IN THE COURT OF APPEALS OF IOWA

No. 2-1089 / 12-0755
Filed February 13, 2013

BAC HOME LOANS SERVICING, LP,
f/k/a COUNTRYWIDE HOME LOANS
SERVICING, LP,
Plaintiff-Appellee,

vs.

CHARLES L. DREW, JR.,
Defendant-Appellant.

Appeal from the Iowa District Court for Wapello County, Daniel P. Wilson, Judge.

Charles Drew appeals from the entry of summary judgment in favor of Bank of America (the successor to BAC Home Loans LP by merger). **REVERSED AND REMANDED.**

David M. Loetz of Iowa Legal Aid, Ottumwa, for appellant.

Ryan Holtgraves of Petosa, Petosa & Boecker, L.L.P., Clive, for appellee.

Considered by Potterfield, P.J., and Danilson and Tabor, JJ.

DANILSON, J.

Charles Drew appeals from the entry of summary judgment in favor of Bank of America (the creditor)[1] in this mortgage foreclosure proceeding. Because a genuine issue of material fact exists as to whether proper notice was, in fact, provided to the debtor, the creditor has failed to establish it is entitled to summary judgment. We therefore reverse and remand for further proceedings.

We review the entry of summary judgment for the correction of errors at law. *Merriam v. Farm Bureau Ins.*, 793 N.W.2d 520, 522 (Iowa 2011). Summary judgment should only be granted when the moving party is able to affirmatively establish that there is no genuine issue of material fact and that they are entitled to judgment as a matter of law. Iowa R. Civ. P. 1.981(3); *Merriam*, 793 N.W.2d at 522. Under our review, we view the facts in the light most favorable to the nonmoving party. *Merriam*, 793 N.W.2d at 522.

The following facts are not in dispute. On June 15, 2007, Charles Drew signed a note in the principal sum of $67,000 and payable to Community 1st Credit Union for property with the address of "407 South 2nd Street, Eddyville, Iowa, 52553." To secure that note, Drew signed a mortgage giving the credit union a security interest in his homestead.[2] Section 7 of the promissory note provides with respect to notices to be given:

> Unless applicable law requires a different method, any notice that must be given to me under this Note will be given by delivering it or by mailing it by first class mail to me *at the Property Address*

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[1] Though no substitution of parties has been filed, Drew does not challenge that Bank of America is the successor in interest by merger to BAC Home Loans Servicing.

[2] The credit union later sold the mortgage and note. Bank of America is now the holder of the note and mortgage.

> *above or at a different address if I give the Note Holder a notice of my different address.*
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> Any notice that must be given to the Note Holder under this Note will be given by delivering it or by mailing it by first class mail to the Note Holder at the address stated in Section 3(A) above or at a different address if I am given a notice of that different address.

(Emphasis added.)

Section 15 of the mortgage similarly provides:

> All notices given by Borrower or Lender in connection with this Security Instrument must be in writing. Any notice to Borrower in connection with this Security Instrument *shall be deemed to have been given to Borrower when mailed by first class mail or when actually delivered to Borrower's notice address* if sent by other means. Notice to any one Borrower shall constitute notice to all Borrowers unless Applicable Law expressly requires otherwise. The notice address shall be the Property Address unless Borrower has designated a substitute notice address by notice to Lender. Borrower shall promptly notify Lender of Borrower's change of address. If Lender specifies a procedure for reporting Borrower's change of address, then Borrower shall only report a change of address through that specified procedure*. There may be only one designated notice address under this Security Instrument at any one time.* Any notice to Lender shall be given by delivering it or by mailing it by first class mail to Lender's address stated herein unless Lender has designated another address by notice to Borrower. Any notice in connection with this Security Instrument shall not be deemed to have been given to Lender until actually received by Lender. If any notice, required by this Security Instrument is also required under Applicable Law, the Applicable Law requirement will satisfy the corresponding requirement under this Security Instrument.

(Emphasis added.)

Drew fell behind in his mortgage payments and, on May 17, 2010, the creditor sent a notice of right to cure default to "Charles L. Drew, Jr., P.O. Box 533, Ottumwa, Iowa, 52501-0533."

On July 9, 2010, the creditor's counsel sent a letter to Drew stating the creditor was accelerating of the note, which letter included a notice of the right to

mortgage mediation. The documents were mailed to "Charles L. Drew, Jr., P.O. Box 533, Ottumwa, Iowa, 52501."

On July 26, 2010, the creditor filed a petition for mortgage foreclosure, alleging in paragraph 13 through 15 that notices of right to cure default, acceleration of the note, and mediation were mailed to Drew. Drew filed an answer, denying paragraphs 13 through 15 and stating that the address to which the notices were sent "is not, nor has it ever been, his address and therefore [he] did not receive" the documents as alleged. The answer also asserted an affirmative defense of failure to comply with condition precedent to acceleration and foreclosure because the creditor "failed to properly notify the defendant."

The creditor filed a motion for summary judgment asserting "all parties to this action have been accorded their rights and notices in accordance with the laws of the State of Iowa." Drew resisted the motion. In support of his resistance, Drew submitted this affidavit:

> I have always lived at 407 S 2nd St Eddyville, IA 52553. The corresponding PO Box has always been Box 737 in Eddyville. I have never provided Bank of America or any holder of the mortgage not [sic] a different address. I did not receive the notice to cure nor the letter of acceleration. I have never received mortgage mediation notices or HAMP.

The pro se resistance was filed on the date originally set for the summary judgment hearing. The court entered an order rescheduling the hearing for March 19, 2012.

The creditor filed a response to Drew's resistance. The creditor did not address Drew's claim that he had not been properly served. Rather, the creditor

argued Drew's attempts to assert legal rights under the Home Affordable Modification program would not preclude summary judgment.

On March 19, the district court entered a decree of foreclosure. The decree states "this cause [came] on for final hearing," and states in part that "proper notice of the right to cure said default has been given to the Mortgagors and Plaintiff has received no response thereto. That the time to cure the default under Iowa law has now expired." No separate order addresses the motion for summary judgment. Based upon the court's findings in the decree, we can only conclude the court considered Drew's resistance and denied him relief.

Drew appeals and we reverse. The record reflects—at the very least—a genuine issue of material fact as to whether proper notice of the right to cure was given.

Iowa Code section 654.2D(4)(a) (2011) provides that a creditor "shall not accelerate the maturity of the unpaid balance of the obligation, demand or otherwise take possession of the land, otherwise than by accepting a voluntary surrender of it, or otherwise attempt to enforce the obligation until thirty days after a *proper notice of right to cure is given*." (Emphasis added.) Proper notice is defined in section 654.2D(2): "A creditor gives the notice when the creditor delivers the notice to the consumer or mails the notice to the borrower's residence as defined in section 537.1201, subsection 4." Section 537.1201(4), in turn, defines a borrower's address as "the address given by that person as the person's residence in a writing signed by the person in connection with a

transaction until the person notifies the person extending credit of a different address as the person's residence, and it is then the different address."

There is nothing in this record that establishes that the creditor gave notice to Drew at Drew's residence, which Drew avers is and has been "407 S 2nd St Eddyville, IA 52553."

On appeal, the creditor does not assert that Drew was given notice at the proper address. Rather, citing Iowa Code section 654.2B,[3] the creditor argues that Drew has not established he was substantially prejudiced by the failure of the notice and it is therefore entitled to judgment. The creditor seeks to invoke the protections of substantial compliance with the technical requirements of the *contents* of a notice to cure—for example, the notice "shall be in writing"; "shall conspicuously state the name, address, and telephone number of the creditor"; "a statement of the nature of the right to cure the default, a statement of the nature of the alleged default, a statement of the total payment, including an

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[3] Section 654.2B provides:

> The notice of right to cure shall be in writing and shall conspicuously state the name, address, and telephone number of the creditor or other person to which payment is to be made, a brief identification of the obligation secured by the deed of trust or mortgage and of the borrower's right to cure the default, a statement of the nature of the right to cure the default, a statement of the nature of the alleged default, a statement of the total payment, including an itemization of any delinquency or deferral charges, or other performance necessary to cure the alleged default, and the exact date by which the amount must be paid or performance tendered and a statement that if the borrower does not cure the alleged default the creditor or a person acting on behalf of the creditor is entitled to proceed with initiating a foreclosure action or procedure. The failure of the notice of right to cure to comply with one or more provisions of this section is not a defense or claim in any action pursuant to this chapter and does not invalidate any procedure pursuant to chapter 655A, unless the person asserting the defense, claim, or invalidity proves that the person was substantially prejudiced by such failure.

itemization of any delinquency or deferral charges"—without first giving the debtor *proper notice*. But proper notice under section 654.2D, that is, notice to the debtor's residence, must first occur to inform the debtor of the default. To allow the creditor to claim the safe harbor of section 654.2B for sending technically accurate notices where the notice has no chance of reaching the debtor would make a mockery of the protections afforded by statute.

Before a creditor may invoke the protections of substantial compliance with the technical requirements of section 654.2B, it must first provide the debtor with proper notice as defined in section 654.2D. The district court erred in concluding proper notice had been giving to the borrowers. The creditor was not entitled to judgment and we therefore reverse and remand for further proceedings.

REVERSED AND REMANDED.