SCV: Submitted on 05-21-2018 15:59:29 EDT for filing on 05-21-2018

IN THE

Supreme Court of Virginia

RECORD NO. 171068

DENNIS W. KERNS,

Appellant,

v.

WELLS FARGO BANK, N.A.,

Appellee.

REPLY BRIEF OF APPELLANT

Henry W. McLaughlin (VSB No. 07105)
THE LAW OFFICE OF HENRY McLAUGHLIN, P.C.
Eighth & Main Building
707 East Main Street, Suite 1050
Richmond, Virginia 23219
(804) 205-9020 (Telephone)
(804) 205-9029 (Facsimile)
henry@mclaughlinvalaw.com

Counsel for Appellant

LANTAGNE LEGAL PRINTING 801 East Main Street Suite 100 Richmond, Virginia 23219 (804) 644-0477
A Division of Lantagne Duplicating Services

TABLE OF CONTENTS

Table of Authorities ii

Reply to Appellee Brief 1

Preliminary Statement 1

Argument 2

1. There is No Cause of Action Until There Are Damages 2

2. Kerns Pled a Claim for Breach of Contract 6

3. Kerns Pled a Back-Dated Notice 10

4. This Case Does Not Depend On Whether this Court Imposes In Rescission Cases a Strict Compliance Standard on Foreclosing Creditor. 11

Conclusion 13

Certificate of Service 14

TABLE OF AUTHORITIES

CASES

Bayview Loan Servicing, LLC v. Simmons,
275 Va. 114, 654 S.E.2d 898 (2008) 12
Bennett v. Bank of America, N.A.,
2012 U.S. Dist. LEXIS 54725 (E.D. Va. April 18, 2012) 8
Harrison v. U. S. Bank National Association,
Civil Action No. 3:12cv00224-JAG (E.D. Va. June 20, 2012) 8
Harrison v. U. S. Bank National Association,
Civil Action No. 3:14-cv-686 (E.D. Va. June 5, 2015) 7
Herbaugh v. Bank of America, N.A.;,
Civil Action No. 5:15cv71, 2016 U.S. Dist. LEXIS 91940 4
Jackson v. Ocwen Loan Servicing,
No. 3:15cv238, 2016 U.S. Dist. LEXIS 44367 ..... 1, 2, 3, 4
Newport News Shipbuilding Employers' Credit Union D/B/A Bayport Credit Union v. Lloyd Busch, et als.,
Record No. 150678 (Unpub., June 16, 2016) 8, 9, 10, 12
Parrish v. Federal National Mortgage Association,
292 Va. 44, 787 S.E.2d 116 (2016) 9, 12
Ruffin v. Bank of N.Y. Mellon,
No.4:13-cv-006 (E.D. Va., May 21, 2013) 7
Squire v. Virginia Housing Development Authority,
287 Va. 495, 758 S.E.2d 55 (2014) 11-12
Thomas v. Bank of America,
No. 4:12-cv-143 (E.D.Va., Mar 19, 2013) 7-8

REPLY TO APPELLEE BRIEF

Appellant, Dennis W. Kerns ("Kerns"), replies to the Appellee's Brief of Wells Fargo Bank, N.A. ("Wells Fargo") as follows:

Preliminary Statement

The appellee brief correctly states that the statute of limitations begins when a cause of action accrues. Subsequent damages do not toll the limitations period. However, a statute of limitations cannot begin to run until the cause of action accrues, which does not occur until the plaintiff has a case upon which the plaintiff can file suit. Kerns submits that, as held in the case of *Jackson v. Ocwen Loan Servicin*g, No. 3:15cv238, 2016 U.S. Dist. LEXIS 44367, he could not file suit after acceleration of a mortgage loan prior to a foreclosure on the deed of trust because an essential element of his cause of action – damages – did not occur prior to the foreclosure.

On the issue of whether a borrower pleads a cause of action based on a 29 rather than 30 day notice because of the backdating of the notice, there has been a split in the case law, with the majority rule in favor of overruling demurrers where the borrower seeks damages on grounds the lender sent a 29 day cure notice rather than a required 30-day cure notice. The basis for this majority rule has usually been that Virginia allows causes

of action based on immaterial breaches of contracts. There is an additional reason: if the courts do not allow causes of action for back-dated cure notices, there will be no incentive for lender compliance when the deed of trust, as a precondition to foreclosure, requires a 30-day cure notice.

Wells Fargo's appellee brief argues that the cure notice in this case was not back-dated at all and was a proper 30-day cure notice. This argument is without merit. Kerns averred that the cure notice was back-dated and was a 29 day cure notice rather than a 30-day cure notice. Wells Fargo asks this Court to set at naught Kerns' averment in the complaint that the cure notice was back-dated. Kerns submits that contention is without merit.

Argument

1. There is No Cause of Action Until There Are Damages

In *Jackson, v. Ocwen, supra*, the U.S. District Court for the Eastern District of Virginia, Richmond Division held that the plaintiffs did not have a cause of action based on the lender's acceleration of the note (without

having sent a proper cure notice as required by the note and deed of trust) because the plaintiffs sustained no damages from such acceleration.

> To the extent that the Jacksons allege a breach of contract stemming from a lack of a 30-day notice under Paragraph 22 of the Deed of Trust… the claim fails. No foreclosure took place. The Jacksons can claim no damages from lack of notice…
>
> -- *Jackson*, p. 17

The appellee's brief stated that Kerns did sustain some damages upon acceleration because "after acceleration the entire amount of the outstanding balance became due." (Appellee's brief, p. 15). However, Kerns pled that no proper 30-day cure notice was sent – a precondition to acceleration. Therefore, Kerns' complaint and amended complaint, by necessary implication, set forth that the entire amount of the outstanding balance did not become due. An unsupported claim by the lender that the entire amount was due did not make that so.

. If Kerns is correct that the notice was insufficient for acceleration, there was no acceleration. Kerns was first damaged upon the foreclosure. Therefore, it was upon the foreclosure that Kerns first had a cause of action

on which relief could be granted. Until the foreclosure occurred, he had sustained no damages and had no cause of action.[1]

Kerns' counsel submits that the language to the contrary in *Herbaugh v. Bank of Am., N.A.;* Civil Action No. 5:15cv71, 2016 U.S. Dist. LEXIS 91940 was dictum because, in that case, the plaintiff filed suit more than five years after both the lender's claim of acceleration and the foreclosure.

Neither *Jackson* nor *Herbaugh* are more than persuasive. This Court will decide whether or not a borrower has a cause of action when a lender claims to have accelerated the loan but has not yet foreclosed. Counsel for Kerns asks this Court to hold that borrowers such as Kerns have no cause of action solely upon the lender's claim – without cause – that the lender has accelerated the loan because, in the absence of actual acceleration, the borrower has suffered no damages.

It is a general principle of law that a party is not liable – without more -- for threatening more than is allowed under the law. This case falls under that general principle of law. In sending an acceleration notice (the notice for foreclosure) Wells Fargo claimed more than it was due; however, if

[1] In *Jackson*, the Court held that the plaintiffs did plead a cause of action prior to the foreclosure because they pled that the lender coerced them to make a payment an overpayment of over $17,000 to avoid foreclosure.

Wells Fargo had taken no further action; if Wells Fargo had withheld foreclosure (a not uncommon event in cases of mortgages in arrears) and if Kerns nevertheless had filed a suit seeking damages, Wells Fargo should have been able successfully to demur to any such lawsuit on grounds Kerns sustained no damages as a result of Wells Fargo's claim to have accelerated the note.

Wells Fargo has made a similar defense in this appeal, even though it did foreclose:

> Assuming Kerns' right of action was not barred by the statute of limitations discussed above, he still fails to state a claim because his Amended Complaint lacks a critical element required in all breach of contract actions in the Commonwealth – causation. Kerns must provide some proximate causation between the purported breach and his alleged damages.
>
> -- Appellee's brief, p. 23

Kerns' claim of damages is based on his contention of breach of contract because Wells Fargo foreclosed without having complied with a pre-condition for foreclosure – a 30-day cure notice. Kerns, by counsel, submits that there was damage from the foreclosure conducted in breach of the contract of the deed of trust. The foreclosure deprived Kerns of his home causing *inter alia*, damage to his credit and costs to defend against eviction.

2. Kerns Pled a Claim for Breach of Contract

In argument before the Circuit Court of the City of Richmond, Virginia ("the trial court"), Wells Fargo's counsel stated, in part, the following:

> Very candidly Your Honor , we believe that the majority of case law would show that a 29-day notice versus a 30-day notice – the 29 day notice itself is a bubble that courts has found that does constitute a material breach. And with complete candidness to the tribunal, I feel like we need to say that to the Court. We have a subsequent argument on that issue about whether or not they need to show damages attendant to that breach, but we believe the statute of limitations argument is entirely dispositive and avoids having to reach that issue at all.
>
> -- JA 201-202[2]

Kerns, by counsel, submits that the majority of case law has held that a plaintiff's claim for damages from a foreclosure should survive demurrer when the lender foreclosed based on a 29 day cure notice when the deed of trust requires a 30-day cure notice. Cases holding to that effect have included at least one decision holding that a foreclosure based on a 29 day rather than a 30 day notice is a material breach of contract; other cases have held that a plaintiff may proceed with a claim for damages based on a 29 cure notice (when the deed of trust requires a 30-day cure notice)

[2] References to the Joint Appendix are set forth as "JA" followed by the appropriate page(s)

because of Virginia law allowing claims based on immaterial breaches of contract.

In *Harrison v. U. S. Bank National Association*, Civil Action No. 3:14-cv-686, the U.S. District Court for the Eastern District of Virginia, Richmond Division, held that a 29-day notice rather than a required 30 day notice was a material breach of contract.

In *Harrison, supra*., the Court also noted "Virginia law allows a plaintiff to recover damages for an immaterial breach of contract" citing *Ruffin v. Bank of N.Y. Mellon*, No.4:13-cv-006, slip. Op. at 8 (E.D. Va May 21, 2013) and *Thomas v. Bank of America*, No. 4:12-cv-143, slip op. at 7 (E.D. Va. Mar. 19, 2013).

In *Thoma*s, a case involving a back-dated cure notice, the court stated the following:

> …."Plaintiffs assert that the Defendants back-dated the notice they received, and that is a fact the Court accepts as true at this state. Taking this fact as true, Plaintiffs have alleged a claim for which relief may be granted – a breach of the note and deed of trust. See also *Bennett v. Bank of Am., N.A*., 3:12CV354-HEH, 2012 WL 1354546 (E.D.Va. Apr. 18, 2012) ("[T]his complaint asserts that the notice was insufficient under the Deed of Trust because, among other things, it did not give Plaintiff sufficient time to avoid acceleration. Plaintiff has therefore alleged facts that, if proven, may demonstrate that BANA failed to send proper pre-acceleration notice.") (Citations omitted).
>
> Defendants argue that this count should be dismissed because Plaintiffs have failed to allege a <u>material</u> breach. Docs. 14 at 6, 20 at 1. However, that is not required. The elements of a breach of contract

> action in Virginia are: "(1) a legally enforceable obligation of a defendant to a plaintiff; (2) the defendant's violation or breach of that obligation; and (3) injury or damage to the plaintiff caused by the breach of obligation." Ulloa v. ASP, Inc., 271 Va. 72, 79, 624 S.E. 2d 43, 48 (2006) (quoting Filak v. George, 267 Va. 612, 619, 594 S.E. 2d 43, 48 (2006). While a material breach is necessary for some types of relief, an immaterial breach may be sufficient for other types of relief. See Fed. Ins. Co. v. Starr Elec. Co., 242 Va. 459, 468, 410 S.E. 2d 684, 689 (1991) (refusing to order specific performance because there was no material breach); Jennings v. Jennings, 12 Va. App. 1187, 1199, 409 S.E. 2d 8, 16 (1991) (denying rescission, but remanding for a determination of damages from an immaterial breach). Since an immaterial breach of contract can be grounds for compensatory damages, and that is one of the forms of relief Plaintiff have requested, they have stated a claim for which relief can be granted.

See also Bennett v. Bank of America, N.A., 2012 U.S. Dist. LEXIS 54725 (E.D. Va. April 18, 2012); and *Harrison v. U.S. Bank National Association*; Civil Action No. 3:12cv00224-JAG (E.D. Va. June 20, 2012);[3]

In *Newport News Shipbuilding Employers' Credit Union D/BIA Bayport Credit Union v. Lloyd Busch, et als.* Record No. 150678. (unpublished order) (June 16, 2016) ("*Busch, supra*) the lender foreclosed based on a cure notice dated February 3 with a deadline of March 3. On grounds including that such notice was a 29 day rather than a required 30 day cure notice, the Circuit Court of Gloucester County, Virginia struck the evidence of the foreclosing creditor in a jury trial in an unlawful detainer

[3] In no case involving a 29 day rather than 30 day notice has the borrower claimed that the borrower would have brought the loan current if given the 30th day to do so.

case on appeal from the General District Court of Gloucester County, Virginia. The foreclosing creditor appealed to this Court contending that the circuit court had lacked jurisdiction to allow the defendant to raise any challenge to the foreclosure because that constituted trial of title. This Court issued an unpublished order reaching the same result as the circuit court but on a different basis. On grounds of this Court's decision in *Brian D. Parrish and Teresa D. Parrish V. Federal National Mortgage Association*, 292 Va 44; 787; S.E. 2d 116 (June 16, 2016) decided the same day, this Court in *Busch, supra*. held that the circuit court had lacked subject matter jurisdiction because the borrower had raised a *bona fide* challenge to the foreclosing creditor's claim of title by challenging the foreclosure on grounds the 29 day cure notice did not give the foreclosing creditor the right to foreclose because the deed of trust required a 30-day cure notice. In a footnote, this Court in *Busch, supra*., noted that the foreclosing creditor had not assigned error based on any contention that the 29 day notice, instead of a 30-day notice, was immaterial. However, this Court in *Busch supra.* also said that that case fell within *Parrish*, in which this Court held that a *bona fide* challenge to title sufficient to deprive a court not of record of subject matter jurisdiction in a post-foreclosure

eviction case was a challenge that would survive demurrer if brought as an affirmative case seeking rescission.

A close reading of *Busch* seems to leave open the question whether a foreclosure based on a 29 day cure notice rather than a required 30 day cure notice would be a basis for rescission. However, Kerns' counsel submits that *Busch, supra.* supports Kerns' contention that a foreclosure based on a 29 day cure notice where the deed of trust requires a 30-day cure notice constitutes a breach of contract giving rise to a claim for damages that should survive demurrer.[4]

3. Kerns Pled a Back-Dated Notice

Wells Fargo's contention that the notice was actually a 30-day notice is without merit.

Kerns' complaint averred that the notice dated June 20, 2010 and which gave a deadline of July 20, 2010, was a back-dated notice and a 29 day notice rather than a 30 day notice. (JA 3) His amended complaint also averred a back-dated cure notice that was a 29-day notice rather than a 30-day notice. (JA 91) In the amended complaint, Kerns specifically averred that the cure notice, dated June

[4] If the law allows the lender to foreclose on the basis of a 29 day cure notice when the deed of trust requires a 30 day cure notice, what would remain the incentive for the lender to comply with the 30 day minimum?

20, 2010, was not mailed until June 21, 2010. (*Id*.)

The appellee brief pointed out that June 20, 2010 was a Sunday and stated the notice was deposited in the mail on that day. The appellee brief, in effect, argued that this Court should affirm the dismissal of Kerns' case on grounds the notice was, in fact, deposited in the mail on June 20, 2010. However, the case came before the trial court on demurrer and a plea in bar without any evidence. Therefore, for purposes of the demurrer and the plea in bar, the facts averred by Kerns were entitled to be taken as correct. Kerns pled that the notice was not mailed until Monday June 21, 2010, and, because it stated a deadline to cure of July 20, 2010, set forth an actual deadline of 29 days rather than 30 days. (JA 3, 91)

4. This Case Does Not Depend On Whether this Court Imposes In Rescission Cases a Strict Compliance Standard on Foreclosing Creditors

Kerns' counsel submits there is an important issue that has not been definitively decided by this Court: whether a homeowner can proceed with a claim for rescission of a foreclosure on grounds that a lender is held to a strict compliance standard in defending against rescission.

In *Squire v. Virginia Housing Development Authority,* 287 Va.

495, 758 S.E. 2d 55 (2014) the majority opinion noted that in *Bayview Loan Servicing, LLC v. Simmons*, 275 Va. 114, 654 S.E. 2d 898 (2008) the borrowers had not stated what they would have done if they had received a 30 day cure notice (which they did not receive and which was not sent to them by certified mail as required by the deed of trust in that case.) The appellee brief in this case attached the amended complaint in *Bayview* in which the borrowers averred that, if granted rescission, they would be able to bring the loan current. Kerns' counsel submits the aforesaid *dictum* in *Squire* supports imposition of a strict compliance standard in foreclosure rescission cases as does that part of the *Busch* unpublished order that stated that the 29 day notice rather than 30 day notice met the test of *Parrish.*[5]

Kerns, by counsel, submits that the issue of whether Virginia law imposes strict compliance on lenders in foreclosure rescission cases is not the deciding issue before this Court in this case. Kerns seeks damages, not rescission. The case law cited herein above in this reply brief, including the cases indicating Virginia law allows

[5] However, the order in *Busch* noted that the foreclosing creditor had not assigned error claiming that the 29 rather than 30 day notice was immaterial.

contract claims on the basis of immaterial breaches of contract should control as to Kerns' claim for damages in this case.

As regards the contention in the appellee brief that Kerns has not connected his breach of contract claim with damages, the complaint and amended complaint both averred that the breach of contract was the foreclosure. Kerns' damages included, *inter alia*, costs to defend against eviction and damage to credit. (JA 8, 94)

Conclusion

Kerns' appeal contends that the breach of contract in this case was not complete and was not actionable until there was damage to Kerns which did not occur until the foreclosure, before which he had no cause of action, and that, therefore, this case is not barred by the statute of limitations. If this is correct, it follows that Kerns has pled damages, specifically the economic damage to him that resulted from the foreclosure. As to the contention by the appellee brief that Wells Fargo actually sent a 30 day notice, that defense should be a matter for evidence, not for dismissal of the claim pled by Kerns, who explicitly and plausibly averred that Wells Fargo back-dated the notice and sent a 29-day cure notice rather than a 30 day cure notice.

WHEREFORE, Kerns prays that the Court reverse the

dismissal of his case by the trial court and remand this case to the trial court for trial.

Respectfully submitted,

DENNIS W. KERNS

By /s/ Henry W. McLaughlin
Counsel

Henry W. McLaughlin (VSB No. 07105)
The Law Office of Henry McLaughlin, P.C.
707 East Main Street, Suite 1050
Richmond, Virginia 23219
(804) 205-9029; fax (804) 205-9029
henry@mclaughlinvalaw.com
Counsel for Appellant Dennis W. Kerns

CERTIFICATE OF SERVICE

I hereby certify on this 21st day of May, 2018, that the foregoing brief has been filed in both digital and paper format with the Clerk's Office of the Supreme Court of Virginia, and this same day a copy has been transmitted via email to opposing counsel.

By /s/ Henry W. McLaughlin
Counsel

Henry W. McLaughlin (VSB No. 07105)
The Law Office of Henry McLaughlin, P.C.
Eighth and Main Building, Suite 1050
707 East Main Street
Richmond, Virginia 23219
(804) 205-9020; fax (804) 205-9029
henry@mclaughlinvalaw.com
Counsel for Appellant