

7/1/97

IN THE COURT OF APPEALS

OF THE

STATE OF MISSISSIPPI

NO. 94-CA-00335 COA

*SHERRA NELL LEE SMITH*

*APPELLANT*

v.

*STAR SERVICES, INC. OF DELAWARE, A DELAWARE CORPORATION*

*APPELLEE*

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND

MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

TRIAL JUDGE: HON. WILLIAM ROBERT TAYLOR, JR.

COURT FROM WHICH APPEALED: PEARL RIVER COUNTY CHANCERY COURT

ATTORNEY FOR APPELLANT:

DELOS H. BURKS

ATTORNEY FOR APPELLEE:

MILTON A. SCHLESINGER

NATURE OF THE CASE: CIVIL -- JUDICIAL ACTION TO FORECLOSE ON DEED OF TRUST ENCUMBERING APPELLANT'S REALTY

TRIAL COURT DISPOSITION: ENTERED JUDGMENT AUTHORIZING APPELLEE TO FORECLOSE DEED OF TRUST ENCUMBERING APPELLANT'S REALTY

MANDATE ISSUED: 7/22/97

BEFORE THOMAS, P.J., COLEMAN, AND SOUTHWICK, JJ.

COLEMAN, J., FOR THE COURT:

The Chancery Court entered its final judgment by which it authorized Star Services, Inc. of Delaware (Star Services) to foreclose on a deed of trust which Sherra Nell Lee Smith (Ms. Smith) and her first husband, Vernon R. Lee, had executed to secure a debt which they owed Miles Homes of Mississippi, Inc. (Miles Homes). The Lees owed Miles Homes for material to be used in the construction of their home on their lot in Carriere, Pearl River County. Ms. Smith appeals from this final judgment to argue that the chancellor erred when he entered this final judgment because Star Services' right to foreclose was barred by one or more statutes of limitation. We reverse the final judgment of foreclosure.

## I. Facts

Star Services and Ms. Lee's agreed stipulations of facts facilitate our recitation of the facts in this case. Because the issue on which the chancellor resolved this case was whether certain statutes of limitation barred Star Services' complaint for foreclosure, chronology orders the sequence of our recitation of these facts.

On December 31, 1976, Vernon R. Lee and Sherra N. Lee, husband and wife, executed a retail installment contract (contract) for the benefit of Miles Homes in the amount of \$21,104.30. The subject of this contract was certain material which Miles Homes was to sell to the Lees for the construction of their new home to be built on their lot located in what is now Carriere in Pearl River County. The contract obligated the Lees to pay thirty four monthly payments of \$139.00 each beginning June 1, 1977, and continuing until March 2, 1980, when a balloon balance of \$16,378.30 would then become due and payable to Miles Homes. The Appellee, Star Services, became the ultimate successor to Miles Homes through a series of assignments of the note and deed of trust, mergers of successors in interest, and finally a name change of the final successor to Star Services, Inc. of Delaware.

On April, 6, 1977, the Lees executed and delivered a deed of trust which encumbered their homestead to B. B. McClendon, Jr., as trustee for the benefit of Miles Homes Division of Insilco Corporation, to secure the Lees' debt of \$21,104.30 owed Mississippi Homes by virtue of the retail installment contract dated December 31, 1976. This deed of trust described the debt of \$21,104.30 "as evidenced by that certain contract dated December 31, 1976, and payable according to its terms." The due date for the payment of the balance of the debt, March 2, 1980, was omitted from the text of this deed of trust.

On October 28, 1985, preparatory to their filing their complaint in the Pearl River County Chancery Court to obtain a divorce on the grounds of irreconcilable differences, the Lees executed their child custody, support, money and property settlement agreement (settlement agreement). The Lees' settlement agreement contained the following provision:

2. It is further understood and agreed that the parties jointly own a residence and one acre of land in Carriere, Pearl River County, Mississippi, and [h]usband agrees to convey unto [w]ife all of his right, title and interest in said residence and property, and *[w]ife agrees to assume all payments due to Miles Homes Division of Insilco Corporation*, and any and all other indebtedness due thereon, and [w]ife agrees to hold and save harmless and protect against loss and indemnify the [h]usband from any and all claims, losses, or demands that may be asserted by anyone growing out of, related to, or

in anyway connected with any action, activity, or event concerning the aforesaid debt due and owing on the said residence and property.

(Emphasis added.)

On this same date, October 28, 1985, Vernon R. Lee, Sr., executed and delivered an assumption warranty deed to the Appellant, Sherra P. Lee, by which he conveyed to her their former homestead in accordance with the previously quoted terms of the settlement agreement. This deed included the following language:

For and in consideration of the sum of TEN DOLLARS (\$10.00) cash in hand paid, and other good and valuable considerations, *a part of which is the assumption by the grantee herein [Sherra Lee] of the payment of the balance of an indebtedness due and owing unto [Miles Homes] . . . , which said indebtedness is secured by a deed of trust dated April 6, 1977, filed April 15, 1977, and recorded in Book 288, pages 57-58, Land Trust Deed Records of Pearl River County, Mississippi, I, VERNON R. LEE, have this day sold and by these presents do hereby grant, bargain, sell, convey and warrant unto SHERRA P. LEE the following described real property lying and being situated in Pearl River County, Mississippi, to-wit:*

(Emphasis added.) Sherra N. Lee and Sherra P. Lee are one and the same person.

On November 1, 1985, the Lees filed their petition for divorce along with their settlement agreement in the Pearl River County Chancery Court.

On January 3, 1986, that court rendered and entered its final judgment of divorce, in which it adjudicated and ordered that the settlement agreement be "ratified, confirmed and approved, and made a part of this Final Judgment of Divorce."

On October 9, 1986, Sherra Lee Smith and David Allen Smith, whom she married after her divorce from Vernon Ray Lee, executed and delivered a quitclaim deed to themselves "as joint tenants with full rights of survivorship and not as tenants in common," to what had been the Lee homestead but what came to belong exclusively to Sherra Lee Smith after her divorce from Vernon Ray Lee pursuant to their settlement agreement.

The next day, October 10, 1986, David Allen and Sherra Lee Smith executed and delivered a land deed of trust to Lonnie Smith as trustee for First National Bank of Picayune (First National) to secure a debt in the principal amount of \$10,000.00 which the Smiths owed First National. This land deed of trust recited that the Smiths were to repay this debt in "180 payments of \$126.81 including interest due each month beginning on 11/15/86 and continuing on the same day on the month thereafter until paid in full."

On January 23, 1987, to correct an error in the description of the land that the original assumption warranty deed contained, Vernon R. Lee executed and delivered a corrected assumption warranty deed to his former wife, "Sherra P. Lee." This corrected assumption warranty deed contained the same language of assumption recited in the original assumption warranty deed which Vernon R. Lee executed on October 28, 1985.

On February 6, 1987, David Allen and Sherra Palmer Smith executed and delivered a corrected

quitclaim deed to themselves as joint tenants, and on June 18, 1987, the Smiths executed and delivered a corrected deed of trust to Lonnie Smith as trustee for First National to secure the identical debt of \$10,000 described in the first deed of trust.

## II. Litigation

On September 19, 1989, Star Services filed its complaint for judicial foreclosure in the Pearl River County Chancery Court against both Lees, First National, and its trustee, Lonnie Smith. Sherra Lee's second husband, David Allen Smith, whom she had married after her divorce from Vernon R. Lee, had died before Star Services filed its complaint. Thus, as the surviving joint tenant pursuant to the earlier quitclaim deed and corrected quitclaim deed, Sherra Smith had become the sole owner of the lot which the deed of trust encumbered. Sherra Smith, who was represented by one lawyer, and First National and its trustee, Lonnie Smith, in the deed of trust and corrected deed of trust, who were represented by another lawyer, filed separate motions to dismiss Star Services' complaint for judicial foreclosure pursuant to Rule 12(b)(6) of the Mississippi Rules of Civil Procedure. Star Services filed a motion for summary judgment, which the chancellor ultimately sustained as to Ms. Smith.

In his bench opinion, the chancellor ruled that:

This present Civil Action was timely filed by the Plaintiff after Vernon R. Lee and Sherra P. Lee Smith tolled the original statute of limitations and by their actions on October 28, 1985, [the date of the settlement agreement and the date on which Sherra Lee Smith accepted the Assumption Warranty Deed] initiating the running of a new six-year period of limitations.

The chancellor also held that the lien with which Star Services' deed of trust had encumbered Ms. Smith's lot was subordinate to the lien with which First National's deed of trust encumbered the same lot because the chancellor found that First National was a bona fide encumbrancer for value without notice pursuant to Section 89-5-19 of the Mississippi Code of 1972. While the chancellor's holding that Star Services' deed of trust was subordinate to First National's deed of trust even though it had been filed earlier may appear to conflict with his holding that Star Services' foreclosure was not barred by the appropriate statute of limitations, this opinion will demonstrate that it was not. Star Services did not cross appeal, and First National did not appeal. Only Ms. Smith has appealed from the final judgment which authorized Star Services to foreclose on its deed of trust.

## III. Issues

Ms. Smith propounds two issues for this Court to resolve. We state them as she has presented them in her brief:

1. The Chancellor . . . in his bench opinion refused to sustain all defendant's motions to dismiss on the grounds all relief was barred by the statute of limitations of six years. There was never a foreclosure or renewal on the face of the recorded security instrument; no renewal of the deed of trust by mortgagors directly or indirectly; and nothing in the transcript of the lower court proceedings to suggest defendant Vernon Ray Lee or Sherra . . . Smith ever signed and forwarded to their mortgagee any acknowledgment of their palpably delinquent indebtedness or new promise to pay during the 1977- 1989 span of time. Despite no statutory renewal, the Court held that a vague and

indefinite [settlement agreement] in 1985 divorce proceedings met the requirements of law to renew, revive and extend the indebtedness by the former wife only, and not by her former husband.

2. The September 1989 complaint sought judicial authority for a judicial foreclosure, or in the alternative, a money judgment against a former husband and wife of an April 6, 1977, deed of trust with no maturity date on its face. The Court in its bench opinion that was made part of the final judgment in this matter erroneously granted relief of both, when both were not prayed for.

This Court thinks it fair to summarize Ms. Smith's first issue as her assertion that the chancellor erred when he granted final judgment of foreclosure to Star Services for the reasons which she summarizes in the text of her first issue. As for her second issue, Star Services responds that while the chancellor found in his bench opinion that the balance of the debt which Vernon R. Lee and Sherra Lee Smith owed Star Services was \$72,872.14 as of February 28, 1994, the chancellor did not award Star Services judgment against Ms. Smith for that or any other sum of money. Star Services counters that the bench opinion which the chancellor incorporated into his final judgment of foreclosure only authorized Star Services to foreclose its deed of trust subject to the first lien with which First National's deed of trust encumbered Ms. Smith's lot. We agree with Star Services' interpretation of the chancellor's bench opinion and thus summarily resolve Ms. Smith's second issue against her.

Even though Star Services did not cross-appeal, it argues in its brief that the chancellor erred by absolving Vernon R. Lee of personal liability for the balance of the debt owed Star Services. On this matter, the chancellor opined that the statute of limitations had run against Star Services' claim against Mr. Lee when Star Services filed its complaint for foreclosure because the settlement agreement was not Mr. Lee's renewal of his obligation to pay that debt. Because Star Services did not cross appeal, this Court is not required to consider and to resolve this issue. *See Beck Enterprises v. Hester*, 512 So. 2d 672, 678-79 (Miss. 1987) (stating the Mississippi Supreme Court will not consider issues not raised on . . . cross-appeal by an appellee).

#### IV. Analysis and resolution of Appellant's first issue

Star Services' motion for summary judgment was the procedural vehicle in which the chancellor drove to the final judgment of foreclosure with Ms. Smith and Star Services as his passengers. Because the Appellant and the Appellee stipulated to all the facts which could possibly be relevant to this issue, there are no material issues of fact. Thus, we need not dwell on the standard of review for our appellate review of a trial court's grant of a summary judgment other than to acknowledge that such a review is *de novo*. *Northern Elec. Co. v. Phillips*, 660 So. 2d 1278, 1281 (Miss. 1995). Moreover, while it is the chancellor's decision that we review *de novo*, our review of this issue involves questions of law. "When presented with a question of law, the manifest error/substantial evidence rule has no application and we conduct a *de novo* review." *Matter of Estate of Mason v. Fort*, 616 So. 2d 322, 327 (Miss. 1993). This Court is concerned only with the questions of law which we must answer to resolve this issue.

A. When would the original debt of \$21,104.30 owed Star Services' predecessor, Miles Homes, by Vernon R. and Sherra Lee Smith, have become barred by the passage of time?

This Court answers this question in terms of the debt which Vernon R. Lee and his then wife, Sherra

Lee, incurred to Star Services' predecessor, Miles Homes, by the retail sales contract executed December 31, 1976. We are concerned with their debt -- and not the lien against their property which the deed of trust to Miles Homes created. Section 15-1-49 of the Mississippi Code of 1972 is the statute of limitations which would bar Star Services' claim against Ms. Smith. Before March 12, 1990, the date the current version of this code section became effective, Section 15-1-49 provided:

(1) All actions for which no other period of limitation is prescribed shall be commenced within six (6) years next after the cause of such action accrued, and not after.

Miss. Code Ann. 15-1-49. The current version of Section 15-1-49 allows three years to commence an action such as the one in this case. The Appellant does not argue that any of the individual monthly payments which she did not make were barred by Section 15-1-49, and the record in this case implies that all of her payments were consumed by accruing interest and did not reduce the principal of the indebtedness. See *Meridian Production Credit Ass'n v. Edwards*, 231 So. 2d 806, 808 (Miss. 1970) (holding where debt is payable in installments, statute of limitations begins to run as to each installment from time it becomes due and creditor can recover only on those installments falling due within statutory period).

Therefore, this Court holds that the six-year period of limitation on the debt which Ms. Smith owed Star Services began running on March 2, 1980, the date that the balloon balance of \$16,378.30 became due and payable under the terms of the contract between Ms. Smith and Star Services. Our so holding means that Section 15-1-49 barred Star Services' claim to recover from Ms. Smith its debt from and after March 2, 1986. Of course, Star Services maintains that the settlement agreement and assumption warranty deed, both dated October 28, 1985, more than four months previous to March 2, 1986, were sufficient to renew Ms. Smith's personal obligation to Star Services to pay the balance of this debt. We will review this issue after we have considered the following question which Ms. Smith poses in her brief.

B. Does Section 89-5-19 of the Mississippi Code of 1972 bar the foreclosure of the deed of trust which Vernon R. Lee and Sherra N. Lee executed and delivered to the trustee for Miles Homes since the deed of trust did not disclose a due date within its four corners?

The portion of Section 89-5-19 which is relevant to this question reads as follows:

Where the remedy to enforce any mortgage, deed of trust, or other lien on real or personal property which is recorded, appears on the face of the record to be barred by the statute of limitations (which, as to a series of notes or a note payable in installments, shall begin to run from and after the maturity date of the last note or last installment), *the lien shall cease and have no effect as to creditors and subsequent purchasers for a valuable consideration without notice*, unless within six (6) months after such remedy is so barred the fact that such mortgage, deed of trust, or lien has been renewed or extended be entered on the margin of the record thereof, by the creditor, debtor, or trustee, attested by the clerk, or a new mortgage, deed of trust, or lien, noting the fact of renewal or extension, be duly filed for record within such time. If the date of final maturity of such indebtedness so secured cannot be ascertained from the face of the record the same shall be deemed to be due one year from the date of the instrument securing the same for the purpose of this section.

Miss. Code Ann. 89-5-19 (1972) (emphasis added).

Star Services argues that Section 89-5-19 cannot benefit Ms. Smith because she is neither a creditor nor subsequent purchaser for a valuable consideration without notice. Instead, Star Services emphasizes that Ms. Smith is the original debtor and mortgagor. It cites *Mason v. Stroud*, 155 Miss. 829, 125 So. 408 (1930), to support its argument. In *Mason*, the creditor-beneficiary of a deed of trust filed a bill in chancery court to foreclose the deed of trust. 155 Miss. at 830. The debt which the deed of trust secured became due on May 17, 1922, but Mason, the creditor, did not file suit until May 18, 1928, one day after the six-year statute of limitations had run. *Id.* at 831. While the primary issue was whether the statute of limitations had run since one of the debtors, G. E. Stroud, Sr., who had died on January 6, 1928, had been a resident of the State of Alabama, the debtors also raised Section 2796, Mississippi Code of 1906, the predecessor of Section 89-5-19, as a defense to Mason's claim for foreclosure. *Id.* at 833. The supreme court rejected the debtor's reliance on this code section to bar the lien which the deed of trust had created because it held that "none of the parties in the present suit are creditors or subsequent purchasers for value without notice . . . ." *Id.* Thus, the debtors-grantors who opposed the foreclosure could not bring themselves within the provisions of this code section. *Id.*

This Court therefore holds that because Ms. Smith was neither a creditor nor a bona-fide purchaser of this property without notice, but instead was the original debtor-grantor, Section 89-5-19 of the Mississippi Code of 1972 does not nullify and negate the lien against her lot which the deed of trust to Miles Homes dated December 26, 1976, imposed against it. We so hold regardless of whether Ms. Smith is correct that the period of limitation for the deed of trust was one year because the deed of trust did not contain the due date of the debt. We have already opined that our determination of this aspect of this issue is consistent with the chancellor's adjudication that First National's deed of trust had become a first lien against the lot because First National was a creditor and a bona fide encumbrancer without notice of the terms of the debt which the Lees had incurred to Miles Homes.

The ultimate facet of this issue is whether Ms. Smith renewed her obligation to pay the balance of the debt to Star Services so that she waived the operation of Section 15-1-49 to bar Star Services from undertaking any legal action to recover that debt from and after March 2, 1986. Star Services contends that by her execution of the settlement agreement and by her acceptance of Vernon R. Lee's assumption warranty deed, she did so.

C. Did the settlement agreement and/or assumption warranty deed renew Ms. Smith's personal liability to pay the balance of this debt?

1. Settlement agreement

Ms. Smith offers two arguments to counter Star Services' argument that the settlement agreement and/or assumption warranty deed, both dated October 28, 1985, renewed her personal obligation to pay the balance of this debt and thus withdrew it from the operation of Section 15-1-49. First, she argues that because Star Services was not a party to the settlement agreement and because the Lees did not notify Star Services of their settlement agreement, the settlement agreement could not benefit Star Services. In other words, Ms. Smith contends that it was essential for Star Services to be a party to the settlement agreement or that it at least be notified of the settlement agreement before it could claim the benefit of Ms. Smith's renewal of her debt.

Section 15-1-73 of the Mississippi Code of 1972 designates when a debtor may remove his or her debt from the operation of the applicable statute of limitations. Section 15-1-73 reads as follows:

In actions founded upon any contract, an acknowledgment or promise shall not be evidence of a new or continuing contract whereby to take any case out of the operation of the provisions of this chapter or to deprive any party of the benefit thereof, unless such acknowledgment or promise be made or contained by or in some writing signed by the party chargeable thereby. Where there shall be two or more joint contractors, one or more of them shall not lose the benefit of the provisions of this chapter so as to be chargeable, by reason only of an acknowledgment or promise made or signed by any other or others of them. In actions against joint contractors, if the plaintiff be barred as to one or more of the defendants but be entitled to recover against any other or others of them, by virtue of a new acknowledgment or promise, or otherwise, judgment shall be given for the plaintiff as to any of the defendants against whom he is entitled to recover, and for the other defendants against the plaintiff.

Miss. Code Ann. 15-1-73 (Rev. 1995).

"Contract" is the operative word in Section 15-1-73. As defined in Restatement, Second, Contracts 3: "A contract is a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty." Restatement (Second) of Contracts 3. Among the definitions of the term contract found in Black's Law Dictionary is the following: "The writing which contains the agreement of parties, with the terms and conditions, and which serves as a proof of the obligation." *Black's Law Dictionary* 322 (6th ed. 1990). The settlement agreement was indisputably a contract between Ms. Smith and her then husband, Vernon R. Lee. Moreover, Ms. Smith's signature on the property settlement satisfied the requirement of Section 15-1-73 that "such acknowledgment or promise be made or contained by or in some writing [the settlement agreement] signed by the party chargeable thereby." Ms. Smith is the party whom Star Services seeks to charge with the payment of the balance of this debt.

However, Star Services was not a party to the settlement agreement; and nowhere in the contract is it written that Ms. Smith intended to waive and did waive the benefit of Section 15-1-49, the statute of limitation which was relevant to her debt owed Star Services. As the Mississippi Supreme Court opined in *UHS-Qualicare v. Gulf Coast Com. Hosp.*, 525 So. 2d 746, 754 (Miss. 1987):

It is said that the first rule of contract interpretation is to give effect to the intent of the parties. More correctly stated, our concern is not nearly so much what the parties may have intended as it is with what they said, for the words employed are by far the best resource for ascertaining intent and assigning meaning with fairness and accuracy.

(Citations omitted.) Star Services does not contend that the settlement agreement expresses Ms. Smith's intent to waive the benefit of Section 15-1-49. Thus, we find that as a contract between Ms. Smith and her then husband, Vernon R. Lee, the settlement agreement did not specify that Ms. Smith intended to waive the benefit of Section 15-1-49. Therefore, the settlement agreement did not renew her personal obligation as a debtor to Star Services as her creditor. Instead, we find from the language which Ms. Smith and Mr. Lee employed in the settlement agreement that they intended to provide, first, for who was to become the owner of their house and the lot on which it was situated and, secondly, as between the two of them, for who would pay the balance of the debt owed Star Services.

Star Services does argue that Ms. Smith's promise to Vernon R. Lee to pay the balance of the debt owed to it was sufficient to waive the operation of Section 15-1-49 and to renew her personal obligation to Star Services so that the then six-year period of limitation provided by Section 15-1-49 began to run anew. It cites an opinion of a California Court of Appeal, *Wilson v. Walters*, 151 P. 2d 685, 686 (Cal. Ct. App. 1944), to support its argument. Star Services quotes the following from *Wilson*:

The distinct and unqualified admission of an existing debt, contained in a writing signed by the party to be charged, and without intimation of an intent to refuse payment thereof, suffices to establish the debt to which the contract relates as a continuing contract, and to interrupt the running of the statute of limitations against the same. From such an acknowledgment the law implies a promise to pay.

....

An actual promise to pay is not necessary.

....

When such an acknowledgment is made before the note becomes barred by the statute of limitations as applied to the date originally designated for the payment of the note, it constitutes a continuation of the life of the original obligations beyond the operation of the statute of limitations as applied in the original obligation.

(Citations omitted.) In *Wilson*, a judgment -- not a contract -- was the basis of the debt; and the letter from the debtor, *Wilson*, which the court found to be an acknowledgment sufficient to remove the debt from the operation of the statute of limitation, was written directly to the creditor. In the case *sub judice*, Ms. Smith's promise to her then husband to pay the balance of the debt was never communicated to Star Services, and, as we noted earlier, Star Services was not a party to the settlement agreement. The Mississippi Supreme Court has held that Section 15-1-73 does not apply to judgments. *See Berkson Bros. v. Cox*, 73 Miss. 339, 342, 18 So. 934 (1895) (holding that judgments are held not to be contracts -- a new promise is not good to renew a judgment in an action upon that judgment in a court of record). For these reasons, *Wilson* is not persuasive that Star Services' position is correct.

Ms. Smith argues that for the settlement agreement to operate to remove the debt owed Star Services from the operation of Section 15-1-73, Star Services must either be a party to the settlement agreement or at least be notified of its execution. She cites the United States Supreme Court case of *City of Fort Scott v. Hickman*, 112 U.S. 150 (1884) as support for her position on this aspect of this issue. In *Hickman*, the United States Supreme Court interpreted and applied a Kansas statute similar to Section 15-1-73 of the Mississippi Code of 1972. According to Ms. Smith's brief, the Kansas statute provided:

In any case founded on contract, when any part of the principal or interest shall have been paid, or an acknowledgment of an existing liability, debt, or claim, or any promise to pay the same shall have been made, an action may be brought in such case within the period prescribed for the same, after such payment, acknowledgment, or promise; but such acknowledgment or promise must be in writing, signed by the party to be charged thereby.

Gen. St. Kan. c. 80, art. 3, 2. In *Hickman*, the City of Fort Scott, Kansas, was in such financial distress that it was unable to pay its bonded indebtedness in accordance with the original terms of its various bond issues. *Hickman*, 112 U.S. at 151-153. Among its bond issues were "railroad" and "street improvement," or "Macadam" bonds. *Id.* The city devised a plan for repaying all of its bonded indebtedness except its street improvement bonds and sent notices of its proposals to the holders of its bonds except for the street improvement bonds. *Id.* at 158. Hickman, who owned certain of the city's street improvement bonds, obtained copies of this notice from sources other than the holders of the other bond issues, to whom the notices were sent by authorization of the city. *Id.* at 159. The notices referred to the unpaid Macadam bonds as part of the city's overall bonded indebtedness, but the notice clearly did not mention repaying the Macadam bonds. *Id.* Hickman sued the City of Fort Scott to recover payment of his Macadam bonds on the theory that the city's notices which it sent to the holders of its other issues of bonded indebtedness also renewed its obligation to pay the Macadam bonds, some of which were otherwise barred by the applicable statute of limitations. *Id.*

The United States Supreme Court held, *inter alia*, that the city's notice of its plan to pay its bonded debt did not renew its obligation to Hickman as a holder of the city's Macadam bonds because its notice had not been directed to him. The Supreme Court opined:

Therefore, to deprive a debtor of the benefit of such a statute by an acknowledgment of indebtedness, *there must be an acknowledgment to the creditor as to the particular claim, and it must be shown to have been intentional.* "An acknowledgment of an existing liability, debt, or claim," within the meaning of the Kansas statute, implies a meeting of minds, the right of the creditor to take what is written as an acknowledgment to him of the existence of the debt, as well as the intention of the debtor, as deduced from the contents of the writing and all the facts accompanying it, to make such acknowledgment.

*Id.* at 163-64 (emphasis added).

Star Services seeks to distinguish *Hickman* by arguing that the City of Fort Scott did not give notice to anyone that it would redeem the Macadam bonds and notes that Hickman argued that the notice that the city would redeem other of its bonds was also a notice to him. Nevertheless, the United States Supreme Court adopted earlier opinions of the Kansas Supreme Court in *Sibert v. Wilder*, 16 Kan. 176; *Schmucker v. Sibert*, 18 Kan. 104; and *Clawson v. McCune's Adm'r*, 20 Kan. 337 that "the acknowledgment, to be effective, must be made, not to a stranger, but to the creditor, or to some one acting for or representing him." *Hickman*, 112 U.S. at 161.

Other general authorities are in accord with *Hickman*. The Restatement (Second) of Contracts provides:

The new promise referred to in 82-85 is not binding unless it is made to a person who is then an obligee of the antecedent duty.

Restatement (Second) of Contracts 92. Section 82 of the Restatement refers to a debtor's promise to remove his or her debt from the operation of the applicable statute of limitations, the situation in the case *sub judice*. Thus, Section 92 of the Restatement (Second) of Contracts would require that Ms.

Smith's promise to her husband to pay the balance of the debt owed Star Services be made to Star Services.

*American Jurisprudence* states this same principle as follows:

The modern and prevailing view is that an acknowledgment, to be effectual so far as the removal of the bar [of the statute of limitations] is concerned, must be made either to the creditor or to some one authorized to act for him, or, if to a stranger, must have been made with the intention that it be communicated to the creditor. Thus, although there are some earlier cases to the contrary, as a general rule the acknowledgment of a debt made to a stranger, and not intended to be communicated to the creditor, will not remove the bar of the statute.

51 Am. Jur. 2d *Limitation of Actions* 354 (1964).

Other jurisdictions have decided cases in accordance with this principle. For example in *Middlebrooks v. Cabaniss*, 20 S.E. 2d 10, 12 (Ga. 1942), the Supreme Court of Georgia opined:

"A new promise, in order to renew a right of action already barred, or to constitute a point from which the limitation shall commence running on a right of action not yet barred, shall be in writing, either in the party's own handwriting, or subscribed by him or someone authorized by him." An acknowledgment in writing of the existing liability is equivalent to a new promise to pay. Such a writing containing a promise or acknowledgment, in order to revive a liability or constitute a new point from which the limitation will commence to run, must in legal effect be made to the creditor; and must sufficiently identify the debt or afford the means by which it might be identified with reasonable certainty. Thus, even a definite promise or acknowledgment in writing, uncommunicated to the creditor or a communicated mere indefinite acknowledgment, which goes no further than to admit a general liability without identifying the debt or affording a means of identification, is insufficient.

(citations omitted).

Star Services cites no Mississippi precedent on this issue, and this question appears to be a matter of first impression in this jurisdiction. Star Services makes no claim as a third-party beneficiary of the settlement agreement. Therefore, based upon its consideration of the foregoing authorities, this Court concludes that as a matter of law, Ms. Smith is correct that for the settlement agreement to constitute a renewal of the debt so as to remove it from the operation of Section 15-1-49, either Star Services must have been a party to the settlement agreement, which it was not, or Ms. Smith must have intentionally communicated the settlement agreement to Star Services, or its agent, which she did not do. Therefore, in accordance with the standard of review which we must employ in this case, we hold that the chancellor erred as a matter of law when he held that the settlement agreement renewed Ms. Smith's debt to Star Services and removed it from the operation of Section 15-1-49 of the Mississippi Code of 1942, the applicable statute of limitation.

Although we have already resolved that the settlement agreement did not renew Ms. Smith's obligation to pay the debt owed Star Services, we now consider Ms. Smith's second reason for urging this Court to reject the proposition that the settlement agreement removed her debt from the operation of Section 15-1-49. Her second reason is that the settlement agreement was too vague and

indefinite to be enforceable by Star Services. She notes in her brief that "[t]here are no terms in the agreement, no figures, no dates, no promise to pay the mortgagee . . . ." To oppose this second reason, Star Services cites *Taylor v. DeSoto Lumber Co.*, 137 Miss. 829, 102 So. 2d 260, 261 (1924), in which the Mississippi Supreme Court made the following ruling on the requirements for an acknowledgment or promise to avoid the bar of a statute of limitations:

An acknowledgment or promise that will save the bar of the statute of limitations must identify the debt and acknowledge or promise to pay a definite amount, unless the debt is evidenced by a written instrument from which the amount due thereon can be ascertained by calculation, in which event the amount due need not be stated in the acknowledgment or new promise.

(citations omitted). *See also Heflin, County Treasurer v. Kinard*, 67 Miss. 522, 7 So.493, 494 (1890) (stating that amount due on note was capable of being definitely and accurately ascertained by mere computation of interest and application of credits appearing on it.)

An exhibit in the record contained the dates and amounts of all the payments which had been made on this debt. The total of these payments was \$8,400.48, an amount less than the interest that had accrued on the debt. This Court accordingly rejects Ms. Smith's second reason to hold that the settlement agreement did not renew the debt which she owed Star Services, *i. e.*, the settlement agreement was too vague and indefinite to be enforceable by Star Services. To the contrary, we find that the reference in the settlement agreement to the debt was sufficient because the debt was evidenced by a written instrument, the retail sales contract, from which the amount due thereon could be ascertained by calculation, as in fact was accomplished by the chancellor. Our recitation that the chancellor was able to ascertain the exact amount due on this debt is not to be confused with our preliminary determination that the chancellor did not award judgment for any specific amount to Star Services. While the chancellor calculated the amount due on the debt in his bench opinion, his bench opinion, which was incorporated into his final judgment of foreclosure, did not award judgment for that or any other sum to Star Services. The bench opinion only authorized a foreclosure of the deed of trust from the Lees to Miles Homes, as a second lien against what had become Ms. Smith's lot. Of course, Ms. Smith's assertion that the settlement agreement is too vague and indefinite is not the reason that we have held as a matter of law that the chancellor erred when he held that the settlement agreement removed the debt owed Star Services from the operation of Section 15-1-49.

## 2. Assumption warranty deed

Star Services has also argued that the assumption warranty deed which Vernon R. Lee executed and delivered to Ms. Smith pursuant to the settlement agreement independently renewed Ms. Smith's personal obligation to pay the balance of her debt to Star Services and thus removed the debt from the operation of Section 15-1-49. Star Services cites *Smith v. General Investments, Inc.*, 246 Miss. 765, 150 So. 2d 862, 864 (1963) to support its assertion that Ms. Smith's promise in the settlement agreement to pay the balance of the debt created a personal obligation on her part to pay it. In *Smith*, the Mississippi Supreme Court opined:

An agreement by the grantee of mortgaged premises to assume and pay the mortgage debt inures to the benefit of the holder of the mortgage. Hence a grantee who has thus assumed it incurs a personal liability to the mortgagee.

Id. (citations omitted).

However, this Court interprets *Smith* to stand only for the proposition that by her agreement to assume the balance of the debt owed Star Services, Ms. Smith incurred a personal liability to the mortgagee. Of course, Ms. Smith's execution of the retail sales agreement on December 31, 1976, created her personal liability to Star Services' predecessor, Miles Homes. Thus, her agreement to pay the balance of the debt contained in the assumption warranty deed was redundant. *Smith* does not stand for the proposition that a grantee's assumption of the payment of a balance of a debt which is secured by a mortgage encumbering the land which the assumption warranty deed conveyed automatically removes the debt from the operation of the applicable statute of limitation. *See Bogart v. George K. Porter Co.*, 222 P. 959, 962 (Cal. 1924) (stating that a grantee who assumes payment of a debt cannot contest its validity on the ground that it was barred by the statute of limitations; however, he is not also estopped to plead the applicable limitations period that may have subsequently run from the time of the assumed obligation).

Besides, this Court thinks it contradictory to hold that while the settlement agreement did not operate to remove the debt from the operation of Section 15-1-79 because Star Services was neither a party to it nor advised of it by Ms. Smith, the assumption warranty deed accomplished that objective even though Star Services was not a party to it nor notified by Ms. Smith that she had accepted her husband's delivery of that instrument. This Court rejects Star Services' contention that the assumption warranty deed renewed Ms. Smith's personal obligation to pay this debt and thus removed the debt from the operation of Section 15-1-49.

3. Settlement Agreement as pleading Star Services seems to argue that the settlement agreement, which was incorporated into the judgment of divorce rendered by the Pearl River Chancery Court on January 3, 1986, removed the debt from the operation Section 15-1-49 because it was essentially a pleading filed in the divorce case. It cites *Kline v. Pearl*, 236 Miss. 66, 109 So. 2d 556, 559 (1959), in which the Mississippi Supreme Court held that a statement in an answer was a deliberate acknowledgment of an indebtedness and thus renewed the running of the statute of limitations. However, the acknowledgment of the debt contained in the answer was made by the defendant, Henry Kline, Bernard Pearl's partner, whom Bernard Pearl had sued. *Id.* at 558. The Mississippi Supreme Court opined:

The authorities generally agree that in a proper case, an acknowledgment or new promise sufficient to remove the bar of the statute of limitations may be made in pleadings; that an admission of a debt in a judicial proceeding may constitute an acknowledgment of the debt so as to take it out of the operation of the statute of limitations.

*Id.* at 559. Even if the settlement agreement in the case *sub judice* was a pleading in the sense that an answer is a pleading, it would remain subject to our earlier analysis in which we previously determined that it could not remove the balance of this debt from the operation of Section 15-1-49 because Star Services was not a party to it and because Ms. Smith did not notify Star Services of her agreement which she had made with her husband, Vernon R. Lee, to pay the balance of the debt. Thus, we hold that the settlement agreement cannot accomplish as a pleading what it could not accomplish as a contract. Consistent with the previous quotation from *Kline*, this is not a proper case in which this Court may hold that the settlement agreement, even as a pleading, can remove the

balance of the debt owed Star Services from the operation of Section 15-1-49, the applicable statute of limitation.

#### V. Summary

Section 15-1-73 is the statutory authority for Ms. Smith's waiving the operation of Section 15-1-49 to bar Star Services' collection of the balance of the debt which she and her first husband incurred on December 31, 1976, when they executed the retail sales contract with Miles Homes, the predecessor of Star Services. Because Ms. Smith and Star Services stipulated all facts which could possibly be relevant to the one issue in this appeal, *i. e.*, whether the chancellor erred when he granted Star Services' motion for summary judgment, the standard of review applicable to our resolution of this issue requires that this court analyze and decide this issue as a matter of law.

This Court has determined that neither the settlement agreement nor the assumption warranty deed can be interpreted as an expression of Ms. Smith's intent to waive the operation of Section 15-1-49 to bar the debt, renew the debt, and thus begin anew the running of that statute's six-year period of limitation. But even if the settlement agreement and/or assumption warranty deed were capable of such an interpretation, they did not remove the debt from the operation of Section 15-1-49 because in accordance with the greater weight of authority, Star Services was not a party to the settlement agreement and Ms. Smith did not communicate her promise to her first husband to pay the balance of the debt to Star Services. Thus, as a matter of law, the chancellor erred when he held that the settlement agreement and the assumption warranty deed had removed this debt from the operation of Section 15-1-49 to bar Star Services' further effort to collect the debt. Nothing contained in Section 15-1-73, the statutory basis for permitting Ms. Smith to renew the debt and waive the operation of Section 15-1-49, is inconsistent with our so holding.

We have determined that the six-year period during which Section 15-1-49 permitted Star Services to undertake legal action to collect its debt from Ms. Smith and/or Mr. Lee began running on March 2, 1980, the due date of the final installment required by the retail sales contract with Miles Homes, and ended March 2, 1986. Based on the weight of authority and the lack of Mississippi precedent on this issue, this Court holds that the chancellor erred as a matter of law when he found that by her execution of the settlement agreement and acceptance of Vernon R. Lee's assumption warranty deed, Ms. Smith renewed this debt and waived the operation of Section 15-1-49 to bar Star Services' legal action to collect the debt from and after March 2, 1986. Because Ms. Smith's promise to Vernon R. Lee that she would pay the balance of their debt owed Star Services did not renew her obligation to pay that debt so as to remove the debt from the operation of Section 15-1-49, Star Services' complaint for judicial foreclosure filed in the Pearl River Chancery Court on September 19, 1989, was barred by operation of Section 15-1-49. The chancellor thus erred when he entered the judgment of foreclosure on Star Services' claim, which had been thus barred by Section 15-1-49. This Court reverses the judgment of foreclosure and renders judgment for the Appellant, Sherra Nell Lee Smith.

**THE JUDGMENT OF FORECLOSURE OF THE PEARL RIVER COUNTY CHANCERY COURT IS REVERSED AND JUDGMENT OF DISMISSAL WITH PREJUDICE FOR APPELLANT, SHERRA NELL LEE SMITH, IS HERE RENDERED. COSTS OF THIS APPEAL ARE ASSESSED TO THE APPELLEE, STAR SERVICES, INC. OF DELAWARE.**

**BRIDGES, C.J., McMILLIN AND THOMAS, P.JJ., DIAZ, HERRING, HINKEBEIN, KING,  
PAYNE, AND SOUTHWICK, JJ., CONCUR.**