VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Thursday the 29th day of November, 2018.

Present: All the Justices

Mary Harris Meade, Appellant,

against Record No. 180244
Circuit Court No. CL16-3453

Bank of America, N.A., et al., Appellees.

Upon an appeal from a judgment rendered by the Circuit Court of Chesterfield County.

Upon consideration of the record, briefs, and argument of counsel, the Court is of opinion that there is reversible error in the judgment of the circuit court.

In August 2008, Mary Harris Meade conveyed a parcel of real property by a deed of trust to Bill H. McKinnon, trustee, for the benefit of Taylor, Bean & Whitaker Mortgage Corp. to secure an indebtedness. Bank of America, N.A. ("BOA") subsequently became the holder of the note evidencing the indebtedness secured by the deed of trust.

In 2009, Meade was delinquent in repaying the indebtedness. BOA appointed Equity Trustees, LLC ("Equity") substitute trustee under the deed of trust. At some time not disclosed by the record, BOA accelerated repayment of the indebtedness and directed Equity to initiate foreclosure. Equity thereafter advertised a foreclosure sale, which it conducted on March 13, 2014. BOA was the highest bidder and Equity conveyed the property to it by a trustee's deed dated April 14, 2014.

After the foreclosure sale, BOA initiated a proceeding to remove Meade from the property. On December 7, 2016, she filed a complaint seeking rescission of the foreclosure sale, arguing that it was void because the right to accelerate and foreclose had never accrued. She asserted that the deed of trust incorporated, as a condition precedent to acceleration and

foreclosure, a regulation codified at 24 C.F.R. § 203.604(b), which required BOA to have, or to make a reasonable effort to have, a face-to-face meeting with her. She alleged that no such meeting had taken place, and that no lender or lender's agent had made a reasonable effort to have one.

BOA responded by filing a plea in bar asserting that Meade's complaint was barred by the statute of limitations. It averred that she had been in default since August 1, 2009, so the face-to-face meeting required by the regulation had to occur no later than November 1, 2009, and the latter date was when her cause of action for breach of the deed of trust accrued. It also averred that Meade had commenced a similar action in August 2014, which was dismissed by order of nonsuit entered on May 5, 2016. It asserted that because her complaint in the present case was filed on December 7, 2016, both the five-year statute of limitations and the six-month tolling period following a nonsuit provided by Code § 8.01-229(E)(3) had elapsed.

In the meantime, Carrington Mortgage Services, LLC ("Carrington") filed a motion to intervene as a defendant. It asserted that BOA had conveyed the property to it in January 2017. The circuit court granted the motion and Carrington also filed a plea in bar. It echoed BOA's statute of limitations claim and further asserted that Meade was judicially estopped from contesting the foreclosure sale because she had surrendered the property in a bankruptcy proceeding. It averred that she had filed for bankruptcy in October 2010 and filed a statement of intent to surrender the property in August 2011. The bankruptcy trustee therefore abandoned the property and the bankruptcy court discharged the indebtedness in a December 2011 order.

Meade responded to the pleas in bar by arguing that because the regulation created no private right of action, no cause of action accrued until BOA accelerated the indebtedness and initiated foreclosure, thereby violating the deed of trust. She contended that the breach did not occur until March 2014. She also denied being judicially estopped from contesting the foreclosure sale because (1) she did not mislead either court to gain advantage and (2) she and BOA discussed loan modification after the bankruptcy discharge, showing that BOA did not rely on her position in the bankruptcy proceeding. She demanded a jury trial to resolve any factual disputes relating to the judicial estoppel issue.

At a hearing on the pleas in bar, the circuit court ruled that Meade's cause of action accrued when BOA failed to conduct the face-to-face meeting in 2009. It therefore sustained the pleas in bar as to the statute of limitations. It expressly declined to rule on the judicial estoppel

issue. It thereafter entered a final order sustaining the pleas in bar as to the statute of limitations, withholding a ruling on judicial estoppel, and dismissing the case with prejudice. Meade appeals.

"A plea in bar asserts a single issue, which, if proved, creates a bar to a plaintiff's recovery. The party asserting a plea in bar bears the burden of proof on the issue presented." *Hawthorne v. VanMarter*, 279 Va. 566, 577 (2010) (citations omitted). With regard to the statute of limitations issue, there are no material facts in dispute here so it presents only a legal question reviewed de novo. *Willard v. Moneta Bldg. Supply*, 262 Va. 473, 477 (2001)

Like the deed of trust in *Mathews v. PHH Mortgage Corp.*, 283 Va. 723, 734 (2012), Paragraph 9(a) of the deed of trust in this case includes an acceleration clause providing that the "[l]ender may, *except as limited by regulations issued by the Secretary [of Housing and Urban Development ("HUD")] in the case of payment defaults*, require immediate payment of all sums secured by" the deed of trust. (Emphasis added.) Paragraph 9(d) provides that

> [i]n many circumstances *regulations issued by the Secretary will limit [the l]ender's rights, in the case of payment defaults*, to require immediate payment in full and foreclose if not paid. *This Security Instrument does not authorize acceleration or foreclosure if not permitted by the regulations of the Secretary.*

(Emphasis added.); *see also Ramos v. Wells Fargo Bank, N.A.*, 289 Va. 321, 321 (2015) (per curiam) (describing but not quoting a similar deed of trust provision); *Squire v. Virginia Hous. Dev. Auth.*, 287 Va. 507, 516 (2014) (same).

As in *Mathews*, *Squire*, and *Ramos*, Meade asserts that these provisions incorporate 24 C.F.R. § 203.604(b), which provides that "[t]he mortgagee must have a face-to-face interview with the mortgagor, or make a reasonable effort to arrange such a meeting, before three full monthly installments due on the mortgage are unpaid." Her complaint alleges that "[n]o creditor ever gained the right to accelerate or foreclose on the home for reasons including but not limited to the fact that no creditor ever complied with" the regulation, "no lender was entitled to foreclose on the home and [Equity] was not empowered to foreclose," and "no lender or any creditor entity ever complied with the requirements of the deed of trust."

Thus, Meade's complaint alleges that BOA and Equity breached the deed of trust by accelerating and foreclosing before a right to do so accrued.[1] The accrual date for the breach alleged in the complaint therefore is the date on which the acceleration occurred. *Kerns v. Wells Fargo Bank, N.A.*, 296 Va. 146, 158 (2018) (Generally, "[a] contractual right of action accrues 'when the breach of contract occurs.'"). That date is not in the record, but BOA conceded at oral argument that if acceleration was the event giving rise to the alleged breach, the limitations period has not elapsed. Consequently, the circuit court erred by sustaining the appellees' pleas in bar as to the statute of limitations.

Carrington asserts that the Court should nevertheless affirm because the regulation includes an exception to the face-to-face meeting when the borrower "has clearly indicated that he will not cooperate," 24. C.F.R. § 203.604(c)(3), and Meade's bankruptcy filings prove that she would not. However, Meade contends that she discussed a loan modification with BOA after the bankruptcy discharge. Thus, whether Meade has clearly indicated that she will not cooperate is an unresolved factual question, and the present record does not support Carrington's assertion on appeal that the exception applies as a matter of law.

The appellees also assert that the Court should affirm because Meade's representations in the bankruptcy proceeding judicially estopped her from contesting the foreclosure. They similarly assert, in the alternative, that the Court should affirm because the discharge of her indebtedness in the bankruptcy proceeding precludes her from asserting a cause of action for breach of the deed of trust. On the present record, the Court declines these invitations. All factual issues relating to Meade's bankruptcy, and the resulting legal conclusions necessary to decide both of these arguments, remain pending before the circuit court on remand.[2]

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[1] Both in this Court and below, Meade denied alleging that a failure to have the face-to-face meeting alone constituted a breach of the deed of trust, without the separate act of accelerating the indebtedness. Accordingly, the Court does not address in this case whether a borrower could allege a breach of contract and seek relief or nominal damages on the sole basis of failing to have the meeting. *Cf. Kerns v. Wells Fargo Bank, N.A.*, 296 Va. 146, 160 & n.13 (2018).

[2] The Court also notes that, notwithstanding Meade's citations to federal court decisions, the elements of judicial estoppel for the purposes of Virginia law were recently discussed in *Wooten v. Bank of America, N.A.*, 290 Va. 306, 309-11 & n.1 & 3 (2015). That discussion and the decisions cited therein may clarify the questions relevant to this issue.

Finally, the appellees assert that the Court should reconsider its decision in *Mathews* that the regulation is a condition precedent to acceleration and foreclosure. However, as the Court explained in that case, the language in the deed of trust, which is identical here, expressly forbids acceleration and foreclosure if not permitted by HUD regulations. The Court noted that 24 C.F.R. § 203.500 "states that '*it is the intent of the Department that no mortgagee shall commence foreclosure or acquire title to a property until the requirements of this subpart have been followed.*'" 283 Va. at 735 (emphasis in *Mathews*) (alteration omitted). Similarly, 24 C.F.R. § 203.606 states "that '*before initiating foreclosure*, the mortgagee must ensure that all servicing requirements of this subpart have been met.'" *Id.* (emphasis in *Mathews*) (alteration omitted).

As the Court held in *Mathews*, the words in the deed of trust and the regulations clearly limit the power of acceleration and foreclosure. It "cannot conceive of any other purpose for which they would have been included." *Id.* at 734. And if "HUD has a contrary intention, it may either (a) cease to require or allow language that incorporates its regulations as conditions precedent to acceleration or foreclosure in the deeds of trust or (b) require or allow language that expressly states its intent that its regulations are not conditions precedent. It has done neither." *Id.* at 737. The Court therefore declines the appellees' invitation to reconsider *Mathews*.

For these reasons, the Court reverses the judgment of the circuit court and remands for further proceedings consistent with this order.

This order shall be certified to the Circuit Court of Chesterfield County.

A Copy,

Teste: Patricia L Harrington

Clerk