



NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

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October 30, 2019

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Raighne C. Delaney
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Re: *G&G, LLC, et al. v. Thoburn Limited Partnership, et al.*, CL 2019-3800

Dear Mr. McEvoy and Mr. Delaney:

Defendant Thoburn Limited Partnership's Plea In Bar was taken under advisement by the court on September 11, 2019 after argument by counsel. Having had the opportunity to consider the parties' memoranda (and attachments), the parties' oral arguments, and the testimony of the witnesses, the court OVERRULES Defendant's Plea In Bar for the reasons that follow.

Facts

Striped to its essentials, the material facts are simple: by deed dated June 9, 1998, Thoburn Limited Partnership ("TLP") owns a five acre parcel. TLP executed two Deed of Trust Notes ("Notes"), with a maturity date of June 9, 2000, which were secured by a Deed of Trust, also dated June 9, 1998, which does not state a maturity date. TLP filed a voluntary bankruptcy petition on February 27, 2012, which was dismissed on January 22, 2015 (2 years, 10 months, and 26 days), and filed a second voluntary bankruptcy petition on March 9, 2015, which was dismissed on February 1, 2016 (10 months and 23 days). G&G, LLC ("G&G"), the holder in due course of the Notes, filed suit on March 18, 2019 to foreclose on the property.

The Parties' Contentions

TLP argues that the specific-date statute of limitations in Code § 8.01-241(B) and the ten-year statute of limitations in Code § 8.01-241(A) bar this action. G&G responds that the twenty-year statute of limitations in Code § 8.01-242 governs and that, pursuant to Code § 8.01-229(D), the twenty years was tolled during the periods which TLP's bankruptcy proceedings were pending.

Analysis

Code § 8.01-241(A) and (B) provide in pertinent part:

A. No deed of trust . . . heretofore or hereafter given to secure the payment of money . . . shall be enforced after 10 years from the time when the original obligation last maturing thereby secured shall have become due and payable according to its terms

B. Notwithstanding the limitations prescribed by subsection A, a deed of trust . . . given . . . for which the original obligation last maturing thereby secured became due and payable according to its terms between July 1, 1988, and July 1, 2000 . . . shall not be enforced after July 1, 2010. . . .

Code § 8.01-242 provides in pertinent part:

No deed of trust . . . given to secure the payment of money . . . in which no date is fixed for the maturity of the debt secured by such deed of trust . . . shall be enforced after twenty years from the date of the deed of trust, mortgage, or other lien

The conundrum here is that, on their face, Code § 8.01-241(A) and (B), and Code § 8.01-242, all appear to apply. Code § 8.01-241(A) applies because the Deed of Trust secures the Notes. Code § 8.01-241(B) applies because the Notes matured between July 1, 1988 and July 1, 2000. Code § 8.01-242 applies because the Deed of Trust contains no date for the maturity of the Notes. Thus, the three provisions are in conflict because each of the three limitations periods would apply. But the court must, where statutes conflict, "harmonize apparently conflicting statutes to give effect to both." *Phipps v. Liddle*, 267 Va. 344, 346 (2004). In doing so, the court's "primary objective" is to:

ascertain and give effect to the legislative intent, which "is initially found in the words of the statute itself." (Citation omitted). "[I]f those words are clear and unambiguous, we do not rely on rules of statutory construction." (Citation omitted). However, "consideration of the entire statute . . . to place its terms in context to ascertain their plain meaning does not offend [this] rule because 'it is our duty to interpret the several parts of a statute as a consistent and harmonious whole so as to effectuate the legislative goal.'" (Citation omitted).

Chaffins v. Atlantic Coast Pipeline, 293 Va. 564, 568 (2017).

Considering first Code § 8.01-241(A) and (B), the legislative intent is

discernable from an examination of the enactment of those provisions.

Prior to July 1, 2008, the limitation in Code § 8.01-241 was 20 years; effective July 1, 2008, the limitation was reduced to 10 years. Acts of Assembly 2008, Ch. 226. Apparently recognizing that reduction of the limitation by 10 years would bar actions by lenders who had relied upon the 20 year limitation where 10 years had passed on or after July 1, 2008, the General Assembly in 2009 amended Code § 8.01-241 by designating the first sentence as paragraph (A), designating the remainder as Paragraph (C), and inserting a new paragraph (B). Acts of Assembly 2009, Ch. 163. Paragraph (B) was retroactive to July 1, 2008 (the effective date of the amendment the previous year shortening the limitation period to 10 years) and extended the limitations period to July 1, 2010 so that any lender who had relied upon the 20 year limitation would have another year to bring an action.¹

In short, Code § 8.01-241(B) is nothing more than a transitional provision to ensure that lenders who had relied on the 20 year statute of limitations would not be barred from bringing an action to enforce a deed of trust when the statute of limitations in Code § 8.01-241 was reduced to 10 years. Thus, the real issue here is not whether Code § 8.01-241(A) or Code § 8.01-241(B) applies, but rather whether Code § 8.01-241 or Code § 8.01-242 applies.

Turning to the Deed of Trust here, because it does not does contain a maturity date, it fits precisely within the language of Code § 8.01-242; it is a "deed of trust . . . in which no date is fixed for the maturity of the debt secured by such deed of trust."² That alone strongly suggests that the applicable statute of limitations is found in Code § 8.01-242. But, as Plaintiff argues, because the underlying Notes do state a maturity date, Code § 8.01-241 could apply.

The resolution of the conflict becomes apparent from the fact that Code § 8.01-241 and Code § 8.01-242, in effect, give lenders and borrowers a choice; they can choose to have a potentially longer statute of limitations, running 10 years from a note's maturity date, by stating the maturity date in the deed of trust, or they can choose to omit the note's maturity date from the deed of trust, in which case the lenders can only enforce the deed of trust for 20 years from its execution.³

¹ Code § 8.01-242 was not amended, leaving its limitation period at 20 years.

² Plaintiff argues that this language from Code § 8.01-242 "refers to whether there is a maturity date of the underlying debt . . . and not whether the maturity date of the underlying debt is set forth in the Deed of Trust." Reply Memorandum at 4-5. This argument is contrary to the plain language of the statute, which refers to a deed of trust "in which" no date is fixed for the maturity of the debt secured by such deed of trust; "in which" can only be referring to the contents of the deed of trust.

³ Code § 8.01-241 applies where the maturity date is stated in the deed of trust because Code § 8.01-242 expressly deals with there being no maturity date "fixed" in the deed of trust and Code § 8.01-241 is silent with regard to where the maturity date is established, thereby implying that the maturity date would be set forth in the deed of trust for Code § 8.01-241 to apply.

The court notes that, at first blush, it seems odd that the facially longer statute of limitations (Code § 8.01-242) actually may allow a lender less time to enforce a deed of trust, but this is due to the fact that, under Code § 8.01-242, the time begins to run "from the date of the deed of trust," not the maturity date of the underlying note. Thus, as Plaintiff correctly points out, a 30-year mortgage could be enforceable for 40 years under Code § 8.01-241 (30 years to maturity plus 10 year limitation) if the maturity date is stated in the deed of trust, whereas the statute of limitations will only run for 20 years (under Code § 8.01-242) from the date of the deed of trust if the maturity date is not stated in the deed of trust.

As a result, if a lender wants a longer statute of limitations, say to protect the enforceability of a 30-year mortgage, it must protect itself by stating the maturity date in the deed of trust. If the lender does not do so, i.e., the lender does not ensure that the maturity date is in the deed of trust, it will have only 20 years to enforce its 30-year mortgage. On the other hand, if note is only a two-year note and the borrower wants a shorter statute of limitations under Code § 8.01-241, then the borrower must ensure that the note's maturity date is "fixed" in the deed of trust.

The bottom line is that the way to harmonize Code § 8.01-241 and Code § 8.01-242 is to view them as choices to be made by the parties and for the court to honor the choice they made. Here, the lender and the borrower elected, for whatever reason, not to "fix" the maturity date in the deed of trust. Thus, they are governed by Code § 8.01-242.

Notably, in 1998, when the Deed of Trust here was executed, the parties had a similar, albeit not identical, choice. Although the limitations period in both Code § 8.01-241 and Code § 8.01-242 was 20 years, under Code § 8.01-242, the time began to run (as now) "from the date of the deed of trust," not the maturity date of the underlying note. Thus, a 30-year mortgage could have been enforceable for 50 years under Code § 8.01-241 (30 years to maturity plus 20 year limitation) if the maturity date was stated in the deed of trust, whereas the limitations period would have only have been 20 years (under Code § 8.01-242) from the date of the deed of trust if the maturity date was not stated in the deed of trust.

This result is supported by *Long, Long & Kellerman, P.C. v. Wheeler*, 264 Va. 531 (2002), where the Court held that "the 20-year statute of limitations contained in Code § 8.01-242 is controlling in this case. The deed of trust at issue in this case did not contain a maturity date" 264 Va. at 538. Notably, the Court did not even mention the maturity date of the underlying note and whether Code § 8.01-241 might apply, plainly suggesting -- albeit not holding -- that, where there is no maturity date in the deed of trust, the analysis is at an end and Code § 8.01-242 applies.

In the case at bar, therefore, the applicable statute of limitations is 20 years from the from the date of the deed of trust, here June 9, 1998, i.e., until June 9, 2018. As this suit was filed on March 18, 2019, the 20-year statute of limitations has run, unless it was tolled. As discussed below, the statute of limitations was tolled and the instant action was timely filed.

The Statute of Limitation Was Tolled

It is undisputed that, on February 27, 2012, Defendant filed a voluntary bankruptcy petition (Case No. 12-11243-RSM) involving the debt at issue here, and that, on December 13, 2013, the bankruptcy court confirmed the final plan of reorganization, but vacated that plan, and dismissed the petition on January 22, 2015, a period of 2 years, 10 months, and 26 days.⁴

It is also undisputed that Defendant filed a second voluntary bankruptcy petition (Case No. 15-10801) on March 9, 2015 involving the debt at issue here, which was initially dismissed on November 6, 2015, the dismissal was vacated, and finally dismissed on February 1, 2016, a period of 10 months and 23 days.

The filing of a bankruptcy case automatically stays any action against a debtor. 11 U.S.C. § 362(a). Code § 8.01-299(D) provides:

When the filing of an action is obstructed by a defendant's (i) filing a petition in bankruptcy or filing a petition for an extension or arrangement under the United States Bankruptcy Act . . . , then the time that such obstruction has continued shall not be counted as any part of the period within which the action must be brought.

Thus, the filings of the bankruptcy petitions by Defendant tolled the statute of limitations for the period in which the automatic stays were in place. Here, the total time the automatic stays were in place was 3 years, 9 months, and 19 days. Thus, the deadline for filing this action was extended by 3 years, 9 months, and 19 days from June 9, 2018, i.e., until March 28, 2022. As the instant action was filed on March 18, 2019, it is not barred by the statute of limitations.⁵

Defendant's Plea In Bar is OVERRULED.⁶

Sincerely yours,


Richard E. Gardiner
Judge

⁴ The time from the filing to the confirmation of the final plan of reorganization was 1 year, 9 months, and 16 days.

⁵ While the court finds, with respect to the first bankruptcy petition, that the tolling period did not end with the confirmation of the final plan of reorganization in that the plan was vacated, even if the tolling time for the first bankruptcy was limited to the time up to the confirmation of the final plan of reorganization (1 year, 9 months, and 16 days, making the total tolling time 2 years, 8 months, and 9 days), the deadline for filing this action would have been extended to February 18, 2021.

⁶ In light of the court's holding with regard to tolling due to the bankruptcy petitions, the court need not address Plaintiff's remaining two arguments.