IN THE COURT OF APPEALS, STATE OF MISSISSIPPI

COA NO. 2007-~~KS~~-00950
CA

RUSH H. SOREY AND CHERI SOREY — APPELLANTS

VS.

JERRY CROSBY — APPELLEE

APPEAL FROM THE CIRCUIT COURT OF NEWTON COUNTY, MISSISSIPPI

NO. 06-CV-246-NW-G

BRIEF FOR APPELLANTS

JERRY L. BUSTIN, ESQ., MSB#[redacted]
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ORAL ARGUMENT REQUESTED

I.

CERTIFICATE OF INTERESTED PARTIES

IN THE COURT OF APPEALS, STATE OF MISSISSIPPI

COA NO. 2007-TS-00950

RUSH H. SOREY AND CHERI SOREY — APPELLANTS

VS.

JERRY CROSBY — APPELLEE

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 in order that the justices of the Supreme Court and/or the judges of the Court of Appeals may evaluate possible disqualifications or recusal.

Rush H.Sorey (Appallent, part owner of Rush Rodeo, LLC and Sorey Farms, Inc.)

Cheri Sorey (Appallent, part owner of Rush Rodeo, LLC and Sorey Farms, Inc.)

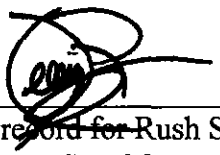
Rush Rodeo, LLC (Former business vehicle of Rush Sorey, Cheri Sorey and Jerry Crosby)

Sorey Farms, Inc. (Business owned and operated by Rush and Cheri Sorey, husband and wife)

Jerry Crosby (Former business partner in Rush Rodeo, LLC)

Honorable Marcus Gordon (8th Circuit District Court Judge)

Honorable Jason Mangum (Attorney of Record for Jerry Crosby)



Attorney of record for Rush Sorey, Cheri Sorey,
Rush Rodeo, LLC and Sorey Farms, Inc.

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3. **The Honorable Marcus Gordon, the Newton County Circuit Court Judge erred by failing to recuse himself from the case.**

IV.

STATEMENT OF CASE

The basis of this case involves a deed of trust, and subsequent foreclosure, made on homestead property, used as collateral towards the purchase of a rodeo company and the new rodeo was to be a joint venture of both Appellee and Appellants. The original rodeo seller was James Harper, from the state of Louisiana, who sold certain animals, equipment, and personal property to Appellant and Appellee for about $400,000.00 dollars, which amount was secured by all purchased property, 400 acres of realty as homestead for and owned in fee simple by Appellants, an included minor payoff thereon to Citizen's Bank. At different times beginning in 2002 Sorey, Appellant, Crosby, Appellee, and Harper discussed sale of parts of Harper & Morgan properties to Appellant and Appellee. A Financial Consultant was hired from Laurel, Mississippi, to assist them in securing funds and organization a partnership to run their new Rodeo. At and during most of these discussions Appellee Crosby expressed a desire to remain in background of newly formed rodeo in Mississippi, a partnership but kept from the public; and Financial Consultant of Laurel, Mississippi, had provided a copy of said written Partnership Agreement between the parties. Both parties agreed to use Appellee Crosby's attorney, the Honorable Jerry Blount, Jackson, Mississippi, to draw-up all legal documents and give advice on legal issues. The end product was to be known as Rush Rodeo, and Appellee-Crosby intervened after financing was secured from other sources, and offered to put-up $400,000, and other needed monies as needed, if Appellant-Sorey would secure it with his Neshoba County Fair Cabin and his 400 acre homestead, said properties formerly sought by Appellee in form of offer to purchase. All these arrangements were drawn up by Attorney Blount and the new

Rodeo began operations with James Harper agreeing to help the newly formed Rush Rodeo secure engagements. Somewhere along the way Attorney Blount and Appellant Sorey and Appellee Crosby decided to form a business corporation (again Crosby staying in the background and not named therein) to help relieve both original investors, Crosby and Sorey from personal liability; also with future plans to sell stock therein and gain additional funds. The third party financing secured by Consultant but was not used to purchase the rodeo property. The Partnership Agreement executed between Appellant Sorey and Appellee Crosby, plus a corporation formed for some reason probably only known to Attorney Blount and Appellee Crosby, the Rush Rodeo began operations. According to Appellant Sorey, the financing by Appellee Crosby was solely Crosby's idea to help their new business and save on interest rates. This idea was developed at the last second of the formation and purchase of the new Rodeo. Apparently Appellee Crosby persuaded Appellant Sorey to grant a deed of trust to his personally owned 400 acre inherited homestead and cabin, and to pledge it all, plus Rodeo property, to him, Appellee Crosby, and his (their) attorney Blount prepared all the papers, including naming Attorney Blount as Trustee. All the while, the Louisiana entrepreneur, James Harper, owner of Harper & Morgan Rodeo, kept close contact and acquaintances with the deal, agreeing to sell Rush Rodeo necessary items of stock and equipment to operate. The transactions were concluded, and Appellant Sorey was to be general manager and operator of Rush Rodeo with Appellee Crosby staying in the background, and the profits split between Rush Sorey (25%), Cheri Sorey (25%) and Jerry Crosby (50%). The new Rodeo was funded routinely by profits and new monies authorized by Appellee Crosby as co-owner of said Rodeo.

Appellee Crosby allowed the business to continue for about a year and a half, whereupon

Appellee Crosby called in all notes and/or offered foreclosure. The new business just beginning had not enough time to begin operating in the black; and the payoff by Appellant Sorey alone was impossible, and Appellee Crosby had to have known such. Thus the closing of business, no longer authorizing distribution of monies, Appellee Crosby took the 400 acres of homestead lands of Appellant Sorey, plus the Neshoba Fair Cabin, rumored to have sold by Crosby for $125,000 dollars, plus all the Rush Rodeo stock, registered bronco bulls, equipment, and trailers, and by private sale without disclosure or accounting re-sold, and by these actions Appellee Crosby multiplied his investment, and partner Appellant Sorey suffered a total loss. Appellee Crosby endorsed two grossly uneven and disparate Trustee foreclosure sale prices, made to him; plus he never afforded Appellant Sorey any accurate payoff rights to redeem his land and cabin. Appellant Sorey has attempted to request the accurate payoff in at least three cause numbers in Newton County Circuit Court and another in Scott County Chancery Court.

The Honorable Jerry Blount said in this record he had no conflict (RE-10), although he was the longtime advising attorney and friend of Appellee Crosby, and drew the documents for both parties and gave advice to both in formation thereof. Attorney Blount advised that Appellant Sorey executed several documents relating hereto in his office (RE-10), and that both he and Appellee Crosby were involved in the organization, formed the LLC corporation (RE-10).

Attorney Blount engaged the local attorney to foreclose for Appellee Crosby on two different occasions, the first an error determined upon challenge by Appellant Sorey, secured property sold only in Newton County, Mississippi. Attorney Blount appeared each time Appellee Crosby was before the court in the Ejectment procedure in Justice Court, and he negotiated for Appellee Crosby

with Appellant Sorey's attorneys to settle issues in earlier stages. The first foreclosure Appellee Crosby paid a recorded Trustee Deed price of $400,000; the second foreclosure several months later Appellee Crosby paid for same 400 acres a Trustee Deed price of $700,000. Accordingly this showed Appellee thought the property appreciated $300,000 in a few months, or else he openly admitted by same his attempt to defraud the Appellant Sorey. There being no appraisal secured, and no adjustment made for seized and sold personalty, nor set off for obligations of partner Crosby, nor any kind of accounting given by items seized and sold, including the Neshoba Fair Cabin; and Appellant Sorey was ill-afforded right of redemption, or an accurate accounting payoff. The lawsuits and litigation filed herein are multiple and in various courts in the two counties involved, with a multitude of cause numbers, fraud charged, actions filed requesting *ad damnum* for damages in simple tort, breach, and tortious breach of duty, with motions before the Honorable Marcus Gordon, Circuit Judge, 8th Circuit District, will all cause numbers listed, long before this appeal.

On May 3, 2007, a hearing took place in Leake County, Mississippi before the Honorable Marcus Gordon, 8th Circuit District Judge. At said hearing, the court stated the only issues before the court was the appeal from Newton County Justice Court regarding the Appellee Crosby's Complaint for Removal of Tenant (RE-2,4,11). Appellant Sorey had prior to this ejectment filing, filed suit against Appellee Crosby for fraud and court order dissolution of the partnership agreement. At the time of the hearing, the Circuit Court of Newton County had three different cause numbers and/or cases for all the same facts. Further, the court made it very clear when addressing the Appellants "you did not file a response to the ejectment proceeding. There is nothing in here that you filed." (RE-11). However, as it can clearly be seen by a review of the Newton County Circuit

Clerk's certified copy of the record, there were numerous filings in this cause. More specifically, on March 28, 2007 (RE-2,8) the Appellant filed a motion to consolidate all three Newton County Circuit Court cause numbers. The motion was never ruled on by the court.

V.
SUMMARY OF THE ARGUMENT

This appeal is based on the issue of ejectment of the Appellants from their homestead property, as a result of a failed rodeo business. The basis for said appeal is grounded in whether or not the Appellants were granted a trial *de novo* upon appeal from the Justice Court level to the Circuit Court of Newton County. Further, when the trial court was approached regarding the possibility of mis-filings by the Circuit Clerk, the trial court refused to allow any evidence from the two other filed cause numbers in Newton County Circuit Clerk which all arise out of the same or similar facts and parties. Finally, the Appellants' believe from the events which transpired at the hearing, the trial court had a preconceived notion for the final ruling, regardless of the evidence.

VI.
ARGUMENT

ISSUE ONE

The Circuit Court of Newton County, Mississippi, erred, by not granting Appellants a trial *de novo*.

This point argued chiefly upon point of error in court failing to grant a trial *de novo* on an appeal from Justice Court. This High Court has ruled numerous times an appeal from Justice Court entitles appellant to a trial de novo. *Ferrell, Jr. Vs. State*, 785 So.2d 317 (2001) makes this known by the following ruling:

> The appeal shall be a trial *de novo*. In appeals from justice or municipal court...the case may be tried without a jury at the court's discretion. The record certified to the court from the lower court is competent evidence. However...[appellant has] the right to a trial on the merits.

Further, in *McGowan v. State*, 178 So. 594, 595 (1938) the Court stated, "cases brought to the circuit court by appeal are there triable *de novo*...and the person has the same right to a trial by appearance and defense through the agency or his attorney."

Appellants have not waived their rights for a complete presentation by Plaintiff-Appellee sufficient to meet burden of proof, regardless of answer by Defendant-Appellant, and more especially when the court goes further than ejecting owner and adjudicated title. For said Judge to adjudicate title many other elements of proof must be introduced into evidence by Plaintiff, for instance the deraignment of title, etc. None of this was done. The judge merely by action ***pro tanto presumptio*** entered a sweeping judgment granting title without proof.

In *Adams v. Mark Oil, Incorporated*, 431 So.2d 489, 490-491, the Supreme Court of

Mississippi stated "a trial court's factual determination cannot be disturbed by this Court unless we can say with reasonable certainty that the findings were manifestly against the overwhelming weight of the evidence." In Adams, the trial court heard evidence prior to making a ruling regarding an ejectment action. Further, the Court stated "a review of this record including a study of the former suits between the parties leads us to the conclusion that there was ample evidence to support the trial court in its decision...." *Id.*

In the present case, the trial court would not allow the Appellants to develop the facts behind the ejectment action. Appellants reported to the trial court on several occasion the need to combined the numerous cases arising out of the same facts. Further, the trial court announced what the ruling of the court would be, prior to testimony, based solely on the record. (RE- 11). As clearly seen in *Adams*, the trial court will not be overturned when the proper factual determination is made; however, when the trial court makes a ruling prior to conducting its factual determination, the ruling need to be reversed on such grounds. The trial court erred in not permitting an appeal from Justice Court *de nova* upon a writ of ejectment, without answer if he so chose, since Justice Court is not a court of record. See *Anderson v. Kimbrough*, 741 So.2d 1041 (Miss. 1999) which requires the Judge to make a finding of fact and law upon subject case. The trial court in the present case treated the action as a default.

Appellant retained right to accounting and redemption, and had pled the retention of those rights in companion case with motions in all three cause numbers for consolidation, and adjudication, pleading mis- filed by clerk, proof thereof evidenced by filing pleadings of Motion to Consolidate in this record showing all three cause numbers. This motion correctly filed of record

(RE-2,8), Appellants companion case pleadings attempting to preserve their rights after illegal foreclosure, specifically because of Appellees' failure and disregard of discount credits for Appellees liability in joint venture or partnership, and set-offs accumulated against debt for sales of other secured properties seized and sold by Appellees prior to foreclosure, information and belief of Appellants being one item of property sold by Appellees, among many items seized was a cabin at the Neshoba County Fair grounds for a consideration yet undisclosed to Appellants, but believed to be in excess of $125,000, other properties yet undisclosed sold which were secured properties under the debt foreclosed by Appellees. Further, due to the secretive seizures and the surreptitious maneuvers of Appellee, joined with collusion to return property by private sale to former owner, Appellants verily believe such facts when heard by a trial judge or jury will warrant a finding of fraud by a fiduciary, and/or a constructive trust with rights of equitable redemption upon proper payoff debt after adjustments as above given, which could result in damages and a debt owing from Appellees to Appellants.

Appellants charge that engaging in a joint venture with joint and several liability, duties for re-payments fall upon shoulders of both Appellants and Appellees; and, without proper debt adjustments and notice of amounts between the parties, with proper accounting to each, Appellees may not unjustly enrich themselves by foreclosure and retention of all monies, and if such be done same affords rights of redemption under the mortgage to Appellants; and, if Appellants by the facts owe a balance, such rule remains that no foreclosure or divesting of title or possession is proper, until accounting to calculate payoff correctly, with notice to Appellants. Appellants further show the business relations between friends and fiduciaries are properly pled in a companion cause number

in same court, a Motion to Merge or Consolidate filed (RE-2,8), and pending, waiting for the same Circuit Judge's ruling, wherein is considered this equitable rule of law requiring partners to divide their share of losses as well as profits, as the case may be, when, as herein, each were engaged in the Rodeo business with their individual duties for and on behalf of said Rodeo.

ISSUE TWO

The Circuit Court of Newton County, Mississippi, erred by entering judgment tantamount to default judgment against Appellants, and failing to require mortgagee-Appellee, upon appeal from Justice Court of Appellees "Complaint to Remove Tenant", to require evidence of record of all necessary disputed matters of facts and law, and to in effect granting a quasi-default judgment on title and possession of homestead property.

This point chiefly argued due to error of court entering what amounted to a default judgment of **TITLE AND POSSESSION** without authority of law, and tantamount to a DEFAULT JUDGMENT.

Circuit Judge announced prior to trial Appellant was subject to default, prior to considering anything of record, his opinion based upon an appeal from Justice Court without Appellant's answer in file. The judge had the court file on the bench when case was called. Appellant presumed mailing the pleading to the clerk with cause number thereupon, had been placed in file. But Appellant presumed wrong. On a point available to interruption, Appellant's counsel announced something to the order of, he didn't see why the file in the judge's hands was so thin and without pleadings of Appellant. Appellants' lawyer's file was significantly larger than the file in the possession of the trial court (RE-15). The discovery of the clerk's potential mis-filing of pleadings was not discovered until after judge ruled from bench. It is believed the Answer was misfiled by the clerk in companion

cause. See the Record Excerpts for evidence of how Appellant's attorneys filed pleadings, because mixed within this record, one pleading was filed correctly: Motion to Consolidate (RE-2,8).

The twice required foreclosure seems a bit perfidious, the second foreclosure sale within months of the first. The spiraled-high consideration differed by $300,000 dollars for same property, the first purchase $400,00, the second $700,00, and bought by same man, the Appellee and beneficiary on mortgage, a Rodeo partner at first, but changing to become not a joint venturer but nothing but a money-investor.

Foreclosure sale included a single 400 acre block of real estate, the description the homestead of Appellants, and overlapped two county lines between two contiguous counties (Newton & Scott); when objections, answers, and motions to consolidate had been filed for both sales in all three Newton and Scott County cases. The first sale purporting to sell said property by advertizing it only in a single county for a sale of all the property in both counties, the actual sale made in one county; then a few weeks later, Appellee re-advertized a second foreclosure sale again, this time in both counties, and sold it again a second time. Both times the Appellee bidding on the property himself and buying it in, but for two vastly unrelated prices; and there was no record evidence placed before the trial court as to **substantive** pre-sale rights or related acts to establish the sale both legal and equitable. Appellant stipulating a sale had been make according to statutory rules, but when mortgagor retains possession, prior rights of redemption existed which metamorphosed into an equitable right of redemption subsequent to wrongful foreclosure, and mortgagor's right was denied by failure to account for property already seized and sold, and discount for liability of mortgagee joint venturer. Plus no record proof was introduced as to proper notice, were posted in both counties,

nor if consideration was adequate, nor who and where and when and how much the payoff was prior to foreclosure, when security included multiple items of personal and real property, or if notices were posted in both counties, where, when, and who bid upon same, nor the time and slight-of-hand of how the same Trustee could make both sales in two separate places obviously miles apart, the same Trustee facing judicial notice of an impossibility of presence in both counties at the same time, and whether the sale included in the publications all proper parties. Further, there was no proof the Appellee had lawful evidence, stipulation, nor exhibits, of lawfully appraised value of each tract sold separately, relating to SCOTT and NEWTON counties, and show receipt of adequate consideration, or if under terms of sales of all properties, if mortgagor was entitled to refunds, no divulgence of time, place, nor considerations received, or whether those sales were legal, or received adequate consideration under the circumstances. The Trustee or mortgagee never accounted or disclosed set-offs and the accurate payoff to Appellees. Considering all issues, values of multiple properties sold, of land, tenements, hereditament, fixtures, and appurtenances there-unto attaching (Appellants' home and barns and sheds thereon, till one house burned), without accounting for total payoff, there being several notes and/or Security Agreements involved, all of which secured the same debts, all of the properties seized by Appellee, sold in some instances without notice to Appellants, or notice of sales receipts from other properties sold prior to the foreclosure, the properties already seized by the Appellees and auctioned. Said proceeds were without credit against the notes, all transactions are void and mortgagee is not entitled to possession without **actual record proof of legal and equitable seizure and sale, with accounting for deduction against note, with set-offs for receipts from sales.** The properties theretofore seized had considerable value, being the purchased as Rodeo

property: animals, equipment, and trailers; and the payoff total, if accurately accounted and set-off accordingly, would reflect a much different figure than that offered by mortgagee, especially after considering discount for mortgagee's liability to the joint venture or partnership. And this figure as a payoff against this real estate was never calculated and made amenable to Appellants for their exercise of redemption rights prior, or equitable redemption rights afterward, when mortgagor retained possession of the real estate, but the court cut off evidence to be presented Appellant given the position of a defaulted defendant.

The Appellants were also aggrieved, the trial court failed to require further proof upon conflict of interest of Appellees' lawyer, who admitted to court and Appellants he prepared documents in dispute, the deeds of trust, notes, and security agreements (RE-17). Further, Attorney Blunt performed other record and non-record documents, acting as lawyer for both at first, when he had served Appellee for a long time prior, the payoff admittedly tabulated at the hands of Appellees' lawyer, Hon. Jerry Blount, of Jackson, giving rise to a taint, or conflict when the Trustee of a document tabulates payoffs and calls for default on document he prepared for both mortgagor and mortgagee, being these parties, the Appellant and Appellee. The image left by such arrangement is prohibited by the Rules of Ethics, but the court found no comment thereupon. Further the court erred by not going beyond the current cause number and into the companion cause numbers to entertain the allegations of fraud or gross negligence, or conspiracy to conceal, when it realized the smear attempt of the first foreclosure of identical real estate which sold to Appellee for $400,000, then a few months later in the same year, upon Appellant's objections to first because of publication error, the foreclosure of same property sold to Appellee for $700,000.

ISSUE THREE

The Honorable Marcus Gordon, the Newton County Circuit Court Judge erred by failing to recuse himself from the case.

The Honorable Circuit Judge, Marcus Gordon, 8th Circuit Court erred by failing to recuse himself when statements directing pre-conceived opinions regarding this cause of action were tantamount to notions leaning towards prejudice, and emphatic, implications by record comments, a prior opinion as to judgment from the bench upon Justice Court Appeal. Such indication limited Appellants' proclivity toward proceeding with a trial *de novo,* court indicating that Appellees were entitled to a Default Judgment as a matter of law; however, the Appellants could put on limited defense, but with little effect since no answer was in the file; and, to the contrary notwithstanding, Appellants had lost their rights due to lack of pleadings. The existence of such which were merely unavailable to court and knowledge of such in the privy of counsels opposite, due to copies mailed postage prepaid to said attorneys mailing address; and Appellees granted immediate judgment by demand of Appellee's to immediate possession for lack of Answer and Motions, when Motion to Consolidate the entire cases. By Appellants' count, there are three cause numbers in Newton County Circuit Court, a copy of said Motion in this file and cause number, made a part of this record (RE-14), filed upon identical facts herein, but enlarging issues to simple and punitive damages, due to multiple simple negligence and/or conspiracies toward collusion to fraud, different circuit cause numbers listed correctly by Appellant upon said Motion, but other filed pleadings mis-filed by clerk.

When asked if he already had an indication regarding who should be entitled to the property, the Honorable Marcus Gordon, 8th District Circuit Judge stated "do you want to read this file and

show me otherwise?" (RE-18). A review of the transcript clearly indicates the court had decided the outcome prior to the testimony of the witnesses. Further, after the statement of the court, Appellants immediately requested for the Honorable Marcus Gordon's recusal from the case (RE-18). Based on the indication from the court, no testimony evidence presented would have changed the court's position that Appellee Crosby was entitled to the land. Furthermore, it is clear the file before the court at the May 3, 2007 hearing date was not a complete file. One can review and clearly determine the numerous documents presented to the Court of Appeals by the Newton County Circuit Court Clerk, which includes sixty some pages.

Finally, close to the end of the hearing, the court stated when referencing Mr. Bustin, "the only case I lost in Scott County as a district attorney, this guy beat me in a burglary case." (RE-19) Further, the court stated, "I'm tired of listening to you, Bustin." (RE-19).

The Mississippi Supreme Court has stated in *Davis v. Neshoba County Gen. Hosp.*, 611 So2d. 904, 906 (Miss. 1992), "recusal is required if a personal tension between a lawyer and judge would lead a reasonable person to question whether the judge would have a personal bias or prejudice concerning the lawyer's client." From the statements made by the court in the record, a reasonable person would question the court had a personal bias against Appellants and/or Appellants' attorney for previous encounters in the courtroom. Based on this, the court should have granted the Appellants' request for recusal from the hearing on May 3, 2007.

VII.

CONCLUSION

Based on the authorities cited and the reasons aforesaid, the Appellants request the judgment of the 8th Circuit District Court be reversed and remanded directing the 8th Circuit District Court to conduct a proper hearing, inclusive of all evidence, including all filings of other causes in Newton County Circuit Court arising out of the same or similar facts and transactions between said listed interested parties. Further upon remanding this cause, based on the evidence of the trial court's previously determined opinion, this cause should be removed from docket of the previous presiding judge and placed on the trial docket of another qualified judge.

CERTIFICATE OF SERVICE

I, JERRY L. BUSTIN, attorney of record for the Appellants, have hereby, on this day, sent by United States Mail, postage prepaid, a true and correct copy of the forgoing appeal to the following:

Honorable Marcus D. Gordon
8th Circuit District Court Judge
Post Office Box 220
Decatur, Mississippi 39327

Honorable Jason Mangum
Attorney of Record for Appellee
Post Office Box 85
Decatur, Mississippi 39327

I certify this to be true on this the 10th day of December, 2007.

JERRY L. BUSTIN
ATTORNEY FOR THE APPELLANTS