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

U.S. BANK NATIONAL ASSOCIATION, AS TRUSTEE FOR LEHMAN XS TRUST MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2006-16N,

Appellant,

v. Case No. 5D20-7

AMY B. DEVOE A/K/A AMY DEVOE, STERLING HILL HOMEOWNER'S ASSOCIATION, INC., ANTHONY MARTINEZ, CANDIDA TAYLOR, ROBERT TAYLOR AND SANDRA READ,

Appellees.

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Opinion filed March 26, 2021

Appeal from the Circuit Court for Hernando County, Donald E. Scaglione, Judge.

Nancy M. Wallace, of Akerman LLP, Tallahassee, William P. Heller, of Akerman LLP, Fort Lauderdale, and Eric E. Levine, of Akerman LLP, West Palm Beach, for Appellant.

Niles B. Whitten, Gainesville, for Appellee Sandra Read.

Anthony Martinez, Miami, pro se.

No Appearance for Other Appellees.

EDWARDS, J.

Appellant, U.S. Bank National Association, as Trustee for Lehman XS Trust Mortgage Pass-Through Certificates, Series 2006-16N ("U.S. Bank") claims that the trial court erred by finding that U.S. Bank failed to sustain its burden in the underlying mortgage foreclosure action. We agree. We reverse the final judgment entered in favor of Appellees and remand for entry of judgment in favor of U.S. Bank.

U.S. Bank sued Amy Devoe, the borrower and original homeowner; Sandra Read, the current owner in possession who signed the mortgage but did not sign the promissory note; and Anthony Martinez, who has an ownership interest in the mortgaged property. Initially, defaults were entered against Devoe, Read, and Martinez. However, the defaults were ultimately set aside as to Read and Martinez ("Appellees") who then answered the complaint, asserted affirmative defenses, and defended against U.S. Bank's claims at trial.

In order to establish an entitlement to a judgment of foreclosure, "a foreclosure plaintiff must prove: (1) an agreement between the parties

[standing to foreclose]; (2) a default by the defendant; (3) acceleration of the debt to maturity; and (4) the amount due." *Liberty Home Equity Sols. Inc. v. Raulston*, 206 So. 3d 58, 60 (Fla. 4th DCA 2016).

The record reveals that U.S. Bank proved the following by competent substantial evidence: it had standing to sue at the time the complaint was filed and at the time of trial;[1] non-payment by the borrower resulting in a continuous state of default under the terms of the note and mortgage; compliance with conditions precedent including sufficient proof that notice of default and acceleration letters, which were admitted as evidence at trial,[2] were properly mailed to both Devoe's listed mailing address and the property

[1] A copy of the note indorsed in blank was attached to the complaint and the original was introduced into evidence at trial. *See US Bank, NA for Truman 2012 SC2 Title Tr. v. Glicken*, 228 So. 3d 1194, 1196 (Fla. 5th DCA 2017). Also admitted into evidence were a bailee letter and certificate of possession showing that the original note had been delivered to and held by U.S. Bank's trial attorney's law firm during times relevant to the lawsuit.

[2] U.S. Bank offered business records which were authenticated by its witness, *see Wells Fargo Bank, N.A. v. Balkissoon*, 183 So. 3d 1272, 1277 (Fla. 4th DCA 2016), and the trial court overruled Appellees' objections to same. Appellees did not cross-appeal those evidentiary rulings. *See MacKenzie v. Centex Homes*, 208 So. 3d 790, 792 (Fla. 5th DCA 2016) (holding court lacked jurisdiction to hear lack of standing argument because appellee did not cross-appeal trial court's order on that issue) (citing Fla. R. App. P. 9.130(g)).

address as called for in the mortgage;[3] no cure by the borrower; and the amount owed on the note which was secured by the mortgage.[4]

Appellees did not put on a case or present any evidence during trial other than testimony obtained on cross-examination.[5] There was no finding by the trial court that Appellees proved any affirmative defense they had raised[6] nor did the trial court strike any testimony or evidence from the record.

Generally, in a non-jury trial, this Court will defer to the trial court's findings of fact so long as those findings are supported by competent

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[3] *See CitiBank, N.A. for WAMU Series 2007-HE2 Tr. v. Manning*, 221 So. 3d 677, 681 (Fla. 4th DCA 2017) ("[M]ailing must be proven by producing additional evidence such as proof of regular business practices, an affidavit swearing that the letter was mailed, or a return receipt." (quoting *Allen v. Wilmington Tr., N.A.*, 216 So. 3d 685, 688 (Fla. 2d DCA 2017))).

[4] U.S. Bank sought attorney's fees and costs below, but offered only affidavits rather than live testimony. The trial court rejected that proof.

[5] Where there is no competent substantial evidence in the record that would support a judgment in favor of Appellees, the Tipsy Coachman doctrine is inapplicable. *See Robertson v. State*, 829 So. 2d 901, 907 (Fla. 2002).

[6] Appellees asserted the affirmative defense that the statute of limitations barred maintenance of the action, but offered no proof to overcome the allegation and proof by U.S. Bank that Devoe had since 2012, and continuously through trial, failed to make any payments on the note. *See Bank of N.Y. Mellon v. Stallbaum*, 230 So. 3d 1271, 1271 (Fla. 5th DCA 2017). Thus, judgment in favor of Appellees cannot be based upon that defense.

substantial evidence. *Williams v. River Bend of Cocoa Beach, Inc.*, 281 So. 3d 546, 549 (Fla. 5th DCA 2019). Nevertheless, a trial court is not free to arbitrarily reject evidence or testimony in a mortgage foreclosure proceeding. *Morroni v. Wilmington Sav. Fund Soc'y FSB*, 292 So. 3d 514, 518 (Fla. 2d DCA 2020). As the Third District explained:

> We are duty bound not to disturb the findings of fact of a trial judge in a case heard without a jury where such findings are based upon conflicting competent evidence. However, where the testimony on the pivotal issues of fact is not contradicted or impeached in any respect, and no conflicting evidence is introduced, these statements of fact cannot be wholly disregarded or arbitrarily rejected. Rather, the testimony should be accepted as proof of the issue for which it is tendered, even though given by an interested party, so long as it consists of fact, as distinguished from opinion, and is not essentially illegal, inherently improbable or unreasonable, contrary to natural laws, opposed to common knowledge, or contradictory within itself.

Merrill Stevens Dry Dock Co. v. G & J Inv. Corp., 506 So. 2d 30, 32 (Fla. 3d DCA 1987) (quoting *Duncanson v. Serv. First, Inc.*, 157 So. 2d 696, 699 (Fla. 3d DCA 1963)).

While neither the trial court's order denying the foreclosure nor the final judgment in favor of Appellees contained any findings of fact, the trial court's ruling, that U.S. Bank failed to carry its burden of proof, implies that the trial court found some particular, yet unnamed, proof to be lacking. However, the record on appeal demonstrates that U.S. Bank proved each element of its case with competent substantial evidence to which there was no contrary

proof, thus entitling it to entry of a judgment of foreclosure in its favor. Accordingly, we reverse the final judgment entered in favor of Appellees and remand for entry of judgment in favor of U.S. Bank.

REVERSED AND REMANDED WITH INSTRUCTIONS.

EVANDER, C.J. and SASSO, J., concur.