Third District Court of Appeal

State of Florida

Opinion filed January 22, 2020.
Not final until disposition of timely filed motion for rehearing.

No. 3D19-328
Lower Tribunal No. 15-27662

The Bank of New York Mellon Corporation as Trustee, etc.,
Appellant,

vs.

Yigani Hernandez, et al.,
Appellees.

An Appeal from the Circuit Court for Miami-Dade County, David C. Miller, Judge.

Akerman LLP, and Nancy M. Wallace (Tallahassee); Akerman LLP, and William P. Heller (Fort Lauderdale); Akerman LLP, and Eric M. Levine (West Palm Beach), for appellant.

Dunlap & Shipman, P.A., and Michael J. Henry (Santa Rosa Beach); Quiñones Law, P.A., and Timothy R. Quiñones (Lake Worth), for appellee Inwood Investments, LLC.

Before FERNANDEZ, MILLER and GORDO, JJ.

GORDO, J.

The Bank of New York Mellon appeals the trial court's sua sponte dismissal of its foreclosure case prior to the presentation of any evidence based on the conclusion that this Court's holding in Yelen v. Bankers Trust Company, 476 So. 2d 767 (Fla. 3d DCA 1985), precluded recovery and rendered the trial futile. The Bank contends it properly invoked the mortgage's due on sale clause and that Yelen is inapplicable as the relevant language differed. We hold that the dismissal was procedurally improper and Yelen is not controlling under the facts of this case. Thus, we reverse and remand for further proceedings.

FACTS AND PROCEDURAL BACKGROUND

In July 2006, Yigani Hernandez executed a promissory note and mortgage encumbering the subject condominium unit. The mortgage contained a due on sale clause providing that upon sale or transfer of the property without the Bank's consent, the Bank would be entitled to accelerate the loan.[1] If Hernandez failed to

[1] The due on sale clause reads as follows:

> **18. Transfer of the Property or a Beneficial Interest in Borrower.** As used in this Section 18, "Interest in the Property" means any legal or beneficial interest in the Property, including, but not limited to, those beneficial interests transferred in a bond for deed, contract for deed, installment sales contract or escrow agreement, the intent of which is the transfer of title by Borrower at a future date to a purchaser.
>
> If all or any part of the Property or any Interest in the Property is sold or transferred (or if Borrower is not a natural person and a beneficial interest in Borrower is sold

pay the accelerated loan amount, the Bank would be entitled to file a foreclosure action.

Following an assessments lien foreclosure sale, the property was transferred to the condominium association, and then to Inwood Investments, LLC, the present owner. The Bank did not consent to either transfer. Thus, the Bank accelerated the loan and instituted the underlying foreclosure proceedings upon nonpayment of the full loan amount. The complaint alleged that Hernandez had "defaulted under the Note and Mortgage because the subject property was transferred or sold without the Lender's prior written consent." Inwood argued that the due on sale clause was not triggered and the foreclosure proceedings were improper because Hernandez did not voluntarily initiate either transfer.

> or transferred) without Lender's prior written consent, Lender may require immediate payment in full of all sums secured by this Security Instrument. However, this option shall not be exercised by Lender if such exercise is prohibited by Applicable Law.
>
> If Lender exercises this option, Lender shall give Borrower notice of acceleration. The notice shall provide a period of not less than 30 days from the date the notice is given in accordance with Section 15 within which Borrower must pay all sums secured by this Security Instrument. If Borrower fails to pay these sums prior to the expiration of this period, Lender may invoke any remedies permitted by this Security Instrument without further notice or demand on Borrower.

The case proceeded to non-jury trial. On the day of trial, the Bank made an ore tenus motion for continuance because it did not have a witness immediately available to testify.[2] Notwithstanding the pending motion for continuance, the trial court instead dismissed the case finding it futile as a matter of law based on its reading of Yelen. The trial court found that the Bank would be unable to present any testimony or evidence that Hernandez violated the due on sale clause in the mortgage because, as both parties agreed, there had not been a voluntary transfer of title. The trial court entered judgment accordingly and denied rehearing. This appeal followed.

LEGAL ANALYSIS

The trial court's dismissal of the Bank's case without a pending motion and based solely on its legal conclusion drawn from proffered testimony prior to the presentation of any evidence was improper. A trial court cannot dismiss a cause of action without a pending motion or objection. Lawson v. Frank, 197 So. 3d 1269, 1271 (Fla. 2d DCA 2016). It is a due process violation for a trial court to sua sponte dismiss a claim without notice or a hearing. Id.; see also Surat v. Nu-Med Pembroke, Inc., 632 So. 2d 1136, 1138–39 (Fla. 4th DCA 1994) (reversing the trial court's sua

[2] Inwood alternatively argues dismissal was justified because the Bank's witness was not present at the time the case was called for trial; however, on the record before us, it is clear that the trial court never ruled on the merits of the Bank's motion for continuance and did not dismiss the action on those grounds.

sponte dismissal for failure to state a claim at a hearing on a motion in limine because it was "in essence, a hearing on an unfiled, unnoticed motion for summary judgment and . . . unfair to the plaintiff"). Further, a trial court is precluded from granting a motion for involuntary dismissal or directing verdict before a plaintiff has concluded its presentation of evidence. See, e.g., A.N. v. M.F.-A., 946 So. 2d 58, 59 (Fla. 3d DCA 2006) (citing Sheldon Greene & Assocs., Inc. v. Williams Island Assocs., 550 So. 2d 1142, 1143 (Fla. 3d DCA 1989)); SJS Enters., Inc. v. Cates, 547 So. 2d 226, 227 (Fla. 4th DCA 1989). Here, Inwood did not file a proper motion arguing that Yelen barred the Bank from proceeding. Thus, dismissal was inappropriate at that stage of the proceedings.

The trial court's dismissal was based on a misapplication of this Court's opinion in Yelen.[3] Indeed, the final judgment specifically stated that the trial court had

> reviewed paragraph 18 of the mortgage and the caselaw provided by the Defendant, specifically *Yelen v. Bankers Trust*, 3rd DCA [sic], 476 So. 2d 767, and determined the borrower would have to have the intent to sell the property to a purchaser in order to violate paragraph 18 of the mortgage and in order to trigger the default.

The trial court continued:

> As the undisputed facts do not establish this violation as a matter of law, the Court finds that even if a witness for the

[3] When dismissing the Bank's case, the trial court stated, "I think this is a good case to appeal to test this point . . . . They are testing Paragraph 18 . . . ."

> Plaintiff were to appear, any testimony provided would be futile and the Plaintiff would not be able to establish a default under paragraph 18 of the mortgage and given that there were no other alleged defaults pled, the Plaintiff would not be able to prevail.

Because the Yelen question is "purely legal, and will not be clarified by further factual development," it is properly before this Court and ripe for our review. Susan B. Anthony List v. Driehaus, 573 U.S. 149, 167 (2014) (quoting Thomas v. Union Carbide Agric. Prods. Co., 473 U.S. 568, 581 (1985)).

It is evident from the record that the plain language in the due on sale clause of the underlying mortgage differs from that interpreted in Yelen. The relevant portion of the due on sale clause at issue here reads as follows:

> If all or any part of the Property or any Interest in the Property **is sold or transferred** (or if Borrower is not a natural person and a beneficial interest in Borrower is sold or transferred) without Lender's prior written consent, Lender may require immediate payment in full of all sums secured by this Security Instrument. However, this option shall not be exercised by Lender if such exercise is prohibited by Applicable Law.

(emphasis added).

In contrast, this was the language on which Yelen was decided:

> 17. Transfer of the Property: Assumption. If all or any part of the Property or an interest therein is **sold or transferred by Borrower** without Lender's prior written consent, excluding (a) the creation of a lien or encumbrance subordinate to this Mortgage, (b) the creation of a purchase money security interest for household appliances, (c) a transfer by devise, descent or by

> operation of law upon the death of a joint tenant or (d) the grant of any leasehold interest of three years or less not containing an option to purchase, Lender may, at Lender's option, declare all the sums secured by this Mortgage to be immediately due and payable.

Yelen, 476 So. 2d at 768 (emphasis added). The due on sale clause in the Yelen mortgage clearly required a voluntary transfer "by Borrower." As such, this Court concluded that the foreclosure sale by the Clerk of Courts did not trigger the clause since that sale was not "by Borrower." In the present case, however, the due on sale clause is undeniably different—the operative words "by Borrower" have been removed. The revised due on sale clause encompasses any and all transfers of the subject property. For these reasons, Yelen is neither controlling in this case nor alone precludes the Bank from foreclosing.[4]

The concurring opinion posits that the Yelen question is "unripe and unnecessary to the resolution of this appeal." Based on the trial court's dismissal of the action on the basis of Yelen, it is evident that this issue is indeed ripe for this Court's consideration and review. The parties have briefed the issue at length, acknowledging that the issue is properly before this Court—neither side raising the argument that it is not ripe. The concurrence also intimates that this opinion is advisory because it does not involve a real controversy. An advisory opinion is one

[4] Despite our holding, we do not adjudicate whether the Bank will be entitled to a final judgment of foreclosure on remand once the parties are afforded due process and present their evidence, and the trial court makes the appropriate findings.

"advising what the law would be upon a hypothetical state of facts." North Carolina v. Rice, 404 U.S. 244, 246 (1971) (quoting Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 240–41 (1937)); see also Hewitt v. Helms, 482 U.S. 755, 761 (1987) ("The real value of the judicial pronouncement—what makes it a proper judicial resolution of a 'case or controversy' rather than an advisory opinion—is in the settling of some dispute *which affects the behavior of the defendant towards the plaintiff*."). The opinion of this Court is not predicated upon hypothetical facts, but rather on the actual dismissal of the underlying foreclosure suit based on the trial court's interpretation of this Court's precedent. A cardinal principle of judicial restraint is that an appellate court should not sua sponte raise arguments that the parties themselves forewent. Both parties to this appeal and the trial court itself requested this Court consider the issue. Remanding this case without clarification of the key issue on which the trial court based its dismissal would further delay this cause of action. Justice delayed is justice denied. Given the trial court's pronouncements both at trial and in its judgment, as well as the parties' briefs and arguments before this Court, the applicability of Yelen to these facts is ripe for review and this opinion contains proper judicial pronouncements.

CONCLUSION

The trial court erred in dismissing the Bank's foreclosure action before the presentation of any evidence at trial based on its misapplication of Yelen.

Accordingly, we reverse the judgment entered and remand for further proceedings consistent with this opinion.

Reversed and remanded.

FERNANDEZ, J., concurs.

MILLER, J., specially concurring.

While I agree with the result reached by the majority, as I see no principled basis for deciding an issue that is both unripe and unnecessary to the resolution of this appeal, I write separately to address my concerns.

In reversing the decision under review today on a deprivation of due process, the majority espouses the well-established adage "[a] trial court is precluded from granting a motion for involuntary dismissal or directing verdict before a plaintiff has concluded its presentation of evidence." It specifically assigns error to the dismissal of the cause premised wholly upon a "proffered testimony." Maj. Op. at *4. I concur in this reasoned recitation.

Having already discerned reversible error and despite the lack of any developed evidentiary record below, the majority then proceeds to consider whether the action below remains viable in light of our prior precedent. As due process is "a sufficient ground for deciding this case" and the factual record with regards to the application of the due on sale clause remains wholly undeveloped below, "the cardinal principle of judicial restraint—if it is not necessary to decide more, it is necessary not to decide more—counsels us to go no further." PDK Labs., Inc. v. United States Drug Enf't Admin., 362 F.3d 786, 799 (D.C. Cir. 2004) (Roberts, J., concurring) ; see also State ex rel. Singh v. Kemper, 883 N.W.2d 86, 124 (Wis. 2016) (Ziegler, J., concurring in part, dissenting in part) ("Judicial restraint requires that

we resolve cases on the narrowest possible grounds.") (citing Wis. Dep't of Justice v. Wis. Dep't of Workforce Dev., 875 N.W.2d 545, 552 (Wis. 2015) ("[W]e are generally obliged to decide our cases on the 'narrowest possible grounds.'")).

Accordingly, I respectfully decline to join in the more expanded analysis engaged by my esteemed colleagues, as the enforceability of the due on sale clause is best left for another day.