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Wells Fargo Bank Minn., Nat'l Ass'n v. Holoway

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**THE FIRST CIRCUITS TREATMENT OF PRESCRIPTION
IN LOUISIANA AND ACKNOWLEDGEMENT
IN THE LOUISIANA CIVIL CODE**

Arthur H. Percy*

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I. INTRODUCTION

This case raises a simple but important practical question: does the fact by the debtor of listing a debt when filing for bankruptcy constitute an acknowledgment of the debt that would interrupt prescription? Typically, a bank will institute a lawsuit when a person stops making payments towards the reimbursement of a mortgage loan. However, the case of *Wells Fargo Bank Minnesota, Nat'l Ass'n v. Holoway*¹ illustrates three important aspects of bankruptcy and acknowledgement of a debt. The Louisiana First Circuit Court of Appeals tackles if an acknowledgment of a debt is enough to interrupt prescription when a borrower in a bankruptcy proceeding acknowledged the debt in his Amended Chapter 13 plan. Bankruptcy procedures require that a debtor list all creditors asserting

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1. *Wells Fargo Bank Minnesota, Nat'l Ass'n v. Holoway*, 2018-1340 (La. App. 1 Cir. 5/24/19); 277 So. 3d 800

claims against him and put together a plan to repay them. Section 101 of bankruptcy code makes clear that the term “claim” may include a claim that is disputed by the person filing for bankruptcy.² Second, it determines if a bankruptcy trustee has the authority to acknowledge the mortgage debt on the borrower’s behalf. Finally, the court had to decide whether the entire loan should be cancelled if it prescribes or only the defaulted monthly mortgage payments that were due more than five years before the filing of the instant foreclosure suit were prescribed.

II. BACKGROUND

In *Wells Fargo Bank Minnesota, Nat'l Ass'n v. Holoway*, the plaintiff, Wells Fargo, sued to enforce a promissory note and mortgage. In December 1999, Defendant Michael E. Holoway executed a promissory note secured by an act of mortgage for land and improvements in Mandeville Louisiana.³ The defendant failed to pay monthly installments on the loan in September of 2002.⁴ The loan was acquired by Provident Bank, subsequent to the defendant’s default. Provident gave Holoway notice of default in accordance with the terms of loan in a letter dated June 11, 2003 and Provident then filed suit to foreclose on the property on August 28, 2003.⁵ In December 2003, Holoway filed a petition under Chapter 13 of the U.S. Bankruptcy Code in the U.S. Bankruptcy court for the Eastern District of Louisiana. On August 16, 2004, the automatic stay in the matter was lifted by the court which enabled Provident to continue the foreclosure proceedings. The first bankruptcy suit was dismissed by the court on January 14, 2005. In March of 2007, Holoway filed a second petition for Chapter 13 bankruptcy, and it was converted to a Chapter 7 bankruptcy. Litton Loan Servicing, LLP, filed a claim in the suit regarding the note on behalf of Wells Fargo. On

2. 1 U.S.C.A. §101(5).

3. *Id.* at 803.

4. *Id.*

5. *Id.*

September 12, 2008, an “Order of Abandonment” signed by the bankruptcy court removed the property from the bankruptcy estate.⁶ The second bankruptcy suit was discharged on November 3, 2008. On June 16, 2009, Wells Fargo filed the instant action seeking to enforce the loan. However, the original foreclosure suit was dismissed on grounds of abandonment pursuant to Louisiana Code of Civil Procedure Art 561 on December 6, 2017.⁷ On January 24, 2018, Holoway filed a peremptory exception of prescription. On May 3, 2018, the trial court granted the exception of prescription and ordered Holoway to submit a written judgment. On June 8, 2018, a judgment was signed granting the exception of prescription, dismissing Wells Fargo’s suit, and ordering the cancellation of the inscription of the mortgage in the St. Tammany Parish records.⁸ After the judgment was rendered, Wells Fargo filed an appeal and presented three issues for the First Circuit Court of Appeal of Louisiana to examine.

III. DECISION OF THE COURT

The Court of Appeal, First Circuit, found that it would be unjust to rule that a debtor has acknowledged his debt under Louisiana Civil Code article 3436 merely because the debtor properly identified the existence of a claim in bankruptcy filings in compliance with bankruptcy laws.⁹ The First Circuit Court found that the defendant did nothing more than identifying an alleged debt and that it was not enough to constitute an acknowledgement as contemplated in Louisiana Civil Code article 3436. Louisiana Civil Code article 3464 provides that prescription is interrupted when the debtor acknowledges the right of the person against whom he had commenced to prescribe.¹⁰ The defendant did not undertake any act of

6. *Id.*

7. *Id.* at 804.

8. *Id.*

9. *Id.* at 807.

10. *Id.* at 805-06 citing *Titus v. IHOP Rest., Inc.*, 2009-951 (La. 12/1/09); 25 So.3d 761, 764-765.

reparation or indemnity, he did not make an unconditional offer or payments, and he did not make any action which could reasonably be found to have lulled Wells Fargo into believing that he would not contest liability. Federal Rules of Bankruptcy Procedure 1007 requires a debtor to list all creditors asserting claims against him.¹¹ “Claim” is defined in Section 101 of bankruptcy codes as “right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured.”¹² On the second issue, a bankruptcy filing creates an estate, which is comprised of the property of the debtor and other property as defined in 11 U.S.C.A. § 541.¹³ One may note that ‘estate’ is a common law concept not to be found in the Louisiana Civil Code. It designates the aggregate of the debtor’s assets. The trustee is the representative of the estate, not of the debtor. Louisiana Civil Code article 2997 says a principal may authorize a mandatary to acknowledge his debt, but only if the authority is given expressly.¹⁴ The defendant did not expressly grant authority to the bankruptcy trustee to acknowledge the debt on the defendant’s behalf, and there is no other mechanism under Louisiana law by which to grant authority to acknowledge debt. After reviewing those articles, the court found no merit in this assignment of error.

On the third issue, the Court held that prescription begins to run with respect to each installment at the time the installment becomes due, unless the creditor accelerates the debt by declaring the whole indebtedness due, in which case prescription runs from the date of acceleration.¹⁵ Louisiana Civil Code article 3463 states that interruption of prescription is considered never to have occurred if a case

11. Fed. R. Bankr. P. 1007.

12. 11 U.S.C.A. § 101(5) (West).

13. 11 U.S.C.A. § 541 (West).

14. LA. CIV. CODE. ANN. Art. 2997 (2020) [quote beginning of article plus (3)].

15. *Harrison v. Smith*, 2001-0458 (La. App. 1 Cir. 3/28/02); 814 So. 2d 42, 45.

is later abandoned.¹⁶ The court finds authority from *Harrison*.¹⁷ The court finds that Civil Code article 3463 provides for the effect of both abandonment and voluntary dismissal and does not distinguish between the two in any way. The court finds it appropriate to apply the same logic employed in *Harrison*. The court found no legal basis to construe the resulting erasure of the interruption of prescription to mean that the loan was somehow un-accelerated. The challenged judgment was affirmed.

IV. COMMENTARY

This commentary will first discuss the basis of prescription, where it comes from in the Civil Code and the prescription period in mortgage cases. Next, it will walk through the mechanics of mortgage prescription and how a single monthly payment or the entire mortgage can prescribe. Third, it will an look at examples acknowledgment in the civil code and interpretations in Louisiana cases.

A. Basis and Mechanism of Prescription

Prescription was codified in Book III, Title XXIV, of the Civil Code. As article 3498 indicates, negotiable and nonnegotiable instruments have a prescriptive period. In addition, article 3498 establishes a five-year prescription period on promissory notes and explains the time frame by stating that, “prescription commences to run from the day payment is exigible.”¹⁸ The five year liberative prescription period is further defined in article 3447. The article states that inaction for a period of time will bar any future actions.¹⁹

Mortgage loans create successive obligations. Though the full balance of the loan is due from the moment the capital is disbursed, the obligation to repay is suspended by a succession of monthly terms. However, companies stipulate acceleration clauses into

16. LA. CIV. CODE. ANN. Art. 3463 (2020).

17. *Harrison v. Smith*, 2001-0458 (La. App. 1 Cir. 3/28/02).

18. LA. CIV. CODE. ANN. Art. 3498 (2020).

19. *Id.* at art. 3447.

contracts. If multiple payments are missed, a mortgage company can accelerate the loan, meaning that the entire unpaid balance is due at once. The date of acceleration in this case was August 28, 2003. On this date, the company who acquired the rights on the loan filed a suit to foreclose on the property.²⁰ This is what caused the acceleration to occur. According to article 3498, the prescription clock starts running then regarding the payment of the balance of the loan. The prescription period will run until August 28, 2008, unless there is interruption of prescription.

The First Circuit correctly calculated the prescriptive period on the mortgage loan, in accordance with the Civil Code. The fact that the loan was accelerated was not disputed and there was evidence that no claim was ever filed during the five-year period. At the outset, the length of time for prescription argued for by Wells Fargo appears to be contrary to the requirements in article 3498. The claim prescribes exactly five years from the date unless prescription is interrupted. In such situations, creditors typically interrupt the prescription by filing claims and refile those as time flows. The claim will only prescribe if the bank has been idle for five years. Any act on behalf of the bank showing they did not abandon the action typically interrupts prescription, unless there is a clear acknowledgment of debt by the debtor, because such an acknowledgement interrupts prescription.

B. Acknowledgement of Debt

Under Louisiana law, prescription is interrupted by the acknowledgment of the right of the other party.

Louisiana Civil Code article 3464 states: "Prescription is interrupted when one acknowledges the right of the person against whom he had commenced to prescribe." What constitutes an acknowledgment is defined in the Civil Code under "Reconnaissance."

20. *Wells Fargo Bank Minnesota, Nat'l Ass'n v. Holoway*, 277 So. 3d 800.

“Reconnaissance de dette” ... Black’s law dictionary defines acknowledgment as, “a formal declaration made in the presence of an authorized officer, such as a notary public, by someone who signs a document and confirms that the signature is authentic.”²¹ It also defines it as “an acceptance of responsibility.”²² Merriam Webster defines acknowledgment as, “a declaration or avowal of one’s act or of a fact to give it legal validity.”²³ The word is used elsewhere in the Civil Code, such as in article 196 establishing the paternity of a man by acknowledging a child.²⁴ Though this article does not give a definition, it sets formalities for the acknowledgment of a child to be valid, detail not to be found in article 3464. A look at Louisiana cases will give some context on acknowledgement.

In this context, when a person is lent money and does not pay it back in time in some fashion the lender will try to get the person to acknowledge his debt. In this case, Holoway listed the mortgage debt as one of the debts to be cleared in the bankruptcy proceedings. The question becomes whether Holoway acknowledged that debt when he listed the mortgage on his bankruptcy proceedings. He listed it as “disputed mortgage.” By doing this, he did not express any unequivocal intent to recognize that he was obligated to pay that claim. Louisiana has established jurisprudence in cases dealing with acknowledgement. In *Coleman*, the Fifth Circuit Court of Appeal of Louisiana held that, recognizing the obligation or creditor’s rights halts prescription before it runs its course.²⁵ In *Bank of New York*, the Third Circuit Court of Appeal of Louisiana held “that acknowledgment is the recognition of the creditor’s right or obligation that halts the progress of prescription before it has run its course; acknowledgment acts to interrupt the prescriptive period before it has

21. *Acknowledgment*, Black’s Law Dictionary (7th ed. 1999). See LA. CIV. CODE. ANN. Art. 1836 (2020).

22. *Acknowledgment*, Black’s Law Dictionary (7th ed. 1999).

23. *Acknowledgment*, Merriam Webster Dictionary (2020).

24. LA. CIV. CODE. ANN. Art. 196 (2020).

25. *Coleman v. Ace Prop. & Cas. Ins. Co.*, 19-305 (La. App. 5 Cir. 11/27/19); 284 So. 3d 1262.

expired.”²⁶ Jurisprudence does not seem to give real guidance for this specific case because the question still is: does putting disputed mortgage on bankruptcy proceedings qualify as acknowledgement of a debt?

While Louisiana has provided some guidance as to acknowledgment, the current case gives additional guidance on the term. The First Circuit held that prescription is interrupted when the debtor acknowledges the right of the person against whom he had commenced to prescribe. The acknowledgement can come in any form. It is not subject to any particular formality. However, this case continues Louisiana’s jurisprudence on the undefined term of acknowledgement. Ruling that putting a disputed mortgage on a bankruptcy claim is not enough to interrupt prescription. There is a need to balance the interest of both parties here. On one hand protecting the interest of a person declaring debt is important so they can prepare their repayment plan. At the same time, they should not be punished for being honest about disputed debts. A requirement that putting a disputed mortgage on a bankruptcy claim acknowledges debt and interrupts prescription will likely not have the results desired. People would likely just not list those disputed debts and try to hide them during proceedings. This does not seem like a viable option. Bankruptcy proceedings and repayment plans will lose value if people are being dishonest about debts.

Finally, the case also held that acknowledgment cannot be done by a trustee in bankruptcy. As said above, the trustee is not an agent for debtor but is an agent for all creditors. The trustee does not have any authority to make an acknowledgment on behalf of the debtor. The job of the trustee is to speak on behalf of the estate but not of the debtor. According to Louisiana Civil Code article 2997, authority must be given expressly to acknowledge a debt. No such express authority was ever given by the debtor to the trustee.

26. *Bank of New York Mellon v. Oldemeyer*, 2019-348 (La. App. 3 Cir. 10/9/19); 282 So. 3d 1098, reh'g denied (Dec. 18, 2019).

The court has interpreted acknowledgment in Louisiana law. The court developed understanding and interpretation by overlooking cases on bankruptcy proceedings. They have concluded that when a trustee puts a disputed mortgage in a bankruptcy plan, it does not qualify as acknowledgment.

