[Cite as *U.S. Bank Natl. Assn. v. Robinson*, 2017-Ohio-5585.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 105067

U.S. BANK NATIONAL ASSOCIATION

PLAINTIFF-APPELLANT

vs.

TERRENCE S. ROBINSON, ET AL.

DEFENDANTS-APPELLEES

JUDGMENT:
REVERSED AND REMANDED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-15-841611

BEFORE: S. Gallagher, J., Stewart, P.J., and Jones, J.

RELEASED AND JOURNALIZED: June 29, 2017

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SEAN C. GALLAGHER, J.:

{¶1} U.S. Bank[1] appeals the grant of summary judgment in favor of Terrence and Kelene Robinson (collectively "the Robinsons"), which was granted based on the application of R.C. 1303.16(A) to U.S. Bank's foreclosure action. We reverse the decision of the trial court and remand for further proceedings.

{¶2} In 2006, Terrence Robinson executed a note in the amount of $368,000 to secure the funds used to purchase property located in Glenwillow, Ohio. The Robinsons jointly executed a mortgage on the property. Roughly a year later, Terrence defaulted on the note. The then owner of the note and mortgage sent Terrence a letter stating that Terrence owed $9,055.69 and the failure to cure the default by June 3, 2007, "may" result in the bank accelerating the full amount of the loan and "if" that should occur, the entire indebtedness would become immediately due. In addition, Terrence was notified that a foreclosure action could be filed. The foreclosure action was pursued but dismissed without prejudice on March 1, 2012.

{¶3} In the interim, Terrence sought to discharge his debts in bankruptcy, which was granted in July 2008, and the accelerated liability on the 2006 note was discharged. The parties seem uninterested in exploring the effect the bankruptcy had on the current

[1]U.S. Bank National Association, as Trustee for the Holders of the Speciality Underwriting and Residential Finance Trust Mortgage Loan Asset-Backed Certificates, Series 2007-BC1 ("U.S. Bank").

foreclosure proceedings, other than noting that U.S. Bank is not seeking to enforce Terrence's obligation to pay the note because of the bankruptcy.

{¶4} Nevertheless, in the early part of 2013, U.S. Bank sent a notice of intent to accelerate the amount due under the 2006 note, and a second foreclosure case was initiated in June 2014. That action was also dismissed without prejudice, but a third foreclosure action, the one underlying this appeal, was filed shortly thereafter. In the latest action, the Robinsons contend that the obligation on the 2006 note was accelerated and triggered the statute of limitations provided in R.C. 1303.16(A). The trial court held that the June 29, 2007 date of the first foreclosure action was the accrual date for that purpose. *See* R.C. 1303.16(A) (the action shall be brought "if a due date is accelerated, within six years after the accelerated due date"). In strict application of the six-year limitations within which to "enforce the obligation of a party to pay a note," the trial court concluded that the equitable action, seeking to recover the property held as a security in lieu of payment of the debt, was time barred.

{¶5} U.S. Bank timely appealed, claiming that enforcing the debt obligation under the note and foreclosing on the property are separate and distinct causes of action. We agree.

{¶6} R.C. 1303.16(A) provides that "an action *to enforce the obligation of a party to pay* a note payable at a definite time shall be brought within six years after the due date or dates stated in the note or, if a due date is accelerated, within six years after the accelerated due date." (Emphasis added.) In considering the extent of this section, we

must be mindful that the drafters of U.C.C. 3-118, as codified in R.C. 1303.16, clarified that U.C.C. 3-118 "does not attempt to state all rules with respect to a statute of limitations." Although R.C. 1303.16(A) may provide a specific statute of limitations regarding the obligation to pay a note, it is not intended as a blanket prohibition against all remedies available to mortgagees.

{¶7} The Robinsons essentially contend that the equitable action in foreclosure is synonymous with enforcing the legal obligation to pay the note. The Robinsons' reliance is misplaced. An action to foreclose a mortgage is not an action for personal judgment on the note secured by such mortgage. *Wells Fargo Bank, N.A. v. Young*, 2d Dist. Darke No. 2009 CA 12, 2011-Ohio-122, ¶ 28, citing *Carr v. Home Owners Loan Corp.*, 148 Ohio St. 533, 540, 76 N.E.2d 389 (1947). Foreclosure "'is in the nature of a proceeding *in rem* to enforce certain security specially set apart for the indemnity of the holder of the note.'" *U.S. Bank N.A. v. George*, 2015-Ohio-4957, 50 N.E.3d 1049, ¶ 12 (10th Dist.), quoting *BAC Home Loans Servicing, LP v. Mowery Properties, Ltd.*, 10th Dist. Franklin No. 10AP-396, 2011-Ohio-1596. Had the drafters intended for the six-year statute of limitations to apply to the equitable action on the mortgage, which has been traditionally regarded as a separate and distinct cause of action, the prohibition in division (A) would not have been limited to enforcing the legal obligation to pay a note.

{¶8} It cannot be ignored that the 2008 bankruptcy proceeding discharged Terrence's obligation to pay the accelerated note. Notwithstanding the fact that the obligation to pay the note is no longer enforceable, U.S. Bank is entitled to maintain an

action in foreclosure to secure its interest as the mortgagee — upon default, "legal title to the mortgaged property passes to the mortgagee as between the mortgagor and mortgagee." *Deutsche Bank Natl. Trust Co. v. Holden*, 147 Ohio St.3d 85, 2016-Ohio-4603, 60 N.E.3d 1243, ¶ 23, citing *Hausman v. Dayton*, 73 Ohio St.3d 671, 1995-Ohio-277, 653 N.E.2d 1190, paragraph one of the syllabus. Thus, the foreclosure action in this case is not in the nature of enforcing an obligation to pay the note but, instead, is better characterized as one meant to secure U.S. Bank's interest in the property based on the defaulted note.

{¶9} It has been "long recognized that an action for a personal judgment on a promissory note and an action to enforce mortgage covenants are 'separate and distinct' remedies." *Holden* at ¶ 25, citing *Carr*. There are two remedies available with respect to actions pursued upon the mortgage, an action in ejectment or one for foreclosure. *Id.* at ¶ 21-24. At one time, there was a colorable distinction between the two remedies. In *Kerr v. Lydecker*, 51 Ohio St. 240, 253, 37 N.E. 267 (1894), it was noted that an action in foreclosure was tied to the statute of limitations on the note (the holding of the case was limited to determining whether a mortgage is a speciality), while in *Bradfield v. Hale*, 67 Ohio St. 316, 65 N.E. 1008 (1902), it was held that an action in ejectment to obtain recovery of the property survived the 15-year statute of limitations on the foreclosure. The Ohio Supreme Court has never applied the dicta from *Lydecker* and has since held that prohibitions against enforcing a note do not preclude an action on the mortgage, which includes both foreclosure and ejectment remedies. *Id.*, citing *Lydecker* and

Bradfield; *CitiMortgage, Inc. v. Wiley*, 10th Dist. Franklin No. 15AP-642, 2016-Ohio-5902, ¶ 25 (bank sought remedy in equity for foreclosure, which was not precluded by the bank's inability to enforce the legal remedy of a deficiency judgment); *accord Blue View Corp. v. Gordon*, 8th Dist. Cuyahoga No. 88936, 2007-Ohio-5433, ¶ 22; *James B. Nutter & Co. v. Estate of Neifer*, 3d Dist. Hancock No. 5-16-20, 2016-Ohio-7641, ¶ 11 (death of the signatory to the note does not extinguish the mortgagee's rights).

{¶10} These concepts must be applied to determine the proper statute of limitations. When a statute of limitations is properly applied, the debtor's obligations on the note are not extinguished but instead the remedies for enforcement are limited. It has been long recognized that "[t]he running of the statute of limitations does not discharge the debt. It only suspends the remedy on the presumption that the debt is paid." *Turner v. Chrisman*, 20 Ohio 332, 336 (1851); *Furr v. Lindalco Emps. Credit Union, Inc.*, 3d Dist. Allen No. 1-78-34, 1979 Ohio App. LEXIS 11224, 5 (Apr. 17, 1979). The *Holden* decision, deeming the equitable remedies on the mortgage survive prohibitions against legal remedies on the note, has greater significance than those considered by the Robinsons. *Bank of N.Y. Mellon v. Walker*, 8th Dist. Cuyahoga No. 104430, 2017-Ohio-535, ¶ 23.

{¶11} U.S. Bank did not pursue a judgment on the note against Terrence, but instead sought to foreclose on the Robinsons' mortgage. As a matter of law, R.C. 1303.16(A) does not apply to actions to enforce the mortgage lien on the property after

the payment on the note becomes unenforceable through the running of the statute of limitations. R.C. 1303.16(A) only applies to prohibit a party from enforcing obligations to pay on the note, an obligation Terrence has not been burdened with since mid-2008 when the accelerated debt was discharged in bankruptcy. *Bank of N.Y. Mellon* at ¶ 24; *see also Hochmeyer v. Fein Such Khan*, D.N.J. No. 16-4531, 2016 U.S. Dist. LEXIS 149793, 13 (Oct. 27, 2016) (noting the distinction between seeking to enforce a note obligation under U.C.C. 3-118 from seeking to enforce the mortgage obligation); *Cadle Co. v. Dejadon*, 153 N.H. 376, 379, 904 A.2d 605 (2006). R.C. 1303.16(A) does not affect the mortgagee's mortgage right created by virtue of the failure to pay the note; the statute only precludes the remedy of a money judgment upon the unsatisfied note.

{¶12} This same conclusion was reached in *Bank of N.Y. Mellon*, 8th Dist. Cuyahoga No. 104430, 2017-Ohio-535. In that case, as in this case, there was a dispute regarding the accrual date under R.C. 1303.16(A) because the date the obligation under the note was accelerated was not clear from the record. *Id.* at ¶ 17. Nevertheless, after finding a genuine issue of material fact regarding the accrual date, the panel held that the mortgagee had a separate avenue of relief for the outstanding debt — namely, the mortgage. *Id.* at ¶ 18. Importantly for the purposes of the current appeal, the panel concluded that R.C. 1303.16(A) does not apply to equitable actions on mortgages. *Id.* Relying on our analysis and that provided in *Bank of N.Y. Mellon*, we must sustain U.S. Bank's assignment of error challenging the applicability of R.C. 1303.16(A) to the action on the mortgage.

{¶13} We reverse the decision of the trial court. R.C. 1303.16(A) does not preclude U.S. Bank from maintaining an action in equity to enforce its mortgage lien on the property for the unsatisfied, but unrecoverable, debt. Further, inasmuch as U.S. Bank seeks an appellate resolution to the trial court's denial of its motion for summary judgment in its second assignment of error, that is wholly outside the scope of our jurisdiction to review final orders. R.C. 2505.02. Having reinstated the foreclosure action, the denial of summary judgment is interlocutory at this stage of the proceedings.

{¶14} Reversed and remanded.

It is ordered that appellant recover from appellees costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

SEAN C. GALLAGHER, JUDGE

MELODY J. STEWART, P.J., and
LARRY A. JONES, SR., J., CONCUR