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No. 05-11-00700-CV

IN THE

COURT OF APPEALS

FOR THE

FIFTH JUDICIAL DISTRICT

DALLAS, TEXAS

WELLS FARGO BANK, N.A., AS TRUSTEE,

Appellant/Cross-Appellee,

v.

RAY ROBINSON,

Appellee/Cross-Appellant.

BRIEF FOR APPELLEE AND CROSS-APPELLANT

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ORAL ARGUMENT REQUESTED

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STATEMENT OF THE CASE

Appellee Ray Robinson ("Robinson") agrees with appellant Wells Fargo Bank, N.A., as Trustee's ("Wells Fargo's") Statement of the Case, but adds the following.

In the trial court, Wells Fargo filed Defendant's Counterclaim for Declaratory Judgment as to the Validity of the June 3, 2008, Non-Judicial Foreclosure Sale of the Property. CR 44. In the Judgment, the trial court awarded conditional appellate attorney fees to Robinson. CR 182. Robinson filed a timely Notice of Appeal. Supp. CR.[1]

[1] Robinson's Notice of Appeal was not included in the original clerk's record filed in this Court. The Notice of Appeal will be included in a supplemental clerk's record to be requested by Robinson.

STATEMENT OF FACTS

Wells Fargo's Statement of Facts is substantially correct. However, Wells Fargo's assertions as to its attempts to obtain a copy of the Agreed Order and its subsequent actions are not supported by evidence, but only by unsworn representations made by Wells Fargo's trial counsel. 1 RR 9-10, 12. In addition, Robinson disagrees with Wells Fargo's statement as to the factual allegation serving as the basis for Robinson's claims. Appellant's Brief at 3. The principal factual allegation serving as the basis for Robinson's claims against Wells Fargo was that the foreclosure sale that took place on June 3, 2008 was wrongful because it was conducted without a valid court order as required by the Texas Constitution and the Deed of Trust. CR 168-69 (¶¶ 3.3, 4.2-4.4), 174 (¶ 8.2). Wells Fargo further fails to note that the relief sought by Robinson included recovery of actual damages for the wrongful foreclosure, as well as reasonable attorney fees in connection with his claims. CR 172 (¶ 7.2), 174 (¶ 9).

In the post-trial Memorandum, the trial court not only found in favor of Robinson on his claim for wrongful foreclosure, but also set forth the amount of damages to be awarded to Robinson (together with the basis for calculating that amount), and awarded attorney fees to Robinson for trial and conditional attorney's fees for appeal. CR 178. As noted above, the Judgment awarded the conditional appellate attorney fees to Robinson. CR 182.

The trial court's conclusions of law included the conclusions that "[t]he Foreclosure Order did not authorize Defendant to foreclose on the Property on June 3, 2008" and that "Defendant and its substitute trustee did not have a valid court order to foreclose on the Property on June 3, 2008." CR 205 (¶¶ 5, 8).

Additional facts are set forth below in connection with appellee Robinson's arguments in support of his responses to Wells Fargo's issues.

SUMMARY OF THE ARGUMENT

The evidence is legally and factually sufficient to support the trial court's judgment in Robinson's favor on a common-law cause of action for wrongful foreclosure. The foreclosure was wrongful because it violated the Texas Constitution's requirement, as embodied in the Deed of Trust, that the lien securing the debt under the Home Equity Note be foreclosed upon only by a court order. There was no court order for the foreclosure sale that took place on June 3, 2008. Under the parties' Agreed Order to Proceed with Notice of Foreclosure Sale and Foreclosure Sale, Wells Fargo was authorized to post the Property only on or before April 14, 2008 for the May 6, 2008 foreclosure sale.

The damages awarded to Robinson for wrongful foreclosure were proper. The evidence supports the trial court's determination on the measure of damages for wrongful foreclosure — the difference between the value of the property and the remaining indebtedness as of the date of the foreclosure.

The award of attorney fees to Robinson was proper under the parties' declaratory judgment actions. Both Wells Fargo and Robinson called upon the trial court to construe the Agreed Order, and the trial court did so under contract principles applicable to agreed orders.

ARGUMENT

I. Response to Issues 1 and 2

The evidence is legally and factually sufficient to support the trial court's judgment in Robinson's favor, including the damages awarded, on a cause of action for common-law wrongful foreclosure.

A. Cause of action for common-law wrongful foreclosure

A debtor may recover damages for common-law wrongful foreclosure if the mortgagee either (1) fails to comply with contractual or statutory terms, or (2) complies with such terms, yet takes affirmative action that detrimentally affects the fairness of the foreclosure process. *See First State Bank v. Keilman*, 851 S.W.2d 914, 921-22 (Tex. App.—Austin 1993, writ denied). For a sale under a deed of trust to be valid, the terms set out in the deed of trust must be strictly followed. *See C&K Investments v. Fiesta Group, Inc.*, 248 S.W.3d 234, 254 (Tex. App.—Houston [1st Dist.] 2007, no pet.). The correct measure of damages for wrongful foreclosure is the difference between the value of the property at the date of foreclosure and the remaining balance due on the indebtedness. *Id*. (citing *Farrell v. Hunt*, 714 S.W.2d 298, 299 (Tex. 1986)).

B. Requirement of court order for home equity lender to foreclose on borrower's homestead

Section 50(a)(6) of Article 16 the Texas Constitution sets forth the requirements for extensions of credit secured by a borrower's homestead. TEX. CONST. art. XVI, § 50(a)(6). One such requirement is that the extension of credit be secured by a lien that may be foreclosed upon only by a court order. *Id.*, § 50(a)(6)(D). The Deed of Trust incorporated this requirement. 2 RR (Exhibit A-2 to P.Ex. 3 (¶ 21)).[2]

C. The foreclosure was wrongful because it was not authorized by a court order, as required by the Texas Constitution and the Deed of Trust.

As the trial court found, the Agreed Order to Proceed with Notice of Foreclosure Sale and Foreclosure Sale ("the Agreed Order") authorized Wells Fargo to proceed with foreclosure and post the Property for foreclosure on or before April 14, 2008 and to conduct a foreclosure sale on May 6, 2008. 1 RR 8; 2 RR (Exhibit A-5 to P.Ex. 3); CR 203 (¶ 7). The Property was not posted or foreclosed upon under the terms of the Agreed Order. Instead, the Property was posted for foreclosure on May 12, 2008, and it was sold at a foreclosure sale on June 3, 2008. CR 203-04 (¶¶ 8-10, 13).

Based upon the undisputed facts, the trial court concluded that the Non-Recourse Home Equity Note and Deed of Trust required that Wells Fargo obtain a court order prior to foreclosure on the Property; that the Agreed Order (or "Foreclosure Order") did not authorize Wells Fargo to foreclose on the Property on June 3, 2008; that the foreclosure on June 3, 2008 was a breach of the Deed of Trust; that the foreclosure on June 3, 2008 was wrongful; and that Wells Fargo and it substitute trustee did not have a valid court order to foreclose on the Property on June 3, 2008. CR 205 (¶¶ 4-8).[3]

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[2] "If the default is not cured on or before the date specified in the notice, Lender, at its option, may require immediate payment in full of all sums secured by this Security Instrument without further demand and may invoke its remedy of judicial foreclosure." 2 RR (Exhibit A-2 to P.Ex. 3 (¶ 21)).

[3] At trial, Wells Fargo's counsel stated: "We will admit that the Foreclosure was not carried out exactly as the Order said, . . ." RR 13.

The undisputed facts support the trial court's conclusion that the foreclosure on June 3, 2008 was wrongful and a breach of the Deed of Trust because it was conducted without a valid court order.

D. The damages awarded are supported by legally and factually sufficient evidence.

Mr. Robinson testified that the value of his homestead property on the date of the foreclosure (June 3, 2008) was approximately $140,000 to $145,000. 1 RR 15-16. The trial court found that the reasonable fair market value of the property on that date was $135,000.00. CR 204 (¶ 15). It was stipulated that the balance of the Non-Recourse Home Equity Note on June 3, 2008 was $87,922.63, and the trial court so found. 1 RR 24; CR 204 (¶ 16). Based on the difference between the value of the property and the amount still owed, the trial court found and concluded that Robinson had incurred and was entitled to actual damages in the amount of $47,077.37 as a result of the wrongful foreclosure. CR 204 (¶ 17), 205 (¶ 9).

The damages awarded to Robinson for the wrongful foreclosure are fully supported by the evidence and conform to the proper measure of damages for wrongful foreclosure. *See generally Farrell v. Hunt*, 714 S.W.2d at 299 (correct measure of damages for wrongful foreclosure).

Wells Fargo's arguments about Robinson's failure to prove a defect in the foreclosure sale proceedings with a causal connection to a grossly inadequate selling price are inapposite. Robinson's wrongful foreclosure claim was based upon Wells Fargo's failure to comply with the relevant provisions of the Texas Constitution and the terms of the Deed of Trust. In other words, his claim was based upon Wells Fargo's failure to strictly comply with statutory (or constitutional) and contractual terms. *See First State Bank v. Keilman*, 851 S.W.2d at 921-22 (debtor may recover damages for wrongful foreclosure if mortgagee fails to comply with contractual or statutory terms). In contrast, the line of cases relied upon by Wells Fargo (for the first time on appeal) involve the proof required when a wrongful foreclosure claim is based upon an irregularity in the foreclosure sale proceedings (that causes a grossly inadequate selling price). *See id*. (debtor may recover damages for wrongful foreclosure if mortgagee complies contractual and statutory terms, yet takes affirmative action that detrimentally affects the fairness of the foreclosure process).[4]

Similarly, Wells Fargo's reliance on the decision in *Farrell v. Hunt* for the proposition that Robinson was required to prove that the wrongful foreclosure caused him damages is misplaced. In *Farrell*, the Texas Supreme Court held that the plaintiff failed to prove common law damages for wrongful foreclosure because there was no evidence of the amount due on one of two notes. *Farrell*, 714 S.W.2d at 300. In contrast, it is undisputed that Robinson provided evidence to establish the difference between the value of the Property at the date of foreclosure and the remaining balance due on the indebtedness.

[4] In its motion for new trial, Wells Fargo acknowledged that the measure of damages in a wrongful foreclosure case is the difference between the value of the property at the date of foreclosure and the remaining balance due on the indebtedness. CR 198 (¶ 7).

II. Response to Issue 3

The trial court's award of attorney fees to Robinson was proper under the Declaratory Judgment Act.

A. The parties' requests for declaratory relief and the trial court's conclusions of law

Wells Fargo filed Defendant's Counterclaim for Declaratory Judgment as to the Validity of the June 3, 2008, Non-Judicial Foreclosure Sale of the Property ("the Counterclaim"). In support of its request for declaratory judgment, Wells Fargo alleged, among other things, that

> 12. Defendant properly obtained a court order authorizing the non-judicial foreclosure sale of the Property. The Agreed Order authorized Defendant to "proceed with foreclosure . . . and post this property on or before April 14, 2008 for the May 6, 2008 foreclosure sale."
>
> . . .
>
> 17. Accordingly, the June 3, 2008, foreclosure sale was validly conducted pursuant to the true purpose and intent of the Agreed Order and Plaintiff was not harmed by the additional time because Plaintiff continued to reside in the Property. Thus, the Agreed Order is not subject to being set aside or voided.

CR 47 (¶¶ 12, 17).

In his second and third amended original petitions, Robinson sought declaratory relief, requesting, among other things, that the trial court declare that Wells Fargo did not have a valid court order, as required by section 50(a)(6) of Article XVI of the Texas Constitution, authorizing Wells Fargo to foreclose on Robinson's homestead property on June 3, 2008. CR 38 (¶ 4.3(a)), 169-70 (¶ 4.5(a)).

The trial court concluded that the Agreed Order did not authorize Wells Fargo to foreclose on the property on June 3, 2008 and that Wells Fargo and its substitute trustee did not have a valid court order to foreclose on the property on June 3, 2008. CR 205 (¶¶ 5, 8).

B. The Uniform Declaratory Judgment Act

Section 37.004(a) of the Texas Civil Practice and Remedies Code provides in relevant part:

> A person interested under a . . . written contract, <u>or other writings constituting a contract</u> or whose rights . . . are affected by a . . . contract . . . may have determined any question of construction or validity arising under the . . . contract . . . and obtain a declaration of rights . . . thereunder.

TEX. CIV. PRAC. & REM. CODE ANN. § 37.004(a) (emphasis added).

C. Agreed order interpreted as a contract

An agreed order is interpreted as if it were a contract between the parties, and the interpretation is governed by the usual rules of contract interpretation. *See In re C.A.T.*, 316 S.W.3d 202, 210 (Tex. App.—Dallas 2010, no pet.).

D. The trial court was authorized to award attorney fees to Robinson under the Declaratory Judgment Act.

Both parties sought under the Declaratory Judgment Act ("the Act") to have the trial court construe the validity of the Agreed Order of March 12, 2008 as it related to the June 3, 2008 foreclosure sale. The trial court's conclusions of law reflect that the trial court made this determination and that this determination was essential to the judgment that was entered in Robinson's favor.[5] Accordingly, the trial court's award of attorney fees to Robinson was authorized under § 37.009 of the Act. TEX. CIV. PRAC. & REM. CODE ANN. § 37.009 (in proceeding under Chapter 37, court may award costs and reasonable and necessary attorney's fees as are equitable and just).

BRIEF FOR CROSS-APPELLANT

ISSUE PRESENTED

Did the trial court err in failing to order the forfeiture of all principal and interest on the Non-Recourse Home Equity Note where the foreclosure on Robinson's Property without a valid court order violated a provision that is mandatory under Article XVI, § 50(a)(6) of the Texas Constitution?

SUMMARY OF THE ARGUMENT

The trial court erred in failing to order the forfeiture of all principal and interest on the Non-Recourse Home Equity Note where the foreclosure on Robinson's Property without a valid court order violated § 50(a)(6)(D) of Article XVI of the Texas Constitution. Section 50(a)(6)(D) requires that a home equity extension of credit be secured by a lien that may be foreclosed upon only by a court order. Section 50(a)(6)(Q)(x) provides that the lender shall forfeit all principal and interest of the extension of credit if the lender fails to comply with the lender's obligations under the

[5] Wells Fargo's repeated assertion that Robinson did not prevail on his requests for declaratory judgment is incorrect. He prevailed on at least one request (on an issue essential to the judgment), and the request was on an issue on which Wells Fargo had also sought declaratory relief. Thus, Robinson prevailed on his request for declaratory judgment <u>and</u> on Wells Fargo's. Moreover, Wells Fargo's assertion that Robinson did not prevail on his requests for declaratory judgment is premised largely on the trial court's statement in the post-trial Memorandum that "[a]ll other relief not specifically granted is hereby DENIED." CR 178. What Wells Fargo has chosen not to mention about the Memorandum in its brief is that the trial court awarded attorney fees to Robinson for trial and for appeal. CR 178. As demonstrated, the award of attorney fees can be supported under the requests for declaratory relief as to the effect of the Agreed Order.

extension of credit. Because the foreclosure was done without the required court order – an obligation under the extension of credit – Wells Fargo should have forfeited all principal and interest.

ARGUMENT

The trial court erred in failing to order the forfeiture of all principal and interest on the Non-Recourse Home Equity Note.

A. Article XVI, § 50(a)(6) of the Texas Constitution

Article XVI, § 50(a)(6) of the Texas Constitution sets forth the requirements for home equity extensions of credit. One of the requirements is that the extension of credit be "secured by a lien that may be foreclosed upon only by a court order." TEX. CONST. art. XVI, § 50(a)(6)(D). Section 50(a)(6)(Q)(x) further provides, in relevant part:

> the lender . . . shall forfeit all principal and interest of the extension of credit if the lender . . . fails to comply with the lender's . . . obligations under the extension of credit and fails to correct the failure to comply not later than the 60th day after the date the lender . . . is notified by the borrower of the lender's failure to comply by [taking one of several enumerated curative actions.]

TEX. CONST. art. XVI, § 50(a)(6)(Q)(x).

B. Wells Fargo failed to comply with its obligation to foreclose upon its lien only with a court order.

As the trial court concluded, Wells Fargo and its substitute trustee did not have a valid court order to foreclose on the Property on June 3, 2008. CR 205 (¶ 8). Thus, it was established that Wells Fargo failed to comply with its obligation under § 50(a)(6)(D) to foreclose upon its lien only by a court order.

On June 10, 2008, Robinson's counsel notified Wells Fargo's counsel in writing that the June 3, 2008 foreclosure sale was not authorized and advised that Wells Fargo had 60 days to set aside the foreclosure sale by deeding the property back to Robinson. 2 RR P.Ex. 1.

C. All principal and interest on the Non-Recourse Home Equity Note should be forfeited.

Wells Fargo failed to comply with its obligation under § 50(a)(60(D) to foreclose upon its lien only by a court order and failed to cure within 60 days after being notified of its failure to so comply. As a result, the trial court should have required the forfeiture of all principal and interest on the Non-Recourse Home Equity Note.[6] *But see Vincent v. Bank of America, N.A.*, 109 S.W.3d 856, 862 (Tex. App.—Dallas 2003, pet. denied) (holding that as long as Loan Agreement, as originally entered into by the parties, complies with the constitution, forfeiture is not an appropriate remedy).

CONCLUSION AND PRAYER

For the reasons stated, appellee/cross-appellant Ray Robinson respectfully prays that the trial court's judgment awarding him damages and attorney fees be affirmed. Robinson further prays that the judgment of the trial court be reversed with respect to the trial court's denial of Robinson's request that Wells Fargo forfeit all principal and interest on the Non-Recourse Home Equity Note and, to the extent necessary, that the cause be remanded with instructions that the trial court calculate such principal and interest and

[6] Thus, the trial court erred in concluding that the foreclosure on Robinson's Property without a valid order was not a violation of any provision mandated by § 50(a)(6) of Article XVI of the Texas Constitution. CR 205 (¶ 12).

enter judgment accordingly. Appellee/cross-appellant Robinson further prays for such other relief to which he may be entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been forwarded to counsel for all parties to this appeal, as indicated below, on this the 30th day of November, 2011.

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