

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2012 CA 1132

JERRY HIERS

VERSUS

JULIAN DUFRECHE

Judgment Rendered: MAY 31 2013

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On Appeal from the
21st Judicial District Court,
In and for the Parish of Tangipahoa,
State of Louisiana
Trial Court No. 2011-3145

Honorable Zorraine M. Waguespack, Judge Presiding

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McClendon, J. dissents and assigns reasons.

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BEFORE: WHIPPLE, C.J., McCLENDON, AND HIGGINBOTHAM, JJ.

HIGGINBOTHAM, J.

Intervenor-Appellant, Regions Bank (“Regions”), appeals the trial court judgment that overruled its exception raising the objection of no cause of action and granted plaintiff’s writ of mandamus. For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY

On September 21, 2011, plaintiff, Jerry Hiers, filed a “Petition for Writ of Mandamus” as a summary proceeding against Julian Dufreche, in his capacity as clerk of court and ex-officio recorder of mortgages for Tangipahoa Parish. Hiers requested Dufreche show cause why a writ of mandamus should not issue ordering him to “erase the Cancellation recorded at Instrument No. 763369 and further to restore the Poole Note Mortgage, Instrument No. 624119 to its position and status as of August 9, 2007 before said cancellation was recorded.” The matter initially came before the court on January 17, 2012, and his request was orally granted. Subsequently, on January 23, 2012, Regions filed a motion for leave to intervene and for new trial. In its motion for intervention, Regions stated that “[i]t holds a promissory note secured by a mortgage on the property involved in this matter, granted to it by 47204, LLC.”

According to the record, in 2004 by an act of assignment, Hiers obtained ownership of a promissory note executed by Alpha Storage and Development, LLC in favor of Genita Poole and Wallace Poole in the amount \$400,000.00 (“the Poole Note”). The Poole Note was secured by a mortgage affecting two tracts of land in Tangipahoa Parish (“Tract 1” and “Tract 2”). Later, Hiers formed 47204, LLC, of which he was the sole member, and the company acquired ownership of Tract 1 and Tract 2.

In March 2005, Florida Parishes Bank (“FPB”) loaned money to 47204, LLC. To secure the debt, FPB was granted a mortgage on Tract 1 and Tract 2.

As part of that transaction, Hiers, his wife Elizabeth, and 47204, LLC signed an “Act of Assignment and Notarial Endorsement of Promissory Notes and Collateral Mortgage” (Poole Note Assignment), which states: “[Jerry Hiers, Elizabeth Hiers and 47204, LLC] do hereby **sell assign, transfer, negotiate and endorse**...unto [FPB] ... any rights title and interest in ... [the Poole Note]” Subsequently, Hiers transferred all his interest in 47204, LLC to Chad Bordelon.

In June 2007, after 47204, LLC had been transferred to Bordelon, Regions extended a \$1,500,000.00 loan to 47204, LLC secured by a mortgage on Tract 1 and Tract 2. As part of that transaction, the FPB loan was paid off, and FPB, at the request of Regions, requested that the clerk of court cancel all existing encumbrances on the property. According to the public records, this included cancellation of the Poole Note secured by a mortgage on Tract 1 and Tract 2, on September 24, 2007.

In his petition for writ of mandamus, Hiers asserts that he pledged the Poole Note to FPB as additional collateral for the loan FPB extended to 47204, LLC. Hiers states that the Poole Note has not been satisfied, and FPB did not have the right or authority to cancel the mortgage securing the Poole Note. Therefore, the Poole Note and mortgage should be reinstated and restored to the position it held before it was erroneously cancelled.

Regions argues that the public records doctrine should apply and the mortgage should not be reinstated. Regions contends that the Poole Note Assignment filed in the public records and signed by Hiers and FPB was, by its plain language, clearly a sale of the Poole Note and not a pledge. Therefore, FPB, on the face of the public records, was the owner of the Poole Note and was the proper party to request the cancellation of the mortgage secured by the Poole Note. Regions’s motion for new trial states that it relied on the public records

and on cancellation of the Poole mortgage executed by [FPB] to determine it had a first mortgage on Tract 1 and Tract 2; therefore, the Poole mortgage should not be reinstated to the prejudice of Regions. Regions also filed a peremptory exception raising the objection of no cause of action, arguing that Hiers had no cause of action for mandamus.

The matter came before the trial court on April 19, 2012. At the hearing, both parties to the Poole Note Assignment¹ testified that the assignment was actually a pledge. Hiers testified that his intent in signing the assignment of the Poole Note to FPB was that it was being used as collateral. He claimed that he had no intention of selling the Poole Note and received no compensation for it from FPB. Wayne Allen, Executive Vice President of FPB, testified that his intention in signing the assignment of the Poole Note was to assure that FPB had a first mortgage on the property. He stated his understanding of an assignment was “taking something that eventually you would return. If you’re taking--a sale would be something that we were buying and we were paying for.” He said FPB did not pay anything for the assignment and took it merely as additional collateral. Allen further testified that he intended only to cancel the assignment of the mortgage and not to cancel the mortgage. According to the testimony of both Allen and Hiers, there was no secret understanding or agreement between them that the document purporting to be a sale of the Poole Note was actually a pledge. Both parties to the Poole Note Assignment thought that what they were signing was only a pledge of the Poole Note to FPB as collateral, and not a sale of the Poole note to FPB.

Ted Dittmer, an attorney who was involved in the refinancing process between Regions and 47204, LLC, testified that he relied on the documents in

¹ The Poole Note Assignment identifies “Jerry A. Hiers” and “Elizabeth P. Hiers” as “ASSIGNORS” and “Wayne Allen” on behalf of FPB as the “ASSIGNEE.”

the public records to determine that the Poole Note had been assigned to FPB, and therefore, FPB was proper in cancelling the mortgage.

At the conclusion of the hearing and in a written judgment signed on April 30, 2012, the trial court granted Regions's motion for new trial, overruled Regions's peremptory exception of no cause of action, and granted Hiers's writ of mandamus. The trial court determined that the mortgage was "erroneously cancelled," and ordered the clerk of court for the Parish of Tangipahoa:

[T]o restore the mortgage recorded on December 9, 2002, at Mortgage Book 1085, Page 789, originally granted by Alpha Storage and Development, L.L.C. to Genita Schorling Poole wife of/and Wallace Poole, Jr., now in favor of Jerry Hiers, to its original place and rank in the land records of the Parish of Tangipahoa, and to erase the cancellation of said mortgage which cancellation was erroneous.

Regions appealed, citing the following assignments of error: (1) the trial court erred when, in contravention of the public records doctrine and La. Civ. Code art. 3342, it considered testimonial evidence of intent and allowed unrecorded claims of ownership at odds with the public records to affect the rights of third parties who relied on those public records; and (2) the trial court erred when it granted mandamus and reinstated the mortgage based on "mistaken cancellation" because, under La. Civ. Code art. 3356(B), the record owner cancelled the mortgage.

In response, Hiers contends that the trial court's determination that the mortgage was erroneously cancelled was correct because the exception to the public records doctrine applies in this case.

LAW AND DISCUSSION

Mandamus

Initially, Regions argued that the trial court erred in ordering the re-inscription of the mortgage at issue in a judgment arising out of a mandamus

proceeding because it was not a ministerial duty as required by La. Code Civ. P. art. 3863.² We need not reach the issue of whether or not mandamus is appropriate in this case. Mandamus is a summary proceeding. La. Code Civ.P. art. 2592. The proper method of opposing the use of a mandamus proceeding is to raise a dilatory exception urging the objection of unauthorized use of a summary proceeding. La. Code Civ. P. art. 926(A)(3). The dilatory exception must be raised prior to answer or judgment by default, and failure to do so means the exception is waived. La. Code Civ. P. art. 928; **Martin v. Bonanno**, 421 So.2d 359, 362 (La. App. 1st Cir. 1982). Regions filed an exception of no cause of action three months after filing its intervention and answer, contending that Hiers failed to state a cause of action for mandamus. The substance of the exception of no cause of action was clearly an objection to the use of summary proceeding by Hiers. We are obligated to construe the exception by its substance, not the title supplied by the litigant. La. Code Civ. P. art. 865. Because Regions' exception, which in substance was an objection to Hiers's use of summary proceeding, was not filed prior to its answer, any objection Regions had to Hiers's use of summary proceeding was waived.³

The Public Records Doctrine

The public records doctrine and its basic principles of recordation are set forth in La. Civ. Code arts. 3338 and 3342, "which protect third persons from the effect of unrecorded instruments affecting real estate and attempts to vary

² Louisiana Code of Civil Procedure article 3863 provides:

A writ of mandamus may be directed to a public officer to compel the performance of a ministerial duty required by law, or to a former officer or his heirs to compel the delivery of the papers and effects of the office to his successor.

³ The recent supreme court case of **Aberta, Inc. v. Atkins**, 2012-0061 (La. 5/25/2012), 89 So.3d 1161, per curiam, addressed the use of mandamus when the cancellation would involve more than a ministerial duty; however, in that case, a dilatory exception of unauthorized use of summary proceeding was filed.

the terms or statements of fact in recorded instruments.” 1 Peter S. Title, Louisiana Real Estate Transactions § 8:26 (2d ed. 2008). The Louisiana Public Records doctrine generally expresses a public policy that interest in real estate must be recorded in order to affect third persons. The public records doctrine is founded upon our public policy and social purpose of assuring stability of land titles. **Cimarex Energy Co. v. Mauboules**, 2009-1170 (La. 4/9/10), 40 So.3d 931, 943.

The public records doctrine has been described as a negative doctrine because it does not create rights, but rather, denies the effect of certain rights unless they are recorded. **Cimarex**, 40 So.3d at 944. In explaining the negative nature of the doctrine, the Louisiana Supreme Court has stated that third persons are not allowed to rely on what is contained in the public records, but can rely on the absence from the public records of those interests that are required to be recorded. Simply put, the rule that what is not recorded is not effective does not mean that what is recorded is effective in all events, despite any defect contained therein.⁴ **Id.**

Although the public records doctrine is a negative doctrine, it also has a positive aspect in the sense that a third person who acquires an interest in an immovable after the recordation of an instrument that relates to the immovable may rely upon the recitals of that recorded instrument under the rule that “secret claims and equities” between the parties to the instrument cannot be invoked to the prejudice of third parties relying upon the public records. **LeBoeuf v. Malbrough**, 188 So.2d 196, 202 (La. App. 1st Cir. 1966); See La. R.S. 9:2721,

⁴ Louisiana Civil Code article 3341, enacted by Acts 2005, No. 169, § 1, effective July 1, 2006, codified this concept, i.e. that the mere fact that a document is recorded does not mean that it is valid or that the person with record title is in fact the owner. See **Evans v. City of Baton Rouge**, 10-1364 (La. App. 1st Cir. 2/14/11), 68 So.3d 576, 580 n. 3.

repealed by Acts 2005, No. 169, § 8, effective July 1, 2006, and replaced with La. Civ. Code art. 3342.”

An exception to the public records doctrine exists where a mortgage is cancelled from the public records through fraud, error or mistake. The cancellation of a mortgage through fraud, error or mistake, without the consent or knowledge of the holder, does not deprive the holder of his security, even as against third parties dealing with the property in good faith in reliance on the public records. **McL. Development Company, Inc. v. Pyburn**, 268 So.2d 296, 298 (La. App. 2d Cir. 1972); **Davis-Wood Lumber Company v. DeBrueys**, 200 So.2d 916, 916 (La. App. 1st Cir. 1967); **National Acceptance Company of America v. Wallace**, 194 So.2d 194, 201 (La. App. 2d Cir. 1967), writs denied, 250 La. 467 and 470, 196 So.2d 533 and 534 (La. 1967).

Cases involving fraudulent or erroneous cancellation, in which the exception to the public records doctrine has been applied, involve mortgage holders who did not know or consent to the cancellation and who had no way of knowing of the wrongful cancellation of the mortgage and no means of protecting their security interests in the property. Therefore, the exception to the public records doctrine is necessary in the interest of justice. **Central Bank v. Frost**, 552 So.2d 508, 512 (La. App. 2nd Cir. 1989), writ denied, 556 So.2d 59 (La. 1990), cert. denied, 498 U.S. 827, 111 S.Ct. 83, 112 L.Ed.2d 55 (1990).

Regions contends that the trial court erred when, in contravention of the public records doctrine, it considered testimonial evidence of intent and allowed unrecorded claims of ownership at odds with the public records to affect the rights of third parties who relied on those public records. Regions asserts that the Poole Note Assignment filed into the public records unambiguously did “**sell assign, transfer, negotiate and endorse** with warranty of title... any and all of

[Hiers's] right, title and interest in and to the Poole Note and mortgage to FPB.” (Emphasis added.) Therefore, Regions argues that any evidence introduced to contradict those terms should not be considered. In support of its position, Regions relies on La. Civ. Code art. 3342,⁵ which provides:

A party to a recorded instrument may not contradict the terms of the instrument or statements of fact it contains to the prejudice of a third person who after its recordation acquires an interest in or over the immovable to which the instrument relates.

Regions also relies on La. Civ. Code art. 3356(B), which provides:

A recorded transfer, modification, amendment, or release of a mortgage or privilege made by the obligee of record is effective as to a third person notwithstanding that the obligation secured by the mortgage or privilege has been transferred to another.

In response, Hiers argues that the factual scenario presented in this case fits within the long-established exception to the public records doctrine as discussed in **Davis-Wood Lumber Company v. DeBrueys**, 200 So.2d 916 (La. App. 1st Cir. 1967). Hiers contends that the cancellation of a mortgage was by mistake and was without his consent or knowledge, and therefore does not deprive him of his security, even as against Regions dealing with the property in good faith and in reliance on the public records. Further, Hiers contends that the document Regions relied on to determine it had a first mortgage on the property is the cancellation of the mortgage, not the assignment, and he was not a party to that document.

Regions' assertion that on the face of the public records it appeared FPB was the owner of the Poole Note is correct. Therefore, Regions had no way of

⁵ This article codified the positive aspect of the Public Records doctrine and the well-settled jurisprudence that third parties who acquire an interest in an immovable are entitled to rely on the recitals of a recorded instrument relating to that immovable regardless of any secret understandings, agreements, claims or equities that may exist between the parties to the instrument. 1 Peter S. Title, Louisiana Real Estate Transactions § 8:5 (2d ed. 2008). In this case, both parties testified that they not only intended the Poole Note Assignment to be a pledge, but actually thought that the document they signed pledged the note as additional collateral and did not sell the note. There was no evidence presented that there was any secret understanding or agreement between Hiers and FPB.

knowing that the Poole Note Assignment's language clearly contemplating a sale was intended by the parties only as a pledge. However, for the following reasons, we agree with the trial court's determination that the Poole mortgage was erroneously cancelled. Therefore, the long-held exception to the public records doctrine applies in this case.

As the public records doctrine is a negative doctrine, the fact that the Poole Note Assignment was recorded does not mean that FPB is, in fact, the owner. See 1 Peter S. Title, Louisiana Real Estate Transactions, § 8:16 (2d ed. 2008). FPB and Hiers agree that the Poole Note Assignment was intended only as additional collateral and not as a sale. Therefore, filing the Poole Note Assignment, which on its face contemplated a sale, into the public records did not create any ownership rights of the Poole Note in FPB. Thus, FPB was not the holder of the note when it requested that the mortgage be cancelled.

The pertinent document Regions relied on to conclude it had a first mortgage on the property was the cancellation of the mortgage securing the Poole Note. According to the record, FPB requested the cancellation of the Poole mortgage at the request of Regions and with its assistance. The cancellation was done for the benefit of Regions. Regions' attorney's secretary actually completed part of the request form for cancellation and filed it. FPB, through its vice president, Wayne Allen, signed the document requesting that the Poole mortgage be cancelled. Allen testified that by signing the request form for cancellation, he intended only to cancel the assignment of the mortgage and not to cancel the mortgage. Wayne Allen unequivocally testified that the cancellation of the mortgage was done in error and without Hiers's consent or knowledge. Further, Hiers testified that he did not know about the cancellation of the mortgage.

The exception to the public records doctrine applies when the cancellation of a mortgage is through mistake and without the consent or knowledge of the holder. In that case, the cancellation does not deprive the holder of his security, even as against third parties dealing with the property in good faith in reliance on the public records. See Davis-Wood Lumber Company, 200 So.2d at 919. In the case *sub judice*, there is uncontroverted testimony of Allen, who was the party responsible for the cancellation of the Poole Note, establishing that the mortgage was cancelled by mistake and without the consent or knowledge of Hiers. Additionally, Hiers testified that he had no knowledge of the cancellation. The trial court listened to the testimony and found it credible. Therefore, the circumstances in this case fit within the long-held exception to the public records doctrine and we find no error in the trial court's determination that the mortgage was erroneously cancelled.

Further, because Hiers did not know or consent to the cancellation, had no way of knowing of the wrongful cancellation of the mortgage, and had no means of protecting his security interests in the property, the application of the exception to the public records doctrine in this case is necessary in the interest of justice. See Central Bank v. Frost, 552 So.2d 508, 512 (La. App. 1st Cir. 1989), writ denied, 556 So.2d 59 (La. 1990), cert. denied, 498 U.S. 827, 111 S.Ct. 83, 112 L.Ed.2d 55 (1990).

CONCLUSION

For the foregoing reasons, the judgment of the trial court is affirmed. All costs of this appeal are assessed to Intervenor-Appellant, Regions Bank.

AFFIRMED.

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2012 CA 1132

JERRY HIERS

VERSUS

JULIAN DUFRECHE

McCLENDON, J., dissents and assigns reasons.

The majority applies the exception to the public records doctrine based on a fallacious determination that FPB was not the holder of the note at the time that it requested cancellation. In order to reach this conclusion, the majority, citing Peter S. Title, Louisiana Real Estate Transactions, § 8:16 (2d ed. 2008), states "as the public records doctrine is a negative doctrine, the fact that the Poole Note Assignment was recorded does not mean that FPB was in fact the owner." However, § 8:16 further provides:

The public records doctrine also has a positive aspect in the sense that a third person who acquires an interest in an immovable after the recordation of an instrument that relates to the immovable may rely upon the recitals of the recorded instrument under the rule that "secret claims and equities" between the parties to the instrument cannot be invoked to the prejudice of third parties relying upon the public records.

The original note was assigned by Hiers to FPB with the following language in the Act of Assignment:

Assignors [Hiers, his wife, and 47204, LLC] do hereby sell, assign, transfer, negotiate and endorse with warranty of title, unto [FPB] ..., any and all of Assignors' right, title, and interest in the following:

1. One certain promissory note in the original amount of \$400,000.00...
2. The Mortgage Note; and
3. The Mortgage,

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and all allonges, collateral mortgage note(s), act of mortgage and/or collateral mortgage, acts of pledge and all other collateral modifying and/or securing the Hand Note all of which are hereby accepted and received by Assignee.

Assignors do hereby notarially endorse the Promissory Note in favor of Assignee...

Clearly, Regions could rely upon the foregoing recitals of the recorded instrument that established FPB to be the holder of the note. Therefore, the exception to the public records doctrine, which requires a lack of consent or knowledge by the holder, does not apply because the note was cancelled with FPB's consent and knowledge. Accordingly, I respectfully dissent and would reverse the judgment of the trial court ordering the restoration of Hiers' mortgage.¹

¹ Hiers' action for improper cancellation of the mortgage is against FPB, the party that allegedly cancelled the mortgage in error.