NOT DESIGNATED FOR PUBLICATION

No. 125,342

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STEVEN WARNER,
Appellee,

v.

KEITH RICHARD ELFTMAN, et al.,
Appellants.

MEMORANDUM OPINION

Appeal from Sedgwick District Court; WILLIAM S. WOOLLEY, judge. Opinion filed June 16, 2023. Affirmed.

Kenneth H. Jack, of Davis & Jack, L.L.C., of Wichita, for appellants.

Beverly M. Weber, of Armstrong Teasdale LLP, of Kansas City, Missouri, for appellee.

Before CLINE, P.J., MALONE and ATCHESON, JJ.

PER CURIAM: Steven Warner sued Keith and Brenda Elftman in 2021 to collect unpaid amounts owed under a promissory note secured by a mortgage. The Elftmans contended most of Warner's claim was barred by the five-year statute of limitations that applies to written instruments like promissory notes since they stopped paying the monthly installments due under the note in 2003.

The district court granted summary judgment to Warner. It found Warner's suit was timely filed because it determined the statute of limitations for the entire debt began to run upon the note's maturity in 2017. We see no error and affirm the court's decision.

The Elftmans' promissory note

In May 1997, the Elftmans took out a second mortgage on their home, secured by an interest-bearing promissory note for a principal sum of $22,000. The note required the Elftmans to make monthly installment payments over a 20-year period. It also provided that if the Elftmans still owed any amounts under the note on May 14, 2017, they would pay all those amounts, in full, on that date (the "maturity date"). The note allowed—but did not require—the lender to demand immediate payment of the outstanding balance if the Elftmans missed a payment (known as "acceleration").

The Elftmans timely paid the note for several years but eventually began to miss payments. They made their last payment on May 15, 2003, and petitioned for Chapter 7 bankruptcy in July 2003. As a result of the bankruptcy proceedings, the Elftmans' personal liability under the note was discharged.

The lender's lawsuit to collect on the note

Many years passed without any action on the Elftmans' ongoing default. Eventually, Warner bought the note and mortgage. In February 2021, he sued the Elftmans, asking for an "in rem" judgment of foreclosure. An in rem judgment allows for the property secured by the mortgage to be sold and the proceeds used to pay off debt owed under the note. Since the Elftmans had discharged their personal liability under the note through bankruptcy, Warner could not sue them to recover any deficiency balance remaining on the note after application of the sale proceeds (known as an "in personam" judgment).

Warner eventually moved for summary judgment, claiming the Elftmans owed $77,601.79 in unpaid principal, interest, and other fees at that time. In response, the Elftmans disputed the amount of proceeds Warner could collect from the sale. They argued the five-year statute of limitations under K.S.A. 60-511(1)—the limitations period for contracts and written agreements—barred most of his claim.

The Elftmans alleged Warner could only enforce those payments due within the five-year window before he filed suit because they contended each missed installment payment triggered a separate statute of limitations period. That is, they argued Warner (along with his predecessors in interest, which we collectively refer to as the lender) had five years from each missed payment to file an action to enforce that payment or the lender would lose the ability to collect it. As a result, they contended only the last 15 installment payments due under the note, totaling $4,101.15, were collectible.

The district court granted summary judgment for Warner and ordered the property to be sold at a sheriff's sale. Because the lender never accelerated the debt upon the Elftmans' payment default, the court found the statute of limitations ran from the note's maturity date. The court concluded Warner was allowed to collect the full outstanding balance owed under the note, which had grown to $101,220.85 at the time judgment was entered, from the sale proceeds.

While the litigation was ongoing, Brenda passed away. The district court substituted Keith to represent her interest, as the administrator of her estate.

The sole issue on appeal is the commencement date of the statute of limitations.

Everyone agrees the statute of limitations on Warner's claim is five years under K.S.A. 60-511(1). The question is when did this limitation period begin to run.

Determining whether a plaintiff's action is time-barred under the applicable statute of limitations is a question of law over which appellate courts exercise unlimited review. *Garcia v. Ball*, 303 Kan. 560, 571, 363 P.3d 399 (2015). Similarly, when no facts are in dispute, determining whether the district court properly granted summary judgment also constitutes a question of law subject to unlimited review. *Becker v. The Bar Plan Mut. Ins. Co.*, 308 Kan. 1307, 1312, 429 P.3d 212 (2018).

Keith argues the district court erred in holding the statute of limitations ran from the note's maturity date. He points to the general rule cited in *Sharp v. Sharp*, 154 Kan. 175, 177, 117 P.2d 561 (1941), which provides the statute of limitations period on installment obligations begins running from the time each individual installment payment becomes due. As a result, he alleges Warner is barred from recovering installment payments due more than five years before he filed suit.

Warner argues *Sharp*'s general rule does not apply because the note provided any outstanding balance was due in full on May 14, 2017. Warner points out that *Sharp* did not involve a promissory note with an acceleration clause and maturity date but addressed a debt stemming from a father's failure to pay monthly child expenses to a mother under a divorce decree. Since the lender never accelerated the Elftmans' debt, Warner argues the statute of limitations accrued for all missed payments upon maturity of the note.

The long-standing rule in Kansas runs the statute of limitations from maturity.

Warner has the better argument. While the rule in *Sharp* may apply to installment debts generally, it is inapplicable here. The law in Kansas has long held the statute of limitations to collect on promissory notes begins to run at the note's maturity date unless the debt has been accelerated, either automatically under the note or by the lender's exercise of its option to accelerate. *FGB Realty Advisors, Inc. v. Keller*, 22 Kan. App. 2d 853, 854, 923 P.2d 520 (1996) ("If the [acceleration] clause provides that the entire debt becomes due on the failure to make payments, the statute of limitations begins to run with the default.") (citing *Miles v. Hamilton*, 106 Kan. 804, 806, 189 P. 926 [1920]); see also *Kennedy v. Gibson*, 68 Kan. 612, 617, 75 P. 1044 (1904) (if the holder of the note elects not to exercise an option to accelerate upon default, the statute of limitations "would not run earlier than the time originally fixed for the maturity of the note"). As Warner notes, we recently reiterated this rule in *Wilmington Savings Fund Society v. Holverson*, 60 Kan. App. 2d 142, 150, 492 P.3d 492 (2021).

Keith attempts to distinguish *FGB Realty Advisors* and *Wilmington Savings Fund Society* by noting those borrowers argued none of their delinquent payments could be collected, while Keith is only claiming the delinquent payments due more than five years before suit are uncollectable. Keith also alleges *FGB Realty Advisors* is inapplicable because the cases on which it relied involved a lump sum note. But these distinctions make no difference. The rule cited in *FGB Realty Advisors* and *Wilmington Savings Fund* does not depend on how many payments are being enforced or how the note was to be repaid. Its bedrock principal is that the statute of limitations runs at the date of maturity. If that date is automatically or optionally accelerated, then the limitations period runs from the accelerated maturity date; if that date is not accelerated, then the limitations period runs from the maturity date stated in the note.

Furthermore, the rule has been applied to installment notes, not just lump sum notes as Keith alleges. For instance, in *South Central Kansas Economic Dev. Dist., Inc. v. Air Cap Truck Plaza, Inc.*, No. 74,797, 1997 WL 35436012 (Kan. App. 1997) (unpublished opinion), we applied the rule where a debtor defaulted in making installment payments on a renewal mortgage note. The guarantors claimed the statute of limitations under K.S.A. 60-511(1) accrued upon the borrower's failure to make a timely installment payment, making the lender's lawsuit untimely and barring recovery from the guarantors. Relying on the rule cited in *FGB Realty Advisors*, we concluded the lawsuit was timely since the lender had not exercised its option to accelerate and the lawsuit was filed within five years of the maturity date of the renewal note. *South Central Kansas Economic Dev. Dist., Inc.*, 1997 WL 35436012, at *2; see also *Smith v. Smith*, No. 81,267, 2000 WL 36745877, at *3 (Kan. App. 2000) (unpublished opinion) (statute of limitations ran from maturity date of a commercial note which required installment interest payments and a final principal payment because lender did not exercise its option to accelerate); *In re White*, Bankruptcy No. 10-12804, 2012 WL 404927, at *7-8 (Bankr. D. Kan. 2012) (unpublished opinion) (citing the rule in holding a mortgage foreclosure action filed more than five years after the debtors missed a monthly installment payment was timely filed because the lender did not accelerate the debt until several years later).

Keith's legal citations are neither controlling nor persuasive.

Keith cites several cases from other jurisdictions in support of his claim that the statute of limitations applied to each payment as it came due regardless of the note's acceleration clause. He claims these jurisdictions follow the general rule in *Sharp*. See *United States v. Dos Cabezas Corp.*, 995 F.2d 1486, 1490 (9th Cir. 1993); *Navy Federal Credit Union v. Jones*, 187 Ariz. 493, 494, 930 P.2d 1007 (Ariz. Ct. App. 1996); *Toomey v. Cammack*, 345 A.2d 453, 455 (D.C. 1975); *Central Home Trust Co. of Elizabeth v. Lippincott*, 392 So. 2d 931, 933 (Fla. Dist. Ct. App. 1980); *Farmers & Merchants Bank v. Templeton*, 646 S.W.2d 920, 923 (Tenn. Ct. App. 1982). But these sources do not advance his cause nor are they controlling.

To begin, Florida courts have since retreated from the position stated in *Central Home Trust Co. of Elizabeth* and now follow the rule as stated in *FGB Realty Advisors*. See *Bank of America, N.A. v. Graybush*, 253 So. 3d 1188, 1193-94 (Fla. Dist. Ct. App. 2018); see also *Grant v. Citizens Bank, N.A.*, 263 So. 3d 156, 157 n.1 (Fla. Dist. Ct. App. 2018) (en banc) (adopting same position as *Graybush*). Next, none of Keith's cases address the concept of a maturity date or clause in any detail or how a maturity date interacts with the general rule applicable to promissory notes that are to be repaid in installments. The only case that mentions a maturity clause is *Toomey*, but the *Toomey* court distinguished that clause from the type we have here. The three notes in *Toomey* were "balloon" notes, meaning the amount of their monthly installments was too low to pay the entire obligation during their lifetime, thus requiring one final, larger payment to satisfy the debt. And the notes allowed the borrower the option of making larger monthly payments "'in any amount.'" 345 A.2d at 455. Thus, the *Toomey* court interpreted the maturity dates in those notes to reference the portion of the final "balloon" payment which might remain unpaid at the end of the life of those notes rather than the entire obligation. The Elftmans' note was not a balloon note.

Keith also cites Corpus Juris Secundum for the following rule:

> "Where the debt is payable in installments and the instrument contains an automatic acceleration clause, the debt is fully matured and the statute of limitations begins running when the debtor first defaults. However, if the acceleration clause in a debt payable in installments is optional, a cause of action as to future nondelinquent installments does not accrue until the creditor chooses to take advantage of the clause and accelerate the balance. Unless the creditor exercises the option, the statute of limitations applies to each installment separately, and does not begin to run on any installment until it is due, and the entire debt does not mature for the purpose of the statute of limitations until the last installment is due and unpaid." 54 C.J.S., Limitations of Actions § 208.

But that rule does not mean what Keith thinks it means. While Keith argues the fragment stating that "the statute of limitations applies to each installment separately" means the statute of limitations barred Warner's claim, he takes this language out of context. This sentence merely recognizes that if the maturity date of the debt is not accelerated, then no claim accrues on future installments until those installments become due. That is, the lender can only sue on defaulted installments and would have to file separate lawsuits each time a borrower defaults on future installments (or amend its lawsuit to add each claim as it accrues). But if the debt is accelerated—either automatically or at the lender's option—then the lender can file one lawsuit to collect the entire debt at once.

The scope of the maturity clause

In his reply brief, Keith tries to avoid application of the rule by arguing that the maturity clause does not apply to outstanding amounts owed for principal and interest but established a final due date for other payment obligations under the note, such as real estate tax reporting services and house repair costs expended by the lender. But we do not read this clause so narrowly. The clause states:

> I will make my monthly payments on the 14th day of each month beginning on June 14th, 1997. I will make these payments every month until I have paid all of the principal and interest and any other charges, described below, that I may owe under this Note. If, on May 14th, 2017, I still owe amounts under this Note, I will pay all of those amounts, in full, on that date. Payments will be applied to interest before principal.

The maturity date plainly applies to all payment amounts owed under the note.

While we did not discuss the purpose behind the rule in *FGB Realty Advisors*, other jurisdictions that follow this same rule have explained it is grounded in the maxim that guides our interpretation of contracts—which is that we must respect the parties' intent as expressed in the language of their contract. *Castle Rock Bank v. Team Transit, LLC*, 292 P.3d 1077, 1081, 1087-88 (Colo. Ct. App. 2012); *Bank of America*, 253 So. 3d at 1194-95.

The parties here agreed in the note—their contract—on (1) the date on which any outstanding amounts owed under the note were due in full and (2) the circumstances under which that date could change. Because the maturity date for the debt was never accelerated, the outstanding balance on the note remained due on the original maturity date. See *Castle Rock Bank*, 292 P.3d at 1087-88 (concluding "a debt on a promissory note 'becomes due' on the note's 'maturity date'"). Not only was the parties' language broad enough to include principal and interest payments, but they concluded the maturity clause by specifying payments would be applied to interest before principal.

Construing the language of this maturity clause to include installment payments also aligns with the purpose behind the rule that runs the limitations period from the date of maturity discussed in *Anton A. Vreede, M.D., P.C. v. Koch*, 94 N.C. App. 524, 380 S.E.2d 615 (1989). There, the North Carolina Court of Appeals explained the rule recognizes that the right to receive advance partial payments or performance is provided for the lender's benefit, and the lender can opt to surrender this right and continue the contract despite the breach. 94 N.C. App. at 529-30 (citing 18 Williston, Contracts §§ 2028, pp. 811-12 [3d ed. 1978]). We agree that we should not stifle the flexibility of performance which the parties contracted for and penalize a lender by barring it from recovering the unpaid balance of the debt because it elected to wait to see whether the borrowers could fulfill their obligation in the future. 94 N.C. App. at 529.

The application of K.S.A. 60-520(a)

Finally, Keith alleges the district court's ruling that the statute of limitations on Warner's claim had not run conflicts with the rule in K.S.A. 60-520(a), which provides that a debtor's payment on an existing debt resets the period for the running of the statute of limitations on that debt. He cites two collection letters sent by a prior holder of the note, which he baldly alleges were sent to induce the Elftmans to make a payment to reset the statute of limitations under K.S.A. 60-520(a). He accuses the lender of sending the letters because it "understood that unless it could induce the Elftmans to make a payment, the Note's 132 monthly payments would remain barred by K.S.A. 60-511(1)." Yet he cites no support for his argument nor did he include any record citation to establish that he raised it before the district court.

We agree with Warner that Keith did not raise this issue before now or explain why we can consider it, so it is thus unpreserved. Supreme Court Rule 6.02(a)(5) (2023 Kan. S. Ct. R. at 36). When he mentioned the collection letters below it was only in the context of his accusation that those letters violated the bankruptcy discharge. He never mentioned that they implicated K.S.A. 60-520(a) or that this statute impacted the commencement of the statute of limitations. And even if we considered his argument, we fail to see a conflict between the rule that the statute of limitations runs at the note's maturity and the rule in K.S.A. 60-520(a) describing the circumstances under which an expired limitations period can be reset.

Conclusion

We conclude, under the circumstances of this case, including the express terms of the promissory note here, that the statute of limitations began running on the date when the Elftmans had to pay all amounts still owed under the note. We thus agree with the district court that no part of Warner's claim is time-barred.

Affirmed.