IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

NOT FINAL UNTIL TIME EXPIRES TO
FILE MOTION FOR REHEARING AND
DISPOSITION THEREOF IF FILED

YEFIM VASILEVSKIY AND
YELENA VASILEVSKIY,

Appellants,

v. Case No. 5D13-3468

WACHOVIA BANK, NATIONAL
ASSOCIATION, ET AL.,

Appellees.

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Opinion filed May 22, 2015

Appeal from the Circuit Court
for Flagler County,
H. Pope Hamrick, Jr., Senior Judge.

Thomas Eross, Jr., Kendrick Almaguer, and
Peter Ticktin, The Ticktin Law Group, P.A.,
Deerfield Beach, for Appellant.

MaryEllen M. Farrell, Michael K. Winston,
C. Cory Mauro, and Dean A. Morande,
Carlton Fields Jorden Burt, P.A., of West
Palm Beach, for Appellee.

PER CURIAM.

In this foreclosure case, we address the effect of a defective notice of default. The mortgage at issue here required that Appellee, Wachovia Bank, National Association, provide to Appellants written notice of the default and an opportunity to cure the default

by a date not less than thirty days from the date of the notice. The notice actually sent to Appellants specified a date that was only twenty-eight days after the date of the notice. Four months later, after Appellants failed to cure the default, Appellee filed suit. Almost four years after suit was filed and shortly before the hearing on Appellee's motion for summary judgment, by way of an amended answer, Appellants raised for the first time the defective notice. The trial court granted Appellee's motion for summary judgment, culminating in this appeal.

Although Appellee breached the contractual provision that required a full thirty-day notice, we conclude that the breach of contract was not material because Appellants never attempted to cure the default before, during or after suit was filed. The purpose of the notice provision is to allow the mortgagor to cure the default prior to acceleration. In this mortgage, even after acceleration, the mortgagor has the right to reinstate the mortgage. Because Appellants never attempted to cure this default at any time for a four-year period following the default, Appellants could not make a tenable claim that they were harmed by the breach. Absent some prejudice, the breach of a condition precedent does not constitute a defense to the enforcement of an otherwise valid contract. *See Gorel v. The Bank of New York, Mellon*, No. 5D13-3272 (Fla. 5th DCA May 8, 2015); *Allstate Floridian Ins. Co. v. Farmer,* 104 So. 3d 1242, 1248-49 (Fla. 5th DCA 2012) (breach of condition precedent must be material, meaning one causing prejudice, to constitute defense to enforcement of contract).

Samaroo v. Wells Fargo Bank, 137 So. 3d 1127 (Fla. 5th DCA 2014), is distinguishable. There, the defective notice omitted an entire element from the list of

required contents, and the mortgagor raised the issue promptly after the lawsuit was filed. Under those circumstances, we were unable to conclude that the breach was immaterial.

AFFIRMED.

TORPY, C.J. and JACOBUS, B.W., Senior Judge, concur.
PALMER, J., dissents with opinion.

PALMER, J., dissenting. 5D13-3468

I respectfully dissent from the majority's affirmance of the final summary judgment of foreclosure entered in favor of Wachovia Bank (bank).

In order to prevail on a motion for summary judgment, a plaintiff must establish that there is no disputed issue of any material fact regarding its claim and also must establish that there are no material issues of fact regarding any of the defenses raised by the defendant. When a party raises affirmative defenses, a summary judgment should not be granted where there are issues of fact raised by the affirmative defenses which have not been refuted. Kurian v. Wells Fargo Nat'l Ass'n, 114 So. 3d 1052 (Fla. 4th DCA 2013).

Here, the defendants asserted an affirmative defense of the bank's failure to fulfill conditions precedent to foreclosure. Specifically, the defendants alleged that the bank failed to comply with paragraph twenty-two of the mortgage by failing to provide a proper notice of default. Paragraph twenty-two of the mortgage states, 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 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 this Security Instrument, foreclosure by the judicial proceeding and sale of the Property.

The undisputed evidence showed that only twenty-eight days notice was given, supporting the factual basis of the defendants' affirmative defense.

The bank did not attempt to avoid this affirmative defense by providing an affidavit or other proof of record that its failure to comply with the explicit terms of its mortgage

was not a material breach of the contract or that it had substantially complied with the paragraph. The bank also did not provide any evidence of record that the defendants were not prejudiced by its failure to comply with the terms of its agreement. Rather, in its supplemental affidavit of proof, the bank addressed the defendants' affirmative defense by simply stating that "the defendants alleged that the plaintiff failed to provide them with the contractual notice of default and right to cure contemplated by the loan documents. However, that allegation is factually incorrect." The record establishes that the defendants' allegation was not factually incorrect since the undisputed evidence shows that the bank failed to provide the notice required by the mortgage.

Accordingly, since there were issues of fact raised by the affirmative defenses which were not refuted by the record, the bank was not entitled to a summary judgment. The issue of materiality of any breach was not before the court in light of the bank's response to the affirmative defense.

Furthermore, even if the materiality of the breach had properly been before us for review, the majority creates a test for materiality which is contrary to controlling case law. Specifically, the majority concludes, as a matter of law, that the breach of the instant mortgage contract was not material because the defendants "never attempted to cure the default before, during or after suit was filed." If that statement of law is controlling, the notice provision of any mortgage is rendered virtually meaningless, since a mortgage holder can simply choose not to give any notice before initiating a foreclosure lawsuit and then later argue that any failure to give notice is not a material breach unless the mortgagor attempts to cure the default.

In Samaroo v. Wells Fargo Bank, 137 So. 3d 1127 (Fla. 5th DCA 2014), this court rejected an argument that the bank substantially complied with a notice requirement identical to the instant mortgage provision. We held that the mortgage "specified the important information that it was bound to give its borrowers in default, and it simply failed to do so." Id. at 1129. In a footnote, we specifically noted that paragraph twenty-two of the mortgage specified five components that the bank must give, with one of those components being a specific thirty-day cure period. See also Kurian, 114 So. 3d 1053 (Fla. 4th DCA 2013). The majority attempts to distinguish Samaroo based on the fact that an entire element of the notice was omitted. However, given the test enunciated by the majority, the omission of an entire element would not be a material breach unless the mortgagor sought to cure its default. Nothing in Samaroo suggests the materiality test advanced by the majority.

Accordingly, in my view, the bank was not entitled to receive a summary judgment, and I would reverse and remand for further proceedings.