1972

The Bowery Savings Bank v. Lynn A. Jenkins And Linda M. Jenkins : Appellant's Brief

In The Supreme Court of the State of Utah

THE BOWERY SAVINGS BANK, a corporation,

Plaintiff-Respondent,

vs.

LYNN A. JENKINS and LINDA M. JENKINS, his wife,

Defendants-Appellants.

APPELLANTS' BR

Appeal from the District Court of Salt L
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In The Supreme Court of the State of Utah

THE BOWERY SAVINGS BANK, a corporation,

Plaintiff-Respondent,

vs.

LYNN A. JENKINS and LINDA M. JENKINS, his wife,

Defendants-Appellants.

Case No. 12903

APPELLANTS' BRIEF

NATURE OF CASE

This is an action to foreclose a note and mortgage brought by the mortgagee after tenders of all payments due under the note and mortgage had been rejected by the mortgagee.

DISPOSITION OF CASE BY LOWER COURT

The lower court granted the Plaintiff's Motion for Summary Judgment and entered Judgment in the amount of $15,932.97, and ordered the mortgage foreclosed and the property sold to satisfy the Judgment.

RELIEF SOUGHT ON APPEAL

The Summary Judgment should be set aside and Judgment should be entered in favor of Defendants-Appellants dismissing the Complaint, or, in the alternative, the case should be remanded for trial.

STATEMENT OF FACTS

In November of 1970, LYNN A. JENKINS ("JENKINS") purchased the property at 4711 Westpoint Drive, Salt Lake City, Utah, from Thomas L. Hoopiiaina, by agreeing, among other things, to assume the mortgage against the property in favor of Johnson-Anderson Mortgage Company ("JOHNSON-ANDERSON") (R.55) This mortgage had been assigned by JOHNSON-ANDERSON to THE BOWERY SAVINGS BANK ("BANK") in New York City, but JOHNSON-ANDERSON was still servicing that mortgage as agent for the BANK. (R.33) JENKINS paid to JOHNSON-ANDERSON all payments which were delinquent at that time and requested whatever was necessary to transfer the loan to his name. (R.55)

In December of 1970, JENKINS sold the property under contract to Clyde B. and Darlene S. Andrus, who went into possession and have remained there ever since. In May of 1971, JENKINS transferred his interest in the property and his seller's interest in the Andrus contract to Vernal E. and Hazel J. Peterson. Copies of the deed to Petersons, the contract to An-

druses and an Assignment of Trust Funds to Petersons were sent to JOHNSON-ANDERSON. Mr. Joe Dugger of JOHNSON-ANDERSON was told by JENKINS that JENKINS from then on would only be acting as escrow agent to service the contract for Petersons and that he would forward the mortgage payments to JOHNSON-ANDERSON as the contract payments were received from Andrus. (R.55-56).

JENKINS received the June, 1971, contract payment from Andrus in July and forwarded the mortgage payment of $129.00, plus a late charge of $2.56 to JOHNSON-ANDERSON. This was returned to JENKINS on July 26, 1971, with a notation that it was not sufficient to pay the June and July payments. As soon as JENKINS received the next contract payment from Andrus, he forwarded a check for two monthly payments and two late charges to JOHNSON-ANDERSON. This too was returned to him with a notation that it was not sufficient because the August payment was now due. JENKINS received this back on August 20, 1971, and telephoned Joe Dugger and explained that Andrus had been out of work because of a strike, but that the next payment was expected soon. That payment was received by JENKINS in September. JENKINS immediately hand carried $394.68 to JOHNSON-ANDERSON. This amount was also later returned to JENKINS. (R. 25, 56).

JENKINS then, on September 23, 1971, telephoned Joe Dugger of JOHNSON-ANDERSON and

stated that he would send over $526.24 to cover all payments due through September, including late charges for each month. Dugger said he would not accept these payments because they wanted the property back. JENKINS then asked for the name of Dugger's immediate supervisor. He was given the name of Phil Albertson in Denver, Colorado. JENKINS then called Albertson in Denver, who refused to accept the money and also refused to give the name of anyone at the BOWERY SAVINGS BANK in New York. JENKINS called the BANK in New York and talked with Mr. Frank Abbey, who told JENKINS to send the payments to him. JENKINS thereupon sent the $526.24 to Abbey in New York along with copies of the other papers previously supplied to JOHNSON-ANDERSON. This money was also later returned to JENKINS. (R. 25-26, 56-57).

In the meantime, the Complaint was filed in this case on September 24, 1971, but was not served on JENKINS until October 4, 1971; JENKINS filed an Answer to the Complaint based upon the several tenders which had been made and also paid into Court all of the allegedly past due installments. Additional payments were made into Court each month as the monthly installments were due. The Plaintiff then filed a Motion for Summary Judgment which was granted by the lower Court based upon findings that there was no genuine issue as to any material fact and that Plaintiff had declared the entire balance due on the note and mortgage

prior to the tender to Plaintiff of $526.24. (R. 69, 72). This appeal resulted.

ARGUMENT

I.

THE COURT ERRED IN GRANTING SUMMARY JUDGMENT SINCE THERE IS A GENUINE ISSUE OF FACT AS TO WHETHER TENDER OF THE FULL AMOUNT DUE UNDER THE NOTE AND MORTGAGE HAD BEEN MADE PRIOR TO ACCELERATION AND INSTITUTION OF THE LAWSUIT.

Rule 56 (c), Utah Rules of Civil Procedure, provides that Summary Judgment may be rendered only if all of the documents on file show that there is no genuine issue as to any material fact. Therefore, all of the evidence on file must be viewed in favor of JENKINS and should any material fact be in dispute, the Summary Judgment must be reversed. *Hatch v. Sugarhouse Finance Company,* 20 Utah 2d 156, 434 P.2d 758 (1967); *In re Williams Estate,* 10 Utah 2d 83, 348 P.2d 683 (1960).

The Affidavit of Joe Dugger of JOHNSON-ANDERSON claims that no tender of the full amount due was made by JENKINS prior to the institution of the lawsuit (R. 34). The Answers to Interrogatories

submitted by JENKINS (R. 25-26) and the Affidavit in Opposition to Motion for Summary Judgment (R. 47-48) and documents attached thereto (R. 55-57) all state that full tenders were made prior to the institution of the lawsuit to three separate agents of the Plaintiff and that the tender was in fact accepted by the BANK in New York. These contrary claims present a disputed fact which should be resolved prior to any judgment. The Summary Judgment was therefore improper and should be reversed.

II.

TENDER OF THE FULL AMOUNT DUE PRIOR TO ACCELERATION OF THE NOTE AND MORTGAGE PREVENTS FORECLOSURE.

Both the note and the mortgage contain provisions with respect to the acceleration of the balance due. These provisions must be read together and in fact, constitute one contract since they were executed at the same time and in the course of the same transaction. *American Savings & Loan Association vs. Blomquist,* 21 Utah 2d 289, 445 P.2d 1, 4 (1968). The note provides that the failure to cure a default by the due date of the next installment gives the holder of the note the option to accelerate the entire principal and accrued interest. (R. 5). The mortgage provides that "if default be made in the payment of the said note or of any monthly installment of principal and interest as therein provided

. . . then the mortgagee may declare the entire indebtedness due and foreclose the mortgage." (R. 9). Read together, these provisions require the holder to give notice of any acceleration of the note and mortgage. *Sullivan vs. Shannon,* 25 Cal.App.2d 422, 77 P.2d 498 (1938); Annotation, 5 A.L.R. 2d 968 §§ 3, 4. The words "without notice" in the note do not change this interpretation since some affirmative act must be taken by the holder to apprise the maker of the exercise of the option. *Carmichael v. Rice,* 49 N.M. 114, 158 P.2d 290, 292 (1945). In this case there is no indication in the record that any act was taken to apprise JENKINS or any other party of acceleration prior to the institution of the foreclosure action and service of Summons on JENKINS.

It is admitted that the service of foreclosure papers on JENKINS is notice of acceleration. However, several tenders of the full amount due had been made to the BANK or its agents prior to that time. The record shows that full tender was made to Mr. Dugger of JOHNSON-ANDERSON by telephone, to Mr. Albertson of JOHNSON-ANDERSON by telephone, and to Mr. Abbey of the BANK both by telephone and by mail. All of these tenders took place on September 23, 1971, which was one day prior to the filing of the Complaint and eleven days prior to the service of Summons which would have accelerated the balance due. The tender to Mr. Abbey in New York was in fact accepted when he told JENKINS to forward the payments to him. The commencement of foreclosure after

this acceptance was improper and should be grounds for the dismissal of the foreclosure action.

The case of *Romero v. Schmidt,* 15 Utah 2d 300, 392 P.2d 37 (1964) was very similar to the case now before the Court. There an attempt was made to foreclose a Uniform Real Estate Contract as a note and mortgage after a tender of full payment was made by telephone by the Defendant's broker. All delinquent payments were to be paid from money held in trust by the broker. The court held that those facts were sufficient to constitute a tender even though they didn't meet the strict legal requirements of a tender. Under the circumstances a strict legal tender would have been a "meaningless gesture." The effect of the tender was to prevent the foreclosure. Those same facts are present in the instant case, except that here we have a note and mortgage, instead of a Uniform Real Estate Contract, which should make no difference. Therefore, the three tenders by telephone and the one in writing should obviously meet even the legal requirements of a tender and prevent foreclosure.

> "Adoption of this construction lends itself to the general principles of equity and the attitude this and other courts have taken toward mortgage foreclosures. The Plaintiff will sustain no damage by the court's refusing to enforce the acceleration clause since he will receive the full consideration he bargained for . . ." (*Romero v. Schmidt,* supra.)

III.

THIS CASE SHOULD BE DISMISSED FOR FAILURE TO JOIN THE TITLE HOLDERS AND THOSE IN POSSESSION OF THE PROPERTY AS INDISPENSABLE PARTIES.

In attempting to foreclose against the property subject to its mortgage, the BANK has failed to join the Petersons, who hold the legal title to the property and the Andruses, who are purchasing the property under contract and are in possession of the property. These parties are, of course, those whose rights are most seriously effected by the foreclosure action. The BANK attempts to justify this failure by relying on § 78-37-3 U.C.A., providing that parties with unrecorded interests need not be made parties to the foreclosure proceedings. This statute must be read in light of § 57-1-6 U.C.A., providing that a conveyance of real property must be recorded to operate as notice to third parties but shall nevertheless be valid and binding between the parties thereto "and to all other persons who have had actual notice." The BANK, in this case, had actual notice of the interests of Petersons and Andruses. Copies of the deed to Petersons and the contract to Andruses were sent to JOHNSON-ANDERSON and also to the BANK. (R 47). In fact, JOHNSON-ANDERSON has communicated with the Andruses by letters dated August 16, 1971, and June 30, 1971, (R. 47, 53, 54), prior to the commencement of foreclosure

proceedings. The actual notice of these interests to the BANK or its agent cannot be denied.

When the above statutes are read together, the obvious interpretation requires the mortgagee to join all interested parties of whom it had notice, either by recording, possession or actual notice to it. Especially is this true where the interested parties of whom the mortgagee has notice are those whose interests are most seriously effected by the foreclosure proceedings, as are those of the Petersons and Andruses in this case. A California court confronted with statutes substantially identical to § 78-37-3 and § 57-1-6 U.C.A., found that the latter took precedence over the former where the mortgagee had actual notice of an unrecorded interest before commencement of a foreclosure suit. In *Johnson v. Home Owners' Loan Corporation,* 46 Cal.App. 2d 546, 116 P.2d, 167 (1941), the suit was brought to set aside a real estate foreclosure decree and sale thereunder, entered in an action where persons claiming title were not made parties. The Court held that the suit to set aside the decree was proper where the mortgagee had actual notice of the interests of those who were claiming title to the property and were in possession of the property and were not made parties to the foreclosure action. Likewise, § 57-1-6 should take precedence over § 78-37-3 and require the BANK to make all persons with an interest in the property, of whom it had notice, parties to this action in order to effectively foreclose its mortgage. Comparison should be made with the Utah case of *Federal Land Bank of Berkeley v. Pace,*

87 Utah 156, 48 P.2d 480 (1935), where the court held that a foreclosure action was not binding on the grantee of the property who was not a party to the foreclosure action.

In preparing foreclosure reports in Utah, title examiners uniformly check and report on the occupancy of the property to be foreclosed. This practice results from the fact that possession serves as constructive notice of the possessor's interest in the property. Had this practice been followed in this case, possession by the Andruses and the interests of the Peterons would have been revealed, even though already known to the BANK. One in possession is usually considered a necessary party to a foreclosure action and a decree of foreclosure is not effective as to him unless he is joined. 55 Am.Jur. 2d Mortgages § 574.

The BANK's failure to join the owners of this property as parties to this action renders any decree of foreclosure and order of sale void and of no effect. In *Mickelson v. Anderson,* 81 Utah 444, 19 P.2d 1033, 1036 (1932), the court held a foreclosure void as to all the parties because the title owner was omitted in the original foreclosure suit. The court stated:

> "The foreclosure and sale were ineffectual to convey any title to respondent, the purchaser at such sale, because the only person who had any title to the property was inadvertently overlooked and not made a party to the suit

> . . . . The sale by the Sheriff could be effective in conveying only the right, title and interest which the parties defendant in that suit had in the mortgaged property, but nothing more. Such parties had no interest in the real estate, each, before suit, having conveyed the property by warranty deed. Thus, no interest in the realty was vested in the purchaser by the Sheriff's sale . . . .
>
> . . . Respondent, while seeking to foreclose her mortgage in the first action, failed to effect a foreclosure because the owner of the property was not a party to the action; hence the decree of foreclosure was void and of no effect as such."

The reasoning of this case becomes even more persuasive where the mortgagee knows of the interests of other parties who have not been joined. In following the *Mickelson* case this court stated in *Hoyt v. Upper Marion Ditch Co.*, 94 Utah 134, 76 P.2d 234, 240 (1938), and in *Reader v. District Court of Fourth Judicial District*, 98 Utah 1, 94 P.2d 858, 861, (1939). "This case would seem fairly conclusive that where a pledgee or subpledgee fails to join a *known* owner, the Judgment is void and must be set aside." (emphasis added). Following these cases, this court should hold that the failure of the BANK to join the Petersons and Andruses as indispensable parties renders the decree of foreclosure void as to all parties.

CONCLUSION

The cases and statutes clearly indicate that any decree of foreclosure and sale of the property would be void and of no effect because of the failure to join the actual owners of the property in the foreclosure proceedings. Those persons whose interests are most seriously effected by the foreclosure, the present owners of the property, are indispensable to a fair and proper determination of this matter. The decree should be reversed and the Complaint dismissed on this ground alone. However, the several tenders of the full amount due prior to acceleration of the balance due on the note and mortgage, and the actual acceptance of one of those tenders, precludes any foreclosure by the mortgagee. The written tender met the strict legal requirements of a tender and the other tenders by telephone are sufficient to prevent foreclosure since they were refused, making any further tender a meaningless gesture. All of these facts are clear from the record and justify a Judgment in favor of Appellants. Yet, at the very least, there exists a genuine issue as to whether tender was actually made. That is a material fact. Therefore, since a material fact remains in dispute, Summary Judgment is not appropriate and the case should be remanded for trial or other further proceedings.

Respectfully submitted:

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