DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT
January Term 2013

JESSY KURIAN and **ANIL THOMAS,**
Appellants,

v.

WELLS FARGO BANK, NATIONAL ASSOCIATION,
Appellee.

No. 4D11-3098

[April 10, 2013]

MAY, C.J.

Homeowners appeal a final summary judgment of foreclosure. They argue the trial court erred in entering summary judgment because the bank failed to refute two of their affirmative defenses. We agree and reverse.

The homeowners executed a note and mortgage with the bank. Section 22 of the mortgage stated, in pertinent part:

> Lender shall give notice to Borrower prior to acceleration following Borrower's breach of any covenant or agreement in this Security Instrument . . . . The notice shall specify: (a) the default; (b) the action required to cure the default; (c) a date, not less than 30 days from the date the notice is given to Borrower, by which the default must be cured; and (d) that failure to cure the default on or before the date specified in the notice may result in acceleration of the sums secured by this Security Instrument . . . .

The bank filed a Complaint to foreclose the mortgage, alleging the homeowners defaulted on December 1, 2008. Attached to the Complaint was a letter, dated March 25, 2009, notifying the homeowners that the mortgage was in default and the bank had accelerated all sums due. The homeowners answered and asserted affirmative defenses. Two of those defenses were: (1) lack of timely notice of the acceleration; and (2) failure of conditions precedent concerning the "acceleration" terms and conditions.

The bank moved for summary judgment and attorneys' fees, and filed an Amended Affidavit as to Amounts Due and Owing. The homeowners filed affidavits in opposition, which attested that they never received notification of the acceleration of the mortgage or note, were never contacted by the bank about the acceleration, and never waived their right to receive notice. The trial court entered final summary judgment in favor of the bank. The homeowners now appeal.

The homeowners argue the trial court erred in entering summary judgment because the bank failed to refute their affirmative defenses, which were legally sufficient. The bank responds that the affirmative defenses were legally insufficient because they were not pled with specificity. We have *de novo* review. *Frost v. Regions Bank*, 15 So. 3d 905, 906 (Fla. 4th DCA 2009).

"When a party raises affirmative defenses, 'a summary judgment should not be granted where there are issues of fact raised by the affirmative defenses which have not been effectively factually challenged and refuted.'" *Alejandre v. Deutsche Bank Trust Co. Ams.*, 44 So. 3d 1288, 1289 (Fla. 4th DCA 2010) (quoting *Cufferi v. Royal Palm Dev. Co.*, 516 So. 2d 983, 984 (Fla. 4th DCA 1987)). The movant must disprove the affirmative defenses or show they are legally insufficient. *Id.*

We have previously held that affirmative defenses such as those pled here are legally sufficient to defeat a summary judgment when they are not refuted. *Frost*, 15 So. 3d at 906. Because "[n]othing in the bank's complaint, motion for summary judgment, or affidavits indicate that the bank gave the [homeowners] the notice which the mortgage required[,] . . . the bank did not meet its burden to refute the [homeowners'] lack of notice and opportunity to cure defense." *Id.; see also Haber v. Deutsche Bank Nat'l Trust Co.*, 81 So. 3d 565, 565 (Fla. 4th DCA 2012) (reversing a summary judgment based on the bank's failure to refute the homeowner's affirmative defense of notice).

Here, the bank failed to refute the homeowners' affirmative defense of lack of notice of acceleration thirty days prior to the filing of the Complaint as required by the mortgage. The letter attached to the Complaint was dated only six days prior to the filing of the Complaint. While the bank argues that section 15 of the mortgage provides that notice is deemed to have been given when mailed by first class mail, the bank failed to prove that any notice was sent by first class mail. For these reasons, we reverse and remand for further proceedings.

Reversed and Remanded.

TAYLOR and CONNER, JJ., concur.

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Appeal from the Circuit Court for the Seventeenth Judicial Circuit, Broward County; Marina Garcia-Wood, Judge; L.T. Case No. 09-18657 CACE 02.

Scott Levine, Weston, for appellants.

Michael K. Winston and Dean A. Morande of Carlton Fields, P.A., West Palm Beach, for appellee.

Not final until disposition of timely filed motion for rehearing.