Rel: December 10, 2021

SUPREME COURT OF ALABAMA

OCTOBER TERM, 2021-2022

1200483

Brett A. Deslonde

v.

Nationstar Mortgage, LLC, d/b/a Mr. Cooper, and The Bank of New York Mellon, as Trustee for Nationstar Home Equity Loan Trust 2007-C

Appeal from Baldwin Circuit Court
(CV-18-900849)

SELLERS, Justice.

Brett A. Deslonde appeals from a summary judgment entered in favor of Nationstar Mortgage, LLC, doing business as Mr. Cooper ("Nationstar"), and The Bank of New York Mellon, as trustee for Nationstar Home Equity Loan Trust 2007-C ("BNYM"), on Deslonde's claim seeking reformation of a loan-modification agreement on the ground of mutual mistake. We affirm.

I. Facts

In December 2006, Deslonde purchased real property in Fairhope with a loan from Nationstar in the amount of $348,386.50; the mortgage securing the loan was recorded in the Baldwin Probate Office.[1] Deslonde subsequently defaulted on his mortgage payments and applied for a loan modification through Nationstar's loss-mitigation program. By a letter dated February 14, 2014, Nationstar notified Deslonde that he had been approved for a "trial period plan" under the federal Home Affordable

[1]The property was initially purchased jointly by Deslonde and his wife, Barbara Lynn Thies Deslonde. Deslonde and Barbara subsequently divorced, and Barbara executed a quitclaim deed conveying her interest in the property to Deslonde. Barbara is not a party to this appeal.

Modification Program ("the federal program").[2] Under the federal program, Deslonde was required to make three monthly trial payments in the amount of $1,767.38 and to submit all required documentation for participation in the program, including an executed loan-modification agreement. The letter also stated that, "[i]f each payment is not received by [Nationstar] in the month in which it is due, this offer will end and your loan will not be modified under the [the federal program]."

By a letter dated July 3, 2014, Nationstar informed Deslonde that his request for a loan modification under the federal program had been denied because he had not returned an executed loan-modification agreement or made the trial payments. That letter informed Deslonde that there were other possible alternatives that might be available to him if he was unable to make his regular loan payments. After further

[2]See JP Morgan Chase Bank, N.A. v. Ilardo, 940 N.Y.S.2d 829, 835, 36 Misc. 3d 359, 366 (Sup. Ct. 2012) (noting that the Home Affordable Modification Program is a federal program that aims "to provide relief to borrowers who have defaulted on their mortgage payments or who are likely to default by reducing mortgage payments to sustainable reduced levels, without discharging any of the underlying debt").

conversations with representatives of Nationstar, Deslonde submitted a second application package for loss mitigation in October 2014.

By a letter dated October 9, 2014, Nationstar informed Deslonde that it had received his second application package for loss mitigation but that the documents he had submitted were incomplete. That letter specifically explained:

> "A complete package must be received by Nationstar in order for us to begin the evaluation process. Prior to our receipt of the missing/completed documents, a foreclosure process may be initiated or if the foreclosure has already been initiated, the foreclosure process will continue until all documents are received.
>
> "Once all of the documentation requested above is provided, we will process the information and provide you a written determination of which loss mitigation options may be available to you and, if applicable, of the steps to be taken to accept our offer. If you qualify for loan modification, you will have 14 days from the date of the offer to accept it. *There is no guarantee that you will qualify or receive any loss mitigation options*.
>
> "It is critical that you return a complete set of documents to us no later than 11/8/2014. If all documents are not received by that date, your application will be denied."

(Emphasis and italicized emphasis in original.)

As required, Deslonde submitted a complete set of documents. Nationstar thereafter sent Deslonde a letter of acknowledgment, dated November 11, 2014, as well as a loan-modification agreement that, it claims, was its standard loan-modification agreement:

> "Attached for execution is the Modification Agreement for your loan serviced by [Nationstar]. The Modification Agreement sets forth the future terms of repayment of your loan. ... The specific terms are identified in the Modification Agreement ....
>
> "By executing the Letter of Acknowledgment and the Modification Agreement, you are agreeing to make a qualifying payment of $7,804.04 ('Qualifying Payment') for your Modification Agreement to become effective ...."

(Emphasis added.)

Deslonde signed both the loan-modification agreement and the acknowledgment letter and returned them to Nationstar with the qualifying payment. A representative of Nationstar countersigned the loan-modification agreement (hereinafter referred to as "the executed modification agreement"). Shortly after Deslonde and Nationstar entered into the executed modification agreement, Nationstar assigned the

mortgage to the property to BNYM, but Nationstar remained the servicer on the mortgage.

Under the executed modification agreement, Deslonde made monthly payments sufficient to cover only interest and escrow charges on the loan. The loan-modification period, however, expired in November 2016, at which time the monthly payments reverted to the premodification amount so as to include principal on the loan. After the loan-modification period expired, Deslonde made three additional monthly payments, but he then ceased making payments altogether.

In an attempt to avoid foreclosure, Deslonde filed a complaint against Nationstar and BNYM in the Baldwin Circuit Court ("the trial court"), requesting a temporary restraining order enjoining foreclosure of the mortgage, a judgment declaring the parties' rights under the executed modification agreement, and reformation of the executed modification agreement on the ground of mutual mistake. Deslonde specifically alleged in his complaint that a representative from Nationstar had confirmed that the terms of the executed modification agreement would be the same terms previously offered under the federal program.

In July 2018, the trial court entered a temporary restraining order enjoining foreclosure of the mortgage pending further order of the court. Nationstar and BNYM thereafter filed a motion for a summary judgment pursuant to Rule 56(c), Ala. R. Civ. P., arguing that the plain language of the executed modification agreement controls and that it should be enforced as written. Nationstar and BNYM supported their motion for a summary judgment with, among other things, copies of the executed modification agreement, the acknowledgment letter, and numerous call logs between the parties. There is no dispute that those documents were properly executed, authenticated, and accepted into evidence. In response, Deslonde submitted, pursuant to Rule 56(f), Ala. R. Civ. P., the affidavit of his attorney, representing that, to oppose the motion for a summary judgment, it was essential that discovery be conducted to ascertain the identity of the Nationstar representative who had confirmed that the terms of the executed modification agreement would be the same as the terms previously offered under the federal program.[3] The trial court

[3]Rule 56(f), Ala. R. Civ. P., allows a party opposing a summary-judgment motion to file an affidavit notifying the trial court that

denied the motion for a summary judgment to allow Deslonde the opportunity to conduct discovery to adequately respond to the summary-judgment motion. Following the completion of that discovery, Nationstar and BNYM filed a renewed motion for a summary judgment, which the trial court granted. Deslonde filed a motion to alter, amend, or vacate that judgment, which the trial court denied. This appeal followed.

II. Standard of Review

This Court reviews a summary judgment de novo, and we use the same standard used by the trial court to determine whether the evidence presented to the trial court presents a genuine issue of material fact. Rule 56(c), Ala. R. Civ. P.; Nettles v. Pettway, 306 So. 3d 873 (Ala. 2020). The movant for a summary judgment has the initial burden of producing evidence indicating that there is no genuine issue of material fact and that the movant is entitled to a judgment as a matter of law. Once the movant

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it is presently unable to present "facts essential to justify the party's opposition." It is within the trial court's discretion to either "deny the motion for summary judgment or ... order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had ...." Id.

produces evidence establishing a right to a summary judgment, the burden shifts to the nonmovant to present substantial evidence creating a genuine issue of material fact. We consider all the evidence in the light most favorable to the nonmovant, indulging every reasonable inference and resolving any doubts in the nonmovant's favor. Id.

III. Discussion

On appeal, Deslonde argues that the trial court erred in entering a summary judgment in favor of Nationstar and BNYM because, he says, the executed modification agreement does not reflect the actual, mutual intentions of the parties at the time that modification agreement was executed and, thus, should be reformed. It is well settled in property law that a trial court may exercise its equitable powers to reform a written instrument that, through mutual mistake, does not truly express the intention of the parties. See § 35-4-153, Ala. Code 1975. In Fadalla v. Fadalla, 929 So. 2d 429, 434 (Ala. 2005), this Court explained:

> " 'The general rule in Alabama is that a court may exercise its equitable powers to reform [an instrument] to make it conform to the intention of the parties.' Powell v. Evans, 496 So. 2d 723, 725 (Ala. 1986); Clemons v. Mallett, 445 So. 2d 276, 278 (Ala. 1984). One of the grounds for

> reformation of [an instrument] is mutual mistake of the parties. Long v. Vielle, 549 So. 2d 968, 970-71 (Ala. 1989). A mutual mistake exists when the parties have entered into an agreement, but the [instrument] does not express what the parties intended under the agreement. Daniels v. Johnson, 539 So. 2d 259, 260 (Ala. 1989). In determining whether a mutual mistake exists, '[t]he initial factual question is, of course, what the parties intended the instruments to express at the time they were executed.' Jim Walter Homes, Inc. v. Phifer, 432 So. 2d 1241, 1242 (Ala. 1983) (citing Behan v. Friedman, 218 Ala. 513, 119 So. 20 (1928)). However, the trial court ' "cannot make a new [instrument] for the parties, nor establish that as a[n] [instrument] between them, which it is supposed they would have made, if they had understood the facts." ' 432 So. 2d at 1242 (quoting Holland Blow Stave Co. v. Barclay, 193 Ala. 200, 206, 69 So. 118, 120 (1915))."

Additionally, the party seeking to reform an instrument on the basis of a mutual mistake bears the burden of proving by "clear, convincing, and satisfactory evidence that the intention he seeks to substitute was that of both parties." Beasley v. Mellon Fin. Servs. Corp., 569 So. 2d 389, 394 (Ala. 1990). In other words, reformation of an instrument requires a showing that both parties negotiated terms that are not reflected in the actual instrument and that the instrument should, thus, be changed to properly detail the mutual agreement of the parties.

In support of the summary judgment, Nationstar and BNYM argue that the terms of the current executed agreement are unambiguous and, thus, that it should be enforced as written. We agree. Deslonde does not dispute that the terms expressed in the executed modification agreement are unambiguous; rather, he contends that he "mistakenly" signed that agreement after a representative from Nationstar confirmed that the terms therein were the same as the terms previously offered under the federal program. As indicated, the trial court afforded Deslonde an opportunity to discover the identity of any Nationstar representative that Deslonde claimed was essential to oppose the summary-judgment motion. Deslonde, however, failed to identify the name of any Nationstar representative and, instead, submitted his own affidavit, stating:

> "At the time [Nationstar] requested me to resubmit the loan modification paperwork, we had been working together to negotiate modification terms for several months. No representative of [Nationstar] told me, nor did they suggest, that the second set of loan documents I was submitting differed from the modification documents I had previously submitted. To the contrary, at the time I submitted the second set of loan documents in 2014, one or more representatives of [Nationstar] confirmed to me that the modification terms would be those I expected and had negotiated previously [i.e., the terms of the federal program].

> "In November 2014, [Nationstar] informed me that I 'was approved' for the modification. After learning this, I paid a qualification payment, which [Nationstar] represented would be a component of the modification on the terms set forth [under the federal program]. For these reasons, I was confident that I successfully modified the Loan under the terms I expected and intended."

(Emphasis added.)

Deslonde has failed to satisfy his burden of opposing Nationstar and BNYM's properly supported summary-judgment motion. His affidavit is not only self-serving, but also does not amount to clear and convincing evidence demonstrating that "the intention [Deslonde] seeks to substitute was that of both parties," Beasley, 569 So. 2d at 394 -- i.e., that, by entering into the executed modification agreement, the parties mutually agreed to be bound by the terms originally offered under the federal program. Specifically, the affidavit fails to state any essential facts that would present a genuine issue of material fact necessitating a trial; for example, it does not state the name of the representative who allegedly confirmed that the terms of the executed modification agreement would be the same as the terms under the federal program, it does not provide

the dates or times that Deslonde spoke with any Nationstar representative, and it does not cite to any of the numerous call logs to indicate that such a conversation ever occurred. In short, Deslonde has failed to show that Nationstar intended any agreement other than the one expressed in the executed modification agreement. The terms expressed in the executed modification agreement were clearly different from those offered under the federal program; for example, among other things, the monthly payment amounts were different and, unlike the terms offered under the federal program, the executed modification agreement required a qualifying payment of $7,804.04.[4] Simply put, it appears that the terms offered under the federal program were merely part of a trial plan, not an agreement binding the parties going forward. Deslonde acknowledged that much by signing the second application for loss mitigation, which stated that Nationstar "will use the information I provide to evaluate my eligibility for available relief options and foreclosure alternatives." (Emphasis added.) Nationstar and BNYM's properly supported summary-

[4]The executed modification agreement included in the record is, for the most part, illegible.

judgment motion clearly refuted Deslonde's assertions and established that any misunderstanding in this case resulted solely from Deslonde's mistake in failing to read the executed modification agreement, which clearly outlined the "future terms" for repayment of his loan. A unilateral mistake, however, is legally insufficient to invoke a court's equitable powers to reform an instrument. Therefore, rewriting the executed modification agreement to reflect the terms that Deslonde "expected and intended" cannot be deemed a mutually agreeable resolution to this matter. Accordingly, the trial court did not err in entering a summary judgment in favor of Nationstar and BNYM.

IV. Conclusion

The summary judgment entered in favor of Nationstar and BNYM is affirmed.

AFFIRMED.

Bolin, Wise, and Stewart, JJ., concur.

Parker, C.J., concurs in the result.