IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

NOT FINAL UNTIL TIME EXPIRES TO
FILE MOTION FOR REHEARING AND
DISPOSITION THEREOF IF FILED

U.S. BANK TRUST, N.A., AS TRUSTEE
FOR LSF9 MASTER PARTICIPATION TRUST,

Appellant,

v. Case No. 5D17-2967

PATRICIA MARIA COZZA LEIGH A/K/A
PATRICIA M. LEIGH A/K/A PATRICIA LEIGH,

Appellee.

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Opinion filed December 6, 2019

Appeal from the Circuit Court
for Brevard County,
Lisa Davidson, Judge.

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

Beau Bowin, of Bowin Law Group, Indialantic, for Appellee.

EDWARDS, J.

Appellant, U.S. Bank Trust, N.A., as Trustee for LSF9 Master Participation Trust, argues that the trial court erred in dismissing Appellant's foreclosure action and entering judgment in favor of Appellee, Patricia Leigh. In so ruling, the trial court agreed with Appellee's position that the demand/default letter, which Appellant undeniably sent to

Appellee, failed to substantially comply with the requirements of paragraph twenty-two of the mortgage. We reverse for two reasons. First, we find that Appellant was authorized by the mortgage to include its attorney's fees and litigation costs incurred in a previously dismissed foreclosure case against Appellee in the demand/default letter as part of the cure amount. Second, there was a posttrial change in the law, making it clear that lenders and their assigns are entitled to recover unpaid installment mortgage payments that were more than five years' past due when the demand/default letter was sent.

In 2004, Appellee borrowed $140,000 from Bank of America, which was evidenced by a promissory note and secured by a mortgage. Because Appellee failed to make the April 2010 installment payment, the lender sent her a demand/default letter and later filed a foreclosure action in 2010 that was ultimately dismissed in May 2015. In July 2015, the holder of Appellee's note sent her a demand/default letter, pursuant to paragraph twenty-two of the mortgage, which advised Appellee that her right to cure the default and reinstate the mortgage, as provided by paragraph nineteen, depended upon her paying the sum of $86,865.59 ("cure amount") within thirty days. When payment of the cure amount was not forthcoming, the current foreclosure action was filed in January 2016, once again alleging that the note was in default because Appellee failed to pay the April 2010 installment and all subsequent installments.

Appellee raised numerous defenses in her answer, but only the following are at issue in this appeal. Generally, Appellee claimed that the cure amount set forth in the paragraph twenty-two demand/default letter was inaccurate and impermissibly sought payment of money for (1) the lender's attorney's fees and expenses from the 2010

foreclosure suit and (2) missed installment payments that were more than five years past due when the paragraph twenty-two letter was sent and when suit was filed.

Although there was limited evidence presented at trial, it was clear that Appellant included attorney's fees and litigation expenses of $10,305.59, apparently incurred by Appellant or its predecessor related to the 2010 foreclosure that was dismissed.[1] Paragraph nineteen of the mortgage provides that in order for Appellee to reinstate the mortgage, she would be required to pay the lender all sums then due and all expenses incurred in enforcing the mortgage, including reasonable attorney's fees and specified foreclosure litigation expenses. According to the plain language of the mortgage, Appellant was not required to be the prevailing party in the first foreclosure action in order to seek and recover its attorney's fees and expenses. *See Maw v. Abinales*, 463 So. 2d 1245, 1247 (Fla. 2d DCA 1985) (holding that even if borrower had been successful in preventing foreclosure by lender due to default by borrower, lender was still entitled by mortgage to seek and recover its reasonable attorney's fees because a default had occurred). Because Appellant was entitled to seek and recover the $10,305.59 representing its attorney's fees and litigation expenses from the first foreclosure action, we find that the trial court erred in ruling Appellant's demand/default letter was non-compliant with paragraph twenty-two of the mortgage.

Second, the trial court ruled that Appellant's default/demand letter was fatally inaccurate and non-compliant with paragraph twenty-two of the mortgage because it included approximately $12,000 representing missed installment payments that were

[1] The trial court mistakenly concluded that the attorney's fees and expenses sought in the demand/default letter represented amounts that the lender had been ordered to pay Appellee at the conclusion of the 2010 foreclosure action.

more than five years past due when the letter was sent. At the time of trial, the law in Florida was generally understood to have been that lenders could only seek and recover for installment payments that were less than five years past due, based upon the application of the statute of limitations set forth in section 95.11(2)(b)-(c), Florida Statutes (2016). However, as Appellant argues and Appellee commendably concedes, the law on this point has been evolving. The Florida Supreme Court's opinion in *Bartram v. U.S. Bank National Ass'n*, 211 So. 3d 1009, 1019 (Fla. 2016), could be read to say that a lender has the right to accelerate all sums due, even those installments that had remained unpaid for more than five years, as long as a default date pled and proved was within five years of when the complaint was filed. Our opinion in *Grant v. Citizens Bank, National Ass'n*, 263 So. 3d 156, 158 (Fla. 5th DCA 2018), clearly states that a lender can recover for unpaid installments more than five years past due. We are compelled to reverse because the law changed posttrial, and "disposition of a case on appeal should be made in accord with the law in effect at the time of the appellate court's decision rather than the law in effect at the time the judgment appealed was rendered." *Hendeles v. Sanford Auto Auction, Inc.*, 364 So. 2d 467, 468 (Fla. 1978). On remand, the trial court shall enter judgment in favor of Appellant and against Appellee in accordance with the evidence offered at trial.

REVERSED AND REMANDED WITH INSTRUCTIONS.

COHEN and LAMBERT, JJ., concur.