REL: December 11, 2020

ALABAMA COURT OF CIVIL APPEALS

OCTOBER TERM, 2020-2021

2190212

Thomas G. Brackett and Lisa M. Brackett

v.

Central Bank

Appeal from Colbert Circuit Court
(CV-18-900336)

HANSON, Judge.

This appeal, transferred to this court pursuant to Ala. Code 1975, § 12-2-7(6), concerns a dispute over ownership of real property and two

boat slips. On October 19, 2018, Central Bank ("the mortgagee") sued Thomas G. Brackett and Lisa M. Brackett ("the transferees") in the Colbert Circuit Court, seeking, among other things, a judgment declaring that the mortgagee had acquired fee-simple title to certain numbered lots and to two numbered boat slips in a subdivision located in Colbert County that the mortgagee had, it said, acquired via a deed issued following foreclosure of a mortgage given by JCG & Associates, LLC ("the mortgagor"), as to the lots that had been recorded in June 2007; the mortgagee asserted that any interests as to the lots and boat slips the transferees might have acquired were via instruments from the mortgagor recorded in October 2008. After the transferees had moved to dismiss the action, the mortgagee amended its complaint to more specifically designate the real property at issue as a single numbered lot and then filed a motion for a partial summary judgment as to the ownership of that lot; that motion was supported by an affidavit given by its executive vice president. After a hearing, the trial court denied the motion to dismiss and the summary-judgment motion, after which the transferees answered the amended complaint and asserted, among other things, adverse

possession, laches, and estoppel as affirmative defenses. The trial court, after an ore tenus proceeding, entered a judgment determining that the mortgagee and not the transferees owned the lot and the boat slips, and that court subsequently denied the transferees' postjudgment motion to alter, amend, or vacate the judgment.

On appeal, the transferees contend that the trial court erred in declaring the mortgagee to be the owner of the lot and the boat slips. Because the trial court conducted a bench trial on the mortgagee's claims, our review is governed by the ore tenus standard of review, under which the trial court's judgment and all implicit necessary supporting findings are presumed correct, whereas that court's conclusions on legal issues carry no such presumption. See Morris Concrete, Inc. v. Warrick, 868 So. 2d 429, 433–34 (Ala. Civ. App. 2003) (quoting earlier cases). Further, this court must "review the evidence in a light most favorable to the prevailing party." Driver v. Hice, 618 So. 2d 129, 131 (Ala. Civ. App. 1993).

The record reflects that, on June 22, 2007, the mortgagor, which is a limited-liability company of which J. Christopher Gibbs was the sole member and president, borrowed $2,500,000 from the mortgagee and, as

security for repayment of principal and interest on the note evidencing that debt, conveyed in a mortgage instrument the mortgagor's interests in particular real property in Colbert County, including several numbered land and "marina" lots in a recorded subdivision known as "Eagle Point" and a second nearby 320-acre tract that included the majority of Section 13, Township 2 South, Range 15 West; the second tract included a then unrecorded subdivision alternatively identified as "Eagle Point Two" or "Phase Two." That mortgage instrument was recorded the real-property records of Colbert County on the same date that it was executed. Donnie Gean, the mortgagee's chief credit officer, testified that, in the ordinary course of business, the mortgagee would execute a limited release of its mortgage as to particular individual lots upon receiving payment therefor; however, if the title history to the property described in the June 2007 mortgage was researched, a prospective purchaser would find the recorded mortgage instrument.

Subsequently, according to Gean's testimony, a second loan was extended by the mortgagee as to which repayment was secured by an interest in certain unsold "boat slips" located at Eagle Point's marina that

were owned by Gibbs individually. Unlike the lots and other land secured by the June 2007 real-property mortgage, the unsold boat slips were personal property, and a financing statement was recorded with the Alabama Secretary of State's office on January 24, 2008, evidencing the mortgagee's security interest in the unsold boat slips; the financing statement specifically identified the Eagle Point marina boat slips numbered 9 and 10.

In February 2008, after having been contacted by a real-estate agent, one of the transferees, Thomas Brackett, entered into negotiations regarding a potential purchase of interests in a numbered lot in Eagle Point Two, i.e., Lot 23, as to which the mortgagor's interests had previously been acquired by third parties (Darren Thompson and Jeanni Thompson) and upon which a partially built home had been located; those negotiations also concerned acquisition of unsold numbered boat slips at the Eagle Point marina. On February 28, 2008, Thomas Brackett and the mortgagor entered into an agreement of sale as to boat slip 9 pursuant to which Thomas Brackett paid $4,500 as earnest money, and the mortgagor further provided a "Vital Information Statement" to Thomas Brackett

concerning a proposed purchase of the mortgagor's interests in Lot 23. On April 2, 2008, those parties entered into a similar agreement of sale, and Thomas Brackett made a similar earnest-money payment, as to boat slip 10, and Thomas Brackett agreed to purchase the mortgagor's interests in Lot 22, which was adjacent to Lot 23.

Although the agreement of sale as to boat slip 9 had specified a proposed closing date of "on or before June 15, 2008," the record reflects that the transferees actually received their interests in Lot 22, Lot 23, boat slip 9, and boat slip 10 on September 30, 2008. On that date, the following instruments were executed: (a) a warranty deed as to Lot 22 naming the mortgagor as grantor and the transferees as grantees, which was executed by Gibbs as the mortgagor's "Sole Member and Manager"; (b) a warranty deed as to Lot 23 naming Darren Thompson and Jeanni Thompson as grantors and the transferees as grantees; (c) a bill of sale conveying to the transferees "all of [the mortgagor's] right, title and interest" in boat slip 9 "for value received"; and (d) a bill of sale conveying to the transferees "all of [the mortgagor's] right, title and interest" in boat slip 10 "for value received." Although, as previously noted, the boat slips

were not actually real property, all of the deeds and bills of sale were recorded in the Colbert County real-property records on October 6, 2008. At trial, Thomas Brackett testified that he had paid Gibbs a total of $364,900 for the lots and the boat slips, having elected not to finance the transaction through a loan from the mortgagee; however, he admitted that he did not order a commitment to ascertain the status of the title to Lot 22, Lot 23, or the boat slips before giving Gibbs those funds. Although the record reflects that the mortgagee expressly released its mortgage interests as to Lot 23, no such express release was undertaken as to Lot 22; moreover, the existence of the mortgage was not disclosed in the warranty deed from the mortgagor to the transferees embracing Lot 22.

In 2010, after the loans extended by the mortgagee to the mortgagor and to Gibbs had become delinquent because of nonpayment, the mortgagee began taking steps to foreclose upon its mortgage as to the lots at Eagle Point and Eagle Point Two that had not previously been released and to seek remedies as to the security interest in the boat slips at Eagle Point Marina. On June 2, 2010, a foreclosure auction was held at the Colbert County courthouse, at which the mortgagee purchased for $2.1

million the mortgaged properties, including the Eagle Point Marina lots and all of Eagle Point Two except for certain lots expressly excluded (e.g., Lot 23); the foreclosure deed was recorded on the same date. The mortgagee also initiated a civil action against Gibbs in the Colbert Circuit Court, case no. CV-10-900089, seeking a judgment under which the mortgagee would take title to the unsold boat slips; in consideration for dismissal of that action, Gibbs executed a deed in November 2010 conveying all of his rights as to boat slip 9 and boat slip 10.

Gean testified that the mortgagee had taken possession of the boat slips, although he admitted that the mortgagee had not "run anybody off" from using them. Gean added that the mortgagee had supplied moneys to construct a gate in front of the Eagle Point Two subdivision and had paid real-estate taxes owed as to Lot 22 (as had the transferees); Gean admitted, however, that the mortgagee had not entered onto Lot 22 and had not physically disturbed the transferees in their use of Lot 22 as a yard space adjacent to the "second home" located on Lot 23 after the foreclosure deed was recorded.

According to Gean's testimony, a series of e-mail communications took place between Gibbs and the mortgagee in July 2010 in which Gibbs, apparently on behalf of the transferees, sought the mortgagee's relinquishment of its interests in Lot 22 and boat slips 9 and 10. In those e-mail exchanges, Gibbs took the position that a sufficient portion of the money owed on the loans made by the mortgagee had been paid so as to warrant the mortgagee's relinquishment of its interests as to that lot and those boat slips -- a position that, as Gean noted at trial, was "a common argument" that borrowers routinely make to the mortgagee.

With respect to the transferees' assertion that they and not the mortgagee are the true owners of Lot 22, we note that "Alabama is a 'title' state, i.e., upon the execution of the mortgage legal title passes to the mortgagee," and that "[t]he mortgagor retains an equity of redemption which he may convey." First Nat'l Bank of Mobile v. Gilbert Imported Hardwoods, Inc., 398 So. 2d 258, 260 (Ala. 1981). Despite the language in the warranty deed executed by the mortgagor in favor of the transferees under which the mortgagor warranted, "for itself and for its successors and assigns, ... that it [was] lawfully seized in fee simple" of Lot 22, that

deed necessarily conveyed only the rights in Lot 22 that the mortgagor retained after the execution of the June 2007 mortgage, i.e., the equity of redemption: "It is settled law that the grantor of a deed can convey only such interest in the property as he has." Alabama Historical Comm'n v. City of Birmingham, 769 So. 2d 317, 321 (Ala. Civ. App. 2000).[1] Further, the "equity of redemption ... is extinguished by a valid foreclosure sale of it under the power in the mortgage, leaving no right in the [transferee] except" any statutory rights to redeem that may arise. McDuffie v. Faulk, 214 Ala. 221, 224, 107 So. 61, 63 (1926). Thus, the record title as to Lot 22 reflects that that lot is owned the mortgagee and not the transferees.[2]

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[1]We note that no party has invoked the equitable doctrine of exoneration, under which a mortgagor's conveyance to a grantee of a portion of mortgaged land by means of a warranty deed will constitute, as between those parties, an election to subject to the mortgage only the land as to which the mortgagor has retained an interest. See generally Taylor v. Jones, 285 Ala. 353, 355-56, 232 So. 2d 601, 603-04 (1970) (discussing the doctrine). "[F]ailure to argue an issue in [a] brief to an appellate court is tantamount to the waiver of that issue on appeal." Ex parte Riley, 464 So. 2d 92, 94 (Ala. 1985).

[2]Although the transferees claim that the mortgagee lacked peaceable possession of Lot 22 and that, as a result, the mortgagee could not properly have asserted a quiet-title claim under Ala. Code 1975, § 6–6-540, the trial court did not base its judgment on that statute, and the judgment in favor of the mortgagee is referable to the mortgagee's

Our conclusion as to title to Lot 22 is not altered by the transferees' invocation of the doctrine of statutory adverse possession as recognized in Ala. Code 1975, § 6-5-200. Under that statute, "[a]dverse possession cannot confer or defeat title to land" unless one of three conditions exists, including when (1) "a deed ... purporting to convey title to [a claimant] has been duly recorded in the office of the judge of probate of the county in which the land lies for 10 years before the commencement of the action" or (2) the claimant has "annually listed the land for taxation in the proper county for 10 years prior to the commencement of the action if the land is subject to taxation." Nevertheless, as a fundamental matter, the possession of the claimant (here, the transferees) must be adverse in order

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declaratory-judgment claim. Thus, any failure to expressly reject the quiet-title theory is harmless. See Hinson v. Holt, 776 So. 2d 804, 808-10 (Ala. Civ. App. 1998) (noting that, on review of a judgment in favor of a plaintiff, the presence of a viable theory in a case renders harmless any error in failing to enter a judgment in the defendant's favor on other theories); see also Mississippi Valley Title Ins. Co. v. Malkove, 540 So. 2d 674, 680 (Ala. 1988) (holding that "[t]he principles of Aspinwall v. Gowens, 405 So. 2d 134 (Ala. 1981)," which mandates reversal of a judgment entered on a jury verdict when a "bad count" is presented to the jury over a specific objection to submission of that count, "do not apply in a non-jury setting").

for the statute to apply. See Courtney v. Boykin, 356 So. 2d 162, 165 (Ala. 1978).

In Christopher v. Shockley, 199 Ala. 681, 75 So. 158 (1917), our supreme court expounded at length upon the concept of "adversity" of occupancy by a transferee of a mortgagor as follows:

> "What is necessary to constitute an effective adverse possession by a mortgagor or his alienee, as against the mortgagee, has been often declared by this court. Prima facie, a mortgagor or his alienee holds in subordination to the title of the mortgagee, and not adversely thereto. 'Until foreclosure, the mortgagor owns the equity of redemption. This he may alien or transfer to another. It cannot be known, without some overt act, throwing off allegiance, that the mortgagor or his vendee is not quietly enjoying the possession of the equity of redemption, at all times acknowledging the rights of the mortgagee.' Boyd v. Beck, 29 Ala. 703, 714 [(1857)].
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> "In harmony with previous decisions, this court said in State v. Conner, 69 Ala. 212[, 215-16 (1881)], per Stone, J.: 'When a mortgagor, after the execution of the mortgage, makes sale of the mortgaged premises to a third person, who has notice, actual or constructive, of the prior mortgage, the presumption is that he sells only the interest remaining in him, which is an equity of redemption. And, as the mortgagor does not hold adversely, but in subordination to the title of the mortgagee, the presumption is that the alienee ... holds in the same right, and asserts no higher, or independent title. So, if such transaction be left to its own legal intendments, the presumption is that the alienee, like his vendor, holds in

> recognition of, and subordination to, the prior and paramount title of the mortgagee. This, without more, is not an adverse holding, which will ripen into a title at the end of 10 years of continued occupation. To convert such a possession into an adverse holding, there must be a renunciation or disclaimer of the mortgagee's right, and that renunciation must be traced to his knowledge. Till that is done, such possession is not regarded as adverse.'
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> "This means that the adversely holding mortgagor or his alienee must either expressly disclaim subordination to the mortgage, or else he must show acts of insubordination, known to the mortgagee, which are inconsistent with further recognition of the mortgage title, and which fairly suggest to the mortgagee the hostile intention of the occupant. Manifestly this is not accomplished by mere exclusive possession and claim of title as against the world in general, nor by any of the customary acts of ownership and enjoyment. For the mortgagor or his alienee, as owner of the equity of redemption, is entitled to such claim, possession, and use as against the world in general; and, as against the mortgagee, those acts import no change from a permissive to a hostile possession. Hence the notice to the mortgagee must be specifically of a holding that is hostile to his mortgage."

199 Ala. at 683-84, 75 So. at 159 (emphasis added; some citations omitted).

Under the foregoing principles, then, any acts of possession by the transferees before the foreclosure sale of Lot 22 in June 2010 were not adverse as to the mortgagee in the absence of evidence of an explicit

disclaimer of possession in subordination to the recorded June 2007 mortgage. Accord Courtney, 356 So. 2d at 166 (holding that trial court erred in considering possessory acts occurring before issuance of foreclosure deed to a mortgagee in determining issue of adverse possession asserted by claimant). Because 10 years had not elapsed since the date of the foreclosure sale at the time the mortgagee brought its action against the transferees, we conclude that the trial court did not err in rejecting the transferees' defense of adverse possession.

To the extent that the transferees assert that the mortgagee should have been denied relief on its claims as to Lot 22 on the basis of their affirmative defenses of laches and estoppel, their appellate argument is based upon their assertion that the mortgagee's delay in bringing its action seeking a judgment declaring its ownership of Lot 22 acted to their disadvantage so as to unduly prejudice them. Essential to their position is their claimed inability, based on the expiration of the pertinent statute-of-limitations period, to assert claims against the mortgagor, i.e., the grantor of their equity-of-redemption interest, under the warranty deed to Lot 22.

Assuming, without deciding, that the transferees adequately developed their laches/estoppel argument in the trial court so as to support appellate review, Alabama law does not support the proposition that all potential claims the transferees might have against the mortgagor are now time-barred. Rather, the transferees' time for asserting any and all claims against the mortgagor based on a breach of the covenants in the October 2008 warranty deed did not begin running at the time of the delivery of that deed:

> " 'The covenant in the deed to warrant and defend the title of the grantee and his successors against the lawful claims of all persons is in substance a covenant for possession and quiet enjoyment, and it is not broken so long as the grantee's enjoyment and possession are not interfered with. Oliver v. Bush, 125 Ala. 534, 27 So. 923 [1900]. "It operates in futuro, unless the true owner is in actual possession at the time the covenant is entered into, in which case there is a breach eo instanti; it runs with the land, that is, it is intended for the benefit of the ultimate grantee in whose time it is broken, and there can be no breach expect by an actual or constructive eviction." '
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> "Chicago, Mobile Development Co. v. G.C. Coggin Co., 259 Ala. 152, 161, 66 So. 2d 151, 157 (1953)."

Lacks v. Stribling, 406 So. 2d 926, 929 (Ala. Civ. App. 1981). In Self v. Petty, 469 So. 2d 568, 570 (Ala. 1985), our supreme court quoted Lacks in support of that court's conclusion that the 10-year statute of limitations applicable to recovery of real property, Ala. Code 1975, § 6-2-33, does not start running as to a breach-of-quiet-enjoyment claim until there is an actual or a constructive eviction of the grantee named in the deed from possession. Accord Steele v. McRaney, 855 So. 2d 1114, 1121 (Ala. Civ. App. 2003) (distinguishing, for purposes of 10-year statute of limitations, accrual date of breach-of-quiet-enjoyment claims from those of breach-of-covenant claims pertaining to seisin and absence of encumbrances).

In any event, the mortgagee brought its own declaratory-judgment claim against the transferees within the 10-year statute-of-limitations period applicable to actions for recovery of land. " '[W]hen a party asserts that a claim is barred by laches in a case where the action is not barred by the statute of limitations, mere delay is not sufficient for the defense of laches' "; rather, " '[s]pecial facts must appear which make the delay culpable.' " Williams v. Mertz, 549 So. 2d 87, 88 (Ala. 1989) (quoting Thomaston v. Thomaston, 468 So. 2d 116, 121 (Ala. 1985)). Here, the

transferees have not shown any such special facts that would have made the mortgagee's eight-year delay culpable: in light of the adversity principles we have discussed, we perceive no advantage that could have inured to the transferees by way of their calling former employees of the mortgagee as witnesses. Thus, the trial court did not err in entering a judgment favorable to the mortgagee notwithstanding the decision to wait for several years to bring the action.

The transferees next contend that the trial court erred in entering a judgment in favor of the mortgagee as to the two boat slips. The record indicates that, as security for the repayment of a loan that was made to Gibbs individually,[3] the mortgagee took title to boat slips 9 and 10 from

[3]The transferees contend, for the first time on appeal, that the loan underlying the security interest in the boat slips was a loan made to the mortgagor such that the financing statement, which identified Gibbs individually as the debtor, was misleading and unenforceable. Even had the evidence, viewed in a light most favorable to the judgment, not indicated that Gibbs, who had owned the boat slips, was a debtor to the mortgagee in his individual capacity as well as being the sole member of the mortgagor, this court would not reverse the judgment under review on that basis because the trial court was not apprised of that issue. See Andrews v. Merritt Oil Co., 612 So. 2d 409, 410 (Ala. 1992) (appellate review "is restricted to the evidence and arguments considered by the trial court").

Gibbs by way of a written instrument in November 2010 after having filed of record a financing statement in January 2008 as to those specific items of personal property with the Secretary of State's office before the transferees began their negotiations to acquire interests therein. In light of that evidence, the trial court was authorized to afford relief consistent therewith regardless of the theories asserted in the mortgagee's complaint. See Rule 54(c), Ala. R. Civ. P.

The transferees correctly note that, under the Uniform Commercial Code ("UCC") as adopted in Alabama (Ala. Code 1975, § 7-1-101 et seq.), a security interest in personal property becomes unperfected as to that property upon expiration of an unrenewed recorded financing statement under Ala. Code 1975, § 7-9A-515(c). However, the mortgagee correctly notes that, under the UCC, the mortgagee had the power to accept the boat slips designated in the November 2010 instrument in partial satisfaction of the loan made to Gibbs with Gibbs's consent (see Ala. Code 1975, § 7-9A-620), which acceptance simultaneously discharged the security interest and terminated the subordinate interests of the transferees in the boat slips under the UCC (see Ala. Code 1975, § 7-9A-

622(a)(3) and (a)(4)). Further, the transferees point to no provision of the UCC that would allow them to take title to the boat slips notwithstanding the mortgagee's preexisting perfected security interest. The boat slips, according to the evidence of record, merely float on water in Pickwick Lake and are not "movable" under the UCC (Ala. Code 1975, § 7-2-105(1)) so as to amount to "goods" that can be sold free of security interests in the ordinary course of business (compare Ala. Code 1975, §§ 7-1-201(a)(9) & 7-9A-320(a), which, taken together, provide for a contrary rule as to sales of encumbered goods). We thus agree with the mortgagee that the trial court did not err in determining that the mortgagee, and not the transferees, owns boat slip 9 and boat slip 10.

Based upon the foregoing facts and authorities, the judgment in favor of the mortgagee is due to be affirmed.

AFFIRMED.

Thompson, P.J., and Moore, Donaldson, and Edwards, JJ., concur.