SIXTH DISTRICT COURT OF APPEAL
STATE OF FLORIDA

Case No. 6D23-401
Lower Tribunal No. 18-CA-5460

CAPE CORAL LOAN ACQUISITIONS, LLC,

Appellant,

v.

924 DEL PRADO, LLC, and DIPLOMAT PARKWAY, LLC,

Appellees.

Appeal from the Circuit Court for Lee County.
James R. Shenko, Judge.

October 6, 2023

WOZNIAK, J.

Cape Coral Loan Acquisitions, LLC ("Cape Coral") appeals the summary judgment entered in favor of 924 Del Prado, LLC ("Del Prado") and Diplomat Parkway, LLC ("Diplomat").[1] The trial court held that Cape Coral's foreclosure claims were barred by the statute of limitations, finding that Del Prado and Diplomat did not waive their right to assert the defense in a prior settlement agreement. We reverse and remand for further proceedings.

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[1] This case was transferred from the Second District Court of Appeal to this Court on January 1, 2023.

In 2006, Del Prado and Diplomat obtained mortgage loans from Fifth Third Bank for the purchase and development of real property. Over the years, the mortgages were modified, cross-collateralized, and then sold to Cape Coral. After Cape Coral acquired the loans, Del Prado and Diplomat defaulted by declining to make payments. On May 26, 2013, the parties executed a settlement agreement, seeking to resolve certain "rights, duties and obligations relating to the [Del Prado] loan . . . [and] the Diplomat loan[.]" That agreement included the following provision:

> **18. <u>No Assertion of Defenses</u>**. So long as this Agreement is in effect and there has been no default by [Cape Coral] under this Agreement, then during any action to enforce the Loan Documents pursuant to this Agreement, [Del Prado, Diplomat,] each Guarantor, and each Tenant acknowledges and agrees that [Del Prado, Diplomat,] Guarantors, and Tenants *shall not assert any defenses of any nature whatsoever* under the Loan Documents or *to [Cape Coral]'s enforcement of any or all of the Loan Documents*, and [Del Prado, Diplomat], Guarantors, and Tenants shall not make any claim or counterclaim against [Cape Coral], including but not limited to the assertion of any offsets against [Cape Coral] in respect of the loan, or which could be asserted against [Cape Coral] by reason of any act, conduct or omission of [Cape Coral], arising or occurring prior to the date of this Agreement.

(Emphasis added).

On November 8, 2018, Cape Coral, having not received payment pursuant to the settlement agreement or the original loan documents, brought an action to foreclose on the mortgaged properties. Despite the waiver of defenses in section 18

of the settlement agreement, Del Prado and Diplomat moved for summary judgment, arguing that Cape Coral's claims were barred by the five-year statute of limitations under section 95.11, Florida Statutes (2018). Cape Coral responded that Diplomat and Del Prado waived their right to assert defenses to the foreclosure proceedings pursuant to section 18 of the settlement agreement. The trial court granted summary judgment in favor of Del Prado and Diplomat, and this appeal followed.

We review orders granting summary judgment and issues involving contract interpretation de novo. *Brevard Cnty. v. Waters Mark Dev. Enters., LC*, 350 So. 3d 395, 399 (Fla. 5th DCA 2022). "The cardinal rule of contractual construction is that when the language of the contract is clear and unambiguous, the contract must be interpreted and enforced in accordance with its plain meaning." *Columbia Bank v. Columbia Devs., LLC*, 127 So. 3d 670, 673 (Fla. 1st DCA 2013).

The settlement agreement states plainly that Del Prado and Diplomat "shall not assert any defenses of any nature whatsoever . . . to [Cape Coral]'s enforcement of any or all of the Loan Documents[.]" In spite of this language, Del Prado and Diplomat asserted that Cape Coral's claims were barred by the statute of limitations. This they could not do. The statute of limitations is an affirmative defense. Fla. R. Civ. P. 1.110(d). It is intended to "encourage the enforcement of legal remedies[.]" *Arvelo v. Park Fin. of Broward, Inc.* 15 So. 3d 660, 663 (Fla. 3d DCA 2009); *see also Midland Funding, LLC v. Johnson*, 581 U.S. 224, 230 (2017) ("[T]he law has

long treated unenforceability of a claim (due to the expiration of the limitations period) as an affirmative defense."). To allow the assertion of such a defense would contradict the explicit terms of the settlement agreement to which the parties agreed. *See Scarborough Assocs. v. Fin. Fed. Sav. & Loan Ass'n of Dade Cnty.*, 647 So. 2d 1001, 1003–04 (Fla. 3d DCA 1994) (holding that parties' modification agreement "clearly waived" the defense and counterclaim and to now permit their assertion would "frustrate the explicit terms" of that agreement).[2]

Accordingly, we reverse the order granting summary judgment and remand for further proceedings consistent with this opinion.

REVERSED and REMANDED.

STARGEL and WHITE, JJ., concur.

Michael M. Brownlee, of The Brownlee Law Firm, P.A., Orlando, for Appellant.

Darol H.M. Carr, of Farr, Farr, Emerich, Hackett, Carr and Holmes, P.A., Punta Gorda, for Appellees.

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF TIMELY FILED

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[2] Given the procedural posture of this case, we determine only whether the statute of limitations defense is waived under the plain meaning of the specific language in section 18 of the settlement agreement. We do not address any other claims or defenses, and we do not preclude Del Prado or Diplomat from denying the allegations of Cape Coral's claim or raising any other claims or defenses on remand.