COURT OF APPEALS
DECISION
DATED AND FILED

July 16, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-0205-FT **Cir. Ct. No. 00-CV-10**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

ASSOCIATED BANK, F/K/A FIRST FINANCIAL BANK, F/K/A NORTHLAND SAVINGS AND LOAN ASSOCIATION,

PLAINTIFF-RESPONDENT,

V.

LAWRENCE PUFALL,

DEFENDANT-APPELLANT,

RAYMOND BUCCANERO,

DEFENDANT.

APPEAL from a judgment of the circuit court for Iron County: PATRICK J. MADDEN, Judge. *Reversed and cause remanded.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Lawrence Pufall appeals a mortgage foreclosure judgment in favor of Associated Bank.[1] At issue is whether the Bank was required to inform Pufall, at the time he was given his notice of loan default, that he was allowed to reinstate his loan by paying the amount that would have been due at the time of payment had no acceleration occurred. The trial court held that Pufall had notice of his right of reinstatement due to the passage of time between notice of the loan default and the trial. As a result, the court held that any failure by the Bank to provide Pufall formal notice of his right of reinstatement was harmless. Pufall argues that the record does not contain a factual basis to support the court's finding that Pufall had notice of his right to reinstatement. We agree and reverse the judgment and remand for further proceedings consistent with this opinion.[2]

BACKGROUND

¶2 Pufall signed a note to the Bank for a loan of $56,000 and granted a mortgage to the Bank on October 28, 1985. On October 26, 1999, the Bank sent Pufall a letter advising him that he was in default on the loan and that failure to cure the default by November 25, 1999, would result in immediate acceleration of all amounts due and the prompt initiation of a mortgage foreclosure. It is undisputed that the Bank failed to provide Pufall formal notice of his reinstatement

[1] This is an expedited appeal under WIS. STAT. RULE 809.17.

[2] In addition, Pufall argues that he is entitled to reinstate his mortgage by paying to the Bank $2,200, plus legal fees and costs incurred by the Bank up to November 25, 1999. However, we do not address this argument. The appropriate remedy in this case is to be fashioned by the trial court upon remand.

rights after the loan was accelerated.[3] Pufall attempted to make partial payments, but stopped because the Bank would not accept payment.

¶3 The Bank filed a complaint seeking foreclosure. Pufall raised as an affirmative defense that the Bank's notice was defective because it did not inform Pufall of his right to reinstate the loan by paying the amount which would have been due at the time of payment had no acceleration occurred.

¶4 At the October 30, 2001, bench trial, Pufall testified that it "would have made a lot of difference" if he had known of his right of reinstatement. The Bank argued that Pufall knew of his right of reinstatement due to the passage of time between the notice of default letter and the trial, some two years. The trial court agreed with the Bank and found that Pufall had "in fact, been given notice."

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[3] The relevant portions of paragraphs 18 and 19, under the Non-Uniform Covenants section of the mortgage, read as follows:

> 18. Acceleration; Remedies. … Lender prior to acceleration shall mail notice to Borrower … specifying: (1) the breach; (2) the action required to cure such breach; (3) a date, not less than 30 days from the date the notice is mailed to Borrower, by which such breach must be cured; and (4) that failure to cure such breach on or before the date specified in the notice may result in acceleration of the sums secured by this Mortgage and sale of the Property. The notice shall further inform Borrower of the right to reinstate after acceleration ….
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> 19. Borrower's Right to Reinstate. Notwithstanding Lender's acceleration of the sums secured by this Mortgage, Borrower shall have the right to have any proceedings begun by Lender to enforce this Mortgage discontinued at any time prior to the earlier to occur of (i) the fifth day before sale of the Property pursuant to the power of sale contained in this Mortgage or (ii) entry of a judgment enforcing this Mortgage if: (a) Borrower pays Lender all sums which would then be due … had no acceleration occurred [and undertakes other specified actions and pays costs].

As a result, the court held that the Bank's failure to provide Pufall formal notice of his right of reinstatement was harmless.

STANDARD OF REVIEW

¶5 We will not reverse a factual determination made by the trial court unless it is clearly erroneous. *See* WIS. STAT. § 805.17(2). The court is the ultimate arbiter of the witnesses' credibility, and when more than one reasonable inference can be drawn from the evidence, this court is obliged to affirm the trial court's findings. ***Onalaska Elec. Htg. v. Schaller***, 94 Wis. 2d 493, 501, 288 N.W.2d 829 (1980). "The standard for reversal is heavily weighted on the side of sustaining the court's findings of fact in cases tried without a jury." ***Leimert v. McCann***, 79 Wis. 2d 289, 296, 255 N.W.2d 526 (1977).

DISCUSSION

¶6 Pufall argues that the record does not contain a factual basis to support the trial court's finding that Pufall had received notice of his right of reinstatement. He contends that the court erred by holding that he had been given notice as a result of the passage of time from the notice of default letter to the trial.

¶7 The Bank cites ***Mortgage Assocs., Inc. v. Monona Shores, Inc.***, 47 Wis. 2d 171, 185, 177 N.W.2d 340 (1970), to support its argument that its failure to provide Pufall formal notice of his right of reinstatement was harmless. In ***Mortgage Assocs.***, a borrower was attempting to prevent a mortgage foreclosure by arguing that no notice of default had been given. ***Id.*** at 181. Our supreme court held that the purpose of the notice of default was to "give the mortgagor a reasonable chance to cure it and avoid a foreclosure." ***Id.*** The court considered the facts and surrounding circumstances and concluded that the lender's failure to

comply with the mortgage provision dealing with the notice was harmless because the borrower was fully aware of its defaults and that its financing was insufficient. ***Id.***

¶8 Here, the trial court found that Pufall had been given notice and that the Bank's failure to give proper notice was harmless "in light of all the time that … has passed." The court also stated:

> Mr. Pufall through his testimony, really, just simply stated that he ignored his rights in favor of his outside work, and he basically succumbed to the bookkeeping of a not very skilled bookkeeper, and what we have by the record and by the evidence is sufficient evidence through the exhibits and the testimony that a motion for foreclosure should be granted, and, therefore, the Court will grant the foreclosure.

¶9 After a thorough review of the record, we conclude that a factual basis does not exist to support the trial court's finding that Pufall had been given notice. Under ***Mortgage Assocs.***, the only fact that matters is whether Pufall had independent and timely knowledge of his reinstatement rights. *See* ***id.*** If he did, then the Bank's failure to give the required notice is harmless.

¶10 Pufall testified that he did not know he could reinstate his loan by paying the amount that would have been due at the time of payment. Nothing in the record contradicts Pufall's testimony. The mere passage of time between the notice of default and the trial does not establish that failure to give the required notice is harmless. Furthermore, the passage of time does not lead to an inference that Pufall had the opportunity to reinstate the loan but chose not to. Such an inference would render the notice requirement meaningless.

¶11 In addition, the trial court's finding that Pufall "ignored his rights in favor of his outside work" fails to support a finding that Pufall received notice. It

is undisputed that no matter how attentive Pufall may have been, he never would have seen a notice of his right to reinstate because the Bank's notice of foreclosure did not contain one.

¶12 The earliest indication that Pufall had notice of his reinstatement rights was his affirmative defense. Pufall testified that he had attempted to make partial payments, but that he "stopped making them because they wouldn't accept payment." There is nothing to indicate that the Bank would have accepted the unaccelerated amount to reinstate Pufall's loan. The only indication in the record that addresses this is the October 26, 1999, default letter. In it, the Bank states that only payment in full of the accelerated amount would cure the default. Therefore, the court's factual finding cannot support the legal conclusion that the Bank's failure to give notice was harmless.

¶13 We conclude that the trial court's finding that Pufall had notice of his reinstatement rights is unsupported by the record and is clearly erroneous. We reverse the judgment and remand for further proceedings to determine the appropriate remedy.

By the Court.—Judgment reversed and cause remanded.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.