No. 01-15-00067-CV

IN THE

FIRST COURT OF APPEALS

HOUSTON, TEXAS

RESIDENTIAL CREDIT SOLUTIONS, INC.
Appellant

V.

MARTHA BURG
Appellee

On Appeal from the 281st District Court
Harris County, Texas.

Trial Cause No. 2013-47157

APPELLEE'S BRIEF

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IDENTITY OF PARTIES AND COUNSEL

Appellee agrees with the identity of parties and counsel stated by Appellant.

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TERMS AND ABBREVIATIONS USED WITHIN APPELLEE'S BRIEF

Appellant	Residential Credit Solutions, Inc.
Appellee	Martha Burg
Burg	Martha Burg
CR	Clerk's Record
RCS	Residential Credit Solutions, Inc.
Saxon	Saxon Mortgage Services, Inc.
Foreclosure Proceeding	Cause No. 200854797, in the 190th Judicial Court of Harris County, Texas.

STATEMENT OF THE CASE

Burg agrees with RCS's Statement of the Case.

STATEMENT REGARDING ORAL ARGUMENT

Burg suggests that this matter is appropriate for determination on the briefs and record without oral argument. If the Court believes that oral argument would assist, Burg requests the opportunity to present oral argument.

ISSUE PRESENTED

1. Has RCS presented competent summary judgment evidence that the August 12, 2008 acceleration of the Burg indebtedness was abandoned by RCS by August 12, 2012, which was four years after RCS agrees that acceleration occurred?

STATEMENT OF FACTS

On March 30, 2007, Burg signed a Texas Home Equity Adjustable Rate Note in the original principal amount of $270,000.00 (the "Note"), bearing interest at the initial rate of 7.600% per annum. The Note was originally payable to Dallas Home Loans, Inc. CR 99-103.

In connection with the Note, Burg signed a Texas Home Equity Security Instrument ("Security Agreement") covering real property described as:

> LOT EIGHT (8), IN BLOCK EIGHTEEN (18), OF REPLAT LETTERED "F" OF MEYERLAND, SECTION EIGHT (8), AN ADDITION IN HARRIS COUNTY, TEXAS, ACCORDING TO THE MAP OR PLAT THEREOF, RECORDED IN VOLUME 67, PAGE 68, OF THE MAP RECORDS OF HARRIS COUNTY, TEXAS. [CR 110-133]

The property is more commonly known as 5330 Dumfries Drive, Houston, Texas 77096 (the "Property"). The Property was security for payment of the Note. The Security Agreement was recorded under Clerk's File No. 20070256175 in the real property records of Harris County, Texas. CR 110-133.

Burg became delinquent in the payment of the Note by failing to pay the installment due on June 1, 2008, and all installments after that date. CR 97. Pursuant to the Note and Security Agreement, Burg has no personal liability, but the Property secured the debt, interest on the debt, and all costs, fees, advances, and expenses, including attorneys' fees, authorized under the terms of the Note and

the Security Agreement, before the liens were extinguished on August 12, 2012, pursuant to Tex. Civ. Prac. & Rem. Code Ann. §16.035. CR 10; 100.

RCS admits that on June 23, 2008, Saxon Mortgage Services Inc., the prior mortgage servicer for the Note, caused a Notice of Default and Intent to Accelerate to be mailed to Burg, which Burg received. Burg did not cure her default. CR 38-39; 62-63; RCS Brief at 11.

RCS also admits that Saxon originally accelerated Burg's loan on August 12, 2008, by causing a Notice of Acceleration of Texas Non-Recourse Home Equity Loan to be mailed to Burg, which Burg received. Burg did not pay the accelerated loan balance. CR 25-26; 38-39; 64; RCS Brief at 11, 18.

On September 9, 2008, Saxon filed its Application for Expedited Foreclosure Proceeding Pursuant to Tex. R. Civ. P. 736 in cause number 2008-54797 styled *In re Order for Foreclosure Concerning Martha A. Burg and 5330 Dumfries Drive, Houston, Texas 77096*, in the 190th Judicial District Court of Harris County, Texas (the "Foreclosure Proceeding"). CR 65-67; RCS Brief at 11. The Foreclosure Proceeding was ultimately dismissed. RCS claims that the dismissal was because the parties or Saxon "announced settlement." RCS Brief at 11, 19. There is absolutely no evidence in the record that the dismissal was because the parties or Saxon "announced settlement." Furthermore, RCS never pleaded and made no reference or argument in the trial court that there had been any kind of

settlement (CR 7-8; 90-94; 158-60), and makes no argument in this Court that any "announced settlement" evidences abandonment of acceleration.

In July 2009, Saxon sent Burg two proposed Stipulation Agreements, the first dated July 20, 2009 and the second dated July 30, 2009. CR 68-70; 71-73. RCS does not dispute that the Stipulation Agreements never became effective because Burg did not sign the first Agreement and Saxon never signed the second Agreement, CR 39. Burg never made a payment under the Agreements, which rendered the Agreements "null and void" from the very beginning, CR 39; 68; 70; 71; 73, and Burg's unchallenged testimony was that the Agreements were never intended to be effective. CR 38-40.

The Agreements also provide that RCS may maintain the Foreclosure Proceeding, and that upon default, the Agreements become "null and void" and that RCS may then continue with the Foreclosure Proceeding "without further notice." CR 69, 72. Burg defaulted at the very inception of the Agreements by never sending a payment pursuant thereto, which was required when Burg returned the Agreements. The Agreements specifically provide that the Agreements became "null and void" from the very beginning because of this lack of initial payment. CR 68 at paragraph 2; 69 at paragraph 8; 71 at paragraph 2; 72 at paragraph 8.

Later, on September 30, 2009, Burg executed a Home Affordable Modification Trial Period Plan (the "Plan") and agreed to make monthly trial

period plan payments. CR 74-77; 137-140. On October 19, 2009, Burg made one payment toward the Plan. CR 40; 97. No further payments were made. CR 40; 97. RCS terminated the Plan by letter dated February 26, 2010. CR 78. The Plan specifically provides that receipt of payments does not affect acceleration. CR 75 at paragraph 2E.

Burg filed a Traditional and No Evidence Motion for Summary Judgment on July 11, 2014. CR 32-36. The "no evidence" portion of the Motion is based on RCS's burden to prove abandonment of the acceleration, which is an affirmative defense. RCS filed its Response to Burg's Traditional and No Evidence Motion for Summary Judgment on July 25, 2014 [CR 90-145]. RCS's Response argued only that Burg's payment under the Plan evidenced abandonment of the acceleration. CR 93. No argument was presented, much less expressly presented in the trial court, that the Agreements constituted notice to Burg that RCS was no longer pursuing collection of the accelerated balance. RCS also made no mention in the trial court of an "announced settlement." CR 90-94; 158-60. Burg filed a Reply on July 28, 2014. CR 146-148. The Traditional and No Evidence Motion for Summary Judgment was set for hearing on August 1, 2014. CR 87-88.

Following hearing, the trial court entered a final summary judgment in favor of Burg on September 12, 2014. The court's judgment stated that, "the lien sought

to be foreclosed by [RCS] [is] void pursuant to [Tex. Civ. Prac. & Rem. Code Ann. §16.035(d)]." CR 155.

On October 10, 2014, RCS filed its Motion for New Trial, which only reiterated the same argument made in RCS's Response to Burg's Motion for Summary Judgment. Again, RCS failed to mention any "settlement" or any argument that the Stipulation Agreements constituted "notice" of abandonment. CR 158-161.

STANDARD OF REVIEW

Burg established her summary judgment by proving that the Note had been accelerated after a prior notice of default and opportunity to cure, and that four years had passed since the acceleration. *See Holy Cross Church v. Wolf*, 44 S.W.3d 562, 568 (Tex. 2001). The parties agree that acceleration occurred on August 12, 2008. RCS Brief at 11. This agreement also establishes the acceleration date. *Wolf, supra* at 568. The burden then shifts to RCS to produce competent summary judgment evidence showing that the acceleration was abandoned by August 12, 2012. *See Wolf, supra* at 570; *Centeq Realty, Inc. v. Siegler*, 899 S.W.2d 195, 197 (Tex. 1995). RCS must "specifically present" both evidence and argument to the trial court. Mere reference to summary judgment evidence is insufficient. *See, e.g., McConnell v. Southside ISD*, 858 S.W.2d 337, 341 (Tex. 1993).

SUMMARY OF THE ARGUMENT

RCS has not presented competent summary judgment evidence showing that it abandoned the August 12, 2008 acceleration of the Burg indebtedness before the liens securing the indebtedness became void, pursuant to Tex. Civ. Prac. & Rem. Code §16.035(d), on August 13, 2012. Actions by RCS after August 12, 2012, cannot resurrect void liens.

RCS is making a completely new argument in this Court that the Stipulation Agreements sent to Burg in July 2009 constitute clear notice that RCS was no longer pursuing collection of the accelerated balance. RCS also references in this Court that the parties and/or Saxon "announced settlement" in the Foreclosure Proceeding but makes no argument in this Court concerning the significance of this alleged fact, and never mentioned this matter in the trial court. This Court cannot consider these issues because RCS never pleaded these matters and never expressly presented arguments concerning these issues to the trial court. Mere reference to summary judgment evidence is insufficient. *See, e.g., McConnell v. Southside ISD,* 858 S.W.2d 337, 341 (Tex. 1993).

Even if this Court were to consider RCS's new argument that the Stipulation Agreements constitute notice to Burg that RCS was no longer pursuing collection of the accelerated balance, such new argument fails. The Stipulation Agreements were presented as proposed agreements, not notices, which agreements were never

signed by the same party and never became effective because of their own terms. In addition, the agreements contain a provision in section 6 that the pending Foreclosure Proceeding was being maintained, and that upon default, the agreement became "null and void" and RCS could continue the Foreclosure Proceeding "without further notice." CR 69, 72.

Texas R. Civ. P. 736(1)(E)(4) and (8), as they existed before 2012 (Appendix 1), required that indebtedness must be accelerated to proceed with an Expedited Foreclosure Proceeding, and RCS acknowledged under oath in the Foreclosure Proceeding that the Burg indebtedness had been accelerated. By their own terms, the Stipulation Agreements did not abandon, but continued the acceleration.

RCS abandons the sole argument it made in the trial court that Burg's payment under the Plan shows abandonment of the acceleration. RCS Brief at 21. RCS abandons this argument because the Plan expressly states that acceptance of payments does not affect acceleration of the Burg debt. This Court has previously ruled that similar wording in an agreement prevents abandonment of an acceleration. *See Hardy v. Wells Fargo Bank, N.A.* No. 01-12-00945-CV, at 13 (Tex. App. — Houston [1st Dist.], Dec. 30, 2014) (memo. opin.). A copy of this case is at Appendix 2. Instead, RCS now contends for the first time that the Plan is irrelevant because the prior Stipulation Agreements were sufficient to abandon the

acceleration. RCS Brief at 21. As shown above and below, this Court cannot consider RCS's new argument concerning the Stipulation agreements, and even if this Court could consider this new argument, the Stipulation Agreements, by their own terms, were insufficient to abandon the acceleration.

Furthermore, this Court must also disregard RCS's assertion of "settlement" because there is no evidence in the record to support it, the issue was not pleaded nor presented to the trial court, and no argument is made in this Court concerning the significance of the alleged settlement.

RCS simply has not presented competent summary judgment evidence showing abandonment of acceleration by August 13, 2012, and actions by RCS after August 12, 2012, cannot revive void liens.

ARGUMENT

A. *RCS's new argument in this Court that the Stipulation Agreements constitute clear notice of abandonment cannot be considered because RCS never expressly presented this new argument in the trial court.*

RCS's arguments on appeal are completely different from those made in the trial court. In the trial court, RCS did not contest that the Stipulation Agreements were "null and void" from their inception. RCS Brief at 12; CR 39; 68; 71; 73; 92. RCS pleaded and argued solely that the payment made by Burg during the pendency of the Home Affordable Modification Trial Period Plan (the "Plan") evidenced abandonment of the acceleration of the Burg indebtedness. CR 7-9; 90-95; 158-161. RCS abandons the payment argument in this Court, obviously realizing that this argument is a loser. RCS Brief at 21. *See also,* Section C below. RCS instead makes an entirely new argument that the Stipulation Agreements constituted "notice" to Burg that RCS was no longer seeking the accelerated balance, which constitutes abandonment of the acceleration. *See* RCS Brief at 20.

This Court cannot even consider RCS's new argument because it was never pleaded (CR 7-13) and never expressly presented to the trial court. As stated by the Supreme Court:

> Issues a non-movant contends avoid the movant's entitlement to summary judgment must be **expressly presented** by written

> answer to the motion or by other written response to the motion **and are not expressly presented by mere reference to summary judgment evidence.** (emphasis added).

McConnell v. Southside ISD, 858 S.W.2d 337, 341 (Tex. 1993). ***See also,*** *Mansions In The Forest, L.P. v. Montgomery County,* 365 S.W.3d 314, 317 (Tex. 2012); *Parham Family Ltd. Part. v. Morgan,* 434 S.W.3d 774, 787-788 (Tex. App. — Houston [14th Dist.] 2014, *no pet*); Tex. R. Civ. P. 166a(c); Tex. R. App. P. 33.1. RCS's only mention of the Stipulation Agreements in its Response to Burg's Motion is that "Burg executed a Stipulation Agreement on July 30, 2009" (CR 91), and that "Burg further alleges that she did not sign the Stipulation Agreement; however, she acknowledges having signed the Modification Agreement." CR 92. The term "Modification Agreement" is defined by RCS as the Home Affordable Modification Trial Period Plan dated October 1, 2009. CR 91. RCS's only mention of the Stipulation Agreements in its Motion for New Trial is that "Burg executed a Stipulation Agreement on July 30, 2009." CR 159.

There is not a whiff of an argument presented, much less expressly presented, to the trial court that the Stipulation Agreements constitute "notice" to Burg that RCS was seeking less than the accelerated balance. CR 90-94; 158-160. Mere reference to the Stipulation Agreements is insufficient. *McConnell,* supra at 341. It is clear that RCS never expressly

presented its new "notice" argument to the trial court, and is therefore prevented from raising it for the first time in this Court.

B. *RCS new reference to an "announced settlement" cannot be considered by this Court.*

Similarly, RCS mentions for the first time in this Court that the parties and/or Saxon "announced settlement" in the Foreclosure Proceeding. RCS Brief at 11, 19. There is absolutely no evidence in the record of any announced settlement. Furthermore, this Court cannot consider any argument concerning "settlement" because it was not pleaded (CR 7-8), and no mention of settlement was made in the trial court. CR 90-94; 158-60.

C. *The Stipulation Agreements are not "notices" showing abandonment of the acceleration.*

Even if this Court were to consider RCS's new argument (which it cannot) that the Stipulation Agreements constitute clear notice to Burg that RCS was no longer seeking the accelerated amount, such argument fails.

Rule 736(1)(E)(4), as provided before 2012 (Appendix 1), requires that indebtedness must be accelerated to proceed in an Expedited Foreclosure Proceeding. Rule 736(8)(A) (Appendix 1) also states that the Application must comply with Rule 736(1)(E) (which includes continued

acceleration of the debt) in order for a lender to obtain an order authorizing foreclosure.

RCS's own sworn pleadings in the Foreclosure Proceeding state that the Burg indebtedness is accelerated. CR 66-67. Paragraph 6 of the Stipulation Agreements provides that RCS may maintain the Foreclosure Proceeding during the Agreement. Furthermore, any failure by Burg to make any of the payments required thereunder "shall immediately result in this Agreement becoming null and void and shall permit [RCS] to immediately proceed with its remedies, **without further notice**, including foreclosure of its Security Instrument on Mortgagor property" (emphasis added). CR 69, 72.

The wording of the Stipulation Agreements themselves, and the requirement of Rule 736 that acceleration be maintained during an Expedited Foreclosure Proceeding, preclude RCS's argument that the Agreements constitute notice of abandonment. Instead, by providing that the pending Foreclosure Proceeding (which requires acceleration) be maintained, and may be pursued after default "without further notice," the Agreements specifically preserve and continue the acceleration of the Burg indebtedness.

Furthermore, the Stipulation Agreements show on their face that they were proposed agreements and not "notices," which never became effective because no Agreement was signed by both parties, and no required payment was made thereunder. CR 39; 68-73. RCS never challenged or contradicted Burg's affidavit that the Stipulation Agreements were never intended to be effective. CR at 39.

RCS relies upon two unreported Federal court cases to substantiate its argument. RCS Brief at 19. However, both of these cases reference account statements and/or notices of intent to accelerate being sent to the borrower before the liens became void, and which set forth only defaulted installments and not the accelerated balance. There is no evidence that such account statements and/or notices of intent to accelerate were sent to Burg before the liens became void. This case is entirely different because it involves proposed agreements which never became effective according to their own terms.

Finally, the later executed Plan makes clear that there is no waiver of acceleration and that RCS was continuing to consider the Burg indebtedness as accelerated. CR 75, 138. The Stipulation Agreements simply do not constitute notices, much less "clear" notices, that RCS was no longer seeking recovery of the accelerated balance.

D. *Burg's payment under the Plan did not affect the acceleration.*

The Plan specifically provides that acceptance of payments "will be without prejudice, and will not be deemed a waiver of the acceleration of the loan or foreclosure action." CR 75, 138 ¶ 2(e). Burg's single payment under the Plan simply did not affect acceleration. This Court has recently held that similar wording in an Agreement prevents abandonment of acceleration. *See Hardy v. Wells Fargo Bank, N.A.,* No. 01-12-00945-CV, at 13 (Tex. App. — Houston [1st Dist.] Dec. 30, 2014) (memo. opin.). A copy of this case is at Appendix 2.

RCS apparently realizes that this sole argument made in the trial court will not prevail, and RCS actually forsakes completely the payment argument in this Court. RCS Brief at 21. Instead RCS asserts only that by sending the Stipulation Agreements to Burg, RCS had already abandoned the acceleration before Burg entered into the Plan. RCS Brief at 21. As shown above, RCS's new argument that the Stipulation Agreements constitute notice to Burg that RCS had abandoned the acceleration cannot prevail because (1) RCS never "expressly presented" the argument to the trial court, rendering this Court unable to even consider this new argument, and (2) the terms of the Stipulation Agreements show that acceleration was not abandoned.

RCS simply has not expressly presented competent summary judgment evidence showing abandonment of acceleration before the liens became void.

E. *RCS's action after August 12, 2012, cannot revive void liens.*

The parties agree that the Burg Note was accelerated on August 12, 2008, and that the liens became void four years later, on August 12, 2012, unless RCS could show abandonment of the acceleration during that four year period. Tex. Civ. Prac. & Rem. Code §16.035(a); RCS Brief at 17-18. RCS has not produced competent summary judgment evidence showing abandonment of acceleration during the four year period after the admitted acceleration date.

RCS references actions it took after August 12, 2012. RCS Brief at 21-23. However, such actions cannot revive liens which are already void. Recognizing notices of acceleration and/or other actions of RCS after August 12, 2012, would make a nullity of the statute of limitations. *See, e.g., Burney v. Citigroup Global Markets Realty Corp.*, 244 S.W.3d 900, 904, (Tex. App. — Dallas 2008, *no pet.*).

PRAYER

Appellee Martha Burg respectfully requests that this Court deny RCS's appeal, affirm the trial court's summary judgment, and additionally grant such other and further relief to which Appellee may show itself entitled.

Respectfully Submitted,

O'CONNOR, CRAIG, GOULD & EVANS

By: /s/ Michael C. O' Connor

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CERTIFICATE OF COMPLIANCE

Pursuant to Texas Rule of Appellate Procedure 9.4(i)(3), I hereby certify that this brief contains 3,282 words (excluding the caption, table of contents, table of authorities, signature, proof of service, certification, and certificate of compliance). This is a computer generated document created on Microsoft Word, using 14-point typeface. In making this certificate of compliance, I am relying on the word count provided by the software used to prepare the document.

/s/ Michael C. O' Connor
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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Appellee's Brief was forwarded to all parties and/or their attorneys of record, in accordance with the Texas Rules of Civil Procedure, on this the 28th of May 2015, addressed as follows:

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APPENDIX

Appendix 1: Tex. R. Civ. P. 736, prior to 2012.

Appendix 2: *Hardy v. Wells Fargo Bank, N.A.*, No. 01-12-00945-CV (Tex. App. — Houston [1st Dist.], Dec. 30, 2014 (memo. opin.).

Rule 736. EXPEDITED FORECLOSURE PROCEEDING [Effective until January 1, 2012].

Texas Rules

TEXAS RULES OF CIVIL PROCEDURE

Part VII. RULES RELATING TO SPECIAL PROCEEDINGS

Section 1. PROCEDURES RELATED TO HOME EQUITY LOAN FORECLOSURE [Effective until January 1, 2012].

As amended through June 10, 2014

Rule 736. EXPEDITED FORECLOSURE PROCEEDING [Effective until January 1, 2012]

(1) **Application.** A party filing an application under Rule 736 seeking a court order allowing the foreclosure of a lien under Tex. Const. art. XVI, § 50(a)(6)(D), for a home equity loan, or § 50(k)(11), for a reverse mortgage, shall initiate such in rem proceeding by filing a verified application in the district court in any county where all or any part of the real property encumbered by the lien sought to be foreclosed (the "property") is located. The application shall:

(A) be styled: "In re: Order for Foreclosure Concerning*(Name of person to receive notice of foreclosure)*and*(Property Mailing Address)*

(B) identify by name the party who, according to the records of the holder of the debt, is obligated to pay the debt secured by the property;

(C) identify the property by mailing address and legal description;

(D) identify the security instrument encumbering the property by reference to volume and page, clerk's file number or other identifying recording information found in the official real property records of the county where all or any part of the property is located or attach a legible copy of the security instrument;

(E) allege that:

(1) a debt exists;

(2) the debt is secured by a lien created under Tex. Const. art. XVI, § 50(a)(6), for a home equity loan, or § 50(a)(7), for a reverse mortgage;

(3) a default under the security instrument exists;

(4) the applicant has given the requisite notices to cure the default and accelerate the maturity of the debt under the security instrument, Tex. Prop. Code § 51.002, Tex. Const. art. XVI, § 50(k)(10), for a reverse mortgage, and applicable law;

(F) describe facts which establish the existence of a default under the security instrument; and

(G) state that the applicant seeks a court order required by Tex. Const. art. XVI, § 50(a)(6)(D), for a home equity loan, or § 50(k)(11), for a reverse mortgage, to sell the property under the security instrument and Tex. Prop. Code § 51.002.

A notice required by Tex. Const. art. XVI, § 50(k)(10), for a reverse mortgage, may be combined or incorporated in any other notice referenced in Rule 736(1)(E)(4). The verified application and any supporting affidavit shall be made on personal knowledge and shall set forth such facts as would be admissible in evidence, provided that facts may be stated based upon information and belief if the grounds of such belief are specifically stated.

(2). **Notice.**

(A) **Service.** Every application filed with the clerk of the court shall be served by the party filing the application. Service of the application and notice shall be by delivery of a copy to the party to be served by certified and first class mail addressed to each party who, according to the records of the holder of the debt is obligated to pay the debt. Service shall be complete upon the deposit of the application and notice, enclosed in a postage prepaid and properly addressed wrapper, in a post office or official depository under the care and custody of the United States Postal Service. If the respondent is represented by an attorney and the applicant's attorney has knowledge of the name and address of the attorney, an additional copy of the application and notice shall be sent to respondent's attorney.

(B) **Certificate of Service.** The applicant or applicant's attorney shall certify to the court compliance with the service requirements of Rule 736. The applicant shall file a copy of the notice and the certificate of service with the clerk of the court. The certificate of service shall be prima facie evidence of the fact of service.

(C) **Form of Notice.** The notice shall be sufficient if it is in substantially the following form in at least ten point type:

Cause No. _____

In re: Order for Foreclosure In the District Court

Concerning Cause No._____ *(1)____ Of _____ County

and

_____*(2)_____ Judicial District

NOTICE TO _____*(3)_____

An application has been filed by , as Applicant, on *(4) , in a proceeding described as:

"In re: Order for Foreclosure Concerning and * (2) .

The attached application alleges that you, the Respondent, are in default under a security instrument creating a lien on your homestead under Tex. Const. art. XVI, § 50(a)(6), for a home equity loan, or § 50(a)(7), for a reverse mortgage. This application is now pending in this court.

Applicant seeks a court order, as required by Tex. Const. art. XVI, § 50(a)(6)(D) or § 50(k)(11), to allow it to sell at public auction the property described in the attached application under the security instrument and Tex. Prop. Code § 51.002.

You may employ an attorney. If you or your attorney do not file a written response with the clerk of the court at ___*(5)____ on or before 10:00 a.m. on *(6) an order authorizing a foreclosure sale may be signed. If the court grants the application, the foreclosure sale will be conducted under the security instrument and Tex. Prop. Code § 51-002.

You may file a response setting out as many matters, whether of law or fact, as you consider may be necessary and pertinent to contest the application. If a response is filed, the court will hold a hearing at the request of the applicant or respondent.

In your response to this application, you must provide your mailing address.

In addition, you must send a copy of your response to *(7) .

ISSUED

B y

_____

(Applicant or Attorney for Applicant)

CERTIFICATE OF SERVICE

I certify that a true and correct copy of this notice with a copy of the application was sent certified and regular mail to *(3) on the_day of_, 20_.

(signature)

_____

(Applicant or Attorney for Applicant)

*(1) name of respondent

*(2) mailing address of property

*(3) name and address of respondent

*(4) date application filed

*(5) address of clerk of court

*(6) response due date

*(7) name and address of applicant or applicant's or applicant's attorney

(D) The applicant shall state in the notice the date the response is due in accordance with Rule 736(3).

(E) The application and notice may be accompanied by any other notice required by state or federal law.

(3) **Response Due Date.** A response is due on or before 10:00 a.m. on the first Monday after the expiration of thirty-eight (38) days after the date of mailing of the application and notice to respondent, exclusive of the date of mailing, as set forth in the certificate of service.

(4) **Response.**

(A) The respondent may file a response setting out as many matters, whether of law or fact, as respondent deems necessary or pertinent to contest the application. Such response and any supporting affidavit shall be made on personal knowledge and shall set forth such facts as would be admissible in evidence, provided that facts may be stated based upon information and belief if the grounds of such belief are specifically stated.

(B) The response shall state the respondent's mailing address.

(C) The response shall be filed with the clerk of the court. The respondent shall also send a copy of the response to the applicant or the applicant's attorney at the address set out in the notice.

(5) **Default.** At any time after a response is due, the court shall grant the application without further notice or hearing if:

(A) the application complies with Rule 736(1);

(B) the respondent has not previously filed a response; and

(C) a copy of the notice and the certificate of service shall have been on file with the clerk of the court for at least ten days exclusive of the date of filing.

(6) **Hearing When Response Filed.** On the filing of a response, the application shall be promptly heard after reasonable notice to the applicant and the respondent. No discovery of any kind shall be permitted in a proceeding under Rule 736. Unless the parties agree to an extension of time, the issue shall be determined by the court not later than ten business days after a request for hearing by either party. At the hearing, the applicant shall have the burden to prove by affidavits on file or evidence presented the grounds for the granting of the order sought in the application.

(7) **Only Issue.** The only issue to be determined under Rule 736 shall be the right of the applicant to obtain an order to proceed with foreclosure under the security instrument and Tex. Prop. Code § 51.002.

(8) **Order to Proceed with Notice of Sale and Sale.**

(A) **Grant or denial.** The court shall grant the application if the court finds applicant has proved the elements of Rule 736(1)(E). Otherwise, the court shall deny the application. The granting or denial of the application is not an appealable order.

(B) **Form of order.** The order shall recite the mailing address and legal description of the property, direct that foreclosure proceed under the security instrument and Tex. Prop. Code § 51.002, provide that a copy of the order shall be sent to respondent with the notice of sale, provide that applicant may communicate with the respondent and all third parties reasonably necessary to conduct the foreclosure sale, and, if respondent is represented by counsel, direct that notice of the foreclosure sale date shall also be mailed to counsel by certified mail.

(C) **Filing of order.** The applicant is to file a certified copy of the order in the real property records of the county where the property is located within ten business days of the entry of the order. Failure to timely record the order shall not affect the validity of the foreclosure or defeat the presumption of Tex. Const. art. XVI, § 50(i).

(9) **Nonpreclusive Effect of Order.** No order or determination of fact or law under Rule 736 shall be res judicata or constitute collateral estoppel or estoppel by judgment in any other proceeding or suit. The granting of an application under these rules shall be without prejudice to the right of the

respondent to seek relief at law or in equity in any court of competent jurisdiction. The denial of an application under these rules shall be without prejudice to the right of the applicant to re-file the application or seek other relief at law or in equity in any court of competent jurisdiction.

(10) **Abatement and Dismissal.** A proceeding under Rule 736 is automatically abated if, before the signing of the order, notice is filed with the clerk of the court in which the application is pending that respondent has filed a petition contesting the right to foreclose in a district court in the county where the application is pending. A proceeding that has been abated shall be dismissed.

Hardy v. Wells Fargo Bank, N.A., 123014 TXCA1, 01-12-00945-CV

LEE A. HARDY AND POLLY HARDY, Appellants

v.

WELLS FARGO BANK, N.A., Appellee

No. 01-12-00945-CV

Court of Appeals of Texas, First District

December 30, 2014

On Appeal from the 157th District Court Harris County, Texas Trial Court Case No. 2011-07737

Panel consists of Justices Jennings, Sharp, and Brown.

MEMORANDUM OPINION

JIM SHARP JUSTICE

Lee A. and Polly Hardy appeal the take-nothing summary judgment on their wrongful foreclosure claim against Wells Fargo Bank, N.A. In five issues, the Hardys contend that the trial court erred in granting summary judgment in Wells Fargo's favor on their wrongful foreclosure claim because (1) Wells Fargo's 2010 foreclosure action was barred by the statute of limitations; (2) there is no evidence that the substitute trustee who conducted the foreclosure was properly appointed; (3) one lender was the owner or holder of the promissory note and the deed of trust had been assigned to another lender; (4) there is no evidence that the Hardys were provided with the required notice of default prior to the foreclosure sale; and (5) Wells Fargo misapplied the Hardys' payments on the promissory note.

We reverse and remand for further proceedings.

Background

In July 1978, the Whitneys purchased a home in Humble, Texas, and executed a promissory note and a deed of trust in favor of Valley Mortgage Company, Inc. The Note's original principal sum was $45, 800 and the last payment was due August 1, 2008—the Note's maturity date.

The Hardys bought the home from the Whitneys in July 1986, and assumed the balance owed on the Note which, along with the Deed of Trust, was subsequently assigned to Washington Mutual Bank (WaMu) and, later, to Wells Fargo.[1] The Note includes an optional acceleration clause: "If any deficiency in the payment of any installment under this note is not made good prior to the due date of the next such installment, at the option of the holder, this note shall become immediately due and payable without notice and the lien given to secure its payment may be foreclosed." The Deed of Trust has a similar provision.

As reflected by the summary judgment evidence, the Hardys began to fall behind on their mortgage payments in 2004 and defaulted under the terms of the Note and Deed of Trust.[2] A July 12, 2005 notice of substitute trustee's sale and internal WaMu records indicate that WaMu, the then-current mortgagee and mortgage servicer, attempted to exercise its option to accelerate the Note on July 11, 2005, and the Property was scheduled to be sold at auction on August 2, 2005. The sale, however, did not proceed as scheduled. Instead, payments on past due installments were periodically made between August 16, 2005 and July/September 2006[3] (and accepted by WaMu).

Wells Fargo was assigned the Note and Deed of Trust in December 2006, and entered into a Stipulated Partial Reinstatement/Repayment Agreement (PRRA) with the Hardys on April 2, 2007 (2007 PRRA), the terms of which included the Hardys' acknowledgement that they were one year behind on their mortgage and their agreement to pay the balance due (April 2006 through August 2008), plus interest, late charges, property preservation fees, and estimated attorney's fees and costs, in fifteen installments beginning on May 2, 2007. The 2007 PRRA further recites:
The receipt of such payments referred to in paragraph two (2) of this agreement does not construe a waiver of our rights or remedies contained in the Note and/or Mortgage; and acceptance of any payments made by you will not be deemed to affect the acceleration of the Note and/or Mortgage in the event of default under the terms of this agreement and the remainder of the accelerated loan balance shall remain due and owing.We will hold legal action only upon receipt of agreed funds, signed agreement, and proof of income. Fees and costs will be paid first, with the remainder toward accrued payments.

The summary judgment evidence reflects that the Hardys only made the first three payments pursuant to the 2007 PRRA (May, June and July 2007).

On May 2, 2008, another Stipulated Partial Reinstatement/Repayment Agreement (2008 PRRA) was executed in which the Hardys acknowledged they were sixteen months behind on their payments and agreed to pay the balance (February 2007 through August 2008), plus interest, late charges, property preservation fees, and estimated attorney's fees and costs, in four installments beginning on May 12, 2008. Like the 2007 PRRA, the 2008 PRRA states that "acceptance of any payments made by [the Hardys] will not be deemed to affect the acceleration of the Note and/or Mortgage in the event of default under the terms of this agreement and the remainder of the accelerated loan balance shall remain due and owing." The record reflects the Hardys' first three payments required under the 2008 PRRA, but not the final payment of $14, 250.18 due on August 1, 2008—the Note's original maturity date.

On January 22, 2010, Wells Fargo issued a default notice advising that payment of the past due balance had not been received, the Note was in default, the Hardys had the right to pay the past due balance, and Wells Fargo was initiating foreclosure proceedings. Attached to this notice of default was a copy of the Notice of Substitute Trustee Sale, executed on February 1, 2010, that recited the foreclosure sale's auction date as March 2, 2010. The Hardys acknowledged their awareness of the March 2, 2010 sale date, and inability to raise funds sufficient to satisfy the total secured debt.

At the foreclosure sale, the Property was sold to David Brown and a Substitute Trustee's Deed was executed reflecting the sale. Brown subsequently conveyed the Property to RESCONN Investments, LLC, which evicted the Hardys in May 2011.

The Hardys sued Wells Fargo, Brown, and RESCONN. In their Third Amended Complaint, the Hardys claims against Wells Fargo alleged (1) wrongful foreclosure; (2) fraud; (3) violations of the Deceptive Trade Practices Act; (4) breach of contract; (5) breach of an implied covenant of good faith and fair dealing; and (6) mental anguish. Wells Fargo's traditional summary judgment motion was granted and the court ordered that the Hardys take nothing on their claims against Wells Fargo.[4] The Hardys, who appeal only the grant of summary judgment with respect to their

wrongful foreclosure claim, do not contest the take-nothing judgment rendered on their fraud, DTPA, breach of contract, breach of implied covenant of good faith and fair dealing, and mental anguish claims.

Statute of Limitations

The Hardys maintain that the summary judgment on their wrongful foreclosure claim was error because any foreclosure action was barred by the statute of limitations.

A. Standard of Review

Our review of a trial court's summary judgment is de novo. *Valence Operating Co. v. Dorsett* , 164 S.W.3d 656, 661 (Tex. 2005). To prevail, the summary judgment movant must show that no genuine issue of material fact exists and that the trial court should grant a judgment as a matter of law. Tex.R.Civ.P. 166a(c); *KPMG Peat Marwick v. Harrison Cnty. Hous. Fin. Corp.*, 988 S.W.2d 746, 748 (Tex. 1999). We examine the entire record and do so in the light most favorable to the nonmovant, taking as true all evidence favoring the nonmovant if reasonable jurors could, and indulging every reasonable inference and resolving any doubts against the motion. *See City of Keller v. Wilson*, 168 S.W.3d 802, 824 (Tex. 2005); *Dorsett*, 164 S.W.3d at 661.

B. Applicable Law

Proof of a wrongful foreclosure claim demands demonstration of a defect in the foreclosure sale proceedings and a causal connection between the defect and a grossly inadequate selling price. *See Sauceda v. GMAC Mortg. Corp.*, 268 S.W.3d 135, 139 (Tex. App.—Corpus Christi 2008, no pet.) (citing *Charter Nat'l Bank-Houston v. Stevens*, 781 S.W.2d 368, 371 (Tex. App.—Houston [14th Dist.] 1989, writ denied)). A defect in foreclosure proceedings may occur when there is no default or when the sale is otherwise void. *See Slaughter v. Qualls*, 162 S.W.2d 671, 675 (Tex. 1942) (deciding that foreclosure sale was void because, inter alia, note was not in default at time of sale); *Lavigne v. Holder*, 186 S.W.3d 625, 627–28 (Tex. App.—Fort Worth 2006, no pet.) (reversing summary judgment in favor of creditor because, in absence of default, creditor could not accelerate debt or foreclose against property). A defect may also occur when the statutory foreclosure procedures are not followed. *See Houston First Am. Sav. v. Musick*, 650 S.W.2d 764, 768 (Tex. 1983).

"A sale of real property under a power of sale in a mortgage or deed of trust that creates a real property lien must be made not later than four years after the day the cause of action accrues." Tex. Civ. Prac. & Rem. Code Ann. § 16.035(b) (West 2002). "If a series of notes or obligations or a note or obligation payable in installments is secured by a real property lien, the four-year limitations period does not begin to run until the maturity date of the last note, obligation, or installment." *Id.* § 16.035(e). "When this four-year period expires, the real-property lien and the power of sale to enforce the lien become void." *Holy Cross Church of God in Christ v. Wolf*, 44 S.W.3d 562, 567 (Tex. 2001). However, if the note or deed of trust contains an optional acceleration clause, the cause of action accrues (and the statute of limitations begins to run) when the holder "actually exercises" its option to accelerate. *Id.* at 566; *Khan v. GBAK Props., Inc.*, 371 S.W.3d 347, 353 (Tex. App.—Houston [1st Dist.] 2012, no pet.). The note holder, however, may only "accelerate" the maturity date of the note if its last installment is not yet due. *See CA Partners v. Spears*, 274 S.W.3d 51, 65 (Tex. App.—Houston [14th Dist.] 2008, pet. denied). Accordingly,

once the maturity date of the last installment has passed, the holder's cause of action accrues—and limitations begin to run—on the maturity date of the final installment. *Id.*

A noteholder who effectively exercises its option to accelerate may nevertheless "abandon acceleration if the holder continues to accept payments without exacting any remedies available to it upon declared maturity." *Khan*, 371 S.W.3d at 353 (quoting *Holy Cross*, 44 S.W.3d at 566). Acceleration can be abandoned by agreement or other action of the parties. *Holy Cross*, 44 S.W.3d at 567 (citing *San Antonio Real–Estate, Bldg. & Loan Ass'n v. Stewart*, 94 Tex. 441, 61 S.W. 386, 388 (1901)); *Khan*, 371 S.W.3d at 353. Abandonment of acceleration has the effect of restoring the contract to its original condition, including restoring the note's original maturity date. *See Holy Cross*, 44 S.W.3d at 567; *Khan*, 371 S.W.3d at 353.

C. Was the Note Accelerated Before the August 1, 2008 Maturity Date?

The Note includes an optional acceleration clause, which means that the cause of action accrues (and limitations commences) when the holder "actually exercises" its option to accelerate. *Holy Cross*, 44 S.W.3d at 566. If there is no acceleration (or the acceleration is abandoned), the holder's cause of action for foreclosure accrues—and limitations commences—on the maturity date of the final installment. *Spears*, 274 S.W.3d at 65.

The Hardys maintain, and the summary judgment evidence supports, that WaMu, Wells Fargo's predecessor in interest, mortgagee, and mortgage servicer at the time, exercised its option to accelerate the Note in July 2005. Wells Fargo does not dispute this.

D. Does Passage of the Note's Maturity Date Void any Prior Acceleration of Note for Purposes of Statute of Limitations?

Citing to *Spears*, Wells Fargo contends that because the Note matured on August 1, 2008, any prior acceleration was void and, the statute of limitations having commenced on the date of maturity, the foreclosure fell within the limitations period and the grant of summary judgment on this basis was not error. 274 S.W.3d at 65. *Spears*, however, does not support the proposition that passage of the maturity date voids any prior acceleration of a note. Rather, *Spears* states that if a note contains an optional acceleration clause, the action accrues when the holder actually exercises its option to accelerate. *Id.* (citing *Holy Cross*, 44 S.W.3d at 566). If, however, the maturity date of the last installment has passed, the holder may no longer "accelerate" the note, and the holder's cause of action accrues—and limitations begins to run—on the maturity date of the final installment. *Spears*, 274 S.W.3d at 65.

E. Was Acceleration Abandoned?

Wells Fargo argues that it proved as a matter of law that it abandoned the acceleration by acceptance of the Hardys' mortgage payments pursuant to the 2007 PRRR and 2008 PRRR. According to Wells Fargo, acceptance of these payments reinstated the loan, and, therefore, Wells Fargo's option to foreclose on the Property did not expire until four years after the date the last payment was due on the Note: four years after the Note's August 2008 maturity date. Wells Fargo further contends that the 2007 PRRA and the 2008 PRRA expressly state "that Wells Fargo did not waive any of its rights in conjunction with acceleration, reinstatement, or continuing with foreclosure if [the Hardys] could not cure the default" and, therefore, it was entitled to foreclose on the Property in 2010.

The Hardys respond that (1) the 2007 PRRA and the 2008 PRRA are ineffective to abandon acceleration and reinstate the loan to its original terms, (2) both agreements merely indicate Wells Fargo's agreement to forbear from exercising its right to foreclosure at that time, and (3) both agreements expressly state that acceptance of payments does not affect the acceleration of the Note in the event of default, and thus, the acceptance of partial payments made pursuant to these agreements cannot abandon acceleration.

Citing to 15 W. Mike Baggett, *Texas Practice Series, Texas Foreclosure: Law and Practice*, § 1.20 (2001), the Hardys argue that abandonment requires a written agreement between the parties that unambiguously states that the acceleration of the note is canceled and the Note is reinstated to be paid in installments pursuant to the original terms. The Hardys contend that neither the 2007 PRRA nor the 2008 PRRA meet this standard, and therefore, both agreements are ineffective to abandon acceleration and reinstate the loan to its original terms. Texas law, however, is clear that acceleration may be abandoned by the conduct of the parties alone—no written agreement is required. *See Holy Cross*, 44 S.W.3d at 567 (citing *San Antonio Real–Estate* , 61 S.W. at 388); *see also Khan*, 371 S.W.3d at 355–56 (rejecting argument that abandonment of acceleration and reinstatement of original terms requires written agreement).

Citing to *Marques v. Wells Fargo Home Mortgages, Inc.*, 2011 WL 2005837, *3–4 (E.D. Cal. 2011) the Hardys also contend that instead of abandoning acceleration and reinstating the Note, the 2007 PRRA and the 2008 PRRA merely indicates Wells Fargo's agreement to forbear from exercising its rights to foreclose on the accelerated Note at that time and that forbearance is not the same as reinstatement. *Marques*, however, treated the question of whether the agreement *modified* the terms of the Note and did not speak to the issue of whether the note holder abandoned acceleration.

The Hardys also argue, contrary to Wells Fargo's position, that their remittance of partial payments pursuant to the 2007 PRRA and 2008 PRRA (and Wells Fargo's acceptance of such payments) is not conclusive evidence that acceleration had been abandoned and the Note reinstated, citing to *Thompson v. Chrysler First Business Credit Corporation*, 840 S.W.2d 25, 30 (Tex. App.— Dallas 1992, no writ). *Thompson*, however, does not support this general proposition. On the contrary, *Thompson* stands for the proposition that when a federal bankruptcy court issues an order of adequate protection pursuant to which the parties enter into a repayment agreement, and the lender accepts payments made pursuant thereto, such payments do not establish that the lender abandoned the acceleration of the Note for purposes of summary judgment. *Thompson*, 840 S.W.2d at 30–31G; *see also Khan*, 371 S.W.3d at 354 (discussing *Thompson*). Here, there is no "adequate protection" agreement and the 2007 and 2008 PRRAs are not comparable to such an agreement. Accordingly, *Thompson* is distinguishable.

Although the Hardys' reliance upon *Thompson* and other legal authorities is misplaced, they, nevertheless, correctly note that both PRRAs expressly provide that, in the event of default on the agreement, the acceptance of payments does not affect the acceleration of the Note:

The receipt of such payments referred to in paragraph two (2) of this agreement does not construe a waiver of our rights or remedies contained in the Note and/or Mortgage; and acceptance of any payments made by you will not be deemed to affect the acceleration of the Note and/or Mortgage

in the event of default under the terms of this agreement and the remainder of the accelerated loan balance shall remain due and owing.

The evidence is clear that the Hardys made only the first three of fifteen installment payments required by the 2007 PRRA and the first three of four installment payments required by the 2008 PRRA. As such, the Hardys failed to comply with both agreements. Because the Hardys defaulted under both PRRAs, Wells Fargo's acceptance of payments under either agreement did not abandon acceleration. Thus, Wells Fargo did not meet its burden of proving that it was entitled to summary judgment as a matter of law. Accordingly, the trial court erred in granting summary judgment in Wells Fargo's favor on the Hardys' wrongful foreclosure claim because a fact issue existed as to whether foreclosure was barred by the statute of limitations.

We sustain the Hardys' first issue. In light of our resolution of this issue, we need not address the remaining arguments raised on appeal.

Conclusion

We reverse the trial court's judgment with respect to the Hardys' wrongful foreclosure claim against Wells Fargo and remand for further proceedings.

Notes:

[1] Wells Fargo contends that U.S. Bank National Association was the owner and holder of the Note and that Wells Fargo serviced the mortgage for U.S. Bank. The only evidence of this is an affidavit submitted by Wells Fargo during summary judgment proceedings. This statement, however, appears to conflict with the March 2, 2010 Substitute Trustees Deed conveying the Property from Wells Fargo—which is identified as both the current mortgagee and mortgage servicer— to David Brown.

[2] According to mortgage records provided by the Hardys, the September 2004 payment was made in June 2005.

[3] There is a gap in the mortgage records from September 26, 2006 through March 9, 2007.

[4] Brown and RESCONN also filed separate motions for summary judgment, which the trial court granted. Neither Brown nor RESCONN are parties to this appeal.
