IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

RUSH H. SOREY and CHERI SOREY **APPELLANTS**

VERSUS

JERRY CROSBY **APPELLEE**

COURT OF APPEALS DOCKET NO. : 2007-CA-00950 - COA e

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Justices of the Supreme Court and/or the Judges of the Court of Appeals may evaluate possible disqualifications or recusal.

Jason A. Mangum, Esquire
Post Office Box 85
Decatur, Mississippi 39327
Attorney of record for Jerry Crosby

Jerry Crosby
10 Autumn Cove
Jackson, Mississippi

Jerry L. Bustin, Esquire
Post Office Box 382
Forest, Mississippi 39074
Attorney of Record for Rush H. Sorey and Cheri Sorey

Rush H. Sorey and Cheri Sorey

Honorable Marcus Gordon
Circuit Court Judge, Eighth Circuit
Post Office Box 220
Decatur, Mississippi 39327

Respectfully submitted,

JASON A. MANGUM

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STATEMENT OF RELEVANT FACTS

Jerry Crosby, Appellee, loaned funds to Rush H. Sorey, Cheri Sorey, [hereinafter "the Soreys], Sorey Farms and Rush Rodeo, LLC. (T. p. 11)[1]. In connection with the loan, Jerry Crosby obtained a certificate of title and took a note and deed of trust on certain properties. (T. pp.11, 16). The borrowers subsequently went into default on those notes. (T. p.11). The Trustee notified the borrowers of their right to redeem the collateral. (T. p. 21). Then, the Trustee called upon another attorney to foreclose the deed of trust. (T. p. 21). Jerry Crosby bid $700,000.00 at the foreclosure sale. (T. p. 14). As counsel for the Soreys admitted, the foreclosure was conducted in accordance with statute. (T. p. 4).

As a result of the successful bid, Jerry Crosby received a Trustee's Deed. (T. p.12). The Soreys, however, continued to remain on the lands described in the Trustee's deed after being asked to vacate the property. (T. p.12). As a result, the action from which this appeal is taken was brought.

[1] The following abbreviation will be used: "T" for Transcript of Proceedings.

SUMMARY OF THE ARGUMENT

In support of their claim that they were denied a trial *de novo* the Soreys argue that the trial court refused to permit them to develop facts behind the ejectment action. (Appellants' Brief p. 8). The implication appears to be that certain issues had been placed before the trial court because the Soreys had filed a motion to consolidate the present case with other pending actions. (Appellants' brief p. 9). However, nothing in the record suggests that the cases were ever consolidated, or that the Soreys ever obtained a ruling on their motion. As such, the motion is deemed waived. Although their attorney made vague references to "very serious and grave problems" related to transactions between the parties, he failed to offer any evidence on any of these alleged and unpled "problems." (T. pp. 4-5). Thus, the matter of the alleged defenses was never brought before the trial court in any manner.

In contrast, Crosby offered evidence of an indebtedness secured by the property in question, default in payment, and a valid foreclosure sale at which he was the successful purchaser. (T. pp. 11-12). He further testified that the Soreys continued to use the property after being asked to cease. (T. p. 13).

Both parties offered such evidence as they chose. The simple fact that the Soreys failed to offer evidence in support of some alleged defense does not prevent the trial from having been *de novo.*

The Soreys' argument that the judgment entered against them was tantamount to a default judgment closely parallels their argument that they did not receive a trial *de novo.* They argue that because the trial court did not consider pleadings in other cases between the parties, they were denied an opportunity to properly defend the action.

Actually, the Soreys did fail to plead any defense. Their motion to consolidate cases was never acted upon by the trial court. By failing to obtain a ruling on the motion, the Soreys

waived the motion. Nevertheless, with almost no objections they were able to present any evidence they chose. After hearing testimony from both parties, the trial court made its ruling. Clearly, the outcome had no resemblance to a default judgment.

Finally, nothing in the record demonstrates any hint of bias on the part of the trial judge. The Soreys' attorney admitted that he was a friend of the judge. (T. p. 25). Any remarks made by the judge regarding earlier cases between them are more appropriately seen as compliments regarding Mr. Bustin's ability, rather than indications of bias on the part of the trial judge.

ARGUMENT

I. WHETHER THE SOREYS WERE GRANTED A TRIAL *DE NOVO*.

The Soreys initially argue that the Circuit Court failed to grant them a trial *de novo*. They argue that the trial court did not allow them to develop the facts behind the ejectment action. (Appellants' Brief p. 8). In fact, the Circuit Court merely noted that the Soreys had simply appealed with supersedeas from the decision of the justice court. (T. p.8). Even their attorney admitted that a proper foreclosure had been conducted. (T. p.6).

The thrust of the Soreys' argument appears to be some undisclosed, and allegedly improper, conduct that occurred prior to the foreclosure. Rather than identifying any particular defense, the Soreys' attorney simply made reference to "some very serious and grave problems that have not been disclosed that are statutory in nature...."(T. pp.4-5).

The trial court noted that the Soreys had not, in their pleadings, raised any issue of whether the trustee's deed was invalid or not. (T. p.8). Instead of properly raising the matter, the Soreys' attorney simply made reference to another case pending before the trial court. (T. p.8). The trial court correctly noted that such arguments related to a different cause of action, and not the matter then before the court. (T. p. 5). To which the Sorey's attorney said, "Right." (T. pp.5-6).

The Soreys argue, without citation to the record, that "Appellants reported to the trial court on several occasion [*sic*] the need to combined [*sic*] the numerous cases arising out of the same facts." (Appellant's Brief. p. 9). Whether or not such a motion was ever duly made by the Soreys, clearly there is no ruling by the trial court. Thus, the Soreys cannot now argue this as a basis of error by the trial court. It is well-established that it is the responsibility of the movant to

obtain a ruling from the court on motions filed by him and failure to do so constitutes a waiver of same. *Rushing v. State*, 96-KA-00814-SCT (¶17), 711 So. 2d 450 (Miss. 1998).

Notwithstanding a total failure to plead any defense, the trial court proceeded to give the Soreys what the trial court referred to as "a lot of leeway" in questioning witnesses. (T. p.20). A careful reading of the record reveals that only two objections were sustained regarding questions asked by the Soreys' attorney:

(1) An objection to relevancy when Jerry Crosby was asked by the Soreys' attorney whether title work had been done on the property. (T. p. 15).

(2) A objection based on work product was made when the Soreys' attorney sought a copy of a certificate of title prepared for Jerry Crosby and was also sustained. (T. p.16).

The Soreys' attorney made no argument for admissibility following either of those objections. Neither did he make an offer of proof on either matter.

Further, the Soreys' attorney was permitted to broadly question Jerry Crosby regarding any business relationship between the parties. (T. p. 14). He was permitted to question how the bid at the foreclosure sale was determined. (T. p. 14). Without objection, he was permitted to question regarding the relationship between Jerry Crosby and his attorney. (T. p. 15). He was permitted to pose questions concerning the foreclosure. (T. p. 15). Broad questioning was permitted concerning interactions between Jerry Crosby and his attorney, Jerry Blount. (T. p. 17). In an apparent effort to reveal a possible conflict of interest, questions were permitted regarding any potential representation of the Soreys by Jerry Blount. (T. pp.19-21). The Soreys' attorney was permitted to question whether a partnership existed between the Soreys and Jerry Crosby. (T. p. 21).

In short, regardless of the Soreys' failure to plead any defense to the action for possession of the property, they were permitted to fully explore virtually every avenue of questioning they

raised. The Soreys presented a single witness, Jerry Blount, who had prepared the deed of trust. (T. p. 19). Indeed, virtually no testimony was excluded by the trial court. Had the Soreys felt that the evidence excluded by the two successful objections was both significant to their case and should have been admitted, they had the duty to make an offer of proof. When a party objects to the exclusion of evidence, he must make an offer of proof to the court, noting on the record for the benefit of an appellate court what evidence the trial judge excluded. *Nunnally v. R.J. Reynolds Tobacco Co.*, 2001-CA-01079-SCT (¶27), 869 So. 2d 373 (Miss. 2004).

To prove his right of possession, Jerry Crosby testified that he loaned the Soreys a substantial amount of money. (T. p. 11). When they defaulted in repayment, he instituted foreclosure proceedings. (T. p. 11). He was the successful bidder and received a trustee's deed to the property in question. (T. p. 12). The Soreys continued using the lands after the foreclosure, despite having been asked to leave. (T. pp. 12-13).

In order to maintain the action of ejectment, or a statutory substitute therefor, the plaintiff must show that he has a present right to possession of the premises in dispute and that he has been ousted or deprived of possession, or that possession is wrongfully withheld from him by the defendant. *Hudson v. Bank of Edwards*, 495 So. 2d 1349, 1351 (Miss. 1986). Further, title deeds are admissible in an unlawful entry and detainer action to prove the right and extent of possession, even though the suit is a possessory action and the determination of title is not involved. *Tate v. Tate*, 217 Miss. 734, 740, 64 So. 2d 908, 910 (1953).

In short, Jerry Crosby proved that he held a trustee's deed granting him the right of possession. He then demonstrated that the Soreys wrongfully withheld possession from him. Thus, he had proven all that was necessary to obtain relief from the trial court. The Plaintiff presented his case. The Defendants then had a full and fair opportunity to present any defenses. The Soreys received a trial *de novo* from the Circuit Court of Newton County.

Although the circuit court gave the Soreys wide latitude in presenting evidence and in questioning witnesses, it could have properly limited evidence to the question of right of possession. Unlawful entry and detainer actions are summary proceedings meant only to evict someone who without claim of right is depriving the owner of possession of some part of his property. *White v. Usry* , 2000-CA-00961-COA (¶11), 800 So. 2d 125 (Miss. App. 2001). In order to maintain the action of ejectment, or a statutory substitute therefor, the plaintiff must show that he has a present right to possession of the premises in dispute and that he has been ousted or deprived of possession, or that possession is wrongfully withheld from him by the defendant. *Hudson v. Bank of Edwards*, 495 So. 2d 1349, 1351 (Miss. 1986). Further, title deeds are admissible in an unlawful entry and detainer action to prove the right and extent of possession, even though the suit is a possessory action and the determination of title is not involved. *Tate v. Tate*, 217 Miss. 734, 740, 64 So. 2d 908, 910 (1953). A purely equitable defense cannot be presented in such actions. *See Id.* (stating any purely equitable defenses that defendant may have had could not be presented in action).

The limited nature, in Mississippi, of an unlawful entry and detainer action was discussed by the United States Fifth Circuit Court of Appeals in *Miller v. Hartwood Apartments, Ltd.*, 689 F.2d 1239, 1242 (5th Cir. 1982). The *Miller* court, citing *Tate v. Tate,* noted that equitable defenses are not available in such a court. *Id.* Further, for the purposes of determining possessory rights, which were the only rights adjudicated in the state court proceedings, the courts of Unlawful Entry and Detainer are dispositive. *Id.*

One who purchases at a valid foreclosure sale of a mortgage or deed of trust acquires thereby all the interests of both the mortgagor and the mortgagee in and about the mortgaged property and may protect himself under their rights. The purchaser acquires the interest of the

parties as effectually as he would have done by deed from them. *Vincent v. J. W. McClintock, Inc.*, 200 Miss. 445, 455, 27 So. 2d 681, 682 (1946).

In *OMP v. Security Pac. Bus. Fin., Inc.*, 1986 U.S. Dist. LEXIS 17616 (N.D. Miss. 1986), certain property had been foreclosed upon. The mortgagor had steadfastly refused to surrender possession subsequent to the foreclosure. The lender, who purchased at the foreclosure sale, sought a writ of possession. An issue was raised contending that the foreclosures on the properties were void due to the alleged breach of an unconditional financing agreement allegedly entered into between the parties. The District Court rejected an argument that that the court should allow discovery to proceed in the suit so as to allow a full and complete adjudication on both the legal and equitable issues raised by the parties. The District Court noted that the Mississippi Supreme Court and the Fifth Circuit Court of Appeals, construing Mississippi law, have expressly held that a party's asserted equitable defenses are not available in Mississippi's Unlawful Entry and Detainer Courts.

In conclusion, the case *sub judice* was a summary proceeding and was not the correct action in which to assert a purely equitable defense if, in fact, one had been presented. However, whether or not presentation of such a purely equitable defense was proper in this proceeding, no such defense was actually presented or offered by the Soreys. They cannot now complain that they did not receive a trial *de novo* simply because they offered no evidence.

II. WHETHER THE TRIAL COURT ENTERED JUDGMENT TANTAMOUNT TO A DEFAULT JUDGMENT AGAINST THE SOREYS.

Next, the Soreys appear to argue that the trial court failed to recognize any pleadings they may have filed, and, in effect, rendered a default judgment. (Appellant's Brief p. 11). In support, the Soreys argue that only a Motion to Consolidate was filed correctly. (Appellant's Brief p. 12).

their waiver. *See Rushing v. State*, 96-KA-00814-SCT (¶17), 711 So. 2d 450 (Miss. 1998).(failure of movant to obtain ruling of court results in waiver).

In discussing the inadequacy of the pleadings, the following was said:

BY THE COURT: No, I'm just trying to get you to the issues of the case.

BY MR. BUSTIN: That's what I was trying to do, Judge, and I'm just trying to tell you, if you've already said that you think he's entitled –which you just did – well, then we don't need to put on anything except we need to ask you verbally to recuse yourself.

BY THE COURT: You know, I learned a long time ago that I'm not the final authority on cases. I've learned a long time ago there is such a thing as the Supreme Court. And you're entitled to make a record. And if I'm wrong, happy days, that suits me fine. So if you want to put on testimony, we'll go at it. (T. pp. 9-10).

The Soreys cite no authority, nor are they likely to encounter any, that suggests that the fact that the trial judge in forming the issues for trial cannot point out inadequacies in the pleadings without recusing himself from the trial. The argument is simply without merit.

The second basis for recusal rests on an off-hand comment by the trial judge that "the only case I lost in Scott County as a district attorney, this guy beat me in a burglary case." (Appellants Brief p. 16). Although the Soreys suggest that this statement was made in a manner that demonstrated animosity toward Mr. Bustin, counsel for the Soreys, the entire colloquy shows otherwise.

BY THE COURT: Jerry, you and I have been friends a long time.

BY MR. BUSTIN: We have.

CERTIFICATE OF SERVICE

I, Jason A. Mangum, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing brief to the following:

Jerry L. Bustin, Esquire
Post Office Box 382
Forest, Mississippi 39074

Honorable Marcus Gordon
Circuit Court Judge, Eighth Circuit
Post Office Box 220
Decatur, Mississippi 39327

SO CERTIFIED, this the 6th day of February, 2008.

JASON A. MANGUM

CERTIFICATE OF FILING

I, Jason A. Mangum, attorney for the Appellee, Jerry Crosby, do hereby certify that I have this date filed Brief of Appellee by depositing an original and three copies of Brief of Appellee with the United States Postal Service, first class postage prepaid, addressed to Betty W. Sephton, Clerk, Supreme Court and Court of Appeals, Post Office 249, Jackson, Mississippi 39205-0249.

This, the 6th day of February, 2008.

JASON A. MANGUM