Client Alert

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Fifth Circuit Holds that a Lender Accepting Late Loan Payments from a Borrower Constitutes Abandonment of Acceleration

On April 23, 2015, the United States Court of Appeals for the Fifth Circuit issued an unpublished opinion regarding a mortgage foreclosure case from the United States District Court for the Eastern District of Texas.[1] The main issue on appeal was whether Bank of America (the "Bank") and Mortgage Electronic Registration Systems ("MERS" and together with the Bank, "Appellees") abandoned the acceleration of the loan by accepting payments from Wilfredo and Ines Rivera (the "Riveras" or "Appellants"). The Fifth Circuit held that accepting payments was abandonment of the acceleration of the note that effectively tolled the running of the statute of limitations until the Bank subsequently accelerated the note the second time.[2]

Factual Background

In 2001, the Riveras obtained a home-equity loan to refinance their mortgage.[3] The loan was secured by a deed of trust naming MERS as the beneficiary for the benefit of the noteholder.[4] The loan agreement provided that in the event of a payment default, the lender could accelerate the note and either require the borrower to immediately pay the total balance or face foreclosure.[5]

In 2003, the Riveras defaulted on their loan payments.[6] In January 2004, the Bank send a notice of default, a notice of intent to accelerate, and a notice of acceleration of the promissory note.[7] In 2006, the Bank accepted several payments on the note from the Riveras, which were applied to the loan and brought the loan current through March 2004.[8]

In 2010, the Bank sent a notice of default, a notice of intent to accelerate, and a notice of acceleration to the Riveras.[9] In 2012, the Bank sent the Riveras a loan modification application under the federal Making Homes Affordable Program.[10] The Riveras alleged that they sent in multiple completed applications, however, the Bank alleged that the documents had been sent to the wrong place or were inadequate.[11] The Riveras failed to cure the defaults or pay the note. Consequently, in February 2013, the Bank notified the Riveras that their home would be posted for foreclosure sale on March 5, 2013.[12] In

[1] *Rivera v. Bank of America*, et. al., Summary Calendar No. 14-40837 (5th Cir. 2015) (pursuant to 5th Circuit Rule 47.5, the court determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Circuit Rule 47.5.4).
[2] *Id.* at 2.
[3] *Id.*
[4] *Id.* (the Bank eventually became the note holder as successor by merger to Countrywide Home Loans).
[5] *Id.*
[6] *Id.*
[7] *Id.*
[8] *Id.* at 3.
[9] *Id.*
[10] *Id.*
[11] *Id.*
[12] *Id.*

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response, the Riveras sued the Bank and MERS in the 366th Judicial Court in Collin County, Texas alleging expiration of the statute of limitations, breach of the common law tort of unreasonable collection efforts, violations of the Texas consumer credit code/debt collection practices act, negligent misrepresentation, and ordinary negligence.[13] The Bank removed the case to federal district court and the district court granted summary judgment in favor of the Bank.[14] The Riveras appealed arguing that the Bank did not have the right to enforce the lien and foreclose on their home because the statute of limitations had expired.[15]

Court's Ruling

The Fifth Circuit relied on Texas Civil Practice & Remedies Code § 16.035(a) which provides a four-year statute of limitations period for foreclosure actions.[16] Specifically, the Fifth Circuit held that the Bank abandoned its prior acceleration by accepting payments and that its foreclosure claim was valid because it was made within four years after the note was accelerated the second time.[17] The Court pointed to undisputed evidence that the Bank accepted payments from the Riveras in 2006 to support its holding.[18] The Fifth Circuit further explained that the cause of action did not accrue until the Bank accelerated the note in 2010.[19] As such, the 2013 foreclosure action was commenced within the four-year limitations period.[20]

Conclusion

Lenders should be aware of two key points from the Fifth Circuit's opinion in *Rivera*. First, acceptance of late payments by a borrower may constitute abandonment of acceleration, which effectively amounts to waiver of default under the note. Consequently, prior to posting property for foreclosure, lenders should review their files to confirm that any actions taken after a note is accelerated cannot be deemed an abandonment of acceleration or waiver of default. Indeed, it is much less expensive to re-notice a default and acceleration than to litigate the issue. Second, and to the benefit of the lender, abandonment of acceleration can toll the limitations period from running, which ultimately extends the time that lenders have to commence foreclosure proceedings on their collateral.

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[13] *Rivera v. Bank of America, et. al.*, Cause No.: 366-00869-2013 (366th Judicial District 2013).
[14] *Rivera v. Bank of America, et. al.*, Case No.: 4:13-CV-195, filed May 3, 2015 (USDC ED Texas 2015).
[15] *Rivera v. Bank of America*, et. al., Summary Calendar No. 14-40837, 4 (5th Cir. 2015)
[16] *Id.* at 2.
[17] *Id.* at 5.
[18] *Id.*
[19] *Id.* at 5-6.
[20] *Id.* at 6.

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