Supreme Court of Florida

No. SC2021-0175

BRINDA COATES, etc.,
Petitioner,

vs.

R.J. REYNOLDS TOBACCO COMPANY,
Respondent.

June 15, 2023

GROSSHANS, J.

Today, we decide a recurring issue of law regarding Florida's offer-of-judgment statute, specifically whether a party must prevail in a proceeding to be entitled to fees under the statute. *See* § 768.79, Fla. Stat. (2022). We hold that the statute does not impose this requirement and, thus, is not a prevailing-party statute.

BACKGROUND

Petitioner Brinda Coates sued Respondent R.J. Reynolds Tobacco Company (RJR) seeking damages for the wrongful death of her sister, Lois Stuckey. Before trial, Coates served RJR with two proposals for settlement under section 768.79—the first for

$75,000, and the second for $749,000. RJR did not accept either offer.

Following trial, a jury awarded Coates $300,000 in compensatory damages and $16,000,000 in punitive damages. After reducing the compensatory damages award based on the jury's finding of comparative fault, the trial court entered judgment for Coates in the amount of $16,150,000.

On appeal, the Fifth District Court of Appeal reversed the punitive damages award as excessive and remanded for remittitur or, in the alternative, a new trial solely on punitive damages. *R.J. Reynolds Tobacco Co. v. Coates*, 308 So. 3d 1068, 1071, 1076 (Fla. 5th DCA 2020). It then certified a question of great public importance concerning punitive damages. *Id.* at 1076.

We accepted review, rephrased the certified question, and ultimately approved the Fifth District's decision. *See Coates v. R.J. Reynolds Tobacco Co.*, 48 Fla. L. Weekly S1, S1-S5 (Fla. Jan. 5, 2023) (holding that the punitive damages award was excessive under Florida statutory law). After issuing that decision, our focus shifted to Coates's motion for attorney's fees incurred in this review proceeding. She claimed entitlement to these fees based on RJR's

rejection of her offers of judgment. Recognizing that Coates had not prevailed here, we requested briefing on whether the offer-of-judgment statute requires the moving party to prevail in the appellate proceeding. With the benefit of this briefing, we now hold that the offer-of-judgment statute is not a prevailing-party statute. In light of this holding, we provisionally grant Coates's motion for reasonable attorney's fees, conditioned upon the trial court's finding of entitlement and determination of amount.

ANALYSIS

Our ruling on Coates's motion depends solely on the meaning of the offer-of-judgment statute.[1] In deciding whether this statute is a prevailing-party statute, we apply the supremacy-of-the-text principle, recognizing that "[t]he words of a governing text are of paramount concern, and what they convey, in their context, is what the text means." *Levy v. Levy*, 326 So. 3d 678, 681 (Fla. 2021) (alteration in original) (quoting *Page v. Deutsche Bank Tr. Co. Americas*, 308 So. 3d 953, 958 (Fla. 2020)). Consistent with this

1. Statutory interpretation presents a purely legal issue. *Lab. Corp. of Am. v. Davis*, 339 So. 3d 318, 323 (Fla. 2022) (applying de novo review in determining meaning of statute (citing *Lopez v. Hall*, 233 So. 3d 451, 453 (Fla. 2018))).

rule, we do not add words to a statute in the guise of interpreting it. *See Statler v. State*, 349 So. 3d 873, 879 (Fla. 2022).

With these foundational principles in mind, we turn to the statute at issue. Section 768.79 provides in part:

> In any civil action for damages filed in the courts of this state, if a defendant files an offer of judgment which is not accepted by the plaintiff within 30 days, the defendant shall be entitled to recover reasonable costs and attorney's fees incurred . . . from the date of filing of the offer if the judgment is one of *no liability or the judgment obtained by the plaintiff is at least 25 percent less than such offer* . . . . If a plaintiff files a demand for judgment which is not accepted by the defendant within 30 days and the plaintiff recovers a judgment in an amount at least 25 percent greater than the offer, she or he shall be entitled to recover reasonable costs and attorney's fees incurred from the date of the filing of the demand. If rejected, neither an offer nor demand is admissible in subsequent litigation, except for pursuing the *penalties* of this section.

§ 768.79(1) (emphasis added).

Two portions of the text are inconsistent with RJR's argument that section 768.79 is a prevailing-party statute. First, the statute itself refers to its fee awards and costs as "penalties." *Id.* ("If rejected, neither an offer nor demand is admissible in subsequent litigation, except for pursuing the penalties of this section."). In line with this text, Florida courts have uniformly characterized section

768.79 as a penalty statute. *See Cassedy v. Wood*, 263 So. 3d 300, 303 (Fla. 1st DCA 2019); *Est. of Sweeney v. Washington*, 327 So. 3d 396, 399 (Fla. 2d DCA 2021); *Cent. Motor Co. v. Shaw*, 3 So. 3d 367, 369 (Fla. 3d DCA 2009); *22nd Century Props., LLC v. FPH Props., LLC*, 160 So. 3d 135, 142 (Fla. 4th DCA 2015); *UCF Athletics Ass'n v. Plancher*, 121 So. 3d 616, 618 (Fla. 5th DCA 2013).

Second, the statute contemplates fee awards to nonprevailing litigants. Specifically, subsection (1) of the statute provides:

> [I]f a defendant files an offer of judgment which is not accepted by the plaintiff within 30 days, the defendant *shall be entitled* to recover reasonable costs and attorney's fees . . . if the judgment is one of no liability *or the judgment obtained by the plaintiff* is at least 25 percent less than such offer . . . .

§ 768.79(1) (emphasis added).

Thus, the text of the offer-of-judgment statute contemplates a situation where the defendant is entitled to fees even if the plaintiff prevails on the most significant issues at trial and ultimately recovers a substantial judgment. It is not reasonable to hold that the Legislature created a prevailing-party requirement when the statute's text allows for awards to litigants who do not prevail.

Consistent with this analysis, we further note that the offer-of-judgment statute differs from other statutes that include a prevailing-party requirement. *Compare* § 59.46, Fla. Stat. (2022) ("[A]ny provision of a statute or of a contract . . . providing for the payment of attorney's fees to the *prevailing party* shall be construed to include . . . attorney's fees to the prevailing party on appeal." (emphasis added)), § 57.105(7), Fla. Stat. (2022) ("If a contract contains a provision allowing attorney's fees to a party when he or she is required to take any action to enforce the contract, the court may also allow reasonable attorney's fees to the other party when that party *prevails in any action*, whether as plaintiff or defendant, with respect to the contract." (emphasis added)), *and* § 627.428(1), Fla. Stat. (2022)[2] ("[I]n the event of an appeal in which the insured or beneficiary *prevails*, the appellate court shall [award reasonable appellate attorney's fees.]" (emphasis added)), *with* § 768.79 (providing for attorney's fees if a reasonable proposal for judgment is rejected and the party making the proposal recovers a

2. This statute has since been repealed. *See* ch. 2023-15, § 11, Laws of Fla. (effective date of March 24, 2023).

qualifying judgment). Had the Legislature intended for section 768.79 to be a prevailing-party statute, it could have adopted similar language to the prevailing-party statutes mentioned above; but it did not.

Reflecting those textual differences, the offer-of-judgment statute operates to penalize a party who refuses to accept a good-faith, reasonable proposal for settlement as reflected in the ensuing final judgment. § 768.79(1). The statute has this effect even if the party seeking fees does not prevail at trial or in appellate proceedings, but is otherwise entitled to fees pursuant to the offer-of-judgment statute.

We do not share RJR's concern that our interpretation of the offer-of-judgment statute will result in a flood of frivolous appeals. Under the statute, a judge can only award "reasonable" fees. § 768.79(1), (7)-(8). When making a reasonableness determination, the judge considers a nonexhaustive list of factors, including the merit of the claim, the closeness of questions of fact and law, and the amount of additional delay if litigation is prolonged. § 768.79(8)(b). The judge is also expressly authorized to consider any other relevant criteria. *Id.* We stress that nothing in our

opinion prevents a party from challenging the reasonableness of fees by raising all relevant factors—including the frivolous nature of an appeal. However, we decline to hold that the outcome of an appeal is entirely dispositive as to the reasonableness of the appellate fees incurred.

CONCLUSION

Based on the analysis above, we hold that the text of section 768.79 shows that it is not a prevailing-party statute. In light of the fact that Coates obtained a judgment—which has been affirmed in part—we provisionally grant her motion for reasonable appellate attorney's fees. The amount shall be determined by the trial court, conditioned on its finding, at the end of the case, that Coates is entitled to attorney's fees under a valid proposal for settlement filed under section 768.79.

It is so ordered.

MUÑIZ, C.J., and CANADY, COURIEL, and FRANCIS, JJ., concur.
LABARGA, J., concurs in result.
SASSO, J., did not participate.

Application for Review of the Decision of the District Court of Appeal
Direct Conflict of Decisions/Certified Great Public Importance

Fifth District – Case No. 5D19-2549

(Orange County)

Jonathan A. Martin and Courtney Brewer of Bishop & Mills, PLLC, Tallahassee, Florida, and John S. Mills of Bishop & Mills, PLLC, Jacksonville, Florida,

for Petitioner

Troy A. Fuhrman and Marie A. Borland of Hill Ward Henderson, Tampa, Florida; Jason T. Burnette and Brian Charles Lea of Jones Day, Atlanta, Georgia, and Charles A. Morse of Jones Day, New York, New York,

for Respondent

SIXTH DISTRICT COURT OF APPEAL
STATE OF FLORIDA

Case No. 6D23-643
Lower Tribunal No. 19-CA-007826

GREGORY MAKI and ELIZABETH MAKI,

Appellants,

v.

NCP BAYOU 2, LLC,

Appellee.

Appeal from the Circuit Court for Lee County.
James R. Shenko, Judge.

June 16, 2023

MIZE, J.

Appellants Gregory and Elizabeth Maki (collectively, the "Makis") appeal the final judgment of foreclosure entered by the trial court in favor of Appellee NCP Bayou 2, LLC ("NCP").[1] We reverse.

[1] This case was transferred from the Second District Court of Appeal to this Court on January 1, 2023.

Background and Procedural History

The Makis obtained two loans that were secured by mortgages on their home (the "Property"). In 2002, the Makis took out a mortgage (the "First Mortgage Loan"). In 2005, the Makis obtained a home equity line of credit (the "HELOC Loan"). To obtain the HELOC Loan, the Makis signed a Home Equity Line of Credit Agreement and Disclosure (the "HELOC Note") and a mortgage (the "HELOC Mortgage") to secure repayment of the HELOC Note. Both the First Mortgage Loan and the HELOC Loan were assigned to different lenders over the years, with the First Mortgage Loan ultimately being assigned to Wilmington Savings Fund Society ("Wilmington"), and the HELOC Loan ultimately being assigned to Multibank 2009-1 RES-ADC Venture, LLC ("Multibank").

The Makis failed to make the payment due on the HELOC Note in June 2013 and failed to make all the subsequent payments that came due thereafter. In October 2014, Multibank sent default letters to each of the Makis. The default letters informed the Makis that Multibank was exercising its right under the HELOC Note to accelerate all amounts due under the note and that, therefore, the entire principal and all other amounts due under the note were immediately due and payable. In each of the default letters, Multibank demanded that the Makis pay all principal and all other amounts due under the HELOC Note within thirty days of receipt of the letters.

In December 2014, after the Makis failed to pay the amount owed on the HELOC Note, Multibank filed a complaint against the Makis to recover the amounts owed under the HELOC Note (the "Prior Lawsuit"). Multibank only sought a monetary judgment for the amounts due under the HELOC Note. Multibank did not assert a claim to foreclose the HELOC Mortgage. Multibank later amended its complaint to add a claim for unjust enrichment.

After conducting a trial, the trial court in the Prior Lawsuit entered a final judgment in favor of Multibank and against the Makis for all amounts due under the HELOC Note. The final judgment was entered on January 3, 2017. In March 2018, Multibank filed notice that it had assigned the final judgment to NCP. Multibank subsequently assigned the HELOC Mortgage to NCP as well.

In November 2019, Wilmington filed an action against the Makis to foreclose its mortgage securing the First Mortgage Loan. Wilmington included NCP as a defendant as the junior lien holder. In December 2019, NCP responded by filing a counterclaim against Wilmington and a crossclaim against the Makis seeking to foreclose the HELOC Mortgage due to the Makis' failure to pay the final judgment entered in the Prior Lawsuit in January 2017. The Makis responded with an answer asserting various affirmative defenses.

NCP filed a motion for summary judgment. The motion was initially heard before a trial judge that was not the judge assigned to the division in which the case

was pending.[2] That judge denied the motion without prejudice so that the motion could be reset for hearing before the judge assigned to the case. Before the motion for summary judgment was scheduled for another hearing, the Makis filed a motion to amend their answer to assert a statute of limitations defense under section 95.11(2)(c), Florida Statutes, which the trial court granted.[3] The Makis followed up that motion with a motion for summary judgment based on, among other things, the statute of limitations defense.

After a hearing on both parties' motions for summary judgment before the judge assigned to the case, the trial court issued an order granting NCP's motion and denying the Makis' motion. The trial court subsequently entered a final judgment of foreclosure ordering the Property to be sold at a foreclosure sale. The Makis filed a motion for rehearing, which the trial court denied. This appeal followed.[4]

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[2] It appears that a senior judge covered the initial hearing on NCP's motion for summary judgment.

[3] NCP asserts in its Answer Brief that the trial court should not have considered the statute of limitations defense in deciding its motion for summary judgment because that defense was not included in the Makis' answer that was pending at the time NCP filed its motion for summary judgment. However, the trial court granted the Makis' motion to amend their answer to assert the statute of limitations defense and did consider the defense in deciding the motion for summary judgment. NCP did not file a cross-appeal. Therefore, the trial court's decision to allow the Makis to argue the statute of limitations defense in opposition to NCP's motion for summary judgment is not at issue in this appeal.

[4] The Makis did not seek a stay of the foreclosure sale pending appeal. The foreclosure sale occurred on September 1, 2022. NCP submitted the winning bid and currently holds title to the Property.

Analysis

The Makis raise five issues on appeal, including that NCP's foreclosure action was barred by the statute of limitations set forth in section 95.11(2)(c), Florida Statutes. We agree with the Makis on this point.[5]

Whether NCP's foreclosure action was barred by the applicable statute of limitations is a question of law that we review de novo. *Snow v. Wells Fargo Bank, N.A.*, 156 So. 3d 538, 541 (Fla. 3d DCA 2015).

Section 95.11(2)(c), Florida Statutes, mandates that an action to foreclose a mortgage shall be commenced within five years. "The statute of limitations on a mortgage foreclosure action does not commence until a default in payment of the final installment, unless the mortgage contains an acceleration clause." *Snow*, 156 So. 3d at 541. When a mortgage secures a promissory note that contains an optional acceleration clause, and the holder of the note exercises its right to accelerate all future payments due under the note, the statute of limitations for the action to foreclose the mortgage begins to run on the date that the lender exercises its right to accelerate the payments due under the note. *See id.*; *Greene v. Bursey*, 733 So. 2d 1111, 1114–15 (Fla. 4th DCA 1999); *Monte v. Tipton*, 612 So. 2d 714, 716 (Fla. 2d DCA 1993).[6]

In this case, NCP's predecessor in interest, Multibank, exercised its option to

[5] We find no merit to the other arguments raised by the Makis.

accelerate all payments due under the HELOC Note in October 2014. Therefore, the statute of limitations on the action to foreclose the HELOC Mortgage began to run in October 2014 and expired in October 2019, approximately two months before NCP filed its action to foreclose the HELOC Mortgage in December 2019.

In its Answer Brief, NCP argues that the HELOC Note required a final payment of all sums due and owing under the note on the maturity date of January 15, 2016 and that, therefore, the statute of limitations did not begin to run until that date. However, as noted above, when a lender exercises its option to accelerate all future payments due under a note, those payments then become due immediately upon the acceleration – not when the payments would have otherwise been due had the lender not accelerated the future payments. Accordingly, the statute of limitations on an action to foreclose a mortgage securing an accelerated debt begins to run when the lender exercises its right to accelerate the debt. *See Snow*, 156 So. 3d at 541; *Greene*, 733 So. 2d at 1114–15; *Monte*, 612 So. 2d at 716.

NCP also argues that a creditor holding a note secured by a mortgage is not

[6] The HELOC Note at issue in this case contained an optional acceleration clause. A debt instrument may also include an automatic acceleration clause by which the entire indebtedness automatically becomes due immediately upon default without any action by the lender. "Such an acceleration is self-executing, requiring neither notice of default nor some further action to accelerate the debt." *Snow*, 156 So. 3d at 541. In a case involving a debt instrument containing an automatic acceleration clause, the statute of limitations to foreclose a mortgage securing such debt instrument begins to run immediately upon the default. *See id.*

required to pursue a monetary judgment on the note and a foreclosure of the mortgage simultaneously. A lender is entitled to elect its remedies and an unsatisfied monetary judgment on the note does not bar a subsequent action to foreclose the mortgage. This is correct, but it does not change the fact that the statute of limitations on a mortgage foreclosure action begins to run when the lender accelerates the debt secured by the mortgage. A lender may choose to initially bring only an action on the promissory note without sacrificing its right to later bring a mortgage foreclosure action, but there is simply no legal authority for the proposition that the lender bringing an action solely on a note and obtaining a final judgment for the amount owed under the note extends the statute of limitations period for a later filed action to foreclose the mortgage.

NCP cites *Klondike, Inc. v. Blair*, for the proposition that:

> [U]ntil the mortgage debt is actually satisfied, the recovery of a judgment on the obligation secured by a mortgage, without the foreclosure of the mortgage, although merging the debt in the judgment, has no effect upon the mortgage or its lien, does not merge it, and does not preclude its foreclosure in a subsequent suit instituted for that purpose.

211 So. 2d 41, 43 (Fla. 4th DCA 1968) (quoting 37 Am. Jur. *Mortgages*, § 523). This proposition of law is correct, but it does not help NCP's case. As the Fourth District Court of Appeal noted, the recovery of a judgment on a promissory note secured by a mortgage, without foreclosure of the mortgage, merges the promissory note in the judgment, *but it has no effect on the mortgage*. When a judgment is

obtained on a note secured by a mortgage without a foreclosure of the mortgage, the mortgage is *not* merged into the judgment. The judgment does not preclude a subsequent action to foreclose the mortgage, but neither does it extend the statute of limitations period on a mortgage foreclosure action that exists separate and apart from the judgment.

NCP also argues that a lender satisfies the statute of limitations for a mortgage foreclosure action by showing separate and continuing defaults, some of which fall within five years of the filing of the complaint. *See Bank of Am., N.A. v. Graybush*, 253 So. 3d 1188, 1192 (Fla. 4th DCA 2018) ("Alleging and proving separate and continuing defaults, some of which fall within five years of the filing of the complaint, satisfies the statute of limitations."). NCP asserts that the Makis' failure to pay the judgment was a continuing default under the HELOC Note that continued after the initial default on the note. But that is not correct. The note having been extinguished and merged into the judgment, the obligation to pay the judgment was a new and different obligation than the original note. The Makis' failure to pay the judgment was a failure to pay the judgment, not a default under the note. This conclusion is apparent from section 95.11, which creates a separate statute of limitations period of twenty years for "an action on a judgment or decree of a court of record in this state," while the statute of limitations period for an action to recover on a promissory note is five years. *Compare* § 95.11(1), Fla. Stat. (2018) *with* §

95.11(2)(b), Fla. Stat. (2018). There is a separate statute of limitations for an action to collect a judgment because such an action is not the same cause of action as the action that was brought to obtain the judgment.

NCP also points to cases in which it contends that courts allowed subsequent foreclosure actions on new defaults on a debt that occurred after a prior lawsuit to collect the debt was dismissed. *See e.g. Bartram v. U.S. Bank Nat'l Ass'n*, 211 So. 3d 1009 (Fla. 2016); *Deutsche Bank Tr. Co. Americas v. Beauvais*, 188 So. 3d 938, 944 (Fla. 3d DCA 2016). Based on these cases, NCP asserts that an initial acceleration does not bar a subsequent action based on subsequent payment defaults. However, as the Florida Supreme Court found, when a lender accelerates an installment debt and brings an action to collect it, and the action is dismissed, the dismissal revokes the acceleration and places the parties back in the same contractual relationship they had before the acceleration "where the mortgage remains an installment loan and the [debtor] has the right to continue to make installment payments without being obligated to pay the entire amount due under the note and mortgage." *Bartram*, 211 So. 3d at 1019; *see also Beauvais*, 188 So. 3d at 946. In such a case, where an acceleration was revoked and the debtor's right and obligation to make installment payments was put back in place, there can be a subsequent default on that reinstituted obligation that starts the running of a new statute of limitations period. However, none of that happened in this case. In this case, the

action on the note brought by NCP's predecessor in interest was not dismissed, the acceleration was never revoked, the parties were never put back in their original contractual relationship with the Makis having the right and obligation to make installment payments on the HELOC Note, and there was no "subsequent default" on such reinstituted installment payments. The opposite happened here. NCP's predecessor in interest succeeded on its claim for a judgment on the HELOC Note and the note was then merged into the final judgment. The statute of limitations on the action to foreclose the mortgage – which is a separate action from an action to collect the amounts owed on a note or an action to enforce a judgment – began to run in October 2014 and no event occurred that tolled or reset the statute of limitations.

Conclusion

NCP's mortgage foreclosure action was barred by the statute of limitations contained in section 95.11(2)(c), Florida Statutes. The trial court erred as a matter of law by concluding otherwise and granting NCP's motion for summary judgment. The final judgment of foreclosure is reversed and this case is remanded to the trial court for further proceedings consistent with this opinion.

REVERSED and REMANDED.

NARDELLA and SMITH, JJ., concur.

Gregory-Eugene Maki and Elizabeth-Ann Maki, Punta Gorda, pro se.

Ben H. Harris, III, of Jones Walker LLP, Miami, for Appellee.

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF TIMELY FILED