

IN THE CIRCUIT COURT IN AND FOR ESCAMBIA COUNTY, FLORIDA

THOMAS D. KING,

Plaintiff,

vs.

Case No. 2008-CA-003385

GFD CONSTRUCTION INC., a/k/a
GFD CONSTRUCTION, INC., A
Dissolved Corporation; ESCAMBIA
COUNTY, DIVISION OF ENVIRONMENTAL
ENFORCEMENT and ERNIE LEE MAGAHA,
CLERK OF COURT, ESCAMBIA COUNTY,
FLORIDA,

Defendants.

FINAL JUDGMENT OF REFORMATION AND FORECLOSURE

This action was tried before the Court on Plaintiff's Third Amended Complaint. The Court previously entered Summary Judgment as to Count II of Plaintiff's Third Amended Complaint in favor of the Plaintiff, struck Defendant GFD Construction, Inc.'s pleadings for discovery violations and entered a Default against Defendant GFD Construction, Inc. The remaining Counts were tried before the Court and after hearing the testimony of the witnesses, reviewing of the evidence, hearing the arguments of counsel and otherwise being fully advised of the premises,

FINDS:

1.) Defendant GFD Construction, Inc., a dissolved Florida Corporation ("GFD") is in default of that note and mortgage recorded in the public records of Escambia County, Florida on April 20, 2007 in Official Records Book 6129 at Page 217. This Court previously entered summary judgment in favor of the Plaintiff establishing GFD's liability for the indebtedness and the amount thereof, except for the determination of Plaintiff's attorney's fees.

2.) At trial, Anthony J. Green, Sr. ("Green"), GFD's sole stockholder, officer and director testified on behalf of GFD that the white sand pit portions of the property not described in the legal description of the mortgage were not intended to be included in the mortgage. The Court finds Green's testimony to be clearly inconsistent with his prior testimony and the arguments of GFD's then counsel.

For example, Green testified before the Court at a bond hearing on June 12, 2012 that the white sand pit was the real value of the property (sand pit hereafter) and that GFD had received and rejected a \$2,000,000.00 offer for the sand pit three years earlier. As well, GFD's now former counsel, Jason R. Mosley argued at the same hearing that the sand pit was so valuable that no appellate bond should have been required to stay the proceedings and that the Plaintiff was oversecured. Former counsel Mosley also argued at the same hearing that "At this point, title has been merged on all of these into one of the defendant parties, and then the foreclosure that's going forward is really on about two-thirds of the overall property".

3.) GFD's former counsel testified, contradicting the trial testimony of Green, that it was not until after this June 12, 2012 hearing that he discovered, upon his own initiative, that the mortgage did not include the sand pit property. Prior to this time, both he and Green believed that the sand pit property was in fact included in the mortgage.

4.) The Court finds the representations of GFD's former counsel Mosley regarding the belief that the sand pit property was in fact included in the mortgage consistent with his prior arguments and representations to the Court and Green's testimony before the Court at the June 12, 2012 hearing that the sand pit property was intended to be included in the subject mortgage.

5.) The Court finds Green's testimony throughout these proceedings not to be credible. At trial, Green attempted to adopt a position inconsistent to that of his prior testimony. This inconsistent position is barred by the Doctrine of Judicial Estoppel. The Court notes that Jason R. Mosley, GFD's counsel at the time, testified that after he discovered the sand pit was not included in the legal description of the mortgage, and so informed Green, Green was "pleasantly surprised" by this news.

6.) From the testimony and evidence presented, the Court finds that Plaintiff and GFD fully intended and, in fact, believed that the white sand pit was included in the subject mortgage. Its omission in the legal description contained in the mortgage was the result of a mutual mistake of the parties.

7.) The testimony presented clearly and convincingly establishes that the parties intended

to mortgage and encumber the sand pit which is correctly described in that legal description attached hereto as Exhibit "A" and by reference made a part hereof.

8.) At all material times, Green, through himself and through various companies that he solely owned and controlled, has maintained complete use, control and beneficial ownership of the sand pit as described in Exhibit "A" attached hereto.

9.) The testimony and evidence also shows that Green was in complete control over the companies and individuals who purportedly held legal title to the sand pit. Green's control over these companies and individuals was such that they would execute any deed or instrument related to the sand pit at any time at Green's request for no consideration and without questioning Green's motive or purpose. In October, 2009, Green, without consideration, caused his sons, Anthony J. Green, Jr. and Gregory B. Green to execute (including himself) deeds in favor of GFD Construction. Any defect in GFD's title to the sand pit property which may have existed at the time the subject mortgage was delivered to Plaintiff was cured by the Doctrine of After-Acquired Title. The Doctrine of After-Acquired Title applies to mortgages as well as to deeds. BCML Holding LLC v. Wilmington Trust, 2015 WL 5603490 (3rd DCA 2015). CDC Builders, Inc. v. Biltmore Seville Debt Investors LLC, 151 So. 3d 479 (Fla. 3d 2014) (fraud unavailable to hinder, delay or defraud creditors).

10.) Defendant Kenneth L. Williams ("Williams") raised the defense that he was a bonafide purchaser for value of the subject property without knowledge of Plaintiff's claim against the entire sand pit.

11. The evidence and testimony shows that Williams is a long standing member of the Florida Bar, a former Escambia County judge and long-term close friend of Green. Williams represented GFD in other proceedings involving the sand pit as early as 2011 while this foreclosure action was pending. Green stated under oath on January 23, 2012 that he had not only discussed the action with Williams but that Williams would be representing GFD at the trial scheduled for February 5, 2012. Attorney Jason R. Mosley testified that he had informed Williams as to this pending action prior to the

October 30, 2012 closing of the deed upon which Williams bases his claim to the property. At the time of the "closing" of the deed between GFD and Williams, Williams was on ~~actual and~~ constructive notice of Plaintiff's mortgage claim to the subject property. In addition to the testimony of Jason R. Mosley that Williams was aware of this foreclosure action, Mosley also testified that he was "very clear" to Williams that he was not insuring title and that he let Williams know specifically that he would have to rely on Green regarding quality of title.

12.) Jason R. Mosley also testified that after Williams received a proposed "Special Warranty Deed" Mosley prepared prior to closing and sent to Green and Williams by e-mail for review, that Williams called Mosley and requested that certain qualifying language be removed from the proposed deed and that the deed be in the form of a "Warranty Deed".

13.) At the time of the purported closing of the deed to Williams on October 30, 2012, the chain of title to the subject property showed that Jason R. Mosley had filed and recorded in the Official Records of Escambia County, Florida on June 11, 2012 a Notice of Appeal of the Final Judgment of Foreclosure as to two related mortgages encumbering other parcels of real property consolidated into the instant action and under the same case title and case number as the instant action. Attached to the Notice of Appeal was a copy of the Final Judgment with the same title and case number of the instant action as a result of the prior Order of Consolidation. Paragraph 10 of the Final Judgment states "The Court shall reserve jurisdiction as to all Counts pertaining to the mortgage recorded April 20, 2007 in Official Records Book 6129 at Page 217 of the Public Records of Escambia County, Florida between the mortgagor GFD Construction, Inc. a/k/a GFD Construction, Inc. and the mortgagee Thomas D. King, the promissory note secured thereby and as to the award of additional costs and attorney's fees". There was also a Lis Pendens of record.

14.) Prior to closing, Williams undertook absolutely no efforts to examine or investigate GFD's title or chain of title to the sand pit to determine if there were any superior liens, judgments, claims or other defects in title.

15.) Had Williams exercised common prudence in the investigation of GFD's title, he would have certainly become aware of the Plaintiff's outstanding mortgage claim against the sand pit property. "If, in the investigation of a title, a purchaser, with common prudence, must have been apprised of another right, notice of that right is presumed as a matter of implied actual notice" Zaucha v. Town of Medley, 66 So.2d 238 (Fla. 1953). Implied actual notice can arise not only when a party actually has information which describes the interest of the third party but also when the party has the means to obtain knowledge under circumstances reasonably suggesting the need for an inquiry, but not use that knowledge and means to obtain the information. Symons v. Department of Banking and Finance, 490 So.2d 1322 (Fla. 1st DCA 1986). Here, the chain of title clearly indicates that the instant foreclosure action remained unresolved and subject to further judicial determination. A review of the Clerk's Court file at or just prior to the GFD-Williams closing would have disclosed to Williams that Plaintiff King sought to reform the subject mortgage to include the white sand pit property. Although at the time of closing this Court had verbally denied the Plaintiff's motion to amend his complaint, Plaintiff's right of rehearing or time to seek appellate review had not yet expired. The record would have indicated that the Motion was still pending. A review of the Clerk's Court file would have also readily disclosed these facts to Williams.

16.) Defendant Williams was on ~~actual notice of Plaintiff's claims and~~ implied actual notice of Plaintiff's claims and therefore cannot claim to be a bonafide purchaser for value without notice. Any interest that Defendant Williams may have to the subject sand pit property is therefore inferior to Plaintiff's mortgage claim.

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17.) The evidence and testimony establishes that within a short time after Attorney Jason R. Mosley informed Green that the subject mortgage did not include the entire sand pit property, Green called Jason R. Mosley and instructed him to "prepare a deed to Defendant Williams for all of the property that was not foreclosed". It was not until later that the issue or amount of consideration was discussed (which was raised by Mosley) or any other terms of a typical real estate transaction. At

closing, no funds or purchase price was tendered. The testimony of Green appears to suggest that loans were made by Williams to Green for a period beginning in 2007 with Williams continuing to make loans to Green after the closing. Both Green and Williams testified that subsequent to the October 30th closing, two leases were prepared for Green's use of the subject property. Although the leases required substantial monthly rents, real property taxes, insurance and other amounts to be paid, both Green and Williams testified that Green has made no rental payments to Williams nor paid the real property ad valorem taxes, insurance or otherwise. In short, Green's unfettered and unconditional beneficial use of the subject property remained unchanged and continues to remain unchanged subsequent to the execution of the October 30, 2012 deed.

18.) The Court is of the opinion that the GFD-Williams deed is a sham designed solely to take advantage of the then recent discovery of the error in the legal description of the subject mortgage. ~~No reasonable rental property owner would allow a tenant to remain on leased property for three years without paying rent or complying with even the most basic provisions of a lease agreement. Certainly, Williams' dire financial condition suggests that an expedited eviction of Green from the property would be in his best interests.~~ At most, the GFD-Williams deed and subsequent leases must be construed as a mortgage with respect to those funds loaned by Williams to Green. However, evidence clearly shows that Williams loaned money to Green individually and not to GFD Construction, Inc. which was dissolved corporation at the time of the purported conveyance.

19.) The fact that GFD was a dissolved corporation at the time of conveyance further supports this Court's findings that Williams was not a bonafide purchaser for value without notice. GFD's former attorney, Mosley, testified that, under Florida law, a dissolved corporation is restricted in its business activity to winding up its business affairs and paying its creditors. In fact, the opposite occurred. GFD was clearly indebted to the Plaintiff yet Green purportedly caused GFD to convey an asset to Williams without any consideration flowing to GFD. Plaintiff King, as a creditor of GFD was deprived of his rights as a creditor under Florida law.

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20.) Although Williams argued to the Court that parole evidence may not be introduced to challenge the terms of the mortgage and note, Florida law is very clear that parole evidence is admissible to establish the intent of the parties to deeds. Zanakis v. Zanakis, 626 So.2d 181 (Fla. 4th DCA 1993); to establish the intent of a deed as a mortgage Markell v. Hilpert, 192 So. 392 (Fla. 1939). Parole evidence may also be used to reform instruments to express the true intent of the parties in equity, including legal descriptions intended by the parties but erroneously described in an instrument. Roberts v. Pfeiffer, 135 So.2d 246 (Fla. 2nd DCA 1961).

WHEREFORE, IT IS ORDERED and ADJUDGED as follows:

1.) The agreement between Plaintiff and Defendant GFD and the resulting mortgage, through mutual mistake incorrectly identified the property intended to be subject to the mortgage through mutual mistake.

2.) Plaintiff and Defendant GFD intended the mortgage to be placed on that property as described in Exhibit "A" attached hereto and by reference made a part hereof.

3.) The subject mortgage between Plaintiff, Thomas D. King and Defendant, GFD Construction, Inc. is reformed such that the encumbered property under the mortgage is that property described in Exhibit "A" and by reference made a part hereof.

4.) The deed between GFD Construction, Inc., a dissolved Florida Corporation, as Grantor, and Kenneth L. Williams, as Grantee, recorded on November 16, 2012 in the Official Records of Escambia County, Florida in Book 6935 at Page 1254 is a sham, inferior in interest to the mortgage as reformed of the Plaintiff, Thomas D. King. Plaintiff's mortgage is also superior to those claims of Defendants Escambia County, Division of Environmental Enforcement; Ernie Lee Magaha, Clerk of Court, Escambia County, Florida; Members First Credit Union of Florida; Palisades Collection, LLC, assignee of Household Bank; Mound Leasing Co. a/k/a Mound Leasing Company, Inc.; Preferred Contractors, Inc., and all those claiming any right, title or interest to the property after the filing of the Lis Pendens on the subject property as described in Exhibit "A", attached hereto and by reference made

a part hereof.

5.) Defendant GFD owes Plaintiff the following amounts: principal due \$70,000.00; pre-judgment interest through November 30, 2015 \$60,146.67; late fees of \$7,000.00; and costs of \$3,543.04. Total amounts due Plaintiff through November 30, 2015 (less Plaintiff's reasonable attorney's fees) total \$140,689.71, that shall bear interest at the legal rate of 4.75% per year.

6.) Plaintiff is entitled to attorney fees and this court reserves jurisdiction to determine at an evidentiary hearing Plaintiff's reasonable attorney's fees which shall be added to the total amount due as set forth in paragraph 5 above prior to the foreclosure sale and which shall be added to the amount due under paragraph 5 above and to the foreclosure bid credit of the Plaintiff.

7.) If the total amount due with interest prescribed in paragraph 5 plus all attorney's fees and costs of this action accruing subsequent to this judgment are not paid within the time required by law, the Clerk of this Court shall sell the property at public sale on JANUARY 6, 2014 to the highest bidder for cash, except as prescribed in paragraph 9, by electronic sale beginning at at 11:00 AM CST o'clock A.M. on the proscribed date at <https://escambia.realforeclose.com>.

8.) Plaintiff shall advance all subsequent costs of this action and shall be reimbursed for them by the Clerk if Plaintiff is not the purchaser of the property for sale, provided, however, that the purchaser of the property for sale shall be responsible for the documentary stamps payable on the certificate of title. If Plaintiff is the purchaser at the sale, the Clerk shall credit Plaintiff's bid with the total sum with interest and costs accruing subsequent to this judgment, or such part of it as is necessary to pay the bid in full.

9.) On filing the Certificate of Title, the Clerk shall distribute the proceeds of the sale as far as they are sufficient by paying: first, all of Plaintiff's costs; second, documentary stamps affixed to the Certificate of Title, unless the documentary stamps have already been paid by a purchaser other than Plaintiff; third, Plaintiff's attorneys' fees; fourth, the total sum due Plaintiff, less the items paid, plus

interest at the rate prescribed in paragraph 6 from this date to the date of the sale; and by retaining any remaining amount pending further order of this Court.

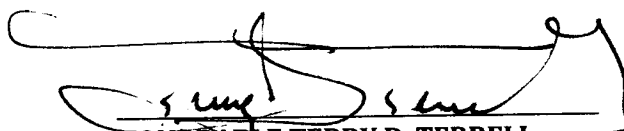
10.) On filing the Certificate of Sale, Defendants and all persons claiming under or against defendants since the filing of the Notice of Lis Pendens shall be foreclosed of all estate or claim in the property and defendant's right of redemption as prescribed by section 45.031, Florida Statutes (2013) shall be terminated except as to claims or rights under chapter 718 or chapter 720, Florida Statutes, if any. Upon the filing of the Certificate of Title, the person named on the certificate of title shall be let into possession of the property.

11.) Jurisdiction of this action is retained to enter further orders that are proper including, without limitation, a deficiency judgment.

IF THIS PROPERTY IS SOLD AT PUBLIC AUCTION, THERE MAY BE ADDITIONAL MONEY FROM THE SALE AFTER PAYMENT OF PERSONS WHO ARE ENTITLED TO BE PAID FROM THE SALE PROCEEDS PURSUANT TO THE FINAL JUDGMENT.

IF YOU ARE A SUBORDINATE LIENHOLDER CLAIMING A RIGHT TO FUNDS REMAINING AFTER THE SALE, YOU MUST FILE A CLAIM WITH THE CLERK NO LATER THAN 60 DAYS AFTER THE SALE. IF YOU FAIL TO FILE A CLAIM, YOU WILL NOT BE ENTITLED TO ANY REMAINING FUNDS.

DONE and ORDERED in Chambers at Pensacola, Escambia County, Florida on this 30th day of November, 2015.


HONORABLE TERRY D. TERRELL
Circuit Judge

12/6/15
EServed

Copies furnished to:

Counsel for Plaintiff

Arby VanSlyke, Esquire

Mark A. Bednar, Esquire

Counsel for Defendants

Jason Mosley, Esquire

Kristin Hual, Esquire

Philip Bates, Esquire

Kenneth L. Williams, Esquire

Interested Parties

Clerk of Court, Escambia County, Florida, 190 Governmental Center, Pensacola, FL 32502

Gary D. Broxson, 32803 West Carrier Drive, Lillian, AL 36549

William Brandon, 5 Country Club Road, Shalimar, FL 32579

Palisades Collection, LLC, c/o C.T. Corporation Systems, 1200 S. Pine Island Road, Plantation, FL 33324

Mound Leasing Company, Inc., c/o Registered Agent 200 Diversion Street, #200, Rochester Hills, MI 48307

Preferred Contractors, Inc., c/o Registered Agent Gary T. Ward, 4205 Queens Court, Pace, FL 32571

EXHIBIT A

Parcel 1:

Begin at the northeast corner of Government lot 5, Section 41, Township 1 South, Range 30 West, Escambia County, Florida; thence go south 00°00'00" east along the east line of Government lot 5 for 481.69 feet to the southeast corner of Government lot 5; thence go south 79°12'42" west along the south line of Government lot 5 for 1343.75 feet; thence go north 00°06'41" west for 723.87 feet to the north line of Government lot 5; thence go north 90°00'00" east long said north line for 1328.60 feet to the point of beginning.

All lying in Section 41, Township 1 South, Range 30 West, Escambia County, Florida and containing 18.41 acres more or less.

Parcel 2:

Commence at the northeast corner of Government lot 5, Section 41, Township 1 South, Range 30 West, Escambia County, Florida; thence go south 90°00'00" west along the north line of Government lot 5 for 1328.60 feet to the southeast corner of Government lot 2 for the Point of Beginning; thence go south 00°06'41" east along the southerly projection of the east line of Government lot 2 for 723.87 feet to the south line of Government lot 5, thence go south 79°12'41" west along the south line of lot 5 for 266.80 feet to the centerline of a creek; thence go along the centerline of said creek the following courses (N 43°57'39" W for 196.47 feet; N 59°18'53" W for 265.50 feet; N 00°18'05" W for 145.38 feet; N 25°54'17" W for 142.94 feet; N 87°41'58" W for 131.22 feet; N 36°24'30" E for 95.05 feet; N 29°19'50" W for 60.12 feet; N 54°29'48" W for 88.35 feet; N 61°44'58" W for 98.88 feet) to the north line of Government lot 5; thence go north 08°07'48" west for 35.36 feet; thence go south 90°00'00" west for 409.00 feet to the west line of Government lot 2; thence go north 00°01'46" west along the west line of Government lot 2 for 821.45 feet; thence go south 89°58'14" East for 420.00 feet; thence go north 00°01'46" east for 105.40 feet; thence south 89°58'14" east for 936.24 feet to the east line of Government lot 2, thence go south 00°06'41" east along the east line of Government lot 2 for 961.15 feet to the point of beginning.

All lying in Section 41, Township 1 South, Range 30 West, Escambia County, Florida and containing 39.41 acres more or less.