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CASE LAW UPDATE

J. Richard White
Amanda R. Grainger

J. Richard White
Amanda R. Grainger
Winstead PC
2728 N. Harwood, #500
Dallas, Texas 75201
jrwhite@winstead.com
agrainger@winstead.com

214.745.5400

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J. RICHARD WHITE AND AMANDA R. GRAINGER
WINSTEAD PC
DALLAS, TEXAS

The case selection for this year's Case Law Update is the arbitrary choice of the authors, but with an emphasis on cases of first impression, novel issues, detailed opinions on elements of a cause or Texas Supreme Court cases. If a case is not mentioned, it is completely the authors' fault. Cases discussed range from 590 S.W.3d through 622 S.W.3d. The references to various statutes and codes used throughout this presentation are based upon the cases in which they arise. You should refer to the case and to the statute or code in question to determine whether there have been any amendments that might affect the outcome of any issue.

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I. MORTGAGES/FORECLOSURES/LIENS.

1. Limitations Tolled by Bankruptcy and Abandonment of Acceleration.

Citibank, NA v. Pechua, Inc., 624 S.W.3d 633, 2021 Tex. App. LEXIS 3166 (Tex. App.—Houston [14th Dist.] 2021, no pet.) involved the foreclosure of a home loan that was contested on the basis of the lapse of the statute of limitations. An original home mortgage loan was made in 2003, but on March 4, 2009, the lender filed an application for Rule 736 foreclosure. After this, the debtor filed three subsequent bankruptcies. The periods of duration of each bankruptcy filing until foreclosure being approximately 17 months, 38 months and 4 months or nearly 5 years in the aggregate. On July 20, 2015, the lender notified the debtor that they were in default, and issued a notice of default on March 2, 2016, and accelerated the debt on April 29, 2016, and filed a second Rule 736 application for foreclosure on July 26, 2016. The new property owner, Pechua, claimed the creditor could not foreclose based on the expiration of the 4 year limitation period.

On appeal, the bank raised two issues upon which the Court focused. The first issue was that the 3 bankruptcy filings tolled the running of the limitation period. And the other issue was that the subsequent 2015 and 2016 notices of default effectively abandoned the prior acceleration of the loan. In analyzing the first issue, the Court noted that the automatic stay in bankruptcy does not statutorily provide for the tolling of the running of limitations. Neither the Texas Supreme Court nor this Court had previously addressed this issue, but such issue had been addressed by prior decisions in various Fifth Circuit and non-precedential opinions issues by its sister courts. Those cases generally held that Texas common law allows for the tolling of limitations where the exercise of legal remedies is prevented by pending legal proceedings. Based on such authority, the Court held that bankruptcy tolled the running of limitations which extended the creditor's right of foreclosure.

In the second issue, the Court addressed whether the acceleration had been abandoned by the subsequent notices of default sent in 2015 and 2016; however, the Court never addressed the 2015 notice of default and relied solely upon the language of the second notice of default in March 2016, which the Court determined to be clear and unequivocal language relating to the unilateral abandonment of acceleration. Four critical elements of the notice of default were applicable to a determination of its prior abandonment of acceleration. These four elements were: (1) the current notice allowed for a cure of the note by paying current past due amount, (2) a statement that the loan would be accelerated if the outstanding payments were not brought current, (3) that the loan might be accelerated in the future, and (4) that the notice was entitled "Notice of Intent to Accelerate," which represented a forward looking statement negating that a prior acceleration was still effective. In following these lines of cases, the Court did notice and distinguish its holding in Swoboda v. Ocwen Loan Servicing, LLC, 579 S.W.3d 628 (Tex. App.—Houston, [14th Dist.], 2019 no pet.), in which it held that abandonment was not proved because the notice contained no suggestion that the original maturity date had been restored after the prior acceleration. The Court also distinguished Pitts v. Bank of New York Melon Trust Co., 583 S.W.3d 258 (Tex. App.—Dallas 2018, no pet.), in which both a monthly statement and delinquency notice were analyzed but rejected because neither contained language that indicated a future acceleration for non-payment of the noticed amount, thereby not negating the prior acceleration. In a final effort, the homeowner contended that the creditor's waiver of acceleration (and the consequential reinstatement of the original maturity date) was inconsistent with the non-waiver clause in the existing Deed of Trust, which read: "**Forbearance by Lender Not a Waiver** . . . any forbearance by Lender in exercising any right or remedy . . . shall not be a waiver of or prejudice the exercise of any right or remedy." This position was rejected with the Court citing favorably from Ocwen Loan Servicing, L.L.C. v. REOAM, L.L.C., 775 F. App'x 354, 357 (5th Cir. 2018)(per curium) which held "the provision's preservation of [the] lender's right to accelerate in the future did not affect its ability to abandon an existing acceleration."

2. Non-Receipt of Notice.

In Douglas v. Wells Fargo Bank, N.A., 992 F.3d 367 (5th Cir. 2021), the homeowners challenged a foreclosure based on a failure to have received the required notices under the deed of trust and foreclosure statute. The evidence showed that the notice of acceleration and foreclosure sale was sent by certified mail but was returned with the notations "unclaimed" and "unable to forward." In its summary judgment proof, the lender submitted (1) its attorney's declaration of mailing the notice, (2) copies of the notice letters, and (3) scan of the envelopes bearing the debtor's name and address. But, the homeowners contended that an allegation of non-receipt should cause summary judgment to be denied.

The Court rejected this argument, citing prior cases upholding the "constructive notice" only requirement in the deed of trust and statute. See, LSR Consulting LLC v. Wells Fargo Bank, N.A., 835 F.3d 530 (5th Cir. 2016). Also, the Court distinguished the case relied upon the homeowners, reasoning that in Sanceda v. GMAC Mortgage Corp., 268 S.W.3d 135 (Tex. App.—Corpus Christi 2008; no pet.), the lender provided no supporting evidence of proper service of a notice. Here, the lender had submitted such proof, which prevailed over the homeowner's "self-servicing protestation[] of non-receipt of notice."

3. HUD Regulations.

In Ferrell v. Union Home Mortg. Corp., 2021 U.S. Dist. Lexis 67228; 2020 WL 1306685 (S.D. Tex., April 7, 2021), a homeowner failed to make payment on her home mortgage and the lender sent notices of default, acceleration and foreclosure sale. The homeowner filed suit alleging breach of contract based on failure to have received the default notice and the lender's failure to follow HUD regulations.

The Court summarily disposed of the failure to receive notice claim. Both the deed of trust and Tex. Prop. Code Ann. § 51.002(e) only require the giving or serving of notice, not the receipt thereof by the debtor. The mere allegation of non-receipt has been repeatedly held to be insufficient to support a summary judgment claim. The dispositive inquiry is only the giving or service of notice, which was supported by the lender's summary judgment evidence, being sworn testimony of an appropriate corporate representative of the lender.

The second claim was that the lender failed to follow HUD regulations which were incorporated into the deed of trust with the following provisions: "[T]his Security Instrument does not authorize acceleration or foreclosure if not permitted by regulations of the [HUD] Secretary." Specifically, the homeowner alleged the lender's failure (1) to have a face to face meeting (pursuant to 24 C.F.R. § 203-604), and (2) to evaluate her for loss mitigation options (pursuant to 24 C.F.R. § 203.605). In analyzing the face-to-face meeting requirement, the Court noted that the regulations required only a reasonable effort to arrange such a meeting, but that such face-to-face meeting is not required when the debtor will not cooperate. Therefore, the lender's evidence of a phone call with the debtor conclusively established the debtor's refusal to have such a meeting and satisfaction of such regulation. The regulations specified that reasonable efforts would be satisfied with at least one certified letter sent to the mortgagor or one trip to see the mortgagor at the mortgaged property. Because the lender had sent the debtor such a certified letter, and provided evidence of same for the summary judgment notice, and the debtor failed to disprove that, the lender had met its burden.

4. Foreclosing Lender Identity.

In PNC Mortg. v. Howard, 618 S.W.3d 75 (Tex. App.—Dallas 2019, pet. granted), the homeowner challenged a foreclosure sale on their home. The problems with the foreclosure sale arise from the different parties which held the note and deed of trust from time to time. The loan was originated by Bank of Indiana on March 24, 2005. Bank of Indiana assigned the note and deed of trust on March 1, 2008 to National City Mortgage Co., a subsidiary of National City Bank. In November, 2009 National City Bank merged into PNC. The default occurred November, 2009 and notice of default and intent to accelerate was issued by National City Bank, as the loan servicer, on January 20, 2009. Notice of acceleration was sent on June 19, 2009 by National City Bank's attorney; on that same day, National City Bank appointed a substitute trustee. A later notice of acceleration was sent in March 2010 by Bank of Indiana, as mortgagee, and PNC, as the loan servicer. The non-judicial foreclosure occurred April 2016 [not a typo; more on that later].

The problem alleged by the Howards was that (1) the foreclosure sale was noticed by and conducted on behalf of Bank of Indiana at a time after it had assigned its interests in the loan, and (2) the substitute trustee was appointed by Bank of Indiana after it had assigned its loan interests.

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