

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
Docket No. 12-0150

**Tribeca Lending Corporation,
Petitioner,**

v.

**(From the 13th Judicial Circuit
Case No. 11-C-2010
Judge Tod J. Kaufman, Presiding)**

**James E. McCormick,
Respondent.**

**PETITIONER'S BRIEF TO CERTIFIED QUESTIONS FROM THE
13TH JUDICIAL CIRCUIT OF WEST VIRGINIA**

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I. QUESTIONS CERTIFIED

First Question Presented

1. Is West Virginia Code § 38-1-4a, which gives a borrower one year to challenge the validity of a foreclosure sale, and provides in applicable part that “no action or proceeding to set aside a trustee's sale ... shall be filed or commenced more than one year from the date of the sale,” applicable when counter-claims are asserted challenging the enforceability of the underlying mortgage loan agreement in response to an unlawful detainer action?

The Circuit Court Answers in the Affirmative.

Second Question Presented

2. Under West Virginia Code § 46A-5-101(a), which provides in applicable part that “[w]ith respect to violations arising from other consumer credit sales or consumer loans, no action pursuant to this subsection may be brought more than one year after the due date of the *last scheduled payment of the agreement.*” (emphasis added). When does the statute of limitations begin to run: the date the applicable Loan was accelerated and all amounts became due and payable; or, the projected date of the final installment payment of the executed loan agreement?

The Circuit Court Answers: The date the applicable Loan was accelerated and all amounts became due.

II. STATEMENT OF THE CASE

Respondent, James E. McCormick, Defendant below (“McCormick”), entered into a mortgage loan with Petitioner, Tribeca Lending Corporation, Plaintiff below (“Tribeca”), for the real property (“Property”) located at 60 8th Avenue, Saint Albans, WV 25177 on September 30, 2005. The loan agreement executed by McCormick provides that McCormick will repay

\$116,900.00 to Tribeca over the course of thirty (30) years by making monthly installment payments of \$1,112.38. An accompanying Deed of Trust dated September 30, 2005 was also executed securing the loan agreement. The Deed of Trust provides that McCormick shall pay when due the principal of and the interest on the debt as evidenced by the loan agreement. The Deed of Trust additionally provides that should McCormick breach any covenant or agreement contained in the Deed of Trust, Tribeca shall give notice to McCormick prior to acceleration following the breach and provide McCormick time to cure the default. Further, if McCormick fails to cure the default, all sums may be accelerated and Tribeca may invoke the power of sale. It is uncontested that McCormick did breach the terms of the loan agreement and Deed of Trust by failure to make monthly payments, and thus defaulted on the loan. A Notice of Right to Cure was sent to McCormick on July 26, 2007. McCormick failed to cure the default by the prescribed legal time to do so and Tribeca invoked the right to sale under the Deed of Trust.

On November 8, 2007, the trustee, under the Deed of Trust, sent McCormick a Notice of Foreclosure Sale (A.R. 29) *via* certified and regular mail (A.R. 31-33). Said notice informed McCormick that all sums secured by the Deed of Trust were immediately due and payable without further demand and that Tribeca had invoked the power given by the Deed of Trust to sell the real estate at public auction on December 7, 2007. The foreclosure sale was continued to December 19, 2007 at 1:25 p.m. No bidders appeared at public auction, and as a result, the property was sold back to Tribeca as the noteholder. A Trustee's Deed was recorded conveying the Property back to Tribeca on January 8, 2008 (A.R. 6).

Thereafter, Tribeca, as the new owner of the Property, filed an unlawful detainer action in the Magistrate Court of Kanawha County for immediate possession alleging McCormick to be unlawfully occupying Tribeca's property. This original unlawful detainer action was filed in

2008, to which McCormick removed it to the Circuit Court and upon the same, filed Counter-claims against Tribeca. On September 25, 2009, the Circuit Court dismissed the case citing inactivity for more than one year (A.R. 1).

On June 2, 2011, Tribeca again filed an unlawful detainer action in the Kanawha County Magistrate Court alleging McCormick to be unlawfully occupying Tribeca's property (A.R. 2-35). McCormick then filed the presently pending Motion to Remove to Circuit Court, Answer and Counter-claim (A.R. 36-37, 38-47). On August 17, 2011, Tribeca, by counsel, Chris R. Arthur, Lora A. Dyer, and the law firm of Samuel I. White, P.C., filed a Motion to Dismiss the Defendant's Counter-claims in this matter (A.R. 48-58). On September 20, 2011, McCormick, by counsel, Sara Bird of Mountain State Justice, Inc., filed a Response to Tribeca's Motion to Dismiss (A.R. 59-68). A Notice of Hearing was filed on September 1, 2011, and the Circuit Court conducted a hearing pursuant to same on September 27, 2011.

Pursuant to the September 27, 2011 hearing, an Order and Amended Order Certifying Questions was issued by the Circuit Court (A.R. 77-83, 84-90). The questions presented in the Amended Order Certifying Questions are presently before this honorable Court.

III. SUMMARY OF ARGUMENT

This case comes down to the meaning of the phrase "last scheduled payment" which was partially addressed in this Court's holding in Dunlap v. Friedman, 213 W.Va. 394, 399, 582 S.E.2d 841, 846 (W.Va. 2003). In Dunlap, this Court concluded that "a consumer who is party to a closed-ended credit transaction, resulting from a sale as defined in West Virginia Code § 46A-6-102(d), may bring any necessary action within either the four-year period commencing with the date of the transaction or within one year of the due date of the last payment, whichever is later." When reaching the above conclusion, this Court noted that its decision "admittedly

does not effectively answer the myriad of hypotheticals raised by the parties with regard to various types of credit sales utilized by consumers.” Id. Here is a perfect example of the “myriad of hypotheticals” which was not addressed in the Dunlap decision. Concerning the same, Tribeca asserts that “last scheduled payment” occurs when Tribeca accelerated the loan due to McCormick’s default, or it occurs after the loan was extinguished by the foreclosure sale, not the end of the original loan maturity date. Alternatively, McCormick argues that the “last scheduled payment” is fixed upon the origination of the loan, and nothing that occurs subsequently can change it, including the acceleration of the loan and/or a foreclosure sale.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Because the principle issues in this case have not been authoritatively decided, the Court’s consideration by oral argument under Rev. R.A.P. 20(a) is proper, unless the Court determines otherwise from the briefs provided.

V. ARGUMENT

A. Applicability of West Virginia Code § 38-1-4a -- Challenge to Foreclosure Time Barred by One Year Statute of Limitation.

Tribeca asserts in its Motion to Dismiss that the West Virginia Legislature enacted West Virginia Code § 38-1-4a giving a borrower one year to challenge the validity of a foreclosure sale or to assert claims relating to a loan that was already foreclosed upon. The statute provides in applicable part that “no action or proceeding to set aside a trustee's sale ... shall be filed or commenced more than one year from the date of the sale.” It is uncontested in the Petition and the counter-claims that the foreclosure sale in this matter occurred on December 19, 2007. The Trustee’s Deed was recorded on January 8, 2008. (A.R. 6). McCormick’s counter-claims were filed on July 25, 2011, almost four (4) years after the foreclosure sale. Hence, one (1) year had elapsed prior to McCormick’s counter-claims. Thus, McCormick’s counter-claims are time

barred. For this reason, Tribeca moved to dismiss McCormick's counterclaim on the grounds that it fails to state a claim upon which relief can be granted. The Circuit Court properly found that McCormick's counter-claims are time barred by West Virginia Code § 38-1-4a when it answered the first certified question presented in the affirmative and ordered the Motion to Dismiss McCormick's untimely claims conditionally granted pending a ruling from this Court (A.R 88-89).

B. Applicability of West Virginia Code § 46A-5-101(a) -- Consumer Protection Causes of Action Time Barred by a One Year Statute of Limitation.

In an attempt to circumvent the statutory limitation set forth in West Virginia Code §38-1-4a, McCormick asserts that his claims arise under the West Virginia Consumer Credit and Protection Act, 46A-1-1 *et al.* ("WVCCPA"). McCormick asserts his counter-claims challenge the enforceability of the underlying mortgage loan agreement by questioning the validity and viability of said agreement. For this reason, he asserts his counter-claims are not time barred by the statute of limitations set forth in West Virginia Code §38-1-4a. However, even assuming *arguendo* that his claims do arise under the WVCCPA and are thereby exempt from the statutorily mandated limitations set by West Virginia Code § 38-1-4a, such claims would also be time barred by a one year statute of limitation pursuant to West Virginia Code § 46A-5-101(a).

Judge Goodwin, in the case of Delebreaux v. Bayview Loan Servicing, LLC, 770 F.Supp.2d 813 (2011), had an opportunity to review a similar claim to that of the Respondent that there is no statute of limitations on consumer protection lawsuits. Judge Goodwin noted that:

I sincerely doubt that the West Virginia legislature meant to allow plaintiffs a half-century in which to bring claims under the [West Virginia Consumer Protection and Credit Act]. Additionally, the Plaintiffs' reading leads to the absurd conclusion that a consumer plaintiff may bring a cause of action for statutory violations that occurred decades beforehand

Id. at 821.

In Delebreau, Plaintiff filed the lawsuit before the foreclosure sale, but more than a year after the lender accelerated the loan. In this matter, McCormick is attempting to file his counterclaims several years after the foreclosure sale actually occurred. As stated above, if McCormick's interpretation of the applicable statutes is accepted, it permits an open ended invitation to file a lawsuit, and makes it virtually impossible to **EVER** convey good and marketable title on foreclosed property. That ridiculous possibility never was contemplated by the West Virginia Legislature.

The statute of limitation for McCormick's counter-claims in Counts I-IV is provided in West Virginia Code § 46A-5-101.

With respect to violations arising from consumer credit sales or consumer loans made pursuant to revolving charge accounts or revolving loan accounts, or from sales as defined in article six [§§ 46A-6-101 et seq.] of this chapter, no action pursuant to this subsection may be brought more than four years after the violations occurred. With respect to violations arising from other consumer credit sales or consumer loans, no action pursuant to this subsection may be brought more than one year after the due date of the last scheduled payment of the agreement.

W. Va. Code § 46A-5-101(1).

The Loan at issue in this case falls within the definition of "other consumer loans" and is subject to a one year limitation period: "no action pursuant to this subsection may be brought more than one year after the due date of the last scheduled payment of the agreement."

Under the statute, the statute of limitations for a cause of action for violations arising from the servicing of the Loan runs one year from the due date of the last scheduled payment under the Loan. In this case, the "date of the last scheduled payment of the agreement" was June

5, 2007 when the Loan was accelerated. Once McCormick defaulted, the scheduled payments ceased and the full amount was accelerated and became due.

The Loan was accelerated in 2007. Accordingly, the statute of limitations began to run in 2007, the date the Loan was accelerated and all amounts became due and payable, and expired in 2008. This action was instituted on July 25, 2011, nearly three years after the statute of limitations had run.

It is undisputed that the McCormick's Loan was accelerated in 2007 and all amounts became due and payable on that date. After 2007, there were no additional scheduled payments to be made under the Note and McCormick understood that fact. McCormick's Note established a 30-year term to pay back the amount borrowed *unless* he failed to pay as required. Once McCormick failed to pay as required, and after the time to reinstate lapsed, the Note's acceleration called for immediate payment in full. Therefore, the last payment scheduled on the Note, excluding any prepayment arrangement, could only be made at one of two mutually exclusive events: at the end of the 30-year term, assuming all payments were made timely, which, in the instant case would be 23 years in the future still, OR upon acceleration for non-payment. This is a common interpretation everywhere, including West Virginia. As the court in Delebreau observed:

The West Virginia legislature clearly contemplated acceleration of loans as part of the regular course of business in consumer loan transactions. Thus, while the plaintiffs are correct that the WVCCPA "should be construed liberally as a remedial statute," Dunlap v. Friedman's, Inc., 213 W. Va. 394, 582 S.E.2d 841, 846 (2003) (internal citations omitted), this does not mean that the court should penalize creditors who accelerate a loan in accordance with both the terms of a loan agreement and West Virginia law.

Put simply under the loan agreement, Bayview could only accelerate the debt – and thereby make the last payment due immediately – when the plaintiffs were in default. This reading of the statute does not, as the plaintiffs assert, allow "the creditor's continued misconduct".

Statutes of limitation “should not be construed so as to reach an absurd result.” Hamrick v. Indianapolis Human Society, Inc., 174 F. Supp. 403, 409 (S.D. Ind. 1959), *aff’d* 273 F.2d 7 (7th Cir. 1959), *cert. den.* 362 U.S. 919 (1960). The “basic purpose of statutes of limitations is to encourage promptness in instituting actions; to suppress stale demands or fraudulent claims; and to avoid inconvenience which may result from delay in asserting rights or claims.” Dunlap v. Friedmans, Inc., 213 W.Va. 394, 397-98 (2003). As the Fourth Circuit has observed, “[s]tates rightly may be concerned about the prosecution of fraudulent claims and reliability of judgments rendered upon old claims, where memories may have faded, witnesses may have died, and evidence may have been lost.” Goad v. Celotex Corp., 831 F.2d 508, 510 (4th Circ. 1987).

When a loan has been accelerated, all amounts are due and payable and no future payments remain. To permit claims some four years in the future would result in an absurd interpretation of the statute and should be avoided. Specifically, under McCormick’s theory, a purchaser of real property at a foreclosure sale never would be able to take clear title due to the possibility of a future challenge from the defaulting borrower. As noted in the dissenting opinion in Dunlap, “[s]imply put, the majority’s reading of West Virginia Code § 46A-5-101(1) leads to an absurd result” which ignored the plethora of “our decisions reflect[ing] our commitment to ensuring that such time limits are strictly followed.” Perdue v. Hess, 199 W.Va. 299, 303, 484 S.E.2d 182, 186 (1997). Id. at 402.

Accordingly, as asserted by Tribeca, the statute of limitations began to run in 2007, the date the Loan was accelerated and all amounts became due and payable. After 2007, there were no additional scheduled payments to be made under the Note. The present action was instituted on July 25, 2011. Hence, nearly three years had elapsed prior to McCormick’s WVCCPA counter-claims, and almost three years after the Trustee’s Deed was recorded. See Jones v.

Home Loan Inv., F.S.B., No. 2:09-0537, 2010 U.S. Dist. LEXIS 26953 (S.D. W. Va. Mar. 22, 2010) (finding, without directly addressing the issue, that plaintiff's unfair and deceptive acts claim under the WVCCPA related to a mortgage loan which was refinanced was time barred by the one-year statute of limitations).

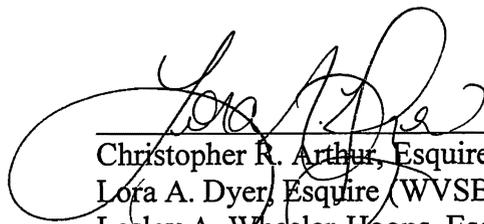
The Circuit Court properly found that the statute of limitations began to run from "[t]he date the applicable Loan was accelerated and all amounts became due" in response to the second certified question and therefore ordered the Motion to Dismiss McCormick's untimely claims conditionally granted pending a ruling from this Court (A.R 88-89).

VI. CONCLUSION

For all of the foregoing reasons, the decision of the 13th Judicial Circuit Court dismissing Respondent McCormick's claims in the underlying civil action as statutorily time barred by West Virginia Code § 38-1-4a and West Virginia Code § 46A-5-101(a) should be affirmed.

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By Counsel,



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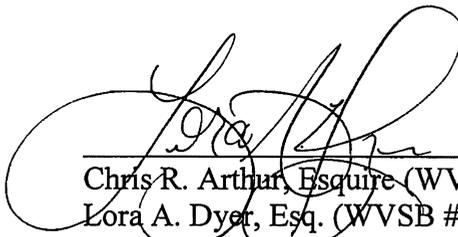
(From the 13th Judicial Circuit
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Judge Tod J. Kaufman, Presiding)

James E. McCormick,
Respondent.

CERTIFICATE OF SERVICE

I, the undersigned, hereby certified that on the 20th day of April 2012, I caused the foregoing "*Petitioner's Brief to Certified Questions from the 13th Judicial Circuit of West Virginia*" to be served on all counsel of record via regular U.S. Mail, postage prepaid, and addressed as follows:

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