IN THE COURT OF APPEALS OF IOWA

No. 9-012 / 06-0824
Filed April 22, 2009

ABN AMRO MORTGAGE GROUP, INC.,
Plaintiff-Appellee,

vs.

LON TULLAR, CANDACE TULLAR, and PARTIES IN POSSESSION,
Defendants-Appellants,

ALLIED MUTUAL INSURANCE COMPANY and MICHAEL MILLER,
Defendants.

Appeal from the Iowa District Court for Polk County, Donna Paulsen (summary judgment and trial) and Artis Reis (order), Judges.

The defendants appeal from the district court's foreclosure decree. **AFFIRMED.**

Robert A. Wright, Jr. of Wright & Wright, Des Moines, for appellants.

William P. Kelly and Matthew E. Laughlin of Davis Brown Law Firm, Des Moines, for appellee.

Heard by Vaitheswaran, P.J., and Doyle and Mansfield, JJ.

MANSFIELD, J.

Although predating the current financial crisis, this case presents some issues that may recur in residential mortgage foreclosure proceedings in this state. ABN AMRO Mortgage Group, Inc. brought this action against homeowners Lon and Candace Tullar to foreclose upon a mortgage. The Tullars asserted various defenses and counterclaims, which were rejected by the district court in the course of entering a foreclosure decree. The Tullars now appeal. After a close review of the facts and chronology of this case, we affirm the district court's foreclosure decree and its disposition of the Tullars' counterclaims.

I. FACTS AND PROCEDURAL HISTORY.

In 1997 the Tullars purchased a house in Ankeny for $126,000. In 1999 they took out a thirty-year note and mortgage on their home in the amount of $118,993 with interest at the rate of 8.75% per annum. The note called for regular monthly payments of principal and interest in the amount of $936.12. The note authorized the lender to accelerate the entire balance in the event of default, "except as limited by Regulations of the Secretary [of the U.S. Department of Housing and Urban Development] (HUD) in the case of payment defaults." Mirroring this provision was a clause in the Tullars' mortgage, which authorized acceleration "except as limited by regulations issued by the [HUD] Secretary, in the case of payment defaults," if the Tullars defaulted on any payment due under their note (or on a required tax or insurance payment). Further, the mortgage stated it does not "*authorize acceleration or foreclosure if not permitted by regulations of the [HUD] Secretary*." (Emphasis added.)

In 2000 the note and mortgage were assigned to ABN AMRO. In the fall of 2002, the Tullars fell behind in their monthly mortgage payments. With escrows of property taxes and insurance, those payments apparently came to approximately $1228.91. Although the Tullars eventually made the October 1 and November 1 monthly payments, they did so belatedly. The Tullars also sent in a December 1 monthly payment (on February 13), which ABN AMRO returned.

On March 6, 2003, Lon Tullar and an ABN AMRO representative had a telephone call wherein, according to Tullar, the parties verbally agreed on a payment plan to cure the defaults. This payment plan involved an immediate electronic payment of $2500 followed by five increased monthly mortgage payments in the amount of $1774.03 commencing April 10 and continuing on or before the tenth of each month through August 10, to bring the loan current.

The Tullars did make an electronic payment of $2500 on March 6. That same day, Lon Tullar wrote ABN AMRO to confirm the foregoing terms but questioned how the $1774.03 figure was arrived at for the subsequent monthly payments. Also, when ABN AMRO sent two successive written confirmations of this repayment plan, which included language requiring the Tullars to make payments by cashier's or certified checks, the Tullars declined to sign either confirmation. In any event, the Tullars concededly failed to make the first $1774.03 payment by the required April 10, 2003 date. They did send a $1774.03 payment (by regular check) on April 8 which ABN AMRO received and applied to the mortgage on April 15. This was sufficient, apparently, to cover anything remaining on the January and February 2003 mortgage payments. It was also the last payment that ABN AMRO accepted. On May 16, 2003, ABN

AMRO notified the Tullars that the check dated April 8 and received April 15 was insufficient to cover the total amount due from the Tullars.

Subsequently, the Tullars made a payment of $1774.03 on May 27, which ABN AMRO returned on June 6, demanding the then-full amount due of $4880.40 and denying the existence of a repayment plan. On July 1, 2003, the Tullars resubmitted the May 27 $1774.03 check to ABN AMRO, and also included a second $1774.03 check (the purported June installment on the payment plan) in the mailing. On June 30, ABN AMRO informed the Tullars in writing that the loan was being turned over to foreclosure. On July 9, ABN AMRO's counsel advised the Tullars in writing that they owed the entire mortgage balance of $116,097.28. On July 27, ABN AMRO returned the Tullars' May 27 check a second time, in addition to returning the $1774.03 check (the purported June installment) that had been mailed to it for the first time on July 1.

Furthermore, on July 29, ABN AMRO returned another $1774.03 check the Tullars had mailed on July 10 (the purported July installment on the payment plan). On September 3, ABN AMRO commenced this foreclosure action.

In their answer to the foreclosure petition, the Tullars asserted that ABN AMRO breached the terms of the foregoing note and mortgage provisions by commencing foreclosure proceedings under circumstances that are not permitted by HUD regulations. The Tullars also alleged ABN AMRO had breached the terms of the repayment plan. Accordingly, the Tullars argued that foreclosure should be denied.

Additionally, the Tullars asserted counterclaims for breach of contract, breach of the covenant of good faith and fair dealing, misrepresentation and

fraud, abuse of process, civil conspiracy, and violations of the Real Estate Settlement Procedures Act (RESPA), 12 U.S.C. § 2605.

The district court granted summary judgment to ABN AMRO on its foreclosure petition as well as on part of the Tullars' breach of contract counterclaim, breach of the covenant of good faith and fair dealing counterclaim, and misrepresentation and fraud, abuse of process, and civil conspiracy counterclaims. Following a bench trial on the Tullars' remaining counterclaims, the district court found in favor of ABN AMRO on those claims as well. This appeal followed.

On appeal, the Tullars argue: (1) the trial court erred in holding as a matter of law that ABN AMRO had not breached the note and mortgage by accelerating payments and commencing foreclosure proceedings; (2) the trial court erred in holding as a matter of law that ABN AMRO had not breached the parties' repayment plan; (3) the trial court erred in granting ABN AMRO summary judgment on the Tullars' claim for breach of the covenant of good faith and fair dealing; (4) the trial court erred in granting ABN AMRO summary judgment on their state-law noncontract claims; and (5) the trial court erred in ruling for ABN AMRO on the Tullars' RESPA claim.

II. STANDARD OF REVIEW.

We review the district court's grant of summary judgment for correction of errors at law. Iowa R. App. P. 6.4; *Rucker v. Humboldt Cmty. Sch. Dist.*, 737 N.W.2d 292, 293 (Iowa 2007). Summary judgment shall be granted when the entire record, viewed in the light most favorable to the nonmoving party, demonstrates there is no genuine issue as to any material fact and the moving

party is entitled to judgment as a matter of law. Iowa R. Civ. P. 1.981(3); *Rucker*, 737 N.W.2d at 293.

We review the district court's judgment in a nonjury law case for correction of errors at law. *Business Consulting Servs, Inc. v. Wicks*, 703 N.W.2d 427, 429 (Iowa 2005).

III. LEGAL ANALYSIS.

A. Breach of Contract/Impact of HUD Regulations.

The Tullars argue that ABN AMRO was not contractually authorized to accelerate the debt and foreclose upon the mortgage because the parties' agreements expressly incorporated HUD regulations, which prohibited foreclosure unless "at least three full monthly installments due under the mortgage are unpaid after application of any partial payments that may have been accepted but not yet applied to the mortgage account." 24 C.F.R. § 203.606(a).

ABN AMRO responds initially that the HUD regulations do not create a private right of action for a mortgagor, because they govern the relationship between the mortgagee and the federal government, not the relationship between the mortgagee and the mortgagor. We think this is too simplistic. The mortgagee *contracted* with the mortgagor to be bound by those regulations. In other words, the parties agreed that HUD regulations would govern their conduct vis-à-vis each other.

The issue presented by this case was addressed recently by Maryland's highest court in *Wells Fargo Home Mortgage v. Neal*, 922 A.2d 538 (Md. 2007).

There the court drew the same contrast between the breach of contract theory being asserted by the homeowner and

> the more ubiquitous argument that violation of the NHA or the companion HUD regulations may support a private cause of action for individuals harmed by those violations. The parties agree that the weight of authority around the country roundly rejects the notion that either the NHA or associated HUD regulations support either direct or implied private causes of action for their violation.

Wells Fargo Home Mortgage, Inc., 922 A.2d at 543-44. However, the court did not adopt the homeowner's entire position. *Id.* Rather, the court went on to conclude that a breach of contract theory based on violations of HUD regulations could not be asserted by the borrower *offensively*, because HUD had *required* the relevant language (e.g., "at least three monthly installments . . . .") to be included in the lender's forms. *Id.* at 545-46. Given that the government had mandated the inclusion of that language, the court decided it would be inappropriate to subject the lender to potential damages over something that was not a "freely-entered contract." *Id*. at 546. In effect, that would be allowing a private right of action by the backdoor. *See id.* at 543-44, 546.

On the other hand, the Maryland court concluded it would be inappropriate to deny that contract language any effect. *See id.* at 549. Thus, it ruled that failure to comply with contractually-incorporated HUD regulations could be raised by the borrower *defensively*. *Id.* at 551. In reaching this conclusion, that court quoted from HUD's own 1989 notice of policy:

> We note that the proposed mortgage language does not incorporate all of HUD's servicing requirements into the mortgage, but simply prevents acceleration and foreclosure on the basis of the mortgage language when foreclosure would not be permitted by HUD regulations. For example, 24 C.F.R. § 203.606 specifically prohibits a mortgagee from foreclosing unless three full monthly

> payments due on the mortgage are unpaid. As long as this requirement remains in the regulations, we do not expect mortgagees to violate it even though the mortgage fails to repeat the requirement, and we believe that *a borrower could appropriately raise the regulatory violation in his or her defense.*

Id. at 449 (quoting Requirements for Single Family Mortgage Instruments, 54 Fed. Reg. 27,599 (June 29, 1989) (emphasis added)). The Maryland court also cited other precedents that had allowed a homeowner's defensive use of a lender's violation of those HUD regulations in foreclosure proceedings. *Id.* at 449-50; *see, e.g., Federal Land Bank of St. Paul v. Overboe*, 404 N.W.2d 445, 449 (N.D. 1987) (collecting cases).

We believe the Maryland court's analysis in *Wells Fargo Home Mortgage, Inc. v. Neal* is correct and should be followed here.[1] According to its 1989 notice, HUD foresaw—and approved—the concept that failure to comply with its so-called "mitigation" or "forbearance" rules could be raised as a defense in a foreclosure proceeding. That intent should be honored here. Furthermore, we believe there is no unfairness in requiring lenders that benefited from a federal mortgage insurance program to accept the obligations that the federal government intended to impose on them.

We now return to the chronology of this case. The events that precipitated this litigation are largely undisputed, although their legal consequences are vigorously contested. On September 3, 2003, ABN AMRO commenced foreclosure proceedings. At that time, the March, April, May, June, July, August,

[1] Because Maryland, unlike Iowa, is a deed of trust state, that case presented a complication not present here. In Maryland, the lender need not go through judicial foreclosure in the event of default but may utilize a trustee's sale. Thus, the borrower typically must bring a lawsuit even to raise a *defense* based on the HUD regulations.

and September 2003 installments on the mortgage were unpaid. Thus, on its face it would appear that ABN AMRO complied with the requirement set forth in 24 C.F.R. § 203.606, that "at least three full monthly installments due under the mortgage [were] unpaid after application of any partial payments that may have been accepted but not yet applied to the mortgage account." *See* 24 C.F.R. § 203.606(a). However, this analysis assumes that ABN AMRO rightfully refused to accept the partial payments it received in the mail from the Tullars between May and July 2003. We do not believe that 24 C.F.R. § 203.606, or by implication the mortgage, would allow ABN AMRO to commence foreclosure proceedings where the company had refused to accept partial payments that other aspects of the same federal regulations required it to accept.

To consider this next question, we refer to 24 C.F.R. § 203.556 ("Return of partial payments."). This section allows a partial payment, defined as "a payment of less than the full amount due under the terms of the mortgage at the time the payment is tendered," to be returned under certain circumstances. *Id.* § 203.556. Where the mortgage is not in default, any partial payment may be returned with a letter of explanation. *Id*. § 203.556(c). However, once the mortgage is in default, a partial payment may only be returned when it aggregates less than fifty percent of the amount due, when it is less than the amount agreed to in a forbearance plan, or when foreclosure has been commenced. *Id*. § 203.556(d). Another provision, however, allows partial payments to be returned that are received more than fourteen days after the mortgagee has mailed to the mortgagor a statement of the full amount due and a notice of intention to return any payment less than such amount, provided four or more monthly installments are due and

unpaid or a delinquency of any amount has continued for at least six months. *Id*. § 203.556(e).

Against this backdrop, we consider the payments that were returned during the summer of 2003. On or about June 6, 2003, ABN AMRO returned (with a letter of explanation) the $1774.03 payment that had been mailed on or about May 27, 2003. This payment amounted to less than fifty percent of the amount then due, because at least the March, April, and May payments were still outstanding and not paid.[2] Thus, we believe ABN AMRO was permitted by 24 C.F.R. § 203.556(d) to return the May 27 partial payment.

Moreover, we believe the June 6 letter was sufficient to trigger 24 C.F.R. § 203.556(e). In that letter, ABN AMRO made clear the total amount due was now $4880.40 (March, April, May, and June) and it would not accept less than that amount.[3] Furthermore, at that time, the Tullars had been continuously delinquent, to some extent, since October 2002, or for at least six months. Thus, pursuant to 24 C.F.R. § 203.556(e), once fourteen days had elapsed from June 6, ABN AMRO would have been entitled to refuse any payment of less than the full amount.

The Tullars next tried to submit a partial payment on July 1, 2003, when they sent in two $1774.03 checks—namely, the same May 27 check ABN AMRO had returned the previous month, plus another $1774.03 check. However, this

[2] This analysis assumes that any repayment plan was not in effect (or was no longer in effect), which we believe to be the case for the reasons discussed below.

[3] One might argue that the June 6 letter could have been clearer as to ABN AMRO's intentions regarding partial payments, as certainly its subsequent letters were. However, in context, and considering that ABN AMRO was returning a partial payment with the letter, we consider it a sufficient "notice of intention to return any payment less than such amount."

total payment of $3548.06 was clearly less than the total amount due, and fourteen days had passed. Accordingly, ABN AMRO was entitled to and did refuse the partial payment. Meanwhile, on July 9, ABN AMRO notified the Tullars that the entire mortgage balance had been accelerated and was now due.

The Tullars also mailed one further $1774.03 check on July 10. However, this payment was likewise less than the total amount due. Even if one could argue that the mortgagee had a duty to treat the July 1 partial payment of $3548.06 and the separately-mailed July 10 partial payment of $1774.03 as a single partial payment of $5322.09, a proposition that we do not here endorse, they would not have been sufficient to cover the full amount due, which by then would have included at the least the July mortgage installment, if not the total unpaid mortgage balance.

For these reasons, we conclude that ABN AMRO did not breach the provision of the parties' mortgage requiring it to comply with HUD regulations.[4]

B. Breach of Contract/Repayment Plan.

The Tullars also argue that ABN AMRO breached the parties' repayment plan. We agree with the district court's denial of this claim, although not with all of its reasoning.

In the proceedings below, both ABN AMRO and the district court observed Iowa Code section 535.17(2) requires modifications to credit agreements to be in

[4] The Tullars make a separate argument that the definition of "default" in certain other HUD regulations means they were not in "default" until thirty days after they had failed to make a mortgage payment. We do not think this argument adds anything here. In the first place, the definition of "default" is for the purposes of a separate subpart of HUD regulations, not the subpart that includes 24 C.F.R. §§ 203.556 and 203.606. Furthermore, if the Tullars were not in "default," this would make it easier, not harder, for ABN AMRO to return partial payments under 24 C.F.R. § 203.556.

writing signed by the party to be charged where a party gives proper notification to that effect. Such a notification was provided in the original loan documents. However, in this case, ABM AMRO *did* separately confirm the terms of the repayment plan in a writing signed by that party. Furthermore, Lon Tullar sent a signed letter on the same day that set forth substantially the same terms. Iowa Code section 535.17(2) does not require a single writing signed by both parties. Accordingly, the lack of a single writing signed by both ABN AMRO and the Tullars does not deprive the loan modification agreement of force and effect. [5]

Having said that, we agree with the district court's alternative basis for rejecting this claim. The undisputed evidence shows the Tullars failed to comply with that agreement after making the first $2500 payment. No one disputes the installment due on April 10 did not reach ABN AMRO until April 15. Although ABN AMRO did not return that payment, its May 16 letter regarding that specific payment would have made it clear to the Tullars that ABN AMRO was no longer recognizing the existence of a payment plan. In any event, there can be no debate that the installment that would have been due on May 10 was not even mailed until May 27. Once the Tullars failed to comply with the repayment plan, ABN AMRO's obligations thereunder were discharged. Therefore, ABN AMRO could not have breached the parties' repayment plan when it deemed that plan null and void in June 2003, or when it subsequently accelerated the balance due and initiated foreclosure proceedings.

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[5] ABN AMRO argues that its form made it clear there would be no deal unless the Tullars signed and returned *that* form. We disagree. The form purported to "confirm" a repayment plan that had been already "agreed upon." While it requested the Tullars to sign and return their form, it did not make the signing and returning a precondition of legal recognition for the repayment plan.

We recognize that continued acceptance of late payments can result in a waiver, requiring the creditor to give notice to the debtor before using a future late payment as grounds for acceleration. *Dunn v. General Equities of Iowa, Ltd*., 319 N.W.2d 515, 517 (Iowa 1982). Yet, even assuming this principle could apply to a forbearance agreement, there is no evidence of continued acceptance of late payments here. ABN AMRO "accepted" only one late payment, the one it received April 15, and even then it was not accepted under the payment plan.

C. Covenant of Good Faith and Fair Dealing.

The Tullars also argue that ABN AMRO breached the covenant of good faith and fair dealing by returning their untimely payments of May 27, July 1, and July 10, 2003. There is a covenant of good faith and fair dealing in every contract. *Harvey v. Care Initiatives, Inc*., 634 N.W.2d 681, 684 (Iowa 2001). However, we agree with the district court that as a matter of Iowa law, this covenant generally does not require a mortgagee to accept untimely payments. Accordingly, we affirm the district court's judgment for ABN AMRO on the Tullars' counterclaim for breach of the covenant of good faith and fair dealing.

D. Non-Contract State Law Counterclaims.

The Tullars also contend that ABN AMRO committed negligent or fraudulent misrepresentation, abuse of process, and civil conspiracy. The district court properly dismissed all of these counterclaims at the summary judgment stage.

There is no evidence that ABN AMRO was in the business or profession of providing information and thereby owed a duty of care to the Tullars. *See Jensen v. Sattler*, 696 N.W.2d 582, 588 (Iowa 2005); *Sain v. Cedar Rapids Cmty.*

Sch. Dist., 626 N.W.2d 115, 124 (Iowa 2001). Hence, negligent misrepresentation is not a viable legal claim for the Tullars.

Moreover, the evidence, even when viewed in the light most favorable to the Tullars, does not show that ABN AMRO knowingly or recklessly made a false statement on which the Tullars reasonably relied. *See Cornell v. Wunschel*, 408 N.W.2d 369, 375 (Iowa 1987) (setting forth the required elements for a fraudulent misrepresentation claim). The Tullars cite certain statements made by ABN AMRO in correspondence with which they disagreed. However, they do not even allege—let alone offer proof—that they were misled by those statements. In fact, their very point is that they *disagreed* with them. The Tullars' fraudulent misrepresentation counterclaim was properly rejected.

Additionally, there is no evidence that ABN AMRO filed this foreclosure proceeding primarily to obtain something other than foreclosure of the Tullars' house. *See Wilson v. Hayes*, 464 N.W.2d 250, 266-67 (Iowa 1990) (holding that abuse of process requires the use of a legal process primarily for a purpose other than the one for which it was intended). Thus, the Tullars' abuse of process claim must fail.

Lastly, without sufficient evidence of an independent tort, which does not exist in this case, there can be no civil conspiracy. *Robert's River Rides, Inc. v. Steamboat Dev. Corp*., 520 N.W.2d 294, 302 (Iowa 1994).

E. RESPA Counterclaim.

The Tullars contend ABN AMRO failed to comply with RESPA by not timely responding to their "qualified written requests." *See* 12 U.S.C. § 2605. We agree that in some respects, the parties' behavior in this case resembles

ships crossing in the night. However, we do not believe there is substantial evidence to support the Tullars' claim of a RESPA violation.

The administrative regulations implementing RESPA allow a servicer, in its notice letter to the borrower, to set forth "a separate address where qualified written requests must be sent." 24 C.F.R. § 3500.21(d)(3)(ii). The regulations further provide: "By notice either included in the Notice of Transfer or separately delivered by first-class mail, postage prepaid, a servicer may establish a separate and exclusive office and address for the receipt and handling of qualified written requests." *Id.* § 3500.21(e)(1).

ABN AMRO followed that approach, directing the Tullars to utilize a post office box in Troy, Michigan for qualified written requests under RESPA. It is undisputed the Tullars never sent any correspondence to that address, instead writing typically to a street address in Norridge, Illinois. Therefore, we affirm the district court's disposition of the Tullars' RESPA claim.[6]

IV. CONCLUSION.

For the reasons stated, we affirm the district court's judgment.

AFFIRMED.

[6] The Tullars also argue that after the district court entered the foreclosure decree, and they appealed, the district court erred in denying their motion to quash the writ of removal or stay its enforcement. Even if we assume the Tullars' motion involved a collateral matter the district court had jurisdiction to address**,** *see In re Marriage of McCurnin*, 681 N.W.2d 322, 332 (Iowa 2004), we believe the district court did not err in denying it. As the district court correctly found, it could not grant a stay in the absence of a supersedeas bond. *See* Iowa R. App. P. 6.7(1). Nor did the Tullars have substantive grounds for a stay. Although Iowa Code section 648.18 provides for a time bar after thirty days of "peaceable possession," the Tullars did not have peaceable possession. To the contrary, a foreclosure proceeding was still pending, albeit on appeal. *See Steele v. Northrup*, 168 N.W.2d 785, 788 (Iowa 1969) ("Litigation between the parties precludes peaceful possession.").