

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2012 CA 0291
AND NO. 2011 CW 2395

WHITNEY BANK

VERSUS

JERRY MICHAEL CASE AND TRUDY BERNUCHO CASE

Judgment Rendered: November 2, 2012

Appealed from the
Twenty-First Judicial District Court
In and for the Parish of Tangipahoa
State of Louisiana
Suit Number 2011-0002570

Honorable Bruce C. Bennett, Presiding

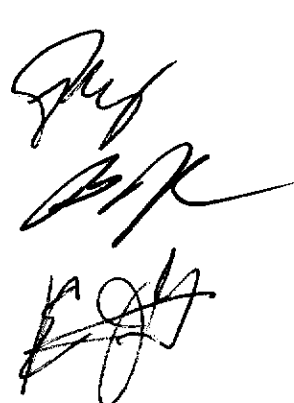
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BEFORE: CARTER, C.J., GUIDRY, AND GAIDRY, JJ.



GUIDRY, J.

In this executory proceeding, plaintiff, Whitney Bank (Whitney), appeals from a judgment of the trial court in favor of defendants, Jerry Michael Case and Trudy Bernucho Case, enjoining Whitney and the Sheriff of Tangipahoa Parish (Sheriff) from proceeding in executory process against the Cases and enjoining the Sheriff from further seizing and/or proceeding to sheriff's sale on the property described in the original petition for executory process. For the reasons that follow, we reverse.

FACTS AND PROCEDURAL HISTORY

On August 4, 2011, Whitney filed a petition for executory process, asserting that it is the holder of a promissory note executed by the Cases in the amount of \$352,898.09, payable on demand, and two multiple indebtedness mortgages securing the indebtedness encumbering: 78240 Hope Road, Kentwood, Louisiana; 202 First Street, Kentwood, Louisiana; 58263 Old US 51, Amite, Louisiana; 15646 Hwy 16, Amite, Louisiana; and 62335 Commercial Street, Amite, Louisiana. Whitney alleged that the note had not been paid in accordance with its terms and conditions, thereby causing a default under the terms of the note, and that there remains a principal sum of \$364,595.23, plus interest. Whitney attached copies of the promissory note and mortgages to its petition. Whitney asserted that the original holder of the note was Hancock Bank of Louisiana, but by name change effective June 4, 2011, Hancock changed its name to Whitney after merging with Whitney National Bank. Whitney asserted, therefore, that it is the proper holder of the note. The petition was verified by William H. Price, Jr., credit officer of Whitney.

Thereafter, the trial court signed an order, ordering that executory process be issued as prayed for, and that the property described in Attachment "C" attached to Whitney's petition be seized and sold as prayed for. After the writ of seizure was

issued and notices were served, the Sheriff set the sale of the property for October 12, 2011.

On October 7, 2011, the Cases filed a petition for preliminary injunction, asserting that they had not received notification of demand for payment, and disputing Whitney's assertion that they confessed judgment, waived homestead exemption, or consented to attorney's fees. The Cases prayed that a preliminary injunction issue against Whitney and the Sheriff, enjoining them from presenting the immovable property at issue in Whitney's petition for executory process for sheriff's sale and thereafter, for a permanent injunction. The trial court set the hearing on the preliminary injunction for November 10, 2011, to be tried by affidavit only pursuant to La. C.C.P. art. 3609.

Whitney answered the Cases' petition for preliminary injunction, asserting that the Sheriff cancelled the sale set for October 12, 2011, and that defendants' petition is not grounded in fact or law. Whitney also submitted a memorandum in opposition to the Cases' request for a preliminary injunction and an affidavit of Brian Berns, Sr., Vice President of Whitney Bank.

At the November 10, 2011, hearing, the court gave the Cases five days to file affidavits and gave Whitney five days to respond, stating that the matter would be fully submitted in ten days.

On November 15, 2011, the Cases filed an amended petition for preliminary injunction and reconventional demand and a memorandum, asserting that Whitney engaged in predatory lending practices and that the methods used by Whitney for collection and lending are in violation of state and federal law. In particular, the Cases alleged that one of the mortgages sued upon covers their residence, and Whitney violated the Truth in Lending Act by failing to provide notice to the Cases of their right to rescind the transaction as required by 15 U.S.C. § 1635. The Cases attached their affidavit to the memorandum, acknowledging that they signed the

promissory note and mortgage in the amount of \$352,895.09, that the mortgage included their residence at 78240 Hope Road, Kentwood, Louisiana, and that they were never furnished with notice of their right to rescind.

Whitney submitted a supplemental memorandum in opposition to the Cases' request for preliminary injunction, a supplemental affidavit of Brian Berns, Sr., promissory notes, loan boarding data sheets, a disbursement request and authorization, and an affidavit of William H. Price, Jr.

On November 29, 2011, the trial court signed a judgment in favor of the Cases and against Whitney and the Sheriff, enjoining them from proceeding in executory process against the Cases and further enjoining the Sheriff from further seizing and/or proceeding to sheriff's sale on the property described in Attachment C to the original petition for executory process. Whitney now appeals from this judgment.

JURISDICTION

At the outset, we note that in addition to filing an appeal, Whitney also filed with this court a writ of supervisory review. By order dated February 29, 2012, this court referred the writ application to the same panel to which the appeal is assigned. Louisiana Code of Civil Procedure article 3612B and C provides that “[a]n appeal may be taken as a matter of right from an order or judgment relating to a preliminary ... injunction[,]” but it “must be taken ... within fifteen days from the date of the order or judgment.” In the instant case, Whitney filed its motion for appeal on December 7, 2011, within the required fifteen days. Accordingly, our review of the trial court's judgment, enjoining Whitney and the Sheriff from proceeding in executory process against the Cases, comes within our appellate jurisdiction. As such, we decline to exercise our supervisory jurisdiction.

DISCUSSION

Executory process is an accelerated procedure whereby a mortgage creditor may provoke the sale of encumbered property to satisfy his mortgage. Aetna Life Insurance Company v. The Lama Trusts, 28,328, p. 3 (La. App. 2nd Cir. 5/8/96), 674 So. 2d 1086, 1089, writ not considered, 96-1502 (La. 9/13/96), 679 So. 2d 100. Executory process, entitling a creditor to seize the debtor's property without citation or the usual delays or formal judgment, is regarded as a harsh remedy, requiring for its use a strict compliance by the creditor with the letter of the law. Reed v. Meaux, 292 So. 2d 557, 560 (La. 1974).

A creditor seeking to enforce a mortgage or privilege on property by executory process must file a petition praying for the seizure and sale of the property affected by the mortgage or privilege. La. C.C.P. art. 2634. To prove his right to use executory process, a plaintiff-creditor must submit with his petition authentic evidence of: (1) the note, bond or other instrument evidencing the obligation secured by the mortgage, security agreement, or privilege; and (2) the authentic act of mortgage or privilege on immovable property importing a confession of judgment. La. C.C.P. art. 2365A.

Defenses and procedural objections to an executory proceeding may be asserted through an injunction proceeding to arrest the seizure and sale as provided in La. C.C.P. arts. 2751-2754. La. C.C.P. art. 2642. The defendant in an executory proceeding may arrest the seizure and sale of the property by injunction when the debt secured by the security interest, mortgage, or privilege is extinguished, or is legally unenforceable, or if the procedure required by law for an executory proceeding has not been followed. La. C.C.P. art. 2751. The injunction proceeding to arrest a seizure and sale shall be governed by the provisions of La. C.C.P. arts. 3601-3601 and 3612, but the defendant may apply for a preliminary injunction in accordance with article 3602. La. C.C.P. art. 2752A. In the event the

defendant does apply for a preliminary injunction, the hearing for such shall be held before the sale of the property. La. C.C.P. art. 2752A. The court may hear an application for a preliminary injunction upon the verified pleadings or supporting affidavits, or may take proof as in ordinary cases. La. C.C.P. art. 3609.

The applicant for a preliminary injunction need make only a prima facie showing that he will prevail on the merits. Paddison Builders, Inc. v. Turncliff, 95-1753, p. 4 (La. App. 1st Cir. 4/4/96), 672 So. 2d 1133, 1136, writ denied, 96-1675 (La. 10/4/96), 679 So. 2d 1386. Whether to grant or deny a preliminary injunction lies within the sound discretion of the trial court. Absent a clear abuse of this discretion, the trial court's ruling will not be disturbed on appeal. City of Baton Rouge/Parish of East Baton Rouge v. 200 Government Street, LLC, 08-0510, p. 4 (La. App. 1st Cir. 9/23/08), 995 So. 2d 32, 36, writ denied, 08-2554 (La. 1/9/09), 998 So. 2d 726.

In the instant matter, the Cases sought to enjoin Whitney and the Sheriff from presenting the immovable property at issue for executory process and for sheriff's sale, asserting: (1) they had received no notification of demand for payment; (2) they did not confess judgment, waive homestead exemption, or consent to attorney's fees; and (3) Whitney engaged in predatory lending practices by making unaffordable loans based on the Cases' assets, inducing the Cases to refinance existing commercial loans and add their residence as additional collateral, engaging in fraud to conceal the true nature of the loans, and failing to provide the Cases with notice of their right to cancel the mortgage on their residence as required by the Truth in Lending Act, 15 U.S.C. § 1635.

From our review of the record, we find that the Cases failed to present sufficient evidence to establish a prima facie showing that they will prevail on the merits. First, the law does not require that a defendant in an executory proceeding be provided with notification of demand for payment prior to the issuance of a writ

of seizure and sale. See 2003 La. Acts 1072, § 2 (repealing La. C.C.P. art. 2639 relating to demand for payment before issuance of a writ of seizure and sale.)

Second, Whitney presented certified copies of the acts of mortgage, which clearly state that the Cases agreed to confess judgment, waive homestead exemption, and consent to attorney's fees. These authentic acts constitute full proof of the agreement they contain as against the parties. La. C.C. art. 1835. Further, though the Cases made allegations regarding predatory lending practices and fraud by Whitney in obtaining the mortgages on the Cases' property, they presented no evidence supporting these allegations.

Finally, the Cases asserted that Whitney failed to provide notice of their right to cancel the mortgage on their residence as required by the Truth in Lending Act, 15 U.S.C. § 1635. The Truth in Lending Act was enacted as part of the Consumer Credit Protection Act of 1968 and specifically deals only with consumer credit transactions, characterized as "one in which the party to whom credit is offered or extended is a natural person, and the money, property, or services which are the subject of the transaction are primarily for personal, family, or household purposes." 15 U.S.C. § 1602(i); see also Baker Bank and Trust Company v. Matthews, 401 So. 2d 1246, 1248 (La. App. 1st Cir. 1981).

In determining whether a particular transaction is exempt from the Truth in Lending Act, the purpose of the transaction or extension of credit is controlling, not the property on which the security interest is retained. R.C. Anderson v. Lester, 382 So. 2d 1019, 1022 (La. App. 2nd Cir. 1980), cert denied, 450 U.S. 1045, 101 S. Ct. 1767, 68 L. Ed. 2d 244 (1981) (citing Sapenter v. Dreyco, Inc., 326 F. Supp. 871 (E.D. La. 1971), aff'd, 450 F. 2d 941 (5th Cir. 1971), cert denied, 406 U.S. 920, 92 S. Ct. 1775, 32 L. Ed. 2d 120 (1972); see also Baker Bank and Trust Company, 401 So. 2d at 1248-1249 (looking at the purpose for which loan

proceeds were used in determining whether a credit transaction was a consumer transaction or a commercial transaction).

In conjunction with their amended petition for preliminary injunction, the Cases submitted a loan operating memorandum from Hancock Bank. This memorandum states that the purpose of the loan is to consolidate two loans originally funded to refinance various investment properties. In response, Whitney submitted loan boarding data sheets, indicating that the purpose of the original two loans was not for personal, family, or household purposes or for personal investment purposes. Additionally, a loan disbursement request and authorization shows that the primary purpose of the loan at issue is for "Business (Including Real Estate Investment)" and specifically for consolidation of the two previous loans.

Accordingly, the documentary evidence in the record indicates that the purpose of the loan, which was secured by the mortgage on the Cases' residence and other properties, was *not* for personal, family, or household purposes or personal investment purposes. Further, though the Cases submitted an affidavit attesting that the note and mortgage included their residence, the affidavit did not speak to the purpose of the loan itself. Therefore, the Cases failed to establish that the loan at issue was a consumer credit transaction, and therefore it is exempt from the requirements of the Truth in Lending Act.

Based on the foregoing, we find that the Cases failed to make a prima facie showing that they will prevail on the merits of their claim, and the trial court abused its discretion in granting their request for a preliminary injunction.

CONCLUSION

For the foregoing reasons, we reverse the judgment of the trial court, ordering that a preliminary injunction issue in favor of the Cases and against Whitney and the Sheriff, enjoining them from proceeding in executory process against the Cases and further enjoining the Sheriff from further seizing and/or

proceeding to sheriff's sale on the property described in Attachment "C" to the original petition for executory process. Further, having exercised our appellate jurisdiction, we deny Whitney's writ for supervisory review. All costs of this proceeding are assessed to the appellees, Jerry and Trudy Case.

REVERSED; WRIT DENIED.