Third District Court of Appeal

State of Florida

Opinion filed August 5, 2020.
Not final until disposition of timely filed motion for rehearing.

No. 3D19-1151
Lower Tribunal No. 14-20750

Bank of America, N.A.,
Appellant,

vs.

Enrique Arevalo, et al.,
Appellees.

An Appeal from the Circuit Court for Miami-Dade County, Abby Cynamon, Judge.

Liebler Gonzalez & Portuondo, and Alan M. Pierce, for appellant.

Dennis A. Donet, P.A., and Dennis A. Donet, for appellees.

Before SALTER, SCALES and LINDSEY, JJ.

SCALES, J.

In this mortgage foreclosure action, appellant Bank of America, N.A. ("the bank"), the plaintiff below, appeals the trial court's order granting defendants

Enrique Arevalo and Clara Patino's ("the borrowers") motion for involuntary dismissal made by the borrowers at the close of the bank's case-in-chief. The trial court involuntarily dismissed the action for the bank's purported failure to present evidence that the borrowers had defaulted on the underlying note and mortgage within the five-year statutory period[1] preceding the filing of the complaint. Because the bank provided sufficient evidence to support a prima facie case for foreclosure, we reverse and remand for completion of the bench trial.

I. RELEVANT FACTS AND PROCEDURAL HISTORY

On August 8, 2014, the bank filed the instant foreclosure action against the borrowers in the Miami-Dade County Circuit Court, alleging, in relevant part, that the underlying note and mortgage were in default because "[t]he required installment payment of September 1, 2008, was not paid, and no subsequent payments have been made." The case proceeded to a bench trial conducted on November 18, 2018.

At the bench trial, the bank, which also serviced the borrower's loan, called one witness: Sandra Priesta, a representative[2] for the bank. Through Ms. Priesta, the bank introduced, without objection, all of the records relevant to the instant action,

[1] See § 95.11(2)(c), Fla. Stat. (2014).

[2] Ms. Priesta testified that she was a "CRT Representative" whose responsibilities include "maintain[ing] a portfolio of loans, some of which are in default, as well as the review of [the bank's] business records, and appear[ing] at trials and mediations, [and] depositions, when necessary."

including (among other things): the note, the mortgage, the recorded assignment of the mortgage, the bank's notice of intent to accelerate the mortgage and certified return receipts, and the note's payment history. With respect to the loan payment history document, Ms. Priesta testified that the document was kept in the regular course of the bank's business activity and that the entries in the document – which were made at, or near, the time of the events described within the document – had been made by persons within the bank's cashier department. Ms. Priesta testified thereto as follows:

> Q. [by the bank's counsel]: And does the payment history reflect the default?
>
> A. [by Sandra Priesta]: It does.
>
> Q. And what date was that?
>
> A. The loan is due – *the last payment received was for the August of 2008, so it's due for September of 2008; it is still in default.* The default is not cured.
>
> Q. And does the record provide a breakdown of how each payment was applied?
>
> A. It does.
>
> Q. And does it also contain a record of the amounts that were paid out for taxes and insurance?
>
> A. It does.
>
> Q. And were the payments that were paid out for taxes and insurance payments made, as required by the note?

A. By the Bank, yes. Well, for the borrower, they were making payments, and then subsequent, by the Bank.

Q. *And is the loan currently in default?*

A. *Yes.*

(Emphasis added). Defense counsel did not cross-examine the bank's representative, reserving instead the right "to recall Ms. Priesta during [the borrowers'] case-in-chief, if necessary."

Presenting no other witnesses, the bank rested its case-in-chief. The borrowers' counsel then moved for an involuntary dismissal asserting that the bank's action was barred because the five-year statute of limitations on the borrowers' initial default had expired prior to the bank filing the lawsuit. The borrowers' counsel argued that "the testimony from the Plaintiff has been based, almost exclusively, on a September 1, 2008 default, and there has been no other default identified by the Plaintiff." The bank's counsel responded that defense counsel had taken Ms. Priesta's testimony out of context, pointing out that Ms. Priesta had testified that the last loan payment received was in August of 2008, that the borrowers were still in default and that all of this was reflected in the loan payment history document that had been admitted into evidence.

Concluding that Ms. Priesta had not testified that "all subsequent payments were not paid," the trial court granted the borrower's motion for an involuntary dismissal. The trial court's subsequent written order of dismissal, entered on

November 19, 2018, relies upon this Court's decision in Collazo v. HSBC Bank USA, N.A., 213 So. 3d 1012 (Fla. 3d DCA 2016). In its May 16, 2019 order denying the bank's motion for rehearing, the trial court further found:

> The record in the present case discloses that Plaintiff alleged a stale default date of September 1, 2008[.] . . . While the Plaintiff pled subsequent defaults within the statutory period, Plaintiff failed to prove this. Plaintiff relies on a vague reference in the transcript . . . "Is the loan currently in default? Yes." However, this does not prove if the default reference is to the stale default date or the subsequent defaults. Without more, the transcript only evidences the stale default date. [] Absent proof of default within the proscribed [sic] statute of limitation's period, Plaintiff's action was time barred.

The bank timely appeals entry of the involuntary dismissal.

II. ANALYSIS[3]

The trial court involuntarily dismissed the instant action based on this Court's decision in Collazo. In that case, the bank sought to foreclose based on a single default date that was outside the statute of limitations period. Collazo, 213 So. 3d at 1013. Because the bank neither alleged, nor proved, that there had been a subsequent payment default within the five-year statutory period preceding the commencement of the lawsuit, this Court held that the bank's foreclosure action was barred by the applicable statute of limitations and should have been dismissed

[3] "Our standard of review of an order granting an involuntary dismissal is de novo[.]" Deutsche Bank Nat'l Tr. Co. v. de Brito, 235 So. 3d 972, 974 (Fla. 3d DCA 2017). This Court also reviews de novo the legal question of whether the statute of limitations has expired. See U.S. Bank Nat'l Ass'n v. Amaya, 254 So. 3d 579, 581 (Fla. 3d DCA 2018).

without prejudice. Id. We have repeatedly distinguished Collazo – and limited Collazo to its facts – by concluding that, so long as a verified foreclosure complaint alleges the occurrence of continuing defaults beyond a "stale" default date, the statute of limitations will not bar an action. See Amaya, 254 So. 3d at 581 (concluding allegations that "Borrowers 'have defaulted under the covenants, terms and agreements of the Note in that the payment due May 1, 2008, and all subsequent payments have not been paid'" was "sufficient to bring a foreclosure action within the five-year limitations period"); Bank of N.Y. Mellon v. Garcia, 254 So. 3d 565, 569 (Fla. 3d DCA 2018) (holding allegations "that 'Garcia has defaulted under the covenants, terms and agreements of the Note in that the payment due April 1, 2008, *and all subsequent payments*, have not been made'" was "sufficient to withstand Garcia's statute of limitations challenge"); U.S. Bank Nat'l Ass'n for Lehman XS Tr. Mortg. Pass-Through Certificates, Series 2007-16N v. Morelli, 249 So. 3d 717, 720 (Fla. 3d DCA 2018) ("[U]nlike the instant case, the default dates alleged in Collazo were not expanded to include either of the following: "*and all payments due thereafter*" or "*and all subsequent payments*.")

In this case, there is no dispute that the bank's allegations in its complaint – alleging that "[t]he required installment payment of September 1, 2008, was not paid, and no subsequent payments have been made" – were sufficient to withstand a motion to dismiss. Rather, the lower court involuntarily dismissed the action upon

finding that the bank, *at trial,* failed to present sufficient evidence to create a fact issue as to whether the borrowers had failed to make any "subsequent payments." On this record, especially in light of the standard applicable to motions for involuntary dismissal, we disagree with the trial court's view of the evidence introduced by the bank.

"When a party raises a motion for involuntary dismissal in a nonjury trial 'the movant admits the truth of all facts in evidence and every reasonable conclusion or inference based thereon favorable to the non-moving party.'" Deutsche Bank Nat. Tr. Co. v. Kummer, 195 So. 3d 1173, 1175 (Fla. 2d DCA 2016) (quoting Day v. Amini, 550 So. 2d 169, 171 (Fla. 2d DCA 1989)); see also de Brito, 235 So. 3d at 974 (requiring the trial court to "view[] all of the evidence presented and all available inferences from that evidence in the light most favorable to the non-moving party"). "Where the plaintiff has presented a prima facie case and different conclusions or inferences can be drawn from the evidence, the trial judge should not grant a motion for involuntary dismissal." Kummer, 195 So. 3d at 1175 (quoting Day, 550 So. 2d at 171).

By determining the bank failed to provide sufficient proof that the borrowers had defaulted within five years of the commencement of the instant action, the trial court failed to view the evidence presented below in the light most favorable to the bank. The bank's representative testified that "the last payment received was for the

August of 2008, so it's due for September of 2008; it is still in default. The default is not cured." Viewing the representative's testimony in context with the loan payment history document[4] that was introduced through this very witness, a reasonable conclusion (viewed in the light most favorable to the bank) is that the borrowers made no mortgage payments beyond August of 2008, and have been in continuous default since that time. This evidence, along with all of the other documentary evidence introduced below, was sufficient to withstand the borrowers' motion for an involuntary dismissal. See Bank of Am., N.A. v. Graybush, 253 So. 3d 1188, 1190 (Fla. 4th DCA 2018) (concluding the trial court erred by involuntarily dismissing the bank's foreclosure action based on the statute of limitations where the bank's witness "testified that the Borrowers defaulted on October 1, 2008 and that the loan was still in default up to that point" and "[t]he Bank introduced a payment history evidencing the missed payments"); accord Amaya, 254 So. 3d at 580 (remanding for entry of judgment in favor of the bank, after a completed bench trial, where the bank "introduced into evidence through an employee of SPS: (1) the original Note; (2) a certified copy of the mortgage; (3) a certified copy of the assignment of mortgage from MERS; (4) a power of attorney between U.S. Bank

[4] The document reflects the entire payment history of the note from the loan's origination in August of 2004, to the time of the bench trial conducted in November of 2018. According to the document, a regular loan payment was applied to the borrower's loan in August of 2008, and no loan payments were applied thereafter.

and its servicing agent, SPS; (5) SPS and prior servicers' records regarding payment history and escrow amounts for the loan; and (6) SPS's default letter to the Borrowers"); Desylvester v. Bank of N.Y. Mellon on behalf of Holders of Alternative Loan Tr. 2005-62, Mortg. Pass-Through Certificates Series 2005-62, 219 So. 3d 1016, 1018 (Fla. 2d DCA 2017) (concluding the bank's foreclosure action was not time-barred by the statute of limitations where, at the bench trial, the bank's witness identified a document, introduced into evidence, "reflecting the payment history on the note, which showed that the last payment received had been applied to the September 1, 2008, installment; [and] no payments had been received on the note thereafter").

For these reasons, we reverse the involuntary dismissal order and remand for completion of the bench trial. See Ruck Bros. Brick, Inc. v. Kellogg & Kimsey, Inc., 668 So. 2d 205, 207 (Fla. 2d DCA 1995) ("When a trial court erroneously grants a motion for involuntary dismissal, the case is remanded to the trial court for the completion of the trial."); accord AIB Mortg. Co. v. Sweeney, 687 So. 2d 68, 70 n.1 (Fla. 3d DCA 1997) (reversing the trial court's grant of an involuntary dismissal, stating "[a]s this case was tried to the court, and the judge who heard it has since retired from the bench, remand for completion of the case, instead of the new trial we have ordered, is not possible").

III. CONCLUSION

Because, during its case-in-chief, the bank provided sufficient evidence to establish a prima facie case that the note and mortgage were in a continuing state of default, the trial court erred by involuntarily dismissing the action. We, therefore, reverse the involuntary dismissal order and remand for continuation of the bench trial.

Reversed and remanded with instructions.