RENDERED: NOVEMBER 4, 2005; 2:00 P.M.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-001226-MR

APPELLANT

AUDREY L. JOHNSON, SR.

APPEAL FROM JEFFERSON CIRCUIT COURT
v. HONORABLE STEPHEN P. RYAN, JUDGE
ACTION NO. 02-CI-009426

HOMEQ SERVICING CORPORATION APPELLEE

OPINION
REVERSING

** ** ** ** **

BEFORE: GUIDUGLI AND MINTON, JUDGES; EMBERTON, SENIOR JUDGE.[1]

EMBERTON, SENIOR JUDGE: This is an appeal from a summary judgment finding appellant to be in default of his obligations under a mortgage agreement with appellee HomEq for failure to maintain hazard insurance on the mortgaged property for the period from January 1, 2001 to May 15, 2001, and for failure to

[1] Senior Judge Thomas D. Emberton sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

provide proof of insurance despite multiple requests for him to do so. Because we are convinced that the uncontradicted facts of this case do not support the decision of the trial judge, we reverse the grant of summary judgment.

In 1999, appellant Aubrey Johnson and Denise E. Johnson executed a $32,000 note to appellee HomEq Servicing Corporation, secured by a mortgage on their realty located at 3731 Chase Court in Louisville. One of the terms of that mortgage was a requirement that the property be properly insured against hazards. On June 26, 2002, HomEq sent appellant a letter containing the following statements pertinent to this appeal:

> A review of our servicing records indicates that at the time you obtained your loan with HomEq in December 1999, you provide[d] proof of hazard insurance coverage with First Mutual Insurance Company. The Declaration page of your policy states the coverage was for the period of October 23, 1999 to October 23, 2000. On October 31, 2000 you were notified by The Money Store (now known as HomEq) that we had not received notification that you had renewed your policy with First Mutual Insurance Company. We advised you at that time that you must provide proof of hazard insurance to us in order to avoid lender placed insurance. On November 27, 2000 we sent you a second notice about your hazard insurance policy. Since we did not receive any proof of hazard insurance from you, on January 16, 2001 we sent you a third letter advising you that we purchased hazard insurance on your behalf. On January 15, 2001 a check was disbursed from your escrow account for

> $671.38, as payment for the period from October 23, 2000 to October 23, 2001.
>
> On August 1, 2001, you provided proof of hazard insurance to HomEq for the period May 14, 2001 to May 14, 2002. As such, the policy purchased by HomEq was canceled effective May 14, 2001, however, due to the lapse in coverage from October 31, 2001 through May 14, 2002, there was an earned premium in the amount of $373.10. As a consequence, the refund to your escrow account was $298.28.

Subsequently, on December 12, 2002, appellee brought this foreclosure action against appellant and Denise Johnson for breaching the terms of the note and mortgage.

Although the master commissioner to which the matter was referred recommended denial of appellee's summary judgment motion, the trial judge sustained appellee's exceptions to the report and granted its motion on the basis of a finding that appellant "was in default of the contract documents because of the failure to have the mortgaged property insured from January 1, 2001 to May 15, 2001, and for his failure to provide proof of insurance to HomEq after multiple requests to do so." The trial judge's order granting appellee's subsequent motion for final judgment and order of sale precipitated this appeal.

The provisions of the mortgage agreement between the parties provide in parts pertinent to this appeal the following:

> 5. Insurance. Borrower shall keep the improvements now existing or hereafter erected on the Property insured against

loss by fire, hazards included within the term "extended coverage," flood and any other hazards as Lender may require, from time to time, and in such amount and for such periods as Lender may require.

The insurance carrier providing the insurance shall be chosen by Borrower subject to approval by Lender; provided that such approval shall not be unreasonably withheld. If the Borrower fails to maintain the coverage described above, Lender may, at its option, obtain coverage to protect its rights on the Property in accordance with Paragraph 8.

8. Protection of Lender's Rights in the Property. If Borrower fails to perform the covenants and agreements contained in this Security Instrument, ..., then Lender may do and pay for whatever is necessary to protect the value of the Property and Lender's rights in the Property....
Any amounts disbursed by Lender under this Paragraph 8 shall become additional debt of Borrower secured by this Security Instrument. Unless Borrower and Lender agree to other terms of payment, these amounts shall bear interest from the date of disbursement at the Note rate and shall be payable, with interest, upon demand of Lender.

12. Borrower Not Released; Forbearance by Lender Not a Waiver; Acceptance of Partial Payment. . . . Any forbearance by Lender on one or more occasions in exercising any right or remedy hereunder, or otherwise afforded by applicable law, shall not be a waiver of or preclude that later exercise of that or any other right or remedy. [2]

[2] Emphasis added.

Clearly, under these provisions, appellee was entitled to "force-place" an insurance policy on the mortgaged property and to charge the costs of obtaining that policy to appellant's escrow account. It is undisputed that such a policy was put in place for the period from October 23, 2000, to October 23, 2001, but that the policy was cancelled effective May 14, 2001, and the unused, unearned premium for the remainder of the term was credited to appellant's escrow account. Thus, by appellee's own admission, the property was not uninsured for the four-month period found by the trial court, but was covered by insurance purchased by appellee and charged to appellant as provided for in the security instrument.

Appellee cites Price v. First Federal Savings Bank[3] as support for its contention that exercise of this option under the security agreement in no way precluded its exercise of its option to declare appellant to be in default of his obligations under the security instrument. We disagree. The holding in Price, construing a nonwaiver clause almost identical to the one in this case, is that a mortgagee's acceptance of late payments does not constitute a waiver of any subsequent defaults. Thus the force-purchase of hazard insurance does not operate as a waiver of any subsequent failure to comply with the insurance

[3] 822 S.W.2d 422 (Ky.App. 1992).

(or any other) provision of the security instrument. However, the non-waiver provision cannot be construed allowing appellee to purchase insurance with appellant's funds and at the same time declare the property to be uninsured. This rationale applies with equal force to appellant's failure to provide proof of insurance. Appellee has not waived the right to declare appellant in default with respect to any failure to comply with the proof of insurance provision subsequent to the termination of the force-placed policy.

Accordingly, the judgment of the Jefferson Circuit Court is reversed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Aubrey L. Johnson, Sr., Pro Se
Louisville, Kentucky

BRIEF FOR APPELLEE:

Jeffrey W. Kibbey
Trent Apple
Louisville, Kentucky