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19-P-1222

Appeals Court

JUNE THORNTON vs. GORDON THORNTON.

No. 19-P-1222.

Suffolk. April 6, 2020. - June 18, 2020.

Present: Wolohojian, Maldonado, & Ditkoff, JJ.

Mortgage, Real estate, Discharge. Real Property, Mortgage.

Civil action commenced in the Land Court Department on November 14, 2017.

The case was heard by Jennifer S.D. Roberts, J., on a motion for summary judgment.

Mark J. Sampson, for the plaintiff, submitted a brief.

WOLOHOJIAN, J. The plaintiff filed this action seeking a declaration that a mortgage recorded on February 19, 2003 is no longer enforceable under the obsolete mortgage statute. More specifically, the issue is whether the mortgage, which states that it is payable "on demand," is one with a stated term or maturity date (in which case the mortgage would be deemed discharged five years after the stated term or maturity date) or whether it is one in which no term is stated (in which case the

mortgage would not be deemed discharged until thirty-five years from the recording of the mortgage). See G. L. c. 260, § 33. Like the Land Court judge, we conclude that the mortgage, which stated only that it was payable on demand and made no reference to the maturity date of the underlying note, had no stated term. The mortgage accordingly remains enforceable for thirty-five years from the recording date (i.e., until February 19, 2038), and judgment was properly entered in the defendant's favor.

The pertinent facts are undisputed and may be stated briefly. On March 27, 1997, the plaintiff and her then-husband signed a note in which they agreed to pay the defendant (the plaintiff's brother-in-law) the original principal sum of \$33,276.54. The note was due and payable approximately six months later, on October 1, 1997, with no interest. Also on March 27, 1997, the plaintiff and her then-husband granted a mortgage¹ to the defendant to secure payment on the note. The mortgage had no identified term or maturity date, but instead stated that it was payable "on demand as provided in [a] note of even date." The mortgage was recorded on February 19, 2003.

The plaintiff filed the underlying declaratory judgment action in the Land Court in November 2017, seeking to have the

¹ The mortgage was on two properties located in North Andover. The plaintiff's former husband conveyed his interests in the properties to her in March 2000.

mortgage declared unenforceable. The defendant answered and asserted counterclaims for unjust enrichment and bad faith.² Thereafter, the plaintiff moved for summary judgment on two grounds. First, she argued that the mortgage was unenforceable because the statute of limitations for enforcing the underlying note had expired.³ This argument is not pressed on appeal for good reason. "The [Supreme Judicial Court] has repeatedly held over the last 180 years that, at both law and equity, the inability to recover directly on a note due to the expiration of a statute of limitations is no bar to recovery under a mortgage, so long as the underlying debt remains unpaid." In re Fortin, 598 B.R. 689, 692 (Bankr. D. Mass. 2019). See Nims v. The Bank of N.Y. Mellon, 97 Mass. App. Ct. 123, 129 (2020) ("A mortgage continues to be enforceable in a proceeding in rem against the security, separate from an action in personam against the debtor

² The counterclaims are not before us. The unjust enrichment counterclaim was dismissed as moot given the judge's disposition on the summary judgment motion, and the counterclaim for bad faith was dismissed pursuant to Mass. R. Civ. P. 12 (b) (6), 365 Mass. 754 (1974).

³ The plaintiff argued that the twenty-year statute of limitations, G. L. c. 260, § 1, applied to an action on the note. However, as the Land Court judge pointed out, if the note was a negotiable instrument, the six-year limitations period of G. L. c. 106, § 3-118 (a), would apply. For our purposes here, it does not matter which limitations period applied because, either way, the enforceability of the mortgage does not depend on whether the limitations period for a claim on the note has expired.

on the note"). Second, the plaintiff argued that the mortgage was unenforceable under the obsolete mortgage statute. The second argument is the sole issue before us now.

"The obsolete mortgage statute sets time periods after which a 'mortgage shall be considered discharged for all purposes without the necessity of further action by the owner of the equity of redemption or any other persons having an interest in the mortgaged property.' G. L. c. 260, § 33. In other words, the statute acts as a self-executing mechanism by which to quiet title with respect to old mortgages. In its current form, the statutory period is '[thirty-five] years from the recording of the mortgage or, in the case of a mortgage in which the term or maturity date of the mortgage is stated, [five] years from the expiration of the term or from the maturity date, unless an extension of the mortgage, or an acknowledgement or affidavit that the mortgage is not satisfied, is recorded before the expiration of such period.' Id." Nims, 97 Mass. App. Ct. at 126. "The statute is designed to create a definite point in time at which an old mortgage will be deemed discharged by operation of law; nothing suggests that the statute is designed to shorten the period during which a mortgage is enforceable." Id.

The mortgage here had no stated term; instead it was payable "on demand." Unlike the mortgages in Deutsche Bank

Nat'l Trust Co. v. Fitchburg Capital, LLC, 471 Mass. 248, 257-258 (2015) (upon which the plaintiff relies), and Nims, 97 Mass. App. Ct. at 124, the mortgage here did not refer to the maturity date of the underlying note. Moreover, while the mortgage said it was payable "on demand," the note stated that it was "due and payable on October 1, 1997."⁴ In the absence of any reference in the mortgage to the maturity date of the note, and the differing language between the mortgage and note as to when each was payable, we see nothing in Fitchburg Capital, LLC that would support using the maturity date of the note as the maturity date for the mortgage.

Given that there is no maturity date stated in the mortgage, nor any language making reference to the maturity date of the note, the mortgage has no stated term and remains enforceable for thirty-five years from the date it was recorded. See G. L. c. 260, § 33.

Judgment affirmed.

⁴ Given the fixed repayment date in the note, the plaintiff is incorrect in characterizing it as a "demand note." See G. L. c. 106, § 3-108 (a) ("A promise or order is 'payable on demand' if it [i] states that it is payable on demand or at sight, or otherwise indicates that it is payable at the will of the holder, or [ii] does not state any time of payment"). By contrast, a note such as this one that has a fixed date for payment is one "payable at a definite time." G. L. c. 106, § 3-108 (b). For this reason, the plaintiff's reliance on Shawmut Bank, N.A. v. Miller, 415 Mass. 482, 484 (1993), and Bielanski v. Westfield Sav. Bank, 313 Mass. 577, 580 (1943), is misplaced.