**IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI**

**NO. 2013-CA-00460-COA**

**TANYA MICHAELE O'NEAL A/K/A TANYA MICHAELE PORTER** — **APPELLANT**

**v.**

**STEVEN KETCHUM** — **APPELLEE**

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| DATE OF JUDGMENT: | 02/27/2013 |
| TRIAL JUDGE: | HON. JENNIFER T. SCHLOEGEL |
| COURT FROM WHICH APPEALED: | HARRISON COUNTY CHANCERY COURT |
| ATTORNEY FOR APPELLANT: | HERBERT J. STELLY |
| ATTORNEY FOR APPELLEE: | ROBERT H. KOON |
| NATURE OF THE CASE: | CIVIL - REAL PROPERTY |
| TRIAL COURT DISPOSITION: | FOUND NEITHER PARTY HAD TITLE TO THE MOBILE HOME; APPELLEE WAS NOT UNJUSTLY ENRICHED AND DID NOT CONSPIRE TO DESTROY APPELLANT'S COTENANCY; PROPER NOTICE OF THE FORECLOSURE SALE WAS GIVEN |
| DISPOSITION: | AFFIRMED - 06/24/2014 |
| MOTION FOR REHEARING FILED: | |
| MANDATE ISSUED: | |

**EN BANC.**

**LEE, C.J., FOR THE COURT:**

¶1. This appeal arises from the trial court's denial of Tanya O'Neal's suit, seeking the court to order the sale and disbursement of proceeds of a mobile home she claimed to own with Steven Ketchum. The Harrison County Chancery Court found that neither O'Neal nor Ketchum had title to the mobile home. The court also found that O'Neal failed to prove that: (1) Ketchum was unjustly enriched; (2) Ketchum and his father had conspired to destroy her

cotenancy; or (3) she did not receive the required notice of the foreclosure sale. Finding O'Neal's issues procedurally barred, we affirm.

## FACTS AND PROCEDURAL HISTORY

¶2. In August 1997, O'Neal and Ketchum began a romantic relationship. On May 10, 1999, O'Neal and Ketchum signed a $21,000 promissory note for Clinton Saucier's mobile home in Saucier, Mississippi. Under the terms of the note, O'Neal and Ketchum were to pay Saucier a $3,000 down payment and $500 each month, commencing on June 15, 1999, with the remainder of the balance due on December 15, 2001. The parties agreed to a zero percent interest rate and waiver of any nonrepayment notice, should O'Neal and Ketchum default on payments.

¶3. At trial, O'Neal testified that she paid the $3,000 down payment, but she did not offer any bank statements, copies of checks, or other evidence to support her statement. However, Ketchum did not dispute that O'Neal paid the down payment. O'Neal testified that Ketchum paid Saucier the monthly payments out of her and Ketchum's joint checking account. While no proof of these payments was admitted at trial, both parties testified that the payments were regularly made to Saucier. No evidence to the contrary was shown at trial, and Saucier was not a party to the action.

¶4. On October 29, 2001, Ketchum's father, Ralph Ketchum, purchased the land where O'Neal and Ketchum's mobile home was located from Saucier for $21,000. While Ralph believed that the mobile home was paid off at the time he purchased the land, O'Neal and Ketchum testified that there was still a small balance owed to Saucier at the time of the land conveyance. That same day, O'Neal and Ketchum executed a second promissory note and

deed of trust in favor of Ralph for $21,717.90. The note did not include the mobile home. Under the terms of the note, O'Neal and Ketchum would pay Ralph $500 a month until the note was paid in full. The note contained a clause that stated if O'Neal and Ketchum, as the debtors, defaulted on the loan, the entire debt plus interest would become due without notice. Also on October 29, 2001, Saucier executed a warranty deed conveying the land purchased by Ralph to Ketchum and O'Neal as tenants in common.

¶5. When O'Neal and Ketchum brought their first $500 payment to Ralph, they asked Ralph to loan them $15,000 to cover attorney's fees needed to bond O'Neal's father out of jail. Ralph loaned them $5,000, and agreed to defer the couple's payments on the note for ten months so they could repay the loan Ketchum took from his 401(k) to contribute to the attorney's fees. While the grace period was ten months, Ralph only received three additional payments from Ketchum between 2001 and 2003.

¶6. O'Neal and Ketchum ended their relationship in February 2004, and O'Neal moved out of the home. Although inconsistently, Ketchum continued to make payments to Ralph. In 2004, Ketchum made six payments, and he made another payment in January 2007. While Ralph allowed Ketchum to remain on the property as a custodian, in 2007, Ralph foreclosed on the land under the deed's terms.

¶7. In December 2007, the trustee and Ralph's attorney, Robert H. Koon, began preparing a nonjudicial foreclosure sale of the property. Koon publicized the foreclosure with a notice of sale in the *Sun Herald* newspaper, first on December 13, 2007, and then weekly for four consecutive weeks. Also on December 13, 2007, Koon posted a notice of sale on the bulletin board at the east front door of the Harrison County Courthouse in Gulfport, Mississippi. This

notice remained posted from December 13 through the foreclosure sale on January 17, 2008.

¶8. On January 17, 2008, Koon and Ralph held the public auction for the land at the Harrison County Courthouse's east front door. No third party appeared or bid on the property, and Koon had been authorized by Ralph to bid the amount of the unpaid balance due on the land. On April 10, 2008, Ralph deeded the property to Ketchum. The deed was filed in Harrison County's land records on July 5, 2011, nunc pro tunc to January 2008. The quitclaim deed described the land, but made no mention of the mobile home.

¶9. Over three years after the foreclosure sale, O'Neal filed her complaint in this action in Harrison County Chancery Court, seeking the sale of the land and mobile home and disbursement of the proceeds between herself and Ketchum. In her amended complaint, O'Neal also asserted that Ketchum was unjustly enriched; that Ketchum and his father, Ralph, conspired to destroy her cotenancy; and that the foreclosure sale was invalid due to lack of notice. A hearing was held on August 9, 2012. The chancellor requested both parties file post-trial briefs; however, only Ketchum and his father filed a brief. The chancellor denied all of O'Neal's claims, and found that neither O'Neal nor Ketchum obtained title to the mobile home.

¶10. O'Neal now appeals, arguing: (1) the chancellor's finding that the mobile home did not belong to O'Neal and Ketchum was against the overwhelming weight of the evidence, and (2) the chancellor erred in finding the foreclosure sale valid because no bids were received.

## STANDARD OF REVIEW

¶11. A chancellor's findings of fact will not be overturned "when supported by substantial

evidence unless an erroneous legal standard was applied or the chancellor was manifestly wrong." *Byrd v. Abney*, 99 So. 3d 1180, 1183 (¶11) (Miss. Ct. App. 2012). This Court's standard of review of a chancellor's decision is abuse of discretion; however, questions of law are reviewed de novo. *Jones v. Graphia*, 95 So. 3d 751, 753 (¶6) (Miss. Ct. App. 2012).

## DISCUSSION

### I. WEIGHT OF THE EVIDENCE

¶12. O'Neal argues, and Ketchum agrees, that the chancellor's determination that neither party had title to the mobile home was against the weight of the evidence.

¶13. At trial, conflicting testimony was given about the remainder on the promissory note to be paid to Saucier. O'Neal and Ketchum both testified that at the time Ralph purchased the land, there was a small balance on the note. No evidence was presented to support the amount of the remainder. Thus, for either party to have obtained title, the mobile home would have to be considered part of the real property when the deed of trust was signed.

¶14. For a mobile home to be considered real property, the specific requirements of Mississippi Code Annotated section 27-53-15 (Rev. 2010) must be met. Under section 27-53-15, first, the mobile home's wheels and axles must be removed, and the home must be affixed to a permanent foundation by anchoring and blocking it to comply with the rules and procedures of the Commissioner of Insurance of the State of Mississippi. Then, the mobile home must be entered on the land rolls of the county tax assessor, and it must be taxed as real property from that date. Lastly, the county tax assessor must issue a certificate certifying that the mobile home is real property, and the tax assessor must file the certificate in the land records. For a security interest to be perfected, the mobile home's description must be

included in the deed of trust. *See Deutsche Bank Nat'l Trust Co. v. Brechtel*, 81 So. 3d 277, 279 (¶8) (Miss. Ct. App. 2012).

¶15. At trial, no evidence was presented that the mobile home's wheels and axles had been removed or that it had been attached to a permanent foundation. Additionally, no evidence was presented that a certification of the mobile home as real property had been entered with the county tax assessor. The deed encompassed the land "together with all improvements and appurtenances now or hereafter erected on [it], and all fixtures of any and every description[,]" but the deed made no mention of the mobile home.

¶16. Neither party asserted that the mobile home had become a fixture on the property. The chancellor determined that because no evidence was presented that the mobile home's wheels were removed, that the home was attached to a foundation or placed on blocks, or that the home was assessed as real property for tax purposes, the mobile home had not become a fixture. The chancellor's findings were supported by substantial evidence. This issue is without merit.

II. FORECLOSURE SALE

¶17. On appeal, O'Neal challenges the validity of the foreclosure sale on the ground that no actual sale was conducted, because no bids were received. Again, O'Neal failed to raise this issue before the chancellor. In her pleadings and at trial, O'Neal challenged the sufficiency of the notice of the foreclosure sale. She cannot assert a new claim on appeal. "As [the supreme court] has stated, time and again, an issue not raised before the lower court is deemed waived and is procedurally barred." *Gale v. Thomas*, 759 So. 2d 1150, 1159 (¶40) (Miss. 1999). This issue is without merit.

¶18. **THE JUDGMENT OF THE HARRISON COUNTY CHANCERY COURT IS AFFIRMED. ALL COSTS OF THIS APPEAL ARE ASSESSED TO THE APPELLANT.**

**IRVING AND GRIFFIS, P.JJ., ISHEE, ROBERTS, CARLTON, MAXWELL AND FAIR, JJ., CONCUR. BARNES, J., CONCURS IN PART AND IN THE RESULT WITHOUT SEPARATE WRITTEN OPINION. JAMES, J., CONCURS IN PART AND DISSENTS IN PART WITH SEPARATE WRITTEN OPINION.**

**JAMES, J., CONCURRING IN PART AND DISSENTING IN PART:**

¶19. I agree with the majority that the title of the mobile home did not pass to O'Neal or Mr. Ketchum. However, the majority also finds that O'Neal asserted a new claim on appeal, and as such is procedurally barred from pursuing it on appeal. I respectfully dissent.

¶20. In the amended complaint, O'Neal stated that the trustee's deed "is completely void ab initio by virtue of the failure of the trustee to follow the laws made and provided for [the] purpose of foreclosing on deeds of trust in the [S]tate of Mississippi." O'Neal attacked the validity of the sale by alleging that the trustee failed to follow the laws of foreclosure, which encompassed the allegation that the sale was invalid because no bid was entered at the auction.

¶21. Further, at trial, Ketchum's father, Ralph, testified that he was at the sale and did not bid on the property. O'Neal's trial counsel specifically asked Ralph why he failed to bid on the property. He was interrupted by an objection of opposing counsel. After some discourse, the court then determined that the information sought by O'Neal was privileged information because Ralph's attorney, who was also the trustee on the deed of trust, advised him about the trustee's sale. O'Neal then attempted to make a proffer, but Ketchum objected to the proffer as well. O'Neal's counsel then stated: "I have considered what the witness has said,

he has admitted that he did not bid on the property, and that he was there, and there were no other bids. And I don't need anything more on the record for that." Counsel's statements coupled with the inclusive language of the complaint are sufficient to infer that O'Neal raised the issue of the validity of the trustee's sale. It should also be noted that several months after the foreclosure sale, Ralph executed a quitclaim deed to Ketchum giving him sole possession of the property.

¶22. The majority opinion states that no third party appeared to bid on the property, and Koon had been authorized by Ralph to bid the amount of the unpaid balance due on the land. However, the chancellor in her final judgment, based on the proof, stated: "[N]o one appeared or bid on the property. Accordingly then, by operation of law, the land reverted back to Ralph."

¶23. The record clearly shows that no sale took place. Therefore, Ketchum and O'Neal remain cotenants of the property in question. In *Mississippi Real Estate Foreclosure Law*, it is stated that "a mortgagee can purchase property at the foreclosure sale under Mississippi law. However, . . . the trustee is the agent for both parties to the deed of trust and occupies a fiduciary relationship as to both." K.F. Boackle, *Mississippi Real Estate Foreclosure Law* § 4-8, at 43 (2d ed. 2002).

¶24. It is further recommended that, "[i]n the event the mortgagee is not present, [the trustee should] accept [mortgagee's] bid as specified in his instructions as the opening bid. . . . The mortgagee need not actually tender cash, but may credit the note for the amount of the bid." *Id.* § 4-9, at 44. "It is a good practice to have a third party witness present. Once the property has been sold, the trustee should have the witness and other participants execute

an affidavit stating the details of the sale." *Id.* Also, Mississippi Code Annotated sections 89-1-53 (Rev. 2011) and 89-1-55 (Rev. 2011) describe the "sale" that takes place during a foreclosure.

¶25. Turning to the validity of the trustee's deed, there was sufficient evidence to declare the deed void, because there were no bids at the sale. The Mississippi Supreme Court has stated that "[i]n a deed of trust the trustee is under a duty to perform his duties in good faith and act fairly to protect the rights of all parties equally. . . . [B]ut it is the trustee's duty to sell the land in such a manner as will be most beneficial to the debtor." *Lake Hilldale Estates Inc. v. Galloway,* 473 So. 2d 461, 465 (Miss. 1985).

¶26. Here, the trustee did not perform his duties in good faith, operating under the mistaken belief that the property automatically reverted back to the beneficiary of the deed of trust, Ralph. Both Ketchum and O'Neal were listed equally on the deed of trust. Thus, O'Neal was entitled to the same protection as Ralph and Ketchum. Ralph testified that his attorney gave him direction and advice as to what to do in the foreclosure. Ralph's attorney was the trustee of the deed of trust. By executing a property deed to Ralph without a formal bid, the trustee did not act in a manner most beneficial to both debtors, Ketchum and O'Neal.

¶27. According to Mississippi Code Annotated section 89-1-63(2) (Rev. 2011):

> The beneficiary of a deed of trust or the mortgagee of a mortgage may purchase at any sale which has been made or shall hereafter be made under a power of sale, and any such sale shall not be invalid because of the relationship of such person to any other party to the deed of trust.

The statute indicates that the beneficiary of the deed of trust is free to purchase the property. There appears to be no statute or case law that supports the supposition that if there are no

bids on the property, then the property automatically reverts to the beneficiary of the deed of trust.

¶28. This Court has also "frequently reiterated our adherence to the general rule that, absent any irregularity in the conduct of a foreclosure sale, it may not be set aside unless the sale[] price is so inadequate as to shock the conscience of the [c]ourt or to amount to fraud." *Dunaway v. Morgan,* 918 So. 2d 872, 876 (¶11) (Miss. Ct. App. 2006). To shock the conscience of the court, the sale price "must be so inadequate that it would be impossible to state it to a man of common sense without producing an exclamation at the inequality of it." *Id.* Here, the sale price for the property was nonexistent, which should definitely shock the conscience.

¶29. Further, "[w]here the foreclosure creditor buys at foreclosure, it must give the debtor fair credit for the commercially reasonable value of the collateral." *Fleisher v. S. AgCredit FLCA,* 108 So. 3d 948, 951 (¶13) (Miss. Ct. App. 2012). There is no evidence in the record that either Ketchum or O'Neal received any credit because no bid was placed at the sale.

¶30. "It is elementary that the proceeds of the foreclosure sale determine the rights between the grantor and beneficiary of a deed of trust absent fraud, bad faith or other defect." *Merchs. Nat'l Bank v. Stewart,* 608 So. 2d 1120, 1127 (Miss. 1992). If, after the foreclosure, a debt is still owed on the property, the foreclosing creditor may be entitled to a deficiency judgment. *Fleisher,* 108 So. 3d at 951 (¶13). For purposes of determining a deficiency, if any, case law recognizes "that the terms of foreclosure . . . must be commercially reasonable and that, particularly where the foreclosing creditor buys at foreclosure, it must give the debtor fair credit for the commercially reasonable value of the collateral." *Shutze v.*

*Credithrift of Am. Inc.,* 607 So. 2d 55, 66 (Miss. 1992).

¶31. Conversely, where a foreclosure sale has occurred, the debtor would be entitled to any funds above the balance of the amount owed on the property minus the foreclosure costs. *Estate of Walters v. Freeman,* 904 So. 2d 1140, 1142 (¶10) (Miss. Ct. App. 2004). Without a proper trustee's sale, it cannot be determined if there was a deficiency or surplus owed to O'Neal and Ketchum.

¶32. I concur with the majority opinion that title to the mobile home did not pass to O'Neal. However, I am also of the opinion that the trustee's sale should be declared void because no sale actually took place. There were no formal bids entered for the property. I would therefore reverse and render this issue and void the trustee's sale.