Orman is a college professor and Mrs. Orman is a school teacher and is working on her PhD.

It is difficult to understand how, under these circumstances, the District Court of Appeal could have held that

Community Federal could not foreclose, while at the same time recognizing that death, serious injury, loss of job or bankruptcy could not prevent foreclosure.

The first two reasons given by the Fourth District for what it recognized was a highly unusual decision was the presumption of correctness given the judgment of the trial court and that this was an equitable proceeding. The remainder of the reasons were:

> ...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.

In Home Owners Loan Corp. v. Wilkes, 178 So.161 (Fla. 1938), this Court stated on page 163:

> 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....

In New England Mutual Life Insurance Co. v. Luxury Home Builders, Inc., 311 So.2d 160 (Fla. 3d DCA 1975), the court stated on page 163:

> 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 therefore...."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.

In David v. Sun Federal Savings & Loan Assn., 429 So.2d 1277 (Fla. 1st DCA 1983), a title company was serving as a closing agent and had the responsibility to make the mortgage payments. It misfiled the documents and failed to make the payments. The First District affirmed the judgment of foreclosure, stating on page 1278:

> 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....

In August Tobler, Inc. v. Goolsby, 67 So.2d 537 (Fla. 1953), a mortgage foreclosure in which foreclosure was granted, this Court stated on page 539:

> Giving Tobler the benefit of every doubt, we can say no more than that the equities here are equal and that consequently the maxim "Equity follows the law" is applicable. Although, as the writer observed in Barbash v. Barbash, 58 So.2d 168, 171, this maxim cannot be regarded as a general principle, it was also pointed out there that only in those cases where "the equities and good conscience point unerringly toward the correctness of the position of one litigant and against that of the other" may equity give some flexibility to the harsh, rigid and usually inexorable principles of the common law. Where the equities are equal, the law must prevail....

In the present case the equities are not equal. What the trial court and the Fourth District appear to have overlooked is that Mr. Orman turned over his financial affairs to a woman known to him to be in the middle of a divorce and in need of money. Mr. Orman made her his agent for purposes of paying his bills and collecting his mail. If she committed a wrongful act in the scope of her employment with Mr. Orman he would be liable. The trial court and the Fourth District have either overlooked or ignored the fact that the conduct of Mr. Orman's agent is attributable to him. Mr. Orman, even if he had not been warned, even if he had not known in early November, 30 days prior to acceleration, is still responsible for the conduct of his agent.

In the present case Community Federal, under circumstances in which its right to accelerate and foreclose would normally be absolute, has been denied that right because of an omission by an employee or agent of the obligor. In Camp v. Hall, 22 So. 792 (Fla. 1897), the Court stated on page 795:

> ...Mechem, Ag. § 735, states the rule as follows: 'If, upon investigation, it be found that the agent was acting, as such, within the apparent scope of his authority, and in the performance of his undertaking, the principal is liable for the agent's negligent omission or commission, although the agent was not authorized to do the particular act complained of, or had received express instructions not to do it.'...

In Niccolls v. Jennings, 92 So.2d 829 (Fla. 1957), the Court stated on pages 832 and 833:

> ...where one of two innocent parties must suffer through the act of a 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....

In United Service Corporation v. Vi-An Construction Corp., 77 So.2d 800 (Fla. 1955), a mortgagee mistakenly satisfied a mortgage before the debt was fully paid, the rights of third parties intervened, and the court denied relief because the mortgagee failed to act immediately on discovery of the problem. This Court held that the failure

to act, once it was on notice, prevented the mortgagee from obtaining relief, which under normal circumstances would normally be granted.

In the present case Mr. Orman discovered his secretary had embezzled the funds and not paid his bills in early November, and his secretary's husband gave him $2,700 in November, to keep him from pressing charges (R 23-24). He did nothing to bring his mortgage current prior to acceleration which occurred on December 14th.

Nor is Mrs. Orman in any better position than Mr. Orman. The temporary order in the divorce case did not relieve her of her contractual obligation to Community Federal. They were husband and wife during this entire period. She relied on him to make the payments and cannot avoid responsibility for his omission. Proodian v. Plymouth Citrus Growers Ass'n., 13 So.2d 15 (Fla. 1943). Moreover Mrs. Orman conducted her affairs in the same careless manner as Mr. Orman, having knowledge that Mr. Orman's secretary was going through her mail, leaving mail opened, resulting in Mrs. Orman's not receiving and therefore not paying some of her bills.

Should the sloppiness which these two highly educated people handled their financial affairs and the picking up of their mail carry more weight in a court of equity than the family in which the breadwinner has been killed, injured or has lost his job? It is clear from the candid opinion of the Fourth District that its decision is not only not supported by precedent, but is directly contrary to precedent. If the well established principle of law that foreclosure cannot be denied where there has been no fault by the lender is to be changed, the facts in the present case certainly do not justify this rather momentous leap.

ISSUE II

DID THE COURT ERR IN DENYING COMMUNITY FEDERAL ATTORNEYS' FEES ON APPEAL?

Even though the Fourth District affirmed the denial of foreclosure it should have awarded attorneys' fees to Community Federal. In Schechtman v. Grobbel, 226 So.2d 1 (Fla. 2d DCA 1969), the mortgagee sued to foreclose because escrow tax funds were paid to a bank instead of to the mortgagee. Foreclosure was denied because all payments were current, and the appellate court affirmed, but reversed the lower court's refusal to award attorney's fees, noting that the mortgagor had failed to full perform every condition of the mortgage, stating on page 4:

> We would be loath to think that a court of equity would apply the rule 'de minimis' to the prayer for attorney's fees herein and deny them for that reason. The provisions of the mortgage contract are clear and the parties are entitled to enforcement thereof. Therefore, notwithstanding that he denied foreclosure, the trial judge should have taken testimony to ascertain an amount for reasonable attorney's fees payable to appellants. After all, appellees were the parties in default and the record reflects no evidence of any wrong-doing on the part of appellants. Appellants may have sought an inequitable or unconscionable remedy, but their right to proper redress should not be denied. (Emphasis in original)

In Rockwood v. DeRosa, 279 So.2d 54 (Fla. 4th DCA 1973), the Fourth District followed Schechtman, supra, and reversed the lower court for failing to award attorney's fees. So did the Fifth District in Brady v. Edgar, 415 So.2d 141 (Fla. 5th DCA 1982).

In each of the above cases payments of principal and interest were current, and the failure to comply with a condition of the mortgage related to insignificant technicalities, yet it was held that the mortgagee would be entitled to attorneys' fees. In the present case the decisions of the trial court and the Fourth District are unprecedented. Even if this Court affirms, since the Ormans failed to make the payments and failed to take immediate corrective action when they became aware of this, prior to

acceleration, attorneys' fees should have been awarded to Community Federal by the Fourth District.

CONCLUSION

The opinion of the Fourth District should be reversed.

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By _____
LARRY KLEIN

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished, by mail, this 19th day of November, 1984, to:

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