COURT OF APPEALS
SECOND DISTRICT OF TEXAS
FORT WORTH

NO. 02-16-00397-CV

NSL PROPERTY HOLDINGS, LLC — APPELLANT

V.

NATIONSTAR MORTGAGE, LLC — APPELLEE

FROM THE 342ND DISTRICT COURT OF TARRANT COUNTY
TRIAL COURT NO. 342-281910-15

MEMORANDUM OPINION[1]

This case involves the paradoxical scenario of a party claiming that it has waived or abandoned its own right: specifically, a senior lienholder is attempting to show that it abandoned its prior purported acceleration of amounts due on its note to avoid a claim by the purchaser of a junior lienholder's interest at foreclosure that the senior lienholder's right to foreclose on its own lien is barred

[1]*See* Tex. R. App. P. 47.4.

by limitations. The trial court granted summary judgment in favor of the senior lienholder after determining that its undisputed summary judgment evidence indicates that it abandoned its right to accelerate as a matter of law. We affirm.

Background

In November 2014, NSL Property Holdings, LLC purchased a residence in Southlake upon the homeowners association's foreclosure of its recorded lien for unpaid assessments. That lien—and thus, NSL's interest in the property—was subject to a pre-existing prior lien and security interest, as evidenced by a deed of trust recorded in April 2005. The holder of the pre-existing lien had assigned its interest under the deed of trust to Nationstar Mortgage, LLC on August 29, 2014.

In October 2015, NSL sued Nationstar seeking a declaration that "it owns the property free of the deed of trust claimed by" Nationstar because the applicable statute of limitations barred Nationstar from enforcing its power of sale under the deed of trust. NSL and Nationstar filed competing traditional motions for summary judgment: NSL claimed that it had conclusively proven that Nationstar was precluded from enforcing its power of sale in the deed of trust because the prior noteholder had exercised its right of acceleration in 2008 and, thus, the applicable statute of limitations had expired, and Nationstar claimed that the statute of limitations had not run because it had abandoned acceleration. The trial court denied both motions. Nationstar then filed an amended motion for summary judgment, again claiming that it had conclusively proven that it had

waived or abandoned "any purported acceleration." NSL did not respond with any summary judgment evidence of its own, nor did it file a second motion for summary judgment. The trial court granted Nationstar's motion in a final take-nothing judgment. NSL appeals the trial court's judgment.

Standard of Review

We review a summary judgment de novo. *Travelers Ins. Co. v. Joachim*, 315 S.W.3d 860, 862 (Tex. 2010). We consider the evidence presented in the light most favorable to the nonmovant, crediting evidence favorable to the nonmovant if reasonable jurors could, and disregarding evidence contrary to the nonmovant unless reasonable jurors could not. *Mann Frankfort Stein & Lipp Advisors, Inc. v. Fielding*, 289 S.W.3d 844, 848 (Tex. 2009). We indulge every reasonable inference and resolve any doubts in the nonmovant's favor. *20801, Inc. v. Parker*, 249 S.W.3d 392, 399 (Tex. 2008). A defendant who conclusively negates at least one essential element of a cause of action is entitled to summary judgment on that claim. *Frost Nat'l Bank v. Fernandez*, 315 S.W.3d 494, 508 (Tex. 2010), *cert. denied*, 562 U.S. 1180 (2011); *see* Tex. R. Civ. P. 166a(b), (c).

When both parties move for summary judgment and the trial court grants one motion and denies the other, the reviewing court should review both parties' summary judgment evidence and determine all questions presented. *Mann Frankfort*, 289 S.W.3d at 848. The reviewing court should render the judgment that the trial court should have rendered. *See Myrad Props., Inc. v. LaSalle Bank*

Nat'l Ass'n, 300 S.W.3d 746, 753 (Tex. 2009); *Mann Frankfort*, 289 S.W.3d at 848. Although NSL did not file a second summary judgment motion in response to Nationstar's amended motion for summary judgment, it appears the trial court considered the same arguments made by the parties in the initial competing motions for summary judgment. Thus, we will review the evidence presented on all of the motions.

The statute of limitations is generally an affirmative defense that the defendant bears the burden to plead, prove, and secure findings to support. *Holland v. Lovelace*, 352 S.W.3d 777, 788 (Tex. App.—Dallas 2011, pet. denied). The same burden applies to a plaintiff seeking on summary judgment a declaration that a limitations period has run. *See Holy Cross Church of God in Christ v. Wolf*, 44 S.W.3d 562, 566 (Tex. 2001).

Abandonment of Acceleration

The parties appear to agree for purposes of the summary judgment motions that Nationstar's predecessor-in-interest purported to accelerate the amounts due on the note on September 15, 2008.[2] Nationstar did not raise a challenge to the effectiveness of this purported acceleration in the trial court. Instead, its only argument on limitations was that it had abandoned "any purported acceleration" as a matter of law. Therefore, under the applicable summary judgment standard of review, we must determine this appeal solely on

[2]As NSL pointed out in its pleadings, Nationstar "does not contest the fact that the note had been accelerated in September, 2008."

the abandonment question of law. *See* Tex. R. Civ. P. 166a(c); *State Farm Lloyds v. Page*, 315 S.W.3d 525, 532 (Tex. 2010) ("Summary judgment may not be affirmed on appeal on a ground not presented to the trial court in the motion.").

A person must bring a suit to foreclose a real property lien not later than four years after the day the cause of action accrues. Tex. Civ. Prac. & Rem. Code Ann. § 16.035(a) (West 2002). Likewise, a foreclosure sale of real property according to a power of sale in a deed of trust creating a lien on real property must occur not later than four years after the day the claim accrues. Tex. Civ. Prac. & Rem. Code Ann. § 16.035(b); *Holy Cross*, 44 S.W.3d at 567. If a sale does not occur within the four-year limitations period, the lien and the power of sale to enforce the lien become void. Tex. Civ. Prac. & Rem. Code Ann. § 16.035(d); *Holy Cross*, 44 S.W.3d at 567. If a note secured by a lien on real property is payable in installments, the statute of limitations does not begin to run until the maturity date of the last installment. Tex. Civ. Prac. & Rem. Code Ann. § 16.035(e); *Holy Cross*, 44 S.W.3d at 566. If a note or deed of trust contains an optional acceleration clause, the claim accrues when the holder actually exercises the option to accelerate the amount due. *Holy Cross*, 44 S.W.3d at 566.

Acceleration of the amount due on a loan is a two-step process requiring clear and unequivocal notices of (1) intent to accelerate and (2) acceleration. *Id*. But even when a holder has accelerated a note, the holder can later unilaterally

abandon acceleration. *Id.* at 566–67; *Graham v. LNV Corp.*, No. 03-16-00235-CV, 2016 WL 6407306, at *3 (Tex. App.—Austin Oct. 26, 2016, pet. denied) (mem. op.) (citing cases holding that abandonment may be unilateral "so long as the borrower neither detrimentally relied on the acceleration nor objected to the abandonment of the acceleration"). In the absence of an express notice of rescission of acceleration, the noteholder may show abandonment of acceleration by conduct. *E.g.*, *Holy Cross*, 44 S.W.3d at 566–67 (noting that holder can abandon acceleration by continuing to accept payments without availing itself of remedies); *Graham*, 2016 WL 6407306, at *3 (collecting cases); *see also G.T. Leach Builders, LLC v. Sapphire V.P., LP*, 458 S.W.3d 502, 511 (Tex. 2015) ("Waiver . . . can occur either expressly, through a clear repudiation of the right, or impliedly, through conduct inconsistent with a claim to the right.").

Although more recent cases refer to the rescission of acceleration as abandonment, the underlying concept is based on waiver. *See Graham*, 2016 WL 6407306, at *3; *Khan v. GBAK Props., Inc.*, 371 S.W.3d 347, 354 n.1 (Tex. App.—Houston [1st Dist.] 2012, no pet.). To show abandonment—waiver—of acceleration, a party must show (1) that it holds an existing right, benefit, or advantage (2) of which it has actual knowledge and (3) either the actual intent to relinquish the right or intentional conduct inconsistent with the right. *Graham*, 2016 WL 6407306, at *3 (citing *Ulico Cas. Co. v. Allied Pilots Ass'n*, 262 S.W.3d 773, 778 (Tex. 2008)); *see Shields Ltd. P'ship v. Bradberry*, No. 15-0803, 2017 WL 2023602, at *10 (Tex. May 12, 2017) ("For purposes of this case, the critical

inquiry is whether Shields intentionally engaged in conduct inconsistent with claiming the right to enforce the nonwaiver agreement."). Although whether waiver has occurred is typically a question of fact, it is a question of law when the facts that are relevant to a party's relinquishment of an existing right are undisputed. *Motor Vehicle Bd. of Tex. Dep't of Transp. v. El Paso Indep. Auto. Dealers Ass'n*, 1 S.W.3d 108, 111 (Tex. 1999).

Nationstar contends that it conclusively proved that its predecessor-in-interest abandoned any purported acceleration of the note as evidenced by a January 27, 2010 letter to the borrower by the then-current servicer of the loan, BAC Home Loans Servicing, LP. That letter (1) stated that the loan was "in serious default," (2) indicated that the total amount "now required" to reinstate the loan was an amount equal to the monthly payments that had accrued as of November 1, 2007, May 1, 2008, and May 1, 2009, along with a charge for "Uncollected Costs" and one month's late charges, and (3) stated that the borrower had the right to cure the default by paying the past due amount shown, "plus any additional regular monthly payment or payments, late charges, fees and charges which become due on or before February 26, 2010." The letter described various options available to the borrower to prevent foreclosure, such as entering into a repayment plan or loan modification, selling the property, or conveying the property to the lender in lieu of foreclosure. Finally, the letter stated that "[i]f the default is not cured on or before February 26, 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" and "[f]ailure to bring your loan current or to enter into a written agreement by February 26, 2010 as outlined above will result in the acceleration of your debt."

Nationstar relies on a Fifth Circuit case, *Boren v. U.S. National Bank Ass'n*, and similar Fifth Circuit cases, holding that proof of such a letter or other communication indicating a willingness to accept less than the full accelerated amount due can be sufficient to prove as a matter of law that a lender has unequivocally elected to abandon a prior acceleration. *See, e.g.*, *Hernandez v. Select Portfolio Servicing, Inc.*, No. 16-41308, 2017 WL 1437279, at *2–3 (5th Cir. Apr. 24, 2017); *Meachum v. Bank of N.Y. Mellon Trust Co., N.A.*, 636 F. App'x 210, 212–13 (5th Cir. 2016); *Boren v. U.S. Nat'l Bank Ass'n*, 807 F.3d 99, 106 (5th Cir. 2015); *Leonard v. Ocwen Loan Servicing, L.L.C.*, 616 F. App'x 677, 679–80 (5th Cir. 2015), *cert. denied*, 136 S. Ct. 554 (2015). NSL contends that we should not rely on these holdings because the holding in *Boren* was merely an *Erie* guess,[3] no Texas court has adopted or applied its holding, and its facts are distinguishable. Although both Nationstar and NSL characterize this issue as a matter of first impression, the resolution merely involves the application of well-established Texas law and standards of review to a specific factual scenario.

[3]*See Erie R.R. v. Tompkins*, 304 U.S. 64, 58 S. Ct. 817 (1938).

In *Boren*, the lender had made numerous attempts to obtain a court order expediting nonjudicial foreclosure—after accelerating the amount due on the note—which the borrower contested each time, triggering dismissal of the lender's suits. *Boren*, 807 F.3d at 102–03. *See generally* Tex. R. Civ. P. 736. After the dismissal of the third such proceeding, the lender sent a notice of default to the borrower indicating that the total amount necessary to bring the loan current was less than the full loan balance. *Id.* at 103. The notice also stated that the borrower had one month to cure the default or face acceleration. *Id.* When the borrower failed to cure the default, the lender again accelerated the note balance. *Id.* The Fifth Circuit made an *Erie* guess that the Texas Supreme Court would likely hold that a lender can unilaterally abandon a prior acceleration and also cited traditional Texas principles of waiver, as set forth by the Texas Supreme Court: the same principles that numerous Texas intermediate appellate courts have relied on in the abandonment of acceleration context. *Id.* at 105–06 (citing *G.T. Leach Builders*, 458 S.W.3d at 511; *Ulico*, 262 S.W.3d at 778)). We note that the supreme court has spoken on traditional waiver and estoppel principles in the abandonment of acceleration context, indicating that a party could unilaterally waive the right. *See San Antonio Real-Estate, Building & Loan Ass'n v. Stewart*, 61 S.W. 386, 389 (Tex. 1901) ("But, aside from this, while neither party by his separate action or nonaction could impair the rights of the other, each could waive his own rights as they accrued from the default in payment of an installment so as to estop him from relying upon such default.");

see also Shields, 2017 WL 2023602, at *10 ("Waiver is 'essentially unilateral' in character and 'results as a legal consequence from some act or conduct of the party against whom it operates; no act of the party in whose favor it is made is necessary to complete it.'").

Relying on its *Erie* guess, intermediate Texas appellate court opinions, and these waiver principles, the Fifth Circuit held that the lender's second default notice "unequivocally manifested an intent to abandon the previous acceleration and provided the Borens with an opportunity to avoid foreclosure if they cured their arrearage"; thus, "the statute of limitations period under § 16.035(a) ceased to run at that point and a new limitations period did not begin to accrue until the Borens defaulted again and U.S. Bank exercised its right to accelerate thereafter." *Boren*, 807 F.3d at 106. Other Fifth Circuit cases decided after *Boren* have followed the same logic. *Hernandez*, 2017 WL 1437279, at *2–3; *Meachum*, 636 F. App'x at 212–13.

Although the holdings in two Texas cases at first appear to conflict with the *Boren* line of cases, they are distinguishable. In *Residential Credit Solutions, Inc. v. Burg*, a declaratory judgment suit brought by the borrower, the loan servicer had sent the borrower two proposed stipulation agreements after default providing that if the borrower paid the past due amounts over a five-month period, the scheduled monthly payments under the note would thereafter resume. No. 01-15-00067-CV, 2016 WL 3162205, at *1 (Tex. App.—Houston [1st Dist.] June 2, 2016, no pet.) (mem. op.). Neither agreement was signed by

both parties, but both contained no-waiver clauses. *Id.* The borrower and loan servicer both signed a trial loan modification plan a little over a year after the lender had accelerated the maturity date of the note. *Id.* The plan contained the following provision: "When Lender accepts and posts a payment during the Trial Period it will be without prejudice to, and will not be deemed a waiver of, the acceleration of the loan or foreclosure action and related activities and shall not constitute a cure of any default under the Loan Documents unless such payments are sufficient to completely cure [the borrower's] entire default under the Loan Documents." *Id.* at *2. When the borrower failed to make payments as promised under the trial plan, the lender terminated the plan and mailed a new notice of default and intent to accelerate to the borrower; two months later, the lender accelerated the maturity date of the note. *Id.* The lender later filed a claim for judicial foreclosure in a separate proceeding that was automatically dismissed when the borrower filed its suit. *Id.* The borrower filed a motion for summary judgment claiming that the statute of limitations had expired and that there was no evidence that the lender had abandoned the 2008 acceleration. *Id.* The trial court granted a final summary judgment for the borrower. *Id.*

Relying on the Fifth Circuit's *Leonard* opinion, the lender argued on appeal that the evidence showed it had "'clearly and unequivocally abandoned' acceleration" by sending the borrower the two stipulation agreements saying it would accept payment only of the past due amounts. *Id.* at *2, *4. But the court of appeals held that neither of the proposed stipulation agreements evidenced an

abandonment of acceleration because the lender expressly reserved the right to maintain the then-pending foreclosure action and because the plain language stated that the lender would abandon acceleration only if the borrower paid all of the required past due amounts according to the schedule set forth therein. *Id.* at *4. The court also held that the lender's acceptance of one past-due amount in connection with the trial modification plan did not show an abandonment of acceleration because that agreement stated that receipt of payments thereunder would not affect acceleration. *Id.*

Here, unlike in *Burg*—and the *Boren* line of cases cited above—the notice upon which the lender relies to evidence abandonment of acceleration does not contain internal language clearly evidencing an intent not to abandon acceleration.

Similarly, in *Fitzgerald v. Harry*, this court held that the evidence did not show that the lender had abandoned acceleration of a note. No. 2-02-330-CV, 2003 WL 22147557, at *5 (Tex. App.—Fort Worth Sept. 18, 2003, no pet.) (mem. op.). Fitzgerald defaulted on a note and Harry, the lender, sent notices of intent to accelerate and acceleration. *Id.* at *1. Fitzgerald then filed a voluntary bankruptcy petition, which was later dismissed. *Id.* After the dismissal, Harry sent Fitzgerald a notice of the continuing delinquency on the note and second notices of intent to accelerate and acceleration. *Id.* Fitzgerald filed yet another bankruptcy petition, which was also dismissed. *Id.* The substitute trustee notified Fitzgerald again of the delinquent status of the note, demanded full

payment, and then—without waiting the required twenty days—accelerated the maturity date when Fitzgerald made no payments. *Id.* at *2. Harry foreclosed on the property, and Fitzgerald later sued him for wrongful foreclosure. *Id.* The parties filed competing motions for summary judgment as to whether the foreclosure was wrongful; the trial court denied Fitzgerald's and granted Harry's. *Id.*

On appeal, Fitzgerald contended that Harry had abandoned any prior acceleration of the note before the last notice of intent to accelerate. *Id.* at *4. That last notice, like the one in this case, contained present tense language: "In the event you do not pay your note payments . . . your unpaid note balance will be accelerated." *Id.* The issue was not whether the statute of limitations had expired but whether the subsequent letters sent after the initial failure to foreclose and dismissal of the bankruptcy petitions—along with the lender's alleged acceptance of partial payments—indicated an intent to waive acceleration and foreclosure in the future. *Id.* at *4–5. Unlike in this case or any of the *Boren* line of cases, in *Fitzgerald*, the lender had, over a less-than-two-year period, engaged on a continuing course of attempting to foreclose on its secured property interest, thwarted only by the borrower's attempts to avoid his obligation in bankruptcy proceedings. Thus, it too is distinguishable.

Here, the evidence presented on summary judgment shows that, with respect to Nationstar's lien, after the prior lender sent its letter indicating that the amount due had been accelerated in September 2008, the borrowers sued to

prevent the foreclosure. There is no evidence that the lender filed a counterclaim. The trial court dismissed the borrowers' suit in August 2009. There is no evidence that the lender took any action within the next three years to collect on or enforce the note except for the January 2010 letter seeking only the past due amounts on the loan—not the matured loan amount—and indicating that if those past due amounts were not cured, the loan would be accelerated in the future. *Cf. Rivera v. Bank of Am., N.A.*, 607 F. App'x 358, 361 (5th Cir. 2015) (noting no contrary evidence existed to show that, despite lender's acceptance of payments less than the accelerated amount, the parties treated the acceleration as anything other than abandoned). In the absence of any other evidence (as was the case in the distinguishable cases cited above), the January 2010 letter—which is replete with language inconsistent with the then-present right to foreclose[4]—compels the conclusion that the lender abandoned the acceleration. *See, e.g.*, *Hernandez*, 2017 WL 1437279, at *2–3; *Meachum*, 636 F. App'x at 212–13; *Boren*, 807 F.3d at 106; *Leonard*, 616 F. App'x at 679–80.

Accordingly, we conclude and hold that the trial court did not err by granting Nationstar's motion for summary judgment. We overrule NSL's sole issue.

[4]Additionally, there is no evidence that the letter was sent in error or otherwise unintentionally.

Conclusion

Having overruled NSL's issue, we affirm the trial court's judgment.

/s/ Terrie Livingston

TERRIE LIVINGSTON
CHIEF JUSTICE

PANEL: LIVINGSTON, C.J.; WALKER and MEIER, JJ.

DELIVERED: August 17, 2017