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SUPREME COURT OF TEXAS
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No. 22-0910

IN THE SUPREME COURT OF TEXAS

Deysi R. Santos,

Petitioner,

v.

Yellowfin Loan Servicing Corp.,
as Successor in Interest to First Franklin,

Respondent.

On Appeal from the Fourteenth Court of Appeals
in Houston, Texas
Case No. 14-21-00151-CV

REPLY IN FURTHER SUPPORT OF PETITION FOR REVIEW

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April 11, 2023

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Introduction

Yellowfin admits that it is relying on the decision below in at least 270 other suits across Texas to attempt to collect debts on notes used years ago to partially finance homes foreclosed on during the mortgage crisis. Resp. 12. It nevertheless contends that this Court should deny review based on a tautological defense of the court of appeals' decision and a self-serving assessment that the issues presented are unimportant. Yellowfin is wrong on the merits and the issues are urgent. This Court should grant review.

Argument

I. The court of appeals erred in holding that Yellowfin had a right to collect unpaid debt twelve years after the foreclosure.

A. Yellowfin's right to sue over the junior loan's balance accrued at the 2007 foreclosure, and its claim is therefore time-barred.

Yellowfin relies on the irrelevant precedent that led the court of appeals to reach its incorrect conclusion about when Yellowfin's claim accrued.

1. Yellowfin repeats the court of appeals' serious errors in analyzing when the right to sue over the junior loan's deficiency accrued.

Yellowfin is wrong that *Holy Cross v. Wolf*, 44 S.W.3d 562, 566 (Tex. 2001), rejected the idea that foreclosure accelerates indebtedness previously secured by a foreclosed-on property. Resp. 8-9. *Holy Cross* was not about what happens to a now-unsecured note, post-foreclosure; instead, it answered the question whether, pre-foreclosure, a creditor may accelerate a

secured note through means other than taking "affirmative steps towards foreclosure." 44 S.W.3d at 569-70. Under those circumstances, a creditor need not take "affirmative action towards foreclosure to trigger acceleration … when the parties' agreement does not require such action." *Id*. at 570.

But *Holy Cross* is irrelevant here, Pet. 14-15, because everyone agrees that the senior lienholder's foreclosure left Yellowfin's note *unsecured*. *Holy Cross's* holding that a creditor with optional acceleration rights may exercise those rights through means other than foreclosure *before* a lien is extinguished is therefore immaterial in this case. To be clear, Santos does not argue, as Yellowfin suggests (at 10-11), that a creditor's right to sue accrues when a debtor *defaults*. Instead, Santos's position is that a senior lienholder's *foreclosure* accelerates any remaining indebtedness such that a junior creditor's claim to recover the unpaid debt accrues and the applicable statute of limitations begins to run. Pet. 10-13.

Yellowfin says that its (mis)reading of *Holy Cross* must be right to protect the "separation of obligations between the note and the lien." Resp. 9. But recognizing that *Holy Cross* is irrelevant here and properly applying Texas contract law does not upset this principle. Of course, the note bestowed Yellowfin's predecessors-in-interest with rights separate from the lien that was extinguished after the 2007 foreclosure. Pet. 10-13. So, when the foreclosure turned the junior loan's balance into unsecured debt, Yellowfin's predecessors-in-interest had a right, *then*, to sue on that debt and collect a

money judgment. *Poston v. Wachovia Mortg. Corp.*, 2012 WL 1606340, at *2 (Tex. App.—Houston [14th] May 8, 2012); *see also Diversified Mortg. Invs. v. Lloyd D. Blaylock Gen. Contractor, Inc.*, 576 S.W.2d 794, 808 (Tex. 1978); *Marhaba Partners Ltd. P'ship*, 457 S.W.3d 208, 215 (Tex. App.—Houston [14th] 2015). But Yellowfin's predecessors-in-interest did not exercise that right.

2. Yellowfin's hypotheticals are premised on incorrect assumptions.

Yellowfin relies on two hypotheticals that do not help its cause. In the first, the owner of multiple rental properties allows one of the unprofitable rental homes to be foreclosed on by a senior lienholder while keeping a note secured by other collateral. Resp. 10. Yellowfin assumes incorrectly that the junior creditor may "choose not to accelerate their note and continue receiving payments." *Id.* But the junior creditor has no right to continue receiving installment payments after the senior lienholder's foreclosure has already accelerated the debt and left the junior loan unsecured. Indeed, Yellowfin fails to address the precedent cited in our petition showing that, under Texas law, after a foreclosure extinguishes a lien, junior creditors have a right to collect any unpaid balance in court (*see* Pet. 11) or to foreclose on any other property securing the debt (an option in Yellowfin's hypothetical), but they do not have the right to collect on the unpaid balance through non-judicial means (*e.g.*, by receiving installment payments). *Marhaba Partners Ltd. P'ship*, 457 S.W.3d at 215. Instead, the junior creditor must "pursue a judgment against the debtor for the unpaid amount," *Wesley v. Amerigo, Inc.*,

2006 WL 22213, at *3 (Tex. App.—Waco Jan. 4, 2006), within the statute of limitations, or the right expires.

It's true that parties may be able to contract their way around the common-law rule that a creditor must obtain a judgment to collect a deficiency rather than having a right to continue to collect installment payments. But Yellowfin's predecessors-in-interest never even attempted to collect monthly payments from Santos post-foreclosure. *See* RR26:18-27:3. So, Yellowfin is wrong that Santos asks for a "one-size-fits-all legal analysis that restricts economic freedom," Resp. 10. In any case, should this Court grant Santos's petition, it could consider when Yellowfin's right to a money judgment accrued and how that accrual compares to circumstances that involve other lender-borrower relationships, including circumstances involving multiple collaterals or family agreements.

Yellowfin's second hypothetical also assumes the conclusion to the question presented here. In Yellowfin's view, a father can "allow the stripping of his junior lien and yet avoid immediate acceleration and suit to keep the peace at the Sunday dinner table." Resp. 10. The father can certainly choose not to sue (to maintain family harmony or for any other reason), but he doesn't get to take a when-I-say-so approach to when the statute of limitations begins to run. It's no surprise that Yellowfin offers no citation for the major premise that after foreclosure on the note's security interest, the father can still accelerate the loan a decade plus later. For all the reasons

already explained in the petition (at 10-13), the father in that hypothetical could not "revive [his] rights" by "purporting to accelerate", *see Wells Fargo Bank, N.A. v. Express Limousines, Inc.*, 2022 WL 3048235, at *3 (Tex. App.—Austin Aug. 3, 2022), because the foreclosure would have already accelerated the father's junior loan, leading his claim to a money judgment to accrue and triggering any applicable limitations period, *see, e.g.*, *McLemore*, 872 S.W. 2d at 291.

3. Yellowfin's suit is untimely under any applicable statute of limitations, and Section 51.003(a) of the Texas Property Code provides the appropriate statute of limitations.

Yellowfin's argument that Section 51.003(a)'s text demonstrates that the two-year statute of limitations does not apply to suits to recover deficiencies on a junior loan is head-scratching. The statute defines "deficiency" simply as the difference between the foreclosure-sale price and "the indebtedness secured by real property." Tex. Prop. Code § 51.003(a). Yellowfin fails to articulate why that definition applies only when a foreclosure is performed by the same lienholder who later seeks the deficiency judgment. Resp. 7-8. The most natural reading of "the indebtedness" is that the phrase refers to the total amount due on loans secured by the property. The unpaid balance on Yellowfin's junior loan was part of "the indebtedness secured by real property" before the 2007 foreclosure. Tex. Prop. Code § 51.003(a). And because "the price at which" the property was "sold at foreclosure" was, according to Yellowfin, "less than the unpaid balance of the indebtedness

secured by the real property," a deficiency resulted and "any action to recover the deficiency" had to be "brought within two years of the foreclosure sale." *Id.*

The cases that Yellowfin cites (at 8) do not change this reality. Yellowfin does not rebut Santos's detailed explanation why *Mandarino v. Sherwood Lane Invs. LLC*, 2016 WL 4034568 (Tex. App.—Houston [1st] July 26, 2016), is wrong, Pet. 15-16, or Santos's point that *Mandarino's* errors add to the urgency that this Court intervene, Pet. 23. Both *Aguero v. Ramirez*, 70 S.W.3d 372, 374 (Tex. App.—Corpus Christi 2002, pet. denied), and *Crego v. Lash*, No. 13-12-00100-CV (Tex. App.—Corpus Christi, December 19, 2013) (mem. op.), *overruled by* 2014 WL 1272220 (Tex. App.—Corpus Christi–Edinburg Mar. 27, 2014), are irrelevant because neither involved post-foreclosure suits to recover indebtedness previously secured by since foreclosed-on properties. And the issue in *Poston v. Wachovia Mortg. Corp.*, 2012 WL 1606340, at *1-3 (Tex. App.—Houston [14th Dist.] May 8, 2012, pet. denied) (mem. op.), had nothing to do with which statute of limitations governs suits by junior creditors for deficiency judgments.

As the petition explains (at 10-13), because Yellowfin waited twelve years to sue, the relief Santos seeks turns on when a junior creditor's deficiency claim accrues post-foreclosure, not which statute of limitations—whether two-year or four-year—applies. But Yellowfin's insistence that Section 51.003(a)'s two-year statute of limitations does not apply just makes this case

even more worthy of this Court's review. Put differently, although the principal issue here is when Yellowfin's claim accrued, and not which statute of limitations began to run at accrual, that the petition also presents an opportunity to address the statute-of-limitations question that *Mandarino* got badly wrong further supports the need for this Court's intervention.

B. Yellowfin waived its acceleration rights by failing to act for over twelve years.

1. Yellowfin responds to Santos's alternative waiver argument by asserting that its predecessors-in-interest may have attempted to collect the debt even though the record lacks evidence of collection attempts. *See* Resp. 11. But Yellowfin did not dispute before the trial court that its predecessors-in-interest knew that their purported acceleration right had been triggered beginning in at least November 2007 but sat on that right until March 2020. *See* Pet. 7; *see* RR26:18-27:3. Yellowfin was free to introduce evidence disputing this version of events below, but it failed to do so. Pet. 7. And Yellowfin's statement (at 11) that evidence of collection attempts is not in the record because they are irrelevant to whether Yellowfin ultimately accelerated the loan is a nonsequitur. Evidence of earlier collection efforts *would be* relevant to whether Yellowfin waived any acceleration right before attempting to exercise it, and Santos argued this point below.

2. As for Yellowfin's apparent disagreement (at 11) with Santos over this Court's "well established" implied-waiver principles, true, waiver requires proof of intent to relinquish a right, but this proof may take the form of

"[s]ilence or inaction." *Alford, Meroney & Co. v. Rowe*, 619 S.W.2d 210, 213 (Tex. App.—Amarillo 1981). In *Tenneco Inc. v. Enter. Prods. Co.*, 925 S.W.2d 640 (Tex. 1996), for example, evidence of waiver included that, over three years, the entity seeking to enforce a right did not complain about the breaching party's failure to comply with the later sued-over contractual provision. *Id.* at 643. This "extended inaction" established "an intentional waiver." *Id.* Likewise, in *Alford,* a partnership sought to enforce a penalty provision against a former partner who entered into competition with it, but a fact question remained over whether the partnership had waived the right to sue over the breach. 619 S.W.2d at 211. The court held that a "jury could conclude that the partnership's failure to reject" the withdrawing partner's proposal regarding the terms of his withdrawal "or respond to [his] request to put its counter-proposal in writing," for a little over a month, "was silence or inaction for an unreasonable period of time, indicating an intention to waive" the penalty provision. *Id.* at 215.

Because Yellowfin's predecessors-in-interest sat silent for an "unreasonable period of time," *Williams v. Moores*, 5 S.W.3d 334, 337 (Tex. App.—Texarkana 1999), and other equitable considerations support a finding of waiver here, Pet. 21-22, Yellowfin "relinquished any right [it] had" to accelerate Santos's loan, *see Williams*, 5 S.W.3d at 337.

II. The issues presented are important and recurring.

A. Yellowfin maintains that the issues presented are not important because, in its view, they do not involve a conflict between the courts of appeals. Resp. 6. That's wrong. The decision below and others involving Yellowfin are inconsistent with precedent that says a foreclosure accelerates a note, *see McLemore v. Pac. Sw. Bank*, 872 S.W. 2d 286, 291 (Tex. App.—Texarkana 1994) (citing *Shepler v. Kubena*, 563 S.W.2d 382, 385 (Tex. App.—Austin 1978)), such that if a creditor seeks "to collect any deficiency that remains after the foreclosure," it "must obtain a judgment" to recover within the applicable statute of limitations, *Marhaba Partners v. Kindron Holdings,* 457 S.W.3d 208, 215 (Tex. App.—Houston [14th] 2015). Pet. 10-12.

B. Next, Yellowfin casually asserts that its 270 suits over long-forgotten debt used to finance homesteads foreclosed on years ago is "hardly overwhelming." Resp. 12. Tell that to the 270 families affected by these stale and inequitable suits. And that group doesn't capture the many other people who could be affected by purchasers of long-ago foreclosed mortgage debt who, unless this Court intervenes, will be incentivized to take Yellowfin's approach.

C. Finally, Yellowfin is dead wrong that predatory debt buyers in other states have no use for the precedent below because courts in other jurisdictions have already rejected Santos's arguments.

Yellowfin first cites *Collins Asset Group, LLC v. Alialy*, 139 N.E.3d 712 (Ind. 2020), which did not involve a post-foreclosure suit to collect a deficiency.

That case is about when a lender must accelerate debt after *default*, not when a claim to a post-*foreclosure* (i.e. post-acceleration) deficiency judgment accrues. *Id.* at 713.

Yellowfin's other cases all stand for an undisputed (and unremarkable) principle: "when a junior becomes unsecured due to foreclosure by the senior lienor, the junior is not barred" from proceeding in a separate action "against the debtor on the note." *City Consumer Services, Inc. v. Peters*, 815 P.2d 234, 237 (Utah 1991); *see also Deutsche Bank Natl. Tr. Co. v. Holden*, 60 N.E.3d 1243, 1249 (Ohio 2016); *Kepler v. Slade*, 896 P.2d 482, 484 (New Mex. 1995). But these cases say nothing about when the junior creditor's claim accrues, triggering the statute of limitations. That's the question here. And if the court of appeals' resolution of that issue is not overturned, Yellowfin and entities like it could use the decision below as persuasive authority in other states to enforce long-forgotten loans with terms so predatory that Yellowfin's counsel would "not … advise anybody to take" them. *See* RR12:6-7.

Prayer for Relief

The petition for review should be granted.

Respectfully submitted,

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Certificate of Compliance

I certify that this Petition complies with Texas Rule of Appellate Procedure 9.4 because it contains 2,736 words, excluding the parts exempted by Rule 9.4(i)(1), in 14-point Palatino Linotype font.

/s/ Madeline Meth
Madeline Meth

Counsel for Petitioner

Certificate of Service

I certify that a true and correct copy of this Petition was served electronically on all counsel of record on December 9, 2022, in compliance with Texas Rule of Appellate Procedure 9.4.

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