REL: October 30, 2020

ALABAMA COURT OF CIVIL APPEALS

OCTOBER TERM, 2020-2021

2180917

Gena Rosser

v.

Federal National Mortgage Association and Bank of America, N.A.

Appeal from Jefferson Circuit Court
(CV-16-901906)

DONALDSON, Judge.

Gena Rosser appeals from the summary judgment of the Jefferson Circuit Court ("the trial court") in favor of Federal National Mortgage Association ("Fannie Mae") and Bank

of America, N.A. ("the Bank"), on Fannie Mae's ejectment claim against Rosser and on Rosser's counterclaim against Fannie Mae and Rosser's third-party claims against the Bank. We affirm the summary judgment in part, reverse it in part, and remand the cause.

Facts and Procedural History

In May 2007, Rosser purchased real property ("the property") located in Birmingham and executed a promissory note ("the note") and a mortgage agreement ("the mortgage") with a lender identified as "Countrywide Home Loans, Inc. d/b/a America's Wholesale Lender" in obtaining a loan for the purchase. On August 2, 2011, the Bank was purportedly assigned the mortgage. On March 2, 2016, the Bank purportedly foreclosed on the property, and Fannie Mae purportedly purchased the property at a foreclosure sale.

On May 24, 2016, Fannie Mae filed a complaint in the trial court seeking the ejectment of Rosser from the property, alleging that Rosser was still living on the property. Rosser filed an answer denying the ejectment claim and asserting certain affirmative defenses, including that Fannie Mae did not have proper title to the property because, she alleged,

the Bank had failed to comply with preforeclosure loss-mitigation procedures in accordance with federal guidelines, that the Bank had lacked ownership of the note and the mortgage on the property at the time of the foreclosure, and that the Bank had failed to strictly comply with the notice requirements in the mortgage. Rosser added the Bank to the action as a third-party defendant and alleged a number of claims against Fannie Mae and the Bank, including a wrongful-foreclosure claim against the Bank and a breach-of-contract claim against Fannie Mae and the Bank. In her breach-of-contract claim, Rosser specifically alleged that the Bank had not sent notices in compliance with paragraph 22 of the mortgage and quoted from that provision. The Bank and Fannie Mae filed an answer denying Rosser's claims and asserting affirmative defenses to her claims.

On September 24, 2018, Fannie Mae and the Bank filed a motion for a summary judgment on Rosser's claims and on Fannie Mae's ejectment claim. Fannie Mae argued that it was entitled to summary judgment on its ejectment claim because it had superior legal title to the property through a foreclosure deed obtained after a foreclosure sale of the property in

March 2016. Fannie Mae and the Bank presented arguments against all of Rosser's claims. Regarding her wrongful-foreclosure claim, the Bank argued, among other arguments, that Rosser had not claimed, or offered any evidence indicating that the Bank had foreclosed on the property for a purpose other than to secure the debt that she owed. Fannie Mae and the Bank also argued that Rosser could not prove all the elements of a breach-of-contract claim, specifically asserting that Rosser could not establish that she had performed her obligations under the mortgage.

In support of their motion for a summary judgment, Fannie Mae and the Bank attached a transcript of Rosser's deposition and a number of documents. Documents were also attached to Rosser's deposition transcript, such as a letter addressed to Rosser dated March 25, 2015, entitled "Notice of Intent to Accelerate." The March 25, 2015, letter stated, in part:

> "If required by law or your loan documents, you may have the right to cure the default and reinstate your loan after the acceleration of the mortgage payments and before the foreclosure sale of your property if all amounts due or past due are paid within the time permitted by law. ... Further, you may have the right to bring a court action if you believe you are not in default, in such a court action, you may exercise any other defense or legal

> right to which you may be entitled to avoid acceleration of your loan and foreclosure."

On January 18, 2019, the trial court entered a summary judgment in favor of Fannie Mae and the Bank on all claims. On February 17, 2019, Rosser filed a motion to alter, amend, or vacate the summary judgment, and Fannie Mae and the Bank filed a response. On April 26, 2019, the trial court entered an order vacating the January 18, 2019, summary judgment and allowing Rosser to respond to Fannie Mae and the Bank's motion for a summary judgment.

On May 3, 2019, Rosser filed a response to the motion for a summary judgment. Regarding Fannie Mae's ejectment claim, Rosser contended that Fannie Mae had not established that it had a superior possessory interest in the property through a valid foreclosure deed because, she contended, the foreclosure sale on March 2, 2016, was defective for the following reasons: the Bank was not the holder of the note at the time of the foreclosure sale, the Bank did not comply with statutory and regulatory preforeclosure loss-mitigation procedures, and the Bank did not comply with notice requirements in the mortgage. Rosser quoted paragraph 22 of the mortgage and emphasized the following language in that

paragraph in asserting that she did not receive the proper notices: "The notice shall further 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." She further asserted:

> "In the present case, the notice dated March 25, 2015 sent to Rosser by [the Bank] is defective. It fails to properly inform the borrowers of the absolute right to reinstate after acceleration as required by paragraph 22. Instead, it tells Rosser 'you may, if required by law or your loan documents, have the right to cure the default after acceleration of the mortgage payments and prior to the foreclosure sale of your property if all amounts past due are paid within the time permitted by law.' It also states that 'you may have the right to bring a court action if you believe you are not in default.' This notice clearly fails to comply with the [mortgage] and recent Alabama case law."

In support of her response, Rosser submitted an affidavit in which she testified as follows:

> "I was never sent nor did I receive any proper notice of default or an opportunity to cure the delinquency. Moreover, I was not provided with a proper notice of intent to accelerate, proper notice of acceleration, and a proper notice of the foreclosure sale as required by the mortgage contract and Alabama law. Paragraph 22 [of the mortgage] requires that the mortgage company send me a default notice. I was not sent a notice stating the following elements: (a) the specific default, (b) the action required to cure the default, (c) a

> date by which to cure the default, and (d) that failure to cure the default on or before the date specified in the notice will cause acceleration of the debt. The [mortgage] also requires that I be informed of my right to reinstate the mortgage after acceleration and my right to bring an action in court to dispute the alleged default. The notice was required by the mortgage, and was extremely important. The mortgage company did send a notice, but it failed to state all the information required by the [mortgage]."

Rosser also presented arguments regarding several of her claims, including her breach-of-contract and wrongful-foreclosure claims.

On May 3, 2019, Rosser filed a motion to strike the documents attached to the motion for a summary judgment. In her motion, Rosser argued that, although some of the documents attached to the transcript of her deposition, such as the note and the mortgage, had been properly authenticated by her testimony, the other documents submitted in support of the summary-judgment motion were not certified or authenticated as required in Rule 56, Ala. R. Civ. P. On May 21, 2019, the trial court entered an order denying Rosser's motion to strike.

On May 28, 2019, the trial court again entered a summary judgment in favor of Fannie Mae and the Bank on Rosser's

claims and in favor of Fannie Mae on its ejectment claim against Rosser. On June 27, 2019, Rosser filed a motion to alter, amend, or vacate the May 28, 2019, judgment. Fannie Mae and the Bank filed a response to the postjudgment motion. On July 30, 2019, the trial court entered an order denying Rosser's motion to alter, amend, or vacate.

On August 9, 2019, Rosser filed a notice of appeal to this court. We transferred the appeal to the supreme court for lack of subject-matter jurisdiction. The appeal was transferred to this court by the supreme court pursuant to § 12-2-7(6), Ala. Code 1975.

Standard of Review

Our review of the summary judgment is de novo; we do not accord any presumption of correctness to the decision of the trial court. Williams v. Deerman, 724 So. 2d 18, 20 (Ala. Civ. App. 1998).

> "'"In reviewing the disposition of a motion for summary judgment, we utilize the same standard as that of the trial court in determining whether the evidence before the court made out a genuine issue of material fact" and whether the movant was entitled to a judgment as a matter of law. Bussey v. John Deere Co., 531 So. 2d 860, 862 (Ala. 1988); Rule 56(c), Ala. R. Civ. P. When the movant makes a prima facie showing that

> there is no genuine issue of material fact, the burden then shifts to the nonmovant to present substantial evidence creating such an issue. Bass v. SouthTrust Bank of Baldwin County, 538 So. 2d 794, 797-98 (Ala. 1989). Evidence is "substantial" if it is of "such weight and quality that fair-minded persons in the exercise of impartial judgment can reasonably infer the existence of the fact sought to be proved." West v. Founders Life Assurance Co. of Florida, 547 So. 2d 870, 871 (Ala. 1989).'
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> "Ex parte General Motors Corp., 769 So. 2d 903, 906 (Ala. 1999). When the basis of a summary-judgment motion is a failure of the nonmovant's evidence, the movant's burden, however, is limited to informing the court of the basis of its motion -- that is, the moving party must indicate where the nonmoving party's case suffers an evidentiary failure. See General Motors, 769 So. 2d at 909 (adopting Justice Houston's special concurrence in Berner v. Caldwell, 543 So. 2d 686, 691 (Ala. 1989), in which he discussed the burden shift attendant to summary-judgment motions); and Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986) (stating that 'a party seeking summary judgment always bears the initial responsibility of informing the [trial] court of the basis of its motion'). The moving party must support its motion with sufficient evidence only if that party has the burden of proof at trial. General Motors, 769 So. 2d at 909."

Rector v. Better Houses, Inc., 820 So. 2d 75, 79-80 (Ala. 2001). Additionally, we "accept the tendencies of the evidence most favorable to the nonmoving party and must resolve all

reasonable doubts in favor of the nonmoving party." Bruce v. Cole, 854 So. 2d 47, 54 (Ala. 2003).

> "The burden is on one moving for summary judgment to demonstrate that no genuine issue of material fact is left for consideration by the jury. The burden does not shift to the opposing party to establish a genuine issue of material fact until the moving party has made a prima facie showing that there is no such issue of material fact."

Schoen v. Gulledge, 481 So. 2d 1094, 1096 (Ala. 1985).

Discussion

Rosser presents several arguments contending that the trial court should not have entered a summary judgment in favor of Fannie Mae on its ejectment claim. We first consider Rosser's argument that Fannie Mae does not have proper title to the property on the basis that the foreclosure was invalid because, she says, she did not receive notice in compliance with paragraph 22 of the mortgage, which provides, in relevant part:

> "Lender shall give notice to Borrower prior to acceleration following Borrower's breach of any covenant or agreement in [the mortgage] .... The notice shall specify: (a) the default; (b) the action required to cure the default; (c) a date, not less than 30 days from the date the notice is given to Borrower, by which the default must be cured; and (d) that failure to cure the default on or before the date specified in the notice may result in acceleration of the sums secured by [the mortgage]

> and sale of the Property. The notice shall further 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."

Rosser asserts that the Bank's March 25, 2015, letter addressed to her did not contain all the information required by the mortgage.

Fannie Mae argues that, in her answer and her response to the summary-judgment motion, Rosser did not preserve for appeal her arguments regarding insufficient notice. Rule 8(b), Ala. R. Civ. P., provides that "[a] party shall state in short and plain terms the party's defenses to each claim asserted ...." Under Rule 8(c), Ala. R. Civ. P., "[w]hen a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court on terms, if justice so requires, shall treat the pleading as if there had been a proper designation."

In her answer, Rosser alleged that the Bank had not provided proper notice of default and acceleration, and she specifically alleged that the Bank had not provided notice in compliance with paragraph 22 of the mortgage, which she quoted. Rosser's answer, therefore, contained sufficient

allegations to apprise Fannie Mae and the Bank of the issue regarding notice. In her response to the summary-judgment motion, Rosser argued that the Bank had not provided proper notice under paragraph 22 of the mortgage. Rosser quoted paragraph 22 and emphasized the following language: "The notice shall further 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." Among other arguments regarding notice, Rosser specifically asserted that the statement "you may have the right to bring a court action if you believe you are not in default" in the March 25, 2015, letter did not comply with the mortgage and Alabama law. Rosser, therefore, sufficiently raised and preserved that argument, as well as other arguments, regarding notice.

A failure to provide proper notice under the mortgage is a ground for challenging a foreclosure sale within an ejectment action, and a lack of proper notice renders a foreclosure sale void. Ex parte Turner, 254 So. 3d 207 (Ala. 2017); Barnes v. U.S. Bank Nat'l Ass'n, as trustee for NRZ Pass-Through Tr. V, [Ms. 2180699, June 26, 2020] ___ So. 3d

___ (Ala. Civ. App. 2020). A valid foreclosure requires strict compliance with the terms of a mortgage agreement regarding notice. As this court discussed in Barnes:

> "[I]n Ex parte Turner, [254 So. 3d 207 (Ala. 2017)], ... our supreme court, on certiorari review, considered whether a defect in the form of a required notice would vitiate the legality of the ensuing foreclosure sale so as to constitute a defense in an ejectment action brought by a mortgagee against the mortgagors after that sale. In Turner, as in this case, the pertinent mortgage-instrument provision addressing required notices and remedies in the event of a claimed default (again, numbered 22) mandated that the pre-acceleration notice '"'shall further 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, the notice sent to the mortgagors in Turner stated that the mortgagors '"'ha[d] the right to assert in foreclosure[] the non-existence of a default or any other defense to acceleration and foreclosure.'"' Id. at 209-10 (emphasis added). Rejecting the view that the foregoing notification had satisfied the notice requirements of paragraph 22 of the mortgage instrument under a substantial-compliance analysis, our supreme court, agreeing with the mortgagors' reading of Jackson[v. Wells Fargo Bank,N.A., 90 So. 3d 168 [(Ala. 2012)] held that 'strict compliance, not merely substantial compliance,' with the mortgage instrument was a prerequisite to a valid foreclosure (id. at 210):
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> > "'In Jackson, as evidenced by its reliance on Dewberry v. Bank of Standing Rock, 227 Ala. 484, 150 So. 463 (1933), Bank of New Brockton v. Dunnavant, 204 Ala.

> 636, 87 So. 105 (1920), and Fairfax County Redevelopment & Housing Authority v. Riekse, 281 Va. 441, 707 S.E.2d 826 (2011), this Court held that a party seeking to institute foreclosure proceedings must do so in strict compliance with the terms of the mortgage. In the present case, [the mortgagee] did provide the [mortgagors] with notice of its intent to accelerate the debt. However, although required to do so under the terms of the mortgage, [the mortgagee] failed to notify the [mortgagors] of their right to bring a court action challenging the foreclosure.'
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> "254 So. 3d at 211-12. ... [O]ur supreme court concluded that, '[a]lthough the [mortgagors] were given notice of certain of their rights under the terms of the mortgage, they were given no notice of their right to bring a court action directly attacking the foreclosure.' Ex parte Turner, 254 So. 3d at 212 & n.2 (emphasis added). Notably, a majority of our supreme court adhered to that conclusion over a dissenting opinion that argued, among other things, that a notice of default that substantially complies with the terms of a mortgage instrument should not be held sufficient to render an ensuing foreclosure sale void even if that notice omits disclosure of the mortgagor's right to bring a court action. Id. at 214-15 (Sellers, J., dissenting)."

___So. 3d at ___ (some emphasis added).

In Barnes, a purchaser at a foreclosure sale brought an ejectment action against the mortgagor who, at the time the ejectment action was filed, was still residing on the subject property. Relying on Campbell v. Bank of America, N.A., 141

So. 3d 492, 494 (Ala. Civ. App. 2012), we noted that the grounds for attacking a foreclosure sale are narrower in an ejectment action after the foreclosure sale has already occurred than in an action seeking to halt a foreclosure before it occurs. The mortgagor in Barnes presented a permissible collateral attack on the foreclosure sale by contending that she had not received adequate notice under the mortgage agreement. The notice of default sent to the mortgagor in Barnes contained the following language: "'You may have the right to assert in court the non-existence of a default or any other defense to acceleration or foreclosure.'" ___So. 3d at ___. We held that the notice of default did not strictly comply with the requirement in paragraph 22 of the mortgage agreement that such a notice inform the mortgagor of 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'" of the mortgaged property, ___So. 3d at ___ (emphasis omitted), stating:

> "[I]n reaching its decision in Ex parte Turner, our supreme court, in a footnote, expressed its approval of the reasoning employed in Pinti v. Emigrant Mortgage Co., 472 Mass. 226, 33 N.E.3d 1213 (2015), an opinion of the highest court of Massachusetts, a state that was identified as 'a

nonjudicial-foreclosure jurisdiction' similar to Alabama. Ex parte Turner, 254 So. 3d at 212 n.1. Our supreme court noted that the Massachusetts court, when confronted with a notice that had merely '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,'"' had concluded that that notice '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' and that that defect rendered the subsequent foreclosure sale of the mortgaged property void. Ex parte Turner, 254 So. 3d at 212 n.1 (quoting Pinti, 472 Mass. at 237, 33 N.E.3d at 1222-23). As noted by our supreme court in its footnote in Ex parte Turner, Pinti reasoned that a failure to notify defaulting mortgagors of the right to bring an action in court has the potential to mislead such mortgagors into the erroneous belief that there is '"no need to initiate a preforeclosure action against the mortgagee but [that they] could wait to advance a challenge or defense to foreclosure as a response to a [foreclosure] lawsuit initiated by the mortgagee -- even though, as a practical matter, such a lawsuit would never be brought."' Ex parte Turner, 254 So. 3d at 212 n.1 (quoting Pinti, 472 Mass. at 237, 33 N.E.3d at 1222).

"... [The] default notice does not 'strictly comply' with paragraph 22 in at least two respects. First, like the notice condemned by the Massachusetts court in Pinti, Ocwen's notice contains no reference to a right to affirmatively seek relief in a court action directly challenging the foreclosure in which, as we noted in Campbell, a wider range of defenses would be available to a mortgagor who is alleged to be in default. Second, the reference in Ocwen's notice is not unequivocal because it refers to what rights Barnes 'may' have;

> as a federal court applying Alabama law recently observed, a notice that informs mortgagors only that they '"may have ... to bring an action to have [a] foreclosure [proceeding] dismissed"' improperly 'insists rights [that mortgagors] unconditionally possess [under paragraph 22] -- including their right to present defenses they "may" have in a lawsuit -- are subject to some unknown and unspecified condition.' Federal Home Loan Mortg. Corp. v. Capps, No. 2:16-CV-01713-JHE, March 4, 2019 (N.D. Ala. 2019) (not published in Federal Supplement); accord Federal Nat'l Mortg. Ass'n v. Marroquin, 477 Mass. 82, 90, 74 N.E.3d 592, 598 (2017) (applying Pinti and holding that loan servicer's use of word 'may' in default notice did not strictly comply with paragraph 22 of mortgage instrument because that word improperly indicated that the right to bring a court action was 'merely conditional, without specifying the conditions, and that the mortgagor may not have the right to file an action in court')."

Barnes, ___ So. 3d at ___.

As in Barnes, paragraph 22 of the mortgage in this case required a notice informing Rosser of "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" of the property. The March 25, 2015, letter states, in relevant part, that "you may have the right to bring a court action if you believe you are not in default, in such a court action, you may exercise any other defense or legal right to which you may be entitled to avoid acceleration of your loan and

foreclosure." As explained in Barnes, such a notice does not sufficiently refer to a right to initiate a court action in direct challenge of a foreclosure. Without having instituted a direct challenge to a foreclosure, a mortgagor could face the possible consequence of having certain defenses later precluded in an ejectment action. Furthermore, the use of "may" in reference to the right to initiate a court action does not unequivocally refer to an unconditional right under the mortgage. Therefore, Fannie Mae failed to establish that it was entitled to a judgment as a matter of law with respect to its ejectment claim. Accordingly, we reverse the portion of the summary judgment in favor of Fannie Mae's ejectment claim. We pretermit discussion of the parties' other arguments regarding the ejectment claim.

The only claims against Fannie Mae and the Bank that Rosser addresses on appeal are the claims of breach of contract against the Bank and Fannie Mae and wrongful foreclosure against the Bank. In their motion for a summary judgment, Fannie Mae and the Bank argued that Rosser did not offer evidence of or could not prove certain elements of those claims. Rosser would have the burden at trial to prove all the

elements of her claims against the Bank and Fannie Mae. See Barter v. Burton Garland Revocable Tr., 124 So. 3d 152, 157 (Ala. Civ. App. 2013) (noting that party had burden of proof at trial on his counterclaims). Fannie Mae and the Bank, thus, merely had the following burden: "'When the basis of a summary-judgment motion is a failure of the nonmovant's evidence, the movant's burden ... is limited to informing the court of the basis of its motion -- that is, the moving party must indicate where the nonmoving party's case suffers an evidentiary failure.'" Tanksley v. ProSoft Automation, Inc., 982 So. 2d 1046, 1049 (Ala. 2007) (quoting Rector, 820 So, 2d at 80).

"Alabama has long recognized a cause of action for 'wrongful foreclosure' arising out of the exercise of a power-of-sale provision in a mortgage. However, it has defined such a claim as one where 'a mortgagee uses the power of sale given under a mortgage for a purpose other than to secure the debt owed by the mortgagor.'" Jackson v. Wells Fargo Bank, N.A., 90 So. 3d 168, 171 (Ala. 2012) (quoting Reeves Cedarhurst Dev. Corp. v. First American Fed. Sav. & Loan Ass'n, 607 So. 2d 180, 182 (Ala. 1992)). In Jackson, the

supreme court affirmed a summary judgement on a party's claim of wrongful foreclosure when the party did not allege or argue that the foreclosure sale was for a purpose other than to secure the debt owed. As in Jackson, Rosser did not allege or argue that the foreclosure sale was conducted for an improper purpose. Although Rosser primarily argues on appeal that the Bank wrongfully foreclosed on the property as a defense to the claim of ejectment, we affirm the summary judgment as to her claim of wrongful foreclosure to the extent that she argues in favor of that claim on appeal.

"[T]he elements of a breach-of-contract claim in Alabama are '"'[(1)] the existence of a valid contract binding the parties in the action, (2) [the plaintiff's] own performance under the contract, (3) the defendant's nonperformance, and (4) damages.'"'" Tidmore v. Citizens Bank & Tr., 250 So. 3d 577, 590 (Ala. Civ. App. 2017) (quoting Poole v. Prince, 61 So. 3d 258, 273 (Ala. 2010), quoting in turn Prince v. Poole, 935 So. 2d 431, 442-43 (Ala. 2006), quoting in turn Southern Med. Health Sys., Inc. v. Vaughn, 669 So. 2d 98, 99 (Ala. 1995)) (emphasis omitted). Rosser has not argued on appeal that she performed her obligations under the mortgage.

Therefore, Rosser has not demonstrated that the summary judgment denying her claim of breach of contract should be reversed.

For the foregoing reasons, we reverse the summary judgment insofar as it granted Fannie Mae's ejectment claim, and we affirm the summary judgment insofar as it denied Rosser's claims against Fannie Mae and the Bank. We remand the cause to the trial court for further proceedings consistent with this opinion.

AFFIRMED IN PART; REVERSED IN PART; AND REMANDED.

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

Edwards, J., concurs in part and concurs in the result in part, with writing.

EDWARDS, Judge, concurring in part and concurring in the result in part.

I concur in the affirmance of the summary judgment in favor of Federal National Mortgage Association ("FNMA") and Bank of America, N.A., and against Gena Rosser as to Rosser's claims. As to the reversal of the summary judgment in favor of FNMA on its ejectment claim, I concur in the result.