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19-P-179 Appeals Court

STEPHEN D. NIMS & another[1] vs. THE BANK OF NEW YORK MELLON, trustee,[2] & another.[3]

No. 19-P-179.

Worcester. December 3, 2019. - March 3, 2020.

Present: Wolohojian, Agnes, & Neyman, JJ.

Mortgage, Real estate, Acceleration clause, Foreclosure. Real Property, Mortgage, Tax title. Bankruptcy. Notice, Foreclosure of mortgage. Negotiable Instruments, Note.

Civil action commenced in the Superior Court Department on October 18, 2017.

Motions to dismiss were heard by Susan E. Sullivan, J., and entry of judgment was ordered by her.

Glenn F. Russell, Jr., for the plaintiffs.
Connie Flores Jones, of Texas, for Bank of America, N.A.
Edward P. O'Leary for The Bank of New York Mellon.

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[1] Vickie L. Nims.

[2] For the certificateholders of CWALT Inc., Alternative Loan Trust 2005-53T2.

[3] Bank of America, N.A.

WOLOHOJIAN, J. The obsolete mortgage statute, G. L. c. 260, § 33, provides that

> "[a] power of sale in any mortgage of real estate shall not be exercised and an entry shall not be made nor possession taken nor proceeding begun for foreclosure of any such mortgage after the expiration of, in the case of a mortgage in which no term of the mortgage is stated, 35 years from the recording of the mortgage or, in the case of a mortgage in which the term or maturity date of the mortgage is stated, 5 years from the expiration of the term or from the maturity date . . . ."

The question presented in this case is whether acceleration of a note secured by a mortgage accelerates the "maturity date" of the mortgage for purposes of the obsolete mortgage statute. We conclude that it does not, and we accordingly affirm the dismissal of the claims against Bank of New York Mellon (BNYM).[4]

Background. The plaintiffs executed a promissory note on July 6, 2005, which was secured by a mortgage on property they owned in Ashburnham.[5,6] The note called for monthly payments

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[4] The plaintiffs appeal from the judgment dismissing their complaint. The only claim the plaintiffs press on appeal against BNYM is the one pertaining to the obsolete mortgage statute; all other arguments are accordingly waived. The plaintiffs raise no issue on appeal regarding Bank of America.

[5] The pertinent facts are undisputed.

[6] The note was in the amount of $375,000, was in favor of Omega Mortgage Corp. (Omega), and was secured by a mortgage on the plaintiffs' property at 402 Ashby Road in Ashburnham. The mortgage identified Mortgage Electronic Registration Systems, Inc. (MERS), as the nominee for Omega, and also as a mortgagee. In October 2011, MERS assigned the mortgage to BNYM and BNYM also became the holder of the note.

over thirty years and defined August 1, 2035, as the "[m]aturity [d]ate" for the loan. By contrast, the mortgage did not explicitly state its term or maturity date. The mortgage did, however, refer on its face to the July 6, 2005 note, and made reference to the requirement that the debt be paid in full no later than August 1, 2035.

The plaintiffs fell behind in the payments due on the note, and on June 10, 2010, they received a "Notice of Intention to Foreclose," stating that they were in arrears in the amount of $23,493.82, and that "[i]f the default is not cured on or before July 10, 2010, the mortgage payments will be accelerated with the full amount remaining accelerated and becoming due and payable in full, and foreclosure proceedings will be initiated

at that time" (emphasis added).[7,8]

In July 2012, the plaintiffs filed for Chapter 7 bankruptcy protection, and in October 2012, they were discharged from personal liability on their debts, including the July 6, 2005 promissory note. The plaintiffs acknowledge that the bankruptcy discharge of their obligations under the note did not extinguish

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[7] In the event of default, the mortgage permitted (but did not require) the lender to accelerate the sums due on the note, provided proper notice to the borrower and an opportunity to cure. Paragraph 22 of the mortgage provided:

> "Acceleration; Remedies. Lender shall give notice to Borrower prior to acceleration following Borrower's breach of any covenant or agreement in this Security Instrument . . . . The notice shall specify: (a) the default; (b) the action required to cure the default; (c) a date, not less than 30 days from the date the notice is given to Borrower, by which the default must be cured; and (d) that failure to cure the default on or before the date specified in the notice may result in acceleration of the sums secured by this Security Instrument and sale of the Property. The notice shall further inform Borrower of the right to reinstate after acceleration and the right to bring a court action to assert the non-existence of a default or any other defense of Borrower to acceleration and sale. If the default is not cured on or before the date specified in the notice, Lender at its option may require immediate payment in full of all sums secured by this Security Instrument without further demand and may invoke the STATUTORY POWER OF SALE and any other remedies permitted by Applicable Law."

[8] The June 10, 2010 notice was not the first step in terminating the mortgagors' rights under the mortgage; instead, it was "designed to give [the] mortgagor[s] a fair opportunity to cure a default before the debt is accelerated and before the foreclosure process is commenced through invocation of the power of sale." U.S. Bank Nat'l Ass'n v. Schumacher, 467 Mass. 421, 431 (2014).

the defendants' rights under the mortgage. See Christakis v. Jeanne D'Arc Credit Union, 471 Mass. 365, 369 (2015) ("Massachusetts case law has long provided that liens perfected well before the filing of a bankruptcy petition remain valid after a discharge"). This is because the bankruptcy discharge voids only actions in personam (such as on the promissory note), and not in rem actions (such as on the mortgage). Id. at 371.

In June 2014, the plaintiffs received a "150 Day Right to Cure" letter, stating that they had failed to make their monthly payments from November 2009 through June 2014, and that if they did not pay the arrearage of $157,108.80 by November 21, 2014, they "may be evicted from your home after a foreclosure sale."

On May 29, 2015, the Harmon Law Offices, P.C. sent a letter to the plaintiffs informing them that it had been retained to foreclose on the mortgage. The letter notified the plaintiffs that "the note is hereby accelerated," but also stated that the plaintiffs "may still have the right to reinstate the loan." Consistent with the legal principle we set out above, the letter recognized that since the plaintiffs' obligations on the note had been discharged in Chapter 7 bankruptcy, they were "not personally liable for this obligation, but the Holder may proceed to foreclose as described herein if the default is not cured."

On behalf of BNYM, Harmon notified the plaintiffs in September 2017 that the property would be sold at a foreclosure auction on October 23, 2017. In response, the plaintiffs sought a preliminary injunction to stop the foreclosure sale, and they also filed this suit, seeking a declaration that the defendants were not entitled to foreclose on the property.[9] Among other things, the plaintiffs claimed that, for purposes of the obsolete mortgage statute, the "maturity date" of the mortgage was accelerated from August 1, 2035, to July 10, 2010, the date of the acceleration of the note, if they did not cure their default. Essentially, the plaintiffs' argument is that the "maturity date" of the mortgage for purposes of the obsolete mortgage statute is the date by which full payment of the loan secured by the mortgage is due. According to the plaintiffs, therefore, the statutory power of sale had to be exercised within five years of the July 10, 2010 acceleration date and, because it was not exercised until 2017, it was untimely.

Discussion. The obsolete mortgage statute sets time periods after which a "mortgage shall be considered discharged for all purposes without the necessity of further action by the

[9] By agreement, the sale was postponed to November 20, 2017. On November 13, 2017, after a hearing, a Superior Court judge denied the request for a preliminary injunction, and the foreclosure sale took place thereafter.

owner of the equity of redemption or any other persons having an interest in the mortgaged property." G. L. c. 260, § 33. In other words, the statute acts as a self-executing mechanism by which to quiet title with respect to old mortgages. In its current form, the statutory period is "[thirty-five] years from the recording of the mortgage or, in the case of a mortgage in which the term or maturity date of the mortgage is stated, [five] years from the expiration of the term or from the maturity date, unless an extension of the mortgage, or an acknowledgement or affidavit that the mortgage is not satisfied, is recorded before the expiration of such period."[10,11] Id.

The statute is designed to create a definite point in time at which an old mortgage will be deemed discharged by operation of law; nothing suggests that the statute is designed to shorten the period during which a mortgage is enforceable. In this way, it serves to quiet title with respect to old mortgages, without shortening the period of enforceability of mortgages before their term or maturity date has been reached. See generally Housman v. LBM Fin., LLC, 80 Mass. App. Ct. 213 (2011); Harvard

[10] As originally enacted in 1957, the statute had limits of fifty and ten years, as did the 1975 version. The current version was enacted in 2006. See St. 2006, c. 63, § 6.

[11] Extensions must satisfy the requirements of G. L. c. 260, §§ 34 and 35.

45 Assocs., LLC v. Allied Props. & Mtges., Inc., 80 Mass. App. Ct. 203 (2011). It is important to observe that the statute does not affect rights and remedies with respect to notes underlying mortgages; nor does continuing liability on the note affect application of the statute with respect to the mortgage. See Deutsche Bank Nat'l Trust Co. v. Fitchburg Capital, LLC, 471 Mass. 248, 257 (2015). In other words, the statute respects and preserves the traditional separate viability and enforceability of the mortgage and the note.

Our reading of the language of the statute is consistent with the legislative history leading to its enactment. The statute was enacted in 1957 as part of a larger legislative effort[12] to enact laws to address "[t]he urgent public need both for greater reliability of records and for shorter safe periods for searches" of land records. Thirty-Second Report of the Judicial Council of Massachusetts, Pub. Doc. No. 144, at 20 (1956), reprinted in 41 Mass. L.Q. (No. 4, 1956). "The problem is to assure that our land title recording system serves effectively the public needs notwithstanding the great increases in volume of records and complexity of titles over the 300 years

[12] These efforts included earlier legislation pertaining to "obsolete attachments, . . . formal defects, entries, reverters and ancient leases." Thirty-Second Report of the Judicial Council of Massachusetts, Pub. Doc. No. 144, at 20 (1956) (Report), reprinted in 41 Mass. L.Q. (No. 4, 1956).

and more since the system was designed and adopted, and will serve effectively public needs now foreseeable due to increase in frequency of sales, mortgages and other title transactions resulting from increasing mobility of population and business and shifts from rural to urban land patterns." Id. "Protection of titles against obsolete mortgages is an important part of this modern problem." Id. at 21.[13]

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[13] The legislative history spelled out a specific set of practical problems the statute was designed to address:

> "The fact that more and more people cannot afford extended title searches leads to shorter searches.
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> "Title attorneys probably cannot be held negligent if they follow the customs of the community as to length of search. The resultant risks of prior interests not disclosed unavoidably fall on owners and investors who often do not fully appreciate them, and when the interests later come to light, both the individuals affected and the reputation of the bar suffer, whether the interests remain enforceable or not. The more the risks of obsolete interests, the less is the value of searches to the purchaser or investor, the less he is justified in paying for searches, the more the pressure for abbreviated searches, and the more the risk again resulting, so that we have in effect a vicious circle. Already, it is reputed, some banks have been forced to accept on practically a self insurance basis, much shorter searches than are customary or now generally considered 'safe.'
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> "On the other hand title attorneys cannot keep from being influenced by fears of what the most meticulous of other title advisors may do if next called on to pass the same title, however remote the practical risks of dispossession may be. The cumulative effect of these fears over the years means that there are always some whose standards are tighter than those of a generation or two earlier, and that the chances of challenge by the most meticulous gradually increase. Again we have a vicious

With this understanding of the statute and its history in hand, we turn to the facts of this case. As noted above, the mortgage at issue here did not explicitly state its term or maturity date. It did, however, refer on its face to the July 6, 2005 note, and made reference to the requirement that the debt be paid in full no later than August 1, 2035. In these circumstances, using common-law interpretive principles, the term or maturity date of the underlying obligation (i.e., the note) is considered the term or maturity date of the mortgage. Fitchburg Capital, LLC, 471 Mass. at 253-255. Thus, in this case, the mortgage is to be read as having a thirty-year term and a maturity date of August 1, 2035. Accordingly, the lender was required, under the obsolete mortgage statute, to exercise its power of sale within five years of August 1, 2035. See id. at 258 ("we read the quoted language in [the] mortgage to state the term or maturity date of [the] mortgage, making [it] subject to the five-year statute of limitations"). BNYM was well within the allowed period when it exercised the statutory power of sale in 2017.

> circle that impairs the ability of the recording system to meet the public needs. And the combination of these trends means an increasing diversity of standards being applied, and resultant confusion and lack of efficient operation of the system."

Report, Pub. Doc. No. 144, at 21.

What remains is the plaintiffs' contention that acceleration of the note in 2010 also "accelerated" the "maturity date" of the mortgage for purposes of the obsolete mortgage statute. The language of the statute does not support or suggest this contention. Equally important, the argument is at odds with the purpose and design of the statute which, as we set out above, establishes dates at which old mortgages will be deemed discharged so as to quiet title. It does not shorten the period of enforceability of mortgages before their maturity date or term has been reached.

We note that our reading of the obsolete mortgage statute is consistent with the long-standing rule that, under Massachusetts law, a mortgage has separate enforceability from its underlying note. A mortgage continues to be enforceable in an in rem proceeding against the security, separate from an in personam action against the debtor on the note. Thus, foreclosure on the mortgage is an alternate remedy to collection on the note. See Pearson v. Mulloney, 289 Mass. 508, 515 (1935); Jeffrey v. Rosenfeld, 179 Mass. 506, 509-510 (1901). For this reason, for example, the mortgage remains enforceable in rem even when personal liability on the note has been discharged fully in bankruptcy. Christakis, 471 Mass. at 371.

Although we recognize that the Supreme Judicial Court, in Fitchburg Capital, 471 Mass. at 254, stated in dicta that "a

mortgage does not mature distinctly from the debts or obligations that it secures," and that a mortgage "does not generally have a binding effect that survives its underlying obligation," that case did not involve the acceleration of a note; nor did it involve shortening the maturity date of the mortgage as the plaintiffs seek here. Moreover, the court relied on those principles only as part of its analysis leading to the conclusion that where a mortgage does not state its maturity date, but refers to the terms of the note it secures, then the maturity date of the note is to be considered the maturity date of the mortgage. Id. at 253-255. As noted above, we apply that holding here to conclude that the mortgage's maturity date is August 1, 2035, the same as for the note.[14]

Conclusion. For these reasons, we affirm the judgment.

So ordered.

[14] The United States Court of Appeals for the First Circuit has reached the same conclusion we do here. See Harry v. Countrywide Home Loans, Inc., 902 F.3d 16, 19 (1st Cir. 2018). The plaintiffs point to Delebreau v. Bayview Loan Servicing, LLC, 680 F.3d 412 (4th Cir. 2012), but that case does not involve our obsolete mortgage statute.