Opinion issued July 21, 2020

In The

Court of Appeals

For The

First District of Texas

NO. 01-18-00777-CV

ANKUS, L.L.C., Appellant

V.

U.S. BANK TRUST, NATIONAL ASSOCIATION, AS TRUSTEE, Appellee

On Appeal from the 281st District Court
Harris County, Texas
Trial Court Case No. 2017-48651

MEMORANDUM OPINION

Appellant, Ankus, L.L.C. ("Ankus"), challenges the trial court's rendition of summary judgment in favor of appellee, U.S. Bank Trust, National Association, as

Trustee (the "Bank"),[1] in Ankus's suit for trespass to try title, removal of cloud from title, and a declaratory judgment against the Bank. In its sole issue, Ankus contends that the trial court erred in granting summary judgment in favor of the Bank.

We affirm.

Background

In its petition, Ankus alleged that in 2006, the Bank's predecessor made a home equity loan to Zardoz Sallam for her purchase of a condominium in Houston, Texas. A deed of trust secured the loan, and the Bank is the assignee of that deed of trust. After Sallam died in 2008, the loan went into default, and the Bank "accelerated the indebtedness . . . at least [by] 2010" (the "2010 acceleration"). On August 4, 2015, Ankus purchased the condominium at a constable's sale.

According to Ankus, because Sallam was "in default o[n] the original note" and the Bank had "accelerated the indebtedness" in 2010, the Bank's "right to enforce the [d]eed of [t]rust [was now] barred by the statute of limitations." Ankus brought claims against the Bank for trespass to try title, removal of cloud from title, and a declaratory judgment. As to its declaratory-judgment claim, Ankus sought a declaration that it was the owner of the condominium, the Bank had no interest in

[1] Ankus sued "U.S. Bank N.A., as Trustee." In its amended answer, the Bank identified itself as "U.S. Bank Trust, N.A., as Trustee," as did the trial court in its final judgment. Our style is in accord with the trial court's final judgment. *Owens v. Handyside*, 478 S.W.3d 172, 175 n.1 (Tex. App.—Houston [1st Dist.] 2015, pet. denied).

the condominium, and the deed of trust was void and barred by the statute of limitations.

In its amended answer, the Bank generally denied Ankus's claims and asserted certain affirmative defenses. The Bank then moved for summary judgment, asserting that it was entitled to judgment as a matter of law on Ankus's claims.

In its motion, the Bank asserted that on April 13, 2006, the Bank's predecessor made a thirty-year $192,000 home equity loan to Sallam so that she could purchase the condominium. A deed of trust secured the loan. The Bank was assigned the deed of trust and the home equity note. Sallam died in 2008, and the loan went into default in December 2008.

On September 11, 2012, the Bank's loan servicer sent a letter to the "Estate of Zardoz Sallam" at the condominium address. The letter, attached to the Bank's summary-judgment motion, proclaims that it is an "Acceleration Warning (Notice of Intent to Foreclose)." After identifying the deed of trust, the letter continues:

> You are in default because you have failed to pay the required monthly installments commencing with the payment due December 1, 2008.
>
> As of September 11, 2012, total monthly payments . . . and other fees and advances due under the terms of your loan documents . . . are past due.

The letter next itemizes the past-due monthly payments, late fees, and other fees. It declares that the total monthly payments and other fees must be paid within thirty-five days to cure the default and that by failing to make payment, the Bank

"will accelerate the maturity of the [l]oan, . . . declare all sums secured by the [deed of trust] due and payable, and commence foreclosure proceedings . . . ."

In its motion, the Bank also asserted that on August 4, 2015, Ankus purportedly acquired the condominium "at a [c]onstable's [s]ale pursuant to a certain Writ of Execution and Order of Sale issued" in favor of the condominium association. But that conveyance was subject to "the first lien mortgage held" by the Bank.

As to Ankus's claims, the Bank argued that it was entitled to judgment as a matter of law because in order for Ankus to proceed on its claims, it must rely on the alleged 2010 acceleration of payment obligations to argue that the Bank's right to enforce the deed of trust is barred by the applicable statute of limitations. And because the Bank had abandoned the 2010 acceleration, it had reset the statute-of-limitations clock and was not precluded from enforcing the deed of trust as a matter of law.

In response to the Bank's summary-judgment motion, Ankus asserted that Sallam, the previous owner of the condominium, executed and delivered a deed of trust to the Bank's predecessor, which created a lien on the property. The deed of trust was later assigned to the Bank.

After Sallam died in 2008, on May 10, 2010, a law firm representing the Bank's loan servicer sent Marshall Henderson, Sallam's son and the independent

executor of her estate, a letter notifying him that the Bank had elected to accelerate the maturity of the debt. On July 16, 2010, the Bank also applied for a court order allowing it to foreclose on the loan. A Harris County district court granted the application in May 2011 and entered a foreclosure order. The Bank did not proceed with a foreclosure sale and took no further action to collect on the defaulted loan until September 2012.

Meanwhile, the condominium association fees owed on the condominium also went unpaid. And in August 2015, Ankus bought Sallam's condominium for $5,000.00 at a constable's sale conducted in execution of the condominium association's judgment against the executor of Sallam's estate.

According to Ankus, the Bank cannot enforce its deed of trust because the failure to foreclose on a deed of trust within four years after a debt has been accelerated bars enforcement of the deed of trust and renders a lien void and unenforceable. Ankus asserts that after the May 10, 2010 letter, the Bank had four years to enforce the deed of trust—from May 10, 2010 to May 10, 2014. Thus, because it was undisputed that the deed of trust was not enforced by the Bank by that date, the Bank could no longer enforce its deed of trust, and the Bank was not entitled to summary judgment on Ankus's claims.

After the Bank replied to Ankus's response, the trial court granted the Bank summary judgment on Ankus's claims against it.

Standard of Review

We review a trial court's summary judgment de novo. *Valence Operating Co. v. Dorsett*, 164 S.W.3d 656, 661 (Tex. 2005); *Provident Life & Accident Ins. Co. v. Knott*, 128 S.W.3d 211, 215 (Tex. 2003). In conducting our review, we take as true all evidence favorable to the non-movant, and we indulge every reasonable inference and resolve any doubts in the non-movant's favor. *Valence Operating*, 164 S.W.3d at 661; *Knott*, 128 S.W.3d at 215. If a trial court grants summary judgment without specifying the grounds for granting the motion, we must uphold the trial court's judgment if any of the asserted grounds are meritorious. *Beverick v. Koch Power, Inc.*, 186 S.W.3d 145, 148 (Tex. App.—Houston [1st Dist.] 2005, pet. denied).

To prevail on a matter-of-law summary-judgment motion, the movant must establish that no genuine issue of material fact exists and the trial court should grant judgment as a matter of law. *See* TEX. R. CIV. P. 166a(c); *KPMG Peat Marwick v. Harrison Cty. Hous. Fin. Corp.*, 988 S.W.2d 746, 748 (Tex. 1999). Once the movant meets its burden, the burden shifts to the non-movant to raise a genuine issue of material fact precluding summary judgment. *See Centeq Realty, Inc. v. Siegler*, 899 S.W.2d 195, 197 (Tex. 1995); *Transcont'l Ins. Co. v. Briggs Equip. Tr.*, 321 S.W.3d 685, 691 (Tex. App.—Houston [14th Dist.] 2010, no pet.). The evidence raises a genuine issue of fact if reasonable and fair-minded fact finders could differ in their

conclusions in light of all of the summary-judgment evidence. *Goodyear Tire & Rubber Co. v. Mayes*, 236 S.W.3d 754, 755 (Tex. 2007).

Abandonment of Acceleration

In its sole issue, Ankus argues that the trial court erred in granting the Bank summary judgment because the 2010 acceleration, which occurred more than four years before Ankus purchased its interest in the condominium at the constable's sale, bars the Bank from enforcing the deed of trust and the evidence does not conclusively establish that the debt owed under the deed of trust had been reinstated.

"A sale of real property under a power of sale in a mortgage or deed of trust that creates a real property lien must be made not later than four years after the day the cause of action accrues." TEX. CIV. PRAC. & REM. CODE ANN. § 16.035(b). "On the expiration of the four-year limitations period, the real property lien and a power of sale to enforce the real property lien become void." TEX. CIV. PRAC. & REM. CODE ANN. § 16.035(d); *Biedryck v. U.S. Bank Nat'l Ass'n*, No. 01-14-00017-CV, 2015 WL 2228447, at *4 (Tex. App.—Houston [1st Dist.] May 12, 2015, no pet.) (mem. op.).

If, as here, the deed of trust contains an optional acceleration clause, the cause of action accrues—and the statute of limitations begins to run—when the holder "actually exercises" its option to accelerate. *Holy Cross Church of God in Christ v. Wolf*, 44 S.W.3d 562, 566–67 (Tex. 2001). "If a note secured by a real property lien

is accelerated pursuant to the terms of the note, then the date of accrual becomes the date the note was accelerated." *Khan v. GBAK Props., Inc.*, 371 S.W.3d 347, 353 (Tex. App.—Houston [1st Dist.] 2012, no pet.).

Effective acceleration requires (1) notice of intent to accelerate and (2) notice of acceleration. *Holy Cross*, 44 S.W.3d at 566. Both notices must be "clear and unequivocal." *Id.*

After accelerating a note, a lender can waive or abandon the acceleration "by agreement or other action of the parties." *Khan*, 371 S.W.3d at 353; *see* TEX. CIV. PRAC. & REM. CODE ANN. § 16.038(a); *Graham v. LNV Corp.*, No. 03-16-00235-CV, 2016 WL 6407306, at *3 (Tex. App.—Austin Oct. 26, 2016, pet. denied) (mem. op.) (noting Texas courts use "abandonment" and "waiver" interchangeably in context of acceleration). "Waiver is essentially unilateral in character and results as a legal consequence from some act or conduct of the party against whom it operates; no act of the party in whose favor it is made is necessary to complete it." *Shields Ltd. P'ship v. Bradberry*, 526 S.W.3d 471, 485 (Tex. 2017) (internal quotations omitted). It "can occur either expressly, through a clear repudiation of the right, or impliedly, through conduct inconsistent with a claim to the right." *G.T. Leach Builders, LLC v. Sapphire V.P., LP*, 458 S.W.3d 502, 511 (Tex. 2015). "Texas' intermediate appellate courts are in agreement that the holder of a note may unilaterally abandon acceleration after its exercise, so long as the

borrower neither objects to abandonment nor has detrimentally relied on the acceleration." *Boren v. U.S. Nat'l Bank Ass'n*, 807 F.3d 99, 105 (5th Cir. 2015); *see also Biedryck*, 2015 WL 2228447, at *5 (explaining formal written agreement is not required to abandon acceleration and note holder may abandon acceleration by action alone and without express agreement).

Abandonment of acceleration restores the contract to its original condition, including restoring the loan's original maturity date and resetting the statute of limitations. *Holy Cross*, 44 S.W.3d at 566–67; *Khan*, 371 S.W.3d at 353. Waiver is a question of law when the facts that are relevant to a party's relinquishment of an existing right are undisputed. *Id*.

The Bank moved for summary judgment on the ground that it had abandoned the 2010 acceleration—and thus reset the statute-of-limitations clock to the loan's original 2036 maturity date—by sending the September 11, 2012 letter (1) providing notice of default; (2) affording the borrower the opportunity to cure the default by paying less than the full amount of the debt; and (3) warning that if cure was not made, the Bank would accelerate the debt. By allowing the borrower to cure the default for less than the full loan amount and warning that acceleration would occur

without cure, the Bank's letter unequivocally manifested an intent to abandon the prior 2010 acceleration.[2]

Ankus argues that the September 11, 2012 letter is ineffective because it is addressed to "Estate of Zardoz Sallam," which is not a legal entity. The authority Ankus relies on, however, involves service in legal proceedings, not the mailing of correspondence. The Bank mailed the letter to the condominium address as expressly agreed in the deed of trust and thus, pursuant to the parties' agreement, is "deemed to have been given to Borrower."

Ankus next asserts that summary judgment is improper because the Bank never rescinded the foreclosure order it obtained in 2011. Although the Bank did not expressly rescind the 2011 foreclosure order, it did not pursue a foreclosure sale at that time, and its loan servicer sent the borrower the September 11, 2012 letter permitting cure of the default. These circumstances unequivocally demonstrate waiver or abandonment by conduct. *See Biedryck*, 2015 WL 2228447, at *4 (holding bank that applied for home equity foreclosure order but later accepted payments and took no affirmative action on declared maturity abandoned acceleration). We hold that the trial court did not err in granting the Bank summary judgment.

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[2] Contrary to Ankus's assertion, language in the September 11, 2012 letter warning the borrower that "we are under no obligation to accept less than the full amount owed" does not affect this conclusion because the letter explains that the "full amount owed" is not necessary to cure the default.

We overrule Ankus's sole issue.

Conclusion

We affirm the judgment of the trial court.

Julie Countiss
Justice

Panel consists of Justices Keyes, Goodman, and Countiss.