Affirmed and Opinion Filed May 31, 2018

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-17-00563-CV

ALI FARMEHR, Appellant
V.
DEUTSCHE BANK NATIONAL TRUST COMPANY AS TRUSTEE FOR LONG BEACH MORTGAGE LOAN TRUST 2006-4, Appellee

On Appeal from the 380th Judicial District Court
Collin County, Texas
Trial Court Cause No. 380-04924-2015

MEMORANDUM OPINION

Before Justices Bridges, Evans, and Whitehill
Opinion by Justice Whitehill

Appellant Ali Farmehr sued appellee Deutsche Bank National Trust Company to establish that he was the rightful owner of a house. Deutsche Bank obtained summary judgment on all of Farmehr's claims. Farmehr appeals.

The sole issue is whether Deutsche Bank conclusively proved that it abandoned an acceleration of a debt for which the house served as security in time to avoid a limitations bar. Because precedent from this Court establishes that Deutsche Bank's abandonment proof was conclusive, we affirm.

I. BACKGROUND

A. Facts

Summary judgment evidence showed that John and Annette Elfers acquired a house in McKinney, Texas, in 2006 by executing a note and deed of trust. Deutsche Bank acquired that deed of trust by assignment in September 2008.

Deutsche Bank later accelerated the Elferses' note on November 1, 2010, but the noticed property foreclosure did not occur.

In November 2014, Farmehr acquired the house by a constable deed issued pursuant to a court-ordered sale. Farmehr contends that Deutsche Bank's lien and power of sale became void four years after the November 2010 acceleration. *See generally* TEX. CIV. PRAC. & REM. CODE § 16.035.

Nevertheless, in December 2015 Deutsche Bank foreclosed on the property and sold it to Lei Liu.

B. Procedural History

The day after the sale to Liu, Farmehr sued Deutsche Bank, Doe I (later identified as Liu), and the Elferses. As to Deutsche Bank, Farmehr sought damages for "the purported sale of his property" and declaratory judgment that the Deutsche Bank foreclosure sale was void, the Deutsche Bank deed of trust was not a valid encumbrance, and Deutsche Bank's power of sale had expired and was unenforceable.

Farmehr obtained a default judgment against Deutsche Bank and nonsuited the other defendants. But Deutsche Bank moved for a new trial, which the trial court granted.

Deutsche Bank later moved for summary judgment. The motion's gist was that the December 2015 foreclosure sale to Liu was valid and wiped out Farmehr's interest, if any, in the property. Deutsche Bank argued specifically that the four-year limitations period that started

running when Deutsche Bank accelerated the Elferses' note on November 1, 2010, was reset as a matter of law because Deutsche Bank abandoned its acceleration by either or both of two acts: (i) entering a loan modification agreement with the Elferses in 2012 and (ii) sending a new notice of default in July 2014 seeking only past due amounts and not the accelerated loan balance. Deutsche Bank also sought its attorney's fees under the Declaratory Judgments Act.

Farmehr responded to Deutsche Bank's summary judgment motion by arguing that there were genuine fact issues as to whether Deutsche Bank successfully abandoned its November 2010 acceleration of the note.

The trial court rendered a final judgment that granted Deutsche Bank's summary judgment motion, dismissed Farmehr's claims against Deutsche Bank, and awarded Deutsche Bank no attorney's fees.

Farmehr timely appealed.

II. ANALYSIS

Farmehr raises one issue, arguing that the trial court erred when it ruled that Deutsche Bank conclusively proved that it abandoned its November 2010 acceleration of the Elferses' note, thus avoiding the four-year statute of limitations.

A. Standard of Review

We review an order granting summary judgment de novo. *Durham v. Children's Med. Ctr. of Dallas*, 488 S.W.3d 485, 489 (Tex. App.—Dallas 2016, pet. denied).

When we review a traditional summary judgment for a defendant, we determine whether the defendant conclusively disproved an element of the plaintiff's claim or conclusively proved every element of an affirmative defense. We take evidence favorable to the nonmovant as true, and we indulge every reasonable inference and resolve every doubt in the nonmovant's favor. A

matter is conclusively established if ordinary minds could not differ as to the conclusion to be drawn from the evidence. *Id*.

B. Applicable Law

If a note payable in installments is secured by a real-property lien, limitations does not begin to run until the last installment's maturity date. CIV. PRAC. § 16.035(e). However, if such a note contains an optional acceleration clause, the action accrues when the holder actually exercises its option to accelerate. *Holy Cross Church of God in Christ v. Wolf*, 44 S.W.3d 562, 566 (Tex. 2001). Effective acceleration requires two acts: (i) notice of intent to accelerate and (ii) notice of acceleration. *Id*.

Once the action accrues, the lienholder has four years to sell the property:

> A sale of real property under a power of sale in a mortgage or deed of trust that creates a real property lien must be made not later than four years after the day the cause of action accrues.

CIV. PRAC. § 16.035(b). When the four-year period expires, "the real property lien and a power of sale to enforce the real property lien become void." *Id*. § 16.035(d).

A holder can abandon its acceleration of a note, which has the effect of restoring the note's original maturity date and cutting off limitations. *See Bracken v. Wells Fargo Bank, N.A.*, No. 05-16-01334-CV, 2018 WL 1026268, at *3 (Tex. App.—Dallas Feb. 23, 2018, no pet. h.) (mem. op.). There is no single form an abandonment must take. "In the absence of an express notice of rescission of acceleration, the lender may show abandonment of acceleration by conduct." *Id*. For example, a holder can abandon acceleration if it "continues to accept payments without exacting any remedies available to it upon declared maturity." *Holy Cross Church*, 44 S.W.3d at 566–67.[1]

[1] Effective June 17, 2015, a new statute specifically addresses abandonment of an accelerated maturity date. *See* TEX. CIV. PRAC. & REM. CODE § 16.038. Farmehr does not argue that the statute applies to this case.

Abandonment of acceleration cases are based on the law of waiver. *See Bracken*, 2018 WL 1026268, at *5; *accord NSL Prop. Holdings, LLC v. Nationstar Mortg., LLC*, No. 02-16-00397-CV, 2017 WL 3526354, at *3 (Tex. App.—Fort Worth Aug. 17, 2017, pet. denied) (mem. op.). Waiver's elements include (i) an existing right, benefit, or advantage held by a party, (ii) the party's actual knowledge of its existence, and (iii) the party's actual intent to relinquish the right or intentional conduct inconsistent with the right. *Bracken*, 2018 WL 1026268, at *5.

C. Applying the Law to the Facts

The summary judgment evidence established the following sequence of events:

March 2006	John and Annette Elfers bought the property and executed a note and deed of trust.
Sept. 2008	Deutsche Bank acquired the note and deed of trust by assignment.
Dec. 2009	The property was sold to Kathryn R. DeWolf pursuant to a constable's sale for unpaid homeowners' association dues. DeWolf later conveyed the property to Wide Horizon Properties, LLC.
Nov. 15, 2010	Deutsche Bank filed in the deed records an acceleration of the note and a notice of foreclosure dated November 1, 2010. The notice recited that the foreclosure sale would be held December 7, 2010.
April 2012	The Elferses and JPMorgan Chase Bank acting for Deutsche Bank executed a Home Affordable Modification Agreement regarding the Elferses' mortgage.
July 28, 2014	Deutsche Bank's loan servicer sent the Elferses a letter under the heading "DEMAND LETTER–NOTICE OF DEFAULT." The letter stated that (i) the Elferses' mortgage was in default, (ii) the Elferses could cure the default by paying within thirty days the past due amounts, late charges, and advances, and (iii) the lender would accelerate the note if the Elferses did not pay the cure amount.

Nov. 6, 2014	Farmehr acquired the property in a constable's sale based on unpaid homeowners' association dues.[2]
Nov. 6, 2015	Deutsche Bank's loan servicer sent notices of acceleration to the Elferses.
Dec. 15, 2015	Deutsche Bank's loan servicer sold the property to Liu in a foreclosure sale.

Deutsche Bank's summary judgment motion argued that Deutsche Bank twice abandoned its November 2010 note acceleration within the next four years—first when the parties modified the loan in April 2012 and second when the trustee under the deed of trust sent the July 28, 2014 notice of default to the Elferses.

On appeal, Farmehr argues that the April 2012 modification did not abandon the acceleration because the modification never went into effect since the Elferses made certain misrepresentations within the modification agreement. Deutsche Bank responds that the modification agreement's enforceability is not relevant to the abandonment question; what matters is that Deutsche Bank's agreement to the modification was inconsistent with enforcing the right to accelerate.

We need not address the modification agreement's effect, however, because under *Bracken* the July 28, 2014 letter is conclusive evidence that Deutsche Bank abandoned the November 2010 acceleration. In *Bracken*, the Brackens were the debtors on a home loan, and Wells Fargo was the creditor. 2018 WL 1026268, at *1. The Brackens defaulted, and Wells Fargo accelerated the loan in July 2009. That same year, the parties attempted a short-term repayment plan to bring the Brackens' loan current, then agreed to a "Home Affordable Modification Program Loan Trial Period" as a prelude to a modification that never materialized. Wells Fargo also periodically sent the Brackens mortgage statements that requested payment of past-due amounts, not the entire

[2] This fact does not appear to be supported by summary judgment evidence, but Farmehr's appellate brief asserts it. Deutsche Bank points out that evidence of this fact appears elsewhere in the clerk's record but not in the summary judgment evidence. It does not affect our disposition to assume this fact in Farmehr's favor.

accelerated balance. Finally, in February 2011 Wells Fargo sent the Brackens a notice of default and intent to accelerate. Like the July 2014 notice in this case, that notice said that (i) the Brackens were in default, (ii) they needed to pay the past-due balance to cure the default, and (iii) failure to cure would result in acceleration of the loan. *Id*. at *4.

In 2014, Wells Fargo sued the Brackens for judicial foreclosure, and the parties filed cross-summary judgment motions addressing whether the statute of limitations barred Wells Fargo's suit. The trial court granted summary judgment for Wells Fargo, and we affirmed. We held that Wells Fargo conclusively proved abandonment of its 2009 acceleration by the February 2011 notice alone:

> Notwithstanding [the parties'] loss mitigation efforts, the 2011 notice unequivocally manifested an intent to abandon the 2009 acceleration and provided the Brackens with an opportunity to avoid foreclosure if they cured their arrearage. . . . [W]e conclude that Wells Fargo conclusively established that it abandoned the 2009 acceleration.

Id. at *5; *see also Boren v. U.S. Nat'l Bank Ass'n*, 807 F.3d 99, 104–06 (5th Cir. 2015) (holding under Texas law that a new notice of default could conclusively establish abandonment).

Although the Elferses' debt was accelerated in November 2010, Deutsche Bank's agent in July 2014 sent the Elferses a notice that was substantially the same as the one involved in *Bracken*. Accordingly, we hold that the July 2014 notice conclusively proved abandonment of acceleration, thereby restoring the prior maturity date and cutting off the running of limitations. *See Bracken*, 2018 WL 1026268, at *3, 6; *accord NSL Prop. Holdings*, 2017 WL 3526354, at *5.

III. CONCLUSION

We overrule Farmehr's sole issue and affirm the trial court's judgment.

/Bill Whitehill/
BILL WHITEHILL
JUSTICE

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JUDGMENT

ALI FARMEHR, Appellant

No. 05-17-00563-CV V.

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Trial Court Cause No. 380-04924-2015.
Opinion delivered by Justice Whitehill.
Justices Bridges and Evans participating.

In accordance with this Court's opinion of this date, the judgment of the trial court is **AFFIRMED**.

It is **ORDERED** that appellee Deutsche Bank National Trust Company as Trustee for Long Beach Mortgage Loan Trust 2006-4 recover its costs of this appeal from appellant Ali Farmehr.

Judgment entered May 31, 2018.