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District Court of Appeal of Florida, Second District.

U.S. BANK N.A. as Trustee, Successor to Bank of America, N.A. as Trustee, Successor by Merger to Lasalle Bank N.A., as Trustee for Merrill Lynch First Franklin Mortgage Loan Trust 2007-1, Mortgage Pass-through Certificates, Series 2007-1, Appellant,

v.

Charles W. ENGLE a/k/ a Charles Engle, Appellee.

Case No.
2D18
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3384
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Opinion filed August 14, 2020

Appeal from the Circuit Court for Pasco County; Kimberly Sharpe Byrd, Judge.

Attorneys and Law Firms

Ileen J. Cantor and Ronald M. Gachè of Shapiro, Fishman & Gachè, Boca Raton, for Appellant.

Daniel Bialczak of Korte & Associates, West Palm Beach, for Appellee.

Opinion

ATKINSON, Judge.

***1** U.S. Bank, N.A., appeals a final judgment entered in favor of borrower Charles W. Engle after he successfully moved for involuntary dismissal based upon several grounds including lack of standing, default notice, damages, and intent to reform the mortgage. Because U.S. Bank presented a prima facie case of mortgage foreclosure and reformation, we reverse.

Background

In May of 2003, Tommie Engle gifted a parcel of real estate located in Pasco County to Charles W. Engle (Engle) as tenants in common with Tracey Stalter. The warranty deed contained the following legal description of that property: "Lot K, Riverside Subdivision as per the plat thereof as recorded in Plat Book 6, Page 10, Public Records of Pasco County, Florida." In December of 2006, Engle and Stalter gave First Franklin a Division of National City Bank a mortgage on: "LOT K, RIVERSIDE SUBDIVISION, AS PER PLAT THEREOF AS RECORDED IN PLAT BOOK 5, PAGE 1 PUBLIC RECORDS OF PASCO COUNTY, FLORIDA[,] which currently has the address of 6704 Canal Street, Hudson, Florida 34667."

The mortgage secured an adjustable-rate promissory note in the principal amount of $100,000 drafted by Engle. Pursuant to the terms of the note, the interest rate "may change on the first day of January 2009, and on that day every 6 month[s] thereafter," which was referred to as a "Change Date." On the first Change Date, the interest rate would "be based upon an Index[, which was] the average of interbank offered rates for 6 month U.S. dollar-denominated deposits in the London market ('LIBOR'), as published in *The Wall Street Journal*." The note provided that the interest rate would "never be greater than 14.0500%, nor less than 8.0500%." The initial interest rate was 8.0500%.

Engle stopped making payments in March of 2008, but U.S. Bank advanced the default date to September 1, 2011, for statute of limitations purposes. At the nonjury trial, the bank's witness, Tonya Williams, testified that Nationstar, U.S. Bank's servicer, drafted the default letters then sent them to a third-party vendor that printed and mailed the letters. The witness, a default case analyst with Nationstar, also testified about the vendor's general mailing practices:

> Once the letter gets imaged over to WALZ, WALZ of course prints it out, mails it. They give Nationstar confirmation that letter was sent. Like I said earlier this is what the collection notice is from showing that the demand letter was sent by WALZ. The [tracking] system that WALZ has is from the United Parcel Servicing. So basically they

take that information and copy and paste it on to the site so you can see the tracking of the letter.

U.S. Bank introduced, through Williams, a copy of the original promissory note, without objection, which contained indorsements that matched those on the copy attached to the original complaint. One indorsement was given by First Franklin, a division of National City Bank to First Franklin Financial Corporation. The other is a blank indorsement from First Franklin Financial Corporation. U.S. Bank also introduced business records showing that the interest rate from February 2009 until February 2018 remained at 8.05%.

***2** At the close of U.S. Bank's case, Engle moved for an involuntary dismissal. With respect to the foreclosure, he argued that the bank had failed to prove that it had standing at the inception of the case, that it had mailed the default letter, and that it was entitled to the interest that it was seeking. He also claimed, regarding the reformation count, that the bank failed to prove "the intent of the original parties at the time that [the mortgage] would have been created" because "there was no word 'intentever utilized here today in testimony." The trial court granted the motion for involuntary dismissal based upon "all grounds stated by defense counsel." The court was particularly concerned with the issue of damages because "without knowing the interest rate and how payments were applied I don't know how you can even begin to calculate ... how those other payments were applied." The bank timely appealed after the court denied its motion for rehearing.

U.S. Bank argues that the trial court erred by granting Engle's motion for involuntary dismissal because it proved a prima facie case of mortgage reformation and foreclosure. "The 'standard of review for a motion for involuntary dismissal is de novo." Deutsche Bank Tr. Co. Ams. as Tr. for Residential Accredit Loans, Inc. v. Harris, 264 So. 3d 186, 188 (Fla. 4th DCA 2019) (quoting Deutsche Bank Nat'l Tr. Co. v. Huber, 137 So. 3d 562, 563 (Fla. 4th DCA 2014)). "When an appellate court reviews the grant of a motion for involuntary dismissal, it must view the evidence and all inferences of fact in a light most favorable to the nonmoving party, and can affirm a directed verdict only where no proper view of the evidence could sustain a verdict in favor of the nonmoving party." Id. (citing Huber, 137 So. 3d at 563–64).

Analysis

To obtain a foreclosure judgment, the foreclosing lender must prove that it is entitled to enforce the promissory note, that the borrower defaulted under the terms of the note and mortgage, and that it properly accelerated the debt to maturity. See Kelsey v. SunTrust Mortg., Inc., 131 So. 3d 825, 826 (Fla. 3d DCA 2014); see also Winchel v. PennyMac Corp., 222 So. 3d 639, 643 (Fla. 2d DCA 2017) ("Once put at issue by a defendant, then, standing becomes a part of the prima facie case that a foreclosure plaintiff must prove in order to secure a judgment."). In addition, it must also establish the amount due by competent and substantial evidence. See Green Emerald Homes, LLC v. 21st Mortg. Corp., —— So.3d ——, 44 Fla. L. Weekly D1449, 2019 WL 2398015 (Fla. 2d DCA June 7, 2019).

I. Standing

U.S. Bank contends that it proved standing by way of the method described in Ortiz v. PNC Bank, National Ass'n, 188 So. 3d 923 (Fla. 4th DCA 2016). "[I]f the [b]ank later files with the court the original note in the same condition as the copy attached to the complaint, ... the combination of such evidence is sufficient to establish that the [b]ank had actual possession of the note at the time the complaint was filed and, therefore, had standing to bring the foreclosure action, absent any testimony or evidence to the contrary." Id. at 925. U.S. Bank presented a copy of the original note, which contained the same indorsements as those on the copy attached to the original complaint. Contrary to Engle's contention, the bank did not need to prove that the special indorsement was placed onto the note before the blank indorsement. The fact that the bank had a copy of the note containing a blank indorsement at the time the complaint was filed is sufficient to establish its entitlement to enforce the note as a holder. See id. Accordingly, the trial court erred by granting the motion for involuntary dismissal based on lack of standing.

II. Notice of Default

U.S. Bank contends that there was adequate proof that it mailed the default letter. "Because the notice requirement of paragraph twenty-two is a condition precedent to foreclosure," U.S. Bank was required to offer proof that it provided the requisite notice to Engle before it instituted the foreclosure action. See Fed. Nat'l Mortg. Ass'n v. Morton, 196 So. 3d 428, 429 (Fla. 2d DCA 2016) (citing Konsulian v. Busey Bank, N.A., 61 So. 3d 1283, 1285 (Fla. 2d DCA 2011)).

***3** Williams testified that Nationstar created the notice of default and it conveyed an image of the letter to the third-party vendor. She further testified that the vendor provided Nationstar with confirmation that the letter was sent, which is corroborated by the collection notes. The vendor input the tracking information from the United States Parcel Service onto a website where Nationstar can monitor the delivery status.

In Harris, a servicer's employee testified that the servicer created the default letters and electronically sent them to third-party vendors for printing and mailing. 264 So. 3d at 192. The witness testified that, after the letter is mailed, the servicer "receives a notification from the third-party vendor, and someone from [the servicer's] pre-foreclosure department enters a note into the system indicating that the demand letter has been mailed." Id. The notes for the Harris loan, which were admitted into evidence, corroborated the witness's testimony. Id. This evidence, the court concluded, was sufficient to preclude involuntary dismissal. Id. at 192–93. Likewise, U.S. Bank presented sufficient evidence that it mailed Engle the default letter. As such, the trial court erred by granting involuntary dismissal.

III. The Amount Due

On appeal, Engle contends that the trial court properly granted involuntary dismissal because U.S. Bank offered insufficient proof of damages. He claims that the bank was required to introduce evidence of the index utilized to calculate the interest rate through the life of the loan. However, where an interest rate is adjustable, the interest rate may be calculated using the lowest rate if that was the only proof adduced at trial. See, e.g., Salauddin v. Bank of Am., N.A., 150 So. 3d 1189, 1190–91 (Fla. 4th DCA 2014) ("[S]ince the note stated that the interest rate would not drop below five percent, this percentage was the only proof the bank supplied at trial, and the trial court should have used this interest rate to calculate the amount of interest after May 1, 2012"); cf. Boyette v. BAC Home Loans Servicing, LP, 164 So. 3d 9, 10 (Fla. 2d DCA 2015) ("The final judgment states that interest accrued in the amount of $23,741.25. But there are no records or testimony reflecting how that amount accrued, and the only document regarding interest, the adjustable rate rider, does not provide enough information to establish the interest that accrued. Thus this portion of the judgment must be reversed."); Gonzalez v. Onewest Bank, FSB, 204 So. 3d 167, 168 (Fla. 4th DCA 2016) (reversing and remanding for a new trial on the interest rate because "the only competent evidence as to the interest charged after the first change date is that it was somewhere between 2.75% and 11.875%").

Here, the bank offered business records showing that from February 2009 until February 2018, the interest rate remained at 8.05%—below which the parties to the promissory note agreed the rate would never fall. The fact that the bank's witness failed to mention the pages concerning the interest rate at trial is of no import. Cf. Michel v. Bank of N.Y. Mellon, 191 So. 3d 981, 983 (Fla. 2d DCA 2016) (noting that although the bank failed to mention it at trial, "the payment history admitted into evidence demonstrates that the increase in principal is due to negative amortization, that is, an increase from the accrual of unpaid interest"). Because there was competent substantial evidence regarding the amount due, the trial court erred by granting involuntary dismissal on that basis.

IV. Reformation

***4** U.S. Bank argues that it presented a prima facie case of reformation based upon the legal descriptions contained in the mortgage as well as the warranty deeds that it introduced into evidence. Engle contends that the bank failed to present sufficient evidence of the partiesintent.

A court may "reform a written instrument where, due to a mutual mistake, the instrument as drawn does not accurately express the true intention or agreement of the parties to the instrument." Providence Square Ass'n v. Biancardi, 507 So. 2d 1366, 1369 (Fla. 1987). In reforming the instrument, the court is merely correcting a defect "so that it accurately reflects the true terms of the agreement actually reached." Id.; accord Smith v. Royal Auto. Grp., Inc., 675 So. 2d 144, 150 (Fla. 5th DCA 1996) ("Reformation, at its essence, acts to correct an error not in the partiesagreement but in the writing which constitutes the embodiment of that agreement."). A mutual mistake occurs "when the parties agree to one thing and then, due to either a scrivener's error or inadvertence, express something different in the written instrument." Plantation Key Office Park, LLLP v. Pass Int'l, Inc., 110 So. 3d 505, 508 (Fla. 4th DCA 2013) (quoting BrandsMart U.S.A. of W. Palm Beach, Inc. v. DR Lakes, Inc., 901 So. 2d 1004, 1005–06 (Fla. 4th DCA 2005)).

To avoid involuntary dismissal, U.S. Bank was required to adduce some evidence of the partiesagreement and the mutual mistake regarding the legal description used in the mortgage. Essentially, this required U.S. Bank to prove that First Franklin lent Engle $100,000 in exchange for a security interest in the subject property. The warranty deeds established that the mortgage was given by the same parties listed on the 2003 warranty deed and that the legal description in the mortgage deviated from the legal description in the deeds by only a few digits—plat book 5 rather than 6 and page 1 rather than 10. When considered collectively, this provides some evidence of the partiesintent to encumber the subject property.

Engle misplaces reliance on Losner v. HSBC Bank USA, N.A., 190 So. 3d 160 (Fla. 4th DCA 2016). There, the legal description was omitted entirely from the mortgage, and the only evidence offered by the lender to reform the mortgage was an assignment which was not signed by the homeowners. Id. at 161. Here, in contrast, U.S. Bank offered three warranty deeds to the subject property, which contained a legal description nearly identical to the one in the mortgage.

Engle also suggests that it is appropriate to affirm on the reformation count because "a nonparty cannot seek reformation." However, for the reasons explained earlier, U.S. Bank offered sufficient proof that it was a holder entitled to enforce the promissory note. And the mortgage follows the note. See HSBC Bank USA, Nat'l Ass'n v. Buset, 241 So. 3d 882, 891 (Fla. 3d DCA 2018) ("Florida law has always held that the mortgage follows the note."), review dismissed, No. SC18-1099, 2018 WL 3650261 (Fla. July 20, 2018).

Because there was evidence of the mutual mistake as well as Engle's intent to give the originating lender a security interest in the subject property, U.S. Bank proved a prima facie case for reformation of the mortgage. Thus, involuntary dismissal of the claim was erroneous.

***5** Reversed and remanded.

SILBERMAN and SMITH, JJ., Concur.

All Citations

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