Abandoning Prior Acceleration Avoids Statute of Limitations on Foreclosure

June 23, 2021

Florey v. U.S. Bank, N.A.

Dallas Court of Appeals, No. 05-20-00306-CV (June 22, 2021)

Justices Osborne, Reichek (Opinion, linked here), and Nowell

Ken Carroll

Where a borrower defaults on a loan secured by real estate and the noteholder accelerates that loan, foreclosure must occur within four years after acceleration—*unless* the noteholder abandons that acceleration, which resets the limitations clock.

The Floreys defaulted on their home equity loan. Nationstar Mortgage, the holder of the note, sent the Floreys a notice of default and then a notice accelerating the debt, both in 2013. But for many months after those notices, Nationstar said nothing further about acceleration and continued to send the Floreys monthly mortgage statements seeking only the current and past due amounts rather than the full amount of the loan, and even offering them the option to pay off the loan with no "prepayment penalty." Those monthly notices made no reference to the acceleration. In August 2017, Nationstar filed an application for expedited foreclosure under Tex. R. Civ. P. 736, expressly relying on the 2013 notice of default, but not the notice of acceleration. But the trial court denied that application, and Nationstar then sold the note to U.S. Bank, which in 2019 sent the Floreys a new notice of default and acceleration and again sought to pursue expedited foreclosure under Tex. R. Civ. P. 736. The Floreys opposed that request and sought to quiet title, arguing that "U.S.Bank's attempt to foreclose the lien was not timely brought within the four-year limitations period" and "[b]ecause the limitations period had expired, … the lien was no longer valid." The trial court, however, granted summary judgment to U.S. Bank and the Court of Appeals affirmed.

"The pivotal issue," the appeals court said, was "whether the 2013 acceleration of the Floreys' note [by Nationstar] was abandoned." If it was, then "the contract [was] restored to its original condition, including restoring the loan's original maturity date and resetting the statute of limitations." "Once a debt has been accelerated, the note holder may unilaterally waive or abandon the acceleration so long as the borrower neither objects to the abandonment nor detrimentally relied on the acceleration. … Abandonment can occur either expressly through a

clear repudiation of the right, or impliedly through conduct inconsistent with a claim to the right." Where the facts are undisputed, whether acceleration has been abandoned is a question of law. Here, Nationstar's repeated monthly notices, sent after its notice of acceleration, that sought only monthly payments and made no mention of acceleration—and in fact, were inconsistent with acceleration—were sufficient to establish Nationstar's abandonment of the 2013 acceleration. The foreclosure limitations clock, therefore, was re-set and didn't start ticking again until U.S. Bank served its own notices of default and acceleration in 2019. U.S. Bank's foreclosure, therefore, was not time-barred.

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