

IN THE COURT OF APPEALS 01/14/96
OF THE
STATE OF MISSISSIPPI
NO. 93-CA-01459 COA

J. M. "FLICK" ASH

APPELLANT

v.

MARGARET FINLEY SHACKELFORD

AND JOHN C. ROSS, JR.

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 H. BIZZELL

COURT FROM WHICH APPEALED: MARSHALL COUNTY CHANCERY COURT

ATTORNEYS FOR APPELLANT:

WILLIAM K. DUKE

GRADY F. TOLLISON JR.

ATTORNEYS FOR APPELLEE:

JANET G. ARNOLD

JACK F. DUNBAR

SHELBY D. GOZA

NATURE OF THE CASE: CIVIL: FORECLOSURE

TRIAL COURT DISPOSITION: COMPLAINT DISMISSED WITH PREJUDICE

MANDATE ISSUED: 6/12/97

BEFORE BRIDGES, P.J., BARBER, AND DIAZ, JJ.

DIAZ, J., FOR THE COURT:

This case before us stems from a wrongful foreclosure where the lower court dismissed the case with prejudice. Aggrieved, the Appellant, J.M. "Flick" Ash (Ash) appeals asserting the following issues: (1) that the chancellor erred in refusing to empanel a jury to determine the facts; and (2) that the chancellor erred in his findings of fact and conclusions of law. Finding no reversible error, we must affirm.

FACTS

In a nutshell, the basic difference between the parties is the manner in which payments would be applied to the amount owed. Having said this, we review the facts below.

In September 1983, Margaret Finley Shackelford (Shackelford) and her sister, conveyed to Ash 1248.7 acres of land for \$850,000. Ash made a \$25,000 down payment, and executed a promissory note and a purchase money deed of trust to secure the promissory note for the remainder of the sum due to Shackelford and her sister. (Shackelford's sister has since died leaving her interest in the property to Shackelford.)

The debt was pre-payable, with certain limitations. All pre-payments were to be applied to the principal balance remaining in inverse order, beginning with the principal payment due on September 21, 1993. For the first three years of indebtedness, through September 20, 1986, the deed placed a limit on the aggregate of permissible pre-payments. After that date, there were no limits on acceptable pre-payment amounts.

The agreement provided that if Ash was to sell portions of the land, he must obtain releases of those portions from the deed of trust at specified amounts per acre for various portions of the land. If Ash sold parts before September 21, 1986, and had already reached the prepayment aggregate, the deed required that he substitute collateral of equal rank in place of land sold in order to obtain its release from the deed of trust.

According to Ash, he had paid Shackelford over the course of the year more than the amount of the annual payment, however, he did not realize that the payments were being applied to the principal on the back end. He did not realize that the payments were being applied as prepayments. Therefore, when the first installment became due on September 21, 1984, he was unable to make the annual payment, and fell into default.

After falling into default, Ash executed a second promissory note to Shackelford in the amount of \$128,294.34, plus prepayment interest payable on January 10, 1985. When Ash did not make the required payment on January 10, 1985, a third promissory note was executed for the principal

amount of \$128,294.35. This note was due on April 1, 1985. On April 1, 1985, no payment was made to Shackelford, nevertheless, she executed partial releases on condition that the entire amounts of the sale proceeds would be paid in satisfaction of Ash's obligations under the deed of trust and the original promissory note.

After several attempts at restructuring the loan, the parties reached an agreement found in a Memorandum of Understanding (Memorandum). According to the Memorandum, Ash owed Shackelford a total of \$758,796.15. The debt was to be renewed into two notes; one note was for \$254,000, and the other note was for \$504,796.15. As to the first note, the Memorandum provided that \$104,000 was to be paid at the time of execution of the note and \$150,000 would be paid upon Ash's death. The note was also to be secured by a life insurance policy in the amount of \$250,000. The second note for \$504,796.15 was to be co-signed by Jerry Fitch, Ash's silent partner, and secured by a new deed of trust. The note was to be payable over a five-year period beginning October 27, 1990. However, until refinancing, any sale of a portion of land by Ash during the interim and resulting payments for releases of land were to be dealt with as "in the past." Under these terms, Shackelford agreed to refrain from instituting foreclosure proceedings. Pursuant to this Memorandum, Ash was given 120 days to comply.

On May 27, 1989, 120 days after the Memorandum of Understanding was drafted, and the day the payment, as well as the notes were due, Ash asked for an extension of another 120 days. In consideration, he offered \$10,000 plus an assignment of all crop payments received on property covered by the deed of trust. Shackelford agreed to the extension, thereby giving Ash until October 27, 1989 to comply with the provisions in the Memorandum. Also in May 1989, John C. Ross took over representation of Shackelford. On August 24, 1989, Ross was appointed substitute trustee under the deed of trust.

Around September or October 1989, Ash sold a parcel of land to Bill Fitch (Fitch) for \$135,000. Ash hired Eugene Brown (Brown) as his attorney to handle the transaction. Ash did not mention anything to Brown about the Memorandum of Understanding. When Shackelford received the proceeds from the Fitch sale, she applied the proceeds to the principal balance owed on the original deed of trust.

After receiving a letter from Shackelford reminding him that the deadline for the \$104,000 payment and the execution of the two promissory notes was approaching, Ash had Brown draft the promissory notes. The notes were forwarded to Ross, Shackelford's attorney on November 6, 1989, ten days after the deadline. At that time, Ash requested that Shackelford apply the proceeds from the sale towards the installment payments on the promissory notes due in 1990 and 1991 so that the first installment would become due October 27, 1992. The \$104,000 was not tendered at that time. Shackelford rejected both the notes and Ash's request to apply the proceeds to the installment payments. Shackelford granted Ash another thirty days in which to comply with the Memorandum of Understanding.

After a series of correspondence, on March 20, 1990, Ross again wrote to Brown advising him on Shackelford's position regarding the Fitch sale proceeds, as well as restructuring the remainder of the loan. In that letter, Brown was advised that foreclosure proceedings would begin on March 23, 1990 if Ash did not tender the new notes and the \$104,000 by that date. Brown responded that the March 23, 1990 deadline was unreasonable and would not be met. Accordingly, foreclosure proceedings

were instigated, and the sale was held on May 11, 1990 where Shackelford bid the amount owed.

Ash filed suit after the foreclosure sale alleging wrongful foreclosure. The basis of the disagreement stems from the different understandings of the original deed of trust, and how the payments were to be applied.

DISCUSSION

I. JURY TRIAL

Ash's first contention of error is that the lower court should have empaneled a jury to hear the case. Actually, the argument is two-fold: Ash first argues that the original circuit court should not have transferred the case to chancery court; in the alternative, he argues that even if jurisdiction in chancery court was proper, the case should nevertheless be remanded to circuit court for a jury trial.

The present case was originally filed in the circuit court. It was transferred to chancery court pursuant to a motion by Shackelford. Ash then filed an interlocutory appeal to the supreme court to determine whether the transfer was proper. The appeal was denied. Ash's complaint rested on the allegation that Shackelford wrongfully foreclosed on the deed of trust, among other allegations. Wrongful foreclosure falls within the jurisdiction of the chancery courts. *See Warner's Griffith*, Mississippi Chancery Practice (Rev.Ed.), §24. Chancery and circuit courts shall have full jurisdiction of all cases transferred to them by the other. *Id.* at § 517. The court to which the case is transferred must not re-transfer it, but must proceed to its determination. *Id.* Therefore, it was proper for the chancery court to retain jurisdiction after it had been transferred. In *Tillotson v. Anders*, 551 So. 2d 212 (Miss. 1989), the supreme court considered the conflict between article 3 section 31 of the Mississippi Constitution which provides that the right to a jury trial shall remain inviolate, and article 6 section 147 of the state constitution which states:

No judgment or decree in any chancery or circuit court rendered in a civil cause shall be reversed or annulled on the ground of want of jurisdiction to render said judgment or decree, from any error or mistake as to whether the cause in which it was rendered was of equity or common-law jurisdiction; but if the Supreme Court shall find error in the proceedings other than as to jurisdiction, and it shall be necessary to remand the case, the Supreme Court may remand it to the court which, in its opinion, can best determine the controversy.

Miss. Const. art. VI., § 147. In *Tillotson*, the supreme court reversed the chancery court's denial of the motion to dismiss or transfer the case to circuit court because the appeal was interlocutory, and not a final judgment. *Tillotson*, 551 So. 2d at 218.

The present case is distinguishable from *Tillotson*. The rationale behind the decision in *Tillotson*, was that the parties had not yet "endured the slings and arrows of litigation." *Aetna Casualty & Sur. Co. v. Berry*, 669 So. 2d 56, 73 (Miss. 1996). In *Berry*, the supreme court refused to apply *Tillotson* because not only had the parties already gone through litigation, but they had done so over many years. Furthermore, the court had already denied a motion for an interlocutory appeal on the issue. We will not reverse a case merely on jurisdictional grounds.

Ash vigorously argues that the issues in the complaint were of a legal nature seeking money damages. Therefore, the issues should have been tried before a jury. Indeed, the rules regarding a jury trial are of no effect in chancery court. *Valley Forge Ins. Co. v. Strickland*, 620 So. 2d 535, 542 (Miss. 1993). Unless a jury is otherwise required by statute, it is within the discretion of the chancellor to empanel a jury, however, our law is clear that its findings are "totally supervisory". *Tillotson*, 551 So. 2d at 214 (footnote 2); *Louisville & N. R.R. Co. v. Hasty*, 360 So. 2d 925, 927 (Miss. 1978). Prior decisions have plainly held that a chancellor's failure to provide a jury trial is not grounds for reversal. *Valley Forge Ins. Co.*, 620 So. 2d at 542 (citations omitted). Because we find that the crux of Ash's complaint lay in the wrongful foreclosure allegation, we find that the chancery court had proper jurisdiction, and therefore was within its discretion in refusing to empanel a jury.

Regardless of our findings, we must note that "[d]espite the mandate of §147 of the Mississippi Constitution, we look with disfavor upon and consider it an abuse of discretion for a chancellor to assume jurisdiction of a common law action which properly should be tried in a court of law where the right to trial by jury remains inviolate." *Hasty*, 360 So. 2d at 927. However, absent other error, we cannot reverse. In short, we refuse to depart from precedence. There is no merit to this issue.

II. CHANCELLOR'S FINDINGS

Ash argues that the chancellor erred in failing to recognize that this was a wrongful foreclosure. Our standard of review of findings of fact is limited in that we will not set aside a chancellor's findings of fact as long as they are supported by substantial credible evidence. *Estate of Davidson v. Davidson*, 667 So. 2d 616, 620 (Miss. 1995). A chancellor's ruling on findings of fact will not be disturbed unless manifestly wrong or clearly erroneous. *Bank of Miss. v. Southern Memorial Park, Inc.*, 677 So. 2d 186, 191 (Miss. 1996). Where there is conflicting evidence, we must give great deference to the fact finder. *City of Jackson v. City of Ridgeland*, 651 So. 2d 548, 553 (Miss. 1995). Where questions of law are raised, we will conduct a de novo review. *Bank of Miss.*, 677 So. 2d at 191.

Memorandum of Understanding

The Chancellor found that Ash made no annual payment on the debt, and that any payments made were from timber and land sales. He found that Ash was in default from the maturity of the purchase money note. Furthermore, he found that the parties were bound by the terms set forth in the Memorandum of Understanding. The principal issue in this case is the interpretation of the Memorandum of Understanding. The Chancellor recognized the fact that Ash refused to follow the restructuring plan for the loan unless the proceeds of the Fitch sale was to be applied to the first annual payments of principal and interest under the plan. Shackelford, however, refused to follow the restructuring plan unless the proceeds of the sale were applied to the total debt from the back. According to Shackelford, Ash would be obligated to begin making payments one year from the date of the new note.

The Memorandum clearly set out initially that it was an acceptance of an agreement to refinance the outstanding debt. Paragraphs 5 and 6 of the Memorandum set out the terms and conditions that the new refinancing agreement should include. Paragraph 6 specifically states in part:

The holder of the note agrees to release the land as and when it is sold, provided that the entire proceeds of the sale are paid to the holder of the note, including the assignment of

any note and deed of trust taken as part of the purchase price. The payment of cash and the assignment of any such purchase money notes and deeds of trust shall be considered as payments to meet the annual payments required as stated above.

However, paragraph 7 is clear on the fact that until refinancing is carried out as provided for in the Memorandum, all rights of the parties are fully reserved. In short, Ash could continue to sell property as he had done, but full payment of the purchase price must be tendered to the present holders of the note for release of the land. Furthermore, the Memorandum itself was not the actual refinancing agreement. The Memorandum merely set forth the suggested terms of the refinancing agreement, and it reserved the parties' rights under the original note until refinancing actually happened. Therefore, contrary to what Ash contends, the language in the Memorandum does not require Shackelford to apply any of the sale proceeds to the future note yet to be drafted. Accordingly, at the time of the Fitch sale, none of the refinancing had taken place. It stands to reason that the sale proceeds of that sale should be applied to the debt under the existing deed of trust.

Fiduciary Duty & Punitive Damages

Ash argues that Ross, Shackelford's attorney, violated a trustee's fiduciary duty to the grantor of the deed of trust. Ash asserts that Ross owed duties of reasonableness to Ash. Furthermore, he asserts that Ross and Shackelford acted in bad faith. We begin by stating that a trustee's affiliation with the beneficiary has no effect on the validity of the deed of trust. *Hood v. Van Devender*, 661 So. 2d 198, 200 (Miss. 1995). It is well settled that a trustee need only conduct the [foreclosure] sale in a commercially reasonable manner. *Eastover Bank for Sav. v. Hall*, 587 So. 2d 266, 270 (Miss. 1991). Every aspect of the sale should be evaluated objectively including the method, advertising, time, place and terms. *Wansley v. First National Bank*, 566 So. 2d 1218, 1225 (Miss. 1990). A review of the record affords no evidence that shows there was a conflict of interest, or that Ross or Shackelford acted in bad faith. Accordingly the Chancellor was correct to deny any punitive damages.

Dragnet Clause

The Chancellor held that language in the original deed of trust constituted a dragnet clause, and therefore, the renewal note executed on January 10, 1985 by Ash was encompassed by the language in the clause. Hence, the foreclosure applied to the January 10, 1985 note. We agree with this decision.

The pertinent clause in the original deed of trust is as follows:

In addition to the note and indebtedness hereinbefore mentioned, this Deed of Trust shall also secure all other amounts that may now or at any future time be or become due to the Beneficiaries of the Grantor.

A dragnet clause is enforceable when both parties have agreed to the clause, and there was no fraud in the making of the contact. *Iuka Guar. Bank v. Beard*, 658 So. 2d 1367, 1371 (Miss. 1995). As such, the above "dragnet clause" is valid, and therefore, covers the January 10, 1985 "renewal note" that Ash executed in favor of Shackelford in lieu of foreclosure. Simply stated, the January 10, 1985 note was secured by the dragnet clause in the original deed of trust, and therefore, that amount owed was properly treated as the amount owed at foreclosure. Therefore, that note was included and

satisfied as part of the Shackelford bid at foreclosure.

CONCLUSION

We find that the chancery court had proper jurisdiction in the present case, so therefore, it was within the discretion of the Chancellor whether to empanel a jury. The Mississippi Constitution restricts our ability to reverse a case on purely jurisdictional grounds. However, we will note that this Court looks upon with disfavor, a chancellor's decision to not to empanel a jury when a common law jury question is presented.

Furthermore, we find that the Memorandum of Understanding was merely an agreement to refinance, and therefore, until the new notes were drafted and agreed upon, the parties rights were reserved under the existing deed of trust. Additionally, we find that the dragnet clause in the original deed of trust was valid and therefore encompassed the note Ash executed in favor of Shackelford in January 1985. Hence, the foreclosure applied to that note. Finally, finding no bad faith or breach of duty on the part of John Ross, we affirm the chancellor's decision regarding punitive damages.

Accordingly, under our limited standard of review, this Court must affirm the Chancellor's decision.

THE JUDGMENT OF THE MARSHALL COUNTY CHANCERY COURT DISMISSING THE COMPLAINT WITH PREJUDICE IS AFFIRMED. COSTS OF THIS APPEAL ARE TAXED TO THE APPELLANT.

FRAISER, C.J., BRIDGES AND THOMAS, P.JJ., BARBER, COLEMAN, KING, PAYNE, AND SOUTHWICK, JJ., CONCUR.

McMILLIN, J., NOT PARTICIPATING.