SUPREME COURT OF FLORIDA

ELAINE FROHMAN, etc., et. al.

Petitioners,

vs. CASE NO. 84,038

JACOB BAR-OR,

Respondent,

_____/

FILED
SID J. WHITE
DEC 5 1994
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PETITIONERS' REPLY BRIEF ON THE MERITS

CERTIORARI PROCEEDING FROM THE DISTRICT COURT
OF APPEAL OF FLORIDA, FOURTH DISTRICT
(DISTRICT COURT CASE NO. 93-0109

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STATEMENT OF THE CASE AND FACTS

Because of space limitations, Petitioners are unable to reply to the Statement of the Facts and of the Case section of Respondent's Answer Brief, except to state that proof of value of the mortgage property would have been submitted to the lower court had not the Petitioners been precluded from proceeding on their deficiency claim. This appraisals are available to this Court if requested. Other points will be responded to if the Court requests.

ARGUMENT

POINT I

THE FOURTH DISTRICT COURT OF APPEAL INCORRECTLY HELD THAT RULE 1.420(e) APPLIES POST JUDGEMENT.

B. IF RULE 1.420(e) APPLIES AT ALL POST-JUDGEMENT, IT APPLIES ONLY AFTER AN APPLICATION FOR POST-JUDGEMENT RELIEF.

The Respondent chooses to reply to this Point not in order, but in Point II (C) "AB" (Answer Brief) (AB P21), despite his Brief being the maximum permitted length, he spends a scant few pages on this, the central point of this proceeding upon certified questions, discussing only two cases. The first of these is Colmes v. Hoco, Inc., 152 So.2d 524 (Fla. 3rd DCA 1963). In their Initial Brief, the Petitioners urged this Court to reject the dicta contained in Colmes where that court stated "it appears from the authorities..." that a deficiency must be applied for either within the statute of limitations for instituting an action under the note and mortgage or the one-year period under the predecessor to Rule

1.420(e), whichever came first. It was pointed out that the "authorities" for this dicta were more than suspect or non-existent, and the statute of limitation on the note should not bar a deficiency determination if a foreclosure suit had previously been instituted since that action could clearly run past the limitation period and a deficiency cannot be determined until after a foreclosure sale.

All the Respondent argues is that the above observation in Colmes, is not dicta "but was deciding substantive issues before it." The language ("dicta") cited in both the briefs (IB22, AB22) is clearly dicta because it was not necessary to the holding. Colmes reversed an order denying a motion for deficiency which had been filed eight months post-judgement without "justification or reason". The reason that the reversal of the order denying the deficiency was dicta was that there was no issue on appeal either way as to whether or not the statutory predecessor to the sub-section of the rule under consideration was applicable post-judgement or not; the court there merely mentioning that the one-year period had not yet run nor had the statute of limitation on the note. This is tantamount to stating that even if the rule applied post-judgement, the period had not yet run. This Court is reminded that the Third District there mentioned no authority whatsoever towards statement that there is authority that a timely application for a deficiency had to be instituted within "the one-year period within which the cause could have been abated..." (at 525). When the Fourth District cited Colmes in Financial Security

Savings v. Espana River Partnership, 537 So.2d 683 (Fla. 4th DCA 1989), which in turn it cited for authority in the decision reviewed here, it was merely a syllogism, built upon a foundation of hypotheses cited as authority, and then repeated again giving the original "authority" a veneer of actual authority.

The Respondent then ignores the Petitioners' arguments that one of the other cases cited by the Fourth District as authority in Financial Security, which is in turn cited as authority by the Fourth District in the case sought to be reviewed here, Withers vs. Flagship Peoples Bank of Tallahassee, 473 So.2d 789 (Fla. 1st DCA 1985), and which clearly supports Petitioners' position that the Rule, if it applies at all, applies only after the motion or petition for a deficiency has been filed, and instead chooses only to mention in passing Barnes v. Escambia County Employees Credit Union, 488 So.2d 879 (Fla. 1st DCA 1986). The Petitioners in their Brief argued that the First District, in Barnes, measured the time of inactivity, not the date of final judgement, but from the date when the petition for a deficiency was filed. Respondent ignored this and chose only to comment that Barnes's "acknowledges that Rule 1.420(e) does apply post-judgement..." and that the petition for deficiency was "not dismissable" because no motion to dismiss for failure to prosecute had been filed in that case.

In argument on this point, the Petitioners went to great length to argue that this Court should adopt as its own the holdings and reasoning contained in two decisions from the Second District which are cited as conflict by the Fourth District, Ravel

v. Ravel, 326 So.2d 223 (Fla. 2d DCA 1976) and Riesgo v. Weinstein, 523 So.2d 752 (Fla. 2d DCA 1988). The later decision in Riesgo, supra, cites to Ravel, where the Second District specifically ruled that the dismissal rule did not apply post-judgement. The Second District clearly expressed itself when it felt that post-judgement, if they were any matters that had to be resolved, the party who felt aggrieved "could have always brought matters to a head by setting down a hearing." (At 224). It was also pointed out that in Financial Security, the basis for the holding being reviewed here, the Fourth District rejected the rationale in Ravel by stating that it did not believe said rationale "supports a refusal to apply the Rule... in a post-judgement proceeding to obtain a deficiency decree..." (At 684).

The court in Ravel posited that a contrary construction of the Rule (i.e. to apply it post-judgement) "would appear to have the practical effect of nullifying an otherwise valid judgement." The court in Financial Security did not dispute the Second District's reasoning on this point, but instead chose to distinguish it, pointing out that in that case the nullification rationale "is not compelling in a mortgage foreclosure..." -stating its reason why. (at 684). See argument on this point at pp.6-9, infra. Nor does the Respondent contest that the Rule was applied by the trial court to a period of latent post-judgement reservation of jurisdiction.

C. RULE 1.420(e) DOES AND SHOULD NOT APPLY POST JUDGEMENT.

The Respondents (AB23) concede that throughout this State numerous workouts and stipulations toward settlement "occur every

day in which matters are to be performed post-judgement." They then state, enigmatically, that the courts have inherent continuing jurisdiction to enforce provisions of their judgements "but such jurisdiction exists only for purposes of enforcing judgements over which the trial court has otherwise lost jurisdiction". Petitioners are unsure of either the argument here or the point. The trial court here reserved jurisdiction for purposes of entering a deficiency, post-judgement. There was no activity contemplated post-judgement, except for the collection on the other mortgages assigned to Petitioners and then the eventual application for a deficiency. So too, in the cases cited for illustration in both briefs (IB33, AB24), the courts there, post-judgement, again not contemplating further record activity post-judgement, nevertheless reserved jurisdiction post-judgement for long periods of latent jurisdiction where only non-record activity was to occur.

The Petitioners not only took issue with the Fourth District's assertions in Financial Security, supra, that there was nothing to indicate that the Rule was not designed to operate post-judgement, but they well-documented their argument with reasoning, appeals to practicality of judicial administration (IB28-29), arguments related to Rule promulgation intention (IB30-31) and citations to federal and foreign jurisdictions (IB33-35). Not only have the Respondents failed to defend the Fourth District's position, but they have utterly failed to attempt to answer any of these arguments on the central and dispositive point certified to this Court for the second time in five years.

D. THE EFFECT OF THE DISMISSAL NULLIFIES PROVISIONS OF THE FINAL JUDGEMENT.

Although the Respondent denominates his argument earlier (AB11), he actually begins it at AB13 by stating that the Fourth District in Financial Security, supra, held that foreclosure decrees are "not a personal judgement against the defendant...", etc. Respondent neglected to quote the language of the opinion immediately preceding that quotation where the judgement is described:

> "The judgement therein is simply an adjudication of the amount of the debt..." (At 684).

In other words, in an attempt to support his argument that the effect of the dismissal nullifies provisions of a judgement, the Respondent engage in misquoting the Fourth District by implying that all judgements of foreclosures are simply "an adjudication of the amount of the debt and a direction to sell the mortgaged property." (At 684). The language "judgement therein" is clearly used by the Fourth District to reference the judgement in that case and no other. Therein lies the difference between the facts in Financial Security and the instant case.

At AB14, the Respondent asserts that no personal judgement was ever intended to be sought from the Respondent. This is belied by the request for a deficiency in the Complaint, the reservation of jurisdiction in the Final Judgement, and the motion to the probate court asking that the estate be reopened for purposes of the possible application for a deficiency - all of these steps being taken prior to the filing of the Motion to Dismiss pursuant to Rule 1.420(e). Next the Respondent takes issue with the Petitioner's

assertion that the Final Judgement constitutes a lien which could be used for executing against other property - the collateralized mortgages. All that the Respondent can state here is that the additional foreclosure sale of the collateralized mortgages contemplated by the Final Judgement is not a "execution" as meant by the Fourth District in Financial Security, and the "other property" mentioned in Financial Security did not contemplate the collateralized mortgages. Nothing could be further from true. "Other property" clearly could mean the collateralized mortgages. "Execution" was used by the Fourth District to signify any provision in a final judgement leading to the disposition of other property. Here that disposition is the additional foreclosure sale provided for. Without belaboring the point, it is clear that the Fourth District was concerned about the retroactive effect via a dismissal of the judgement containing provisions involving prospective application and involving disposition of other property. Finally and tellingly, he states that the Petitioners cannot claim that the Final Judgement constitutes a lien against the collateralized mortgages because of the Petitioners' independent rights under the Repurchase Agreement. The Petitioners point out that insofar as the Final Judgement allowed the Petitioners, under proper circumstances, to foreclose out any rights of the Respondent in the collateralized mortgages, the Final Judgement constituted a lien respective of whether or not the Petitioners had ownership rights to the mortgages because of the terms of the Repurchase Agreement.

The Respondent argues that the provisions of F.S. § 697.01(1) required the foreclosure of the Respondent's interest in the assigned mortgages "notwithstanding the documentation of the original transaction [which] appeared to be an unconditional assignment to Petitioners." (AB31). The Respondent executed absolute Assignments of the mortgages (ABAppen.3). He also executed the Repurchase Agreement (A1) which provided that upon full payment by Respondent to his mortgagees, at his written request, accompanied by consideration, the mortgagees would reassign the mortgages to him. (A2, R32).

A perusal of the cases interpreting the above statute shows that depending on the facts, an absolute assignment of a mortgage may exhibit the characteristics either of security agreement or, as here, of a absolute transfer, subject to a condition subsequent by which an assignor may regain title. See O'Neal v. MacNeill, 238 So.2d 648 (Fla.3rd DCA 1970) which is almost factually identical to the instant case except for the title of the documents.

The Repurchase Agreement (A1) in the instant case is identical to the deed in O'Neal, supra. First it expresses that it is collateral security, and then provides that the assignments shall be absolute unless 1) full repayment takes place, 2) consideration is given and 3) the original assignor request a reassignment. It is therefore clear that, as it caused the Petitioners below nothing extra to attempt to gain a judicial sanction of their interest in an already existing suit, they attempted to so do. The two assignments of mortgages, as well as the Repurchase Agreement

effectively vested title in the mortgages in the Petitioners. The only way in which the Respondent/Assignor could regain title to these mortgages were 1/ by complying with above-stated conditions of the Repurchase Agreement or 2/ by an adjudication of no deficiency. There has been never been an adjudication of no deficiency as the matter was dismissed, which had, as argued, the effect of nullifying the prospective provisions of a judgement which would have benefitted either one party or the other.

The only found extant authority refutes the Respondent's arguments, made throughout his Brief, that the Petitioners/Mortgagees acted improperly because the receiver was never "discharged". See Dulberg v. Ebenhart, 417 N.Y.S.2d 71 (N.Y.App.Div. 1979).

The Respondents fails to realize the obvious; that since the receiver's duties only involved the encumbered property, as to collecting payments on the assigned mortgages and is in applying these payments towards the maintenance of the property, these duties ceased automatically upon the foreclosure sale of the property. 44 Florida Jurisprudence 2d "Receivers" § 49, ff.6.

POINT II

THE LOWER COURT ERRED IN DISMISSING THE CAUSE BELOW FOR FAILURE TO PROSECUTE IN THAT THE PETITIONERS PROVIDED GOOD CAUSE TO PREVENT DISSMISSAL.

On this point, the Respondent first seeks mightily to distinguish the first of the authorities cited by appellant, Skeketee v. Ballance Homes, Inc, 376 So.2d 873 (Fla. 2nd DCA 1979),

by pointing out that the mortgagee's efforts to mitigate damages there consisted of activity in other cases. He then attempts to further distinguish it by arguing that the Petitioners failed to properly present their good cause below. The matter was properly presented to the lower court in the Statement of Good Cause (R50-55). The facts contained in that Statement showed that the Petitioners attempted to mitigate their damages by collecting payments on the assigned mortgages. It matters not whether the Petitioners' efforts to mitigate their damages, non-record, post-judgement, (by correspondingly reducing the amount of any possible deficiency against the Respondent) were via another lawsuit, or via collection on other collateral; equitable "good cause" is established in either instance. In ruling against the Petitioners, the lower court queried as to what the Petitioners were doing from May until October (T18). Counsel for the Petitioners' response was proper. Once a date of non-record activity has been established, the one-year period, if it is applicable at all, runs from that date. See e.g. Johnson v. Mortgage Investment of Washington, 410 So.2d 541 (2nd DCA 1982). Accordingly, even if the rule were applicable, the Petitioners would have had until April 10, 1993 to apply for a deficiency. They were not given half of that time.

The Respondent amazingly argues that the Petitioners/Mortgagees below could have established, if they wanted, a pre-payoff valuation of the assigned mortgages, assisted by experts. The Respondent would be the first to argue that this position would be unfair. By hindsight, the Petitioners neither

reaped the windfall of late fees or default interest collected upon a reinstatement of the assumed mortgages, nor did they suffer the expenses of foreclosures and/or being left with deficiencies - all of which would have either aided or harmed the Respondent when it came time to establish his deficiency vel non.

POINT III

THE LOWER COURT ERRED IN FAILING TO GRANT THE PETITIONERS' MOTION FOR RELIEF.

The Final Judgement provided that if a "deficiency judgement is later entered by the court", the interest in these mortgages will be sold by foreclosure sale and that "in the event that no deficiency is adjudged," then title in the mortgages would revert to the Respondent. The word "adjudge", signifying adjudication, is central here. An "adjudication" in "is the giving or pronouncing judgement or decree in a cause... (cases cited)... it implies the hearing by a court after notice... on the factual issue involved... [case cited]... and contemplates that claims of all of the parties had been considered... Miller v. Scobie, 11 So.2d 892, 894 (Fla.), Blacks Law Dictionary 4th Ed.

Several equitable maxims are applicable here. Not only does equity abhor a forfeiture, Rivers v. Amara, 40 So.2d 364 (Fla. 1949), but as the Respondent states (AB 36) "equity cannot demand an impossible performance...". Given the Respondent's interpretation, he would be left with a windfall via a reassignment of rights under these mortgages as of some date, while still owing approximately $20,000.00 to the Petitionerss under the terms of the

Final Judgement and the Repurchase Agreement. (See dollar computation resulting in this amount set forth on pp. 4-5 of Petitionerss' Initial Brief, also see R61-62).

The Respondent failed to challenge the Petitioners' argument that the "Authors' Comments" to this rule required a liberal construction of the rule. The denial of the motion under these circumstances amounted to an abuse of discretion.

POINT IV

PETITIONERS ARE NOT BARRED BY THE STATUTE OF LIMITATIONS.

This point is treated beginning at AB35. While it is true that Barnes v. Escambia County, supra, did state in dicta that a deficiency proceeding was "commenced" by the filing of the petition for deficiency, post-judgement, this was not the central point of the appeal. The issue involved here was not raised there. The court there framed the central question of the appeal there:

> "The issue posed for our consideration is whether an action brought by a petition for assessment of a deficiency is barred if not brought within one year from the date of the entry of the final judgement of foreclosure." (at 880).

Since the above quote indicates the statute of limitation point was not argued, the Petitioners are free to argue that the date of commencement must necessarily be measured from the date of filing of suit, not the later application for deficiency, especially when considered in light of prior holdings indicating that that limitation deadline is to be measured from the date of default on the note. To rule otherwise would be the hold that a

post-judgement application for a deficiency, which cannot be determined until after a foreclosure sale, must be commenced, post judgement, within five years from the mortgage default, even though a mortgage foreclosure action can be filed up until the fifth anniversary of the default on the note. This is and could not be good law. The effect of these cumulative holdings would be that a mortgage foreclosure would have to be filed two or three years earlier than the statute permits to allow for a deficiency or, in the alternative, that a protracted foreclosure suit could see seal the fate of an otherwise valid assessment of a deficiency. This is a unique situation involved only in foreclosure and deficiency situation because there is a condition precedent to a deficiency i.e. valuation of the property as of the date of the foreclosure sale. Mabson v. Christ, 119 So. 131 (Fla. 1928), Exter v. State Bank, 79 So. 724 (Fla. 1918).

Indeed, all extant Florida law leads to the conclusion that an action for a deficiency is commenced, if commenced at all, within the foreclosure action, at the time of the prayer for the deficiency in the foreclosure complaint, and not upon application, post-judgement. For example, a foreclosure suit including the prayer for a deficiency acts as a bar to an action at law on the mortgage debt. Provost v. Swinson, 146 So. 649 (Fla. 1933). The commencement of an action and the subsequent acquisition of jurisdiction over the person are acts which satisfy the running of the statute of limitations generally. In a mortgage foreclosure a served -but- later defaulting defendant is entitled to no further

notice upon an application for deficiency whereas if no deficiency is initially prayed for, he is entitled to be served thereafter with notice. Cole v. Heidt, 158 So. 435 (Fla. 1935) Merrill v. Nuzum, 471 So.2d 128 (Fla. 3rd DCA 1985).

Alternatively, it is argued that if this Court does not believe that the mortgagees below "commenced" their action for a deficiency upon the filing of the original foreclosure complaint, then it is urged that the statute of limitations in deficiency situations in general, and in the case below specifically, did not commence to run until the foreclosure sale was held. A cause of action must exist and be completed before an action can be "commenced". Coral Gables v. Harry Sakolsky, 215 So.2d 329 (Fla. 3rd DCA 1968) cert. den., 225 So.2d 526. The subsequent occurrence of a material fact will not cure earlier filing and the right of a plaintiff to recover must be measured from the facts as they existed when suit was instituted. The same rule is applicable in equity proceedings. City Council of North Miami Beach v. Trebor Const. Corp., 277 So.2d 852 (Fla. 3rd DCA 1973). In mortgage foreclosure cases, the mortgagee's right to a deficiency, and hence his cause of action, cannot be established until after the sale and it is then and only then that the period of limitations commences. See Life & Casualty, Inc. Co. of Tenn. v. Turnlin, 189 So. 406 (Fla. 1939). In this case, all of the elements of the cause of action did not exist even at the time of sale, since collateral mortgages were reducing the amount due to Plaintiffs. The collection of these collateral mortgages by the mortgagees, post-

judgement, were akin to additional multiple foreclosure sales on other encumbered property that had not yet taken place. Only at the end of all of these "sales" would the Plaintiffs' cause of action be complete. Since the final payoff was April 10, 1992, it was at this point when the period of limitations began to run. It was also at this point when compellingly equitable non-record activity concluded i.e. collection of portions of the judgement with a pending deficiency application. The one-year period under the dismissal rule would begin from that date as well. Accordingly, both elements of the two prong tests of Colmes v. Hoco Inc., supra, were satisfied and the Petition for a Deficiency, filed on October 10, 1992, was within the requisite period; the time being measured under the rule from April 10, 1992, and under the statute of limitations either from the date of sale, July 10, 1989 or from the date of termination of collection on the assigned mortgages, April 10, 1992. Viewed from any perspective, the statute of limitations had not run.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing main Brief was furnished by mail to H. Taylor White, Esq., Eighth S.E. 8th St., Fort Lauderdale, Florida, this 30th day of November, 1994.

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