

IN THE SUPREME COURT OF MISSISSIPPI

TOMMY THOMPSON

APPELLANT

V.

CAUSE NO. 2008-CA-00244

FIRST AMERICAN NATIONAL BANK

APPELLEE

**APPEAL FROM THE CIRCUIT COURT
OF ALCORN COUNTY, MISSISSIPPI**

BRIEF OF APPELLANT

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ORAL ARGUMENT REQUESTED

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FIRST AMERICAN NATIONAL BANK

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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 disqualification or recusal.

1. Tommy Thompson, Appellant
2. B. Sean Akins, Attorney for Tommy Thompson
3. First American National Bank, Iuka Mississippi, Appellee
4. Wendell H. Trapp, Jr., Attorney for Appellee Bank
5. Stanley R. Parker, Attorney for Appellee Bank
6. Matt P. Patterson, Attorney for Appellee Bank
7. Honorable James L. Roberts, Jr., Alcorn Circuit Court Judge

This the 7th day of May, 2008.



B. SEAN AKINS, MSB NO. [REDACTED]
ATTORNEY FOR APPELLANT

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STATEMENT OF THE ISSUES

WHERE A BANK FORECLOSED ON COLLATERAL AFTER DECLINING TO ACCEPT A FULL PAYMENT AND PROMISING TO STOP FORECLOSURE, DOES THE DOCTRINE OF PROMISSORY ESTOPPEL PREVENT THE CIRCUIT COURT FROM GRANTING SUMMARY JUDGMENT TO THE BANK BASED UPON THE STATUTE OF FRAUDS AND LACK OF CONSIDERATION?

STATEMENT OF THE CASE

A. Nature of the Case

Tommy Thompson (hereinafter "Thompson") borrowed money from First American National Bank (hereinafter "First American" or "the Bank") and pledged land as collateral. Upon default, First American started foreclosure proceedings. Thompson went to bank and made partial payment but told teller that he would make full payment if necessary to stop foreclosure. Thompson was able to make a full payment. Teller assured that the partial payment would be sufficient to stop foreclosure. Bank foreclosed anyway and Thompson sued for wrongful foreclosure.

First American filed a Motion for Summary Judgment claiming that the loan modification was not in writing so the Plaintiff's claim was barred by statute of frauds. The Bank also argued that the loan modification lacked consideration. Thompson responded that the doctrine of promissory estoppel was an exception to statute of frauds and the lack of consideration arguments. The Circuit Court agreed with the Thompson's arguments but found that promissory estoppel did not apply because Thompson did not demonstrate any detrimental reliance. The Court found that Thompson's position did not change because of the Bank's actions. The Trial Court granted the Defendant's Motion for Summary Judgment which is the issue of this appeal.

B. Course of Proceedings and Disposition of the Court Below

On May 14, 2004, Thompson filed a complaint against First American alleging wrongful foreclosure and other claims in the Circuit Court of Alcorn County, Mississippi. First American answered. On November 13, 2007, First American filed a Motion for Summary Judgment which was granted by the Court on January 25, 2008. On February 5, 2008, Thompson timely filed a Notice of Appeal.

C. Statement of the Facts

The facts outlined below are summarized from the Statement of Undisputed Facts (RE 6) which were the basis of First American's Motion for Summary Judgment and was the factual basis of the trial court's decision:

Tommy Thompson purchased a gravel pit in Hardin County, Tennessee with money borrowed from First American National Bank. Thompson pledged 110 acres which included the gravel pit as collateral to secure the loan. Thompson did not make timely payments and the Bank commenced foreclosure proceedings.

Thompson testified in his deposition that he received a letter from attorney Bradley Tennison, trustee in the Bank's deed of trust, on June 3, 2003, giving him notice of the Bank's foreclosure on the property. Not desiring to lose his property, Thompson called Tennison the following day to determine what he needed to pay to stop the foreclosure. Tennison told Thompson to call the Bank.

The following day, Thompson and his friend, Elbert Moore, traveled to the First American National Bank branch in Tishomingo, Mississippi to pay whatever amount was necessary to stop the foreclosure which was scheduled for July 8, 2003. According to Thompson, he spoke with Ms. Linda Johnson to determine how much he needed to pay to stop the foreclosure. (Thompson's depo, RE p. 20-21) According to Thompson's deposition, Ms. Johnson pulled his loan up on the computer and Thompson told her that he wanted to pay two payments and wanted to make the next payment on July 10. Thompson told Ms. Johnson that he had enough money to pay the loan current, but asked Ms. Johnson, "Will this be enough to stop the foreclosure?" and she said that it was. Thompson asked "If you have any problems, I have got enough money to go ahead and make that other payment, I will catch it up next month." (Thompson depo, RE p. 20-21)

Thompson's friend, Elbert Moore, confirmed the event. His affidavit which was offered to the Court says that he rode with Thompson to the Bank and went to the teller window to get change. Moore says that he observed Thompson in Ms. Johnson's office with her reviewing his records on the computer. Most significantly, Moore states that upon leaving Moore offered Thompson any additional money he needed to stop the foreclosure but that Thompson confirmed that he had it taken care of. (Moore's affidavit is RE 22).

Ms. Johnson acknowledges that she received Thompson's payments but claims that she never looked at his records and that she was never aware that his loan was in foreclosure. She denies ever telling Thompson that his two payments would stop the foreclosure.

STANDARD OF REVIEW

"This Court applies a *de novo* standard of review to the trial court's grant of summary judgment." *Moss v. Batesville Casket Co.*, 935 So.2d 393, 398 (Miss.2006) (citing *Stuckey v. Provident Bank*, 912 So.2d 859, 864 (Miss.2005)).

"The standard of review in Mississippi for questions of law is *de novo*." *Mississippi Transp. Com'n v. Fires*, 693 So.2d 917, 920 (Miss.1997).

This Court is familiar with the standard of review for summary judgment. The Court must determine that there are no material facts in dispute and that the moving party is entitled to a judgment as a matter of law. *Price v. Purdue Pharma*, 920 So.2d 479, 485 (Miss. 2006).

A motion for summary judgment should only be granted when there are no disputed material facts. *Robinson v. Singing River Hosp. Sys.*, 732 So.2d 204, 207(¶ 7) (Miss.1999). The burden of proving the absence of disputed material issues of fact rests upon the moving party. *Miller v. Meeks*, 762 So.2d 302(¶ 3) (Miss.2000). When faced with a motion for summary judgment, the court is obligated to review all evidentiary matters before it, including admissions in pleadings, answers to interrogatories, depositions, affidavits, etc. *Id.* In considering whether there exists material disputed facts, the court is further obligated to view the facts in the light most favorable to the nonmoving party. *Robinson*, 732 So.2d at 206(¶ 7). If after having done so, the court finds that the plaintiff would be unable to prove any set of

facts, which would support his or her claim, then summary judgment is appropriate. *Id.* The presence of fact issues does not defeat summary judgment; however, the court must be convinced that the fact issues present are material. *Dailey v. Methodist Medical Center*, 790 So.2d 903, 907 (¶ 3) (Miss.App.2001).

Herring Gas Co., Inc. v. Newton, 941 So.2d 839, *842 (Miss.App.,2006)

SUMMARY OF THE ARGUMENT

In its Motion for Summary Judgment, First American sought dismissal based on two theories. First, the Bank claimed that Thompson's breach of contract claim should fail because any loan modification by the bank teller, Ms. Johnson, must have been in writing to comply with the Mississippi Statute of Frauds. Second, the Bank claimed that any loan modification must include new consideration.

The trial court agreed that the doctrine of promissory estoppel was an exception to the Bank's arguments but found that Thompson failed to demonstrate detrimental reliance on the promise to stop the foreclosure by the Bank.

In considering First American's Motion, the Court is required to consider all evidence "in the light most favorable to the party against whom the motion has been made." *Glover ex rel. Glover v. Jackson State University*, 968 So.2d 1267, 1275 (Miss.,2007) If the jury accepts Thompson's version of events, then each of the elements of promissory estoppel exists. First American's employee made a promise that the Bank would not foreclose on Thompson's property by allowing Thompson to pay less than the amount due despite the fact that Thompson was ready, willing and able to pay the total due. Thompson relied on First American's representations that the foreclosure would end and did not make any effort to make another payment until July, after the foreclosure had already occurred.

The trial court found that Thompson did not demonstrate detrimental reliance. Essentially, the Court found that Thompson left the bank in the same position as when he arrived. However, the

trial court clearly missed the point. Thompson entered the bank willing to make a full payment to stop the foreclosure, but left the bank having relied on the Bank's representation that a full payment was not necessary. He entered the Bank facing foreclosure and he left the Bank believing that another payment was not due until July. Thompson stopped his efforts to make a full payment because of the Bank's representations and lost his property as a result. While Ms. Johnson disagrees with Mr. Thompson's deposition testimony, these disputed facts create an issue for the jury.

If Thompson had merely made a partial payment without any offer or ability to pay the note in full, the Bank's inducement would not exist. However, since Thompson was able to pay in full, then the Bank induced Thompson to change his position by withholding the payment until July, after the foreclosure.

ISSUE

WHERE A BANK FORECLOSED ON COLLATERAL AFTER DECLINING TO ACCEPT A FULL PAYMENT AND PROMISING TO STOP FORECLOSURE, DOES THE DOCTRINE OF PROMISSORY ESTOPPEL PREVENT THE CIRCUIT COURT FROM GRANTING SUMMARY JUDGMENT TO THE BANK BASED UPON THE STATUTE OF FRAUDS AND LACK OF CONSIDERATION?

Thompson filed his complaint against First American alleging breach of contract. Essentially, Thompson claimed that First American's employee modified the terms of the loan agreement by agreeing to stop the pending foreclosure without requiring Thompson to bring the loan current.

In its Motion for Summary Judgment, First American sought dismissal based on two theories. First, the Bank claimed that Thompson's breach of contract claim should fail because any loan modification by the bank teller, Ms. Johnson, must have been in writing to comply with the Mississippi Statute of Frauds. Second, the Bank claimed that any loan modification must include new consideration. First American's Motion cites several cases that stand for each proposition which are not disputed by Thompson.

Our law is clear that the statute of frauds requires any modification of a mortgage to be in writing. *Canizaro v. Mobile Communications Corp. of America*, 655 So.2d 25, 29 (Miss. 1995). Likewise, Thompson's partial payment of the pre-existing debt lacks consideration to bind the lender to a modification of the pre-existing debt. *Hattiesburg Production Credit Ass'n v. Smith*, 1 So. 2d 768, 769 (Miss. 1941).

Thompson responded to the Bank's Motion for Summary Judgment by arguing that both arguments should fail based on the doctrine of promissory estoppel. Clearly, if the Supreme Court finds that the doctrine of promissory estoppel doesn't apply, then the trial court was proper in its dismissal.

While the Supreme Court is not bound by the findings of the trial court in matters of law, the trial court agreed that the doctrine of promissory estoppel was an exception to the Bank's arguments but found that Thompson failed to demonstrate detrimental reliance on the promise to stop the foreclosure by the Bank. The trial court stated "[Thompson] must show that he undertook some action or changed his position, to his detriment, in reliance on the conduct of [the Bank]." (Trial Court's opinion, ¶4, RE 3).

The doctrine of promissory estoppel holds:

an estoppel may arise from the making of a promise, even though without consideration, if it was intended that the promise should be relied upon and in fact it was relied upon, and if a refusal to enforce it would be virtually to sanction the perpetuation of fraud or would result in other injustice.

Citing *C.E. Frazier Constr. Co. v. Campbell Roofing and Metal Works Inc.*, 373 So.2d 1036, 1038 (Miss.1979).

The purpose of the doctrine of promissory estoppel is to "forbid one to speak against his own act, representations, or commitments to the injury of one to whom they were directed and who reasonably relied thereon." *Koval v. Koval*, 576 So.2d 134, 137 (Miss.1991). The doctrine is "a rule of justice which prevails over all other rules" and may, where applicable, "operate to cut off a right or privilege conferred by statute or even by the constitution." *Id.* "However, estoppel should only be used in exceptional circumstances and must be based on public policy, fair dealing, good faith, and reasonableness." *Powell v. Campbell*, 912 So.2d 978, 982(¶ 12) (Miss.2005) (citing *PMZ Oil Co. v. Lucroy*, 449 So.2d 201, 206 (Miss.1984)).

Service Elec. Supply Co., Inc. v. Hazlehurst Lumber Co., Inc., 932 So.2d 863, 870 -871 (Miss.App.,2006)

In considering First American's Motion, the Court is required to consider all evidence "in the light most favorable to the party against whom the motion has been made." *Glover ex rel. Glover v. Jackson State University*, 968 So.2d 1267, 1275 (Miss.,2007) If the jury accepts Thompson's version of events, then each of the elements of promissory estoppel exists. First American's employee made a promise that the Bank would not foreclose on Thompson's property by allowing Thompson to pay less than the amount due despite the fact that Thompson was ready, willing and

able to pay the total due. Thompson relied on First American's representations that the foreclosure would end and did not make any effort to make another payment until July, after the foreclosure had already occurred.

The trial court found that Thompson did not demonstrate detrimental reliance. Essentially, the Court found that Thompson left the bank in the same position as when he arrived. However, the trial court clearly missed the point. Thompson entered the bank willing to make a full payment to stop the foreclosure, but left the bank having relied on the Bank's representation that a full payment was not necessary. He entered the Bank facing foreclosure and he left the Bank believing that another payment was not due until July. Thompson stopped his efforts to make a full payment because of the Bank's representations and lost his property as a result. While Ms. Johnson disagrees with Mr. Thompson's deposition testimony, these disputed facts create an issue for the jury.

Ms. Johnson, the Bank teller's actions were similar to the actions of the lender in *Brewer v. Universal Credit Co., et al*, 192 So. 902 (Miss. 1940).

Brewer financed the purchase of an automobile. After making two payments, Brewer became unemployed and the lender took possession of Brewer's car on the condition that Brewer should have time to pay the two delinquent payments before receiving his car back and that the lender would not sell the car. Three weeks later Brewer appeared to pay the loan current and was told that the vehicle had been sold. The trial court granted a peremptory instruction and dismissed Brewer's claims.

The Supreme Court reversed stating:

It was an agreement which was calculated to induce the promisee to expend his efforts to meet the two installments within the thirty days, and he did so, and was there with the money within the time specified. It was calculated to induce him and did induce him not to expend his efforts in raising the full amount of the balance of all installments, as to which otherwise his course of action would in all probability have been different and effective to that particular end. Wherefore, there arises a situation proper for the application of the principle embodied in Section 90, Rest. Contracts, that "A promise which the promisor should reasonably expect to induce action or forbearance of a definite or substantial character on the part of the promisee

and which does induce such action and forbearance is binding if injustice can be avoided only by the enforcement of the promise,"-which is simply a concise statement of the modern doctrine of promissory estoppel. *Lusk-Harbison-Jones v. Universal Credit Co.*, 164 Miss. 693, 698, 145 So. 623; 1 Williston on Contracts (Rev.Ed.) Secs. 139, 140; 19 Am.Jur. pp. 657-660; *Fried v. Fisher*, 328 Pa. 497, 196 A. 39, and the annotations thereto in 115 A.L.R. pp. 152-162.

Brewer v. Universal Credit Co., 192 So. 902, 904 (Miss. 1940)

If the jury believes Thompson with his witnesses and other circumstantial evidence, then the Bank's statements induced Thompson to withhold payment of the full amount which he was able to pay. If Thompson had merely made a partial payment without any offer or ability to pay the note in full, the Bank's inducement would not exist. However, since Thompson was able to pay in full, then the Bank induced Thompson to change his position by withholding the payment until July, after the foreclosure.

Again, First American argues that even if the Bank made the agreement, it is not binding if it is not in writing. However, the Supreme Court has previously stated that the doctrine of promissory estoppel is an exception to the statute of frauds in *Sanders v. Dantzler*, 375 So.2d 774 (Miss. 1979). Citing *Brewer*, in a case involving an oral contract to sell land, the Supreme Court reversed a trial court stating:

The general rule concerning estoppel and its application to the statute of frauds is well stated in 73 Am.Jur.2d, Statute of Frauds, ~~section 565, p. 203;~~

"It is universally conceded that the doctrine of equitable estoppel may be invoked to preclude a party to a contract from asserting the unenforceability of a contract by reason of the fact that it is not in writing as required by the statute of frauds. As is often said, the statute of frauds may be rendered inoperative by an estoppel in pais. Where one has acted to his detriment solely in reliance on an oral agreement, an estoppel may be raised to defeat the defense of the statute of frauds. This is based upon the principle established in equity, and applying in every transaction where the statute is invoked, that the statute of frauds, having been enacted for the purpose of preventing fraud, shall not be made the instrument of shielding, protecting, or aiding the party who relies upon it in the perpetration of a fraud or in the consummation of a fraudulent scheme." (Emphasis added).

Sanders v. Dantzler, 375 So.2d 774, *776 (Miss., 1979)

First American also argues that even if the Bank made a modification then it must be supported by new consideration and not by a promise for Thompson to do what he had already agreed to do. Again, however, our Supreme Court has also noted that consideration exists where the doctrine of promissory estoppel applies. The actions of the promisor to induce the actions of the promisee to pursue a specific course of conduct are sufficient consideration. See *Lusk-Harbison-Jones, Inc. v. Universal Credit Co.*, 145 So. 623, 624 (Miss. 1933).

In Mississippi, the doctrine of promissory estoppel “may arise from the making of a promise, even though without consideration, if it was intended that the promise should be relied upon and in fact it was relied upon ... *and if a refusal to enforce it would be virtually to sanction the perpetuation of fraud or would result in other injustice.*” *C.E. Frazier Constr. Co. v. Campbell Roofing and Metal Works Inc.*, 373 So.2d 1036, 1038 (Miss.1979) (quoting 28 Am.Jur.2d *Estoppel and Waiver*, § 48 (1966)) (emphasis added). Promissory estoppel is an equitable doctrine. *Id.* (citing Griffith, *Miss. Chancery Practice* § 24 (2d ed.1950)). It is also considered “*a rule of justice which prevails over all other rules.*” *Koval v. Koval*, 576 So.2d 134, 137 (Miss.1991). (emphasis added).

Suddith v. University of Southern Mississippi, 2007 WL 2178048, *16 (Miss.App.) (Miss.App.,2007)

During the oral arguments for the Motion for Summary Judgment, First American argued that if promissory estoppel was binding on the Bank simply because Thompson claims that he was told something that the teller denies, then the Bank would never be able to complete a foreclosure without the risk of a similar claim. To be clear, Thompson is not suggesting that our law should be broadened to permit anyone making a partial payment on a loan to argue that the Bank told him that a foreclosure would stop and then sue when the Bank forecloses. What makes this case fall within the purview of promissory estoppel is the fact that Thompson was able to pay the loan current and offered to do so, but the Bank refused the payment.

While no Mississippi case exists on point to establish that a borrower's promise to pay an existing debt lacks consideration, other states have uniformly found that no consideration exists. The

normal fact pattern found in those cases involves a borrower who makes a partial payment on a loan. Even when the Bank agrees that its employee agreed to stop a foreclosure or repossession, the Courts have found that the Bank was within its rights to go ahead with the foreclosure because the Borrower did not do anything more than he had already agreed to do and, without new consideration, in writing, the loan was not modified. "The promise to pay a debt already due is not sufficient consideration for a creditor's promise to forbear the time of payment." *O'Brien v. General Motors Acceptance Corporation*, 362 P.2d 455, 458 (Wyo. 1961).

It is significant to note that the cases upon which the Defendant relies involve circumstances whereby a borrower made a partial payment without any ability to pay the entire amount. The distinguishing fact in this case from those cited by the Defendant and the fact that triggers promissory estoppel is that Thompson offered to make all necessary payments to bring the note current but the Bank's representations prevented him from making them. If Thompson had simply made the payments without making his offer to pay the note current, then the Defendant's arguments would be meritorious. Mr. Moore's affidavit confirms his willingness to assist Thompson if necessary.

The Court must simply ask whether Thompson, who had the money to pay, would have allowed the Bank to complete the foreclosure absent its assertion that the foreclosure would not happen.

In order to work an estoppel it must appear that one has been induced by the conduct of another to do something different from what otherwise would have been done, and which has resulted to his harm and that the other knew or had reasonable cause to know that such consequence might follow.

Turner v. Terry, 799 So.2d 25, 37 (Miss.,2001)

Thompson says that the Bank turned down his money and promised that it would not foreclose. If Thompson can prove those allegations to the satisfaction of a jury, then those claims

fall squarely into the category of promissory estoppel. The trial court accepted Thompson's allegations as true for purposes of its order. The trial court noted in footnote 2 of its opinion that "It should be noted that a factual dispute exists as to the events that occurred in the Tishomingo branch on this date. However, this dispute is not material to the Defendant's motion. For purposes of this opinion, the version of events most favorable to the Plaintiff must be used."

The sole basis of the trial court's dismissal and First American's Motion for Summary Judgment was the basis of statute of frauds and lack of consideration. Promissory estoppel is an exception to both of those defenses and exists as a bar to prevent this matter from being dismissed as a matter of law.

CONCLUSION

If the jury believes the evidence most favorable to Thompson, then the Bank is bound by the representations made by Ms. Johnson and is estopped from claiming statute of frauds or lack of consideration as defenses. The Court should reverse the judgment of the Circuit Court of Alcorn County, Mississippi and remand the matter for trial by jury on the merits.

THIS, the 7th day of May, 2008.

RESPECTFULLY SUBMITTED

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CERTIFICATE OF SERVICE

I, B. Sean Akins, attorney for the Appellant, do hereby certify that I have served a true and correct copy of the above and foregoing Appellant's Brief by first class mail, postage prepaid to the following:

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THIS, the 7th day of May, 2008,



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