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IN THE

Supreme Court of Virginia

RECORD NO. 171068

DENNIS W. KERNS,

Appellant,

v.

WELLS FARGO BANK, N.A.,

Appellee.

BRIEF OF APPELLANT

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ASSIGNMENT OF ERROR[1]

1. The Circuit Court of the City of Richmond, Virginia ("the trial court") erred in its Final Order ("the final order") dismissing Kerns' amended complaint with prejudice. Kerns' amended complaint averred damages resulting from a foreclosure of his home, including loss of legal title to his home, loss of equity, damage to his credit from the report to credit reporting agencies of the foreclosure, costs to defend against eviction, and inconvenience. Kerns' averred*, inter alia*, that the foreclosure was in breach of a required precondition for foreclosure of his home including, *inter alia*, a requirement that the lender send him a 30-day cure notice required by the deed of trust. In dismissing Kerns' claim for the aforesaid damages, the trial court held that the five-year statute of limitations for Kerns' claim began, not upon the foreclosure of his home, but earlier, when the appellee, Wells Fargo, N.A. ("Wells Fargo"), (which was the note noteholder) accelerated the note. Because Kerns' lawsuit was filed exactly five years after the foreclosure, the trial court held that the complaint, as amended, was barred by the five-year statute of limitations set forth in Va. Code Ann. Section 8.02-246(2) for breach of contract because the acceleration of

[1] See Joint Appendix at 183. References to the Joint Appendix are set forth as "JA" followed by the appropriate page(s)

the loan occurred on a date prior to the foreclosure. The trial court therefore granted Wells Fargo's plea I bar and dismissed with prejudice Kerns' amended complaint against Wells Fargo. That was error because Kerns did not sustain any damages, and therefore had no cause of action until Wells Fargo (acting through the substitute trustee) caused a foreclosure of the home. [Error preserved at JA 89-94; 171-176; 232-234; 268-273]

STATEMENT OF THE CASE

Appellant, Dennis W. Kerns ("Kerns"), maintains this appeal from the Final Order ("the final order") of the trial court entered on May 5, 2017 granting a plea in bar by the appellee, Wells Fargo Bank, N.A. ("Wells Fargo") on the basis of Wells Fargo's claim that Kerns' amended complaint was barred by a five year statute of limitations.

Kerns sued for damages averring that a foreclosure of his home ("the home") based on a deed of trust ("the deed of trust") breached a provision in paragraph 22 of the deed of trust requiring a cure notice of at least 30 days as a precondition to foreclosure. Kerns averred that Wells Fargo foreclosed on his home without having send the required 30-day cure notice, rather had sent a cure notice which, because back-dated, was for only 29 days. He averred damages including, *inter alia,* loss of equity and damage to credit.

Wells Fargo's plea in bar contended that Kerns' claim was barred by the five-year statute of limitations set forth in Va. Code Ann. Section 8.01-246 (2). It was undisputed that Kerns filed his lawsuit exactly five years after the foreclosure, and that Wells Fargo, as holder of the mortgage note ("the note") secured by the deed of trust, accelerated the note prior to the foreclosure. The narrow legal question in this appeal is whether the statute of limitations for Kerns' claim accrued on the date of the acceleration of the note, or on the later date of the foreclosure. If the statute of limitations began to run upon acceleration of the note, then Kerns' appeal must fail. If the statute of limitations began to accrue upon the foreclosure, then Kerns' appeal should succeed and this case should be remanded to the trial court for trial.[2]

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[2] In a separate case, in which a petition for appeal is now pending before this Court, an appellant (represented by the same counsel as counsel for Kerns) contended that the applicable statute of limitations to sue on grounds of breach of a deed of trust in a foreclosure is Va. Code Ann. Section 8.01-241. Debra Doss et al. v. Bank of American, N.A.; Record No. 171759. In that case the appellants contended that Section 8.01-241 provided that they had ten (10) years to file suit on a claim for damages based on averment that a foreclosure breached the terms of a deed of trust. However, Kerns, by counsel, did not raise that issue in this case.

Summary of the Case

(1) Facts

The facts are those in the amended complaint, as follows:

Uncontroverted Facts

Kerns entered into a mortgage loan ("the loan") evidenced by a note ("the note") signed by him, secured by a deed of trust ("the deed of trust"), which was a lien on his home. (JA 89-90)

The note at paragraph 6(C) stated,

> If I am in default, the Note Holder may send to me a written notice telling me that if I do not pay the overdue amount by a certain date, the Note Holder may send me a written notice telling me that if I do not pay the overdue amount by a certain date, the Note Holder may require me to pay immediately the full amount of Principal which has not been paid and all the interest that I owe on that amount. That date must be at least 30 days after the date on which the notice is mailed to me or delivered by other means.

(JA 90)

The deed of trust, at paragraph 22, provided, in pertinent part, the following:

> NON-UNIFORM COVENANTS. Borrower and Lender …covenant
>
> and agree as follows:
>
> **Lender shall give notice to Borrower prior to acceleration following Borrower's breach of any covenant or agreement in this Security Instrument . . . .**
> **. . . .**
> **The notice shall specify (a) the default; (b) the action required to**

> **cure the default; (c) a date, not less than 30 days from the date of notice is given to the Borrower, by which the default must be cured; and (d) that failure to cure the default on or before the date specified in the notice may result in acceleration of the sums secured by this Security Instrument and sale of the Property.**
>
> **The notice shall … inform Borrower . . . . of the right to bring a court action to assert the non-existence of a default or any other defense of Borrower to acceleration and sale.** [Emphasis not supplied]
>
> -- JA 90

Wells Fargo claimed rights as holder of the note. The deed of trust appointed Samuel I. White, P.C. ("White") as trustee on the deed of trust. (JA 90, 91)

Contested Factual Averments

The following averments of facts were contested by Wells Fargo, but taken to be correct for purposes of the trial court's ruling on Wells Fargo's plea in bar, because the plea in bar was decided without presentation of any evidence: (a) Wells Fargo sent Kerns a back-dated cure notice which, because it was back-dated, was a 29-day notice rather than a 30-day cure notice; (JA 91, 97-98, 99) (b) Wells Fargo caused White to foreclose on Kerns' home on the basis of the back-dated 30-day cure notice and neither Wells Fargo nor any other lender ever sent Kerns any proper 30-day cure notice as required by the deed of trust and note. (JA 91, 92)

Additional Uncontested Facts

Wells Fargo foreclosed on August 23, 2011 (JA 92-93), exactly five years before Kerns' original complaint was filed on August 23, 2016. (JA 1-50) Therefore, Wells Fargo accelerated the note on an earlier date, more than five years before the foreclosure. (JA 232-233)

Claim for Damages

In his complaint and amended complaint, Kerns claimed damages resulting from the foreclosure: (a) loss of record title to the home; (b) loss of equity; (c) damage to credit because of report to credit bureaus that he had been subjected to foreclosure; (d) cost to defend against eviction; and (e) inconvenience. (JA 8-9; 96)

MATERIAL PROCEDURE

Kerns originally filed a complaint in this case on August 23, 2016. (JA 2-50) contending that Wells Fargo had breached the terms of the deed of trust, *inter alia*, by foreclosing on the basis of a back-dated cure notice. (JA 5-6) He averred that, because the cure notice sent by Wells Fargo was back-dated, it gave a deadline of 29 days rather than 30 days. (JA 3-5, 39-41) He averred that neither Wells Fargo nor any other lender ever sent him a proper 30 day cure notice. (JA 5). He averred that, because no lender ever sent him a proper 30-day cure notice, the August 23, 2011 foreclosure breached

the deed of cure notice requirement of paragraph 22 of the deed of trust. (JA 5-6)

After Kerns' filed his original complaint, Wells Fargo demurred, with a memorandum in support arguing, *inter alia* (a) that the cure notice was not back-dated; and (b) that Kerns' claims were barred by the statute of limitations. (JA 54-55) Kerns' counsel did not object at that time to the inclusion of a statute of limitations defense by demurrer. After briefing and argument (JA 253-291), the trial court held that the statute of limitations ran from the date of the foreclosure (JA 87) but sustained Wells Fargo's demurrer on grounds that a back-dated notice was not sufficiently material to support a cause of action. (JA 87) The trial court granted Kerns leave to amend. (JA 88)

Kerns filed an amended complaint. (JA 89-118). Wells Fargo demurred again, and again claimed a defense of the statute of limitations. (JA 89-138) This time Kerns' counsel, in a memorandum in opposition to the demurrer to the amended complaint, objected to the defense of the statute of limitations being presented in a demurrer. (JA 140) Wells Fargo moved for leave to file a plea in bar (See JA 190). The trial court, at a hearing on April 17, 2017, allowed Wells Fargo to proceed to defend on the basis of a late plea in bar. (See JA 207)

At the April 17, 2017 hearing, counsel for Wells Fargo advised that trial court that, although the trial court had ruled that a back-dated cure notice (by one day) was not sufficiently material to support a claim for damages, there was substantial case law supporting claims by borrowers based on back-dated cure notices. (JA 201-202, 203-205) Wells Fargo's counsel asked the trial court to dismiss Kerns' case on different grounds—on the basis of the statute of limitations, including, *inter alia,* a contention by Wells Fargo that the statute of limitations began to run when the note was accelerated, more than five years before the foreclosure. (JA 209-216)

Kerns' counsel acknowledged acceleration occurred prior to the foreclosure (JA 232-233) so that acceleration occurred more than five years before Kerns' complaint was filed. Kerns' counsel argued the statute of limitations did not begin to run until the date of the foreclosure, stating, inter alia, "Until they actually go and foreclose, the borrower hasn't lost the home, and I submit the cause of action for a foreclosure cannot occur until there's a foreclosure. (JA 234)[3]

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[3] In argument on the statute of limitations issue, Kerns' counsel also stated the following: "You have cases all over everywhere where lenders are entitled to foreclose and don't do it. They have all sorts of discretion., and to say that if they are not supposed to foreclose because the haven't met the preconditions to foreclosure, that the statute of limitations runs before they foreclose when they're not entitled to do so, I submit is way too much of a stretch …. (JA 233)

The trial court took the matter under advisement and allowed counsel to submit supplemental briefs (JA 234-236). Counsel for both sides submitted supplemental briefs, repeating their respective positions on the issue of whether the statute of limitations had run. (JA 146- 154; 171-177)

On May 5, 2017, the trial court issued a final order including an opinion that the statute of limitations began to run at the time of the acceleration of the note, and therefore more than five years before Kerns' lawsuit was filed. (JA 179) On that basis, the trial court's final order dismissed Kerns' amended complaint, with prejudice. (JA 180) Kerns filed a Notice of Appeal on June 5, 2017 (JA 181-182).

STANDARD OF REVIEW

Because the trial court ruled on the plea in bar without taking any evidence, the standard of review for this appeal is *de novo*.

ARGUMENT

1. Kerns' Cause of Action Did Not Accrue Until the Foreclosure, Because, Until Then, He Had No Damages

In *Herbaugh et als. v. Bank of America, N.A. et al*.; Civil Action No. 5:15-cv-00071-MFU, the U.S. District Court for the Western District of Virginia held that the statute of limitations in a back-dated cure notice case began to run at the time of the acceleration of the note. However, in that

case, both the acceleration and the foreclosure occurred more than five years before suit was brought.

In *Jackson v. Ocwen et. als*; U.S. Dist. Ct., E.D. VA; Civil Action No. 3:15-cv-00238-MHL, a federal court ruled contrary to the holding in *Herbaugh.* In Jackson, the court held that the borrowers could not sue the lender for a defective cure notice because, although the lender had advertised the borrowers' home for foreclosure (which, as in this case, necessarily meant that the lender had sent a notice for foreclosure, which, *inter alia*, was a notice of acceleration), the borrowers could not sue on grounds of a defective 30-day cure notice because the lender had not, in fact, foreclosed.[4]

Kerns' counsel submits that Jackson was correctly decided and that the *dictum* in *Herbaugh (*that the statute began to run at acceleration of the note) was mistaken.[5]

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[4] The court in *Jackson* allowed the plaintiffs to proceed on a claim that the action by the lender to foreclose despite the borrowers being current on the note was the basis for a cause of action.

[5] But see *Mary Harris Meade v. Bank of America, N.A. et. als.*; Cir. Ct, Chesterfield Co.; Case No. CL16-3453 (May 1, 2017) (in that case, the borrower sued on grounds the lender foreclosed on her home without having complied with ted VHDA from proceeding to foreclosure without offering her a face-to-face meeting. That case is on appeal to this Court.

All of the damages recited in both the original and amended complaint flowed entirely from foreclosure: loss of record title, loss of equity, damage to credit from a report of a foreclosure, cost to defend against eviction. The lender's wrongful acceleration of the note caused none of those damages. All of the damages to Kerns set forth in his complaint and amended complaint were caused by the foreclosure. Wrongful acceleration of the note caused none of those damages. The mere acceleration of the note caused no damages at all. That was the basis of that part of the *Jackson* decision.

2. A Decision in Favor of Wells Fargo in this Case Would Create an Unfair Precedent Allowing Lenders to Avoid Liability by Early Wrongful Accelerations Followed by Delay Until the Expiration of the Statute of Limitations After Which Wrongful Foreclosures Could Be Conducted With Impunity

Because foreclosures seldom result in high bids that are comparable to the real value of the home being auctioned, a precedent in the law that the statute of limitations begins to run at acceleration of the note would allow lenders the option to accelerate early without sending a proper 30-day cure notice or without sending any 30-day cure notice, followed by a five year wait, and, if the borrower is paying but somewhat in arrears, the lender could foreclose in breach of the terms of the deed of trust with impunity, with the opportunity to make a credit bid less than the actual

value of the home, so that, if the lender purchased the home at the foreclosure, the borrower would have no recourse on the basis of a defective cure notice or even if there were no notice at all.

CONCLUSION

Kerns' counsel submits the *Jackson* case should prevail in the case law and asks this Court to hold that, where there is a foreclosure in breach of the terms of a deed of trust, the statute of limitations begins to run on the date of the foreclosure. Wherefore, Kerns prays that the Court reverse the May 5, 2017 final order of the trial court and remand this case for trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify on this 10th day of April, 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.

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