IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit
FILED
April 24, 2018
Lyle W. Cayce
Clerk

No. 17-10208

JOHN SEXTON; SHELIA SEXTON,

Plaintiffs - Appellants

v.

DEUTSCHE BANK NATIONAL TRUST COMPANY, as Trustee for GSAMP Trust 2007-FM2, Mortgage Pass-Through Certificates, Series 2007-FM2,

Defendant - Appellee

Appeal from the United States District Court
for the Northern District of Texas
No. 3:15-CV-2429

Before BARKSDALE, DENNIS, and ELROD, Circuit Judges.

PER CURIAM:*

Primarily at issue is whether the district court erred in granting Deutsche Bank summary judgment on the basis that it had abandoned its prior acceleration of a loan to John and Shelia Sexton, and, therefore, the foreclosure sale of their house was not barred by the statute of limitations. AFFIRMED.

* Pursuant to 5th Cir. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Cir. R. 47.5.4.

I.

Pursuant to a note in 2006, John Sexton borrowed $169,920 to purchase a home in Dallas, Texas. He and his wife, Shelia Sexton, concurrently executed a Texas home-equity security instrument, granting a security interest in the property. The note and security instrument (collectively, the loan) were assigned to the bank in 2009.

The Sextons first missed their monthly payment in August 2009; and, that month, the bank sent them a notice of default and intent to accelerate. By January 2010, the loan was "at least 5 monthly payments in default". Accordingly, that month, the bank accelerated the unpaid balance of the note; and, that February, the bank applied for a court order allowing foreclosure.

Although the Sextons did not make any payments, the bank did not immediately foreclose. Instead, that April and May, it sent the Sextons new notices of default and intent to accelerate, seeking payment of only the sums overdue, rather than the unpaid balance of the loan.

That July, the bank sent the Sextons a repayment plan agreement (RPA), which, rather than demanding payment of the unpaid balance of the loan, gave them the opportunity to bring the loan current by paying the lesser amount overdue ($14,799.10). John Sexton signed and returned the RPA; but, he did not make any of the required payments.

After the Sextons failed to comply with the RPA's terms, the bank, in August, September, and November 2010, sent another round of notices of default and intent to accelerate, again seeking only the amount necessary to cure the default. Notwithstanding the Sextons' not making any payments, the bank, in January 2011, offered yet another RPA, again seeking the amount overdue, $17,136.50, rather than the unpaid balance of the loan. After the Sextons did not return the RPA or make any payments, the bank, in May 2011, again accelerated the debt.

The bank then sent monthly statements to the Sextons from November 2011 to November 2013, requesting payment of less than the accelerated balance of the loan. (The March 2012 statement is not in the record.) The Sextons, however, made no payments during that two-year period.

Accordingly, in February 2014, the bank sent another notice of default and intent to accelerate, and, that March, sent a notice of acceleration. The bank sold the property at a foreclosure sale that August, and tried, unsuccessfully, to evict the Sextons.

The Sextons responded by filing this action in state court, seeking a declaratory judgment that the bank's security interest and transfer of deed pursuant to the foreclosure sale are void and unenforceable. In that regard, they asserted the statute of limitations expired before the bank foreclosed on their home in August 2014, more than four years after the loan was first accelerated in January 2010.

After removing this action (diversity of citizenship), the bank moved for summary judgment. The motion contended: the bank abandoned the 2010 acceleration, and sent new notices of default and acceleration within the four-year limitations period, rendering the August 2014 foreclosure sale timely.

The magistrate judge recommended summary judgment's being awarded the bank because it "repeatedly sent correspondence to [the Sextons] over the course of several years, including two [RPAs] and five notices of default, requesting payment of less than the full, accelerated balance of the debt. This unequivocally demonstrates that [the bank] was intentionally abandoning and waiving its right to foreclose". *Sexton v. Deutsche Bank, N.A.*, No. 3:15-CV-2429-K-BK, 2016 WL 10587718, at *3 (N.D. Tex. 20 Oct. 2016) (citations omitted). The district court accepted the magistrate judge's report and recommendation and dismissed this action. *Sexton v. Deutsche Bank, N.A.*, No. 3:15-CV-2429-K, 2016 WL 10587719 (N.D. Tex. 7 Nov. 2016).

II.

The Sextons assert there is a genuine dispute of material fact for whether the bank abandoned the January 2010 acceleration; and, in the alternative, by separate motion, urge our certifying to the Texas Supreme Court the issue of whether, and how, a lender may unilaterally abandon acceleration under Texas law.

A.

A summary judgment is reviewed *de novo*, applying the same standard as the district court. *E.g.*, *Smith v. Reg'l Transit Auth.*, 827 F.3d 412, 417 (5th Cir. 2016). Summary judgment is appropriate where "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law". Fed. R. Civ. P. 56(a).

A genuine dispute of material fact exists if a reasonable jury could return a verdict for the non-movant. *E.g.*, *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The court views the evidence in the light most favorable to the non-movant, *e.g.*, *Tolan v. Cotton*, 134 S. Ct. 1861, 1866 (2014); and, if the movant demonstrates the absence of a genuine dispute of material fact, the burden shifts to the non-movant to "designate specific facts showing that there is a genuine issue for trial", *Willis v. Roche Biomedical Labs., Inc.*, 61 F.3d 313, 315 (5th Cir. 1995).

Where, as here, federal jurisdiction is based on diversity of citizenship, we must apply state law "as announced by that state's highest court, or, in [the] absence of such a decision, we must predict what the highest court would decide if it confronted the same issue". *In re Complaint of John E. Graham & Sons*, 210 F.3d 333, 337 (5th Cir. 2000); *see also Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938). For such absence of authority from the State's highest court, we "follow the decisions of intermediate state courts", unless there is "convincing evidence that the highest court . . . would decide [the matter]

differently". *Stoner v. N.Y. Life Ins. Co.*, 311 U.S. 464, 467 (1940). Moreover, once our court has "decide[d] an issue of state law by making an *Erie* guess", we are bound by that decision, "unless a subsequent state statute or state court decision has rendered the panel's interpretation clearly wrong". *Kelly v. State Farm Fire & Cas. Co.*, 582 F. App'x 290, 293 (5th Cir. 2014) (internal quotation omitted).

In Texas, a lienholder must foreclose on, and sell, encumbered property no later than four years after the claim accrues. Tex. Civ. Prac. & Rem. Code § 16.035(b). The claim accrues on the loan's maturity date; or, if, as here, the loan contains an optional acceleration clause, when the lienholder exercises its option to accelerate. *Holy Cross Church of God in Christ v. Wolf*, 44 S.W.3d 562, 566 (Tex. 2001). After the four-year limitations period expires, the lien and power of sale become void and unenforceable. Tex. Civ. Prac. & Rem. Code § 16.035(d).

On the other hand, a lienholder can abandon acceleration "by agreement or other action of the parties". *Boren v. U.S. Nat'l Bank Ass'n*, 807 F.3d 99, 104 (5th Cir. 2015) (quoting *Khan v. GBAK Props., Inc.*, 371 S.W.3d 347, 353 (Tex. App.—Houston [1st Dist.] 2012, no pet.)); *Wolf*, 44 S.W.3d at 566–67. Abandonment "has the effect of restoring the contract to its original condition" and "restoring the note's original maturity date" for accrual purposes. *Khan*, 371 S.W.3d at 353. In Texas, abandonment is analyzed according to the elements of waiver: "(1) an existing right, benefit, or advantage held by a party; (2) the party's actual knowledge of its existence; and (3) the party's actual intent to relinquish the right, or intentional conduct inconsistent with the right". *Boren*, 807 F.3d at 105 (quoting *Thompson v. Bank of Am. Nat'l Ass'n*, 783 F.3d 1022, 1025 (5th Cir. 2015)).

When an acceleration is abandoned by conduct, the intent to abandon must be "unequivocally manifested". *Thompson*, 783 F.3d at 1025. And where,

as here, the surrounding facts are undisputed, abandonment is a question of law. *Boren*, 807 F.3d at 106.

The parties agree the bank first accelerated the loan in January 2010, and the acceleration was not abandoned by agreement. Therefore, at issue is whether the bank's conduct "unequivocally manifested" its intent to abandon the 2010 acceleration, and thereby reset the limitations period. *E.g.*, *Thompson*, 783 F.3d at 1025.

1.

As an initial matter, the Sextons contend language in the loan agreement prevents the bank from abandoning acceleration by conduct alone. Section 11 of the security instrument provides: "Any forbearance by Lender in exercising any right or remedy including, without limitation, Lender's acceptance of payments . . . in amounts less than the amount then due, shall not be a waiver of or preclude the exercise of any right or remedy". The bank counters that this non-waiver provision is irrelevant to whether it abandoned the first acceleration.

Our court has rejected the contention that a non-waiver provision serves as a disclaimer of abandonment, reasoning "[a]bandonment of an existing acceleration and waiver of [the bank's] right to accelerate in the future are two distinct issues and this [non-waiver] provision only addresses the latter". *Justice v. Wells Fargo Bank Nat'l Ass'n*, 674 F. App'x 330, 335 (5th Cir. 2016). A Texas court of appeals has also held that a similar anti-waiver provision did "not preclude [the bank] from abandoning a specific acceleration of the [l]oan". *Bracken v. Wells Fargo Bank, N.A.*, No. 05-16-01334-CV, 2018 WL 1026268, at *3 (Tex. App.—Dallas 23 Feb. 2018, no pet.).

Considering the application of the provision from a temporal standpoint is helpful. In this context, abandonment is backward-looking: the bank may only abandon an acceleration it has already undertaken. Waiver, on the other

hand, is forward-looking: by agreement or conduct, the bank may waive its right to exercise a particular right or remedy (such as foreclosure) in the future. *E.g.*, *Justice*, 674 F. App'x at 335.

The non-waiver provision in the Sextons' security instrument does not affect whether the bank may abandon a prior acceleration by inconsistent conduct; instead, the provision informs that, if the bank exercises forbearance upon default, it would not be prevented from later exercising the right to accelerate and foreclose. *Id.*

Nonetheless, the Sextons contend Texas' "strong public policy favoring freedom of contract" prevents the bank's abandoning-by-conduct because "nonwaiver provisions are binding and enforceable". *Shields Ltd. P'ship v. Bradberry*, 526 S.W.3d 471, 481 (Tex. 2017). Their reasoning is of no moment, however, because the bank does not contend it is not bound by the non-waiver provision in all instances. As discussed *supra*, that provision simply does not apply to abandonment. Accordingly, the provision does not affect our analysis for whether the bank abandoned the January 2010 acceleration.

2.

In *Boren*, our court held a lender may abandon acceleration "by sending notice to the borrower that the lender is no longer seeking to collect the full balance of the loan and will permit the borrower to cure its default by providing sufficient payment to bring the note current under its original terms". 807 F.3d at 105. The bank contends the numerous items of correspondence in the record, *which the Sextons admit receiving*, provided the requisite notice, and, therefore, "unequivocally manifested" intent to abandon. *E.g.*, *Thompson*, 783 F.3d at 1025.

First, the bank asserts the monthly statements—seeking less than the full, accelerated balance—the Sextons received between November 2011 and November 2013 "unequivocally manifested" intent to abandon. *Id.* A lender

may abandon a prior acceleration "by sending the [borrowers] account statements indicating the past due balance and by giving the [borrowers] the option to cure their default by paying the past due balance". *Leonard v. Ocwen Loan Servicing, L.L.C.*, 616 F. App'x 677, 680 (5th Cir. 2015). The bank did just that. Because the statements sought less than the accelerated balance of the loan and would "permit the [Sextons] to cure [their] default by providing sufficient payment to bring the note current under its original terms", the statements can show abandonment under our precedent. *Boren*, 807 F.3d at 105; *Leonard*, 616 F. App'x at 680.

The Sextons attempt to create a genuine dispute of material fact on the grounds that the monthly statements "do not [explicitly] request less than the full balance of the accelerated loan". This, however, ignores the substance of the statements. Each provided "Details of Amount Due", and the amount listed as due on each was less than the balance of the loan shown on each.

The Sextons also take issue with the statements' advising the "loan is in foreclosure". The bank responds that this is not inconsistent with abandonment. At most, drawing all reasonable inferences, as required, in the Sextons' favor, *Tolan*, 134 S. Ct. at 1866, this language arguably renders the monthly statements ambiguous, rather than unequivocal. Nonetheless, the statements do not create a genuine dispute of material fact, *i.e.*, one that would allow a reasonable jury to return a verdict for the Sextons, *Anderson*, 477 U.S. at 248, because other evidence, as discussed *infra*, demonstrates the bank abandoned acceleration as a matter of law.

Second, the bank points to the two RPAs it offered the Sextons as evidence it was "no longer seeking to collect the full balance of the loan". *Boren*, 807 F.3d at 105. As noted *supra*, the bank sent RPAs in July 2010 and January 2011, giving the Sextons the opportunity to bring their loan current for

$14,799.10 and $17,136.50, respectively, rather than demanding the balance of the loan.

But, as the Sextons observe, each RPA advised that, if a required payment was not made, the bank would "have the right to proceed with foreclosure action", and would not be "required to give any notice of default". The Sextons contend the bank's maintaining the right to foreclosure without notice of default, as the RPA purports to do, is inconsistent with abandonment.

The bank answers that the right to proceed with foreclosure without notice of default "simply means the loan would still be in default", and has no bearing on abandonment. The bank had already sent the Sextons notices of default and intent to accelerate in April and May 2010, preceding the July 2010 RPA, and again in August, September, and November 2010, preceding the January 2011 RPA. If the Sextons failed to make a payment under the RPA, the loan would continue to be in default, and, because the default had already been noticed, no additional notice of default would be necessary.

Advising the Sextons of this fact does not inhibit the bank from abandoning the acceleration. Instead, because the RPAs sought payment of less than the accelerated balance, they "unequivocally manifested" abandonment by conduct inconsistent with the enforcement of the bank's rights. *Thompson*, 783 F.3d at 1025.

The third, and most persuasive, type of evidence the bank relies upon as "unequivocal[] manifest[ations]" of abandonment consists of the six notices of default and intent to accelerate it sent the Sextons after the January 2010 acceleration. Again, each notice requested only the amount overdue to cure the default. Moreover, each notice advised that, if the Sextons did not cure the default, the bank "*will accelerate* the maturity date" of the loan. (Emphasis added.) This language unambiguously shows that, at the time of the notices, the loan was not accelerated, but would be if the Sextons did not cure the

default. Along that line, the bank's again accelerating the loan in May 2011, and March 2014, further shows the January 2010 acceleration was no longer in effect.

Our court has consistently held a lender demonstrates abandonment where the lender, after accelerating a debt, sent subsequent notices of default seeking only the amount overdue and warning borrowers that, in the event of failure to cure, the debt would be accelerated. *E.g.*, *Boren*, 807 F.3d at 106; *Alcala v. Deutsche Bank Nat'l Tr. Co.*, 684 F. App'x 436, 439 (5th Cir. 2017); *Meachum v. Bank of N.Y. Mellon Tr. Co.*, 636 F. App'x 210, 212–13 (5th Cir. 2016); *Leonard*, 616 F. App'x at 680. This is true even where the lender continues to report the loan in default. *E.g.*, *Boren*, 807 F.3d at 103. Therefore, the six notices of default and intent to accelerate the bank sent the Sextons "unequivocally manifested an intent to abandon" as a matter of law. *Id.* at 106.

3.

Nevertheless, the Sextons fault the bank for never providing an explicit notice of abandonment. The Sextons cite Texas Civil Practice & Remedies Code § 16.038 as evidence that Texas law prefers express abandonment, and urge its being required here. Their request misses the mark for two reasons.

First, § 16.038, effective 17 June 2015, *after* the foreclosure sale in this action, clarifies that, although a mortgagor may abandon acceleration *via* express notice, it is not required to do so. § 16.038(e) ("This section does not create an exclusive method for waiver and rescission of acceleration"). At most, it suggests a best practice.

Second, in the light of the optional language in § 16.038, our requiring abandonment to be effected by express, written notice would be in conflict with our precedent, which we may not overrule as a panel. *E.g.*, *Lowrey v. Tex. A&M Univ. Sys.*, 117 F.3d 242, 247 (5th Cir. 1997); *Boren*, 807 F.3d at 106 (written notice not "exclusive method for abandoning").

In sum, regardless of any ambiguities in the monthly statements, the RPAs and notices of default and intent to accelerate "unequivocally manifested" the bank's intent to abandon the January 2010 acceleration. *Thompson*, 783 F.3d at 1025. Because one of the RPAs and three of the notices of default and intent to accelerate were sent well within the four-year limitations period preceding the August 2014 foreclosure, the sale and transfer of title were not time-barred.

B.

By the earlier-referenced motion, submitted following the Sextons' reply brief on appeal, they request certification of several questions related to a lender's ability to unilaterally abandon acceleration under Texas law. Whether to certify lies within our court's "sound discretion". *Patterson v. Mobil Oil Corp.*, 335 F.3d 476, 487 (5th Cir. 2003).

Certification may be appropriate when there are "genuinely unsettled matters of state law", but "the absence of a definitive answer from the state supreme court on a particular question is not sufficient to warrant certification". *Jefferson v. Lead Indus. Ass'n, Inc.*, 106 F.3d 1245, 1247 (5th Cir. 1997). Again, once "this court decides an issue of state law by making an *Erie* guess, this court is bound by [that] decision, unless a subsequent state statute or state court decision has rendered the panel's interpretation clearly wrong". *Kelly*, 582 F. App'x at 293 (internal quotation omitted).

As shown in part II.A., the issues relevant to this appeal are not "genuinely unsettled". *See Jefferson*, 106 F.3d at 1247. Our court has already addressed the questions proposed for certification, *see, e.g.*, *Boren*, 807 F.3d at 105; *Justice*, 674 F. App'x at 335; and we are bound by those "*Erie* guess[es]" because the Sextons point to no intervening change in Texas authority rendering them "clearly wrong", *Kelly*, 582 F. App'x at 293. Accordingly, there is no basis for certification.

III.

For the foregoing reasons, the motion requesting certification is DENIED; the judgment, AFFIRMED.