REL: May 8, 2020

SUPREME COURT OF ALABAMA

OCTOBER TERM, 2019-2020

1180804

Pentagon Federal Credit Union

v.

Susan R. McMahan

Appeal from Baldwin Circuit Court
(CV-18-900160)

MENDHEIM, Justice.

Pentagon Federal Credit Union ("PenFed") appeals a judgment entered by the Baldwin Circuit Court in favor of Susan R. McMahan. We reverse the circuit court's judgment and remand the cause for further proceedings.

Facts and Procedural History

PenFed and McMahan stipulated to the following facts:

> "1. On or about June 16, 2005, Plaintiff Susan R. McMahan and her now deceased husband (collectively 'the McMahans'), purchased the property located at 23324 Cornerstone Drive, Loxley, Alabama 36551 (the 'property'). ...
>
> "2. Also on June 16, 2005, the McMahans executed a mortgage on the property in favor of Wells Fargo in the principal amount of $122,700.00 (the 'Wells Fargo mortgage'). ...
>
> "3. The Wells Fargo mortgage identifies the property encumbered by the [Wells Fargo] mortgage as being located at '23324 Cornerstone Drive, Loxley, Alabama 36551,' Id. at p. 3. The legal description attached to the Wells Fargo mortgage does not correctly describe the property.
>
> "4. On or about September 14, 2007, the McMahans obtained a loan and executed a promissory note in favor of PenFed in the amount of $55,000.00 ('PenFed note'). ...
>
> "5. On or about September 14, 2007, the McMahans executed a second mortgage on the property in favor of PenFed (the 'PenFed mortgage'). ...
>
> "6. PenFed was aware of the Wells Fargo mortgage when PenFed made the loan to the McMahans and obtained its mortgage on the McMahans' property."

The PenFed mortgage states, in pertinent part:

> "At no time shall this mortgage, not including sums advanced to protect the security of this mortgage, exceed $55,000.00.

> "....
>
> "... [PenFed] shall be subrogated to the rights of the holder of any previous lien, security interest, or encumbrance discharged with funds advanced by [PenFed] regardless of whether these liens, security interests or other encumbrances have been released of record."

The parties' stipulation of facts further states:

> "7. On or about September 27, 2014, the McMahans filed for Chapter 13 bankruptcy protection in the United States Bankruptcy Court for the Southern District of Alabama, Case No. 14-03147. ...
>
> "8. In Schedule D of their bankruptcy petition, the McMahans acknowledged that Wells Fargo held a $112,000.00 mortgage on the property ..., which was incurred in June 2005 ....
>
> "9. The McMahans also acknowledged in Schedule D the second mortgage on the property held by PenFed in the amount of $46,000.00. ...
>
> "10. On or about March 31, 2015, PenFed sought relief from the automatic bankruptcy stay in order to foreclose the PenFed mortgage. ...
>
> "11. On or about May 6, 2015, Wells Fargo sought relief from the automatic bankruptcy stay in order to foreclose the Wells Fargo mortgage. ...
>
> "12. The bankruptcy court granted PenFed's motion to lift the stay on May 19, 2015. ...
>
> "13. The bankruptcy court granted Wells Fargo's motion for relief from the automatic stay on June 22, 2015. ...

"14. On or about July 1, 2015, PenFed declared the PenFed note and mortgage in default and scheduled a foreclosure sale for August 7, 2015.

"15. At the duly noticed and conducted foreclosure sale on August 7, 2015, PenFed purchased the property for a credit bid of $36,000.00 (the 'foreclosure sale'). PenFed received a foreclosure deed, taking title subject to the senior lien of Wells Fargo. ...

"16. As of the date of the foreclosure sale, the McMahans owed PenFed the total amount of $47,714.16 under the PenFed note.

"17. The fees and costs incurred in association with the foreclosure sale totaled $2,719.25.

"18. The McMahans' bankruptcy case was dismissed on or about November 17, 2015. ... The Wells Fargo debt/lien and the PenFed debt were not discharged in the bankruptcy proceedings.

"19. On or about December 30, 2015, PenFed brought suit against Wells Fargo in the Circuit Court of Baldwin County, Alabama, Civil Action No. 05-CV-2015-901538, to quiet title as the first lien holder and fee simple owner of the property by virtue of the PenFed mortgage, the foreclosure deed, and the erroneous legal description in the Wells Fargo mortgage. PenFed did not notify or make [McMahan] a party to that lawsuit.

"20. That lawsuit was never tried to conclusion but was settled, and PenFed paid Wells Fargo $91,256.54 to satisfy the [Wells Fargo] note and in exchange for a cancellation and release of the Wells Fargo mortgage. PenFed did not acquire the right to enforce the Wells Fargo note and/or mortgage. ...

"21. On or about July 28, 2016, within one year of the foreclosure, PenFed sold the property to

> independent third-party purchasers for a sales price of $157,525.00 (the 'post-foreclosure sale'). ...
>
> "22. The costs and expenses associated with the July 28, 2016, post-foreclosure sale of the property totaled $12,350.39, which resulted in the net proceeds from the post-foreclosure sale totaling $145,174.61.
>
> "23. The McMahans' deficiency balance of $14,433.41 on the PenFed note was satisfied as a result of the post-foreclosure sale.
>
> "24. On or about December 5, 2017, counsel for Susan McMahan wrote PenFed inquiring about how the Wells Fargo mortgage was satisfied. ...
>
> "25. On or about January 8, 2018, counsel for PenFed responded to the December 5 letter, explained PenFed's calculation of the surplus remaining after the post-foreclosure sale, and offered to tender the surplus in exchange for execution of a hold harmless agreement. ..."

PenFed's calculation of the post-foreclosure-sale surplus proceeds excluded the $91,256.54 that PenFed paid to Wells Fargo to satisfy the Wells Fargo note and cancel the Wells Fargo mortgage.

On February 7, 2018, McMahan sued PenFed, asserting claims of breach of contract, "breach of quasi-fiduciary (trustee) duty," money had and received, unjust enrichment, constructive trust, and conversion. McMahan alleged that PenFed's sale of the property to third-party purchasers for

$157,525 ("the post-foreclosure sale") "created excess proceeds[] greater than the amount Pen[Fed] was entitled to collect under the Pen[Fed] ... note." The gravamen of each of McMahan's claims against PenFed is that the proceeds of the post-foreclosure sale exceeded the amount McMahan owes on the PenFed note, that McMahan is entitled to the proceeds of the post-foreclosure sale that exceed the amount McMahan owes on the PenFed note, and that PenFed has failed to remit to McMahan the entirety of the surplus proceeds from the post-foreclosure sale that she says she is entitled to. In essence, McMahan asserted that PenFed should not have excluded from the post-foreclosure-sale surplus proceeds the $91,256.54 that PenFed paid to Wells Fargo to settle the Wells Fargo note and the Wells Fargo mortgage.

On June 6, 2018, McMahan filed a motion for a partial summary judgment as to her claims of breach of contract and money had and received. On August 13, 2018, PenFed filed a motion for a summary judgment as to all of McMahan's claims. Both parties filed responses opposing the other's summary-judgment motion. On April 9, 2019, the circuit court denied the parties' summary-judgment motions.

On May 23, 2019, the parties submitted a joint motion containing a stipulated statement of facts, which is set forth above. The parties further stated in their joint motion that, "[h]aving reached this stipulation, [the parties] further stipulate that joint exhibits will be submitted and that neither party will present testimony at the trial of this matter." On May 31, 2019, the circuit court conducted a bench trial. PenFed submitted a trial brief at the conclusion of the bench trial. During arguments presented at the trial and in its trial brief, PenFed argued that the doctrine of unjust enrichment prohibited McMahan from recovering the $91,256.54 that PenFed paid to Wells Fargo to settle the Wells Fargo note and the Wells Fargo mortgage; McMahan objected to PenFed's raising the doctrine of unjust enrichment for the first time at trial.

On June 7, 2019, the circuit court entered a judgment in favor of McMahan. The circuit court concluded that,

> "[a]t the time of the post[-]foreclosure sale, [McMahan] was entitled to $94,741.20 in surplus, which represents the [post-foreclosure] sale price of $157,525.00 minus the amount owed on the PenFed note of $47,714.16 minus the costs associated with the foreclosure of $2,719.25 minus the costs associated with the post[-]foreclosure sale of

> $12,350.39. Prejudgment interest on $94,741.20 from July 28, 2016, is calculated to be $15,632.30."

In other words, the circuit court concluded that PenFed could not exclude from the post-foreclosure-sale surplus proceeds the $91,256.54 that it paid to Wells Fargo to settle the Wells Fargo note and the Wells Fargo mortgage. Further, concerning PenFed's unjust-enrichment argument, the circuit court stated:

> "PenFed did raise a defense at trial that [McMahan] had been unjustly enriched by PenFed's payment to Wells Fargo; however, PenFed did not raise unjust enrichment as a defense in any of its responsive pleadings, nor did PenFed claim unjust enrichment as a counterclaim. Thus PenFed's defense of unjust enrichment was waived, and this court need not have an opinion as to its merit."

PenFed appealed.

Standard of Review

In Ivey v. Estate of Ivey, 261 So. 3d 198, 206 (Ala. 2017), this Court stated:

> "'"[W]here the facts before the trial court are essentially undisputed and the controversy involves questions of law for the court to consider, the court's judgment carries no presumption of correctness." Allstate Ins. Co. v. Skelton, 675 So. 2d 377, 379 (Ala. 1996). Questions of law are reviewed de novo. BT Sec. Corp. v. W.R. Huff Asset Mgmt. Co., 891 So. 2d 310 (Ala. 2004).'

> "Alabama Republican Party v. McGinley, 893 So. 2d 337, 342 (Ala. 2004)."

Discussion

It is undisputed that McMahan is entitled to the entirety of the surplus proceeds from the post-foreclosure sale; the parties disagree, however, as to the amount of the surplus proceeds. McMahan argues that the surplus proceeds equal $94,741.20; PenFed argues that the surplus proceeds equal $3,484.66. The difference in the amounts claimed by the respective parties is $91,256.54, which is the amount PenFed paid Wells Fargo to satisfy the Wells Fargo note and to cancel the Wells Fargo mortgage. Thus, the more specific question raised by this appeal is whether the $91,256.54 that PenFed paid to settle the Wells Fargo note and the Wells Fargo mortgage should be excluded from the post-foreclosure-sale surplus proceeds.

As set forth above, the circuit court concluded that PenFed could not exclude from the post-foreclosure-sale surplus proceeds the $91,256.54 that PenFed paid to Wells Fargo to settle the Wells Fargo note and the Wells Fargo mortgage. PenFed argued below that the doctrine of unjust enrichment prohibits McMahan from receiving and retaining the

benefit of PenFed's settlement of the Wells Fargo note and the Wells Fargo mortgage while also recovering the $91,256.54 that PenFed paid to Wells Fargo to settle the Wells Fargo note and the Wells Fargo mortgage. However, the circuit court refused to consider PenFed's unjust-enrichment argument. The circuit court stated that PenFed waived its unjust-enrichment argument by failing to raise it as a defense in PenFed's responsive pleadings and by failing to assert the argument as a counterclaim.

On appeal, PenFed argues that the circuit court erred in determining that PenFed's unjust-enrichment argument had been waived. McMahan makes no effort to rebut PenFed's argument. We agree with PenFed; the circuit court erred in refusing to consider PenFed's unjust-enrichment argument.

The circuit court's conclusion that PenFed waived its unjust-enrichment argument is based, in part, on its characterization of the doctrine of unjust enrichment as an affirmative defense, which PenFed undisputedly did not raise in its responsive pleading. PenFed, however, argues that the circuit court's characterization of the doctrine of unjust enrichment as an affirmative defense was error. PenFed notes

that "there is no Alabama case law that recognizes unjust enrichment as an affirmative defense." PenFed's brief, at p. 17. PenFed appears to be correct; this Court cannot find any authority characterizing the doctrine of unjust enrichment as an affirmative defense. Accordingly, PenFed did not waive the defense of unjust enrichment by failing to plead it in its responsive pleadings. Instead, PenFed raised the argument to the circuit court at trial and in its trial brief; the argument was properly before the circuit court. Cf. Green Tree Acceptance, Inc. v. Blalock, 525 So. 2d 1366, 1369 (Ala. 1988) (holding that a trial court may even consider an argument raised for the first time in a postjudgment motion).

We note that the circuit court also stated that PenFed failed to assert unjust enrichment as a counterclaim. However, it does not appear that PenFed had reason to assert a counterclaim of unjust enrichment because PenFed was not seeking to recover any damages; PenFed had retained the at-issue $91,256.54 and McMahan sought to recover it from PenFed. Rather, PenFed appropriately raised the doctrine of unjust enrichment as a defense to McMahan's claims. See Fox v. Title Guar. & Abstract Co. of Mobile, Inc., 337 So. 2d 1300

(Ala. 1976) (noting that the doctrine of unjust enrichment was raised as a defense); and Gulf Shores Plantation Condo. Ass'n v. Resort Conference Centre Bd. of Directors, 184 So. 3d 1040 (Ala. Civ. App. 2015) (noting that a party initially raised the doctrine of unjust enrichment as a defense in its response to a summary-judgment motion). McMahan seeks to recover $91,256.54 from PenFed even though she has already received and retains the approximately $112,000 benefit she undisputedly received by PenFed's settlement of the Wells Fargo note and the Wells Fargo mortgage; McMahan does not dispute that she is seeking a windfall. The circuit court erred in determining that PenFed waived its unjust-enrichment argument.

Conclusion

Accordingly, we reverse the circuit court's judgment and remand the cause, directing the circuit court to consider the merits of PenFed's unjust-enrichment argument.[1]

[1]We note that PenFed raised several other arguments on appeal concerning the merits of the case. However, our decision to reverse the circuit court's judgment based on the court's failure to consider PenFed's unjust-enrichment argument pretermits discussion of those arguments.

REVERSED AND REMANDED WITH INSTRUCTIONS.

Bolin, Sellers, and Stewart, JJ., concur.

Shaw, Bryan, and Mitchell, JJ., concur in the result.

Parker, C.J., dissents.

Wise, J., recuses herself.

PARKER, Chief Justice (dissenting).

In my view, Pentagon Federal Credit Union ("PenFed") has not sufficiently argued to this Court that it met the elements of its unjust-enrichment defense at trial. Moreover, on the merits, PenFed failed to meet those elements.

As a preliminary matter, I do not believe that PenFed has sufficiently argued the elements of its unjust-enrichment defense here. The entirety of PenFed's unjust-enrichment discussion consists of the following:

> "The trial court noted that PenFed argued at trial that [Susan R.] McMahan had been unjustly enriched by PenFed's payment to Wells Fargo. PenFed actually argued that McMahan will be unjustly enriched if she is awarded the $91,256.54 she now seeks. PenFed's argument was raised in the context of whether McMahan suffered any damage. The trial court noted that an unjust enrichment defense was waived because it was not raised in a responsive pleading. However, the trial court cited no authority for that holding, and there is no Alabama case law that recognizes unjust enrichment as an affirmative defense, thus making the trial court's holding in this regard error and subject to reversal."

PenFed's brief, at pp. 16-17 n.6 (record citations omitted). Thus, PenFed seems to argue only two things: (1) the trial court misunderstood the unjust-enrichment defense as relating to past enrichment rather than future enrichment and (2) the court incorrectly ruled that the unjust-enrichment defense was

waived. PenFed does not argue that it established the elements of unjust enrichment. Because PenFed fails to argue that merits question, PenFed has not sufficiently shown that the trial court's purported procedural errors were harmful, a mandatory requirement for reversal. See Bucyrus-Erie Co. v. Von Haden, 416 So. 2d 699, 702 (Ala. 1982) ("It is a fundamental principle that the appellant ... has the burden of proving prejudicial error.").

More importantly, PenFed failed to prove the elements of unjust enrichment at trial. The doctrine of unjust enrichment requires proof that "(1) [the recipient] knowingly accepted and retained a benefit, (2) provided by [the donor], (3) who ha[d] a reasonable expectation of compensation." Matador Holdings, Inc. v. HoPo Realty Invs., L.L.C., 77 So. 3d 139, 145 (Ala. 2011). Additionally, the donor must show that the enrichment was unjust, meaning that "'"(1) the donor of the benefit ... acted under a mistake of fact or in misreliance on a right or duty, or (2) the recipient of the benefit ... engaged in some unconscionable conduct, such as fraud, coercion, or abuse of a confidential relationship."'" Id. at 146 (quoting Welch v. Montgomery Eye Physicians, P.C., 891 So. 2d 837, 843 (Ala. 2004), quoting in turn Jordan v. Mitchell,

705 So. 2d 453, 458 (Ala. Civ. App. 1997)). "'"In the absence of mistake or misreliance by the donor or wrongful conduct by the recipient, the recipient may have been enriched, but he is not deemed to have been unjustly enriched."'" Id.

The stipulated facts at trial did not establish these elements. McMahan apparently had no contemporaneous notice of PenFed's quiet-title action and thus did not knowingly accept PenFed's payoff of the note secured by the Wells Fargo mortgage. Furthermore, nothing in the stipulated facts suggests that PenFed acted by mistake or that McMahan fraudulently induced PenFed to pay off the note. Thus, although McMahan benefited from the payoff, PenFed has not shown that it was entitled to keep that portion of the surplus under the doctrine of unjust enrichment. Accordingly, I dissent from the majority's reversal on this issue.