

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2012 CA 0698

COUNTRYWIDE HOME LOANS SERVICING, L.P.

VERSUS

Ⓟ

RHP by Ⓟ

MARCUS J. THIRSTRUP

JEW by Ⓟ

Judgment Rendered: **APR 10 2013**

On Appeal from the 22nd Judicial District Court
In and for the Parish of St. Tammany
Trial Court Number 2009-11923

The Honorable Allison H. Penzato, Judge Presiding

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Reconvention/Appellee, Countrywide
Home Loans Servicing, L.P., and
Defendant-in-Reconvention/Appellee,
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Marcus Thirstrup

BEFORE: PARRO, HUGHES,¹ AND WELCH, JJ.

¹ Justice Jefferson D. Hughes III is serving as judge ad hoc by special appointment of the Louisiana Supreme Court.

HUGHES, J.

This is an appeal of a November 8, 2011 trial court judgment, dismissing claims asserted by the defendant/plaintiff-in-reconvention in a foreclosure proceeding, via executory process, which sought: to annul a sheriff's sale of immovable property; to assert a claim for failure of the mortgagee to maintain flood insurance at an existing coverage level; and to challenge the constitutionality of LSA-R.S. 13:3852, 13:3853, 13:3886, and 13:3886.1, regarding notice. Having found this case appropriate for disposition by memorandum opinion, in accordance with the Uniform Rules for Louisiana Courts of Appeal, Rule 2-16.1(B), we detail only the central facts and law herein.

Marcus Thirstrup was the owner of a home located on Olympia Drive in Slidell, Louisiana, which he had insured for flood damage in the amounts of \$125,000 for the building and \$30,000 for the contents, when he entered into a loan agreement, on March 28, 2002, with Countrywide Home Loans Servicing, L.P. ("Countrywide"), securing the loan with a mortgage on the property. As part of the agreement between the parties, Countrywide agreed to pay the flood insurance premiums to the insurer, along with other expenses, out of an escrow account, and Mr. Thirstrup agreed to make sufficient payments into the escrow account for payment of the insurance premiums and to "furnish to [Countrywide] all notices of amounts to be paid." Further, the mortgage agreement obligated the borrower, Mr. Thirstrup, to keep the improvements on the property insured against all hazards, including flood. The mortgage agreement stated, in pertinent part, as follows:

5. Property 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," and any other hazards including, but not limited to, earthquakes and floods, for which Lender requires insurance. This insurance shall be maintained in the amounts (including deductible levels) and for the periods that Lender requires. What Lender requires pursuant to the preceding sentences can change during the term of the Loan. The insurance carrier providing the insurance shall be chosen by Borrower subject to Lender's right to disapprove Borrower's choice, which right shall not be exercised unreasonably. Lender may require Borrower to pay, in connection with this Loan, either: (a) a one-time charge for flood zone determination, certification and tracking services; or (b) a one-time charge for flood zone determination and certification services and subsequent charges each time remappings or similar changes occur which reasonably might affect such determination or certification. Borrower shall also be responsible for the payment of any fees imposed by the Federal Emergency Management Agency in connection with the review of any flood zone determination resulting from an objection by Borrower.

If Borrower fails to maintain any of the coverages described above, Lender may obtain insurance coverage, at Lender's option and Borrower's expense. Lender is under no obligation to purchase any particular type or amount of coverage. Therefore, such coverage shall cover Lender, but might or might not protect Borrower, Borrower's equity in the Property, or the contents of the Property, against any risk, hazard or liability and might provide greater or lesser coverage than was previously in effect. Borrower acknowledges that the cost of the insurance coverage so obtained might significantly exceed the cost of insurance that Borrower could have obtained. Any amounts disbursed by Lender under this Section 5 shall become additional debt of Borrower secured by this Security Instrument. These amounts shall bear interest at the Note rate from the date of disbursement and shall be payable, with such interest, upon notice from Lender to Borrower requesting payment.

All insurance policies required by Lender and renewals of such policies shall be subject to Lender's right to disapprove such policies, shall include a standard mortgage clause, and shall name Lender as mortgagee and/or as an additional loss payee. Lender shall have the right to hold the policies and renewal certificates. If Lender requires, Borrower shall promptly give to Lender all receipts of paid premiums and renewal notices. If Borrower obtains any form of insurance coverage, not otherwise required by Lender, for damage to, or destruction of, the Property, such policy shall include a standard mortgage clause and shall name Lender as mortgagee and/or as an additional loss payee. [Emphasis added.]

In August of 2002 and August of 2003, the flood insurance policy issued by Bankers Insurance Group/First Community Insurance Company,

in the coverage amounts of \$125,000 for the building and \$30,000 for the contents, with a \$500 deductible applicable to each coverage amount and at a premium of \$236, was renewed at the existing coverage level, with Countrywide paying the premium out of Mr. Thirstrup's escrow account. However, in November of 2003, Fidelity National Insurance Services ("Fidelity"), the successor to Bankers Insurance Group/First Community Insurance Company, sent a notice to Mr. Thirstrup stating that, pursuant to new eligibility requirements established by the National Flood Insurance Program for "Preferred Risk Policies," the Thirstrup property was no longer in a preferred risk policy zone. The November 2003 notice further notified Mr. Thirstrup that, unless he submitted an additional premium of \$366, his policy would be rewritten as a "Standard Flood Policy," with lower limits of coverage.

Although Mr. Thirstrup contends that he contacted a Countrywide representative by telephone about the flood insurance change, it does not appear that Mr. Thirstrup took any steps to "maintain" his insurance coverage, which was his duty pursuant to the mortgage contract, by negotiating with Fidelity for different coverage than that described in Fidelity's November 2003 notice. Nor does the record reflect that Mr. Thirstrup paid the additional \$366 premium amount requested in Fidelity's November 2003 notice, either by forwarding this sum directly to Fidelity or by paying this sum into his Countrywide escrow account for payment by Countrywide to Fidelity. Upon Mr. Thirstrup's failure to "maintain" his flood insurance coverage at the existing coverage level, Countrywide, pursuant to the express provisions of the mortgage contract, was "under no obligation to purchase any particular type or amount of coverage."

A November 21, 2003 flood insurance declarations page, for the policy period ending August 8, 2004, was mailed to Mr. Thirstrup, stating that the coverage limits were \$30,900 for the building and \$4,700 for the contents, and the premium amount was \$248. The subsequent flood insurance renewal notice for the policy period of August 8, 2004 through August 8, 2005, mailed to Mr. Thirstrup on June 13, 2004, also stated that the coverage limits were \$30,900 for the building and \$4,700 for the contents, and the premium was \$248, which was paid by Countrywide out of Mr. Thirstrup's escrow account. Thereafter, on August 3, 2004, a declarations page showing these coverage and premium amounts was mailed to Mr. Thirstrup. The next flood insurance renewal notice, for the policy period of August 8, 2005 through August 8, 2006, was mailed to Mr. Thirstrup on June 13, 2005, and again stated that the coverage limits were \$30,900 for the building and \$4,700 for the contents; the premium was again paid by Countrywide out of Mr. Thirstrup's escrow account. On August 9, 2005, a declarations page showing these coverage and premium amounts was again mailed to Mr. Thirstrup. On August 29, 2005 Hurricane Katrina made landfall in Louisiana and resulted in flooding damage to Mr. Thirstrup's Olympia Drive house. Mr. Thirstrup subsequently received flood insurance proceeds checks from Fidelity in the amounts of \$30,900, \$3,000, and \$1,700.

On April 3, 2009 Countrywide filed this suit for executory process, based on a confession of judgment in the act of mortgage signed by Mr. Thirstrup. Countrywide alleged that the monthly installment payment due on January 1, 2006, and all subsequent installment payments, had not been paid. After complying with the procedures set forth in the Louisiana Code of Civil Procedure for executory process, including notice to Mr. Thirstrup,

a sheriff's sale of the property was scheduled for July 22, 2009. The first scheduled sale was canceled, the sale was rescheduled for February 3, 2010, and the property was sold.

On August 3, 2010 Mr. Thirstrup filed a pleading entitled "Petition in Reconvention to Nullify Foreclosure Sale, for Immediate Injunctive Relief against Eviction, and for Damages," naming as defendants both Countrywide and the alleged administrator of the loan, Bank of America, N.A. ("BNA"),² and alleging, in summary, that Countrywide: breached its obligation to maintain flood insurance at existing coverage levels; engaged in fraud and ill practices by agreeing to cancel the first scheduled foreclosure sale, but rescheduling the sale without further notice to him; and engaged in unfair trade practices. The statements made in the attached affidavit of Mr. Thirstrup included his admission that he had received the November 2003 correspondence from his flood insurer detailing the change of status of his insured property and indicating that, to maintain his existing coverage level, an additional premium of \$366 was required. Mr. Thirstrup's affidavit also maintained that, during this litigation, he had received numerous verbal assurances from both BNA personnel and from the foreclosure attorney's office that the foreclosure would be cancelled and, after the property was sold, he claimed to have been told that steps were being taken to rescind the foreclosure. Further, Mr. Thirstrup attached a copy of a July 20, 2009 email, purportedly sent to him by one of the foreclosure attorneys, stating:

Good afternoon and thank you for your correspondence. I am out of the office this afternoon but have confirmed that the sale this week has been canceled. More shortly.

² Although Mr. Thirstrup named BNA as "Bank of America, National Association," pleadings filed by BNA showed its correct name to be "Bank of America, N.A."

Mr. Thirstrup's affidavit and attachments further indicate that he had prior knowledge of the first scheduled (July 22, 2009) sheriff's sale.

In response to Mr. Thirstrup's petition, Countrywide and BNA filed a peremptory exception raising the objection of no cause of action, contending that when a creditor has properly complied with the legal requirements for executory process, there are only two ways to defend against the sale of the property (i.e., by filing an injunction to arrest the sale or by suspensively appealing from the writ of seizure and sale (citing LSA-C.C.P. art. 2642;³ LSA-R.S. 13:3852;⁴ **Citizens Bank & Trust Company v. Little Ford, Inc.**, 522 So.2d 1124 (La. App. 1 Cir. 1988); **Ford Motor Credit Company v. Herron**, 234 So.2d 517 (La. App. 3 Cir. 1970); and **Dryades Savings and**

³ Article 2642 provides:

Defenses and procedural objections to an executory proceeding may be asserted either through an injunction proceeding to arrest the seizure and sale as provided in Articles 2751 through 2754, or a suspensive appeal from the order directing the issuance of the writ of seizure and sale, or both.

A suspensive appeal from an order directing the issuance of a writ of seizure and sale shall be taken within fifteen days of the signing of the order. The appeal is governed by the provisions of Articles 2081 through 2086, 2088 through 2122, and 2124 through 2167, except that the security therefor shall be for an amount exceeding by one-half the balance due on the debt secured by the mortgage or privilege sought to be enforced, including principal, interest to date of the order of appeal, and attorney's fee, but exclusive of court costs.

⁴ Louisiana Revised Statute 13:3852(A) requires notice to the debtor of only the first scheduled sale of the property, providing:

The sheriff to whom the writ is directed shall make three notices setting forth the title of the action or proceeding, its docket number, the court which issued the writ, the amount of the judgment or claim specified in the writ, an exact copy of the description of the immovable property furnished him in accordance with R.S. 13:3851, and the fact that the sheriff is seizing the described property, in accordance with Code of Civil Procedure Article 2293, and, if applicable, the *date of the first scheduled sale of the property*. If the immovable property to be seized is owned by more than one party, the sheriff shall make an additional notice for each additional party. [Emphasis added.]

We note that 2012 La. Acts, No. 504, § 1, added the following sentence to LSA-R.S. 13:3852(A): "No other notice of seizure shall be required."

Loan Association v. Givens, 602 So.2d 325 (La. App. 4 Cir. 1992)), and the plaintiff did neither.

Following a November 3, 2010 hearing on Mr. Thirstrup's request for injunctive relief and on the exception of no cause of action raised by the defendants-in-reconvention, the trial court denied injunctive relief and granted judgment, in part, in favor of the defendants-in-reconvention, dismissing that portion of Mr. Thirstrup's reconventional demand seeking the nullity of the foreclosure sale. The trial court also denied the no cause of action exception as to Mr. Thirstrup's reconventional demand for damages for Countrywide's failure to maintain his existing flood insurance coverage level. In her reasons for judgment, the trial judge recognized that Mr. Thirstrup had alleged two separate causes of action: (1) to annul the foreclosure sale; and (2) for damages arising out of tort, contract, and the Louisiana Unfair Trade Practices Act. With respect to the action to annul the foreclosure sale, the trial court stated that Mr. Thirstrup had alleged two bases: (1) lack of notice of the sale date; and (2) fraud and ill practices by Countrywide, in telling Mr. Thirstrup he would be advised of subsequent developments. Citing **Reed v. Meaux**, 292 So.2d 557 (La. 1973), the trial court reasoned that LSA-C.C.P. arts. 2001-2006, otherwise governing nullity actions, are not applicable to judicial sales by executory process, since the authentic documents required for executory process, under LSA-C.C.P. art. 2635, are the foundation of the proceeding, and the failure to comply with Article 2635 are "defects of form," which are not substantive in character and cannot serve as grounds for nullity of the sale. Further citing **Chase Manhattan Mortgage Corp. v. Lassiter**, 2004-0484 (La. App. 5 Cir. 11/30/04), 889 So.2d 1155, the trial court held that Louisiana law does not require the defendant in an executory proceeding to be provided with notice

of a *rescheduled* judicial sale. The trial court concluded that because Mr. Thirstrup was aware of the *first* scheduled sheriff's sale date and the cancellation of that sale, he had failed to state a cause of action to annul the foreclosure sale. However, the court found Mr. Thirstrup had stated a cause of action for damages, based on the allegations made regarding a possible obligation of the mortgagee to maintain the existing flood insurance coverage level.

Thereafter, on January 18, 2011, Mr. Thirstrup requested permission to file a first supplemental and amending petition, which was granted. In his amended petition, Mr. Thirstrup added an additional defendant-in-reconvention, the Federal National Mortgage Association ("FNMA"),⁵ and further challenged the constitutionality of LSA-R.S. 13:3852, 13:3853, 13:3886, and 13:3886.1, insofar as these statutes did not require that notice of the rescheduled foreclosure sale be provided to him.

FNMA responded to Mr. Thirstrup's amended petition with a peremptory exception, pleading the objections of no cause of action and no right of action. Countrywide and BNA filed a peremptory exception, pleading the objections of no cause of action and no right of action, as to Mr. Thirstrup's constitutional challenges, and also filed a motion for partial summary judgment, seeking dismissal of Mr. Thirstrup's flood insurance related claims. A hearing was held on the exceptions and on the motion for partial summary judgment on August 24, 2011. Thereafter, judgments were signed on September 6, 2011, granting Countrywide's and BNA's motion for partial summary judgment, dismissing Mr. Thirstrup's claims "related to the level of flood insurance coverage" on his property, granting FNMA's

⁵ Mr. Thirstrup alleged that Countrywide purchased his property at the foreclosure sale and then assigned or sold the loan and/or property to FNMA.

peremptory exceptions, and dismissing all claims against FNMA. A judgment was signed on November 8, 2011, granting Countrywide's and BNA's peremptory exceptions, as to Mr. Thirstrup's constitutional challenges, and dismissing "all claims asserted in this litigation by Marcus J. Thirstrup" against defendants-in-reconvention, "by virtue of this Judgment and the prior Judgments . . . dated January 3, 2011 and September 6, 2011." Mr. Thirstrup has appealed the November 8, 2011 judgment.

Having thoroughly reviewed the record presented on appeal, we find no merit in Mr. Thirstrup's assignments of error. The basis of his lawsuit is his contention that, because of the unreimbursed expenses and costs he had to pay out-of-pocket to repair his Hurricane Katrina damaged house, he was unable to pay his monthly mortgage payments and/or he did not owe further mortgage payments, on account of Countrywide's alleged breach of its contractual obligation to maintain the existing flood insurance coverage level.⁶ However, the plain language of the mortgage contract, quoted hereinabove, clearly placed the burden on Mr. Thirstrup to acquire an appropriate level of flood insurance coverage. Mr. Thirstrup's flood insurance company notified him that it was lowering his limits of coverage in November of 2003. Yet, despite repeated renewal notices and declarations of coverage being sent to Mr. Thirstrup over the course of several years, unequivocally showing that he had lower limits of coverage than he preferred, he took no other action to maintain the flood insurance

⁶ In his affidavit, Mr. Thirstrup stated, in pertinent part:

I ended up having to pay for the majority of the losses out of pocket to repair the house. Of the net adjusted claim value exceeding \$155,000, \$35,900 was received in payments [from the flood insurance company], leaving approximately \$119,200 remaining unpaid. Approximately \$110,000 was due on the mortgage. After offsetting this balance, Countrywide still owed me \$6,200, in addition to a full lien release and mortgage cancellation, as the debt was not extinct.

coverage level he wanted. Because of Mr. Thirstrup's erroneous interpretation of the obligations imposed under his mortgage contract (that Countrywide had a contractual duty to maintain flood insurance on his behalf, when the mortgage contract provided to the contrary), he concluded that he was justified in failing to make his mortgage payments, resulting in Countrywide's use of executory process to seize and sell the mortgaged home. Because Countrywide's suit for executory process was authorized under the contract between the parties and under the law, Mr. Thirstrup's action to annul the sheriff's sale of the property and/or for damages was meritless. Accordingly, we find no error in the trial court rulings dismissing Mr. Thirstrup's claims, and we affirm the November 8, 2011 trial court judgment, in accordance with Uniform Rules of Louisiana Courts of Appeal, Rule 2-16.1(B). All costs of this appeal are to be borne by the appellant, Marcus J. Thirstrup.

AFFIRMED.