IN THE SUPREME COURT FOR THE STATE OF MISSISSIPPI

No. 2010-CA-01584

CONGRESS STREET PROPERTIES, LLC AND
930 BLUES CAFE, LLC

APPELLANTS

V.

BMR FUNDING, LLC

APPELLEE

On appeal from the Chancery Court
of Hinds County, Mississippi

REPLY BRIEF OF APPELLANTS

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Congress Street Properties Deed of Trust

BMR begins its argument erroneously. It states that Congress Street Properties (CSP) borrowed $618,000 for the purchase of property, gave a deed of trust to secure that debt, and directs the Court to its RE 9, which is the re-recorded deed of trust that attached a legal description of the property after the original document was signed. There is no proof in the record that this was the document signed by the parties on April 29, 2001. BMR implicitly argues that attaching Exhibit A after the fact and re-recoding the deed of trust was okay because the face of the Deed of Trust references an "Exhibit A". However, BMR put no proof into the record that the "Exhibit A" attached was the "Exhibit A" referenced. BMR obtained no acknowledgment by CSP or ratification by CSP that this Exhibit A was in fact the Exhibit A referenced on the face of the Deed of Trust. This kind of behavior–one party unilaterally attaching an Exhibit after the fact and claiming it to be part of the original agreement– is exactly the kind of fraudulent behavior case that this Court has condemned. That the re-recorded deed was sent to Mr. Byrd does not constitute any ratification by him nor does it satisfy the requirements for properly re-recording a deed of trust.

BMR wants to shift the burden of proof to CSP when in fact, it has the burden of proving that the Deed of Trust was valid, which includes the burden of proving that CSP agreed to the legal description attached to the re-recorded deed of trust, rests on BMR. BMR has not met this burden. Referring to the other transactional documents does not prove what the Deed of Trust was to cover. The Purchase documents which included two parcels of property – each distinctly identified by address - shows the

agreement between CSP and Protective Life, the seller. They prove nothing about the intent of the parties to the transaction between CSP and SouthTrust Bank. Mr. Byrd testified, via affidavit, that CSP did not intend to encumber the lot known as 933 N. President – BMR presented no evidence to rebut that. BMR only argues that Mr. Byrd did not testify that Exhibit A was not attached at the time he signed the deed of trust. But Mr. Byrd did not need to – the two recorded deeds of trust speak for themselves. Had Exhibit A been attached to the original deed of trust, there would have been no need for a re-recording. Moreover, Mr. Byrd never received a copy of the originally recorded deed of trust; only the second one.

BMR then goes on to argue that Mr. Byrd "reaffirmed and acknowledged the validity of the CSP Deed of Trust" in subsequent Forbearance Agreements. However, the only deed of trust that Mr. Byrd received was the re-recorded one. He had no knowledge of the improper recording and alteration of the first one. At no time did BMR approach Mr. Byrd and ask him to acknowledge that Exhibit A was accurate; or re-do the deed of trust so that it could be properly recorded. Instead BMR and its predecessors put language into other agreements in a vain attempt to now later argue that Mr. Byrd had in fact agreed to something he never knew happened.

In this instance, the improper re-recording invalidated the deed of trust *ab initio*. It could only be cured with a proper written acknowledgment by CSP of the contents of Exhibit A or a redrafting and re-execution of the deed of trust with Exhibit A attached. There was a string of attorneys representing BMR and its predecessors prior to the foreclosure sale and someone should have caught this error and cured it. But all failed to do so.

The 930 Blues Café Deed of Trust

The parties agree that another entity, Northgate Properties , owed an indebtedness to SPCP Group (BMR"S predecessor) which was secured by certain property located on State Street. When SPCP predecessors pressed for payment, Northgate Properties found a buyer for the property who offered $900,000 for it. SPCP agreed to release the property for the sale and the terms of that Agreement with Northgate Properties is found in the Reaffirmation Agreement these parties signed. As part of that agreement, Northgate Properties, CSP, and Isaac Byrd, agreed to give the proceeds of the sale to SPCP along with an additional $200,000. To secure that $200,000 payment, another entity, 930 Blues Café LLC by corporate resolutions, authorized the pledging property it owned. This corporate resolution is included in and attached to the Reaffirmation Agreement. This resolution is clear about the amount the property secured, and the Reaffirmation Agreement itself is similarly clear about the amount in paragraph 2 which states :

> ...In addition, Obligors agree to pay to Lender the additional sum of Two Hundred Thousand and 00/100 dollars ($200,000.00) in case to the lender as a credit against the Indebtedness within ten (10) business days from the closing of the sale of the property. **This obligation** shall be secured by a deed of trust on certain real property owned by 930 Blues Café, LLC in Jackson ...

This language, along with the e-mail from R. David Marchetti, clearly shows the intent of the parties to what the deed of trust was to secure.

BMR argued that the dragnet clause it put in the deed of trust extended the amount that 930 Blues Café property secured. There is no doubt that the Northgate Properties indebtedness may end up being greater than the $900,000 purchase price plus the $200,000 secured by the 930 Blues Café Property, but the resolution of the

corporation made it very clear as to what amount of that indebtedness its property was securing. The 930 Blues Café LLC did not sign the Reaffirmation Agreement or agree to take on any indebtedness of any other corporation beyond the $200,000 that all parties agreed was paid.

ARGUMENT

I. The Lower Court erroneously upheld the validity of the CSP Deed of Trust

BMR argues from its own erroneous factual statement that CSP has failed to show that there was a material alteration of the deed of trust. *Tate v. Rouse*, 156 So.2d 217 (Miss. 1963) does state that the burden is on the one seeking to show the alteration by clear and convincing evidence. In *Jackson v. Day,* 80 Miss. 800, 802, 31 So. 536 (1902), held to this effect, stating that it must 'plainly appear' and be 'plainly certain' that the instrument had been altered.

Here, it plainly appears and is certain that the Exhibit A was added to the deed of trust originally signed. BMR offered no proof as to how this particular legal description on Exhibit A was obtained. It offered no affidavit from the recording individual, or from the attorney preparing the deed of trust. It offered no proof at all that what appears on Exhibit A was the collateral for the loan agreed upon by SouthTrust Bank and CSP. CSP, however, offered an affidavit from Mr. Byrd saying that the 933 N. President property was not to be encumbered. The closing documents showed a cash payment of $10,000 which adequately paid for this vacant lot. The property located at 939 n. President, valued in excess of $1 million more than adequately secured the $681,000 loan. More importantly, BMR offered no **proof** – no affidavit from SouthTrust or the closing attorney – to show that it was mere inadvertence or mistake for someone to include the 933 N. President property in

Exhibit A. All it argues is conjecture and speculation. The proof, however, shows that this lot was a separate parcel of property, and only 939 N. President was intended to collateral for the loan. Like the Defendant in *Mullins v. Merchandise Sales, Co.,* 192 Sol.2d 700 (Miss), where there was no proof of an honest mistake or omission, BMR here put in no proof that Exhibit A as written was attached to the original document when it was signed and just inadvertently omitted with recorded. To the contrary, the **proof** in the record show that CSP purchased two parcels of property, but that only one was intended to secure the deed of trust with SouthTrust Bank. The proof also shows that without the knowledge, consent, or subsequent ratification of CSP, Exhibit A was obtained, attached to the original deed of trust and re-recorded. The result is the same as that in *Merchants' & Farmers' Bank v. Dent,* 102 Miss. 455, 59 So. 805 (1912), the deed of trust became void and of no effect. The original instrument executed by parties was in reality destroyed. It was not the paper which they signed and delivered. Accordingly, BMR obtained no rights thereunder.

BMR then argues that, if there were a material alteration, it was done by SouthTrust's closing attorney (again without any proof in the record of this), and thus done by a third party. BMR argues that under *Francis v. Hughes*, 64 So.2d 351 (Miss. 1953), the alteration did not void the Deed of Trust. However, the *Francis* case does not apply here. In *Francis*, a bond in the amount of $500 was prepared to secure the release of an individual who was being held for child support payments. The attorney learned that a $1000 bond was required instead. He prepared a new one, and gave it to an individual who returned it, saying the parties had agreed to the increase. It turned out that they had not. The *Francis* case, then, dealt with a stranger to the transaction changing the instrument. In this case, the attorney for SouthTrust Bank,

the bank's agent, changed the deed of trust by adding Exhibit A to the original deed of trust and re-recording it.

The bottom line is that the proof in the record shows a material alteration that voided the CSP deed of trust. It was unenforceable as soon as it was re-recorded without the consent of CSP. As a result, the foreclosure sale was improper and should be set aside.

II. The 930 Blues Café Deed of Trust was satisifed and the lower Court should have voided the foreclosure on its property.

BMR argues that whether the indebtedness on the 930 Blues Café property was paid off is a matter of contract law and that the four corners of the contract should be first reviewed. The 930 Blues Café, LLC contends that were this done, the document to review is the corporate resolution attached to the Reaffirmation Agreement. Therein, the 930 Blues Café LLC clearly states that the only indebtedness that its property was securing was the $200,000 partial payment the other parties owed under the Reaffirmation Agreement. The 930 Blues Café was not a party to the entire contents of the Reaffirmation Agreement and cannot be held bound by provisions of it that BMR argues defined the entire indebtedness of the parties, i.e. the judgment. There is no other contract to look to, except the Deed of Trust, which again refers to the Reaffirmation Agreement. If anything, the Reaffirmation Agreement **clarifies** the extent of the indebtedness that the 930 Blues Café property was to secure. BMR wants these two documents read together – the Deed of Trust and the Reaffirmation Agreement. Doing so, however, leads to inevitable conclusion that the 930 Blues Café LLC agreed only to let its property secure a $200,000 partial payment.

BMR then goes on to argue that Mr. Byrd's actions in paying more than the $200,000 is proof that the Deed of Trust was meant to secure more. However, to accept this extrinsic evidence, the Court and BMR must also accept the stronger proof of intent that it was to secure only the $200,000 as shown by David Marchetti's e-mail and Isaac Byrd's fax to Jon Holman, which states:

> I will pledge 946 North Congress Street or another property mutually agreed to by the Lender and Seller as collateral for the $200,000.00 to which I will deliver cash in thirty (3) days in which time the collateral will be released.

The debt having been paid, under MS 89-5-21, title reverted back to 930 Blues Café LLC.

CONCLUSION

Property ownership is valuable and the state of Mississippi and this Court has put in place a variety of principles and statutes that must be followed before instruments affecting title can be enforced. Some may seem harsh, such as the need in this case for SouthTrust Bank to have had its Deed of Trust properly re-executed or ratified or it is rendered void. However, that is why there are attorneys specializing in property law who work for Banks and lenders to make sure that these laws and precepts are followed. In this case, with respect to the Congress Street Properties deed of trust, they weren't. BMR as a subsequent holder, unfortunately held a deed of trust that was void. It must suffer from the mistakes of its predecessors. But as the *Dent* case says, there was no way to inject life back into that deed of trust once something was added to it and it was re-recorded without CSP's knowledge or agreement.

Moreover, title to the 930 Blues Cafe's property reverted back to it once the obligation it had agreed to secure, the $200,000, was repaid. The 930 Blues Café was

not an obligor under the entire Reaffirmation Agreement and to find, in essence, that it was, was clear error by the lower Court.

In this case, this Court should reverse the lower Court's decision, find that the 939 N. President Street property deed of trust was materially altered and void, and that the 930 Blues Café LLC Deed of Trust was satisfied. Title to both these properties should be revested in their rightful owners, Congress Street Properties and the 930 Blues Café LLC.

Respectfully submitted, this 5th day of July, 2011.

CONGRESS STREET PROPERTIES, LLC
AND 930 BLUES CLUB, LLC
Appellants

By: Suzanne Keys
Suzanne Keys, Esq.
Attorney for 930 Blues Café, LLC.,
and Congress Street Properties, LLC.

Certificate

I, Suzanne Keys, attorney for Congress Street Properties, LLC and 930 Blues Café, LLC hereby certify that I have caused to be mailed by U.S. Mail, postage prepaid, a true and correct copy of the foregoing Brief of Appellants to the Trial Court and attorneys for the Appellee, BMR Funding, LLC. on this day and date:

Honorable Dwayne Thomas
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So certified this the 5th day of July, 2011.

SUZANNE KEYS