

FILED: May 31, 2012

IN THE COURT OF APPEALS OF THE STATE OF OREGON

BERNARD D. BLUNIER
and JEAN MARIE BLUNIER,
husband and wife,
Plaintiffs-Respondents,

v.

RICHARD L. STAGGS, II,
Defendant,

and

WALTER SCOTT ZWINGLI,
Defendant-Appellant.

Polk County Circuit Court
09P10477

A145975

William M. Horner, Judge.

Argued and submitted on November 30, 2011.

Terrance J. Slominski argued the cause for appellant. With him on the briefs were David W. Venables and Slominski and Associates.

Teresa Ozias argued the cause for respondents. With her on the brief was Shetterly, Irick & Ozias.

Before Schuman, Presiding Judge, and Wollheim, Judge, and Nakamoto, Judge.*

SCHUMAN, P. J.

Affirmed.

*Wollheim, J., *vice* Landau, J. pro tempore.

1 SCHUMAN, P. J.

2 Defendant Zwingli appeals from a general judgment of foreclosure based
3 on his failure to comply with terms of a trust deed in favor of plaintiffs, the beneficiaries
4 under the deed--in particular, his failure to pay plaintiffs for attorney fees that they
5 incurred in attempting to enforce the term of that deed under which defendant agreed to
6 "preserve and maintain the property in good condition and repair" and "not to commit or
7 permit any waste of said property."¹ Defendant argues, first, that he did not violate that
8 term and, second, that nothing in the trust deed compels him to pay for attorney fees
9 incurred by plaintiffs prior to foreclosure itself. We disagree with both of defendant's
10 arguments. We therefore affirm.

11 Because judicial foreclosure of a trust deed is an equitable proceeding, we
12 have the discretion to review this case *de novo*. ORS 19.415(3)(b). However, neither
13 party presents an argument in favor of our doing so, nor do we perceive one.
14 Accordingly, "[w]e review the trial court's legal conclusions for errors of law, and we are
15 bound by its factual findings if there is any evidence to support them." [Neff v. Sandtrax,](#)
16 [Inc.](#), 243 Or App 485, 487, 259 P3d 985, *rev den*, 350 Or 716 (2011) (footnote omitted).
17 If there is a disputed issue of fact and the trial court could have reached the result that it
18 did only if it resolved the dispute in one way, we will presume that it did so. *Ball v.*
19 *Gladden*, 250 Or 485, 487, 443 P2d 621 (1968).

¹ Although the original grantor of the deed, Staggs, was a defendant at trial, the only defendant on appeal is Zwingli, Staggs's successor. Hereafter, references to defendant are to Zwingli only.

1 In 2004, plaintiffs sold a house to Staggs in exchange for a promissory note
2 secured by a trust deed. In April 2006, Staggs was in default, and plaintiffs started
3 foreclosure proceedings. Staggs assigned all of his interest in the property to defendant,
4 subject to the original promissory note and trust deed in favor of plaintiffs. Defendant
5 cured the existing defaults, including the expenses that the trust had incurred in initiating
6 foreclosure. After evicting a tenant, defendant took possession of the property in June
7 2007 and began extensive renovations, including replacing the roof, windows, doors,
8 gutters, exterior railings, and electrical wiring; repairing the sewer and water connections;
9 leveling the foundation; closing holes in the crawl space beneath the house; and
10 refinishing and carpeting the floors. Defendant undertook the improvements to increase
11 the value of the house and to bring it up to code so that a future buyer could obtain
12 financing.

13 In October and November 2007, plaintiff Jean Blumier observed piles of
14 construction debris and garbage on the property and became concerned; previously,
15 plaintiffs had lost insurance coverage due to similar debris accumulation. Plaintiffs sent
16 defendant a certified letter asking him to clean up the property; defendant refused to
17 accept the letter, and it was returned to plaintiffs. At that point, they turned the matter
18 over to their attorney, Ozias. On November 15, 2007, Ozias (on behalf of plaintiffs)
19 wrote to Staggs and defendant, complaining about the condition of the property and
20 demanding that it be cleaned up within 30 days to avoid default. Ozias relied on a
21 provision in the trust deed stating that the grantor agrees "[t]o protect, preserve, and

1 maintain the property in good condition and repair" and "not to commit or permit any
2 waste of said property." Ozias also stated that, to avoid default, defendant had to pay the
3 additional attorney fees that plaintiffs had incurred in the process of enforcing
4 compliance--that is, the attorney fees incurred in demanding that defendant pay attorney
5 fees. Defendant cleaned up the property and informed plaintiffs of that fact. Ozias then
6 sent defendant an e-mail informing him that he still owed \$460.75 for attorney fees.
7 Defendant refused to pay; Ozias wrote defendant several times attempting to collect the
8 fees, each time adding the fees for her demand letters to the underlying debt obligation.
9 Defendant paid off the promissory note in January 2009, but continued to refuse to pay
10 attorney fees. For that reason, the reconveyance of the property to defendant was not
11 recorded. Finally, in June 2009, plaintiffs filed this action against defendant and Staggs
12 to foreclose on the trust deed, alleging that defendant was in default for his failure to pay
13 attorney fees and costs, which, by then, amounted to \$2,054.04.

14 At trial, defendant argued that the property was in very bad condition when
15 he took possession in 2007 and that the condition of the property a few months later when
16 plaintiffs and Ozias demanded a clean-up was the normal byproduct of the renovation
17 work. Further, defendant argued that Ozias's fees were for her legal advice and services
18 to plaintiffs, not fees incurred as an attorney or trustee enforcing the trust deed. The trial
19 court ruled that, by purchasing the property from Staggs, defendant assumed Staggs's
20 interest and obligations under the 2004 trust deed. Defendant does not assign error to that
21 ruling. The court then stated:

1 "[Defendant], you are the very best witness, aside from all these
2 pictures, * * * [to] what you described as the deplorable condition of the
3 house. It was in a condition of being wasted. It was waste, waste was
4 going on there. The responsibility of the grantor, that would be you.

5 "And what you said was 'well, I was fixing it and so why, why didn't
6 they just leave me alone?' The reason they didn't just leave you alone is
7 because you, as the successor to the grantor, are required, not to permit any
8 waste.

9 "The property was in a condition of waste. And the trust is entitled
10 to remedy that and to take whatever reasonable actions were necessary to
11 remedy that. And you're right, they stayed all over you. They kept saying
12 'fix it, fix it, do it now.' And it didn't get done now. It got done later."

13 The court also held that defendant was in default for failing to pay Ozias's attorney fees.

14 Defendant renews his arguments on appeal.

15 "Waste occurs when the person in possession of the land, by act or
16 omission, causes the property's value to decrease as the result of abuse or destruction,
17 thereby causing injury to the property and the holders of the legal interests in it."

18 *Whistler v. Hyder*, 129 Or App 344, 349, 879 P2d 214, *rev den*, 320 Or 453 (1994).

19 Although the Oregon courts have not announced the standard of review that applies to
20 waste, the proper standard must reflect that the question whether waste has occurred is a
21 legal conclusion based on historical facts such as, for example, facts relevant to the
22 condition of the property and the acts or omissions of the person in possession. We
23 therefore review the historical facts for any evidence, Or Const, Art VII (Amended), § 3,
24 and the ultimate ruling on waste for legal error.

25 In the present case, although there is a dispute between the parties as to the
26 condition of the property when defendant came into possession, there is *no* dispute as to

1 the condition of the property in 2004 when the deed of trust was executed by Staggs and
2 plaintiffs, nor is it disputed that defendant succeeded to Staggs's obligation under the trust
3 deed to avoid waste and "preserve and maintain the property in good condition." Plaintiff
4 Jean Blunier testified that, in 2004, the property

5 "did need some repairs, but we had cleaned it up from top to bottom * * *.
6 We had to just take out all the carpeting and we painted all the walls and
7 everything. There was some things left to do. * * * And the back yard was
8 in good shape because my son-in-law and his brother had burned and
9 rototilled all the debris that was out there from that renter we had."

10 A photograph, admitted as Exhibit 3, shows a normal-looking house. Further, there is no
11 dispute as to the condition of the house and grounds when plaintiffs demanded that the
12 property be cleaned up in 2007. Defendant's own testimony and pictures offered by
13 plaintiffs as exhibits depicted the debris that existed for at least a month. Further,
14 plaintiff Jean Blunier testified about her concern that the debris could cause problems
15 with insuring the property based on past loss of insurance coverage due to similar
16 conditions.

17 The only disputed fact is whether the condition at that time was the result of
18 "abuse or destruction," *Whistler*, 129 Or App at 349, or the justifiable result of ongoing
19 repairs that were increasing the property's value. Plaintiff Jean Blunier acknowledged
20 that the work being done on the house would necessarily create some problems, but
21 insisted that the problems had persisted too long to qualify as the necessary incidents of
22 the rehabilitation work:

1 "Q [Defense Counsel]: Well, since you were watching this house,
2 were you aware that perhaps the downspouts had to be taken off while the
3 new roof was put on?

4 "A: Right. But I didn't think he was in a timely manner of putting
5 them back up."

6 Testimony from Ozias confirmed that conclusion: "[T]he project had been * * * ongoing
7 and had not been completed in a reasonable manner or reasonable time, sorry. The roof
8 project needed to be completed and all the excess materials needed to be removed." We
9 can discern from the trial court's statement, quoted above, that it agreed: "They kept
10 saying 'fix it, fix it, do it now.' And it didn't get done now. It got done later." That
11 finding, then, is supported by evidence in the record: Blunier's and Ozias's testimony.
12 Based on these undisputed facts, we conclude that the trial court's conclusion that waste
13 had occurred was correct. Further, in addition to the requirement to avoid waste, the deed
14 of trust required defendant to keep the property "in good condition and repair," and there
15 is no evidence to contradict the abundant evidence that he had failed to do so.

16 Defendant contends, however, that he was not obligated under the deed of
17 trust to pay the attorney fees that the trust incurred by paying Ozias for her role in the
18 proceedings leading to the trial, that is, for her role in (1) attempting to compel defendant
19 to restore the property to "good condition" and remedy "waste," and (2) attempting to
20 compel defendant to pay for that underlying attempt.² Defendant's argument cannot be
21 reconciled with the trust deed itself. Paragraph seven of that document provides that the

² Defendant challenges only the entitlement to fees; he does not challenge the number of hours claimed nor the hourly rate.

1 grantor--again, defendant as the successor to Staggs's obligations--agrees

2 "[t]o pay all costs, fees and expenses of this trust including the cost
3 of title search, as well as the other costs and expenses of the Trustee
4 incurred in connection with or in enforcing this obligation together with
5 trustees' and attorneys' fees actually incurred."

6 After the second word, "pay," the paragraph consists of a list of that verb's direct objects,
7 that is, a list of what the grantor agrees to pay, as modified by adjectives and phrases.

8 The list consists of (1) all costs, fees, and expenses of the trust; (2) other costs and
9 expenses of the trustee incurred in *connection with* "this obligation," that is, the
10 obligation to pay costs, fees and expenses of the trust; (3) other costs and expenses of the
11 trustee incurred in *enforcing* the obligation to pay all costs, fees and expenses of the trust;
12 (4) trustees' fees actually incurred; and (5) attorney fees actually incurred. The trial court
13 concluded that Ozias's attorney fees incurred in attempting to enforce the no waste
14 obligation fell within the first item on the list, that is, her fees were among the "expenses
15 of this trust":

16 "So you are required, as a grantor, to pay all costs, fees, and
17 expenses of the trust. That's the trust that has the right to have the property
18 remain in good condition and repair, contrary to what you said was the
19 condition when you took possession of it.

20 "But it was in that condition. And it is that condition which is
21 entitled to [justifies?] enforcement action, including costs and expenses and
22 trustees' and attorney's fees actually incurred. Well, there weren't any
23 trustee's fees incurred because the bank was the trustee,^[3] but there were
24 attorney's fees incurred in enforcing the terms of the trust deed.

³ Ozias testified that she was a trustee, and no one contradicted that assertion. However, the deed of trust specifies that First American Title Insurance Company of Oregon was designated the trustee when the deed was executed, and nothing in the record contradicts that, either. Ultimately, however, the identity of the trustee is not relevant to

1 "They're expenses of the trust and entitled to be recovered."
2 Defendant argues that item three in the list above, costs incurred by the trustee in
3 enforcing "this obligation," does not encompass expenses incurred by the trustee in an
4 attempt to enforce the no waste provision of trust. That argument misses the point. The
5 court did not rely on item three, and, in any event, we do not read that provision, as
6 defendant does, to require that "attorneys' fees" be "incurred in connection with or in
7 enforcing" the trust. The phrase "incurred in connection with or in enforcing this
8 obligation" modifies "the other costs and expenses of the Trustee." Under the language
9 of the trust deed, then, defendant was responsible for paying "all costs, fees[,] and
10 expenses of this trust including * * * attorneys' fees actually incurred." There is no stated
11 limitation on the type of attorneys' fees incurred other than that they be an expense of the
12 trust, and we conclude that a fee reasonably incurred with respect to bring defendant into
13 compliance with the no waste requirement is such an expense. Therefore, defendant was
14 obligated to pay Ozias's attorney fees related to the November 15, 2007, letter and her
15 fees related to collecting that debt.⁴

16 Further, Ozias's fees were properly added to the underlying debt pursuant to
17 the language of the trust deed:

our resolution of this case.

⁴ Defendant argues that, if we hold that plaintiffs can recover attorney fees in this case, we create the possibility that attorneys for grantees will generate illegitimate fee claims by engaging in frivolous, unfounded, repetitive, or trivial demands. That is not the situation presented by this case; as noted, the demand to comply with the no waste provision was genuine and legitimate. We need not and do not consider any other circumstances.

1 "[s]hould the Grantor fail to make payment of * * * other charges
2 payable by Grantor * * * Beneficiary may, at its option, make payments
3 thereof, and the amount so paid, with interest at the rate set forth in the note
4 secured hereby, together with the obligations described in paragraph[] 7 * *
5 * of this Trust Deed [the attorney fees provision], shall be added to and
6 become a part of the debt secured by this Trust Deed * * *."

7 The trust deed explicitly allowed for unpaid attorney fees to be added to the underlying
8 debt obligation.

9 Defendant argues that his refusal to pay the attorney fees did not constitute
10 a material breach and that therefore, foreclosure should not have occurred because he
11 otherwise paid the underlying debt in full. In other words, he argues that foreclosure on
12 the basis of the unpaid attorney fees alone is improper. However, as quoted above, the
13 trust deed authorized that amounts owed under the attorney fees provision be added to
14 and become part of the secured debt. Therefore, defendant's failure to pay the fees
15 amounted to a default under the trust deed. The trust agreement provides that,

16 "[u]pon default by Grantor in payment of any indebtedness secured
17 hereby or in Grantor's performance of any agreement contained hereunder,
18 * * * the Beneficiary may declare all sums secured hereby immediately due
19 and payable. In such event Beneficiary, at its election, may proceed to
20 foreclose this trust deed * * *."

21 Defendant defaulted "in payment of any indebtedness secured hereby" by failing to pay
22 the attorney fees portion of the underlying debt. Plaintiffs therefore were entitled to
23 enforce the attorney fees obligation in the trust deed by initiating foreclosure.

24 Affirmed.