

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

LAVADA THOMAS

APPELLANT

VS.

NO. 2009-CA-00442

FIRST FEDERAL BANK FOR SAVINGS

APPELLEE

APPEAL FROM THE CHANCERY COURT OF

MARION COUNTY, MISSISSIPPI

CAUSE NO. 2007-0026-G-W

REPLY BRIEF OF APPELLANT, LAVADA THOMAS

Prepared by:

William L. Ducker



P. O. Box 217

Purvis, MS 39475

(601) 794-8545

Counsel for Appellant:

Lavada Thomas, Administratrix

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Reply to Appellee's Proposition 1.

When Defendant, First Federal Bank For Savings, disputed Plaintiff's claim in his conclusion that Plaintiff only has to prove her claim by a scintilla of evidence, counsel for Appellee left out the inverse that First Federal Bank For Savings must be able to prove there is no set of facts under which Appellant could prevail. The affidavits of George May (R.E. 39-40) and Nellie May (R.E. 41-42) satisfy that requirement in favor of the Plaintiff.

McClinton v. Delta Pride Catfish, Inc., 792 So2d 968 (Miss. 2001)

"Even when the Trial Court finds there is nothing before it that indicates a genuine dispute of material fact and finds that the Movant is otherwise entitled to Summary Judgment, the Trial Court may nevertheless be justified in denying Summary Judgment when, in it's view, a full exposition of the facts may result in a triable issue or is warranted in the interest of justice."

Great Southern Nat'l Bank v. Minter, 590 So2d 129 (Miss. 1991). Nellie May was told by a bank employee she needed to double up on her payments to avoid legal action. She did so.

The Defendant, bank says no Notice to Nellie May or other heirs was required. If the Defendant was not concerned about notice, why did the bank President, Mr. J. Roy McComb send an unsigned letter to Edward May, who the bank personnel well knew was deceased? (Appelle's R.E. 9). Plaintiff, Lavada Thomas submits an *in rem* proceeding against the property of a decedent without notice to the heirs or the person making payment on the debt is a violation of Article 3 § 14 of the Mississippi Constitution of 1890, as well as the Fourteenth Amendment to the United States Constitution. River Valley Company v. Deposit Guaranty National Bank, 331 Fed Supp 698, N.D. Miss. 1971 and Morgan v. Linham, 86 So2d 473, (Miss 1956).

The Appellee relied on E. B., Inc v. Allen, 722 So 2d 555, (Miss. 1998). However the case at bar is easily distinguishable for two (2) reasons:

- 1) Notice in the Allen case was given to the parties paying the note.
- 2) The foreclosure involved a subordination of Deed of Trust and Assignment to another lending institution, subsequent to a divorce distribution of assets.

Plaintiff recognizes the Judgment of the Marion County Chancery Court dated February 17, 2009, (R.E. 6-8) and is appealing this case based solely on the negligence claims set out in the Amended Complaint. (R.E. 9-15) A genuine issue of material fact is set up by the conflicting affidavits, "I was actually told when I made my January payment that two (2) more payments would get me back in a current position with the Bank". That statement creates a genuine factual issue that should have survived Summary Judgment. Summary Judgment can be granted only if everything in the record demonstrates that no genuine issue of material fact exists. Adcock v. International Paper, 809 F.Supp. 457 (S.D. Miss. 1992)

Reply to Appellee's Proposition 2.

"Our review of jurisdictional issues is essentially *de novo*: In making this determination, this Court is in the same position as the trial court, since all facts are set out in the pleadings or exhibits, and the Chancellor may be reversed if he erred whether the error was manifest or not." McDaniel v. Rutter, 556 So2d 303 (Miss. 1989). In a recent case the Circuit Court of Forrest County, Mississippi attempted to subvert the jurisdiction of the District Court of the State of New Mexico, Schwartz v. Hynum, 933 So2d 1039, (Miss. App., 2006). The Court of Appeals overruled the Circuit Court holding, one cannot confer jurisdiction upon a Court for convenience or otherwise. Defendant, FSB declares that Plaintiff chose its forum in Chancery. Such is not the case. The original cause of action including the foreclosure was by stature, certainly a chancery matter. However, Lavada Thomas was allowed to amend her pleadings to pursue a negligence claim for damages after the Defendant, David Hobgood, was dismissed. Amending her Complaint did not give Plaintiff the authority to transfer jurisdiction, so Plaintiff asked the Court to construe its cause of action in light of Tyson Breeders v. Harrison, 940 So2d 230, (Miss. 2006). However, the Chancellor refused to do so, overruling Plaintiff's jurisdictional challenge and granting Summary Judgment.

Subject matter jurisdiction is an issue that can be raised by any party at any time. MRCP 12 (h)(3) In re: J. D. S., 953 So2d 1133, (Miss. Ct. App. 2007) The jurisdictional question is subject to *de novo* review and may be raised for the first time on appeal.

Conclusion

Summary Judgment was not proper in this case and Appellant, Lavada Thomas, as Administratrix of the Estate of Edward May, deceased respectfully requests that this cause be reversed and remanded for a trial on the merits to the Court of proper jurisdiction. The May heirs have not had their day in Court and there is most certainly a genuine issue of material facts existing between the parties.

CERTIFICATE

I, William L. Ducker, do hereby certify that I have mailed the original and three (3) copies plus the CD Rom of the above Response to Brief of Appellee, First Federal Bank for Savings to:


Hon. Betty Septon
Supreme Court Clerk
P. O. Box 117
Jackson, MS 39205

and I have also mailed a true copy, postage pre-paid to:

Hon. Johnny L. Williams
Chancellor, Tenth District
P. O. Box 1664
Hattiesburg, MS 39403-1664

Donovan O. McComb, Esq.
Attorney at Law
718 Broad Street
Columbia, MS 39429

This the 27th day of August, A.D., 2009.



William L. Ducker