REL: July 17, 2020

ALABAMA COURT OF CIVIL APPEALS

SPECIAL TERM, 2020

2180849

Thomas Denault and Carol Denault

v.

Federal National Mortgage Association and Seterus, Inc.

Appeal from Jefferson Circuit Court
(CV-14-901195)

On Application for Rehearing

EDWARDS, Judge.

Thomas Denault and Carol Denault seek rehearing of this court's May 1, 2020, opinion affirming a June 6, 2019, order of the Jefferson Circuit Court ("the trial court") entering a summary judgment in favor of Federal National Mortgage Association ("FNMA") and Seterus, Inc. ("Seterus").

Specifically, the Denaults challenge this court's affirmance of the summary judgment in favor of FNMA regarding its claim in the nature of an action in ejectment and of the summary judgment in favor of Seterus regarding the Denaults' third-party claims against Seterus alleging wrongful foreclosure.

The Denaults argue on rehearing that this court's decision conflicts with our supreme court's decision in Ex parte Turner, 254 So. 3d 207 (Ala. 2017), which we cited in the opinion on original submission. According to the Denaults, we wrongly concluded that the August 29, 2013, letter notifying them of FNMA's intent to accelerate their loan was legally adequate. In support of their argument that we misapplied Turner, the Denaults make an extended argument addressing Pinti v. Emigrant Mortgage Co., 472 Mass. 226, 33 N.E.3d 1213 (2015), which is discussed in a footnote in Turner, 254 So. 3d at 212 n.1; Federal National Mortgage Ass'n v. Marroquin, 477 Mass. 82, 74 N.E.3d 592 (2017), which applied Pinti; and Dysart v. Trustmark National Bank, 729 F. App'x 722 (11th Cir. 2018), which applied Turner.

Before addressing the decisions in Turner, Pinti, Marroquin, and Dysart, we will first restate the pertinent

factual background. Paragraph 22 of the Denaults' mortgage instrument stated, in part:

> "Lender shall give notice to Borrower prior to acceleration following Borrower's breach of any covenant or agreement in this Security Instrument. ... The notice shall ... inform Borrower of the right to reinstate after acceleration and the right to bring a court action to assert the non-existence of a default or any other defense of Borrower to acceleration and sale."

The August 29, 2013, letter stated:

> "We hereby demand that you bring [the] loan up-to-date ('cure this default') by payment of [$15,744.72]. In addition, your regular payment may become due by the Expiration Date [October 3, 2013]. The delinquent amount of principal continues to accrue interest.
>
> "If full payment of the default amount is not received by us in the form of a certified check, we will accelerate the maturity date of your loan and upon such acceleration the ENTIRE balance of the loan ... shall ... become immediately due and payable.
>
> "....
>
> "IF THE DEFAULT IS NOT CURED ON OR BEFORE [OCTOBER 3, 2013], THE LOAN OWNER AND WE INTEND TO ENFORCE THE LOAN OWNER'S RIGHTS AND REMEDIES AND MAY PROCEED WITHOUT FURTHER NOTICE TO COMMENCE FORECLOSURE PROCEEDINGS. ADDITIONAL FEES SUCH AS FORECLOSURE COSTS AND LEGAL FEES MAY BE ADDED PURSUANT TO THE TERMS OF THE LOAN DOCUMENTS.
>
> "....

> "You have the right to reinstate your loan after acceleration and the right to bring a court action or assert in the foreclosure proceedings the nonexistence of a default or any other defense to acceleration and sale. If you reinstate your loan after acceleration, the loan no longer will be immediately due in full."

(Capitalization in original.)

In our opinion on original submission, we addressed the Denaults' argument regarding the August 29, 2013, letter as follows:

> "[T]he Denaults argue that genuine issues of material fact exist regarding whether FNMA complied with paragraph 22 of the mortgage by providing them with a proper notice of intent to accelerate the promissory note. See Ex parte Turner, 254 So. 3d 207, 209-13 (Ala. 2017) (holding that a foreclosure sale 'failed' because of a deficient notice that did not inform the mortgagors of their right to bring a court action challenging the foreclosure, as required by the terms of the mortgage); Jackson v. Wells Fargo Bank, N.A., 90 So. 3d 168, 172-73 (Ala. 2012) (holding that a lender failed to comply with the requirements of the mortgage when the lender provided notice that it was accelerating a loan without first providing notice of intent to accelerate). ...
>
> "'....'
>
> "According to the Denaults, a genuine issue of material fact exists regarding whether the August 29, 2013, letter sent by Seterus on behalf of FNMA satisfied the requirements of paragraph 22 because that letter references 'the right to bring a court action or assert in the foreclosure proceedings the nonexistence of a default or any other defense to

> acceleration and sale.' (Emphasis added.) The Denaults contend that, because the foreclosure at issue was pursuant to a power of sale, the reference to 'foreclosure proceedings' resulted in their not being properly informed of their rights and that, '[a]t best[,] [the reference to such foreclosure proceedings] is confusing while at worst it is completely inaccurate information.'
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> "The August 29, 2013, letter informed the Denaults of their right to bring a court action, as required by paragraph 22 of the mortgage, and the superfluous language of which the Denaults complain is in the disjunctive. Also, the Denaults refer us to no specific evidence that would support the conclusion that a genuine issue of material fact existed regarding whether they may have been misled by that language. See Rule 28(a)(10), Ala. R. App. P.; see also Thomason v. Redd, 565 So. 2d 259, 260 (Ala. Civ. App. 1990) ('It is not the duty of this court to search the record to determine whether it contains evidence to support contentions made by a party.'). Accordingly we reject the Denaults' argument regarding the August 29, 2013, letter, and, for similar reasons, we reject the Denaults' argument that FNMA failed to provide them with proper 'notice of default, intent to accelerate, acceleration, and foreclosure sale date in accordance with the notice provisions contained in [the] mortgage contract.'"

___ So. 3d at ___ (footnotes omitted).

Regarding the Denaults' argument that our opinion on original submission is in conflict with Turner, we note that in Turner the supreme court addressed the issue whether the foreclosure by Wells Fargo Bank, N.A., of property owned by Trenton Turner, Jr., and Donna Turner was void because the

mortgage at issue, like the mortgage in the present case, required the mortgagee to "'inform the Borrower of the right to reinstate after acceleration and the right to bring a court action to assert the non-existence of a default or any other defense of Borrower to acceleration and sale.'" 254 So. 3d at 208. However, unlike the August 29, 2013, letter in the present case, the intent-to-accelerate notice at issue in Turner contained no notice informing the Turners "of their right to bring a court action challenging the foreclosure." Id. at 212. The notice to the Turners stated only that they "'ha[d] the right to reinstate [their] loan after legal action ha[d] begun'" and that they "'also ha[d] the right to assert in foreclosure[] the non-existence of a default or any other defense to acceleration and foreclosure.'" Id. at 209. Relying on its decision in Jackson v. Wells Fargo Bank, N.A., 90 So. 3d 168, 172-73 (Ala. 2012), the supreme court stated in Turner that "a party seeking to institute foreclosure proceedings must do so in strict compliance with the terms of the mortgage," id. at 211-12, and that the notice to the Turners failed the strict-compliance requirement because "they were given no notice of their right to bring a court action

directly attacking the foreclosure." Id. at 212 (emphasis added).

In Turner, the supreme court referenced Pinti in a footnote following the statement that, "although required to do so under the terms of the mortgage, Wells Fargo failed to notify the Turners of their right to bring a court action challenging the foreclosure."[1] 254 So. 3d at 212. The footnote states:

> "Another instructive case from a nonjudicial-foreclosure jurisdiction is Pinti .... In Pinti, the Supreme Judicial Court of Massachusetts held that a notice provision in a mortgage (nearly identical to the one at issue in this case) required strict compliance as a necessary component of the power of sale in the mortgage. The court explained that the improper notice, which informed the defaulting mortgagors only of their right '"to assert in any lawsuit for foreclosure and sale the nonexistence of a default or any other defense [they] may have to acceleration and foreclosure and sale,"' did not strictly comply with the terms of the mortgage because the notice did not inform the mortgagors of their right and need to initiate legal action to challenge the validity of the foreclosure. 472 Mass. at 237, 33 N.E.3d at 1222-23. This lack of notice is significant in a nonjudicial-foreclosure state, such as Alabama, because, as explained by the Pinti court, defaulting mortgagors

[1]The Denaults did not discuss this reference to Pinti in their brief on original submission.

> "'could be misled into thinking that they had no need to initiate a preforeclosure action against the mortgagee but could wait to advance a challenge or defense to foreclosure as a response to a lawsuit initiated by the mortgagee -- even though, as a practical matter, such a lawsuit would never be brought.'
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> "472 Mass. at 237, 33 N.E.3d at 1222. The court held that the subsequent foreclosure sale was void because the notice failed to strictly comply with the terms of the mortgage. 472 Mass. at 240-43, 33 N.E.3d at 1224-26."

254 So. 3d at 212 n.1.

Regarding the other cases discussed by the Denaults in their application for a rehearing, Marroquin was concerned with the issue whether Pinti, which was to have prospective application in Massachusetts, should be applied to an action that was pending when Pinti was decided. The Marroquin court concluded that Pinti applied and affirmed a Massachusetts trial court's judgment holding that a notice did not strictly comply with the requirement that it inform the mortgagor of his or her "right to bring a court action" because the notice merely stated that the mortgagor "may have the right to bring such an action. ... [T]he implication is that the right is merely conditional, without specifying the conditions, and that the mortgagor may not have the right to file an action in

court." 477 Mass. at 90, 74 N.E. 3d at 598. Dysart, which applied Jackson and Turner, concerned the issue whether actual knowledge might obviate a mortgage-notice requirement; the Dysart court determined that the mortgagee had breached its obligations under the mortgage by failing to provide the mortgagor with notice of the right to bring a court action, as the mortgage required. 729 F. App'x at 725.

As noted above, the August 29, 2013, letter in the present case, unlike the notices at issue in Turner and in Pinti, expressly informed the Denaults of their "right to bring a court action ...." There was no conditional language concerning that right, as in Marroquin, and there was not a total lack of notice, as in Dysart. In other words, our opinion on original submission is not in conflict with the holdings in the foregoing cases, particularly in light of the factual differences between the August 29, 2013, letter and the respective notices at issue in those cases.

Nevertheless, one might read Pinti broadly as supporting an argument that misleading language in a notice might cause a notice to fail the strict-compliance requirement. To base any such conclusion on Turner, however, which arguably is

referencing Pinti in dicta, would be more tenuous. In any event, to agree with the Denaults' argument in their application for rehearing would require us to conclude (1) that the additional language used in the August 29, 2013, letter is misleading as a matter of law (we noted in our opinion on original submission that the Denaults directed this court to no evidence that would support the conclusion that a genuine issue of material fact existed regarding whether they had been misled by that language) and (2) that misleading language of the type at issue causes a notice to fail the strict-compliance requirement.

The first issue, whether the additional language is misleading, is more complicated than it might appear. That is so because judicial foreclosure remains a viable remedy for a mortgagee even when a power of sale is included in a mortgage. See Johnson v. Shirley, 539 So. 2d 165, 168 (Ala. 1988) ("[A] power of sale given under a mortgage affords the mortgagee an additional ... remedy for recovery of the debt."). See generally 59 C.J.S. Mortgages § 654 (2019) ("Although the mortgage contains a power of sale, the mortgagee may resort to a foreclosure by judicial proceedings, even though the

instrument provides that foreclosure may be had only under the power of sale." (footnotes omitted)).

In the present case, paragraph 22 of the mortgage instrument states that, if the Denaults' default was not cured, FNMA "may invoke the power of sale and any other remedies permitted by Applicable Law." Also, the intent-to-accelerate notice references only "foreclosure proceedings," it does not state what form (power-of-sale foreclosure or judicial foreclosure) those proceedings might take. Thus, when Seterus sent the intent-to-accelerate notice on behalf of FNMA, FNMA still had the option of instituting a judicial-foreclosure proceeding, and, had it done so, the Denaults would have had the right to raise the defense of "the non-existence of a default or any other defense to ... acceleration and sale" in such a proceeding. Indeed, for that matter, the use of the term "proceeding" in juxtaposition to "court action" also would be consistent with the conclusion that the Denaults had the right to "assert" such defenses to FNMA if FNMA pursued a power-of-sale foreclosure. In other words, is the notice misleading when it clearly informs the mortgagor of his or her right to "bring a court action" -- the

mortgagor's offensive right that was the express concern of Turner, Pinti, Marroquin, and Dysart -- but also includes an ambiguous (although arguably accurate) reference to the mortgagor's defensive rights -- asserting defenses in a foreclosure proceeding, which in turn may or may not be of a judicial nature? We are not convinced such a notice is misleading, even though it might be worded more clearly to eliminate such an ambiguity.

Regarding the second issue -- whether potentially misleading language would result in a failure to satisfy the strict-compliance requirement even when the mortgagee satisfies the requirement that it inform the mortgagor of his or her right to bring a court action -- neither Turner, nor Pinti, nor Marroquin, nor Dysart address that issue because none of those cases involved the required notice informing the mortgagor of his or her right to bring a court action. Again, although Pinti, and perhaps Dysart, might be read broadly as supportive of such an argument, the Denaults have directed us to no Alabama case or any law that actually is on point. Instead, they presumably hope that we will take the issue up on rehearing as a matter of first impression, without

providing further supportive authority and without even arguing that the matter is one of first impression. Even if we were inclined to address the issue, however, we are not inclined to the view that the issue is best resolved as a matter of law -- regardless of whether there was any evidence indicating that the mortgagor had foregone his or her offensive right because he or she thought a judicial proceeding must be filed in which the mortgagor could assert his or her defensive rights -- although we understand a reasonable argument can be made to the contrary. We also reject the Denaults' argument that our recent decision in Barnes v. U.S. Bank National Ass'n, [Ms. 2180699, June 26, 2020] ___ So. 3d ___ (Ala. Civ. App. 2020), is in conflict with our decision on original submission and requires that we grant their application for rehearing and reverse the judgment in the present case. Accordingly, we overrule the application for rehearing.

APPLICATION OVERRULED.

Thompson, P.J., and Moore, Donaldson, and Hanson, JJ., concur.