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 Reply Brief on the Merits

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TABLE OF CONTENTS

TABLE OF CONTENTS

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 Ormans state on page 6 that we misstated the evidence when we said that Mr. Orman turned over his financial affairs to a woman who had been working for him for a few months. Mr. Orman testified that this woman came to work for him in January, 1981, which was the same year she allegedly caused all of these problems (R 19). On page 7 the Ormans state that it is not true that Mrs. Orman's bills were going unpaid. Mrs. Orman testified that during this period of time her mail was being picked up, her mail would be opened, and " ... some of my payments to those utilities were late because somebody had gone through the mail" (R 44).

In arguing that the Ormans were not at fault, they have failed to respond to the fact that Mr. Orman discovered his secretary embezzled these funds in early November, that his secretary's husband repaid him everything which was allegedly embezzled during November, and yet he did nothing to bring his mortgage current, the acceleration of which

occurred on December 14th (R 23, 24, 213). Community Federal mailed the Ormans three letters informing them of the delinquency, on November 11th, November 30th and December 14th, and also sent two notices every thirty days indicating the mortgage was in arrears (R 82, 83, 222).

Although the Ormans have cited numerous cases in their brief, none of them involve even remotely similar facts. One of the primary cases Community Federal relied on for conflict jurisdiction in this Court was David v. Sun Federal Savings & Loan Assn., 429 So.2d 1277 (Fla. 1st DCA 1983). This Court accepted jurisdiction of that case and has recently affirmed that decision in David v. Sun Federal Savings & Loan Assn., 9 FLW 527 (Fla. Dec. 20, 1984).

If the law in Florida was not 100% clear at the time the Fourth District rendered its decision in the present case (and we believe that it was), this Court's decision in David, supra, disposes of every single contention advanced in the Ormans' brief. In David the closing agent, apparently a title insurance company, had the responsibility of making the mortgage payments but misfiled the documents and did not make them. The Federal accelerated. The issue was whether the Federal had the right to accelerate when the failure to make the payments was not the fault of the

mortgagor. The present case presents a similar situation in that the Ormans were relying on Mr. Orman's secretary to make the payments and she did not make them. The Ormans position is weaker than the mortgagor in David, however, because the mortgagor in David was totally without fault, while the Ormans were guilty of inexcusable neglect and failed to take action, prior to acceleration of the mortgage, even after the embezzlement was discovered. In David this Court stated:

> It is well established in this state that an acceleration clause or promise in a mortgage confers a contract right upon the note or mortgage holder which he may elect to enforce upon default. Campbell v. Werner, 232 So.2d 252, 255 (Fla. 3d DCA 1970). Safeguarding the validity of such contracts, and assuring the right of enforcement thereof, is an obligation of the courts which has constitutional dimensions. Id. at 256. See also art. I, § 10, U.S. Const.; Declaration of Rights, art. I, § 10, Fla. Const.
>
> * * *
>
> Only under certain clearly defined circumstances may a court of equity refuse to foreclose a mortgage. Mere notices or concepts of natural justice of a trial judge which are not in accord with established equitable rules and maxims may not be applied in rendering a judgment.
>
> Although providing equitable relief in a proper case is discretionary with the trial judge, were that discretion not guided by fixed principles, the degree of uncertainty injected into contractual relations would be intolerable. Equity cannot therefore look solely to the result in determining whether to grant relief, but must apply rules which

> confer some degree of predictability on the decision-making process.
>
> * * *
>
> Failure to make timely payment is not a mere technical breach of covenant intended to preserve the security; it goes to the heart of the agreement between a mortgagor and mortgagee. See Guynn v. Brentmoore Farms, Inc., 253 So.2d 136 (Fla. 1st DCA 1971). In the instant case, when petitioner's title agent failed to make two monthly payments, a material default occurred under the mortgage. Respondent then had a right to accelerate, which it exercised only after giving notice and opportunity to cure default to mortgagors...

If Community Federal cannot foreclose on the present facts, because the mortgagor's secretary did not make the payments, it would create unlimited possibilities of explanations or excuses as to why mortgage payments were not made, which could be used to deny acceleration. If the mortgagee in David was entitled to accelerate, when the mortgagor was totally innocent and the title company failed to make the payment, then certainly Community Federal is entitled to accelerate in the present case, where the mortgagor set the stage for these events and failed to take corrective action when they became known to him, long prior to acceleration.

CONCLUSION

The opinion of the Fourth District should be reversed.

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By 
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished, by mail, this 17th day of January, 1985, to:

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