Rel: November 30, 2018

SUPREME COURT OF ALABAMA

OCTOBER TERM, 2018-2019

1170179

Langley & Watters, LLP, and Richard L. Watters

v.

Michael Gamble, as personal representative of the Estate of Barbara Long

Appeal from Mobile Circuit Court
(CV-14-900620)

PER CURIAM.

AFFIRMED. NO OPINION.

Stuart, C.J., and Bolin, Parker, Main, Wise, Bryan, and Mendheim, JJ., concur.

Shaw, J., concurs specially.

Sellers, J., dissents.

SHAW, Justice (concurring specially).

I concur to affirm the judgment of the Mobile Circuit Court without an opinion. I write specially to address Justice Sellers's dissenting opinion. Under the ore tenus standard of review, I believe that there was sufficient evidence to support the trial court's judgment that an equitable mortgage existed in this case.

Barbara Long executed a deed to certain property she owned in Conecuh County. The issue in this case is whether the execution of the deed was an outright sale of the property or was intended to be collateral for a loan, thus creating an equitable mortgage.

> "'At common law, a deed of conveyance of land absolute and unconditional on its face, but intended and understood by the parties to be merely a security for the payment of a debt, will be treated in equity as a mortgage, conferring upon the parties the relative rights and remedies of the mortgagor and mortgagee, and nothing more.'"

Smith v. Player, 601 So. 2d 946, 949 (Ala. 1992) (quoting Andress v. Parish, 239 Ala. 67, 69, 193 So. 727, 729 (1940)).

> "To prove an equitable mortgage, it must be shown that: (1) the mortgagor has a mortgageable interest in the property sought to be charged as security; (2) a definite debt is due from the mortgagor to the mortgagee; and (3) the intent of

> the parties is to secure the debt by mortgage, lien, or charge on the property."

Hall v. Livesay, 473 So. 2d 493, 494 (Ala. 1985). So, although the deed on its face indicated that Barbara conveyed the land, if it was actually intended to be a security, mortgage, lien, or "charge on the property" for a debt, the law will treat the purported conveyance as an equitable mortgage.

In this case, it is alleged that Barbara needed a loan so she could pay a tax lien on or redeem the property and that Ted Langley agreed to loan her that money. It is further alleged that the deed, which purports to transfer the land to Langley & Watters, LLP ("the partnership"), was intended to be collateral for that loan. Langley contended, however, that the transaction was actually a sale of the property to the partnership but that Barbara had the option to repurchase it within a certain period.

The intent of the parties--whether the deed represented an absolute sale of the property or instead security/collateral for a loan of money to pay the taxes--was hotly debated at trial. At that point, Barbara was deceased, and we have no testimony by her as to her intent. However, in

the course of the proceedings before the trial, which also dealt with other issues, much evidence was generated regarding the transaction. Richard L. Watters, Barbara's attorney and a partner in the partnership who facilitated the transaction, had previously executed an affidavit, portions of which were read into evidence at trial. The affidavit stated, in part: "Shortly before the [tax] redemption time had run [Barbara] contacted me and asked me if I could find someone to loan her the funds for the redemption." In depositions taken before trial, portions of which were read into evidence, Watters and Langley both identified the transaction as a "loan" for which no interest was charged, both testified that Barbara would "repay" the loan (within 30 days, according to Watters, or three months, according to Langley), and both indicated that the deed to the property was "collateral" for that loan:

> "[Counsel:] What was the next conversation with [Barbara] as far as what was going to happen and how was this all going to work?
>
> "....
>
> "[Watters:] I called her up. [Langley] didn't want to do a mortgage. He just wanted to do a straight loan. At first he just wanted it paid back within a week. But then I got him to agree to thirty days and [Barbara] said that she could get the money up in thirty days."

(Emphasis added.)

"[Counsel:] This loan from [Langley], was it ever put down on paper as to the actual terms, interest rate, anything?

"[Watters:] There was no interest. He didn't want any interest. He just wanted the money paid back within thirty days."

(Emphasis added.)

"[Counsel:] But you were willing to loan [Barbara] this money but the collateral you needed was a quitclaim deed, not just a mortgage?

"[Langley:] Correct.

"[Counsel:] Okay. Was there any discussion between you and your brother[1] about the terms of the loan other than what we just discussed?

"[Langley:] Just that it was going to be interest free. I was lending the money. All I wanted was my money back. If they repaid it then we were going to use the money for another interest that we had.

"....

"[Counsel:] How long was the loan supposed to be?

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[1]Langley apparently discussed the transaction with his brother.

> "[Langley:] You know, my recollection of the period seems to differ from what I heard Richard testify. But I remember it being three months and that I'd give her three months to repay my money."

(Emphasis added.)

> "[Counsel:] And since [Barbara] didn't pay this twenty-five hundred dollar loan you went ahead -- well, not you, but the quitclaim deed that was the collateral for this loan was recorded?
>
> "[Langley:] In October, several months later."

> "[Counsel:] [The partnership] had already sent [Barbara] the quitclaim deed back in March which she sent back which was the collateral for the loan?
>
> "[Langley:] That's correct."

(Emphasis added.)

In an affidavit dated July 7, 2015, Langley testified as to the nature of the transaction, in part, as follows:

> "Watters contacted me ... as a last resort to advance funds to help redeem a client's property that had been sold for past taxes. ... I agreed to help the client redeem the property with the understanding that I would be repaid in full. ... When I advanced the money I had no interest in profiting from helping someone in need by charging interest but neither was I going to be out of pocket.

> "Richard stated that the client was agreeable to a mortgage on the property but I made it clear I wasn't interested in a mortgage, that I would advance the money but if I had not been repaid in one month in full (I originally requested one week) that I wanted the property outright. ..."

(Emphasis added.) Langley also stated that before he agreed "to advance the money and hold the deed" he researched "land sales in Conecuh County." He stated:

> "I wasn't even sure that there was timber on the property at that point as it is in a remote location down several dirt roads and I couldn't take the time to view the property. ... At that point I only wanted my money back."

(Emphasis added.) Langley stated that his "agreement [was] to be repaid in full or be deeded the land." This is not the testimony of one who wanted to buy this land, but of one who was loaning money with a guarantee of repayment.

A letter by Watters to Barbara dated June 25, 2010, described the transaction as a loan to Barbara so that she could redeem the property: "When can you pay the excess money that was loaned by Mr. Langley to redeem your property, as he is concerned about his investment and is insisting that I go ahead and record the deed." (Emphasis added.) At trial, Watters was questioned about this letter:

> "[Counsel:] And according to this, that letter you sent to your client you describe the transaction as a loan; correct?
>
> "[Watters:] Yes."

The transaction was not described as a sale:

> "[Counsel:] But in this case the terms of the transaction that I've asked you about and that you've testified to repeatedly in your deposition, in your affidavit, you'll agree with me that in all these documentations you never once referred to it as a sale; correct?
>
> "[Watters:] Never."

(Emphasis added.)

This evidence establishes that Barbara sought a "loan" to use to redeem the property. Langley agreed to "help" Barbara redeem the property--not to buy the land--and wanted to be repaid. If Barbara could not do so, then he would keep the land, although, after reviewing the nature of the property, he "only wanted [his] money back." The transaction was a "loan" with no interest that had to be "repaid." The property itself--or the deed to it--was "collateral." The above evidence does not indicate that the deed represented an outright sale of the property with a right to repurchase. Property that is sold is generally not described as collateral; "holding" a deed until payment of a debt is

generally not an outright sale; and a right or option to repurchase is generally not described as a repayment of a loan. The trial court found as follows:

> "The Court finds that the evidence in this case, along with the reasonable inferences drawn from said evidence, establishes that a loan was made from Langley to [Barbara]. The [property] was put up as collateral to secure the loan."

There is ample evidence in the record to support those findings. Under Smith and Hall, supra, those findings support the trial court's judgment that an equitable mortgage was created.

The live testimony at trial by Watters and Langley was different from the pretrial testimony and documentary evidence described above. Together, their testimony was that the deed represented an immediate sale of the property with an option by Barbara to repurchase, that there was no loan, and that the deed to the property was not collateral for a loan. I see no need to repeat all of their trial testimony or the withering examination by opposing counsel pointing out the inconsistencies of their trial testimony with the pretrial testimony and evidence because, as explained below, the trial

court, under the ore tenus rule, could have rejected--and apparently did reject--it.

When a trial court in a nonjury trial hears oral testimony, the ore tenus standard of review applies. Kennedy v. Boles Invs., Inc., 53 So. 3d 60, 67 (Ala. 2010). Under that standard, the trial court's findings of fact are presumed correct, "and the trial court's judgment based on those findings will not be reversed unless the judgment is palpably erroneous or manifestly unjust." Lawson v. Harris Culinary Enters., LLC, 83 So. 3d 483, 491 (Ala. 2011). The ore tenus standard or rule is grounded on the principle that, in hearing such testimony, the trial court has the opportunity to evaluate the demeanor and credibility of witnesses, Reed v. Board of Trs. for Alabama State Univ., 778 So. 2d 791, 795 (Ala. 2000), "and to assign weight to their testimony." Wehle v. Bradley, 195 So. 3d 928, 934 (Ala. 2015). The trial court is "in the best position" to perform this evaluation, even if a witness "is the sole witness or the only witness to provide testimony on some question of fact." Chunn v. Chunn, 183 So. 3d 985, 992 (Ala. Civ. App. 2015). Further, in making such evaluations, the trial court is "free to reject" a witness's

testimony "as being not credible." Wells v. Wells, 69 So. 3d 192, 196 (Ala. Civ. App. 2011). See also Hall v. Mazzone, 486 So. 2d 408, 410–11 (Ala. 1986) ("In this case, the trial court observed one witness testify concerning this issue and made a determination of credibility. The fact that this determination was negative does not entitle us to ignore it.").

The trial court observed the in-court testimony given by Watters and Langley. It evaluated their demeanor and credibility and assigned weight to their testimony. Reed and Wehle. In doing so, it was free to assign no weight to their in-court testimony or to reject it as not credible. Hall and Wells. The trial court was in the best position to make that determination, Chunn, even if Watters and Langley were the sole witnesses on the issue. Hall and Chunn.[2] With the trial testimony discounted, Watters's and Langley's prior testimony and the documents discussed above support the trial court's factual finding that the transaction was a loan and that the property was collateral for that loan. These factual findings are presumed correct.

[2]The trial court did not state that it rejected any trial testimony. However, its factual findings, which are in accord with the pretrial evidence and contrary to the trial testimony, are consistent with such a determination.

Such a conclusion is logical. Langley initially advanced Barbara $19,186.79; however, $16,865.51 was returned because only $2,321.28 was needed to redeem the property. If Barbara intended to sell the property for the sum advanced by Langley, why was $16,865.51 of the purported purchase price returned? If Barbara intended to sell the property for only $2,321.28--a sum much smaller than the $40,000 to $50,000 it was worth--then why would she want that money to be used to redeem property she just sold and no longer owned? That would mean that she intended to sell the property for nothing. The fact that only enough money to pay off the tax debt changed hands confirms that she wanted to borrow just enough money to pay the taxes and redeem the property and that she did not want to sell the property outright.

It is true that Langley indicated at times that he did not desire a "mortgage" on the property. But this does not disprove an intent to create an equitable mortgage, which is different from a "mortgage." Specifically, the intent to create a "mortgage" is only one way an equitable mortgage might be created. As noted in Hall, an equitable mortgage is created when the parties intend "to secure the debt by

mortgage, lien, or charge on the property." 473 So. 2d at 494 (emphasis added). The decision in Smith explains it more generally: When a deed is intended and understood to be "a security" for the payment of a debt, it is treated in equity as a mortgage. 601 So. 2d at 949. So, although Langley's testimony, if accepted by the trial court, might show no intent by him "to secure the debt by mortgage," it does not disprove the other methods by which an equitable mortgage is created: when there is an intent to secure the debt by a "lien" or a "charge on the property" or "a security." In the instant case, the deed was intended as collateral for a definite debt--the loan--owed by Barbara. Although Langley might not have intended a contractual or express mortgage agreement, what he did intend was that the property be collateral for the payment of the loan, which is the very definition of an equitable mortgage.

SELLERS, Justice (dissenting).

Michael Gamble, as personal representative of the estate of Barbara Long ("Barbara"), asked the Mobile Circuit Court to declare that a quitclaim deed from Barbara to Langley & Watters, LLP ("the partnership"), purporting to convey to the partnership 32 acres of real property in Conecuh County ("the property") created an "equitable mortgage" instead of conveying fee-simple ownership of the property to the partnership. After a nonjury trial, the trial court granted Gamble the relief he requested. This appeal followed. I respectfully dissent from the Court's decision to affirm the trial court's judgment.

In October 2002, Barbara hired attorney Richard L. Watters in an effort to obtain her share of her deceased father's assets, including the property. Watters filed a declaratory-judgment action in the Conecuh Circuit Court on Barbara's behalf and engaged in settlement negotiations with the other heirs of Barbara's father. Pursuant to those negotiations, Barbara obtained a deed to the property. The employment agreement between Watters and Barbara provided for a contingency fee, and Watters has claimed that, as a result

of the employment agreement and the services he rendered to Barbara, he obtained a 1/3 interest in the property.

Taxes assessed on the property went unpaid, and a company owned by Barbara's cousin, Larry Findley, bought the property at a May 2, 2007, tax sale. Barbara did not have the funds necessary to redeem the property. Watters asked his friend, Ted Langley, to provide those funds. Langley agreed to do so if Barbara would sign a deed conveying the property to the partnership, the partners of which are Watters and another partnership, Langley & Associates.[3]

Langley also agreed that, if within three months of redeeming the property, Barbara paid Langley the amount of funds he planned to provide her, then the deed to the partnership would not be recorded, steps would be taken to cancel the effectiveness of the deed, and Barbara would own the property. Barbara signed the deed, Langley provided the funds, and the property was redeemed. Barbara did not pay Langley the funds he had provided, and, on October 20, 2010, almost seven months after the deed to the partnership was executed and delivered, Watters recorded the deed.

[3]The partners in Langley & Associates are Langley and his brother.

Barbara died on April 2, 2013, and Gamble was appointed as personal representative of her estate. Gamble filed an action in the Mobile Circuit Court seeking to quiet title to the property in Barbara's estate, and the partnership filed a counterclaim requesting that the trial court enter a judgment quieting title to the property in the partnership. After a nonjury trial, the trial court entered a judgment concluding that the deed from Barbara to the partnership resulted in only an equitable mortgage.[4]

Watters and the partnership describe the arrangement with Barbara as a sale and conveyance of the property to the partnership with an option for Barbara to repurchase the property from the partnership within 30 days of redeeming it.[5]

> "When a deed is made for a consideration paid at the time, whether the payment is made in cash, or by the surrender and satisfaction of a precedent debt, it will not lose the character of a conveyance, by

[4]The trial court's judgment states that Langley, who is not a party to this action, holds an equitable mortgage on the property. The judgment does not state that the partnership holds an equitable mortgage on the property. The parties do not discuss the ramifications, if any, of that circumstance.

[5]There is some conflict in the evidence as to Barbara's deadline to pay Langley the funds after redeeming the property. Watters's recollection, and the position he and the partnership take on appeal, is that Barbara had 30 days. Langley, however, testified that she had three months.

> an agreement on the part of the vendee, to allow the vendor to re-purchase at a future day, for the same price, or for an advanced price."

West v. Hendrix, 28 Ala. 226, 234 (1856) (emphasis omitted). Our precedent, however, recognizes that trial courts have the equitable power to declare that a deed operates only as a mortgage. See Donaldson v. Jaguar Land Co., 516 So. 2d 619, 622 (Ala. 1987) ("'It has been settled since the early decisions of this Court that a court of equity in this state has jurisdiction to entertain a bill to have a deed declared a mortgage and to grant such relief.'" (quoting Cousins v. Crawford, 258 Ala. 590, 597, 63 So. 2d 670, 676 (1953))). To convert a deed to a mortgage, it must be shown that the parties to the transaction had a "clear and certain intention and understanding" that the transaction was to create a mortgage. Cousins, 258 Ala. at 599, 63 So. 2d at 677.

> "Whether a transaction is to be considered as an absolute sale with right to repurchase or a mortgage depends upon the intention of the parties, to be ascertained by the circumstances attending the transaction. Eiland v. Radford, 7 Ala. 724 [(1845)]. The intention may be collected from the extrinsic circumstances and the internal evidence afforded by the papers. Jones v. Kennedy, 138 Ala. 502, 35 So. 465 [(1903)]. The subsequent conduct of the parties may be considered. Wilkinson v. Roper, 74 Ala. 140 [(1883)]; Oakley v. Shelley, 129 Ala. 467, 29 So.

385 [(1900)]; Rose v. Gandy, 137 Ala. 329, 34 So. 239 [(1903)].

"....

"There are some facts which are regarded of controlling importance in determining the question. Did the relation of debtor and creditor exist before and at the time of the transaction? Or, if not, did the transaction commence in a negotiation for a loan of money? Was there great disparity between the value of the property and the consideration paid for it? Is there a debt continuing for the payment of which the vendor is liable?

"....

"The absolutely certain thing which the cases establish is that if there is no continuing debt to be secured, there can be no mortgage ....

"In Reeves v. Abercrombie, [108 Ala. 535, 540, 19 So. 41, 42-43 (1895)], it was said:

> "'It is helpful to ascertain whether the transaction began in an application for the loan of money; was there great disparity between the value of the property and the consideration of the conveyance; whether the grantor retained possession, paid taxes, made improvements a tenant would not probably make, or otherwise, with the knowledge and consent of the grantee, acted towards the property in a way an owner would naturally do when his property was [e]ncumbered. The conduct of the parties under, and with reference to, any agreement made by them, throws a strong light upon their understanding of its scope and purpose; and, upon this idea, the inquiries above suggested would naturally arise in the mind of the searcher after

> truth, who, in the midst of conflicting statements, would probably give more heed to the actions of the parties than to their words.'"

Cousins, 258 Ala. at 599-600, 63 So. 2d at 677-79 (emphasis omitted). "It has been held that the omission to take a covenant as the evidence of a debt, is a strong circumstance to show that the conveyance was intended as a sale, and not a mortgage." Adams v. Pilcher, 92 Ala. 474, 476, 8 So. 757, 758 (1891). Based on the referenced precedent, it appears that, in addition to the parties' own statements regarding the transaction, relevant considerations include whether the transaction created a debtor/creditor relationship between Barbara and the partnership, whether there was a great disparity between the value of the property and the consideration provided to Barbara for the deed, and whether Barbara took actions consistent with her maintaining ownership of the property after deeding it to the partnership.

In the trial court, Barbara's estate relied primarily on statements made by Watters and Langley in correspondence, handwritten notes, and during depositions before the trial began, whereby they described the transaction with Barbara as creating a "loan" or a "debt." I note, however, that, during

his deposition, Watters expressly stated that Langley "didn't want to do a mortgage." Likewise, although Langley did not correct counsel for Barbara's estate every time during Langley's deposition counsel referred to the transaction with Barbara as creating a loan, at other times during his deposition Langley clearly denied that there had been a loan:

> "Q. [By counsel for Barbara's estate:] ... Is there any document that details the terms of this loan agreement between [Barbara] and, I guess, Langley & Associates?
>
> "A. [By Langley:] And it's easy to call it that. But based on my instructions to [Watters], this was not a loan or a mortgage. Essentially, I received title to that property for that amount that was being paid to redeem the property. Essentially, if she repaid that amount, gave me that same amount back, no interest, then she could have the property back. So you can call it a loan or you can call it whatever you want. But I never set this thing up with interest or intent of being repaid like a loan. I helped her facilitate her redeeming this property.
>
> "....
>
> "A. And that's why when you keep asking about a loan there, I keep telling you there's not a loan agreement.
>
> "Q. Right.
>
> "A. My agreement was I would put up the money, I get the deed. If she gives me the money back, she gets the deed back.
>
> "....

> "A. I have no desire to be a part of a mortgage or a loan agreement. I thought it was easier to sell me the property and then if you want the property back, I'll sell it back to you for the same thing. Now, that wasn't in writing but I would have held to my terms at that time.
>
> "Q. You said sell you the property?
>
> "A. Essentially, that deed conveyed the property to me for what I put up for it, conveyed it to [the partnership]. I mean, you get a deed, you put money up. Is there anything in there that says anything about repayment? I didn't see anything in there about that. So she has--has no agreement. All she has to buy the property back is my word."

Both Langley and Watters testified during the trial that Langley did not want a promissory note or a mortgage, and, in fact, no such document was produced. Langley confirmed that he intended for the partnership to own the property upon Barbara's execution of the deed and for Barbara to have an option to repurchase it. He also testified that Barbara had no obligation to pay him the funds if she chose not to. Watters testified that he informed Barbara that, if she did not pay the funds by the deadline, the deed would be recorded, "that would be the end of it," and Barbara "would have no right to the property." When Gamble, as representative of Barbara's estate, filed an accounting of the estate's assets and liabilities, he did not identify any debts owed to the

partnership or to Langley, nor did he notify those parties of their right to make a claim as creditors of the estate.

Langley testified that, after the deed to the partnership was delivered, Barbara never expressed any interest in the property. She did not live on the property. There is no evidence indicating that she visited the property or that she made any improvements to it. With the exception of perhaps tax year 2010, Langley, Watters, or the partnership paid the taxes that were assessed on the property after Barbara signed the deed in March 2010.

I acknowledge that there appears to be a disparity between the value of the property and the consideration provided to Barbara. However, "[i]nadequacy of price or consideration alone will not convert an absolute conveyance into a security for the repayment of money." Cousins, 258 Ala. at 601, 63 So. 2d at 680. Moreover, Watters's and Langley's testimony indicates that Watters relinquished a right he held in another piece of property owned by Barbara, which apparently was producing oil. Thus, the evidence indicates that Barbara received more than just the funds that had been provided by Langley to redeem the property.

Notwithstanding the ore tenus rule, which all parties agree applies to the Court's review of the trial court's judgment, I do not believe that Barbara's estate demonstrated that a mortgage was the "clear and certain intention and understanding" of the parties to the transaction. Cousins, 258 Ala. at 599, 63 So. 2d at 677. See also Lee v. McDonald, 338 So. 2d 407, 409 (Ala. 1976) (reversing a trial court's declaration of an equitable mortgage, noting that neither of the two grantors (one of whom was deceased by the time of the trial) testified that they had intended the deed to operate as a mortgage). Accordingly, I respectfully dissent.