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ALABAMA COURT OF CIVIL APPEALS

OCTOBER TERM, 2011-2012

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Brenda F. Campbell and C.W. Campbell

v.

Bank of America, N.A.

**Appeal from Jefferson Circuit Court
(CV-08-903079)**

PITTMAN, Judge.

Brenda F. Campbell and her son, C.W. Campbell, appeal from a judgment in favor of Bank of America, N.A. ("Bank of America"), in an ejectment action. We affirm.

Facts and Procedural History

The Jefferson Circuit Court's judgment recites the following facts:

"The parties entered into a mortgagor/mortgagee relationship based on a mortgage and note, which originated on June 10, 1998. Subsequently, the [Campbells] experienced financial difficulties, and the loan was accelerated in 2004 as a result of default for nonpayment. Over the next two years, the evidence shows that [Bank of America] initiated a number of loss-mitigation procedures as well as other actions designed to help the [Campbells] avoid foreclosure. These actions were unsuccessful, and although [Bank of America] set a date for a foreclosure sale in late 2006, the [Campbells] stayed the sale by filing a Chapter 13 bankruptcy petition. Over the next two years, numerous bankruptcy petitions were filed, further delaying foreclosure proceedings. [Bank of America] was granted relief from the stay of the foreclosure sale in June of 2008, and notice of the sale was again given to the [Campbells]. The foreclosure sale took place on September 3, 2008, at which time [Bank of America] took title.

"At trial, the [Campbells] did not dispute the fact that they were in default; rather, they argued that [Bank of America] failed to comply with [United States Department of Housing and Urban Development] regulations regarding loss-mitigation procedures, and that the foreclosure sale was therefore wrongfully initiated. Specifically, the [Campbells] alleged that [Bank of America] was guilty of noncompliance by failing to both 1) offer all possible loss-mitigation programs to [them] before beginning foreclosure proceedings, and 2) reinstate loss-mitigation efforts after the relief from stay was granted and before foreclosure proceedings were resumed."

Following a bench trial, the circuit court entered a judgment determining that the United States Department of Housing and Urban Development ("HUD") loss-mitigation procedures were mandatory, that Bank of America had substantially complied with those procedures, and that Bank of America had established its right to eject the Campbells from the property. The Campbells filed a timely postjudgment motion and requested a hearing on that motion. The circuit court set a date for a hearing, but it denied the motion before the hearing was held. The Campbells timely appealed. The supreme court subsequently transferred the appeal to this court pursuant to Ala. Code 1975, § 12-2-7(6).

Standard of Review

"Where evidence is presented to the trial court ore tenus, a presumption of correctness exists as to the court's conclusions on issues of fact; its determination will not be disturbed unless it is clearly erroneous, without supporting evidence, manifestly unjust, or against the great weight of the evidence." Pollard v. Unus Props., LLC, 902 So. 2d 18, 23 (Ala. 2004) (quoting American Petroleum Equip. & Constr., Inc. v. Fancher, 708 So. 2d 129, 132 (Ala. 1997)). 'However, as to issues of law, ... " ... our review is de novo.'" Padgett v. Conecuh County Comm'n, 901 So. 2d 678, 685 (Ala. 2004) (quoting Alfa Mut. Ins. Co. v. Small, 829 So. 2d 743, 745 (Ala. 2002))."

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Weeks v. Wolf Creek Indus., Inc., 941 So. 2d 263, 268-69 (Ala. 2006).

Discussion

I.

The Campbells argued in the circuit court and they now maintain on appeal that Bank of America's alleged noncompliance with HUD loss-mitigation alternatives to foreclosure constitutes a defense to a foreclosure action. An ejectment action following a nonjudicial foreclosure, however, is not a "foreclosure action," and a defense in such an action asserting errors in the foreclosure process is a collateral attack on a foreclosure. See Dewberry v. Bank of Standing Rock, 227 Ala. 484, 493, 150 So. 463, 470 (1933) (characterizing the action in Jones v. Hagler, 95 Ala. 529, 10 So. 345 (1891), in which the plaintiff sought possession of certain property he had purchased from a trustee, who had sold the property pursuant to a power of sale in a deed of trust, and in which the defendant had asserted irregularities in the sale, as "a statutory action in the nature of ejectment -- an indirect or collateral attack upon the foreclosure of real and personal property sold by a trustee, under the power [of sale

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in a deed of trust]" (some emphasis in original; some emphasis added)). We need not address whether the circuit court's factual determination -- that Bank of America had substantially complied with the HUD-mandated loss-mitigation procedures -- is "clearly erroneous, without supporting evidence, manifestly unjust, or against the great weight of the evidence," Weeks, supra, because we affirm the circuit court's judgment, as a matter of law, on another, more fundamental, basis: that the Campbells waived the loss-mitigation issue by failing to seek injunctive or declaratory relief to halt the foreclosure sale before it occurred or to file an action to set aside the foreclosure sale after it occurred.

In Coleman v. BAC Servicing, [Ms. 2100453, February 3, 2012] ___ So. 3d ___, ___ (Ala. Civ. App. 2012), the mortgagor argued that the foreclosing entity's failure to explore loss-mitigation measures was a defense to an ejectment action. This court stated:

"In support of her argument, Coleman cites a number of decisions from other jurisdictions indicating that the failure to explore loss-mitigation actions as an alternative to foreclosure is an equitable defense to a foreclosure action. The cases upon which Coleman relies do, in

fact, contain such statements, but the statements are in the context of judicial foreclosure actions by mortgagees, or in pre-foreclosure actions by mortgagors seeking declaratory or injunctive relief, not in the context of nonjudicial foreclosure actions pursuant to a power of sale in a mortgage instrument or post-foreclosure ejectment actions. See, e.g., Federal Nat'l Mortg. Ass'n v. Moore, 609 F. Supp. 194 (N.D. Ill. 1985) (judicial foreclosure); ABN AMRO Mortg. Group, Inc. v. Tullar, 770 N.W.2d 851 (Iowa Ct. App. 2009) (table) (decision without a published opinion) (judicial foreclosure); Wells Fargo Home Mortg., Inc. v. Neal, 398 Md. 705, 922 A.2d 538 (2007) (pre-foreclosure action by mortgagor seeking declaratory and injunctive relief); Federal Land Bank of St. Paul v. Overboe, 404 N.W.2d 445, 449 (N.D. 1987) (judicial foreclosure). '[I]t is generally recognized under Alabama law that a power of sale given under a mortgage affords the mortgagee an additional and more speedy remedy for recovery of the debt.' Johnson v. Shirley, 539 So. 2d 165, 168 (Ala. 1988) (citing Paint Rock Props. v. Shewmake, 393 So. 2d 982, 984 (Ala. 1981)). In the absence of a statute or controlling authority from our supreme court to the contrary, we conclude that the failure of a foreclosing entity to comply with HUD or [United States Department of Veterans Affairs] loss-mitigation requirements may not be raised as a defense to an ejectment action following a nonjudicial foreclosure."

___ So. 3d at ___. In the present case, the Campbells cite the same authorities that were cited and distinguished in Coleman. Perhaps recognizing the distinction made in Coleman, the Campbells cite an additional, unreported California decision for the proposition that "a property owner facing a

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nonjudicial foreclosure [may] assert a lender's failure to apply the mandatory loss mitigation procedures" as a defense. Ghervescu v. Wells Fargo Home Mortg., (No. E041809, March 13, 2008) (Cal. Ct. App. 2008) (unpublished). Ghervescu actually supports the position that the Campbells have waived their loss-mitigation defense by raising it for the first time in an ejectment action following a foreclosure. Ghervescu was not an ejectment action; the mortgagor in that case sought an injunction to restrain delivery of the trustee's deed and to set aside a foreclosure sale. The California Court of Appeals stated:

"We see no reason that a property owner facing a nonjudicial foreclosure should not be able to assert a lender's failure to apply the mandatory loss mitigation procedures defensively, either to preclude or to set aside a foreclosure sale. Where no sale has taken place, a court may preclude the sale until the lender complies with the [Federal Housing Administration's] loss mitigation procedures. Or, if the sale has taken place, the court may set the sale aside"

See also Wells Fargo Home Mortg., Inc. v. Neal, 398 Md. 705, 922 A.2d 538 (2007) (holding that because foreclosure is an equitable remedy, a mortgagor may assert the equitable defense of the mortgagee's failure to engage in the loss-mitigation procedures mandated by federal regulations and a court may

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prohibit a foreclosure sale until the mortgagee has complied with those regulations).

The Campbells cite Berry v. Deutsche Bank National Trust Co., 57 So. 3d 142 (Ala. Civ. App. 2010), and Hawkins v. LaSalle Bank, 24 So. 3d 1143 (Ala. Civ. App. 2009), overruled on another ground, Berry, supra, for the proposition that a mortgagor may raise irregularities in the foreclosure proceedings as an affirmative defense to an ejectment action. Berry addressed the alleged inadequacy of the price paid at a foreclosure sale. Hawkins addressed the question whether the collective sale at foreclosure of three parcels of land hampered the mortgagor's ability to redeem the one parcel on which he was residing. Berry and Hawkins are distinguishable because they dealt with foreclosure sales that allegedly failed to satisfy the statutory requirements for a nonjudicial foreclosure in Alabama. See Ala. Code 1975, § 35-10-9 (stating that "[a]ll sales of real estate, made under powers contained in mortgages or deeds of trust contrary to the provisions of this article, shall be null and void" (emphasis added)). Nothing in Title 35, Chapter 10, Article 1 et seq., Ala. Code 1975, mandates that a foreclosing entity

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offer a mortgagor loss-mitigation alternatives to foreclosure. The fact that such measures are required by federal statute or regulation, or by the mortgage instrument signed by the debtor, may constitute an equitable defense to a "foreclosure action," but it is wholly immaterial to an ejectment action, which, as we have discussed, is not a "foreclosure action."

II.

The circuit court's failure to hold a hearing on the Campbells' postjudgment motion was harmless error because the motion had no probable merit and this court has resolved the issues presented therein, as a matter of law, adversely to the Campbells. See Ware v. Deutsche Bank Nat'l Trust Co., 75 So. 3d 1163, 1172 (Ala. 2011) (citing Hollander v. Nichols, 19 So. 3d 184, 197 (Ala. 2009); Kitchens v. Maye, 623 So. 2d 1082, 1088-89 (Ala. 1993); and Greene v. Thompson, 554 So. 2d 376, 381 (Ala. 1989)).

The judgment of the Jefferson Circuit Court is affirmed.

AFFIRMED.

Thomas and Moore, JJ., concur.

Thompson, P.J., concurs in the result, without writing.

Bryan, J., concurs in the result, with writing.

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BRYAN, Judge, concurring in the result.

I concur in the result because this court held in Coleman v. BAC Servicing, [Ms. 2100453, Feb. 3, 2012] ___ So. 3d ___, ___ (Ala. Civ. App. 2012), that, "[i]n the absence of a statute or controlling authority from our supreme court to the contrary, we conclude that the failure of a foreclosing entity to comply with HUD [United States Department of Housing and Urban Development] or VA [United States Department of Veterans Affairs] loss-mitigation requirements may not be raised as a defense to an ejectment action following a nonjudicial foreclosure." I disagree with the main opinion insofar as it may be interpreted as indicating that the affirmative defenses that may be raised in an ejectment action are limited to a foreclosing party's failure to adhere to statutory requirements applicable to foreclosures. In my opinion, the affirmative defenses that may be raised in an ejectment action also include the foreclosing party's failure to adhere to contractual provisions of the mortgage and equitable defenses other than the failure of a foreclosing entity to comply with HUD or VA loss-mitigation requirements.