ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
JOHN B. ROBBINS, JUDGE

DIVISION III

CA 06-363

DECEMBER 20, 2006

CURTIS A CROFFORD and MARY E. CROFFORD

APPELLANTS

V.

GREEN TREE SERVICING, LLC f/k/a CONSECO FINANCE SERVICING CORP.

APPELLEES

APPEAL FROM THE PULASKI COUNTY CIRCUIT COURT, SIXTEENTH DIVISION
[NO. EQ-01-3667]

HONORABLE ELLEN BASS BRANTLEY, JUDGE

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS

This is an appeal of the grant of summary judgment regarding an in rem foreclosure decree ordered by the Pulaski County Circuit Court. We reverse and remand for further proceedings. Appellee was not entitled to judgment as a matter of law.

The following is an overview of events, to provide context for discussion. Appellants Curtis and Marie Crofford owned certain real property and a mobile home located at 25301 Sunshine Lane in Hensley, Arkansas. In 2000, the Croffords signed two notes evidencing certain indebtedness, and they signed two mortgages to secure this indebtedness. The holder of the notes and mortgages was Conseco Bank, Inc. The Croffords defaulted on payments within a year, and the entity holding the notes and mortgages (Conseco Finance Servicing Corporation ("CFSC") commenced proceedings to reform the deeds and mortgages, which

purportedly had incorrect legal descriptions of the acreage, and to foreclose on the property securing the debt reflected in the notes. During the pendency of the case, both the lending institution and the Croffords filed bankruptcy petitions, the former for reorganization and the latter for personal discharge. As the case proceeded, the nominal plaintiff became Green Tree Servicing, LLC ("Green Tree") formerly known as CFSC. Green Tree is the present appellee. The complaint was amended three times, and appellants answered each complaint, resisting the relief in toto.

Eventually, Green Tree moved for summary judgment, attaching copies of the mortgages and notes, asserting the total amount of indebtedness, asking that the corrected mortgages be ratified by the trial court, and seeking an in rem foreclosure decree. Appellants resisted the motion, attaching affidavits of Mr. and Mrs. Crofford stating that they had no intent to mortgage any real property but only the mobile home itself to secure any debt. They further had responded in their answers to the third-amended complaint that Green Tree had not provided proof of its rightful position as the assignee of the notes and mortgages, had not presented evidence of the original notes, had not proved that the legal description of real property was ever to be added to the mortgage, much less that the legal description was accurate, and further that Green Tree was seeking to collect on a debt discharged in bankruptcy.

Green Tree's counsel responded that the Croffords' affidavits (denying that they intended to mortgage the land) were in violation of the parol evidence rule, that no

bankruptcy law was violated when it was seeking only an in rem foreclosure, that the correct documents were all before the trial judge for consideration, and that it was clearly entitled to summary judgment. The trial court, after a hearing on the matter, agreed with appellee that the affidavits filed by the Croffords were in violation of the parol evidence rule and would not be considered. The trial court decided that motion would be granted on its request for an in rem foreclosure decree on the mortgages with the corrected legal descriptions. A foreclosure decree was filed on March 14, 2006, in which the trial judge found that appellants owed appellee $107,969.18 plus daily interest; that an in rem judgment was entered against the property; and that unless the judgment was paid within ten days, the property would be sold at public auction. No supersedeas bond or stay was requested by appellants. Appellants filed a notice of appeal from the foreclosure decree. The property was sold at public auction on June 1, 2006, with appellee submitting the prevailing bid in the amount of its in rem judgment. An order of confirmation of sale was filed on June 8, 2006. No appeal was taken from the confirmation order.

Appellants appeal to our court, asking that we reverse the in rem foreclosure decree. Appellants argue that appellee Green Tree is not entitled to summary judgment because (1) it did not produce a valid written assignment from the original notes-and-mortgages holder, (2) it did not produce the original promissory notes, (3) it did not properly identify the property upon which it asserted a lien, (4) this foreclosure action violated the bankruptcy stay provisions because the lien was invalid, and (5) fraud was effectively pleaded. Appellee

Green Tree responds that summary judgment was proper on the merits. Green Tree also asserts that this appeal cannot be pursued because no supersedeas bond was posted, and furthermore, the property has already been sold in foreclosure to Green Tree.

First, we address two issues raised by appellee in its brief. It contends that this appeal cannot be heard because appellants did not seek or post a supersedeas bond, and furthermore, any appeal is moot because the property at issue has already been subject to a foreclosure sale and the debt satisfied. We decline to dismiss the appeal as moot.

With regard to the notion of satisfaction of the debt barring this appeal, appellee relies on *Lytle v. Citizens Bank of Batesville*, 4 Ark. App. 294, 630 S.W.2d 546 (1982), in which the court of appeals wrote:

> Some jurisdictions hold that the payment of a judgment under any circumstances bars the payer's right to appeal. However, in the majority of jurisdictions, the effect of the payment of a judgment upon the right of appeal by the payer is determined by whether the payment was voluntary or involuntary. In other words, if the payment was voluntary, then the case is moot, but if the payment was involuntary, the appeal is not precluded. The question which often arises under this rule is what constitutes an involuntary payment of a judgment. For instance, in some jurisdictions the courts have held that a payment is involuntary if it is made under threat of execution or garnishment. There are other jurisdictions, however, which adhere to the rule that a payment is involuntary only if it is made after the issuance of an execution or garnishment. Another variation of this majority rule is a requirement that if, as a matter of right, the payer could have posted a supersedeas bond, he must show that he was unable to post such a bond, or his payment of the judgment is deemed voluntary. [Citations omitted.]
>
> We adopt the majority rule as the better reasoned rule. Thus, if appellant's payment was voluntary, then the case is moot, but if the payment was involuntary, this appeal is not precluded. In applying this rule to the facts at bar, we must determine whether the payment made by appellant was voluntary or involuntary. In doing so, we believe that one of the most important factors to be considered is whether appellant was able to post a supersedeas bond at the time he satisfied the judgment.

Lytle, 4 Ark. App. at 296-97. *See also Sherman Waterproofing, Inc. v. Darragh Co.*, 81 Ark. App. 74, 98 S.W.3d 446 (2003); *Hendrix v. Winter*, 70 Ark. App. 229, 16 S.W.3d 272 (2000); *Smith v. Smith*, 51 Ark. App. 20, 907 S.W.2d 755 (1995); *DeHaven v. T & D Development, Inc.*, 50 Ark. App. 193, 901 S.W.2d 30 (1995).

In *Reynolds Health Care Services v. HMNH, Inc.*, __ Ark. __, __ S.W.3d __ (Nov. 17, 2005), our supreme court was asked by HMNH, Inc., to dismiss the appeal where the judgment had been satisfied and an appeal bond had not been posted. The supreme court held that, while the posting of a bond is one of the most important factors to be considered in determining whether a judgment has been satisfied voluntarily, it found compelling the fact that the judgment was only satisfied as the result of the sheriff's levying a writ of execution on Reynolds' property. This rendered the satisfaction of the judgment not a purely voluntary act, and the supreme court declined to dismiss the appeal.

Specifically with regard to a foreclosure decree and subsequent sale, in *National Home Centers v. First Arkansas Valley Bank*, __ Ark. __, __ S.W.3d __ (June 15, 2006), our supreme court addressed the merits of an appeal of a foreclosure decree but did not address the merits of the foreclosure sale and confirmation. There was no notice of appeal filed from the confirmation of sale, which deprived the supreme court of jurisdiction to consider any defects in the sale process. *See id.* However, National Home Centers filed a notice of appeal from the foreclosure decree, albeit without a motion to stay the sale or to post a supersedeas

bond. The supreme court addressed the arguments raised on appeal about the priority of liens and the validity of the mortgage itself, part and parcel of the foreclosure decree.

We are mindful that appellants sought debt relief through bankruptcy proceedings, and the judgment was satisfied by the sale of the land on the courthouse steps to the purported party in interest. This is not in the nature of a voluntary satisfaction of debt. Therefore, we decline to dismiss the appeal as moot. *See also Ward v. Williams*, 354 Ark. 168, 118 S.W.3d 513 (2003) (declining to dismiss; Williams argued that appeal was moot due to judgment satisfaction; supreme court held that it did not believe that the absence of a supersedeas bond and the granting of the land to Williams as part and parcel to execution on a judgment nullifies an appeal from that underlying judgment).

We hasten to add that the purchaser at the foreclosure sale was purportedly the party in interest as holder of the notes and mortgages. When property is sold at a judicial sale to one not a party to the suit, a subsequent reversal of the decree does not affect the purchaser's title. *See Orem v. Moore*, 224 Ark. 146, 272 S.W.2d 60 (1954). Here, we have a party in interest as the prevailing bidder at the public sale. Green Tree's title is dependent upon the validity of the foreclosure decree because Green Tree, as a party, is not an innocent purchaser. *See Millington v. Hill*, 54 Ark. 239, 15 S.W. 606 (1891).

Moving to the merits of the summary judgment, we begin with several well-established statements of law. A trial court may grant summary judgment only when it is clear that there are no genuine issues of material fact to be litigated, and that the party is

entitled to judgment as a matter of law. *Harris v. City of Fort Smith*, 359 Ark. 355, 197 S.W.3d 461 (2004). Once the moving party has established a prima facie case showing of entitlement to summary judgment, the opposing party must meet proof with proof and demonstrate the existence of a material issue of fact. *Young v. Gastro-Intestinal Center*, 361 Ark. 209, ___ S.W.3d ___(Mar. 24, 2005). On appellate review, we determine if summary judgment was appropriate based on whether the evidentiary items presented by the moving party in support of its motion leave a material question of fact unanswered. *Id*. This court views the evidence in a light most favorable to the party against whom the motion was filed, resolving all doubts and inferences against the moving party. *Adams v. Arthur*, 333 Ark. 53, 969 S.W.2d 598 (1998).

Appellants contend that there were three primary issues of fact left unresolved– whether there was undisputed evidence that appellee was the correct party in interest as successor to Conseco Bank, Inc., whether there was undisputed evidence of the existence and terms of the notes, and whether there was undisputed evidence of the correct legal description of the real property.

We first address the issue of assignment. In *Beal Bank, S.S.B. v. Thornton*, 70 Ark. App. 336, 19 S.W.3d 48 (2000), we explained the importance of the plaintiff's proof of assignment as follows:

> Unless the defendant admits the assignment under which the plaintiff claims, the plaintiff has the burden of proving that there was a valid assignment in order to show that he or she has a cause of action. 6 Am.Jur.2d *Assignments* § 191 (1999). "Whether an assignment of contract rights has occurred is determined by the intent of the

> parties; the assignor must intend to transfer a present interest in the subject matter of the contract." *Id*. at section 135. The intent of parties to an assignment is a question of fact derived from the instruments and the surrounding circumstances; therefore, whether an assignment occurred is a question of fact for the trial court. *Id*. at sections 136 and 190.

70 Ark. App. at 341.

The assignee's burden of proving the existence of the assignment is met by evidence that is satisfactory in character to protect the defendant from another action by the alleged assignor, and which shows that there was a full and complete assignment of the claim from an assignor who was the real party in interest with respect to the claim. *Corn Ins. Co. v. First Federal Bank of Ark.*, 88 Ark. App. 8, 194 S.W.3d 230 (2004). Appellants cite to *Corn*, *supra*, and *Beal*, *supra*, as the basis for reversal on the issue of proof of assignment from Conseco Bank, Inc., to Green Tree.

Appellee responds that it did prove a valid assignment, via the affidavit it submitted. The affidavit of Dominic Baglio averred that he was the Divisional Vice President of Default Services for appellee Green Tree Servicing, formerly known as Conseco Finance Servicing Corporation. Baglio swore that "Green Tree Servicing, LLC is the successor in interest to Conseco Bank, Inc. with regard to the Notes and Mortgages that are attached hereto as Exhibits A through E." Baglio stated that he worked for Conseco from 1999 until his hire with Green Tree in 2003.

In addition, appellee points out that when the foreclosure was first begun with complaints filed in 2001, the named plaintiff was "Conseco Finance Servicing Corporation."

The complaint alleged the existence of the execution of the notes and mortgages in favor of Conseco Bank, Inc., and appellants' default on those notes. Appellee alleged, beginning with its original complaint and continuing through its second amended complaint, that "Conseco [Finance Servicing Corporation] is now the holder of the notes and mortgages." Appellants admitted in their answer to these complaints that this particular allegation was true. Therefore, appellee asserts that the connection between the original mortgages-and-notes holder and Conseco Finance Servicing Corporation was established by admission. It argues that the connection between Green Tree and Conseco Finance Servicing Corporation was established in earlier pleadings and documents flowing from a reorganization resulting from the company's bankruptcy.

The bankruptcy documents do not specifically recognize CFSC or Green Tree as assignees of Conseco Bank, Inc. The affidavit of Mr. Baglio is set out in conclusory terms without supporting documentation. Furthermore, while appellants admitted the existence of the notes and the holders of the notes in early pleadings, the complaint was amended for a third time, and in the last response to this complaint, appellants denied that Green Tree was the holder of the notes and mortgages. However, it does not appear that appellants' response to appellee's motion for summary judgment disputed Mr. Baglio's affidavit pertaining to appellee being the successor in interest to the original mortgagee. Consequently, appellants' argument on this issue is not preserved for purposes of our review of this summary judgment.

Appellants next argue that there was a failure of proof on the existence and terms of the notes. There can be no judgment on a note when it is not introduced into evidence and its absence is not explained. *See McKay v. Capital Resources Co.*, 327 Ark. 737, 940 S.W.2d 869 (1997); 12 Am.Jur.2d *Bills and Notes* §§ 658, 677, 679 (1997). Appellants argue that because appellee did not produce the original notes or sufficiently explain their absence, it failed to establish its status as a holder entitled to sue on them. *See Corn*, *supra*.

Appellee does not dispute that the original notes evidencing the indebtedness were not introduced into evidence. Instead, appellee asserts that the original notes upon which the debt rested were not required as proof because it was seeking an in rem foreclosure on the real property, not an in personam judgment against the debtors. Appellee adds that the property has been sold, the debt has been satisfied, the debtors were protected personally by bankruptcy discharge, and there is no possibility that the debtors might be subjected to additional liability. It asserts, in sum, that any error for failure of proof on the indebtedness reflected in the notes is, at worst, harmless error.

While the relief sought was only in the form of an in rem judgment, such judgment was dependent upon the existence of a valid debt. Without proof of the debt, there was no basis upon which to assert a mortgage lien. We do not find it necessary to decide whether appellee was obliged to produce the original notes and, if so, whether this was waived by appellants, or at least not preserved for review for failure to raise this issue in their response

to appellee's motion for summary judgment, inasmuch as we are reversing the summary judgment on the reformation issue, next discussed.

Finally, we examine appellants' contention that summary judgment was not proper on the state of the evidence presented to the trial court regarding the validity of the legal description on the mortgages. The foreclosure decree implicitly granted reformation of the mortgage documents inasmuch as it ordered a sale of appellants' property with a description that appeared in appellee's "corrected" documents. Appellants, throughout the proceedings, denied that they ever intended to mortgage any real property, and more specifically challenged the propriety of the legal description as reformed.

The general rule is that equity has jurisdiction to cancel or reform written instruments, either where there is mutual mistake or where there has been mistake of one party, accompanied by fraud or other inequitable conduct of the other. *Sherwin-Williams Co. v. Leslie*, 168 Ark. 1049, 272 S.W. 641 (1925). The burden of proof on a party seeking to reform a deed or mortgage alleged to be in error is by clear and convincing evidence. *See Hervey v. College of the Ozarks*, 196 Ark. 481, 118 S.W.2d 576 (1938). Even presuming that a mortgage of real property was indeed the intent of the parties, a reformation of the legal description without the consent of the property owner would require a high degree of proof regarding the nature of the requisite mistake. Appellants denied that they ever intended to mortgage real property, and certainly contested the validity of the altered legal description from the very inception of this lawsuit. To enter summary judgment on this issue was error.

We do not discuss the bankruptcy issue raised by appellants, except to state that this issue is dependent upon the validity of the debt and the existence of a lien. The argument for reversal regarding fraud is subsumed in the discussion regarding the legal description.

Reversed and remanded for further proceedings.

PITTMAN, C.J., and GLADWIN, J., agree.