

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

No. 2010-CA-00376-COA

TENNESSEE PROPERTIES INCORPORATED

Plaintiff/Appellant/Cross-Appellee

v.

SOUTHERN PILOT INSURANCE COMPANY
AND LARRY GILLENLINE

Defendants/Appellees/Cross-Appellants.

APPEAL FROM THE CHANCERY COURT OF LEE COUNTY, MISSISSIPPI.
CIVIL ACTION NO. 08-0942-41-H

RESPONSE OF APPELLANT/CROSS-APPELLEE
TO ISSUES PRESENTED ON CROSS-APPEAL

William R. Bruce (MS # [REDACTED])
Attorney for Plaintiffs/Appellants
707 Adams Avenue
Memphis, Tennessee 38105
(901) 525-8601

ORAL ARGUMENT REQUESTED

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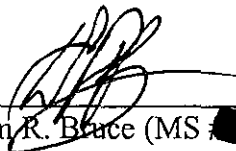
Defendants/Appellees/Cross-Appellants

I. 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 judges of the Court of Appeals may evaluate possible disqualification or recusal.

Tennessee Properties, Inc.
Herbert Brewer
Larry Gillentine
Southern Pilot Insurance Company
Renasant Bank

Respectfully submitted,



William R. Bruce (MS # [REDACTED])
Attorney for Plaintiff/Appellant
707 Adams Avenue
Memphis, Tennessee 38105
(901) 525-8601

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III. TABLE OF CASES AND AUTHORITIES

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<u>Wyssbrod v. Wittjen</u> , 798 So.2d 352, 357 (¶ 17) (Miss. 2001)	4

IV. STATEMENT REGARDING ORAL ARGUMENT

Plaintiff/Appellant/Cross-Appellee requests oral argument.

V. STATEMENT OF ISSUES

1. For purposes of its Response to Issues Presented on Cross-Appeal, Plaintiff/Appellant/Cross-Appellee adopts Issue 4 as set forth in the "Statement of Issues" contained in the Brief of Appellee Larry Gillentine, to wit: "The trial court erred in failing to award sanctions to Larry Gillentine pursuant to Rule 11(b) of the Mississippi Rules of Civil Procedure."

VI. STATEMENT OF THE CASE

A. Nature of the case, course of proceedings, and disposition below.

Plaintiff claims a possessory interest in certain property that was subject of a substituted trustee's sale on June 12, 1998. Plaintiff filed a Complaint to Adjudicate Title on June 12, 2008, claiming that the substituted trustee's sale was ineffective for either or both of the following reasons: 1) Plaintiff had satisfied the underlying debt obligation which had been secured by the Deed of Trust through which the substituted trustee claim the authority and the right to sell the Property, and 2) substitute trustee's sale was not done in accordance with the Deed of Trust in that it was not conducted a public outcry, rendering the sale ineffective and creating a concealed defect in the chain of title of Defendant that could not be discovered by examination of the face of the publicly filed documents.

Defendant responded with an Answer containing a Motion to Dismiss as his First Affirmative Defense. Defendant followed that with a separate motion to dismiss, arguing that the three year general statute of limitations found at Miss. Code Ann. § 15-1-49, was applicable to this case.

Defendant's motion was heard by the Chancellor in chambers on September 10, 2009,

with opportunity for the parties to provide additional briefing after the hearing. There was no record made of the hearing.

Plaintiff filed its Response to Defendants' Motion to Dismiss on October 26, 2009, raising essentially the same arguments as presented in its Brief on Appeal.

The Chancellor signed a Judgment of Dismissal on February 4, 2010 (Record 053), and in that Judgment specifically found that "[t]here is no basis for an award of attorney's fees under Rule 11(b) of the Mississippi Rules of Civil Procedure in this particular case and therefore, [Defendants' motion for attorney's fees] should be and is hereinafter denied." Record 052.

VII. SUMMARY OF ARGUMENT

At both the trial court level and on this appeal, Plaintiff has presented a good faith argument for the factual distinction of the instant case from McWilliams v. McWilliams, 970 So.2d 200 (Miss. App. 2007), cited by Defendant and by the Trial Court. The Chancellor found no basis for an award of attorney's fees to Defendant pursuant to Rule 11(b), and the Chancellor's decision on that point is reviewed under the abuse of discretion standard. IllinoisCent. R. Co. v. Broussard, 19 So.3d 821, 823 (¶ 8) (Miss. Ct. App. 2009).

Should this Honorable Court sustain Plaintiff's appeal, Defendant's cross-appeal logically must fail as it is premised on Plaintiff's Complaint being "frivolous" and without any hope of success.

Even if this Honorable Court affirms the Trial Court's dismissal of Plaintiff's Complaint, Defendant's Cross-Appeal must fail as Defendant has failed to allege or demonstrate any abuse of discretion on the part of the Chancellor in denying Defendant's motion for attorney's fees

under Rule 11(b), especially in light of Plaintiff's articulation of a factual distinction between the case at bar and McWilliams as cited by Defendant and the Trial Court. The Chancellor has the discretion to decline to impose the sanction of an award of attorney's fees even in the face of a clearly frivolous claim, as was the case in Broussard, where a complaint was re-filed on behalf of a person who died subsequent to the original filing. 19 So.3d at 824 (¶ 13).

In the case at bar, the Chancellor specifically found "no basis for an award of attorney's fees under Rule 11(b)" Because Defendant has failed to allege or identify any abuse of discretion on the part of the Chancellor, the Chancellor's denial of Defendant's motion for attorney's fees should not be overturned.

For either of the above stated reasons, this Honorable Court should affirm the Trial Court's denial of Defendant's motion for attorney's fees under Rule 11(b).

VIII. ARGUMENT

- A. It is axiomatic that if Plaintiff's appeal is sustained, then Defendant's cross-appeal must fail.

Given that Defendant's cross-appeal is premised on Plaintiff's Complaint being frivolous and without hope of success because of it being barred by the statute of limitations, a reversal of the Trial Court's decision that the action is barred by the statute of limitations logically requires a denial of Defendant's cross-appeal.

In its appeal, Plaintiff asks this Honorable Court to find that the Trial Court erred in applying the three year general statute of limitation found at Miss. Code Ann. § 15-1-49, rather than the 10 year statute of limitation found at Miss. Code Ann. §§ 15-1-7 or 15-1-11, or alternatively that the Trial Court erred in failing to find that the three year general statute of

limitation was tolled because of a concealed defect in the manner of sale of property which would not have been discoverable earlier even the exercise of reasonable diligence. The Trial Court found that the three-year general statute of limitation applicable, and found no reason to toll the running of the statute. Record 052. A reversal of that decision by this Honorable Court destroys the premise upon which Defendant's cross-appeal rests.

B. The Chancellor did not abuse his discretion in finding "no basis for an award of attorney's fees under Rule 11(b) of the Mississippi Rules of Civil Procedure in this particular case"

After consideration of arguments by counsel, both oral and written, the Trial Court found "no basis for an award of attorney's fees under Rule 11(b) of the Mississippi Rules of Several Procedure in this particular case" Record 052. This finding by the Trial Court is reviewed under an abuse of discretion standard. IllinoisCent. R. Co. v. Broussard, 19 So.3d 821, 823 (¶ 8) (Miss. Ct. App. 2009), and Wyssbrod v. Wittjen, 798 So.2d 352, 357 (¶ 17) (Miss. 2001)(internal citations omitted).

Under the abuse of discretion standard, unless there is a "definite and firm conviction that the court below committed a clear error of judgment in the conclusion it reached upon weighing of relevant factors," the judgment of the Trial Court to impose (and implicitly to decline to impose) sanctions will be upheld. Wyssbrod at 357 (¶ 17). It is incumbent upon Defendant to demonstrate to this Honorable Court "that the court below committed a clear error of judgment in the conclusion reached" in declining to impose sanctions.

Defendant argues sanctions are appropriate because "it is clearly evident that the present complaint was frivolous, filed for the purpose of delay, harassment of Gillentine, and with no hope of success due to the fact that the action was barred by the three-year statute of limitations,

Miss. Code Ann. § 15-1-49.” Defendant alleges error, but fails to allege abuse of discretion on the part of the Chancellor, and fails to point to any specific clear *error of judgment* on the part of the Chancellor. On the contrary, Plaintiff has articulated a clear factual distinction between the case at bar and McWilliams, which presents a good faith question as to the applicability or tolling of that statute of limitation.

Given the clear factual distinction made by Plaintiff between the case at bar and McWilliams, and the argument presented for tolling of the three year statute of limitations or application of the 10 year statute of limitations, it cannot be said that objectively speaking Plaintiff had no hope of success. The decision of the Chancellor in declining to impose sanctions is consistent with this assertion.

The Trial Court is granted wide discretion in its decision to impose or to deny sanctions. Broussard, 19 So.3d at 824, ¶ 13. Even in the face of a claim clearly frivolous and without hope of success because it was filed on behalf of the deceased person, the trial court retained discretion to deny sanctions because, in its judgment, it did not “see the type of egregious conduct that would warrant sanctions.” *Id.* Plaintiff respectfully argues that this case is not clearly frivolous and without hope of success, again pointing to the factual distinction made between this case and McWilliams. The Trial Court made a clear and unequivocal assessment, after considering both oral and written argument, that there was no basis for the imposition of sanctions pursuant to Rule 11(b), as requested by Defendant.

IX. CONCLUSION

For either of the reasons stated above, Plaintiffs pray this Honorable Court uphold the Trial Court's denial of Defendant's motion for attorney's fees under Rule 11(b).

Respectfully submitted,



William R. Bruce (MS [REDACTED])
Attorney for Plaintiff/Appellant
707 Adams Avenue
Memphis, Tennessee 38105
(901) 525-8601

Certificate of Service

I hereby certify that a copy of the foregoing document has been served upon:

Hon. John A. Hatcher, Chancellor
P.O. Box 118
Booneville, MS 38829

Hon. Dennis W. Voge
P.O. Box 7120
Tupelo, MS 38802

Southern Pilot Insurance Company
c/o CT Corporation System of Mississippi
645 Lakeland Drive, Ste 101
Flowood, MS 39232

by mailing the same, via United States mail, postage prepaid, on this the 11th day of November, 2010.



William R. Bruce