STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2018 CA 1340

WELLS FARGO BANK MINNESOTA, NATIONAL ASSOCIATION, SOLELY IN ITS CAPACITY AS TRUSTEE, UNDER THE POOLING AND SERVICING AGREEMENT DATED MARCH 1, 2000, HOME EQUITY LOAN ASSET BACKED CERTIFICATES, SERIES 2000-1

VERSUS

MICHAEL E. HOLOWAY

Judgment Rendered: MAY 24 2019

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On Appeal from the Twenty-Second Judicial District Court
In and for the Parish of St. Tammany
State of Louisiana
Docket No. 2009-13483

Honorable Martin Coady, Judge Presiding

* * * * * *

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BEFORE: WHIPPLE, C.J., McCLENDON, AND HIGGINBOTHAM, JJ.

McCLENDON, J.

This appeal arises from an action to enforce a promissory note and mortgage, which the trial court dismissed upon finding the action had prescribed. For the reasons that follow, we affirm.

FACTS AND PROCEDURAL HISTORY

On December 14, 1999, Defendant Michael E. Holoway executed a promissory note in the principal sum of $196,000 ("the note"), secured by an "Act of Mortgage" ("the mortgage") encumbering land and improvements located at 106 Woodlawn Drive, Mandeville, Louisiana 70471 ("106 Woodlawn Drive"). The note and mortgage were recorded in St. Tammany Parish as Instrument No. 1179277 (collectively, "the loan.") Defendant failed to pay monthly installments on the Loan in September of 2002. The Loan, originally payable to Crossland Mortgage Corporation, was acquired by The Provident Bank ("Provident") subsequent to Defendant's default.

Provident gave Defendant notice of default in accordance with the terms of the Loan in a letter dated June 11, 2003. Provident then filed suit to foreclose on the property located at 106 Woodlawn Drive on August 28, 2003 ("the original foreclosure suit"). It is undisputed that the filing of the original foreclosure suit accelerated the Loan ("the acceleration") and interrupted the five-year liberative prescription period that began to run when Defendant first failed to pay a monthly installment on the Loan ("the interruption").

In December of 2003, Mr. Holoway filed a petition under Chapter 13 of the U.S. Bankruptcy Code in the U.S. Bankruptcy Court for the Eastern District of Louisiana ("the first bankruptcy suit"). On August 17, 2004, the bankruptcy court lifted an automatic stay in the matter to enable Provident to continue foreclosure proceedings. However, Provident did not take further action in that suit. The first bankruptcy suit was dismissed by the court on January 14, 2005.

In March of 2007, Mr. Holoway filed a second petition for Chapter 13 bankruptcy, which was converted to a Chapter 7 bankruptcy ("the second bankruptcy suit"). Litton Loan Servicing, LLP, filed a claim in the second bankruptcy suit regarding the note on

behalf of Plaintiff Wells Fargo.[1] The Loan was identified in the second bankruptcy suit and 106 Woodlawn Drive was initially included in the bankruptcy estate. On September 12, 2008, an "Order of Abandonment" signed by the bankruptcy court removed 106 Woodlawn Drive from the bankruptcy estate. The second bankruptcy suit was discharged November 3, 2008.

On June 16, 2009, Wells Fargo filed the instant action (sometimes herein "the second foreclosure suit") seeking to enforce the Loan against Mr. Holoway.[2] However, the original foreclosure suit was dismissed on grounds of abandonment pursuant to Louisiana Code of Civil Procedure Article 561 on December 6, 2017.

On January 24, 2018, Defendant filed a Peremptory Exception of Prescription in the instant matter. Defendant contended that there were two interrelated consequences of the dismissal of the original foreclosure suit: one was that the interruption of prescription that occurred with the filing of the original foreclosure suit was rendered ineffective because once a suit is abandoned it is as if the suit never existed; the other was that the acceleration of the Loan that occurred with the filing of the original foreclosure suit remained effective, because the acceleration occurred as a result of the contractual relationship between the parties. Defendant argued that as a result, the prescriptive period began to run when the Loan was accelerated by the filing of the original foreclosure suit, and the second foreclosure suit was therefore prescribed when it was filed over five years later. In opposition, Plaintiff argued that Defendant had acknowledged his debt in the bankruptcy proceedings before prescription accrued, which recommenced the five-year prescriptive period and made filing of the instant suit timely.

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[1] Plaintiff is referred to as "Wells Fargo" throughout for the sake of brevity. The full name of the Plaintiff entity is Wells Fargo Bank Minnesota, National Association, Solely in its Capacity as Trustee, Under the Pooling and Servicing Agreement Dated March 1, 2000, Home Equity Loan Asset Back Certificates, Series 2000-1.

[2] Wells Fargo acquired the note from Provident by notarial endorsement dated December 21, 2009. No explanation is given for the discrepancies between the date Litton Loan Servicing filed a claim in the second bankruptcy proceedings on behalf of Wells Fargo, the date Wells Fargo acquired the note, and the date Wells Fargo filed the second foreclosure suit.

The trial court heard Defendant's Exception of Prescription on April 11, 2018, and took the matter under advisement. In Reasons for Judgment issued on May 3, 2018, the trial court granted the Exception of Prescription and ordered Defendant to submit a written judgment. On June 8, 2018, a judgment was signed granting the Exception of Prescription, dismissing Plaintiff's suit, and ordering the cancellation of the inscription of the mortgage in the St. Tammany Parish records. It is from this judgment that Wells Fargo now appeals, presenting the following issues for review:

1. Whether the trial court erred in granting an Exception of Prescription on a mortgage foreclosure where the borrower acknowledged the debt in his bankruptcy by listing the mortgage loan as a debt in his Amended Chapter 13 Plan, and by including regular payments towards the mortgage debt in his proposed bankruptcy plan.
2. Whether the trial court erred in finding that the bankruptcy trustee lacked the authority to acknowledge the mortgage debt on the borrower's behalf.
3. Whether the trial court erred in ordering the entire Loan to be canceled on prescription grounds, rather than finding that only those defaulted monthly mortgage loan payments that came due more than five years before the filing of the instant foreclosure suit were prescribed.

LAW & ARGUMENT

A court of appeal may not overturn a judgment of a trial court unless there is an error of law or a factual finding that is manifestly erroneous or clearly wrong. *Lakeview Reg'l Med. Ctr. v. Washington Par. Sch. Bd.*, 2013-1934 (La. App. 1 Cir. 7/17/14), 152 So.3d 957, 959–60. The Louisiana Supreme Court has posited a two-part test for the appellate review of facts in order to affirm the factual findings of the trier of fact: (1) the appellate court must find from the record that there is a reasonable factual basis for the finding of the trier of fact; and (2) the appellate court must further determine that the record establishes that the finding is not clearly wrong (manifestly erroneous). *Id.* Thus, if there is no reasonable factual basis in the record for the trier of fact's finding, no additional inquiry is necessary to conclude there was manifest error. However, if a reasonable factual basis exists, an appellate court may set aside a factual finding only

if, after reviewing the record in its entirety, it determines the factual finding was clearly wrong. *Id.* If the trial court's factual findings are reasonable in light of the record reviewed in its entirety, the court of appeal may not reverse those findings, even though convinced that, had it been sitting as the trier of fact, it would have weighed the evidence differently. *Id.*

Plaintiff asserts that this appeal presents only questions of law and therefore this Court should apply the *de novo* standard of review. Defendant argues that the issue of acknowledgement is actually a mixed question of law and fact, which is generally subject to the manifest error standard of review. We note that no testimony was presented in this case, and the trial court based its decision on the stipulations and documentary evidence entered into the record. Nevertheless, the manifest error standard applies even when the evidence before the trial court consists solely of written reports, records, or depositions. *Shephard v. Scheeler*, 96-1690, (La. 10/21/97), 701 So.2d 1308, 1315–16; *Virgil v. American Guar. & Liab. Ins. Co.,* 507 So.2d 825 (La. 1987). Given that we are presented with mixed questions of fact and law, review of this matter is subject to the manifest error standard.

Actions on promissory notes are subject to a liberative prescription of five years. *Harrison v. Smith*, 2001-0458 (La. App. 1 Cir. 3/28/02), 814 So.2d 42, 45. Prescription begins to run from the day payment is exigible. La. C.C. art. 3498. Prescription begins to run on an accelerated note upon acceleration. *Harrison*, 814 So.2d at 45. This Court has often cited the following rule:

> Where there is an acceleration clause giving the creditor the right upon certain contingencies to declare the whole sum due, the statute begins to run, only with respect to each installment, at the time the installment becomes due, unless the creditor exercises his option to declare the whole indebtedness due, in which case the statute begins to run from the date of the exercise of the option.

Id.; *See also First Federal Savings and Loan Ass'n of Rochester v. Mullone*, 612 So.2d 1016, 1019 (La. App. 2 Cir. 1993); *Matherne v. Purdy*, 576 So.2d 621, 623 (La. App. 4 Cir. 1991) and *Ellsworth v. West*, 95-0988, (La.App. 4 Cir. 1/19/96), 668 So.2d 402, 405. Where steps are taken to accelerate a note more than five years before the institution of a suit, a promissory note is not enforceable because it prescribes under

Louisiana Civil Code Article 3498. *See Mullone*, 612 So.2d at 1019. The evidence demonstrates that the note was accelerated on August 28, 2003, when the original foreclosure suit was filed, and the parties do not contest this point.

Although the exceptor generally bears the burden of proof at the trial of the peremptory exception, when prescription is evident on the face of the pleadings, the burden shifts to the plaintiff to show that the action has not prescribed. *Allen v. State*, 2005-1076 (La. App. 1 Cir. 5/5/06), 934 So.2d 172, 174, *writ denied*, 2006-1218 (La. 9/15/06), 936 So.2d 1272. Plaintiff does not dispute that prescription is evident on the face of the petition and that Plaintiff bears the burden of proving that its claims have not prescribed. However, Plaintiff maintains that it has met that burden.

Louisiana Civil Code Article 3464 provides that prescription is interrupted when the debtor acknowledges the right of the person against whom he had commenced to prescribe. *Titus v. IHOP Rest., Inc.*, 2009-951 (La. 12/1/09), 25 So.3d 761, 764-765. Such an acknowledgment is not subject to any particular formality. *See Lake Providence Equip. Co. v. Tallulah Prod. Credit Ass'n*, 257 La. 104, 241 So.2d 506, 509 (1970). An acknowledgment may be written or verbal, express or tacit. *Id.* Acknowledgment "involves an admission of liability, either through explicit recognition of a debt owed, or through actions of the debtor that constitute a tacit acknowledgment." *Bracken v. Payne and Keller Co., Inc.*, 2006–0865 (La. App. 1 Cir. 9/5/07), 970 So.2d 582, 588. A tacit acknowledgment arises from a debtor's acts of reparation or indemnity, unconditional offers or payments, or actions which lull the creditor in believing that the debtor will not contest liability. *Titus*, 25 So.3d at 765; *Lima v. Schmidt*, 595 So.2d 624, 634 (La. 1992); *Bracken*, 970 So.2d at 588-589. Conversely, mere settlement offers or conditional payments, humanitarian or charitable gestures, and recognition of disputed claims will not constitute acknowledgments. *Lima v. Schmidt*, 595 So.2d at 634; *Schilling v. Cooper*, 2004-2460 (La. App. 1 Cir. 12/22/05), 928 So.2d 19, 22.

Plaintiff's first assignment of error is that the trial court erred in granting the Exception of Prescription. Plaintiff argues that the Loan was acknowledged, and therefore prescription was interrupted, because the existence of the Loan was recognized in the second bankruptcy suit. Specifically, in a May 21, 2007 filing,

Defendant listed the debt as a "disputed mortgage." In an April 7, 2008 filing, Defendant listed Litton Loan as a creditor and listed 106 Woodland Drive as the collateral. In a second April 7, 2008 filing, time-stamped at the same time as the other April 7, 2008 filing, Defendant clarified that the "claim for the mortgage arrears is still in dispute." Plaintiff also contends that although Defendant characterized the Loan as disputed and filed objections to the Proof of Claim filed by Litton, LLP, Defendant did not contest the validity of the debt.

In response, Defendant argues that the Loan was identified in his bankruptcy pleadings in order to comply with bankruptcy law, and that these changes in the law had been enacted in order to eliminate the concept that a debtor acknowledged a debt and the right of the creditor simply by listing the debt. Defendant also argues that it is the acknowledgement that must be clear and specific, not the language disputing the debt, and that a debtor is not required to provide a reason for disputing a debt in order to avoid acknowledging it.

In *Chinn v. Mitchell*, 98-1060 (La. App. 1 Cir. 5/14/99), 734 So.2d 1263, *writ not considered*, 99-1772 (La. 7/2/99), 747 So.2d 7, this Court declined to find that a written acknowledgement of the existence of a disputed claim constitutes an acknowledgement as contemplated in Louisiana Civil Code Article 3464. In *Chinn*, the plaintiff argued that a defendant insurance program had acknowledged an obligation to the plaintiff based on a letter from the administrator of the insurance program. The letter acknowledged an attorney's lien, requested all future correspondence concerning the matter be addressed to the administrator, and requested additional information so that "'further consideration may be given to [the plaintiff's] claim.'" *Id.* at 1266. This Court stated: "Admission of the existence of a claim is not an acknowledgment. This correspondence does not, expressly or tacitly, admit liability or recognize an obligation. There is no merit to these arguments." *Id.* at 1266.

Pursuant to *Chinn*, it is abundantly clear that Defendant did not acknowledge the debt by listing it as a "disputed mortgage" in the May 21, 2007, bankruptcy filing, or by listing it in the April 7, 2008 filing and then simultaneously amending said filing to specify that the "claim for the mortgage arrears is still in dispute." Defendant did not

undertake any act of reparation or indemnity, he did not make any unconditional offers or payments, and he did not make any action which could reasonably be found to have lulled Wells Fargo into believing that he would not contest liability. Like the program administrator in *Chinn*, Defendant did nothing more than identify an alleged debt, and identify the debt as disputed. This does not constitute an "acknowledgement" as contemplated in Louisiana Civil Code Article 3464.

Further, as Defendant points out, Federal Rule of Bankruptcy Procedure 1007 requires a debtor to list all creditors asserting claims against him. The term "claim" is defined in Section 101 of the Bankruptcy Code as "right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured..." 11 U.S.C.A. § 101(5). Bankruptcy debtors are also required to file a plan that provides for payment of all claims. 11 U.S.C.A. § 1321 and 1322. The Bankruptcy Code encourages honest and full disclosure and imposes harsh penalties for omitting debts and assets. *In re Vaughn*, 536 B.R. 670, 676 (Bankr. D.S.C. 2015). Plaintiff argues that certain jurisprudence supports its contentions that identifying a debt in a bankruptcy filing, including listing a debt in a proposed bankruptcy plan with regular payments towards the debt, constitutes acknowledgement of that debt sufficient to interrupt prescription.[3] However, the cases relied upon by Plaintiff either pre-date significant changes in the bankruptcy laws or are materially factually distinguishable, such that they are neither persuasive nor binding in this matter.[4]

In the absence of jurisprudence or positive law mandating otherwise, it would be inherently unjust to find that a debtor has acknowledged a debt under Louisiana Civil Code Article 3464 merely because the debtor properly identified the existence of a claim

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[3] While Plaintiff maintains that defendant acknowledged the debt by including regular payments toward the mortgage debt in the proposed bankruptcy plan, such argument fails for the reasons stated herein. This Court further notes that the proposed Chapter 13 plan in the first bankruptcy suit was never implemented as the proceeding was dismissed, and the second proposed Chapter 13 plan was not used either, as the second bankruptcy suit was converted to a Chapter 7 bankruptcy.

[4] For example, Wells Fargo's reliance on *LPP Mortg. Ltd. v. Cathey*, No. CIV.A. 04-2031, 2006 WL 1476026, at *3 (W.D. La. May 23, 2006) to support its claim that identifying a debt in bankruptcy filings constitutes acknowledgement of that debt conveniently ignores that the debt in *LPP* was identified as "liquidated and undisputed" and the debtor stated that "it believes the claim of the SBA to be fully secured," and "this creditor's claim shall be repaid in full, with interest ..." in the bankruptcy filings at question in that case. Notably, no such language was used in reference to the loan in the instant matter.

in bankruptcy filings in compliance with the bankruptcy laws.[5] Finding no such law or jurisprudence, we find no merit in this assignment of error.

Plaintiff's second assignment of error is that the trial court erred in finding that the bankruptcy trustee lacked the authority to acknowledge the mortgage debt on the borrower's behalf. Defendant argues that in the absence of an express grant by Defendant to the trustee to acknowledge the debt, the trustee lacked authority to do so under Louisiana law.

The commencement of a bankruptcy creates an estate, which is comprised of the property of the debtor and other property as defined in 11 U.S.C.A. § 541. The Bankruptcy Code is clear that the trustee is the representative of the estate, not the debtor. See 11 U.S.C.A. § 323. Under Louisiana Civil Code Article 2997 a principle may authorize a mandatary to acknowledge his debt, but only if the authority is given expressly. Defendant did not expressly grant authority to the bankruptcy trustee to acknowledge the debt on Defendant's behalf, and there is no other mechanism under Louisiana law by which to grant authority to acknowledge a debt. Thus, we find no merit in this assignment of error.

Plaintiff's third assignment of error is that the trial court erred in ordering the entire Loan to be canceled on prescription grounds, rather than finding that only those defaulted monthly mortgage loan payments that came due more than five years before the filing of the instant foreclosure suit were prescribed. As detailed above, prescription begins to run with respect to each installment at the time the installment becomes due, unless the creditor accelerates the debt by declaring the whole indebtedness due, in

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[5] Due to the interplay between state laws and the federal bankruptcy laws, the Bankruptcy Courts have considered whether a state law reviving a stale debt simply by its mention in lists and schedules filed in connection with a bankruptcy petition, as Wells Fargo argues should occur here, would be supplanted by a federal principle. "The short answer to that is affirmative," in part because:

> The effect of reviving stale debts simply by including them in the lists would be to permit a creditor who slept on enforcement of its rights to have those rights revived by a debtor seeking relief from debt under federal law and acting consistent with a mandate of full disclosure. Such a creditor would then share in the pool of assets or income the debtor commits to her case, and generally do so at the expense of other creditors. Permitting this result undermines the balance made in the Code where honest debtors receive relief from debts, and creditors of equal rank, that is those who enjoyed similar and current rights to payment, share in the equal distribution of the debtor's assets.

In re Vaughn, 536 B.R. 670, 675-676 (Bankr. D.S.C. 2015). The Bankruptcy Rules also permit debtors to amend their schedules "as a matter of course at any time before the case is closed." Fed. R. Bankr. P. 1009(a).

which case prescription runs from the date of acceleration. *Harrison*, 814 So. 2d at 45. Plaintiff contends that "[i]t is well-established that if a lawsuit is dismissed on the grounds of abandonment, *it is as if the lawsuit never occurred.*" Plaintiff argues that because the original foreclosure lawsuit was abandoned and therefore "never occurred," it follows that the acceleration of the Loan caused by the filing of the original foreclosure suit "never occurred" and therefore could not trigger the running of prescription. Instead, Plaintiff argues that the Loan was accelerated when it filed the second foreclosure suit on June 6, 2009, and only those defaulted monthly payments that came due more than five years before June 6, 2009 could be prescribed.[6] Plaintiff relies on several cases, among them *Hebert v. Cournoyer Oldsmobile-Cadillac GMC, Inc.*, 419 So.2d 878, 879 (La. 1982), in support of its argument that the abandonment of the original foreclosure suit negated all effects of the original foreclosure suit. However, a review of the governing statute and the jurisprudence does not support this position.

Louisiana Code of Civil Procedure Article 561 provides that an action, except as otherwise provided, is abandoned when the parties fail to take any step in its prosecution or defense in the trial court for a period of three years. Louisiana Civil Code Article 3463 provides the effect of abandonment on prescriptive periods, reading in pertinent part:

> An interruption of prescription resulting from the filing of a suit in a competent court and in the proper venue or from service of process within the prescriptive period continues as long as the suit is pending. Interruption is considered never to have occurred if the plaintiff abandons, voluntarily dismisses the action at any time either before the defendant has made any appearance of record or thereafter, or fails to prosecute the suit at the trial.

The plain language of Louisiana Civil Code Article 3463 states that *interruption of prescription* is considered never to have occurred if a case is later abandoned. *Hebert* and the other cases cited by Plaintiff consider and discuss the "never to have occurred" consequences of abandonment only within the context of an interruption of prescription. In the absence of jurisprudence or statutory language supporting the

[6] These would be only those payments that were due between September 1, 2002 and June 4, 2009, five years before the filing of the second foreclosure suit on June 6, 2009.

application of the "never to have occurred" effect to any issue other than the interruption of prescription, we cannot find that the abandonment of the original foreclosure suit should result in the acceleration of the Loan being "considered never to have occurred."

We find authority for this interpretation of the law and jurisprudence in *Harrison*, which Defendant relies on in support of his argument that the abandonment of the original foreclosure suit rendered the interruption of prescription ineffective but did not negate the effect of the acceleration. In *Harrison*, Mrs. Smith acquired the former family home in a community property settlement, though she did not assume liability for the note. At the time of Mrs. Smith's death in 1994, the note holder had accelerated the note and instituted foreclosure proceedings. Mrs. Smith's father, Mr. Harrison, purchased the note and mortgage to prevent foreclosure as his grandchildren and Mr. Smith were living in the home at the time. *Id.* at. 44. The note holder then dismissed the foreclosure suit without prejudice and transferred the note to Mr. Harrison. *Id.* On June 8, 1999, Mr. Harrison subsequently filed suit against Mr. Smith seeking payment in full of the amounts owed on the note. Mr. Smith responded by filing an exception of prescription. The trial court granted the exception, and this Court affirmed. *Id.* This Court considered that the note itself contained no provision for reinstatement, and that no efforts had been made to reinstate the note.

Noting that Mr. Harrison relied on *LeBlanc v. Travelers Indemnity Company*, 262 La. 403, 406, 263 So.2d 337, 338 (1972) for the proposition that "dismissal of a suit without prejudice restores matters to the status occupied before the filing of the suit" and extrapolated that the voluntary dismissal of the foreclosure suit made "the acceleration of the note disappear," this Court wrote:

> We find no legal basis to construe this principle of restoring matters to their former status upon dismissal of a suit without prejudice to mean that a note once accelerated will be reinstated as if it were not accelerated.
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> *Harrison*, 814 So.2d at 46.

Though we acknowledge that a factual distinction exists between the instant matter and *Harrison* because the initial suit in this matter was abandoned and the initial suit in *Harrison* was voluntarily dismissed, we do not find that the distinction warrants a

different outcome. Louisiana Civil Code Article 3463 provides for the effect of both abandonment and voluntary dismissal, and does not distinguish between the two in any way. We therefore find it appropriate to apply the same logic employed in *Harrison*.

In the instant case, as in *Harrison*, a note was accelerated and was not subsequently reinstated.[7] The interruption of prescription that continued while the original foreclosure suit was pending was deemed never to have occurred upon the abandonment of the original foreclosure suit, in the same manner as the interruption of prescription was deemed never to have occurred upon the voluntary dismissal of the suit in *Harrison*. Like this Court in *Harrison*, we find there is no legal basis to construe the resulting erasure of the interruption of prescription to mean that the Loan was somehow un-accelerated. Thus, we find no merit in this assignment of error.

For these reasons, the judgment of the trial court is affirmed.

AFFIRMED.

[7] To the contrary, the original foreclosure suit was still pending at the time the instant suit was filed, indicating that Plaintiff had no intent to reinstate the Loan.