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District Court of Appeal of Florida, Second District.

Michael E. KUHNSMAN and
Erin L. Kuhnsman, Appellants,
v.
WELLS FARGO BANK, N.A., Appellee.

Case No.
2D19
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Opinion filed October 30, 2020

Appeal from the Circuit Court for Pinellas County; Amy M. Williams, Judge.

Attorneys and Law Firms

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Opinion

LaROSE, Judge.

***1** Michael and Erin Kuhnsman appeal the foreclosure judgment entered against them. We have jurisdiction. See Fla. R. App. P. 9.030(b)(1)(A). They argue that we must reverse because Wells Fargo Bank, N.A., failed to conduct a face-to-face interview with them, a condition precedent to foreclose upon their Federal Housing Administration-backed loan. We affirm because Wells Fargo substantially complied with the condition precedent.

Background

In 2007, the Kuhnsmans signed a note in favor of Wells Fargo to buy a home. The FHA insured the loan. The note provides that in the event of default, Wells Fargo "may, except as limited by regulations of the Secretary [of Housing and Urban Development] ... require immediate payment in full of the principal balance remaining due and all accrued interest." The note also states that Wells Fargo's ability to accelerate payment and foreclose is prohibited "when not permitted by HUD regulations."

The relevant HUD regulations require Wells Fargo to "have a face-to-face interview with the mortgagor, or make a reasonable effort to arrange such a meeting, before three full monthly installments due on the mortgage are unpaid." 24 C.F.R. § 203.604(b) (2016).[1] Thus, a mortgagee's ability to foreclose upon an FHA-backed loan is cabined by these federal regulations. See 14 C.F.R. § 203.500 (2016) ("It is the intent of the Department that no mortgagee shall commence foreclosure or acquire title to a property until the requirements of this subpart have been followed."). However, a mortgagee is excused from conducting a face-to-face interview when "[a] reasonable effort to arrange a meeting is unsuccessful." 24 C.F.R. § 203.604(c)(5). A "reasonable effort" is defined as "at a minimum ... one letter sent to the mortgagor certified by the Postal Service as having been dispatched." § 203.604(d). This "reasonable effort" must "also include at least one trip to see the mortgagor at the mortgaged property" to coordinate the face-to-face interview. Id.

***2** In 2010, the Kuhnsmans stopped making their loan payments. Wells Fargo filed a foreclosure action. While the action was pending, the Kuhnsmans sought loss mitigation relief from Wells Fargo. After a final hearing in 2013, the trial court dismissed the action, finding that Wells Fargo "did not make a sincere, bonafide [sic] effort to comply with FHA guidelines." By August 2014, the parties' loss mitigation efforts failed.

In September 2014, Wells Fargo sent a certified letter to the Kuhnsmans stating that Wells Fargo wished to "arrange a face to face meeting with you and a representative of Wells Fargo" in order "to review your financial situation and discuss mortgage payment assistance options that may help you bring your account current." In early October 2014, the Postal Service returned the letter to Wells Fargo bearing a stamp "Refused" on the envelope. Several weeks later,

Wells Fargo received a letter from the Kuhnsmans' counsel directing Wells Fargo to cease and desist all direct contact with the Kuhnsmans and, instead, to communicate only with counsel.[2] And so, Wells Fargo did just that.

Customer service notes reflect that counsel spoke with a Wells Fargo representative in October 2014. Wells Fargo requested counsel to update the Kuhnsmans' financial status since the August 2014 failure of loss mitigation efforts. Another customer service note, from later that same day, recorded that counsel had called Wells Fargo to report that she was "not aware of any changes since the denial." A customer service note from the next day indicates "FHA checklist review passed."

Over two years later, in February 2017, Wells Fargo filed a second foreclosure action. The complaint alleged that all conditions precedent to foreclosure "have been performed, have occurred, or have been waived." The Kuhnsmans denied "satisfaction of conditions precedent required for FHA insured mortgages"; they specifically alleged that Wells Fargo failed "[t]o make a reasonable effort to arrange a face-to-face meeting with the mortgagor" pursuant to section 203.604.

At a nonjury trial, a contretemps arose over Wells Fargo's attempt to elicit testimony from a loan verification consultant concerning the cease and desist letter and the customer service notes. The Kuhnsmans argued that such testimony was offered to demonstrate that they had waived the face-to-face interview, a defense Wells Fargo did not raise. See Fla. R. Civ. P. 1.110(d) ("In pleading to a preceding pleading a party shall set forth affirmatively ... waiver, and any other matter constituting an avoidance or affirmative defense."); Louie's Oyster, Inc. v. Villaggio Di Las Olas, Inc., 915 So. 2d 220, 223 (Fla. 4th DCA 2005) ("As a matter of law, waiver [is an] affirmative defense[ ] that must be pleaded."). Eschewing waiver as a defense, Wells Fargo maintained that the testimony was relevant to show that it substantially complied with the HUD regulations. The trial court sustained the objection insofar as the evidence related to the issue of waiver; it permitted admission as to the matter of compliance, acknowledging that the evidence "could be taken in two different ways."

***3** After Wells Fargo rested its case, the Kuhnsmans moved for involuntary dismissal. They contended that Wells Fargo failed to make a "reasonable effort" to arrange the face-to-face interview. § 203.604(c)(5). Although Wells Fargo had mailed a certified letter attempting to arrange the interview, Wells Fargo failed to make "at least one trip to see the mortgagor at the mortgaged property." § 203.604(d). The Kuhnsmans claimed that their "cease-and-desist" letter was not intended to communicate that they would forego a face-to-face interview, only that the interview was to be conducted through their counsel. The Kuhnsmans relied on Derouin v. Universal American Mortgage Co., 254 So. 3d 595, 602 (Fla. 2d DCA 2018), where we stated:

> We are even less inclined to conclude that Ms. Derouin's statement that Universal or its servicer should speak to her lawyer constitutes a clear indication that she was unwilling to cooperate in the face-to-face interview. There was no evidence Universal or its servicer was prohibited from asking the Derouins for a face-to-face meeting through their attorney, nor was there any evidence that the Derouins would not participate in one if asked.

Wells Fargo countered that it substantially complied with section 203.604. Specifically, Wells Fargo contended that after its receipt of the cease-and-desist letter, loss mitigation communications and negotiations continued with the Kuhnsmans' counsel. The trial court agreed and denied the Kuhnsmans' motion. The trial court, thereafter, entered judgment for Wells Fargo.

Analysis

I. Standard of Review

Our review of the trial court's denial of the Kuhnsmans' motion for involuntary dismissal is de novo. See Arsali v. Chase Home Fin. LLC, 121 So. 3d 511, 514 (Fla. 2013) ("[T]his Court undertakes de novo review of questions that present a pure question of law."); Torres v. Deutsche Bank Nat'l Tr. Co., 256 So. 3d 903, 905 (Fla. 4th DCA 2018) ("We review the denial of a motion for involuntary dismissal de novo." (citing Deutsche Bank Nat'l Tr. Co. v. Huber, 137 So. 3d 562, 563 (Fla. 4th DCA 2014))).

However, "we review the trial court's findings of facts to determine if they are supported by competent substantial evidence." Coconut Grove Acquisition, LLC v. S & C. Venture, 240 So. 3d 92, 94 (Fla. 3d DCA 2018). And, of course, "whether a party has substantially complied with or performed a contract term remains a question of fact." Fed. Nat'l Mortg. Ass'n v. Morton, 196 So. 3d 428, 431 (Fla. 2d DCA 2016). Thus, we review the record for competent,

substantial evidence that Wells Fargo substantially complied with a condition precedent to foreclosure.

II. Face-to-face interview as a condition precedent

We have recognized the face-to-face interview as a condition precedent to foreclosure. See, e.g., Derouin, 254 So. 3d at 599 ("The parties tacitly agree that the face-to-face meeting requirement is a condition precedent to filing a foreclosure lawsuit. For purposes of this appeal, we assume the same." (citing ARC HUD I, LLC v. Ebbert, 212 So. 3d 513, 515-16 (Fla. 2d DCA 2017), in which this court reversed a summary judgment award because the mortgagee created an issue of material fact as to whether an exception applied to the "condition precedent" of a face-to-face interview)). We are not alone. See, e.g., Chrzuszcz v. Wells Fargo Bank, N.A., 250 So. 3d 766, 768 (Fla. 1st DCA 2018) ("We agree with the Borrower's contention that, in the current case, the HUD-mandated face-to-face interview (or attempt to interview) was a condition precedent to the foreclosure action, and the Bank shouldered the burden of proving its satisfaction."); White v. Planet Home Lending, LLC, 234 So. 3d 802, 803 n.1 (Fla. 4th DCA 2018) ("Absent evidence that Appellee engaged in a face-to-face interview with Appellant before the former filed its foreclosure complaint or that any exception to the interview requirement applied, it would be appropriate to enter an involuntary dismissal of Appellee's foreclosure complaint." (citing McIntosh v. Wells Fargo Bank, N.A., 226 So. 3d 377, 379 (Fla. 5th DCA 2017))); Palma v. JPMorgan Chase Bank, Nat'l Ass'n, 208 So. 3d 771, 773, 775 (Fla. 5th DCA 2016) (holding that mortgage language providing, in the event of a default, the debt could be accelerated "except as limited by regulations of the Secretary ... of Housing and Urban Development" incorporated the federal regulations, including the face-to-face interview requirement, as a condition precedent to filing suit).

***4** Indisputably, the Kuhnsmans challenged Wells Fargo's compliance with the face-to-face interview requirement. Consequently, regardless of whether the requirement was raised as an affirmative defense or as a specific denial, the parties teed up the issue. See Fla. R. Civ. P. 1.120(c) ("In pleading the performance or occurrence of conditions precedent, it is sufficient to aver generally that all conditions precedent have been performed or have occurred. A denial of performance or occurrence shall be made specifically and with particularity."); see also Bank of Am., N.A. v. Asbury, 165 So. 3d 808, 810 (Fla. 2d DCA 2015) ("A defendant, as the responding party, shoulders the responsibility of identifying a specific, unfulfilled condition precedent should it wish to deny that general averment."). And, Wells Fargo bore the burden to demonstrate substantial compliance. See McIntosh, 226 So. 3d at 379 ("Here, Borrowers raised noncompliance with § 203.602 and the terms of the note and mortgage as both a specific denial and an affirmative defense. Thus, the burden remained on Wells Fargo to demonstrate compliance with the applicable HUD regulations.").

III. Substantial compliance: strict compliance's foil

A lender may strictly comply with the face-to-face interview requirement in two ways; first, a lender must either have a face-to-face interview with the borrower, or, second, the lender must make a "reasonable effort" to arrange an interview before the borrower misses three monthly payments. § 203.604(b).

Wells Fargo concedes that there was no face-to-face interview.[3] But Wells Fargo may satisfy its regulatory obligation by making a "reasonable effort" to arrange the interview. § 203.604(b). As mentioned earlier:

> A reasonable effort to arrange a face-to-face meeting with the mortgagor shall consist at a minimum of one letter sent to the mortgagor certified by the Postal Service as having been dispatched. Such a reasonable effort to arrange a face-to-face meeting shall also include at least one trip to see the mortgagor at the mortgaged property ....

§ 203.604(d).

However, the regulation acknowledges that "reasonable efforts" may be fruitless. § 203.604(c)(5) (providing that "a face-to-face meeting is not required if," among other things, "a reasonable effort to arrange a meeting is unsuccessful"). Therefore, a lender complies with the regulation, despite not conducting the interview, so long as it demonstrates its "reasonable efforts" to do so.

The Kuhnsmans urge us to conclude that Wells Fargo failed to strictly comply with the face-to-face interview requirement. They urge too much. "[A] party's adherence to contractual conditions precedent is evaluated for substantial compliance or substantial performance." Green Tree Servicing, LLC v. Milam, 177 So. 3d 7, 13 (Fla. 2d DCA 2015); Liberty Home Equity Sols., Inc. v. Raulston, 206 So. 3d 58, 61 (Fla. 4th DCA 2016) ("In the foreclosure context, a plaintiff need only substantially comply with conditions precedent."). "Substantial compliance or performance is 'that performance of a contract which, while not full performance, is so nearly equivalent to what was bargained for that it would

be unreasonable to deny' the other party the benefit of the bargain." Green Tree Servicing, LLC, 177 So. 3d at 14 (quoting Casa Linda Tile & Marble Installers, Inc. v. Highlands Place 1981 Ltd., 642 So. 2d 766, 768 (Fla. 4th DCA 1994)).

IV. Wells Fargo substantially complied with section 203.604

***5** Wells Fargo substantially complied with the "reasonable effort" provision of section 203.604(d). The parties agree that Wells Fargo sent the certified HUD letter. The Kuhnsmans not only refused it, they directed Wells Fargo to cease all direct communications with them, insisting that Wells Fargo speak with their counsel. Following these instructions, Wells Fargo never visited the property or met with the Kuhnsmans. Rather, Wells Fargo pursued loss mitigation efforts, albeit unsuccessfully, with their counsel. Under these circumstances, a face-to-face interview was not required. Cf. U.S. Bank Nat'l Ass'n v. McMullin, 47 N.Y.S.3d 882, 889, 55 Misc.3d 1053 (N.Y. Sup. Ct. 2017) (noting that the federal agency has not affirmatively prohibited foreclosure where there has not been "full and literal compliance" with the presuit requirements in section 203.604). To require such an interview after loan modification efforts have already been undertaken and failed would elevate form over substance. See Bank of N.Y. Mellon v. Estate of Peterson, 208 So. 3d 1218, 1222 n.2 (Fla. 2d DCA 2017) ("[A] party may not elevate form over substance to gain an improper advantage in litigation.").

In our view, the Kuhnsmans received the "equivalent to what was bargained for" under the HUD regulations: the opportunity to avoid foreclosure through loss mitigation alternatives. Green Tree Servicing, LLC, 177 So. 3d at 14 (quoting Casa Linda Tile & Marble Installers, Inc., 642 So. 2d at 768). Accordingly, competent, substantial evidence supported the trial court's finding that Wells Fargo substantially complied with section 203.604.

V. No prejudice

Even if Wells Fargo's efforts at substantial compliance fell short, we would still affirm. Cf. City of Clearwater v. Sch. Bd. of Pinellas Cty., 905 So. 2d 1051, 1057 (Fla. 2d DCA 2005) ("[T]he 'tipsy coachman' doctrine ... allows an appellate court to affirm a trial court decision that 'reaches the right result, but for the wrong reasons' so long as 'there is any basis which would support the judgment in the record.' " (quoting Dade Cty. Sch. Bd. v. Radio Station WQBA, 731 So. 2d 638, 644 (Fla. 1999))). After all, as Wells Fargo argued in its avoidance of the Kuhnsmans' denial of the performance of conditions precedent, the parties' failed loss mitigation efforts subsequent to the Kuhnsmans' default preclude them from proving that they were prejudiced by Wells Fargo's failure to strictly comply with the face-to-face interview requirement. Citigroup Morg. Loan Tr. Inc v. Scialabba, 238 So. 3d 317, 323 (Fla. 4th DCA 2018) ("[L]ack of prejudice is an avoidance which should be pleaded."); see Deutsche Bank Nat'l Tr. Co. v. Hagstrom, 203 So. 3d 918, 923 n.5 (Fla. 2d DCA 2016) ("[A]bsent some prejudice, the breach of a condition precedent does not constitute a defense to the enforcement of an otherwise valid contract." (quoting Gorel v. Bank of N.Y. Mellon, 165 So. 3d 44, 47 (Fla. 5th DCA 2015))); Nationstar Mortg., LLC v. Silva, 239 So. 3d 782, 785 (Fla. 3d DCA 2018) (same); Bank of N.Y. Mellon v. Johnson, 185 So. 3d 594, 597 (Fla. 5th DCA 2016) (same); see also Hagstrom, 203 So. 3d at 923 n.5 ("The Hagstroms did not allege how they were prejudiced by Deutsche Bank's alleged failure to comply with section 559.715[, Florida Statutes (2011)].").

VI. Derouin is inapposite

Derouin does not compel reversal. In Derouin, the borrowers defaulted on an FHA-insured note and mortgage containing the identical provisions at issue here. 254 So. 3d at 597. On rehearing, the trial court concluded that the borrowers had waived their right to seek compliance with the face-to-face interview requirement because, in a call made by the lender shortly after the Derouins had defaulted, the borrowers advised that they "no longer wished" to deal directly with the lender. Id. at 598. According to the trial court, the lender could not reasonably be expected to engage in a face-to-face interview after this communication, and the borrowers were not prejudiced by the lack of a face-to-face interview. Id. However, we reversed, recognizing that the lender failed to conduct a face-to-face interview with the borrowers. Id. at 600 n.2. More so, we observed that the lender failed to prove that it was in substantial compliance with the HUD regulation:

> ***6** We cannot say that the Derouins clearly indicated that they would not engage in the face-to-face meeting. Indeed, if Universal never offered such an opportunity, it cannot be the case that the Derouins demonstrated a reluctance or refusal to meet sufficient to excuse Universal's obligations. We are even less inclined to conclude that Ms. Derouin's statement that Universal or its servicer should speak to her lawyer constitutes a clear indication that she was unwilling to cooperate in the face-to-face interview. There was no

> evidence Universal or its servicer was prohibited from asking the Derouins for a face-to-face meeting through their attorney, nor was there any evidence that the Derouins would not participate in one if asked.

Id. at 602.

The Kuhnsmans' case is distinguishable from Derouin. First, unlike Derouin, this is not a waiver case. The crux of this case is substantial compliance with the HUD regulation. Second, Derouin concerned section 203.604(c)(3), and whether the borrowers' conduct excused the need for a face-to-face interview. See § 203.604(c)(3) (stating that a face-to-face interview is not required if "[t]he mortgagor had clearly indicated that he will not cooperate in the interview"). In contrast, our record reveals that under section 203.604(c)(5), Wells Fargo substantially complied with its obligation to arrange the interview. Section 203.604(c)(3) is not implicated here, and the Kuhnsmans' attempt to shoe-horn their facts into Derouin fails.

Third, in Derouin we held that the borrowers telling the lender to direct all communication to their attorney was not a clear indication that they would not engage in the face-to-face interview. 254 So. 3d at 602. As a result, the lender never considered the Derouins for loss mitigation. That is not the case here. The record reflects that the Kuhnsmans, through their counsel, received such consideration as "an alternative to foreclosure." Bagley v. Wells Fargo Bank, N.A., No. 3:12-CV-617, 2013 WL 350527, at *5 (E.D. Va. Jan. 29, 2013) (not reported in F. Supp. 2d) (observing that section 203.604 "requires lenders to engage 'in loss mitigation actions for the purpose of providing an alternative to foreclosure' " (quoting 12 U.S.C. § 1715 (2012))).

In short, Derouin is factually inapposite and does not afford the Kuhnsmans the shelter they seek.

Conclusion

We affirm the foreclosure judgment because Wells Fargo substantially complied with the face-to-face interview requirement provided in section 203.604 of the HUD regulations.

Affirmed.

NORTHCUTT and SMITH, JJ., Concur.

All Citations

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Footnotes

1 Section 203.604 vacillates between describing what is required as being either a "face-to-face interview" or "[a] face-to-face meeting." Certainly, while an interview may be a type of meeting, a meeting need not be an interview. See The American Heritage Dictionary of the English Language 1094 (5th ed. 2018) (defining "meeting" as "[t]he act or process or an instance of coming together; an encounter" or "[a]n assembly or gathering of people, as for a business, social, or religious purpose"); id. at 918 (defining an "interview" as "[a] formal meeting in person, especially one arranged for the assessment of the qualifications of an applicant"). We chalk this discrepancy up to sloppy draftsmanship because, when the regulation is read as a whole, the inconsistent verbiage clearly refers to the same thing. Cf. Jones v. ETS of New Orleans, Inc., 793 So. 2d 912, 914-15 (Fla. 2001) ("A basic tenet of statutory interpretation is that a 'statute should be interpreted to give effect to every clause in it, and to accord meaning and harmony to all of its parts.' " (quoting Acosta v. Richter, 671 So. 2d 149, 153-54 (Fla. 1996))); Blandin v. Bay Porte Condo. Ass'n., 988 So. 2d 666, 668 (Fla. 4th DCA 2008) ("Under the principle of statutory construction referred to as *in pari materia*, a provision should 'be construed as a whole in order to ascertain the general purpose and meaning of each part; each subsection, sentence, and clause must be read in light of the others to form a congruous whole.' " (quoting Bush v. Holmes, 919 So. 2d 392, 406-07 (Fla. 2006))). Wells Fargo suggests that the purpose of visiting the mortgagor is to schedule an interview to discuss loss mitigation efforts. See Fed. Hous. Admin., U.S. Dep't of Hous. & Urban Dev., FHA Single Family Housing Policy Handbook 4000.1, HUD.GOV, 654 (Aug. 14, 2019), https://www.hud.gov/sites/dfiles/OCHCO/documents/4000.1hsgh.pdf (last visited Sept. 24, 2020). We need not address that interpretation given our conclusion in this case. For convenience, throughout this opinion, we employ the terms "face-to-face interview," or, just "interview."

2 The letter was not entered into evidence at trial, only customer service notes reflecting the letter's content. On appeal, the Kuhnsmans complain that the customer service notes "were inadmissible as hearsay" and the trial court erred in admitting them in the letter's stead. However, the Kuhnsmans never lodged a hearsay objection challenging admission

of the customer service notes. Thus, they waived any such argument. See Paeth v. U.S. Bank Nat'l Ass'n ex rel. C-Bass Mortg. Loan Asset-Backed Certificates, Series 2006-RP2, 220 So. 3d 1273, 1275 (Fla. 2d DCA 2017) (stating that appellant's hearsay argument concerning "the admissibility of the payment history ... is not properly before this court because Paeth did not object to the admission of the document below" and that "any objection to the admissibility of the payment history was waived and cannot support a reversal on appeal").

3 Wells Fargo argues that the face-to-face interview regulations may be disregarded as an anachronism of a by-gone era, when mortgage origination and servicing were conducted locally. This history, it argues, augurs in favor of our being guided by the regulation's original purpose-"ensuring that borrowers are afforded an adequate opportunity to avoid foreclosure through loss mitigation alternatives, while taking into consideration technological advancements and subsequent federal measures." Unfortunately for Wells Fargo, we are not at liberty to disregard the law as it is written. The legislative and administrative arenas, not the courts, are the appropriate crucible to affect such change.

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