STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

Sport Mart, Inc. and R. Brawley Tracy,
Defendants Below, Petitioners

vs) No. 11-0048 (Putnam County 09-C-13)

Debra Knell and Withrow-Wills, L.L.C.,
Plaintiffs Below, Respondents

FILED
November 28, 2011
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioners (defendants below), Sport Mart, Inc. ("Sport Mart") and R. Brawley Tracy ("Tracy"), appeal from the circuit court's order dismissing this action and finding in favor of respondents (plaintiffs below), Debra Knell ("Knell") and Withrow-Wills, L.L.C. ("Withrow-Wills"), on the basis that the foreclosure actions taken by petitioners are barred by the statute of limitations. Petitioners seek a reversal of the circuit court's order. Respondents have each filed a response brief.[1]

This Court has considered the parties' briefs and the record on appeal. The facts and legal arguments are adequately presented in the parties' written briefs and the record on appeal, and the decisional process would not be significantly aided by oral argument. Upon consideration of the standard of review, the briefs, and the record presented, the Court finds no substantial question of law and no prejudicial error. For these reasons, a memorandum decision is appropriate under Rule 21 of the Revised Rules.

Respondent Knell and Gary Cullifer ("Cullifer") were previously married and jointly owned certain real estate in Putnam County, namely the Richard Drive property and several lots located in the Town of Bancroft ("the subject property"). In 1987, Knell and Cullifer became indebted on a Promissory Note to Charleston National Bank that was secured by a Deed of Trust on the subject property. After making two payments on the Note in 1987, Knell and Cullifer made no further payments.

On May 19, 1988, Cullifer and Knell filed for bankruptcy. On June 13, 1988, Charleston National Bank assigned its Note and Deed of Trust to Tracy and/or Sport Mart.

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[1]Although defendant Gary Curtis Cullifer is listed as a respondent in the Petition for Appeal, he has not filed any brief in this Court and, thus, has not participated in this appeal.

On June 15, 1988, Tracy filed a proof of claim in the bankruptcy proceeding. On April 10, 1989, the bankruptcy trustee filed a Notice of Abandonment reflecting the election to abandon any interest of the bankruptcy estate in the subject property. The Notice of Abandonment was later withdrawn as to the Richard Drive property. On June 26, 1989, the Bankruptcy Court entered its discharge order discharging Knell and Cullifer from any legal obligation under the Note. Neither Charleston National Bank, nor Tracy, nor Sport Mart filed any objection to the discharge.

Cullifer and Knell divorced sometime after their bankruptcy filing. Pursuant to their divorce, the subject property securing the Note was divided between them with Cullifer taking the Bancroft lots and Knell the Richard Drive property, each assuming the respective debt obligation thereon. Cullifer subsequently executed a general warranty deed on January 20, 1997, conveying the Bancroft property to James Withrow and Nathan Wills. At the time of this conveyance, Withrow and Wills had a title search performed and were informed that Cullifer possessed clear, marketable title, and the transaction was closed.

Withrow and Wills later formed respondent Withrow-Wills, a West Virginia limited liability company, and transferred the Bancroft property to it. In 2008, Withrow-Wills entered into a contract to sell the Bancroft property. The purchaser's title examination revealed the Deed of Trust held by Tracy, who advised the title attorney that the lien had been assigned to Sport Mart as of June 13, 1988. This assignment was not placed of record until September 15, 2008.

On November 17, 2008, Tracy and Sport Mart initiated foreclosure proceedings under the Deed of Trust indicating that they would sell the Richard Drive property owned by Knell. Upon receipt of the Notice of Trustee's Sale, Knell asked that the sale be postponed so that she could determine what action to take. On January 6, 2009, she instituted the case-at-bar seeking a temporary restraining order and a declaration that the Deed of Trust was barred by, among other things, the applicable statute of limitations. Withrow-Wills filed its own Verified Complaint on February 27, 2009, seeking a declaration that the debt set forth in the Note and secured by the Deed of Trust was unenforceable, invalid, and time-barred. Cullifer was added as a defendant to Knell's action, and the two actions were consolidated for purposes of disposition.

On December 8, 2010, the circuit court entered an "Order Finding for the Plaintiffs and Dismissing the Action." While this order does not cite Rule 56 of the West Virginia Rules of Civil Procedure, nor does it state that "summary judgment" is being entered, the order reflects that there were no disputed facts and that the circuit court was resolving a question of law. Accordingly, we have utilized our standard of review for summary

judgment.[2] Having considered the parties' arguments and record on appeal, the Court finds no error and incorporates, adopts, and attaches hereto the circuit court's well-reasoned order.

For the foregoing reasons, we affirm.

Affirmed.

ISSUED: November 28, 2011

CONCURRED IN BY:

Chief Justice Margaret L. Workman
Justice Robin Jean Davis
Justice Brent D. Benjamin
Justice Menis E. Ketchum
Justice Thomas E. McHugh

[2] "A circuit court's entry of summary judgment is reviewed *de novo*." Syl. Pt. 1, *Painter v. Peavy*, 192 W.Va. 189, 451 S.E.2d 755 (1994).

IN THE CIRCUIT COURT OF PUTNAM COUNTY, WEST VIRGINIA

DEBRA KNELL, and
WITHROW-WILLS, L.L.C.

Plaintiffs,

v. Consolidated Civil Action No. 09-C-13
(Judge O.C. Spaulding)

SPORT MART, INC.,
R. BRAWLEY TRACY,
and GARY CURTIS CULLIFER

Defendants.

ORDER FINDING FOR THE PLAINTIFFS AND DISMISSING THE ACTION

The above styled action traces its origins to a Note that was executed on May 12, 1987. More immediately, the above styled action traces its history to a foreclosure proceeding brought by R. Brawley Tracey ("Mr. Tracey") and Sport Mart, Inc., ("Sport Mart"). The current action before this Court was consolidated from two other cases. The first was Civil Action No. 09-C-13, filed on January 6, 2009, which was an injunction brought by Debra Knell ("Ms. Knell"), who was formerly known as Ms. Cullifer, and Withrow Wills, L.L.C. ("Withrow Wills") to stop Mr. Tracey and Sport Mart from foreclosing on the Note at issue. The second, Civil Action No. 09-C-70, filed on February 27, 2009, was a motion by Withrow Wills to intervene and to add Gary Curtis Cullifer ("Mr. Cullifer") as a defendant.

At a hearing on August 26, 2010, the parties indicated that there were no facts in dispute and the case should be resolved on a question of law. Accordingly, the Court directed the parties to brief the issues before the Court. Currently, the Court is in possession of Sport Mart and Mr. Tracey's *Brief in Support of Foreclosing Defendant's Right to Both Principal and Interest Under the Terms of the Governing Deed of Trust* (dkt. no. 43), Withrow-Wills' *Memorandum in Support of Motion for Summary Judgment* (dkt. no. 47), Ms. Knell's *Brief Submitted in Support of Plaintiff, Debra Knell* (dkt. no. 48) and Mr. Cullifer's *Brief Submitted in Support of Defendant, Gary Curtis Cullifer* (dkt. no. 49). After a review of the record, including the parties' stipulation of the facts, all of the briefs submitted by the parties, and all legal precedent, this Court finds as follows.

BACKGROUND

The major facts in this case are not in dispute and are set forth in a *Stipulation of Fact* memorandum prepared by all of the parties. *Stipulation of Fact*, August 26, 2010, dkt. no. 41. The pertinent facts that are necessary for this Court to make a decision are as follows. Ms. Knell and Mr. Cullifer were previously married. During this marriage, on May 12, 1987, the two executed a Promissory Note ("Note") in the amount of $8,500.00, payable to Charleston National Bank secured by a Deed of Trust.

The Note contained an acceleration clause which stated

> That in the event the said parties of the first part [the Cullifer's] shall make default in the payment of any note or other obligation hereby secured, or any installment thereof, when the same is due and payable, and such default shall continue for a period of ten (10) days, or in the event they shall breach any covenant or agreement herein contained by them to be kept and performed, or

> upon maturity of the indebtedness hereby secured by lapse of time or otherwise, then all of the indebtedness secured by this deed of trust shall, at the option of the owner or holder of the said note or other obligation, immediately become due and payable without further notice than is herein contained . . . .

To secure the Note, the Deed of Trust gave Charleston National Bank a lien on two tracts of real estate owned by the Cullifers: (1) 85 Richard Drive, Poca, West Virginia; (2) Lots 32, 33, 34, and 35 in the Town of Bancroft, West Virginia. The Cullifer's made two payments on the Note and thereafter defaulted.

On May 19, 1988, the Culifer's filed for bankruptcy. "On or about June 13, 1988, Charleston National Bank assigned the note and deed of trust to Sport Mart, Inc., and/or R. Brawley Tracy, but the assignment was not recorded until September 15, 2008." *Stipulation of Fact*, August 26, 2010, dkt. no. 41, pg. 3, ¶ 13. On June 15, 1988, a Proof of Claim was filed in the bankruptcy proceeding by Mr. Tracey. The Proof of Claim gave the Trustee notice of the Mr. Tracey's claim in the amount of $7, 973.77 plus daily interest thereafter in the amount of $2.62 from June 7, 1988. On April 10, 1989, the Trustee filed a Notice of Abandonment on the properties listed in the Deed of Trust. The Notice of Abandonment was later withdrawn as to the 85 Richard Drive, property. During this period, no party attempted to foreclose on this property. On June 26, 1989, the United States Bankruptcy Court for the Southern District of West Virginia entered its Discharge Order discharging the Cullifer's obligations on the Note. None of the parties before this Court filed an objection to this Order.

Sometime after the bankruptcy, Debra Cullifer, now Debra Knell was granted a divorce. Ms. Knell was awarded the 85 Richard Drive property and was responsible for the indebtedness thereon. Mr. Cullifer was awarded Lots 32, 33, 34,

and 35 in the Town of Bancroft, West Virginia and was responsible for the indebtedness thereon. "On or about January 20, 1997, [Mr.] Cullifer executed a general warranty deed in favor of James Withrow and Nathan Wills, conveying the property located in Bancroft, West Virginia, being lots 32, 33, 34 and 35. The Declaration of Consideration of Value stated: $8,776.95. This amount represented the balance of that certain Deed of Trust Note execurted [*sic*] by Gary Cullifer on July 20, 1978 for the principle sum of $44,000.00." *Stipulation of Fact*, August 26, 2010, dkt. no. 41, pg. 3, ¶ 14. Mr. Tracey and Sport Mart are currently trying to foreclose on all of the properties at issue based upon their rights under the May 12, 1987, Deed of Trust originally executed by the Cullifers.

DISCUSSION

The central issue in this case is whether the lien created by this Deed of Trust is still valid and enforceable so that Mr. Tracey and Sport Mart can foreclose on the properties. West Virginia law states that one has twenty-years to enforce a lien once the obligation is due. W.Va. Code § 55-2-5. In the case at bar, the question of when the obligation was due depends on whether the Note's acceleration clause as quoted *supra*, was exercised. The plaintiffs' aver that the filing of the Proof of Claim on June 15, 1988, invoked the acceleration clause in the Note and made the whole debt due, and therefore, the twenty year statute of limitations for the enforcement of a lien had passed. For the reason stated *ante*, this Court agrees.

In determining when an acceleration clause in a default is invoked, one must determine if the clause is automatic or optional. K. A. Dreschler, *Acceleration of note or mortgage as automatic or optional*, 159 A.L.R. 1077. An automatic acceleration clause is exactly that, automatic. *Id.* It requires no action on the part

of the contracting parties. Basically, it is self-executing. An optional acceleration clause, however, requires some action on the part of the invoking party, "without which the full amount will not become due." *Id.* In the case at bar, the acceleration clause states that the clause will be invoked "at the option of the owner or holder of the said note or other obligation.[1]" Consequently, once the Cullifer's defaulted on their obligations, the non-defaulting party had the option to invoke the acceleration clause.

The West Virginia Supreme Court of Appeals has not ruled on how one can effectively invoke an acceleration clause. However, many other jurisdictions have ruled on the issue. The consensus among these courts is that the one invoking the acceleration clause must take an affirmative step to apprise the defaulting party that the debt is due now. *Clark v. Trumble*, 44 Mass. App. Ct. 438, 692 N.E.2d 74 (1998); *Morris v. Granger*, 675 S.W.2d 15, 17 (Mo.Ct.App.1984); *Central Home Trust. Co. of Elizabeth v. Lippincott*, 392 So.2d 931 (Fla. App., 1980); *Moresi v. Far West Services, Inc.*, 291 F.Supp. 586 (D.Hawaii 1968); *United Ben. Life Ins. Co. v. Holman*, 177 Neb. 682, 130 N.W.2d 593 (1964); *Boulukos v. Chresafes*, 20 Misc. 2d 673, 187 N.Y.S.2d 141 (Sup 1959); *Kleiman v. Kolker*, 189 Md. 647, 57 A.2d 297 (1948). An objective test is used when determining if an affirmative step was taken. *Richards Engineers, Inc. v. Spanel*, 745 P.2d 1031 (Colo. App. 1987). One can affirmatively invoke the acceleration clause and put the defaulting party on notice by filing suit against the defaulting party. *United Ben. Life Ins. Co. v. Holman*, 177 Neb. 682, 130 N.W.2d 593 (1964). In the context of a demand note, making a

[1] Withrow-Wills, by Counsel J. Robert Leslie, Esq., argues that the acceleration clause in the Note is automatically invoked. In arguing this point Mr. Leslie quotes, in his *Memorandum in Support of Motion for Summary Judgment*, the acceleration clause in the Note. However, Mr. Leslie improperly leaves out the above quoted section. The omission of this section completely changes the meaning of the acceleration clause. For the reasons stated *supra*, this Court disagrees with Mr. Leslie and finds that it was an optional acceleration clause. The Court will assume that counsel did not understand the relevance of the option language in the acceleration clause and its omission was not an attempt by counsel to intentionally misdirect the Court.

demand for payment or sending a written notice is an affirmative step that will put the defaulting party on notice. *Clark v. Trumble*, 44 Mass. App. Ct. 438, 692 N.E.2d 74 (1998); *Central Home Trust. Co. of Elizabeth v. Lippincott*, 392 So.2d 931 (Fla. App., 1980).

Therefore, the next question for this Court is whether filing a Proof of Claim in a bankruptcy proceeding is an affirmative step to apprise the defaulting party that the debt is due now. After extensive research by this Court and the parties involved, only one case can be found that has dealt with this issue: *Barnett v. Hitching Post Lodge, Inc.*, 101 Ariz. 488, 421 P.2d 507 (1966). In that case, the Supreme Court of Arizona found, *inter alia*, that an acceleration clause was invoked when the non-defaulting party took the affirmative step of filing a proof of claim against the defaulting party. *Id.* This Court agrees with the Arizona Court's conclusion.

To explain why this Court agrees with *Barnett*, this Court must define proof of claim. Black's Law Dictionary (7th ed.) defines a proof of claim as "[a] creditor's written statement that is submitted to show the basis and amount of the creditor's claim." The reason that bankruptcy courts require a proof of claim is to "alert the bankruptcy court, trustee, and other creditors, *as well as the debtor* to the existence of the particular claim so as to facilitate the orderly administration of the bankruptcy case." *In re Bargdill*, 238 B.R. 711, 717 (Bkrtcy.N.D.Ohio 1999) (citations omitted) (emphasis added). Basically, a proof of claim is a way for a creditor to put essential parties on notice that the debtor/defaulting party owed the creditor money and that the creditor wants to be paid.

In the case at bar, the affirmative step taken by R. Brawley Tracey was the filing of the proof of claim. This proof of claim put, *inter alia*, the Cullifers on notice

that their debt obligation was now due. Consequently, the acceleration clause was invoked and the debt became due immediately on June 15, 1988.

W.Va. Code § 55-2-5 is a statute of limitations that "expressly fixes the time for enforcement of liens created by trust deeds and certain other instruments." *Miller v. Diversified Loan Service Company, et al.*, 181 W.Va. 320, 323, 382 S.E.2d 514, 517 (1989). This code section basically states that one has twenty-years to enforce a lien once the obligation is due. Because the debt became due on June 15, 1988, the twenty-year statute of limitations expired on June 15, 2008. The action before this Court to enforce the liens was not brought within the twenty-year statute of limitations and therefore is barred from being prosecuted.

Consequently, this Court **FINDS** the foreclosure actions taken by Mr. Tracey and Sport Mart are barred by the statute of limitations. Accordingly, this action is **ORDERED DISMISSED and REMOVED** from this Court's docket.

Finally, it is **ORDERED** that the Circuit Clerk shall send copies of this *Order* to all counsel of record including:

James T. Cooper, Esq.
Counsel for Sport Mart and R. Brawley Tracey
108 Hills Plaza
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Charles Lee Phalen, Jr., Esq.
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Stephen P. Swisher, Esq.
Counsel for Debra Knell
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Dunbar, WV 25064

SIGNED this 8th day of December, 2010.

STATE OF WEST VIRGINIA
COUNTY OF PUTNAM, SS:
I, Ronnie W. Matthews, Clerk of the Circuit Court of said County and in said State, do hereby certify that the foregoing is a true copy from the records of said Court.
Given under my hand and the seal of said Court.
this 10 day of Dec, 2010
Ronnie W. Matthews, Clerk
Circuit Court
Putnam County, W.Va.

O.C. Spaulding, Judge