

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

BRIEF OF APPELLANT

Prepared by:

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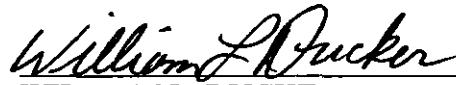
APPELLEE

CERTIFICATE OF INTERESTED PERSONS

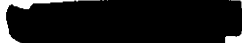
The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of the Supreme Court and/or the judges of the Court of Appeals may evaluate possible disqualifications or recusal.

- 1) Estate of Edward D. May, Deceased
by Lavada Thomas, Administratrix - Appellant
- 2) First Federal Bank for Savings - Appellee
- 3) Honorable Johnny L. Williams
Chancellor, 10th Judicial District
Lamar County, Mississippi
- 4) Nellie May, Individually
- 5) William C. Callendar, Esq.
- 6) Donovan McComb, Esq.
Attorney for Appellee
- 7) William L. Ducker, Esq.
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Respectfully submitted,



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STATEMENT OF ISSUES

The following issues are presented by Lavada Thomas as Administratrix of her late father, Edward D. May's Estate for review by this Honorable Court:

I.

The Chancellor erred in granting Summary Judgment to the Appellee, First Federal Bank for Savings.

II.

The Chancellor erred in overruling Appellant, Lavada Thomas's jurisdictional objection to the cause not being transferred to Circuit Court.

STATEMENT OF THE CASE

Plaintiff/Appellant, Lavada Thomas, would begin by declaring unto this Court what this case is not about. This is not about the foreclosed eighteen (18) acres and the bona fide purchaser, David Hobgood. The Appellee, First Federal Bank for Savings will attempt to interweave those issues, but they are *res judicata*. Lavada Thomas as the Administratrix of her late father's Estate in her Amended Complaint has sued the Defendant Bank for the wrongful conversion of the Plaintiff's property for monetary damages both actual and punitive. No one in Plaintiff's family was given official notice of the pending foreclosure. (RE 39-42) The Defendant, Bank, accepted two (2) payments on January 30, 2004, and February 13, 2004. (RE 47) In the span of three (3) weeks four (4) payments were made and the Defendant Bank proceeded with the foreclosure on February 23, 2004.

A genuine issue of material facts exists between the parties.

Plaintiff, Thomas, challenged the jurisdiction of the Marion County Chancery Court under existing case law but was summarily overruled without discussion by the Chancellor. Once the *res* concerning the real estate was eliminated, this case should have been transferred to Circuit Court for a jury trial on damages both actual and punitive.

SUMMARY OF THE ARGUMENT

PROPOSITION I

The Chancellor erred in granting Summary Judgment to the Appellee, First Federal Bank for Saving.

On behalf of her brothers and sisters, Lavada Thomas filed her Amended Complaint (RE 9-16) for the wrongful conversion committed by the Defendant Bank. This case is not about the foreclosure, but First Federal's actions surrounding the foreclosure. No one in the Edward May Family received any official Notice of Foreclosure. (RE 39-42). The Defendant Bank has overreached, Nellie May, an uneducated woman by taking her money and the estate's property. There is a justiciable cause of action to the case sub judice that needs to be heard. The Defendant Bank will argue that there is no genuine factual issue remaining to be resolved following the foreclosure, but while the two (2) cases facts are historically related, the same are not dependent on each other. What happened at the foreclosure, i.e. loss of real estate is over, however, the manner in which the rights of the Plaintiffs were circumvented should be the subject of a continuing lawsuit.

PROPOSITION II.

The Chancellor erred in overruling Appellant, Lavada Thomas's jurisdictional objection to the cause not being transferred to Circuit Court (TR 4). Plaintiff raised the question with the Court in the pleadings. (RE 34) However, the case never proceeded past the Summary Judgment stage for the Court to consider the argument. Lavada Thomas would represent to this Honorable Court that the jurisdictional question as raised by Plaintiff should have been heard and should have been given priority over the Defendant bank's Motion for Summary Judgment. Although this Court has now distinguished some cases from Tyson

Breeders, Inc v. Harrison, 940 So2d 230 (Miss. 2006) that decision was controlling at the time of Plaintiff's Motion. According to prevailing case law the Honorable Chancery Court of Marion County had no jurisdiction following the filing of the Amended Complaint. (RE 9-16)

PROPOSITION I

The Chancellor erred in granting Summary Judgment to the Appellee, First Federal Bank for Savings.

The Affidavit of George May, (RE 39-40) and the Affidavit of Nellie May (RE 41-42) create a genuine issue of material facts because they are in direct conflict with the Affidavit of Jack Ezelle, Senior Vice-President of First Federal Bank for Savings. (RE 33-35) Issues of fact sufficient to require denial of a Motion for Summary Judgment are present where one party and his witness swear to one (1) version of the matters in question and another says the opposite. Gorman-Rupp Co. v. Hall, 908 So2d 749 (Miss. 2005). The party moving for Summary Judgment has the burden of demonstrating that there is no genuine issue of material fact in existence and for which the non-moving party should be given the benefit of every reasonable doubt. Vaughn, ex rel. Vaughn v. Estate of Worrell, 828 So2d 780 (Miss. 2002). Nellie May's sworn Affidavit accompanied with the bank payment record (RE 47) raises a genuine factual issue. Any probable set of facts asserted by Plaintiffs, which suggest a genuine issue exists between the parties places the burden squarely on the Defendant to show under no circumstances could such issues exist. Moore ex rel. Moore v. Memorial Hospital, Gulfport 825 So2d 658 (Miss. 2002). The Order granting Summary Judgment as well as, the Amended Order Granting Summary Judgment (RE 49-53) clearly indicate the Chancellor was still considering the subject matter of this lawsuit as being the foreclosure. The Amended Complaint (RE 9-16) changed the *res* to a cause of action based on the conduct of the bank employees concerning Notice and taking 2 payments from an uneducated person January 30, 2004, and taking another 2 payments on February 13th, and foreclosing on her on February 23rd. A Motion for Summary Judgment should be overruled

unless the trial Court finds beyond a reasonable doubt that the Plaintiff would be unable to prove any facts to support his claim. On a Summary Judgment Motion the Trial Court may only decide whether there are issues to be tried. Montgomery v. Wollbright, 904 So2d 1027 (Miss. 2004)

No depositions were taken by the Defendant bank, which states its whole case on the statutory requirement for conducting a foreclosure and the affidavit of one (1) bank officer. Plaintiff on the other had had two (2) family members telling a different story but using the bank's own records for their proof.

"If any triable issues of fact exist, the lower Court's decision to grant Summary Judgment will be reversed. Otherwise this decision is affirmed." Richmond v. Benchmark Construction Corp., 692 So2d 60 (Miss 1997).

PROPOSITION II

The Chancellor erred in overruling Appellant, Lavada Thomas's jurisdictional objection to the cause not being transferred to Circuit Court.

In paragraph three (3) of the Amended Complaint (RE 34) Plaintiff was requesting a ruling by the Court on the jurisdictional question before trial *de novo*. Tyson Breeders, Inc. v. Harrison, 940 So2d 230 (Miss. 2006) dictates that cases such as the case at bar should be transferred to the Circuit Court for trial by jury. When the Complaint was amended, the theory of the case was totally changed. The Edward May Estate stopped trying to block or overturn a foreclosure and commenced suing the Defendant Bank for its wrongful acts perpetrated on Nellie May as well as the Estate of Edward May, deceased.

A contest to jurisdiction can be brought at any time on any level and requires the reviewing Court to consider the challenge *de novo*. National Heritage Realty, Inc. v. Estate of Boles, 947 So2d 238 (Miss. 2006).

“This Court has previously stated that “the Constitution makers of 1890 knew, when they invested the Chancery Court with full jurisdiction of all matters in equity, (Sec 159 of Constitution) that the Supreme Court had therefore held that equity is defined as that system of Justice which was administrated by the High Court of Chancery in England...””
Mitchell v. Rawls, 493 So2d 361 (Miss. 1986)(quoting Griffith's Mississippi Chancery Practice§ 584 (2nd Ed 1950). Thus, the equitable jurisdiction and power of the Chancery Court is limited to the system of justice administered by England's High Court

of Chancery” In Re Bell, 962 So2d 537 (Miss. 2007) Circuit Court is the Court of general jurisdiction in all civil matters.

When the cause was amended the matters became a civil action damage suit with claims for actual and punitive damages for bad faith on the part of the Defendant Bank. These are jury issues, which the Chancellor should have transferred to Circuit Court for *trial de novo*. For further authority the Appellant cites, In Re Spiers, 992 So2d 1125 (Miss. 2008). In this case the Circuit sat as a court of equity by Petition of the coroner of Adams County to the Circuit Court. It was held that while Circuit Courts are courts of general jurisdiction, they may sometimes hear equity matters.

CONCLUSION

A genuine issue of material fact exists between Appellants, Lavada Thomas, Nellie and George May and Appellee, The First Federal Bank for Savings. There are at least three (3) scenarios that rise to the level above reasonable doubt in the case and Plaintiff only has to prove her case by a scintilla of evidence or the inverse, Appellee Bank must be able to prove there is no set of facts under which Lavada Thomas could prevail. When the Complaint was amended the entire cause of action changed from objection to a foreclosure to a suit for damages because of the manner in which First Federal Bank for Savings conducted itself when dealing with the Plaintiff.

Cause No. 2007-0026-G-W should have been transferred to the Marion County Circuit Court. Once the foreclosure aspect was removed, Chancery had no jurisdiction according to existing case law. Had the Chancellor made the proper ruling concerning jurisdiction, we would not be here arguing for a reversal and remand from Summary Judgment that clearly should not have been granted.

CERTIFICATE

I, William L. Ducker, do hereby certify that I have mailed the original and three (3) copies plus the 3 x 5 floppy disc of the above Brief of Appellant 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 10th District
P. O. Box 1664
Hattiesburg, MS 39403

Donovan O. McComb, Esq.
Attorney at Law
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This the 19th day of July, A.D., 2009.



William L. Ducker