Appellate Division Docket No. CA 19-01672
Genesee County Clerk's Index No. E67594

Court of Appeals

of the

State of New York

BATAVIA TOWNHOUSES, LTD., ARLINGTON HOUSING CORPORATION, and BATAVIA INVESTORS, LTD.,

Plaintiffs-Respondents,

– against –

COUNCIL OF CHURCHES HOUSING DEVELOPMENT FUND COMPANY, INC.,

Defendant-Appellant.

MEMORANDUM OF LAW IN OPPOSITION TO MOTION FOR LEAVE TO APPEAL TO COURT OF APPEALS

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PRELIMINARY STATEMENT

This case involves a straightforward application of plain statutory terms. The Fourth Department unanimously concluded that General Obligations Law § 17-105(1), and not § 17-101, governs whether the six-year limitations period on enforcing a mortgage debt has been tolled. (The trial court had reached the same conclusion). Section 17-105, which applies to "mortgage debt[s]," provides that only a written promise can toll the limitations period, whereas § 17-101, which excludes "an action for the recovery of real property," provides that either an acknowledgement or promise can revive other forms of debt.

The Fourth Department further found that the mortgagor's financial statements do not meet the requirements of section 17-105 because they merely listed the mortgage as a liability and do not constitute an express promise to pay the mortgage debt. Similarly, it found that the mortgagor's tax returns merely showed unspecified nonrecourse loans on its balance sheets and do not constitute an express promise to pay the mortgage debt.

Defendant/Appellant Council of Churches Housing Development Fund Company, Inc. ("Council") asks this Court to review the Fourth Department's conclusion that § 17-105 governs this case and that it requires a written promise, not merely an acknowledgement. But permissive review by this Court is appropriate only to resolve issues that are novel or of public importance, or if the

decision conflicts with prior decisions of this Court or the Appellate Divisions. 22 N.Y.C.R.R. § 500.22(b)(4). None of these criteria is satisfied here. Accordingly, the Court should deny Council's motion for leave to appeal.

DISCLOSURE STATEMENT

Plaintiff/Respondent Batavia Townhouses, Ltd. is a limited partnership whose limited partners are Plaintiffs/Respondent Arlington Housing Corporation and Batavia Investors, Ltd. Arlington Housing Corporation has an affiliate, Arlington Financial Group, Inc.; the stock of both companies is owned by PL Acquisition, Inc., their parent company. There are no other parents, subsidiaries or affiliates.

BACKGROUND

In this case, Council was both the mortgagee (creditor) and the general partner of the limited partnership which was the mortgagor (debtor). After the mortgage debt matured, Council caused the limited partnership to stop making payments on it and allowed the six-year limitations period for enforcing the mortgage debt to expire. Council subsequently caused the partnership to resume making payments, totaling $330,000, on the expired mortgage debt to further its own interest. The limited partners filed this derivative action on behalf of the partnership to have the mortgage debt declared unenforceable and the improper payments returned to the partnership.

The parties filed cross-motions for summary judgment. Council argued that the limitation period on the mortgage debt had been tolled by (1) the partnership's annual financial statements, which listed the mortgage debt as a liability of the partnership, and (2) the partnership's federal income tax returns, which listed an amount of "non-recourse debt" that corresponded to the amount of the mortgage debt. Council contended that these documents constitute a sufficient acknowledgement of the mortgage debt to toll the limitations period.

Supreme Court ruled in favor of the limited partners. It rejected Council's argument that GOL § 17-101 governs the tolling issue. The court noted that this statute, by its explicit terms, does not cover an action for the recovery of real property. (Decision at 6).[1] Section § 17-101 provides:

> An acknowledgment or promise contained in a writing signed by the party to be charged thereby is the only competent evidence of a new or continuing contract whereby to take an action out of the operation of the provisions of limitations of time for commencing actions other than an action for the recovery of real property. This section does not alter the effect of a payment of principal or interest. (emphasis added).

Supreme Court ruled that the tolling of a mortgage debt is instead governed by GOL § 17-105, which provides:

> A waiver of the expiration of the time limited for commencement of an action to foreclose a mortgage of real property or a mortgage of a

[1] Supreme Court's Decision is attached as Exhibit B to Defendant/Appellant's affidavit in support of motion for permission to appeal.

> lease of real property, or a waiver of the time that has expired, or a promise not to plead the expiration of the time limited, or not to plead the time that has expired, or a promise to pay the mortgage debt, if made after the accrual of a right of action to foreclose the mortgage and made, either with or without consideration, by the express terms of a writing signed by the party to be charged is effective, subject to any conditions expressed in the writing, to make the time limited for commencement of the action run from the date of the waiver or promise." (emphasis added).

Supreme Court found that the partnership's annual financial statements did not satisfy § 17-105 because they were not a written express promise to pay the mortgage debt, signed by the partnership as the debtor. (Decision at 9). Further, the court found that the financial statements do not constitute even an "acknowledgement" of the debt. (Decision at 9-12). Supreme Court did not address the tax returns, evidently because Council had not invoked them until its reply brief. Finally, the court found that Council breached its fiduciary duty by causing the partnership to re-commence making mortgage payments a year after the limitations period expired. It set aside those payments and ordered the funds restored to the partnership." (Decision at 12-13).

THE FOURTH DEPARTMENT'S DECISION

The Fourth Department agreed with Supreme Court that GOL § 17-105(1), and not § 17-101, applies in this case. Its careful, thorough opinion listed five separate reasons that support this conclusion. "First, the plain language of subdivision (1) of section 17-105 is specifically applicable to waivers of the

limitations period for commencement of an action to foreclose a mortgage and promises to pay mortgage debt." (Opinion at 4).[2] "Second, legislative history supports the conclusion that subdivision (1) of section 17-105 governs here." (*Id.*). "Third, a leading treatise on mortgage foreclosure law in New York [1 Bergman on New York Mortgage Foreclosures § 5.11 [7] [2020]] likewise reinforces the conclusion that subdivision (1) of section 17-105, and not section 17-101, applies." (*Id.* at 5). "Fourth, principles of statutory construction support the same conclusion." (*Id.*). "Fifth, case law to which we are bound does not compel a different conclusion." (*Id.*).

ARGUMENT

Permissive review by this Court is appropriate only when the decision below involves "issues [that] are novel or of public importance, [that] present a conflict with prior decisions of th[e] Court [of Appeals], or [that] involve a conflict among the departments of the Appellate Division." 22 N.Y.C.R.R. § 500.22(b)(4); *see, e.g.*, *In re Hart's Estate*, 24 N.Y.2d 158, 160 (1969). This case does not merit review.

Council seeks review of two distinct issues. The first is whether tolling of the limitations period on the mortgage debt is governed by GOL § 17-101 in

[2] The Fourth Department's Opinion and Order is attached as Exhibit A to Defendant/Appellant's affidavit in support of its motion for permission to appeal.

addition to § 17-105(1). The second is whether § 17-105 can be satisfied by a written "acknowledgment," in contrast to a "promise." These issues are controlled by statute, not by common law. And the statutory provisions are clear. Section 17-105, by its explicit terms, applies to "mortgage debt[s]," whereas § 17-101, by its equally explicit terms, excludes "an action for the recovery of real property." Section 17-105 requires "a promise to pay the mortgage debt ... made ...by the express terms of a writing signed by the party to be charged" whereas § 17-101 requires either "[a]n acknowledgment or promise contained in a writing signed by the party to be charged."

The distinction between these two provisions is significant. "At common law, an acknowledgment or promise to perform a previously defaulted contract obligation was effectual, whether oral or in writing, at least in certain types of cases, to start the statute of limitations running anew." *Scheur v. Scheur*, 308 N.Y. 447, 450-51 (1955). Although an acknowledgement of a debt is not a promise to repay it, the acknowledgement provided a basis from which the common law would imply such a promise. "A review of the cases ... will clearly show that a bare or mere acknowledgment of the existence of the debt is sufficient, as the law will imply or infer from its existence a promise to pay it ...." *Henry v. Root*, 33 N.Y. 526, 530 (1865).

The Legislature deliberately changed this common law regime to eliminate "acknowledgements" of mortgage debts when it enacted sections 17-101 and 17-105. The 1961 report of the Legislative Revision Commission recognized that, theretofore, "[i]n New York and most states a barred mortgage may ... be revived by an 'acknowledgement.'" 1961 Leg. Doc. No. 65(F), reprinted in *McKinney's 1961 Session Laws of New York* at 1873. However, the issue of what constitutes a sufficient "acknowledgement" had bred considerable litigation and the Commission found it "doubtful whether a satisfactory clarification on this area of the law can be accomplished by decisional development without a prolonged period of uncertainty or without repeated litigation." *Id.* at 1875. To avoid this outcome, "[t]he Commission believes that legislation is needed to provide a coherent set of rules which will give effect, within limits clearly defined, to transactions intended to toll the statute of limitation ... without requiring litigation of difficult questions of fact or impairing the security of titles and of real property financing." *Id.* In the words of the Fourth Department, "[t]he Law Revision Commission recognized that the rationale for permitting a mere 'acknowledgment' to revive a general or contractual debt ...is inapplicable to the acknowledgment of a mortgage lien on real property because a mortgage is not a promise but rather an executed transaction creating an interest in real property." (Opinion at 4).

The plain statutory terms, confirmed by the legislative history, are dispositive here. In addition, as the Fourth Department noted, they are buttressed by other reasons. A leading expert, Professor Bergman, agrees that § 17-105 controls mortgage debts rather than § 17-101. *See* 1 *Bergman on New York Mortgage Foreclosures* § 5.11[7] [2020]. And he emphasizes that § 17-105 requires "an unconditional promise to pay the debt." *Id.* § 5.11[6][a]. Further, principles of statutory construction dictate that § 17-105, as the more specific provision, supplants the more general provision, § 17-101, even if § 17-101 did not specifically exclude "an action for the recovery of real property."

Finally, the Fourth Department considered whether any binding case law might compel a different conclusion. It recognized that this Court had analyzed a mortgage debt under both § 17-101 and § 17-105 in *Petito v. Piffath*, 85 N.Y.2d 1 (1994). This Court ruled in that case that the mortgage debt had not been revived under either 17-101 or § 17-105. The decision, however, does not acknowledge that § 17-101, by its terms, is inapplicable to an action for the recovery of real property. *Id.* at 7. To construe the import of *Petito*, the Fourth Department reviewed both the underlying appellate decision and the parties' briefs to this Court. It properly determined that the threshold issue of whether § 17-101 applies in mortgage debt cases had not been squarely raised. Thus, it concluded that the

more accurate reading of *Petito* is that this Court simply assumed the potential applicability of § 17-101, in addition to § 17-105.

Council now contends that the Fourth Department's painstaking opinion "muddles the interplay between [§ 17-101 and § 17-105]." (Council's Memo. at 12). It asks this Court to intervene, and to contravene the explicit terms of both statutes and the clearly expressed intention of the Legislature. But there is no basis for this Court to do so.

Council asserts that the Fourth Department's decision "is contrary to a long line of case law" and "a controlling decision of this Court," i.e., *Petito*. (*Id.*). This is not so. *Petito* simply assumed the applicability of § 17-101; the Court did not address the question, let alone hold that § 17-101 applies to mortgage debts notwithstanding its plain language ("other than an action for the recovery of real property"). Nor does Council identify any other appellate decision that has squarely addressed this issue and held that § 17-101 applies to mortgage debts despite its own explicit language and the Legislature's clearly expressed intent. In all of the cases that Council cites, the courts simply assumed the applicability of § 17-101 to a mortgage debt, without examining and deciding that issue. There is no actual conflict between the Fourth Department's decision and any decision by another department of the Appellate Division. Indeed, the First Department has followed the Fourth Department's decision and ruled that § 17-105, not § 17-101,

governs mortgage foreclosures. *See U.S. Bank, N.A. v. Caruana*, --- N.Y.S.3d ----, 2020 WL 6600022 (1st Dept. Nov. 12, 2020) (Mem.).

Council further contends that a mere "acknowledgement" of a mortgage debt satisfies § 17-105 and that an express promise is not required. But its construction distorts the statutory language, which requires "a promise to pay the mortgage debt ... made ...by the express terms of a writing signed by the party to be charged." Council also ignores the legislative history of the provision. The Legislative Review Commission explained that "[a]n intention to waive the bar of the statute or the time that has expired is also reasonably to be inferred from an express promise to pay the mortgage debt, made after the accrual of a right of action to foreclose the mortgage." 1961 Leg. Doc. No. 65(F), reprinted in *McKinney's 1961 Session Laws of New York* at 1876. (emphasis added).

Likewise, the authority Council cites is inapposite, either because it discusses the common law before the enactment of the statute or else is taken out of context. For example, in *Comerica Bank, NA. v. Benedict*, 39 A.D.3d 456, 457 (2d Dept. 2007), the court stated that the defendant's execution of a mortgage "did not qualify as an acknowledgment of a prior existing debt such that the statute of limitations was extended pursuant to General Obligations Law § 17-105 (1) (*see Comerica Bank, N.A. v Benedict*, 8 A.D.3d 221, 223 [2004])." (emphasis added). However, the 2004 decision cited by the court states that the issue was whether the

execution of the mortgage "constituted a promise to pay the mortgage debt which extended the limitations period pursuant to General Obligations Law § 17-105 (1)." *Comerica Bank, N.A. v Benedict*, 8 A.D.3d at 223 (emphasis added). The 2007 decision's use of the term "acknowledgement" is imprecise, but does not signal a break with the prior decision.

Similarly, Council invokes Professor Bergman in support of its position by selectively quoting his treatise for the proposition that § 17-105 "is merely a codification of 'the authority under which an effective written acknowledgement of a mortgage obligation serves as a revival of the statute of limitations time period.'" (Council's Memo at 18-19) (citing 1 *Bergman on New York Mortgage Foreclosures* § 5.11[6][a]) (emphasis in Council's brief). But Professor Bergman states in that same section of his treatise that § 17-105 requires "an unconditional promise to pay the debt." *Id.*

In fact, no department of the Appellate Division has ever held that § 17-105 can be satisfied by anything less than an express written promise to pay the debt, signed by the party to be charged. The First Department recently held, in line with the Fourth Department, that "GOL § 17–101 requires an acknowledgment of the debt or a promise to pay it; GOL § 17–105(1) requires a promise to pay the debt." *U.S. Bank, N.A. v. Caruana*, --- N.Y.S.3d ----, 2020 WL 6600022, at *1.

Far from muddling the interplay between § 17-101 and § 17-105, the Fourth Department has exhaustively analyzed it and definitively explained it. There is no need for this Court to grant review simply to affirm that the Fourth Department has construed and applied those clear statutory provisions faithfully and accurately.

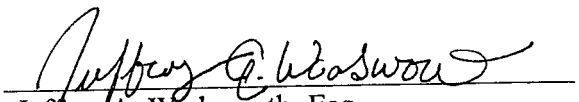
CONCLUSION

Council's motion for leave to appeal should be denied.

Dated: November 20, 2020
Rochester, New York

Respectfully submitted,

HARTER SECREST & EMERY LLP

By: 

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