IN THE SUPREME COURT OF MISSISSIPPI

NO. 2006-CA-00641

BANCORPSOUTH BANK APPELLANT

V.

NED G. MCINNIS, JR., MARY DEANE MCINNIS
RON NELSON and JAMES C. P. HARTMAN, DECEASED
AND RONSON CONSTRUCTION SYSTEMS, INC. APPELLEES

ON APPEAL FROM THE CHANCERY COURT OF FORREST COUNTY, MISSISSIPPI
HONORABLE SEBE DALE, JR., CHANCERY JUDGE

RESPONSE BRIEF OF APPELLEE, JAMES C. P. HARTMAN, DECEASED

ORAL ARGUMENT REQUESTED

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INTRODUCTION

BancorpSouth Bank ("the Bank") seeks to have it both ways: to retain the property on which it foreclosed, together with the equity it contains, and simultaneously to recover from Hartman $266,949.27, the principal amount that the McInnises continue to owe on the mortgages underlying the Note. Although Hartman has already demonstrated the lack of merit in this position in the Brief of Appellant at pages 12-13 and 20-25, we make this brief additional response. In support of its position, which would place the Bank in a better position than it would have occupied had the McInnises and Hartman made all payments due under the Note, the Bank relies solely on a single, much-criticized case from a foreign jurisdiction. The absence of Mississippi authority or accepted authority from *any* jurisdiction in support of its argument is powerful evidence that the Bank's argument has nothing to support it. In fact, not only is the Bank's position unsupported by credible law, it flies directly in the face of well-settled law from around the United States.

ARGUMENT

A. The Senior Note and Deed on the Ronson Properties Were Extinguished by the Foreclosure Sale.

The Bank does not challenge Hartman's well-supported argument that where the holder of both mortgages forecloses on the junior mortgage, "the mortgagor's personal liability for the debt secured by the first mortgage is extinguished." OSBORNE ON MORTGAGES § 274 (2d ed. 1970); *see also* 55 AM. JUR. 2D *Mortgages* § 1347 (2006). *See* Brief of Appellant, Hartman, at 21-24.

Instead, the Bank offers the much-maligned opinion of the Texas Supreme Court in *Summers v. Consolidated Capital Special Trust*, 783 S.W. 2d 580 (Tex. 1989). In pertinent part, and as correctly stated by the Bank, the *Summers* court determined that "a third party purchaser would have to satisfy the underlying indebtedness [of a foreclosed wrap-around mortgage] to

obtain clear title to the property following a successful bid at the foreclosure sale." Brief of Appellant, BancorpSouth, at 14-15. This holding is flatly wrong. It has never been endorsed, or followed, by any subsequent American court.

In fact, it is telling that even the legal commentators on whom the Bank relies have thoroughly savaged *Summers* as "bad law." *E.g.*, Frank A. St. Claire, *Wraparound Mortgage Problems in Nonjudicial Foreclosures*, 20 REAL EST. L.J. 221, 223 (1992) (cited by the Bank at page 14 of its Brief of Appellant). In fact, St. Claire calls the *Summers* opinion "a somewhat tortured use of logic to reach an equitable result." *Id.*

As others have noted, the chief problem with *Summers* is that it would provide a windfall to the Bank, or to any other mortgagee which forecloses under a similar wraparound mortgage. Bill B. Caraway, *Unwrapping the Wraparound Mortgage Foreclosure Process*, WASH. & LEE L. REV. 1025, 1042 (1990) (cited by the Bank at page 13 of its Brief of Appellant). As argued in Hartman's Appellant Brief, Caraway notes that the method endorsed by the Bank "allows the wraparound mortgagee to regain title to the property and sue the wrap-around mortgagor for any deficiency, or transform form the mortgagee's equity in the property into cash." *Id.* at 1040-41. Under the Bank's approach, "the wraparound mortgagee thus benefits more when a wraparound mortgagor defaults than when the wraparound mortgagor fully performs under the wraparound." *Id.* at 1041. This is obviously not the proper result, either in law or equity.

Where a mortgagee has acquired the property at a price that is reduced by the amount of the first mortgage, he cannot both retain the property, with the equity it contains, and simultaneously sue the mortgagor for the debt. The property stands in place of the debt and extinguishes it. *Bd. of Tr. of Gen. Ret. Sys. v. Ren-Cen Indoor Tennis & Racquet Club*, 377 N.W. 2d. 432, 434-35 (Mich. Ct. App. 1985).

The economic basis of the rule is plain. When the mortgagor buys the subject of his foreclosure sale,

> it is presumed that the purchaser of land subject to a mortgage deducted the amount of the [first mortgage] from the market value of the land when he bought. The mortgagor therefore has an equitable right to have the land pay the mortgage before his personal liability is called upon and the purchaser will not be permitted to retain the land, go out and acquire the mortgage, and enforce the same against the mortgagor personally . . . It follows therefore that when the purchaser, retaining the land, acquires the prior debt, although he is not personally liable thereon, he is the owner of the res which ought to discharge the debt as between himself and the mortgagor and he will not be permitted to retain the res and at the same time to say it is insufficient to satisfy the debt.

Wright v. Anderson, 253 N.W. 484, 487 (S.D. 1935); *accord* 95 A.L.R. 89, 103-04 (The "purchase of the mortgaged property by the holder of junior and senior mortgages, on foreclosure of the junior mortgage held by him, extinguishes the mortgagor's personal liability for the debt secured by the first mortgage in the absence of an agreement to the contrary.").

The Bank's attempt to achieve this unfair result was correctly rejected by the chancery court below, and must be rejected here as well. The Bank cannot both retain the property, with the equity it contains, and simultaneously sue Hartman for the debt. The property stands in place of the debt and extinguishes it.

CONCLUSION

For all these reasons, the judgment of the Chancery Court of Forrest County as to the Bank's claims against Hartman should be affirmed.

RESPECTFULLY SUBMITTED, this the 26th day of February, 2007.

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CERTIFICATE OF SERVICE

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