

FILED: September 10, 2014

IN THE COURT OF APPEALS OF THE STATE OF OREGON

FEDERAL NATIONAL MORTGAGE ASSOCIATION,
Plaintiff-Appellant,

v.

ROBERT BELLAMY, et al.,
Defendant-Respondent.

Clackamas County Circuit Court
FE120475

A152173

Susie L. Norby, Judge.

Argued and submitted on March 13, 2014.

Tracy J. Frazier argued the cause for appellant. With her on the brief were Rochelle L. Stanford and Pite Duncan, LLP.

Jeffrey A. Myers argued the cause for respondent. With him on the brief were Richard M. Fernández and John Bowles.

Before Duncan, Presiding Judge, and Wollheim, Judge, and Lagesen, Judge.

DUNCAN, P. J.

Reversed and remanded.

1 DUNCAN, P. J.

2 Plaintiff Federal National Mortgage Association brought this forcible entry
3 and wrongful detainer (FED) action against defendant Bellamy, seeking possession of
4 real property. The case proceeded to a bench trial, and the trial court awarded possession
5 of the property to defendant. Plaintiff appeals, asserting that, given the evidence
6 presented at trial, it was entitled to possession as a matter of law. For the reasons that
7 follow, we agree with plaintiff and, therefore, reverse and remand.

8 Defendant obtained a loan from PTF Financial Corporation. As security for
9 the loan, defendant executed a trust deed, which encumbered real property commonly
10 known as 6323 SE Molt Street, Milwaukie, Oregon. The trust deed was recorded in
11 Clackamas County, the county in which the property was located.

12 Defendant failed to perform the obligations required by the trust deed, and,
13 on February 17, 2012, a trustee's sale was held at which plaintiff was the successful
14 bidder. Thereafter, a trustee's deed was issued to plaintiff and recorded in Clackamas
15 County. The trustee's deed describes defendant's failure to perform his obligations under
16 the trust deed and the subsequent nonjudicial foreclosure proceedings, including the sale
17 of the property to plaintiff. The trustee's deed states that the trustee "does hereby convey
18 unto [plaintiff] all interest which the grantor had or had the power to convey at the time
19 of the grantor's execution of said Trust Deed, together with any interest the said grantor
20 or grantor's successors in interest acquired after the execution of said Trust Deed in and
21 to the [property.]"

1 On April 5, 2012, plaintiff initiated this FED action against defendant,
2 seeking a judgment against defendant for possession of the property. In its complaint,
3 plaintiff alleged that (1) defendant was in possession of the property, (2) defendant was
4 unlawfully holding the property by force, and (3) plaintiff was entitled to possession of
5 the property. In support of its allegation that it was entitled to possession, plaintiff cited
6 to a statute, *former* ORS 86.755(5)(a) (2009), *amended by* Oregon Laws 2011, chapter
7 510, section 2,¹ which has been renumbered ORS 86.782(6)(a) and now provides:

8 "Except as provided in paragraph (b) or (c) of this subsection,^[2] the
9 purchaser at the trustee's sale is entitled to possession of the property on the
10 10th day after the sale. A person that remains in possession after the 10th
11 day under any interest, except an interest prior to the trust deed, or an
12 interest the grantor or a successor of the grantor created voluntarily, is a
13 tenant at sufferance. The purchaser may obtain possession of the property
14 from a tenant at sufferance by following the procedures set forth in ORS
15 105.105 to 105.168 [the FED procedures] or other applicable judicial
16 procedure."

17 In response, defendant filed an answer on April 13, 2012; then, after retaining counsel,
18 defendant filed an amended answer on May 14, 2012, approximately three months after

¹ *Former* ORS 86.755(5)(a) (2009) was renumbered *former* ORS 86.755(6)(a) (2011) and renumbered again as ORS 86.782(6)(a) (2013).

² Plaintiff apparently relied upon the 2009 version of *former* ORS 86.755(5)(a), which was no longer operative at the time of the FED action. The operative version at the time of the FED action, as well as the current version, contain the phrase, "[e]xcept as provided in paragraph (b) or (c) of this subsection[,]" and paragraphs (b) and (c) are not in the 2009 version. However, the exceptions in those paragraphs do not affect the court's analysis in this case; they apply only to a person for whom the grantor or successor of the grantor voluntarily created a possessory interest or to a person who occupies a dwelling unit "under a bona fide tenancy." *See former* ORS 86.755(6)(b)-(c) (2012), *renumbered as* ORS 86.782(6)(b)-(c) (2013). The recitals in the trustee's deed establish that defendant is the original grantor, not a tenant or other third-party; thus, this FED action does not implicate those exceptions.

1 the trustee's sale. In his amended answer, defendant admitted that he was in possession
2 of the property, but denied that he was holding the property by force and that plaintiff
3 was entitled to possession. Defendant also raised several affirmative defenses.

4 On July 10, 2012, the case proceeded to trial, during which plaintiff
5 submitted the trustee's deed as its only evidence. By statute, the recitals in a trustee's
6 deed "shall be prima facie evidence in any court of the truth of the matters set forth
7 therein[.]" *Former* ORS 86.780 (2012), *renumbered as* ORS 86.803 (2013). Defendant
8 did not put on any evidence in response to plaintiff's evidence or in support of his
9 affirmative defenses. Thus, the question before the trial court was whether plaintiff had
10 proved that it was entitled to a judgment against defendant for possession of the property.
11 To do so, the plaintiff in an FED action must prove that (1) the defendant was in
12 possession of the property, (2) the defendant was unlawfully holding the property by
13 force, and (3) the plaintiff was entitled to possession. *See* ORS 105.123 (describing
14 required contents of FED complaint). The trial court concluded that plaintiff had failed
15 to carry its burden. It appears that the court concluded that plaintiff had failed to prove
16 that defendant was unlawfully holding the property by force.³

³ At trial, defendant argued that plaintiff was required to prove that it served him with a notice of the trustee's sale after the sale occurred and that the recitals in the trustee's deed did not establish that such service had occurred. The trial court seemed to accept that argument. On appeal, defendant acknowledges that no such notice is required for grantors. By statute, grantors are to receive notice of the sale before it occurs. *Former* ORS 86.740(1) (2012), *amended by* Or Laws 2012, ch 113, § 7, *renumbered as* ORS 86.740(1)(a), *amended by* Or Laws 2013, ch 304, § 11, *renumbered as* ORS 86.764(1) (2013); *former* ORS 86.745 (2012), *renumbered as* ORS 86.771 (2013); *former* ORS 86.750 (2012), *renumbered as* ORS 86.774 (2013). In this case, the trustee's

1 As mentioned, plaintiff appeals, arguing that it was entitled to possession as
2 a matter of law. In response, defendant acknowledges that, under *former* ORS 86.780,
3 the recitals in the trustee's deed are *prima facie* evidence of the matters asserted and that
4 the recitals are *prima facie* evidence that plaintiff was entitled to possession; but,
5 defendant contends that the recitals do not establish that he was in possession of the
6 property or that he was unlawfully holding it by force. We address the evidence
7 regarding those two elements in turn.

8 First, contrary to defendant's argument on appeal, plaintiff did not fail to
9 carry its burden of proving that defendant was in possession of the property; rather,
10 defendant himself relieved plaintiff of that burden. As mentioned, in his amended
11 answer, defendant admitted that he was in possession of the property. An admission in
12 an answer relieves the opposing party of the burden of putting on evidence of that fact at
13 trial. *Britton v. Frost*, 282 Or 355, 361, 578 P2d 1241 (1978) (citing *Schucking v. Young*,
14 78 Or 483, 495, 153 P 803 (1915)).

15 Nevertheless, defendant argues that his amended answer does not constitute

deed recitals state that defendant received the required notice, and defendant offered no evidence to rebut those recitals.

It also appears that the trial court believed that plaintiff needed to prove that it had not entered into an agreement to allow defendant to remain in possession of the property after the sale. The court observed, "[S]ometimes when people foreclose, they allow people to rent back. It's common. So how do I know that that didn't happen here? I didn't have anyone testify it didn't, and it's not in the deed." On appeal, defendant does not defend the trial court's judgment on that basis; he does not identify any authority for the proposition that plaintiff needed to prove that defendant had not received permission to remain on the property, and we are not aware of any such authority.

1 *prima facie* evidence of his possession because (1) the amended answer was never
2 admitted into evidence and (2) the fact that defendant admitted that he was in possession
3 at the time of the amended answer, which was filed on May 14, 2012, does not establish
4 that he was still in possession at the time of trial, which was held on July 10, 2012.

5 With respect to defendant's first contention, we note that "[a]n admission of
6 fact in a pleading is a judicial admission and, as such, is normally conclusive on the party
7 making such an admission." *Yates v. Large*, 284 Or 217, 223, 585 P2d 697 (1978)
8 (citations omitted). The amended answer did not need to be admitted into evidence
9 because the facts admitted in that answer were already conclusive as to defendant. *See*
10 *Foxton v. Woodmansee*, 236 Or 271, 278, 386 P2d 659 (1963), *reh'g den*, 388 P2d 275
11 (1964) ("[A] judicial admission is one made by a party or his attorney for the purpose of
12 dispensing with proof of a fact in issue.") (Citations omitted.)

13 Defendant's second contention is also unpersuasive. Defendant cites no
14 authority, and we are aware of none, requiring a plaintiff to prove a fact that a defendant
15 has already admitted in the answer, simply because the passage of time between the filing
16 of the answer and the trial could have affected the existence of that fact. Defendant did
17 not attempt to amend his answer to reflect any new factual developments. *See* ORCP 23
18 E ("Upon motion of a party the court may, upon reasonable notice and upon such terms
19 as are just, permit the party to serve a supplemental pleading setting forth transactions or
20 occurrences or events which have happened since the date of the pleading sought to be
21 supplemented."). Nor did defendant present any evidence at trial that could suggest that

1 he was no longer in possession of the premises. In fact, as mentioned, defendant offered
2 no evidence at trial whatsoever. Thus, the trial court was obligated, as a matter of law, to
3 conclude that plaintiff proved that defendant was in possession of the premises.

4 The question becomes whether plaintiff proved that defendant was
5 unlawfully holding the property by force. For the purposes of FED proceedings, ORS
6 105.115(1)(d) provides that a person unlawfully holds property by force "[w]hen the
7 person in possession of a premises remains in possession after the time when a purchaser
8 of the premises is entitled to possession in accordance with the provisions of * * * [ORS]
9 86.782." As set out above, ORS 86.782(6)(a) provides:

10 "Except as provided in paragraph (b) or (c) of this subsection,⁴ the
11 purchaser at the trustee's sale is entitled to possession of the property on the
12 10th day after the sale. A person that remains in possession after the 10th
13 day under any interest, except an interest prior to the trust deed, or an
14 interest the grantor or a successor of the grantor created voluntarily, is a
15 tenant at sufferance. The purchaser may obtain possession of the property
16 from a tenant at sufferance by following the procedures set forth in ORS
17 105.105 to 105.168 [the FED procedures] or other applicable judicial
18 procedure."

19 Thus, a purchaser at a trustee's sale is entitled to possession of the purchased property on
20 the 10th day after the sale, and the purchaser can use the FED process to obtain
21 possession from a tenant at sufferance, that is, "[a] person that remains in possession after
22 the 10th day under any interest, except an interest prior to the trust deed, or an interest the
23 grantor or a successor of the grantor created voluntarily[.]" ORS 86.782(6)(a).

24 We assume, without deciding, that, in order to prove that defendant was a

⁴ See ___ Or App at ___ n 2 (slip op at 2 n 2).

1 tenant at sufferance, plaintiff not only had to prove that (1) defendant remained in
2 possession of the property more than 10 days after the trustee's sale, but also that (2)
3 defendant did not remain in possession pursuant to "an interest prior to the trust deed"
4 and that (3) defendant did not remain in possession pursuant to "an interest the grantor or
5 a successor of the grantor created voluntarily[.]" *Id.* We conclude that plaintiff carried
6 that burden.

7 First, as discussed above, defendant's amended answer established that
8 defendant was in possession of the property at the time of the trial, which was held more
9 than 10 days after the trustee's sale. Second, the recitals in the trustee's deed are *prima*
10 *facie* evidence that defendant did not possess the property pursuant to "an interest prior to
11 the trust deed," *id.*; they establish that defendant was the grantor of the trust deed and that
12 "all interest" that he had in the property at the time that the trust deed was executed was
13 conveyed to plaintiff as a result of the trustee's sale. Third, the recitals also serve as
14 *prima facie* evidence that defendant did not possess the property pursuant to "an interest
15 the grantor or a successor of the grantor created voluntarily[.]" *Id.* Again, the recitals
16 establish that defendant himself was the grantor; he was not a tenant or other third-party,
17 in which case other statutory requirements might have applied. *See former* ORS
18 86.755(6)(b) - (c) (2012), *renumbered as* ORS 86.782(6)(b) - (c) (2013) (providing
19 procedure for obtaining possession from a person who holds possession under an interest
20 that the grantor or a successor of the grantor created voluntarily or a person occupying a
21 dwelling unit on the property under a bona fide tenancy).

1 In sum, we conclude that plaintiff established--through defendant's
2 admission of possession of the property and the recitals in the trustee's deed--that
3 defendant was in possession of the property, that he was unlawfully holding the property
4 by force, and that plaintiff was entitled to the property because it purchased the property
5 at a trustee's sale more than 10 days earlier. Given plaintiff's *prima facie* evidence, which
6 was unchallenged, the trial court erred in awarding defendant possession.

7 Reversed and remanded.