Affirmed and Memorandum Opinion filed February 14, 2017.

In The

Fourteenth Court of Appeals

NO. 14-15-00442-CV

CARRINGTON MORTGAGE SERVICES, LLC AND DEUTSCHE BANK TRUST COMPANY, AS INDENTURE TRUSTEE FOR NEW CENTURY HOME EQUITY LOAN TRUST 2005-2, Appellants

V.

LARRY HUTTO AND BONNIE HUTTO, Appellees

On Appeal from the 55th District Court
Harris County, Texas
Trial Court Cause No. 2013-08693

M E M O R A N D U M O P I N I O N

The assignee of a home-equity note and security instrument and its mortgage servicer asserted claims seeking to foreclose a lien on the borrowers' homestead. After a bench trial, the trial court rendered a take-nothing judgment in favor of the borrowers, concluding that the lender parties may not foreclose under the facts presented based on uncured violations of Texas Constitution article XVI, section 50(a)(6), the lender parties' failure to give the borrowers the opportunity to cure

required by the note and security instrument, and the lender parties' failure to strictly comply with their contractual duties. We conclude that the lender parties' statute-of-limitations argument against the borrowers' defenses under Texas Constitution article XVI, section 50(a)(6) lacks merit because the statute of limitations does not apply to these defenses. Because the lender parties have not presented an appellate argument challenging the trial court's findings and conclusions on the lender parties' alleged failure to give the borrowers the opportunity to cure and on their alleged failure to strictly comply with their contractual duties, we affirm the trial court's judgment.

I. FACTUAL AND PROCEDURAL BACKGROUND

Appellees/counter-defendants Larry and Bonnie Hutto own a homestead in Katy, Texas. On January 20, 2005, Larry executed a home equity-note in the principal amount of $82,400 in favor of New Century Mortgage Corporation. That same day, the Huttos also executed a home-equity security instrument and an affidavit of fair market value of the homestead property. Within days, New Century executed the affidavit of fair market value.

New Century assigned the note and security instrument to appellant/counter-plaintiff Deutsche Bank National Trust Company, as Indenture Trustee for New Century Home Equity Loan Trust 2005-2 ("Deutsche"), making it the noteholder. Appellant/counter-plaintiff Carrington Mortgage Services, LLC services the loan, note, and security instrument. A limited power of attorney authorizes Carrington to act on behalf of Deutsche.

The Huttos fell behind on their payments in mid-2011 and sought a repayment plan from Deutsche and Carrington (hereinafter the "Bank Parties") to bring the loan current. The Bank Parties offered a six-month payment plan,

starting August 1, 2011, with the payments in the amount of $2,670.39. After the Huttos had made all of their payments under the six-month repayment plan, the Bank Parties notified them that "[y]our loan is current now and not due until 2-1-12. I will be requesting it moved out of foreclosure." Starting on February 1, 2012, the payment was $785.43.

The February 2012 mortgage statement shows, in addition to the $785.43 mortgage payment, a past-due amount of $1,751.06. The Huttos submitted the $785 mortgage payment, but not the $1,751.06. Bonnie Hutto contacted the Bank Parties about the $1,751 in fees, but received no explanation. The monthly statements that followed showed the past-due amount continuing to increase. The Huttos submitted the March 2012 payment of $785, but that was the last monthly payment they made because, they said, the Bank Parties could not explain the additional charges.

The Huttos received from the Bank Parties a May 7, 2012 notice of intent to foreclose, stating that the Huttos were in default on the April 1, 2012 payment and "[t]he amount required to cure this delinquency as of the date of this letter is $4,277.30[.]" More than six months later, the Huttos sent the Bank Parties a "notice to cure" letter, asserting that the home-equity lien was invalid. According to the Huttos, the home-equity lien did not comply with the Texas Constitution because, among other things, the lender did not sign the affidavit of market value on the date the extension of credit was made. The Huttos demanded that the Bank Parties "cure the violations" within sixty days. *See* Tex. Const. art. XVI, § 50(a)(6)(Q)(ix). The Bank Parties never responded to the notice or undertook to cure the alleged violations.

The Huttos sued the Bank Parties asserting various claims. The Bank Parties answered the suit and filed counterclaims against the Huttos seeking a declaration

that the Huttos are in default of payment under the note and security instrument. The Bank Parties also sought an order authorizing them to foreclose on the Huttos' homestead, a judgment lien on the debt, and an order of sale and foreclosure of the judgment lien through an *in rem* foreclosure sale of the homestead. The Bank Parties alleged equitable subrogation and claimed that the Huttos used the proceeds of the note to pay a previous lienholder as well as taxes owed to government agencies.

The Huttos answered the Bank Parties' counterclaims and asserted a number of affirmative defenses. The Huttos later nonsuited all of their claims, leaving only the Bank Parties' counterclaims and the Huttos' defenses.

The trial court conducted a bench trial and signed findings of fact and conclusions of law. The trial court's findings of fact are as follows:

- The home-equity lien did not comply with the Texas Constitution because the lender signed the affidavit of fair market value after the closing date of the loan.
- The Bank Parties had the opportunity to cure, which would have involved paying a fee and issuing new loan documents, but did not do so.
- The past due amount of $1,751.06 and late charges of $1,437.35 on the February 2012 statement were in breach of the parties' agreement and the Bank Parties further waived these charges by declaring that the Huttos were "current" on the loan.
- The Bank Parties were unable to prove the $4,277.30 delinquency stated in the notice of intent to foreclose, that amount was incorrect, and the Bank Parties offered no support for it other than the conclusory statement in a business-records affidavit that the figure was correct.
- The Huttos were current on their loan as of February 2012, and the monthly mortgage payment should have been $785.43.
- The opportunity to cure given to the Huttos was not in accordance

with Bank Parties' duties under the note and security instrument.

- The Bank Parties failed to give the Huttos a proper and accurate notice to cure.
- The Bank Parties failed to prove that the Huttos were in default as of May 7, 2012.
- There was error in the Bank Parties' calculations. There was no evidence to support a correct calculation, and the trial court was unable to make a correct finding on the balance owed under the note.

The trial court made the following conclusions:

- The lien was not created in compliance with Texas law, and the problems have not been cured.
- The notice of default contained an erroneous "cure amount," making the Huttos' opportunity to cure impossible. A lender must strictly comply with its contractual duties before foreclosing. Because the Bank Parties did not do so, under the facts presented at trial, the Bank Parties may not foreclose.
- The statute of limitations did not bar the Huttos' constitutional defenses to the Bank Parties' claims.
- Deutsche could not, under the doctrine of equitable subrogation, step into the shoes of a prior lender.

The trial court signed a final judgment that the Bank Parties take nothing on their claims against the Huttos.

III. ANALYSIS

A. Does the statute of limitations bar the Huttos' constitutional defenses?

In their first issue, the Bank Parties claim that the trial court erred in ruling that the Bank Parties were not entitled to foreclose on the homestead because the lien became valid, that is, no longer voidable, several years before the Huttos provided notice of the alleged constitutional violations or filed this suit. Citing to decisions from intermediate Texas appellate courts, including this court, the Bank

Parties contend a lender that fails to comply with a home-equity provision of the Texas Constitution, holds a voidable, rather than a void, lien and an action to declare a voidable lien void is subject to the four-year residual statute of limitations. *See Wood v. HSBC Bank USA, N.A.*, 439 S.W.3d 585, 592–94 (Tex. App.—Houston [14th Dist.] 2014), *aff'd in part and rev'd in part*, No. 14-0714, — S.W.3d —, 2016 WL 2993923 (Tex. May 20, 2016). The Bank Parties posit that, because the legal injury accrued the day the transaction closed, January 20, 2005, the four-year statute of limitations on the Huttos' claim to void the voidable lien expired on January 20, 2009, and what was once a voidable lien became valid when the four-year statute of limitations expired.

The Supreme Court of Texas recently rejected the same argument and abrogated the part of the *Wood* opinion in which this court had validated this argument. *Wood v. HSBC USA, N.A.*, No. 14-0714, — S.W.3d —, 2016 WL 2993923 (Tex. May 20, 2016); *see also Gonzalez v. Green Tree Serv., Inc.*, No. 14-15-1076-CV, 2016 WL 7401929, at *2–3 (Tex. App.—Houston [14th Dist.] Dec. 20, 2016, no pet. h.) (mem. op.) (recognizing that the Supreme Court of Texas abrogated this part of the Fourteenth Court of Appeals's *Wood* opinion).

The people of Texas amended the state constitution in 1997 to allow homestead liens to secure home-equity loans under "clearly prescribed very specific and extensive limitations on those encumbrances." *Wood*, 2016 WL 2993923 at *2 (citing Tex. Const. art. XVI, § 50(a)(6)(A)–(Q)). The high court in *Wood* held that a lien securing a constitutionally noncompliant home-equity loan is not valid before the defect is cured. *Id.* at *4. The court explained that "[a] plain reading of the Constitution necessitates a finding that liens securing noncompliant home-equity loans are not valid before the defect is cured." *Id.* at *5. To hold otherwise would be contrary to the language of section 50(c), which "dictates that

no lien on a homestead 'shall ever be valid' unless it secures a debt that meets section 50(a)(6)'s requirements." *Id.* (quoting Tex. Const. art. XVI, § 50(c)).

The cure provisions in the constitution "are the sole mechanism to bring a loan into constitutional compliance." *Id.* The constitution requires the lender to cure within sixty days after notice of the defect, but does not impose a corresponding deadline by which the borrower must request cure. *Id.* The court thus held that liens securing constitutionally noncompliant home-equity loans are invalid until cured and therefore are not subject to any statute of limitations. *Id.* at *1.

The record contains evidence that the Huttos sent a notice to the Bank Parties that the lender did not sign the affidavit of acknowledgement of market value on the date the loan was made (January 20, 2005). *See* Tex. Const. art. XVI, § 50(a)(6)(Q)(ix). The Bank Parties never challenged the Huttos' claim that the Bank Parties received their notice to cure or otherwise attempted to cure the defect. The trial court did not err in concluding that the four-year residual statute of limitations does not bar the Huttos' defenses under the Texas Constitution.[1] We overrule the Bank Parties' first issue.

B. Have the the Bank Parties challenged all possible bases of the trial court's judgment?

In their second issue, the Bank Parties assert that the trial court erred when it ruled that the Huttos were not in default and when it ruled that the Bank Parties

[1] A decision of the Supreme Court of Texas operates retroactively unless the high court exercises its discretion to modify the decision's application. *Bowen v. Aetna Cas. & Sur. Co.*, 837 S.W.2d 99, 100 (Tex. 1992) (per curiam). There is nothing in the high court's *Wood* opinion indicating the Supreme Court of Texas exercised its discretion so that the *Wood* decision would not apply retroactively. *See Wood*, 2016 WL 2993923, at *2–7. Therefore, we conclude that *Wood* applies retroactively. *See Bowen*, 837 S.W.2d at 100; *Diamond Offshore (Bermuda), Ltd. v. Haaksman*, 355 S.W.3d 842, 846, n.4 (Tex. App.—Houston [14th Dist.] 2011, pet. denied).

could not foreclose because they did not prove the amount of the delinquency, or arrearage, on the note. Under this issue, the Bank Parties state that the trial court erred in concluding that the Bank Parties failed to prove that the Huttos were in default on May 7, 2012, because of testimony in the Huttos' case-in-chief showing that the Huttos stopped paying after they made the March 2012 payment. The Bank Parties also assert the trial court erred in ruling that they could not foreclose because the amount stated in the May 7, 2012 letter is inaccurate. The Bank Parties state that a power of sale can be exercised if any part of the debt is due and owing and that, even if the amount claimed to be owed is incorrect, the borrower still has the duty to tender payment of the part of the debt that is due and owing to stop a foreclosure. In their third issue, the Bank Parties assert that the trial court erred when it ruled that the lender's violation of Texas Constitution article XVI, section 50(a)(6) precludes the Bank Parties from being equitably subrogated to liens paid off at the closing of the home-equity loan.

The security instrument provides that the lender must give notice to the Huttos before acceleration, specifying the default, the action required to cure the default, a date, not less than thirty days after the notice date by which the default must be cured, and that failure to cure the default on or before the specified date will result in acceleration of the sums secured by the security instrument and sale of the homestead. Under the security instrument, if the Huttos do not cure the default on or before the date specified in the notice, the lender at its option may require immediate payment in full of all sums secured by the security instrument without further demand and may invoke the power of sale and any other remedies permitted by applicable law.

In their opening brief, the Bank Parties have not presented argument challenging the trial court's determinations that (1) the opportunity to cure given to

the Huttos was not in accordance with Bank Parties' duties under the note and security instrument; (2) the Bank Parties failed to give the Huttos a proper and accurate notice to cure; (3) the notice of default contained an erroneous cure amount, making the Huttos' opportunity to cure impossible; and (4) because the Bank Parties did not strictly comply with their contractual duties before foreclosing, under the facts presented at trial, the Bank Parties may not foreclose. Because the Bank Parties have not presented argument in their opening brief challenging each independent basis for the trial court's ruling that they were not entitled to foreclosure based on the facts presented, we overrule the second and third issues.[2] *See Midway Nat'l Bank of Grand Prairie, Tex. v. W. Tex. Wholesale Supply Co.*, 453 S.W.2d 460, 460–61 (Tex. 1970) (per curiam).

Having overruled all of the Bank Parties' issues, we affirm the trial court's judgment.

/s/ Kem Thompson Frost
Chief Justice

Panel consists of Chief Justice Frost and Justices Boyce and Wise.

[2] Even if the Bank Parties had challenged each independent ground, we still would affirm the trial court's judgment.