

ACCELERATION NOTICES—WHETHER HOLDER OF A NOTE GAVE PROPER NOTICE TO MAKER OF HOLDER’S INTENT TO ACCELERATE

By Brad Ratliff *

Mathis v. DCR Mortg. III Sub I, L.L.C., 389 S.W.3d 494 (Tex. App.—El Paso 2012, no pet. h.).

In the case of *Mathis v. DCR Mortg. III Sub I, L.L.C.*,¹ the El Paso Court of Appeals shed light on the particularities involved in creating a valid waiver of notice of the holder’s intent to accelerate and notice of acceleration.² The language in the note was a clear and unequivocal waiver of both, but the deed of trust required notice of default and a cure period. The court held that the documents read together were ambiguous, so the waivers were ineffective and so was the acceleration. The El Paso Court of Appeals’ opinion is significant because it addresses the issue concerning the risk of inconsistent document language on waivers of notice and intent to accelerate and of notice of acceleration.

In March of 2000, Lawrence Mathis signed a promissory note in connection with his purchase of a roughly 20,000 square foot building in Austin, Texas.³ Mathis arranged for financing through Norwest Bank, N.A., an institutional lender (first lien holder), for approximately 50% of the purchase price.⁴ Additionally, Mathis found second lien financing through CenTex Certified Development Corporation (“CDC”) for approximately 40% of the purchase price.⁵ Mathis provided the remaining 10% of the purchase price with a down payment.⁶

The note in question was made payable to first lien holder, Norwest Bank, N.A. and secured by a deed of trust.⁷ The original principal sum of the note was \$440,000.⁸ DCR Mortgage III Sub I, L.L.C. (“DCR”), current owner and holder, acquired the note and deed in 2006.⁹ Under the terms of the note, Mathis was to make payments of principal plus interest over a twenty year term.¹⁰ The note had an acceleration provision that gave the holder a discretionary right to accelerate the maturity of all debt owed by Mathis.¹¹ Specifically, the acceleration provision gave the holder the right to accelerate in the event that “[Mathis/Makers] fail[s] to make timely any payment required by this Note or to perform

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¹ 389 S.W.3d 494 (Tex. App.—El Paso 2012, no pet. h.).

² *Id.*

³ *Id.* at 497.

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Id.* at 498.

¹⁰ *Id.* at 497.

¹¹ *Id.* at 498.

timely any other obligation owed to Holder”¹²

Furthermore, the note also contained a waiver of notice provision in connection with any potential acceleration:

Each of Makers, each guarantor of any of the Indebtedness, and each person who grants any lien or security interest to secure payment of any of the Indebtedness, (i) except as expressly provided herein, waives all notices (including, without limitation, notice of intent to accelerate, notice of acceleration and notice of dishonor), demands for payment, presentment, protest and diligence in bringing suit and in the handling of any security;. . . .¹³

However, the deed of trust had the following language concerning potential default and acceleration:

5. If Grantor defaults on the note or fails to perform any of Grantor’s obligations or if default occurs on a prior lien note or other instrument, and the default continues after Beneficiary gives Grantor notice of the default and the time within which it must be cured, as may be required by law or by written agreement, then Beneficiary may:

- a) declare the unpaid principal balance and earned interest on the note immediately due.¹⁴

After DCR acquired the Mathis note around September 15, 2006, Mathis was still several months behind on payments.¹⁵ Throughout 2007 and 2008 Mathis made several installment payments which were accepted by DCR.¹⁶ In 2007, Mathis entered into a sales contract to sell the property secured under the note but the deal collapsed because Mathis was not pleased with negotiations.¹⁷ However, in the third or fourth quarter of 2008, the partners of DCR decided that the company would no longer accept monthly payments from Mathis and that it would proceed with foreclosure.¹⁸ A DCR representative acknowledged that he did not tell Mathis that DCR would no longer accept monthly payments.¹⁹

On February 25, 2009, Mathis attempted to bring the note current and mailed a check for three installment payments.²⁰ These payments were eventually rejected by DCR.²¹ According

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.* at 499.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.* at 500.

²¹ *Id.* at 501.

to Mathis, he was completely unaware any acceleration on the note had occurred.²² On April 10, 2009, an attorney appointed by DCR signed a foreclosure notice stating that a foreclosure sale was to take place on May 5, 2009.²³ A representative from DCR sent a letter to Mathis indicating that the note had been accelerated by an “Acceleration Notice” sent on February 19, 2007.²⁴ Mathis’s attorney requested documentation evidencing an acceleration but neither the appointed attorney nor a representative from DCR responded to the request.²⁵

On April 29, 2009 Mathis filed a declaratory judgment with regard to the parties’ rights under the note and sought a temporary injunction to enjoin DCR from going forward with the foreclosure sale.²⁶ The trial court issued an order that conditionally granted Mathis’s request.²⁷ On March 2, 2010, the trial court held a hearing on the matter and rendered judgment in favor of DCR.²⁸ The trial court found that the note had been accelerated and DCR was entitled to foreclose the deed of trust lien.²⁹ Upon request by Mathis, the trial court filed Findings of Fact and Conclusions of Law.³⁰ Mathis filed an appeal challenging the legal and factual sufficiency of the evidence to support the trial court’s findings of fact and law.³¹

The court of appeals started its analysis by stating that “[i]t is clear that the holder of a note must ordinarily give notice to the maker of the holder’s intent to accelerate the time for payment as well as notice of acceleration.”³² Next, the court outlined the principle that the maker may waive his right to notice of intent to accelerate and notice of acceleration.³³ Further, the court reiterated that the waivers are effective if they are contained in either a note or a deed of trust.³⁴ Most importantly, the court belabored the point that regardless of its location, the waiver of notice must be “clear and unequivocal.”³⁵

Mathis acknowledged that the waiver provision in the note was sufficient to show a clear and unequivocal intent to waive.³⁶ Nevertheless, Mathis’s argument on appeal is that when the promissory note and deed of trust are read together as a single instrument, they do not indicate a “clear and unequivocal waiver of the maker’s right to receive notice of the holder’s intent to

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.* The trial court’s temporary injunction ordered that Mathis pay the tax loans. However, it did condition the continued effectiveness of the temporary injunction after August 3, 2009 upon the tax loans’ being paid on or before that date. The tax loans were paid and the liens securing them released before August 3, 2009.

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.* at 502.

³¹ *Id.* at 504.

³² *Id.* at 505 (citing *Shumway v. Horizon Credit Corp.*, 801 S.W.2d 890 (Tex. 1991)).

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

accelerate maturity of the note.”³⁷ Mathis relied on a provision in the deed of trust which required notice to be given prior to acceleration.³⁸

Mathis, in support of his argument, depended heavily on the case of *Dolci v. Askew*,³⁹ where the San Antonio Court of Appeals’ encountered a similar fact scenario: clear waiver language in the note coupled with inconsistent language elsewhere.⁴⁰ The San Antonio Court of Appeals’ focused on reading the note as a whole in determining that the waiver was ineffective.⁴¹ The court reasoned that the inconsistent language did not resolve all ambiguity regarding the waiver.⁴²

The court found Mathis’s argument consistent with prior case law and basic construction principles.⁴³ The court determined that the note and deed of trust must be read together “because they were executed by the same parties on the same day, they pertain to the same real property, each document references the other, and the deed of trust is identified as the security for the note.”⁴⁴ Further, the court reiterated the principle that acceleration is not favored in the law and is considered as a harsh remedy.⁴⁵ Therefore, the court applied strict scrutiny to the acceleration provision and “if any reasonable doubt exists as to the parties’ intent, we resolve such doubt against acceleration.”⁴⁶ Also, the court propounded the idea that its primary duty in construing an instrument is to ascertain the parties’ intent.⁴⁷ Applying these principles, the court held that the waiver was ineffective because the deed of trust casted doubt on whether the parties clearly and unequivocally intended to waive notice of default and time to cure.⁴⁸

In conclusion, ambiguous language within a legal instrument or in different instruments within the same transaction may lead to litigation. Here, the El Paso Court of Appeals’ decision is significant because it addresses this issue in relation to drafting an effective waiver of notice of intent to accelerate. *Mathis* serves as a reminder to carefully draft the waiver provisions in a consistent manner across all documents involved in the transaction.

³⁷ *Id.*

³⁸ *Id.*

³⁹ No. 04-95-00867-CV, 1997 WL 428560, at *2 (Tex. App.—San Antonio July 30, 1997, no pet.) (mem. op., not designated for publication).

⁴⁰ *Mathis*, 389 S.W.3d at 506.

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.* at 507.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*