TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-16-00795-CV

Mark Metcalf and Cheryl Metcalf, Appellants

v.

Wilmington Savings Fund Society, FSB, d/b/a Christiana Trust, Not In Its Individual Capacity but solely as Trustee for BCAT 2014-9TT, and Rushmore Loan Management Services, LLC, Appellees

FROM THE DISTRICT COURT OF TRAVIS COUNTY, 353RD JUDICIAL DISTRICT NO. D-1-GN-003696, HONORABLE LORA LIVINGSTON, JUDGE PRESIDING

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

Mark and Cheryl Metcalf challenge the trial court's rendition of summary judgment in favor of Wilmington Savings Fund Society, FSB, d/b/a Christiana Trust (Wilmington), as Trustee for BCAT 2014-9TT (BCAT), and Rushmore Loan Management Services, LLC (Rushmore) (collectively, "the Lender Defendants"). The trial court ordered that all right, title, and interest to certain real property located in Travis County was fully vested in Wilmington pursuant to a substitute trustee's deed executed after a foreclosure sale. We will affirm.

BACKGROUND[1]

In 2005, the Metcalfs obtained a purchase money loan to acquire property located at 7401 Twilight Shadow Drive in Austin (the Property). Cheryl Metcalf executed a promissory note in the original principal amount of $400,000. The Note was secured by a Deed of Trust in which the Metcalfs granted and conveyed the Property to the trustee to hold in trust with the power of sale. The Note and Deed of Trust were assigned and transferred over the years, but the parties agree that Wilmington and Rushmore were the mortgagee and mortgage servicer when the Property was ultimately sold in a foreclosure sale.

In 2010, Cheryl Metcalf stopped making payments on the loan and BAC Home Loans Servicing, LP, at that time the mortgage servicer, sent the Metcalfs a notice that if they did not pay a specific amount by a specific date it would accelerate the debt. The Metcalfs did not tender the amount BAC demanded, and on June 23, 2010, BAC advised them that it had accelerated the Note and gave notice of a foreclosure sale. Before the sale occurred, the Metcalfs petitioned a federal bankruptcy court in the Western District of Texas for bankruptcy relief under Chapter 13 of the United States Bankruptcy Code. The case was converted to a Chapter 7 case, and the Metcalfs were personally discharged in March 2011.

After the discharge, BAC sent another notice of acceleration of the Note in May 2011 along with notice of a foreclosure sale to be held on July 5, 2011. Days before the sale was scheduled

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[1] The facts recited in this section are derived from the pleadings and summary judgment evidence presented to the trial court and, unless otherwise indicated, are undisputed. The parties are familiar with the facts and procedural history of the case. Accordingly, we will not recite them here except as necessary to advise the parties of the Court's decision and the basic reasons for it. *See* Tex. R. App. P. 47.4.

to occur, the Metcalfs filed suit in Travis County District Court (the 2011 suit) seeking to prevent the sale, alleging that BAC did not timely offer them a loan modification and interfered with their attempts to complete a sale of the property that would have permitted them to pay the loan in full. The trial court granted the Metcalfs' request for a temporary restraining order preventing the foreclosure sale. BAC filed a counterclaim in the 2011 suit on November 4, 2013, seeking a declaration that it had complied with Texas law and the terms of the Deed of Trust and Note and was therefore authorized to proceed with a non-judicial foreclosure sale of the Property pursuant to Texas law and the terms of the Deed of Trust. In the alternative, BAC requested that the court sign an order foreclosing on the lien and authorizing sale of the Property. BAC filed a motion for summary judgment on the Metcalfs' claims against it, as well as a motion for summary judgment on its counterclaim, and requested the Court to order that BAC was authorized to proceed with foreclosure of the Property in accordance with the terms of the Deed of Trust.

On the day of the summary-judgment hearing, the Metcalfs filed a notice of nonsuit of their claims against BAC. After the hearing, the trial court signed an order granting BAC's motion for summary judgment in which it recited that "[BAC], or its successors or assigns, may lawfully proceed with the foreclosure sale of the property at issue in this litigation pursuant to the terms of the Deed of Trust and § 51.002 of the Texas Property Code." The order, dated December 2, 2013, included the address and legal description of the Property and directed that "[u]pon conveyance of the property by Substitute Trustee's Deed after public sale, [BAC] will file a Report of Sale with the Court, and will thereafter petition the Court for an Order confirming that the public sale was held in accordance with the loan documents." Neither party filed a notice of appeal from or otherwise challenged the trial court's order.

During the next two years, rather than sell the Property in a foreclosure sale, the successor mortgage servicers, Bank of America, N.A. and later Rushmore, sent the Metcalfs several notices asking them to pay balances due on the Note. The Metcalfs did not make any payments on the Note and twice more sought protection under Chapter 13 of the United States Bankruptcy Code. After the third bankruptcy proceeding was dismissed with prejudice in July 2015, Rushmore sent another notice of acceleration of the Note and included a notice that a foreclosure sale was scheduled for September 1, 2015. On August 31, 2015, the Metcalfs filed the proceeding underlying this appeal, seeking a temporary restraining order to prevent the sale. The trial court did not grant the requested relief. The public sale of the Property went forward hours before the Metcalfs filed a fourth bankruptcy proceeding. The substitute trustee executed a Substitute Trustee's Deed conveying the Property to Wilmington.

The Metcalfs then amended their petition to allege that the Lender Defendants had "lost any lien or claim to the [P]roperty through the running of limitations by failing to file a lawsuit or foreclose within four years of accelerating the debt" on June 23, 2010. According to the Metcalfs, the Lender Defendants' lien or claim to the Property had become, through the passage of time, "invalid and unenforceable." *See* Tex. Civ. Prac. & Rem. Code § 16.035(a) (providing that person must bring suit for recovery of real property under real property lien or foreclosure of real property not later than four years after day cause of action accrues), (b) (sale of real property under power of sale in mortgage or deed of trust that creates real property lien must be made not later than four years after day cause of action accrues), (c) (on expiration of four-year limitations period real property lien and power of sale to enforce real property lien become void). The Metcalfs sought a declaration

that limitations had run on the Lender Defendants' right to foreclose several months before the September 2015 sale and asked the trial court to set aside the sale, cancel the substitute trustee's deed, and quiet title to the Property in their name.

The Metcalfs and the Lender Defendants filed cross-motions for summary judgment. After a hearing, the trial court denied the Metcalfs' motion, granted the Lender Defendants' motion, and declared that right and title to the Property was fully vested in Wilmington pursuant to the September 1, 2015 Substitute Trustee's Deed. The Metcalfs then perfected this appeal arguing that the trial court erred by concluding that the real property lien on the Property, along with the power of sale to enforce that lien, were not void due to the expiration of the four-year limitations period.

STANDARD OF REVIEW

We review the district court's summary judgment de novo. *Valence Operating Co. v. Dorsett*, 164 S.W.3d 656, 661 (Tex. 2005); *Provident Life & Accident Ins. Co. v. Knott*, 128 S.W.3d 211, 215 (Tex. 2003). Summary judgment is proper when there are no disputed issues of material fact and the movant is entitled to judgment as a matter of law. Tex. R. Civ. P. 166a(c); *Shell Oil Co. v. Khan*, 138 S.W.3d 288, 291 (Tex. 2004). When, as here, both parties move for summary judgment on overlapping issues and the trial court grants one motion and denies the other, we review the summary-judgment evidence presented by both sides, determine all questions presented, and render the judgment the trial court should have rendered. *Texas Workers' Comp. Comm'n v. Patient Advocates of Tex.*, 136 S.W.3d 643, 648 (Tex. 2004); *FM Props. Operating Co. v. City of Austin*, 22 S.W.3d 868, 872 (Tex. 2000). When the trial court does not specify the ground for its ruling, summary judgment must be affirmed if any of the grounds on which the judgment was

sought are meritorious. *State v. Ninety Thousand Two Hundred Thirty-Five Dollars & No Cents in U.S. Currency*, 390 S.W.3d 289, 292 (Tex. 2013).

DISCUSSION

Texas Civil Practice and Remedies Code section 16.035(a) provides that "[a] person must bring suit for the recovery of real property under a real property lien or the foreclosure of a real property lien not later than four years after the day the cause of action accrues." *See* Tex. Civ. Prac. & Rem. Code § 16.035(a).[2] The statute also provides that "[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." *Id.* § 16.035(b). Ordinarily, a cause of action does not accrue until "the maturity date of the last note, obligation, or installment." *Id.* § 16.035(e). However, if, as here, the note or deed of trust contains an optional acceleration clause, the cause of action accrues—and the limitations period begins to run—when the holder "actually exercises" its option to accelerate. *Holy Cross Church of God in Christ v. Wolf*, 44 S.W.3d 562, 566-67 (Tex. 2001).

Thus, a suit to foreclose on a deed of trust must be brought within four years of the exercise of the option to accelerate the note it secures. Likewise, a sale of property pursuant to a power of sale in a mortgage or deed of trust must take place within four years of the exercise of the option to accelerate. Once the four-year limitations period has expired, both the real property lien and the power of sale to enforce the real property lien become void. *Id.* § 16.035(d). In this suit to set aside the sale of the Property, the Metcalfs asserted that (1) the Lender Defendants exercised the

[2] "Real property lien" includes a deed of trust. *See* Tex. Civ. Prac. & Rem. Code § 16.035(g)(2).

option to accelerate the Note on June 23, 2010,[3] (2) taking into account tolling periods, the four-year period for the Lender Defendants to sell the property pursuant to the power of sale in the Deed of Trust expired on March 31, 2015, and (3) the power of sale in the Deed of Trust became void on that date. As a consequence, the Metcalfs contended that the Lender Defendants did not have the legal right to sell the property on September 1, 2015, and that the sale should be set aside.

The undisputed summary-judgment evidence establishes, however, that the Lender Defendants' predecessor brought suit to foreclose on the Deed of Trust on November 4, 2013 by filing a counterclaim for an order of foreclosure in the 2011 suit. The Lender Defendants argue that the Deed of Trust, a real property lien, was valid at the time the counterclaim for foreclosure was filed and that the counterclaim prevented the limitations period from expiring and rendering the real property lien void. The Lender Defendants maintain that they sold the property pursuant to the trial court's order authorizing the sale according to the terms of the power of sale in the Deed of Trust.

Assuming the Metcalfs are correct that the four-year limitations period commenced on June 23, 2010, the Lender Defendants predecessor's counterclaim requesting an order of foreclosure was filed well within the limitations period. The Metcalfs counter, however, that the Lender Defendants "voluntarily nonsuited or abandoned the judicial foreclosure suit" shortly after filing it "by pursuing and securing solely an order to foreclosure [sic] nonjudicially under the deed of trust." On appeal, they continue to argue that the November 4, 2013 counterclaims "are never

[3] The Lender Defendants argue that they abandoned acceleration of the Note and that June 23, 2010 is not the correct date from which to calculate the limitations period. For purposes of our analysis, however, we will assume, without deciding, that the four-year limitations period was triggered on June 23, 2010.

implicated" in calculating the four-year limitations period. We understand the Metcalfs' argument to be that the November 4, 2013 counterclaim did not operate to preserve the validity of the Deed of Trust or, correspondingly, the Lender Defendants' right to sell the property pursuant to the terms of the Deed of Trust. We disagree.

The November 4, 2013 counterclaim was filed within four years of June 23, 2010, and the trial court's summary-judgment order grants the relief the Lender Defendants sought—an order confirming that they "may lawfully proceed with the foreclosure sale of the property at issue in this litigation." The plain language of section 16.035(a) does not require that the actual foreclosure occur within the four-year limitations period, but rather "requires only that the party seeking foreclosure 'bring suit . . . not later than four years after the day the cause of action accrues.'" *Slay v. Nationstar Mortg., L.L.C.*, No. 02-09-00052-CV, 2010 WL 670095, at *3 (Tex. App.—Fort Worth Feb. 25, 2010, pet. denied) (mem. op.). The Metcalfs insist, however, that the term "suit for . . . foreclosure of a real property lien" in Texas Civil Practice and Remedies Code section 16.035(a) refers solely and exclusively to a suit that requests *and* results in a judgment that orders a sheriff's or constable's sale pursuant to rule 309 of the Texas Rules of Civil Procedure, what they refer to as "judicial foreclosure."[4] Thus, in their view, the Lender Defendants' suit that resulted in a judgment

[4] Rule 309 provides:

> Judgments for the foreclosure of mortgages and other liens shall be that the plaintiff recover his debt, damages and costs, with a foreclosure of the plaintiff's lien on the property subject thereto, and, except in judgments against executors, administrators, and guardians, that an order of sale shall issue to any sheriff or constable within the State of Texas directing him to seize and sell the same as under execution, in satisfaction of the judgment; . . . .

Tex. R. Civ. P. 309.

ordering a sale pursuant to the Deed of Trust and Texas Property Code section 51.002, which they refer to as "non-judicial foreclosure," did not prevent the Deed of Trust from becoming void four years after acceleration of the Note.

The November 4, 2013 counterclaim requested both a declaration confirming that foreclosure pursuant to the Deed of Trust was authorized and, alternatively, an order foreclosing on the lien. Thus, even were we to agree with the Metcalfs that section 16.035(a) refers strictly to a suit seeking a judgment of foreclosure by sheriff's or constable's sale, the Lender Defendants' counterclaim asking for such relief, albeit in the alternative, qualifies. We are unpersuaded by the Metcalfs' contention that the ultimate form of the trial court's order—an order that the lender could proceed with a foreclosure sale pursuant to the terms of the Deed of Trust—eradicated the alternative request for an order foreclosing on the lien. The Lender Defendants' counterclaim seeking confirmation of the right to foreclose under the Deed of Trust and, in the alternative, an order of foreclosure, served to prevent the four-year limitations period in section 16.035 from expiring and the deed of trust and power of sale from becoming void.

We also observe that the statute does not itself define a "suit for the foreclosure of a real property lien" to mean only a suit seeking an order of sale by a sheriff or constable as provided in Texas Rule of Civil Procedure 309. The Metcalfs provide no authority for their assertion that a suit seeking to confirm a party's right to foreclose is not itself a "suit for the foreclosure of a real property lien" sufficient to toll limitations.[5] We see no objective that would be attained by

[5] A party holding a deed of trust with a power of sale is not prohibited from seeking an order from a court authorizing foreclosure. A party *may* exercise the power of sale and foreclose on property without judicial intervention, but the power of sale does not interdict the holder's right to

construing section 16.035(a) to provide that a suit seeking a rule 309 judgment of foreclosure prevents a deed of trust from becoming void while a suit to confirm that the holder has authority to foreclose on the same deed of trust does not. *See* Tex. Gov't Code § 311.023 (directing court construing statute to consider object to be attained and consequences of particular construction). It is neither uncommon nor undesirable for a lender, faced with a suit like this one challenging its right to foreclose on property, to seek court confirmation that it is within its rights and has performed all acts necessary to proceed with foreclosure under a deed of trust. The purpose of a limitations period is to preclude "stale or spurious claims." *See S.V. v. R.V.*, 933 S.W.2d 1, 5 (Tex. 1996). That purpose would not be served by construing section 16.035(a) to incorporate the definitional restriction the Metcalfs advocate. A lender actively attempting to navigate a legal obstacle course of litigation and bankruptcies cannot be said to be "sleeping on its rights." *See Little v. Smith*, 943 S.W.2d 414, 418 (Tex. 1997) ("Statutes of limitations preclude claimants from sleeping on their rights.").

The counterclaim filed on November 4, 2013 constituted a "suit for foreclosure of a real property lien" filed not later than four years after the cause of action accrued. Consequently, the Deed of Trust did not become void pursuant to section 16.035(d). The trial court properly granted the Lender Defendants' motion for summary judgment and ordered that title to the Property was vested in Wilmington.

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seek judicial confirmation that it is legally authorized to foreclose. Our sister courts have regularly affirmed trial court judgments authorizing foreclosure pursuant to the terms of a deed of trust rather than ordering a sheriff's sale. *See, e.g.*, *Weeks v. Bank of America, N.A.*, No. 02-13-00039-CV, 2014 WL 345633 (Tex. App.—Fort Worth Jan. 30, 2014, no pet.) (mem. op.); *Athey v. Mortgage Elec. Registration Sys., Inc.*, 314 S.W.3d 161, 167 (Tex. App.—Eastland 2010, pet. denied).

CONCLUSION

For the reasons stated in this opinion, the trial court's judgment is affirmed.

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Scott K. Field, Justice

Before Chief Justice Rose, Justices Field and Bourland

Affirmed

Filed: March 29, 2017