FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

No. 1D19-759

MATTHEW SHAWN HARTZ,

Appellant,

v.

WELLS FARGO BANK, N.A.,

Appellee.

On appeal from the Circuit Court for Okaloosa County.
Terry D. Terrell, Judge.

April 16, 2021

M.K. THOMAS, J.

Appellant, Matthew Hartz, appeals the final judgment of foreclosure entered in favor of Wells Fargo Bank (WFB). He raises several issues on appeal, only two of which warrant discussion. The remaining issues are affirmed without comment. Initially, Appellant argues the trial court erred in ruling that cited portions of the Veterans Administration Regulations (VA regulations) did not create conditions precedent to foreclosure. We find no error in the trial court's determination and affirm on this issue. However, we find merit in Appellant's claim that WFB failed to prove certain debts by competent, substantial evidence and reverse accordingly.

I. Facts

In 2006, Appellant obtained a residential mortgage loan from Market Street Mortgage Corporation that was subsequently acquired by WFB. Attached to the mortgage was a Veterans Affairs Guaranteed Loan and Assumption Policy Rider. It is undisputed that the loan under review is guaranteed and insured by the Department of Veterans Affairs (VA). The documents reference certain federal regulations issued under the VA Guaranteed Loan Authority. It is also undisputed that Appellant has not made any payments on the mortgage since 2008.

As a result, WFB filed a complaint of foreclosure. After WFB rested its case at trial, the trial judge continued the trial and granted Appellant's motion for leave to amend his answer and add an affirmative defense—that WFB failed to comply with conditions precedent required by VA regulations. Appellant was instructed that going forward, he bore the burden of proof as to whether the VA regulations were conditions precedent to foreclosure.

Ultimately, the trial court entered judgment in favor of WFB. The trial court found that WFB had "substantially complied" with its obligations under the note and mortgage and that the VA regulations "do not establish a condition precedent for the lender to establish beyond the mailing of the notice of default"; thus, the trial court awarded a judgment amount of $341,507.18 to WFB.

II. Analysis

A. Conditions Precedent

Whether adherence to certain VA regulations was a condition precedent to acceleration of the loan is a question of law subject to de novo review. *See Chrzuszcz v. Wells Fargo Bank, N.A.*, 250 So. 3d 766, 768 (Fla. 1st DCA 2018). "[W]here it [is] unclear whether alleged conditions precedent even appl[y], 'the burden is on the party asserting the existence of the conditions precedent to establish their applicability.'" *Id.* at 769 (quoting *Diaz v. Wells Fargo Bank, N.A.*, 189 So. 3d 279, 285 (Fla. 5th DCA 2016)). Once it is established that the conditions precedent apply, the burden shifts to the plaintiff to establish their satisfaction. *See id.* at 770;

Palma v. JPMorgan Chase Bank, 208 So. 3d 771, 774 (Fla. 5th DCA 2016).

Initially, the trial court was unclear whether, under the subject mortgage and note, the VA regulations were conditions precedent to foreclosure. Upon allowing Appellant to amend his answer and affirmative defenses to assert that the alleged conditions precedent had not been satisfied, the trial court instructed Appellant that he bore the burden at trial to establish the VA regulations constituted conditions precedent.

At the continuation of the trial, Appellant argued as follows: 1) "I'm not discussing the issues of Veteran Administration"; and 2) "[t]his is just simply a Paragraph 22 situation," in reference to the mortgage provision requiring notice to a mortgagee prior to accelerating the loan. He stated generally that conditions precedent must be satisfied by WFB and referenced that it should have notified the department of Veteran Affairs, without more. On appeal, Appellant argues that mere assertion of the VA regulations as conditions precedent in his answer and affirmative defenses satisfied his burden of proof, thus, shifting the burden to WFB to prove compliance. We disagree. In making his argument, Appellant ignores a critical factor—although the federal provisions at issue may be conditions precedent, what is not clear is whether the VA regulations are applicable to the instant loan. *See Diaz*, 189 So. 3d at 284.

Appellant asserts that Title 38, section 36.4346(g), Code of Federal Regulations (2006) creates a condition precedent to Appellant's loan foreclosure. The 2006 version of the code in effect at the time required that, "[h]olders shall employ collection techniques which provide flexibility to adapt to the individual needs and circumstances of each borrower." 38 C.F.R. § 36.4346(g) (2006).[1] The provision requires, at a minimum, written delinquency notice to the borrower(s), an effort to establish contact, among others. He further asserted 38 USC 3732

[1] Provision now contained in section 36.4350(g), Code of Federal Regulations.

establishes a condition precedent requiring notice and filed a copy of 38 USC 3732, without more.

Appellant urges our adoption of the Fifth DCA's reasoning in *DeLong v. Lakeview Loan Servicing, LLC*, 222 So. 3d 662, 663 (Fla. 5th DCA 2017) and *Palma,* 208 So. 3d 771, which he interprets as recognizing VA Regulations as valid conditions precedent under loan document provisions. We disagree as Appellant stretches *DeLong* beyond its boundaries. In *DeLong*, the Fifth District concluded that *certain* VA regulations incorporated into a note created conditions precedent. 222 So. 3d at 663. It does not announce a broad-sweeping rule of law that all VA regulations constitute conditions precedent to a loan foreclosure. Furthermore, the federal provisions at play in *DeLong* are distinguishable from those now before us. In *DeLong*, the mortgagee specifically alleged that the mortgagor had failed to comply with "statutory conditions precedent" of Title 38, section 36.4350, Code of Federal Regulations, by failing to provide notice and an opportunity to cure the default. *Id*. at 663. The court specifically determined that the note and mortgage at issue provided that if any provisions that are inconsistent with the VA statutes or regulations, the provisions "are amended and supplemented to confirm thereto." *DeLong* 222 So. 3d at 662 n.2.

In *Palma v. JPMorgan Chase Bank*, 208 So.3d 771, 775 (Fla. 5th DCA 2016), the Fifth District held that a promissory note that specifically incorporated the Department of Housing and Urban Development ("HUD") regulations was appropriately construed as requiring conditions precedent to foreclosure—"no different than compliance with paragraph twenty-two in a standard mortgage." (*citing Colon v. JP Morgan Chase Bank, NA*, 162 So. 3d 195, 196 (Fla. 5th DCA 2015)).

Here, Appellant failed to satisfy his burden of laying the required predicate that under the terms of the subject note and mortgage, the VA regulations were conditions precedent to foreclosure. Merely raising a defense that conditions precedent were not satisfied does not automatically shift the burden of proof

to the Bank to show satisfaction.[2] If it is unclear whether alleged conditions precedent apply, the burden is on the party asserting the existence of the conditions precedent to establish their applicability. *Diaz*, 189 So. 3d at 285. Appellant failed to present competent evidence at trial to meet his burden.

Accordingly, we affirm the order of foreclosure. This decision shall not be construed as foreclosing the possibility that VA regulations may create conditions precedent to acceleration under a different record.

B. Sufficiency of the Evidence

On appeal, this Court reviews whether the trial court's findings of balances due are supported by competent, substantial evidence. *Atkins N. Am., Inc. v. Tallahassee MH Parks, LLC*, 277 So. 3d 1156, 1159 (Fla. 1st DCA 2019) (citing *Wolkoff v. Am. Home Mortg. Servicing, Inc.*, 153 So. 3d 280, 283 (Fla. 2d DCA 2014)). "It is axiomatic that the party seeking foreclosure must present sufficient evidence to prove the amount owed on the note." *Wolkoff*, 153 So. 3d at 281. "Typically a foreclosure plaintiff proves the amount of indebtedness through the testimony of a competent witness who can authenticate the mortgagee's business records and confirm that they accurately reflect the amount owed on the mortgage. Thereafter, the business records are admitted into evidence." *Id.*

Here, WFB's representative testified at trial regarding the amounts owed by reading from the proposed final judgment, a document not admitted into evidence. However, other documents submitted by WFB as evidence clearly reflect a principal balance owed in the amount of $206,135.15. Thus, this portion of the final judgment is affirmed. No documents were submitted to support the testimony regarding the amounts due related to interest, title search, late charge, hazard insurance disbursements, tax

[2] Appellant does not argue on appeal that any specific VA regulation creates a condition precedent that was not met. Instead, he relies on his claim that his assertion of conditions precedent shifts the burden of proof to WFB.

disbursements, or property inspection/preservation. Thus, this portion of the final judgment must be reversed, and the matter remanded for a determination of amounts owed. *See McMillan v. Bank of New York Mellon*, 180 So. 3d 1090, 1092 (Fla. 4th DCA 2015).

Regarding Appellant's request for attorney's fees owed and associated costs, we find the argument is waived. Appellant's argument on appeal provides, "The Bank witness testified on itemized damage amounts in this case from a proposed final judgment that she was reading on WFB's counsel's cell phone." The initial final judgment issued, including attorney's fees and costs, was based solely on WFB's representative's testimony. However, after the order was issued, a hearing was conducted on the proper amount of attorney's fees and costs, and the amounts awarded were revised. The award of attorney's fees and costs in the amended final judgment is based, not on the representative's testimony, but evidence subsequently provided. Appellant makes no argument in his briefs regarding the same. Thus, the issue is waived for purposes of appeal. *See Rosier v. State*, 276 So. 3d 403, 406 (Fla. 1st DCA 2019) (citing *Hall v. State*, 823 So. 2d 757, 763 (Fla. 2002)).

III. Conclusion

Based on the foregoing, we affirm the judgment of foreclosure, but reverse as to the amounts in the final judgment relating to interest, title search, late charge, hazard insurance disbursements, tax disbursements, and property inspection/preservation. We remand the case for further proceedings to determine the amounts due.

AFFIRMED in part, REVERSED in part, and REMANDED for further proceedings consistent with this opinion.

MAKAR, J., concurs; RAY, C.J., concurs in result only.

Not final until disposition of any timely and authorized motion under Fla. R. App. P. 9.330 or 9.331.

Sharon Delene Regan, Pensacola, for Appellant.

William J. Simonitsch and Stephen A. McGuinness of K&L Gates LLP, Miami, for Appellee.