

IN THE FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

TONA M. DEMERS,

Appellant,

v.

NATIONSTAR MORTGAGE
LLC d/b/a MR. COOPER,

Appellees.

DCA Case No. 1D23-0745
L.T. Case No. 2020 CA 000348

**ANSWER BRIEF OF APPELLEE,
NATIONSTAR MORTGAGE LLC D/B/A MR. COOPER,
APPELLEE**

Appeal from an Order of the Circuit Court

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STATEMENT OF CASE AND FACTS¹

On December 7, 2007, Appellant, Tona Demers (“Demers” or “Appellant”) executed a promissory note (the “Note”) in the amount of \$90,000. [R15]. The same day she executed a mortgage (the “Mortgage” or, collectively with the Note, the “Loan”) securing payment of the Note. [R16]. The Mortgage encumbers a property located at 708 Via De Luna, Pensacola Beach, FL (the “Property”). [R. 39]. Appellant signed a Rehabilitation Loan Rider which stated that the Loan proceeds were to be used for the rehabilitation of the Property. [R. 41]. The Loan was serviced by Taylor Bean Whitaker (“TBW”), then Ocwen Loan Servicing (“Ocwen”), and now by Appellee, Nationstar Mortgage LLC d/b/a Mr. Cooper (“Nationstar”). [R. 411].

After obtaining the loan Demers moved to Arkansas. [TM 136]. She did not complete any repairs on the home after 2008. [TJ 123]. While Appellant lived in Arkansas, the Loan was service transferred

¹ All record references are to page number (*e.g.* [R1] references record, page 1). The trial was held on May 3, 2022, and continued on July 7, 2022. References to the transcript of the May 3, 2022, proceedings will be notated as [TM__] (*e.g.* [TM1] references the transcript of the May 3, 2022, proceedings, page 1). References to the transcript of the July 7, 2022, proceedings will be notated as [TJ__] [TJ1] references the transcript of the July 7, 2022, proceedings, page 1). All Initial Brief references are to the Initial Brief and its page number (*e.g.* [IB1] References Initial Brief, page 1)

from TBW to Ocwen. Ocwen sent Appellant notice of this transfer to the Property address. [TM 145]. Appellant fell into default and Ocwen filed a foreclosure action in January 2010. [T.J. 36]. That foreclosure alleged a default date of September 1, 2009. [TJ 36]. The action was ultimately dismissed. [TJ 146].

Nationstar filed this residential foreclosure action on May 19, 2017, because Appellant, Tona Demers, (“Demers” or “Appellant”) failed to pay the subject Loan since the payment due July 1, 2012, over 11 years ago. [R15-16]. Appellant responded to the foreclosure raising affirmative defenses including failure to send notice as required by the mortgage, Nationstar’s breach of contract, and unclean hands. [R. 71]. Appellant later amended her answer to add a three-count counterclaim for breach of contract, conversion, and trespass. [R. 242-247].

The matter went to a non-jury trial on May 3, 2022. Kristen Trompisz (“Trompisz”), a representative from Nationstar, appeared and testified on behalf of Nationstar. [TM 20-132]. Nationstar admitted 19 exhibits into evidence including service transfer letters [TM 28], the original note [TM 36], the rehabilitation agreement [TM 36], the Mortgage [TM 36], the loan payment history [TM 76], and

Nationstar's breach letter to Appellant [TM 38]. Appellant also testified at the trial [TM 135-55] and introduced her own exhibits. The trial was continued to July 7, 2022. The Court heard additional testimony from Appellant and Trompisz, as well as counsels' arguments.

After reviewing the testimony, evidence, and counsels' legal arguments the lower court entered Judgment for Nationstar on its Foreclosure claim and against Demers on her Counterclaim. [R. 476-481]. Appellant filed her Notice of Appeal on March 20, 2023. [R. 650-658].

SUMMARY OF ARGUMENT

The initial brief asserts the following errors at trial: (1) the court erred by determining that Appellant defaulted under the loan; (2) the court erred by determining that the lender's failure to send proper notice to Appellant at her home in Arkansas was a mere clerical error and not breach of the Mortgage; and (3) the court erred by admitting the business records of TBW and Ocwen over Appellant's hearsay objections. [IB6]. Each of these grounds is insufficient to warrant a reversal.

At trial, Nationstar presented evidence of Appellant's default,

that contractually required notices were sent to the notice address designated in the Mortgage, and business records to support its foreclosure claim. Nationstar proved that it met all the elements of its mortgage foreclosure claim. Appellant's defenses fail to preclude Nationstar's rights to foreclose. The final judgment is supported by competent, substantial evidence and should be affirmed.

ARGUMENT

Standard of Review.

The final foreclosure judgment and trial court findings are presumed correct. See *Michael Anthony Co. v. Townhomes*, 174 So. 3d 428, 432 (Fla. 4th DCA 2015); *JPMorgan Chase Bank v. Combee*, 883 So. 2d 330, 331 (Fla. 1st DCA 2004). The Court may affirm based on any ground in the record, viewed most favorably to Nationstar. *Robertson v. State*, 829 So. 2d 901, 906 (Fla. 2002). Both the court's judgment and underlying factual findings are reviewed for competent, substantial evidence. *Jasser v. Saadeh*, 91 So. 3d 883, 884 (Fla. 4th DCA 2012). "A trial court has wide discretion in determining the admissibility of evidence, and, absent an abuse of discretion, the trial court's ruling on evidentiary matters will not be overturned." *LaMarr v. Lang*, 796 So. 2d 1208, 1209 (Fla. 5th DCA 2001).

I. The Court Properly Found that Demers Defaulted Under the Loan

A. Appellant failed to make the July 2012 payment and each payment thereafter.

Appellant defaulted under the Loan by failing to make the July 2012 payment and each payment thereafter. Failure to make

monthly payments is a default under the Loan. Nowhere in the record does Appellant dispute that she failed to make the July 2012 and every month thereafter. Appellant does not dispute that Nationstar sent her a Notice of Default. Demers had the opportunity to reinstate the Loan at this time but presented no evidence that she tried to reinstate the Loan after receiving Notice of Default from Nationstar. [TM 167-168].

B. The 2012 Default is Not a Continuation of the 2009 Default

In her initial brief Appellant makes arguments concerning a 2009 default that was the subject of the 2010 foreclosure. [IB 15-19]. These arguments are irrelevant because Nationstar does not base its foreclosure on the 2009 default. Nationstar's foreclosure is based on Appellant's 2012 default.

Appellant argues that the 2012 default is a continuing default. That is not what Nationstar plead in its foreclosure complaint nor what is supported by the evidence. First, the dismissal of the 2010 foreclosure resulted in the parties being put back into the place they were before the foreclosure. *See Bartram v. U.S. Bank Nat'l Ass'n*, 211 So.3d 1009.

Nationstar does not seek payments prior to the 2012 default date. Nationstar moved the due date on the loan forward from September 2009 to July 2012. This waived 34 months of payment and three years of lender advances on taxes and insurance. [TM 78-79]. Finally, when Nationstar gave the opportunity to Appellant to reinstate her loan in 2012 it did not include all of the sums due from the 2009 default. Appellant cannot credibly argue that the 2012 default is a continuation of the 2009 default when there is a clear break in continuity of the amounts being sought under each default.

II. Failure to Send Notice to Appellant's Arkansas address was not a breach of the Mortgage

A. Appellant's April 8, 2009 Letter to TBW was Not a Clear Directive to Designate a Substitute Notice Address

Paragraph 15 of the Mortgage states that “the notice address shall be the Property address unless Borrower has designated a substitute notice address by notice to the lender. [R. 31]. Defendant alleges that she sent a “Notice of Change of Address” to TWB. The purported “Notice of Change of Address” failed to clearly advise TBW of Appellant's intent to change her notice address for several reasons.

First, the purported notice is an untitled letter to TBW.

Though Appellant calls the letter a “Notice of Change of Address” in the pleadings, the letter itself does not contain those words. Unlike other letters that Appellant submitted as evidence of her communications with TBW, the putative notice does not have a title. Without a title as a guide, TBW would have to look to the content of the letter to determine the purpose of the document.

In contrast, other letters submitted by Appellant as evidence of her communications with TBW are clearly labeled as “Request for Reimbursement.” [R. 501 – 507]. TBW did not have to guess as to the purpose of these letters as the purpose was stated clearly in the titles of the letters. Here, TBW would have to assume that the purpose of Appellant’s letter was to change the notice address since Appellant failed to state that was the letter’s purpose.

Appellant does not state the purpose of the letter is to change the address at which she receives notices. Instead, she states “the purpose of this letter is to inform you that I have taken a temporary position with Alltel in Arkansas until I am able to complete the repairs on my house and move back in.” Appellant never instructed TBW to change her notice address nor to deliver notices to the temporary address. Instead, Appellant sent a letter to TBW on her

own letterhead which prominently featured the Property address and the temporary address without stating which one she intended to be her notice address.

The Mortgage only allows one designated notice address under the Mortgage at any one time. [R. 45]. The presence of two mailing addresses on the letterhead without a directive from the Appellant as to which address was her notice address should not be viewed as a notice of change of address. Without a clear notice of change of address, the prior servicers would have been contractually obligated to send notices to the Property address under the terms of the Mortgage.

B. Notices were sent to the Notice Address

Appellant argues that there was a breach of contract because the transfer notices were not sent to her temporary address in Arkansas. This argument fails because the Property address was the designated notice address under the terms of the Mortgage. [R. 45]. As stated, Appellant's putative notice of change of address did direct the TBW to send notices to the temporary Arkansas address, nor did it direct Appellee's to stop sending notices to the Property address.

Appellant admits that prior servicer Ocwen did indeed send her

a Notice of Assignment, Sale or Transfer of Servicing Rights at the Property address – the contractual notice address under the Mortgage. [TM 145]. Further, Appellant admitted that the mail delivered to the Property was forwarded to her temporary address in Arkansas after she no longer lived at the Property. [TJ63, p.1-7]

C. Appellant Breached the Contract First

Even if the TBW and Ocwen's failure to send notices to Appellant in Arkansas was a breach of the mortgage agreement, Appellant cannot bring forth an action for breach of contract because she defaulted under the loan documents. Appellant's Loan was a rehabilitation loan. [R. 392]. Under the terms of the Loan Appellant was required to finish work on the Property by December 6, 2008. Appellant failed to complete the work on the Property. The agreement also required her to obtain permits and comply with building codes. Appellant failed to do so. Notably, these breaches all occurred before TBW and Ocwen's alleged breaches. Appellant continued to breach the contract prior to the 2012 default by abandoning the property and committing waste upon the property in violation of paragraphs 9 and 7 of the Mortgage, respectively. [R. 394].

Under Florida law, if one party has not honored his or her

commitments in a contract, the other party does not have to perform his or her part of the contract, and cannot be later faulted for not performing under that circumstance. See *Toyota Tsusho Am., Inc. v. Crittenden*, 732 So. 2d 472, 477 (Fla. 5th DCA 1999) (“When a nonbreaching party to a contract is confronted with a breach by the other party, the nonbreaching party may stop performance, treating the breach as a discharge of its contractual liability.”); *City of Miami Beach v. Carner*, 579 So. 2d 248, 251 (Fla. 3d DCA 1991) (“The rule is quite clear that a contracting party, faced with a material breach by the other party, may treat the contract as totally breached and stop performance.”).

Here, Appellant materially breached the terms of the mortgage well before any alleged breach by Nationstar or prior servicers thus the court did not err by dismissing Appellant’s breach of contract defense.

III. The Business Records of Prior Servicers were Properly

Admitted

Appellant argues that prior servicer records should not have been admitted, however the prior servicer records were properly admitted under the business records exception to the hearsay exclusion.

Under Fla. Stat. § 90.803(6) a party seeking to introduce evidence under the business records exception must show that (1) the record was made at or near the time of the event; (2) was made by or from information transmitted by a person with knowledge; (3) was kept in the ordinary course of a regularly conducted business activity, and (4) that it was a regular practice of that business to make such a record. *Yisrael v. State*, 993 So. 2d 952, 956 (Fla. 2008).

It is well established under Florida law that where a witness presents evidence that she has some knowledge of a prior loan servicer's record-keeping practices, the records may be admissible under the business records exception to the hearsay rule. A loan servicer can lawfully rely on the records and loan transaction history of a prior loan servicer. *In re Sagamore Partners, Ltd.*, 2012 Bankr. LEXIS 3800, 2012 WL 3564014 at *4 (Bankr. S.D. Fla. Aug.

17, 2012) (citing *WAMCO XXVIII, Ltd. v. Integrated Elec. Env'ts, Inc.*, 903 So. 2d 230 (Fla. 2d DCA 2005)).

Additionally, records can be admitted under the business records exception where a subsequent note holder can provide testimony that it has procedures in place to check the accuracy of the information it received from the previous noteholder. *Deutsche Bank Trust Co. Ams. v. Frias*, 178 So. 3d 505, (Fla. 4th DCA 2015).

Appellant argues the Court should ignore the well-established case law regarding the admissibility of prior servicer records because there were two servicers prior to Nationstar. There is no case law cited to support this argument. Nationstar was only required to testify that Nationstar had current procedures in place to check the accuracy of the information it received from the prior loan servicer. Nationstar is not required to know the ins and outs of each prior servicers business keeping procedures. Nor is it required to know or explain each and every document that the previous servicer relied upon in making its records. Nationstar was only required to testify that Nationstar had current procedures in place to check the accuracy of the information it received from the prior loan servicer.

Here, Trompisz laid the proper foundation to admit the prior servicer records. She testified she was familiar with Nationstar's practices and procedures for maintenance of the business records in connection with its loan servicing operations. [TM 22]. She testified as to Nationstar's procedures for onboarding a loan from prior services and verification of information received. [TM 24-25]. She specifically confirmed that she verified and reconciled the history of each prior servicer. [TM 55]. Based on Ms. Trompisz's testimony, the court admitted the business records. Appellant has not provided any authority as to why the records should not be admitted.

IV. Nationstar Proved it was Entitled to Foreclose

To establish its *prima facie* case of foreclosure, Nationstar needed to prove there was an agreement between the parties, a default by the defendant, acceleration of the debt to maturity, and the amount due. *Liberty Home Equity Sols. Inc. v. Raulston*, 206 So. 3d 58 (Fla. 4th DCA 2016).

Here Nationstar proved each element. The contracts between the parties were admitted to evidence. Appellant admits that she did not make the July 2012 payment or any payment thereafter.

Nationstar accelerated the debt by filing the 2017 foreclosure action and presented evidence of the amounts due at trial.

CONCLUSION

Nationstar proved all the elements of its mortgage foreclosure claim. Appellant's defenses fail to preclude Nationstar's rights to foreclose. The final judgment is supported by competent, substantial evidence and should be affirmed, with remand for calculation of the total amount due.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on December 20, 2023, a true and correct copy was served by E-Mail on: **Benjamin Alexander, Esq.**, Tidwell, Higdon & Associates, PLLC, 811 N. Spring Street, Pensacola, FL 32501, ben@tha-law.com (*Counsel for Appellant*); and **Amanda Murphy, Esq.**, Roberson, Anschutz, Schneid, Crane & Partners, PLLC, 6409 Congress Ave. Suite 100, Boca Raton, FL 33487, amanda.murphy@raslg.com and flmail@raslg.com (*Co-Counsel for Appellee*).

/s/ Dorrella L. Gallaway
Attorney

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with the type-volume limitation and font requirement set forth in Rule 9.045, Florida Rules of Appellate Procedure. This brief contains 2,678 words. It has been prepared in a proportionally spaced typeface using Microsoft Word in 14 point Bookman Old Style font.

/s/ Dorrella L. Gallaway
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