IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2020-CA-00044-COA

THE ESTATE OF MARK STEPHENS SR. BY AND THROUGH MARK STEPHENS JR., ADMINISTRATOR	**APPELLANT**
v.	
THE ESTATE OF SHIRLEY PALMER, MARC DUNLAP, AND CANDACE DUNLAP	**APPELLEES**

DATE OF JUDGMENT:	11/21/2019
TRIAL JUDGE:	HON. LAWRENCE PRIMEAUX
COURT FROM WHICH APPEALED:	LAUDERDALE COUNTY CHANCERY COURT
ATTORNEY FOR APPELLANT:	CALEB ELIAS MAY
ATTORNEY FOR APPELLEES:	MARK A. SCARBOROUGH
NATURE OF THE CASE:	CIVIL - WILLS, TRUSTS, AND ESTATES
DISPOSITION:	AFFIRMED - 06/29/2021
MOTION FOR REHEARING FILED:	
MANDATE ISSUED:	

BEFORE CARLTON, P.J., GREENLEE AND McDONALD, JJ.

GREENLEE, J., FOR THE COURT:

¶1. In an action to set aside a foreclosure sale, the Estate of Mark Stephens Sr., by and through Mark Stephens Jr., administrator (hereinafter "Stephens Estate") appeals from a judgment by the Lauderdale County Chancery Court dismissing its civil action against Marc and Candace Dunlap and the Estate of Shirley Palmer.

¶2. On appeal, the Stephens Estate argues that the chancery court erred by ruling that necessary parties were not included in the action. Specifically, the court held that Robert M. Dreyfus, the trustee of a relevant deed of trust, was not included as a necessary party. After

reviewing the parties' arguments and the applicable law, we affirm the chancellor's decision.

FACTS AND PROCEDURAL HISTORY

¶3. In 2001, Mark Stephens Sr. purchased property in Lauderdale County, Mississippi, from H.C. "Sonny" Palmer.[1] On July 16, 2007, Mark Stephens Sr. executed and delivered a renewed deed of trust to Robert M. Dreyfus Jr., as trustee, for the benefit of Sonny and his wife, Shirley. The deed of trust secured Mark Stephens Sr.'s debt to the Palmers in the principal amount of $80,586.09.

¶4. Under the deed of trust, Mark Stephens Sr. was required to pay the debt owed to the Palmers and all taxes and assessments. He also granted Dreyfus the authority to conduct a non-judicial foreclosure sale upon default at the request of the beneficiary**.**

¶5. Mark Stephens Sr. made his scheduled payments and performed his duties under the deed of trust until his death in February 2011. After his father's death, Mark Stephens Jr. claimed that he made the prescribed payments to the Palmers.[2] In February 2013, Sonny passed away, leaving Shirley as the sole beneficiary under the deed of trust. The Stephens Estate claimed in its complaint that it paid the loan in full in August 2014 and that Shirley had promised to issue a release immediately.

¶6. In November 2014, Shirley assigned the note and the deed of trust and all of her rights and interest in them to Marc Dunlap and his wife, Candace. Shirley's assignment to the Dunlaps of the deed of trust was recorded in the land records of Lauderdale County.

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[1] The purchased property contained eleven rental houses.

[2] The Estate of Mark Stephens Sr. was opened in the Chancery Court of Lauderdale County, Mississippi.

¶7. According to the Dunlaps, the Stephens Estate was in default of both its payments and its performance of several of the deed-of-trust terms, including non-payment of taxes. The Dunlaps requested that Dreyfus foreclose on the property. Pursuant to the terms of the deed of trust, Dreyfus noticed the sale of the property by posting a notice on the bulletin board of the Lauderdale County Courthouse, mailing notices to all known heirs of the Stephens Estate, and publishing the notice in the *Meridian Star* newspaper. On December 12, 2014, Dreyfus conducted the foreclosure sale, at which the Dunlaps were the highest bidders, offering $24,420.10. Later the same day, Dreyfus executed a trustee's deed and delivered it to the Dunlaps. The Dunlaps paid the delinquent taxes and redeemed all prior taxes on the property.[3]

¶8. On May 18, 2016, Mark Stephens Jr. filed a complaint on behalf of the Stephens Estate against the Dunlaps and Shirley in the Lauderdale County Chancery Court to set aside the foreclosure sale. The complaint alleged that the Stephens Estate had paid its debt in full, and thus, the Dunlaps unlawfully foreclosed on the property in question. Specifically, the complaint alleged that the Dunlaps wrongfully foreclosed on property belonging to the Stephens Estate and did not give the proper notice to Mark Stephens Jr. of foreclosure. The Stephens Estate requested that the court set aside the foreclosure, return the property, and award any rents collected since the foreclosure along with costs and attorney's fees. Dreyfus, the trustee of the deed of trust, was not a party to the complaint.

¶9. Shirley died on March 29, 2017. The Stephens Estate amended its complaint to add

[3] According to the record, after purchasing the property at the foreclosure proceedings, the Dunlaps began making improvements to the deteriorating property.

Shirley's Estate as a party.

¶10. On May 24, 2018, and October 01, 2019, the Dunlaps filed a motion to dismiss the complaint and the amended complaint. On October 17, 2019, the Stephens Estate filed its response to the Dunlaps' motion to dismiss. On November 20, 2019, the chancery court heard arguments on the motion. The court rendered its judgment on November 21, 2019. The court found that the Stephens Estate failed to include all necessary parties by not including the trustee, Dreyfus, as a party. And because the statute of limitations had run on an action against the trustee, the court dismissed the action. After the court denied the Stephens Estate's motion to alter or amend the judgment or, in the alternative, grant a new trial, the Stephens Estate filed its appeal.

¶11. On appeal, the Stephens Estate argues that the chancery court erred by ruling that all necessary parties were not included in the action because of the omission of trustee Robert M. Dreyfus as a party. The Stephens Estate also argues that the court erred by not finding that the debt was paid in full and by limiting its grounds for relief. After reviewing of the parties' arguments and the applicable law, we affirm the chancellor's decision.

STANDARD OF REVIEW

¶12. On appeal, we review the chancellor's grant of a motion to dismiss de novo. *Nethery v. Estate of Nethery*, 146 So. 3d 999, 1003 (¶16) (Miss. Ct. App. 2014). Questions of law are reviewed de novo. *Id*.

DISCUSSION

I. Whether the trustee to the deed of trust was a necessary party to this action.

¶13. On appeal, the Stephens Estate contends that the chancery court erred when it dismissed the action and found that complete relief could not be afforded without the trustee's participation as a party. The Stephens Estate's main assertion regarding the chancellor's judgment is that Dreyfus should not have been deemed a necessary party under Mississippi Rule of Civil Procedure 19. The chancellor's application of Rule 19 is a matter of law, so, as stated above, we apply a de novo review. *Pope v. Fountain*, 287 So. 3d 988, 993 (¶18) (Miss. 2019) (citing *Williams v. Williams*, 264 So. 3d 722, 725 (¶5) (Miss. 2019)).

¶14. A necessary party is one who "has such a substantial interest in the suit that no complete, practical, and final judgment can be made without directly affecting his interest or else leaving the controversy in such condition that its final determination may be wholly inconsistent with equity and good conscience." *Mahaffey v. Alexander*, 800 So. 2d 1284, 1285 (¶5) (Miss. Ct. App. 2001). Rule 19 governs the joinder of necessary parties. Assuming joinder is feasible, Rule 19(a) states:

> A person who is subject to the jurisdiction of the court shall be joined as a party in the action if:
>
> > (1) in his absence complete relief cannot be accorded among those already parties, or
> >
> > (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest.
> >
> > If he has not been so joined, the court shall order that he be made a party. If he should join as a plaintiff but refuses to do so,

> he may be made a defendant or, in a proper case, an involuntary plaintiff.

M.R.C.P. 19(a)(1)-(2). Where joinder is not feasible, Rule 19(b) applies.[4]

¶15. As an agent of both parties, the trustee named in a deed of trust has a "duty to perform his duties in good faith and act fairly to protect the rights of all parties equally." *Eastover Bank for Sav. v. Hall*, 587 So. 2d 266, 269-70 (Miss. 1991). "The sale by a trustee under a deed of trust is presumed valid and the burden of proof is on the party attacking this validity." *Myles v. Cox*, 217 So. 2d 31, 34 (Miss. 1968).

¶16. In situations such as the one before this Court, a trustee is a necessary party. *See* 5 *Tiffany Real Property* § 1534 (3d ed. 2010) (citing *Harlow v. Mister*, 64 Miss. 25, 26, 8 So. 164, 164-165 (1886)) (explaining that the trustee under a deed of trust "must usually be made a party to a proceeding instituted by an owner or part owner of the debt secured"); *see also Hill v. Boyland*, 40 Miss. 618, 640 (1866) (finding that where a "bill seeks to enforce the collection of the notes secured by the deed of trust to [Miles] as trustee, he is the holder of the legal title, and a necessary party"); *Moyse v. Cohn*, 76 Miss. 590, 25 So. 169, 169 (1899)

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[4] Rule 19(b) states:

> If a person as described in subdivision (a) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: First, to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

(stating that in both *Hill*, 40 Miss. at 640, and *Harlow*, 64 Miss. at 26, 8 So. at 164, a trustee is deemed a necessary party).[5] Therefore, the Stephens Estate's claim that Dreyfus was a "nominal" party, whose presence was not necessary for the chancery court to enter a final judgment, is incorrect.

¶17. Stephens relies on *Taylor v. Ocwen Loan Servicing LLC*, No. 2:12-CV-107-SA-JMV, 2014 WL 280399 (N.D. Miss. Jan. 24, 2014), and *Smith v. Homecomings Financial LLC*, No. 1:14-CV-345-HSO-JCG, 2016 WL 750661 (S.D. Miss. Feb. 24, 2016), in support of his claim that a trustee is a nominal party. However, we must note that in those cases the courts found that the trustees were nominal parties for the purpose of diversity jurisdiction; they had no personal stake in the outcome of the case, and therefore complete relief could be afforded in their absence. *Smith*, 2016 WL 750661, at *2; *Taylor*, 2014 WL 280399, at *2. As discussed below, Dreyfus has a stake in the outcome of this case because he holds legal title and is therefore a necessary party. "[T]he trustee is not necessarily a nominal party when he is alleged to have misadministered the trust or has a similar personal connection with the claims." *Anderson v. Wells Fargo Bank N.A.*, 953 F.3d 311, 314 (5th Cir. 2020); *see, e.g., Sims v. Shapiro & Massey LLP*, No. 2:11-CV-248-KS-MTP, 2012 WL 13024148, at *2-3 (S.D. Miss. Jan. 17, 2012) (complaint purported that trustee "knowing[ly] and active[ly] participat[ed] in the intentional wrongful foreclosure"). On the other hand, "where the

[5] In further support of the contention that a trustee is a necessary party the court in *Ponder v. Martin*, 119 Miss. 156, 80 So. 388, 390 (1919), held that where a suit was brought to foreclose the deed of trust, the trustee was a necessary party. Also, in *Yates v. Council*, 137 Miss. 381, 102 So. 176, 176-77 (1924), the court found that in a "mortgage foreclosure suit where bill shows that notes secured by mortgage and deed of trust held by banks as collateral security to an indebtedness, banks [were] necessary parties."

complaint contains no meaningful allegations regarding the trustee and he has no special stake in the litigation, the trustee may be disregarded as nominal." *Anderson*, 953 F.3d at 314.

¶18. The dissent contends that there were no allegations of wrongdoing by Dreyfus. While the Stephens Estate did not name Dreyfus in its complaint, it alleged that the foreclosure was not conducted according to law. In attacking the foreclosure, the complaint focused on Dreyfus' actions in his capacity as trustee. It alleges that the property was fraudulently foreclosed and that the "foreclosure was also not conducted according to the law, as the property owner(s) were not provided with any notice of foreclosure proceedings." The complaint requested that the court set aside the foreclosure and return the property to the Stephens Estate, which required that the court review Dreyfus' actions as the trustee.

¶19. Moreover, a trustee in a deed of trust holds legal title. *Wansley v. First Nat'l Bank of Vicksburg*, 566 So. 2d 1218, 1223 (Miss. 1990). The dissent argues that since Dreyfus conveyed any interest he had via trustee's deed, he was not a necessary party. The dissent also asserts that because Dreyfus no longer has any legal interest in the property, the Mississippi Supreme Court cases cited earlier in this opinion are distinguishable. While the dissent is correct that Dreyfus conveyed his interest, we disagree that Dreyfus is no longer a necessary party. If the court were to set aside the foreclosure sale, the court would have to place everyone in their respective pre-foreclosure position. That result would re-vest legal title in the trustee. The cases cited earlier in this opinion remain applicable to this case.[6] When a trustee carries out the duties and responsibilities of that role, and it is that action

[6] *See supra* ¶16.

which is challenged, the trustee is a necessary party.

¶20. The Stephens Estate further contends that Dreyfus was not a necessary party since prior to the foreclosure Dreyfus could be replaced as trustee at any time and without notice. While the terms of the deed of trust allows the substitution of a trustee, the Dunlaps were not required to make such a substitution. Dreyfus was the trustee at the time of the foreclosure, and it is his actions that the Stephens Estate challenges; thus, he is indeed a necessary party. The chancellor was correct to find that in this situation the trustee is a necessary party.

II. Whether the three-year statute of limitations had expired.

¶21. "[T]he application of a statute of limitations is a question of law[.]" *Lyas v. Forrest Gen. Hosp.*, 177 So. 3d 412, 416 (¶18) (Miss. 2015) (internal quotation marks omitted) (quoting *Sarris v. Smith*, 782 So. 2d 721, 723 (¶6) (Miss. 2001)). "[T]his Court reviews questions of law . . . de novo." *Stephens v. Equitable Life Assurance Soc'y of U.S.*, 850 So. 2d 78, 81 (¶10) (Miss. 2003).

¶22. Although Rule 19 anticipates the joinder of a necessary party, the court here found that Dreyfus could not be joined if proscribed by the statute of limitations. In *Martin*, the court discussed *Diggs v. Ingersoll*, 28 So. 825, 825 (Miss. 1900), where the trustee was deemed a necessary party. *Ponder*, 80 So. at 390. In *Diggs*, the trustee was not given proper notice of the suit. *Diggs*, 28 So. at 825. The court later stated that "[i]t is of the highest importance that [interested parties] receive summons or notices . . . ." *Ponder*, 80 So. at 390.

¶23. The Dunlaps and the Estate of Shirley Palmer argued, and the court agreed, that the three-year statute of limitations had run in this matter. Even the Stephens Estate did not

dispute that the general three-year statute of limitations under Mississippi Code Annotated section 15-1-49 (Rev. 2012) applied. Therefore, like in *Diggs*, the court could not order Dreyfus to resume his role as trustee since he had not been served with process or made a party and the limitation of action against Dreyfus as trustee had run. He was not named in either the original complaint or the amended complaint. The chancery court cited as applicable the "catch-all" three-year statute of limitations. Miss. Code Ann. § 15-1-49(1) (statute applies to "[a]ll actions for which no other period of limitation is prescribed . . .").

¶24. The chancellor was correct. The three-year statute of limitations governs the Stephens Estate's suit. *See Tenn. Props. Inc. v. Gillentine*, 66 So. 3d 695, 697-78 (¶10) (Miss. Ct. App. 2011) (finding that the general three-year statute of limitations applies to mortgagor's action for wrongful foreclosure rather than the ten-year statute of limitations applicable to actions to recover land).

¶25. The Dunlaps and the Estate of Shirley Palmer argued that the three-year statute of limitations was applicable in this case, and because it had expired, Dreyfus could no longer be added as a party. The Stephens Estate made no argument, nor did it provide any authority whatsoever, in response to the Dunlaps' argument in its memorandum of authorities or its oral argument. The chancery court found that the three-year statute of limitations applied, and we find that the Stephens Estate waived this issue: "If not specifically argued before the [chancery] court, such is waived[.]" *Easterling v. State*, 306 So. 3d 808, 818 (¶23) (Miss. Ct. App. 2020); *see also Waller v. Waller*, 273 So. 3d 717, 721 (¶¶13-15) (Miss. 2019) (finding that any error by the trial court in applying the ex parte contact rule was waived where the

grantees' attorney conceded that the rule did not apply to attorneys).

¶26. Because "[t]he completion of the period of limitation prescribed to bar any action . . . shall defeat and extinguish the right as well as the remedy," the chancery court did not err by applying the three-statute of limitations, finding that the limitation had run, and that it could not order Dreyfus to resume his role as trustee. Miss. Code Ann. § 15-1-3(1) (Rev. 2019).

III. Whether the chancery court erred by not addressing the Stephens Estate's paid-in-full argument.

¶27. In September 2019, the Estate of Shirley Palmer filed a motion for summary judgment. Shortly after, the Dunlaps filed their second motion to dismiss, which they amended on October 31, 2019. The court heard the Dunlaps' motion to dismiss the Stephens Estate's complaint and the amended complaint on November 20, 2019. The Dunlaps requested a dismissal since the Stephens Estate failed to join Dreyfus as a party, and the statute of limitations in the matter had run. *See* M.R.C.P. 12(b)(7). In its judgment, the court found that Dreyfus was a necessary party to the action, and because the applicable statute of limitations had expired, the court could no longer join him pursuant to Rule 19. Based on these findings, the court dismissed the action, determining it could not set aside the foreclosure, and therefore, the other relief including relief related to the alleged payment in full requested by the Stephens Estate was not procedurally proper. On November 27, 2019, the Stephens Estate filed a motion to alter or amend the judgment or, alternatively, grant a new trial. In denying the Stephens Estate's motion, the court noted that the issue of whether the debt was paid in full was not properly before the court since the action had been dismissed.

¶28. On appeal, the Stephens Estate argues that because the debt was paid in full, Dreyfus was not a necessary party to the action. The complaint alleged that the debt secured by the deed of trust was paid in full in August 2014. The complaint further alleged that Shirley, as the lienholder at the time, confirmed that the debt was settled and promised that a release would be issued. The Stephens Estate argues that because it paid the debt in full, the deed of trust became null and void, and therefore the Dunlaps could not instruct Dreyfus to conduct foreclosure proceedings.[7] However, payment of the debt or the alleged statement of Shirley were not brought before the court by proof or affidavit. After our review, we agree with the chancery court.

¶29. This action to set aside the foreclosure sale was not viable without the trustee as a party. We note there was no affidavit filed by the Stephens Estate showing that the total amount of payments made satisfied the underlying note in the deed of trust. It is "[t]he appellant['s] . . . duty to insur[e] that the record contains sufficient evidence to support his assignments of error on appeal." *Gillentine*, 66 So. 3d at 698 (¶12) (internal quotation marks omitted) (quoting *Oakwood Homes Corp. v. Randall*, 824 So. 2d 1292, 1293 (¶4) (Miss. 2002)). As an appellate court we "must decide each case by the facts shown in the record, not assertions in the brief." *Harvey v. Fed. Nat'l Mortg. Ass'n*, 200 So. 3d 461, 464 (¶15) (Miss. Ct. App. 2016).

¶30. Furthermore, we note the Stephens Estate's assertion that the chancery court erred in

[7] We also observe that under the deed of trust, the Stephens Estate was required to pay the taxes associated with the property. According to the record, the Stephens Estate was delinquent in its tax payments. Therefore, the Dunlaps could have also begun foreclosure proceedings on that ground as well.

not addressing its paid-in-full argument is presented by the Stephens Estate in a cursory fashion on appeal. While the Stephens Estate cites to the record and references Mississippi Code Annotated section 89-1-49(a) (Rev. 2011), it cites no further authority, nor is there a showing of payment in full. The argument is directed entirely by unsupported assertions. Specifically, the Stephens Estate's brief states:

> The Appellant would submit that the status of the parties upon such a finding after a trial on the merits would not require that the Chancellor order the trustee to re-conduct a foreclosure sale because the Deed of trust would be null and void under its own terms.

The Stephens Estate later states:

> If the Chancellor, after a trial on the merits, finds that the loan was paid in full as alleged in the Complaint, the trustee would have no rights or interest under the fully paid, null and void deed of trust, and, therefore, would not be a necessary party under Rule 19.

¶31. With no cited authority and no showing of payment in full, the Stephens Estate's assertion is insufficient to demonstrate reversible error. Our supreme court has held that the "[f]ailure to cite legal authority in support of an issue is a procedural bar on appeal." *Webb v. DeSoto County*, 843 So. 2d 682, 685 (¶10) (Miss. 2003); *see also Soffra v. Shieldsboro Dev.*, 314 So. 3d 129, 139 (¶34) (Miss. Ct. App. 2020) ("We employ a limited standard of review on appeals from chancery court.").

IV. Whether the chancery court mischaracterized and limited the grounds for relief.

¶32. The Stephens Estate claims that the court mischaracterized and limited its requests for relief by not acknowledging that in paragraph five and six of its complaint, the Stephens Estate requested that the foreclosure sale be set aside because the debt had been paid in full.

The Stephens Estate also argued that in paragraph seven of the complaints it stated failure of notice as an alternative ground for setting aside the foreclosure sale.[8]

¶33. However, as the chancellor noted, the complaint's prayer for relief, in its entirety, states:

> 1. That this Complaint be filed and . . . process issued unto the Defendants, and that upon a final hearing hereupon, an Order will be issued by this Court setting aside the foreclosure;
>
> 2. That any and rental fees collected since the time of the improper foreclosure be awarded to the Estate of Mark Stephens, Sr.;
>
> 3. The Defendants be held responsible for any and all attorney fees and court costs in the institution and prosecution of this action;
>
> And if your Petition has prayed for wrong, incomplete or improper relief, then he prays for such other, further and general relief as may be proper in the premises.

¶34. The chancellor found that the relief sought by the Stephens Estate was the setting aside of the foreclosure sale, which in turn would open the door to the other requested relief, including recoupment of rents paid to the Dunlaps. Because the court could not set aside the foreclosure, the chancellor found the other requested relief would be improper. From a review of the complaint and the amended complaint, we agree. The relief requested was to set aside the foreclosure sale and to recover rents paid to the purchaser at the foreclosure sale.

¶35. The Stephens Estate argues that the court should have set aside the foreclosure sale for failure to give the Stephens Estate notice. Again, this argument involves the duty of the

[8] We note from a review of the record on appeal that the exhibits to different filings by the parties do not indicate that the note was paid in full and instead indicate that the property taxes had not been paid, but like the chancellor, we do not rule on that basis.

trustee in a foreclosure. The trustee, as a nonparty, could not refute that allegation. The Stephens Estate fails to acknowledge that "Mississippi is a non-judicial foreclosure state." *Blanchard v. Mize*, 186 So. 3d 403, 406 (¶13) (Miss. Ct. App. 2016) (quoting *Pennell v. Wells Fargo Bank N.A.*, No. 1:10-cv-00582-HSO-JMR, 2012 WL 2873882, at *6 (S.D. Miss. July 12, 2012)). Therefore, "Mississippi law does not require the mortgagee to directly notify the mortgagor of an impending foreclosure." *Id*. To conduct a foreclosure sale, Mississippi Code Annotated section 89-1-55 (Rev. 2011) only requires that notice be given by publication and by posting at the county courthouse.

¶36. Unlike in *Blanchard*, the deed of trust foreclosed herein does not contain a clause requiring notice to grantors of foreclosure. *Cf. Blanchard*, 186 So. 3d at 406 (¶15). Although the Stephens Estate alleged that Dreyfus did not give it notice to Stephens, we note that Dreyfus noticed the sale of the property by posting the notice on the bulletin board of the Lauderdale County Courthouse, mailing notices to all known heirs of the Stephens Estate, and publishing the notice in the *Meridian Star* newspaper.[9]

¶37. We note that the prerequisites to the foreclosure sale were not proved to have been violated. However, even if it was proved that Dreyfus had not met the notice requirements, the Stephens Estate's request for alternative relief should have been denied because the statute of limitations against the trustee who provided notice had expired in this matter. By statute, once a statute of limitations has expired, the action, as well as the remedy, is barred.

[9] Again, exhibits to filings contained in the record on appeal indicate that the trustee attempted to notify the heirs of the Stephens Estate. However, as the chancery court did not use that in its ruling, neither do we.

See Miss. Code Ann. § 15-1-3(1) (Rev. 2012).

CONCLUSION

¶38. The chancery court correctly determined that the trustee was a necessary party as required by Rule 19, that the applicable statute of limitations had expired, and that complete relief could not be afforded without the trustee's participation as a party. Therefore, we affirm the chancellor's judgment.

¶39. **AFFIRMED.**

CARLTON, P.J., WESTBROOKS, McDONALD, LAWRENCE AND SMITH, JJ., CONCUR. BARNES, C.J., CONCURS IN PART AND IN THE RESULT WITHOUT SEPARATE WRITTEN OPINION. EMFINGER, J., DISSENTS WITHOUT SEPARATE WRITTEN OPINION. WILSON, P.J., DISSENTS WITH SEPARATE WRITTEN OPINION, JOINED BY McCARTY, J.; EMFINGER, J., JOINS IN PART.

WILSON, P.J., DISSENTING:

¶40. The dispositive issue in this suit to set aside a trustee's deed is whether the trustee is a necessary or indispensable party simply because he conducted the foreclosure sale pursuant to the deed of trust. The majority holds that the trustee is a necessary and indispensable party and that the entire case must be dismissed because the statute of limitations bars any claim against the trustee. I respectfully disagree that the trustee is a necessary or indispensable party in this case. The trustee claims no interest in the subject property, the complaint does not allege any wrongdoing by the trustee, and relief can be granted without the trustee being joined as a party. Therefore, I would reverse and remand for further proceedings, and I respectfully dissent.

¶41. Rule 19(a) of the Mississippi Rules of Civil Procedure provides that, if feasible, a

person "shall be joined as a party" if he "is subject to the jurisdiction of the court" *and*

> (1) in his absence complete relief cannot be accorded among those already parties, or
>
> (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest.

M.R.C.P. 19(a).

¶42. Rule 19(b) then addresses the circumstances under which the inability to join such a person should result in the dismissal of the case. It states that if such a person

> cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: First, to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

M.R.C.P. 19(b).

¶43. In an action to set aside a trustee's deed, the trustee of the deed of trust is not a necessary or indispensable party simply because he acted as trustee and conducted the foreclosure sale. As our Supreme Court has stated, the trustee of a deed of trust holds legal title to the subject property as a matter of form—for the benefit of the beneficiary—not substance. *Wansley v. First Nat'l Bank of Vicksburg*, 566 So. 2d 1218, 1223 (Miss. 1990); *see also Heard v. Baird*, 40 Miss. 793, 798 (1866) (stating that the "trustee [of a deed of

trust] holds but a naked legal title for the debtor, who has the whole beneficial interest"). "[T]he deed of trust under our law is little more than a common law mortgage with a power to convey in the event of default. The trustee is little more than an agent, albeit for both parties, and the [deed of trust] prescribes his duties." *Wansley*, 566 So. 2d at 1223. Therefore, once the trustee has exercised his power to convey the property at a foreclosure sale, he no longer has any interest in or claim to the property. *See Crosby v. CitiMortgage Inc.*, No. 3:13-CV-670-TSL-JMR, 2014 WL 12638846, at *3 (S.D. Miss. Jan. 16, 2014) (holding that a trustee of a deed of trust that had been foreclosed was only a nominal party with no interest in the outcome of the litigation and could be ignored for purposes of determining diversity jurisdiction).

¶44. In the instant case, the trustee, Dreyfus, conveyed whatever interest he had in the property to the Dunlaps by trustee's deed. Accordingly, Dreyfus no longer has any interest in or claim to the property. As such, he is not a necessary party to this litigation simply because of his prior formal/legal ownership of the property in his capacity as trustee of the deed of trust. *Cf. Mahaffey v. Alexander*, 800 So. 2d 1284, 1286 (¶7) (Miss. Ct. App. 2001) (holding that first tax sale purchaser was not a necessary party to a suit to cancel a tax deed to a second tax sale purchaser because the first purchaser had quitclaimed whatever interest he had in the property to the second purchaser and no longer claimed any interest in the property); *Putney v. Sanford*, 282 So. 3d 627, 632-33 (¶21) (Miss. Ct. App. 2019) (holding that a party who purchased property from the defendant and then sold it to the plaintiff was not a necessary party in a quiet title action because he had "conveyed what interest he had

in the property" to the plaintiffs and "claim[ed] no interest in the land whatsoever").

¶45. Because Dreyfus no longer has any legal interest in the property, the various Mississippi Supreme Court cases cited by the majority are distinguishable. None of those cases was an action to set aside a trustee's deed. Rather, each was an action to foreclose under a deed of trust. *See Hill v. Boyland*, 40 Miss. 618, 640 (1866) (stating that the trustee of a deed of trust was a "necessary party" in a suit "to enforce the collection of the notes secured by the deed of trust"); *Harlow v. Mister*, 64 Miss. 25, 25, 8 So. 164, 164 (1886) (stating that the trustee is a necessary party in an action "to foreclose in equity a deed of trust"); *Moyse v. Cohn*, 76 Miss. 590, 25 So. 169 (1899) (concluding that the trustee is a necessary party in an action to foreclose a deed of trust); *Ponder v. Martin*, 119 Miss. 156, 163, 80 So. 388, 390 (1919) (same); *Yates v. Council*, 137 Miss. 381, 391, 102 So. 176, 177 (1924) (stating that two banks were necessary parties to a mortgage foreclosure suit because they held notes secured by the deed of trust as collateral for a loan to the beneficiary of the deed of trust)[10]; *see also* 5 *Tiffany Real Property* § 1534 (3d ed. 2010) ("[T]he trustee under a deed of trust must usually be made a party to a proceeding instituted by an owner or part owner of the debt secured."). In an action to foreclose under a deed of trust, the trustee is a necessary party because he holds legal title to the property. In contrast, in a typical action to set aside a trustee's deed, the trustee neither holds nor claims any interest in the property.

¶46. A trustee may be a necessary party in a wrongful foreclosure suit if the complaint alleges wrongdoing by the trustee. *Cf. Sims v. Shapiro & Massey LLP*, No. 2:11-CV-248-

[10] In *Yates*, the trustee had filed the suit and thus was a party. *Id.* at 389, 102 So. at 176.

KS-MTP, 2012 WL 13024148, at *2 (S.D. Miss. Jan. 17, 2012) (holding that the trustee was not a "nominal party" because the plaintiff alleged that the trustee "participated in a coordinated effort to foreclose on [the property] when [the trustee and all other defendants] knew they had no authority to do so"). However, that is not the case here. The complaint alleges that the foreclosure was "fraudulent," apparently because Shirley Palmer allegedly knew that the promissory note had been paid in full before she assigned her interest in the note and deed of trust to the Dunlaps. However, there is no allegation that Dreyfus was aware of or participated in the alleged fraud.

¶47. The complaint also alleges that the foreclosure was "not conducted according to law" because "the property owner(s) were not provided with any notice of the foreclosure proceedings." Again, however, there is no allegation of wrongdoing by Dreyfus. Indeed, the trustee's deed attached to the complaint shows that Dreyfus published notice of the sale in the *Meridian Star* and posted notice at the Lauderdale County Courthouse as required by Mississippi Code Annotated section 89-1-55 (Rev. 2011), and the complaint contains no allegation to the contrary. Publication and posting are the only forms of notice required by statute or by the terms of the deed of trust itself. *See EB Inc. v. Allen*, 722 So. 2d 555, 561 (¶21) (Miss. 1998) (holding that "any [notice] requirements beyond those expressed in the applicable statutes are determined by the provisions of the note and deed of trust"). Neither the statute nor the deed of trust requires the trustee to provide notice of the sale to "the property owner(s)." And if the promissory note included any additional notice

requirements,[11] the duty to give such notice would have rested on the noteholder, not the trustee.

¶48. The defendants also argue that Dreyfus is a necessary party because he might be reinstated as trustee if the Stephens Estate prevails. However, by statute and the express terms of the deed of trust, the beneficiary may revoke Dreyfus's appointment as trustee and appoint a substitute trustee at any time. *See* Miss. Code Ann. § 89-1-63(3) (Rev. 2011). Thus, the mere fact that relief might result in reinstatement of the deed of trust does not make Dreyfus an "indispensable" party. M.R.C.P. 19(b). The defendants will not be prejudiced in any way if Dreyfus is not joined as a party, and the court can fashion appropriate relief without Dreyfus's presence. *Id.* The defendants should not be able to prevent the Stephens Estate from having an "adequate remedy" by erroneously insisting that Dreyfus is somehow irreplaceable. *Id.*

¶49. In summary, Dreyfus claims no interest in the subject property, the complaint alleges no wrongdoing by Dreyfus specifically, and appropriate relief can be granted in his absence. The defendants will not be prejudiced if Dreyfus is not joined, but the Stephens Estate will be left with no adequate remedy if the case is dismissed because of his non-joinder. Under these circumstances, Dreyfus is not a necessary or indispensable party under Rule 19. I would reverse and remand to allow the Stephens Estate to attempt to litigate its wrongful foreclosure claim on the merits. I respectfully dissent.

McCARTY, J., JOINS THIS OPINION. EMFINGER, J., JOINS THIS

[11] The promissory note is not in the record, and there is nothing in the record to indicate whether it required any additional notice.

OPINION IN PART.