IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

NO. 2011-M-00358-SCT

CHASE HOME FINANCE, L.L.C. AND PRIORITY TRUSTEE SERVICES OF MISSISSIPPI, L.L.C.

APPELLANTS/CROSS APPELLEES/DEFENDANTS

VS.

JAMES D. HOBSON, JR.

APPELLEE/CROSS-APPELLANT/PLAINTIFF

On Interlocutory Appeal from the Circuit Court
of Warren County, Mississippi, Ninth Judicial District
(Cause No. 10,0001-CI)

REPLY/RESPONSE TO CROSS-APPEAL OF APPELLANTS/CROSS APPELLEES CHASE HOME FINANCE, L.L.C. AND PRIORITY TRUSTEE SERVICES OF MISSISSIPPI, L.L.C.

ORAL ARGUMENT REQUESTED

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STATEMENT OF THE CASE

A. Objection to Hobson's Statement of the Facts

Chase Home Finance, L.L.C. ("Chase") and Priority Trustee Services of Mississippi, L.L.C. ("Priority") (collectively "Chase/Priority") object to one assertion in James D. Hobson Jr.'s ("Hobson") "Statement of the Facts," because it is an assertion that is not supported by the Record on appeal. Hobson suggests that the precise language of the Vicksburg Post Notice of Sale is before this Court (Hobson Brief p. 4), but the Notice itself is not in the Record. Hobson cites R. 39, 55[1] as proof of the content of the Notice, but these citations are to Hobson's own affidavit and his itemization of facts relied upon in support of his Motion for Summary Judgment. Hobson characterizes the Notice's absence as "inadvertent," and he alleges that Chase/Priority failed to specifically object to his rendition of the Notice of Sale in briefing before the County Court (Hobson Brief p. 11). The fact remains, however, that the Notice is not available for this Court's review.

This omission exemplifies a key problem with Hobson's claim – he has not produced a clear, unambiguous piece of writing that supports summary judgment in his favor for a breach of contract claim. He did not prove that the terms of the alleged contract were unconditional. This appeal is not just about whether the alleged contract was conditional – it is about whether the lower courts had undisputed evidence to make that finding. The lower courts erred in holding that no genuine issues of material fact existed regarding the alleged contract, where no written contract was presented to the lower courts.

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[1] Citations to documents within the clerk's papers are as follows: Record Excerpts of Appellants are cited as R.E. [tab number]; Record Citations are cited as R. [page number]; Transcript of the Circuit Court hearing are cited as Tr. [page number].

B. Objection to Hobson's Citation to the County Court Transcript

Hobson makes references to the County Court's summary judgment hearing transcript. *See, e.g.* Hobson Brief pp. 3, 24. Unfortunately, this transcript was not designated for appeal before this Court, so it does not appear in the Record. These citations are improper references to materials outside of the Record, and they should not be considered by this Court.

SUMMARY OF THE ARGUMENT

Hobson *knew* the foreclosure sale could be cancelled by the borrower's timely reinstatement:

> "Borrower's Right to Reinstate" – Paragraph 18 of the Deed of Trust, filed in the public land records of Warren County. R.E. 15; R. 29-35.

Chase/Priority presented genuine issues of material fact that the foreclosure sale *was conditioned* on the borrower not reinstating her loan before the sale:

> "This receipt is issued in connection with the foreclosure sale of the above-referenced property and is subject to the terms stated, as part of the sale. The sale will not be considered final until all requirements have been met and may be withdrawn based on a timely re-instatement and/or by an order of the Bankruptcy Court." R.E. 20; R. 84 (emphasis added).

Chase/Priority presented genuine issues of material fact that the foreclosure sale *was, in fact, cancelled* based on the borrower's timely reinstatement:

> "[T]he borrower for the subject loan that was in default was provided with reinstatement requirements and she complied with those requirements prior to the foreclosure sale that was cried on March 20, 2008." Affidavit of LaShun Palmer, a Reinstatement/Payoff Representative. R.E. 19; R. 81-83.

The Circuit Court incorrectly affirmed the liability portion of Hobson's breach of contract claim, and this Court should reverse the Circuit Court's decision on liability. If this Court determines that the ruling as to liability should be affirmed – which Chase/Priority urge this Court not to do – the Circuit Court's decision to send the issues of damages to a jury should be affirmed. The Circuit Court was well within its discretion to determine that the evidence regarding damages was not summary judgment-clear.

ARGUMENT

I. REPLY

A. Chase/Priority satisfied their duty to identify genuine issues of material fact in opposing Hobson's Motion for Summary Judgment.

There are disputed issues of fact in this case, material to the questions of whether a contract existed, and if so, what the terms of that contract were and whether Chase/Priority breached that contract. "[S]ummary judgment is not a substitute for the trial of disputed fact issues," . . . and "it cannot be used to deprive a litigant of a full trial on genuine issues of fact." Miss. R. Civ. P. 56, cmt.

Chase/Priority satisfied their burden to establish genuine issues of material fact, which precluded summary judgment for Hobson. *See Matthews v. Horseshoe Casino*, 919 So. 2d 278, 280 (Miss. Ct. App. 2005) (citing *Lowery v. Guaranty Bank and Trust Company,* 592 So. 2d 79, 81 (Miss. 1991); *Galloway v. Travelers Insurance Co.,* 515 So. 2d 678, 682 (Miss. 1987)); *Massey v. Tingle,* 867 So.2d 235, 238 (Miss. 2004). The lower courts failed to give Chase/Priority the "benefit of the doubt." *See McCullough v. Cook*, 679 So. 2d 627, 630 (Miss. 1996).

Issues of fact that preclude summary judgment include:

(1) undisputed testimony with more than one reasonable interpretation;

(2) uncontradicted evidentiary facts from which materially different but reasonable inferences may be drawn;

(3) facts that are not sufficiently established or complete to enable the trial judge to say with reasonable confidence that the full facts of the matter have been disclosed; and

(4) facts that involve opposing parties swearing to opposite versions of those facts.

See Miller v. Meeks, 762 So. 2d 302, 304-05 (Miss. 2000); *see also Canizaro v. Mobile Communications Corp. of America*, 655 So. 2d 25, 28-29 (Miss. 1995).

The lower courts ignored the following issues of material fact:

(1) Undisputed testimony that a live foreclosure sale occurred (R.E. 18; R. 39-41), but different interpretations about the terms of the sale;

(2) Uncontradicted evidentiary facts that Hobson appeared for the foreclosure sale, tendered a cashier's check for $60,948.82, and the check was returned to Hobson (R.E. 18; R. 39-41; R.E. 20; R. 84; R.E. 7, ¶ 6; R. 55-56), but materially different, reasonable inferences about whether Hobson was on notice and agreed to the condition that the sale could be cancelled if the borrower timely reinstated her mortgage loan;

(3) Facts that were not sufficiently established or complete to enable the trial judge to say with reasonable confidence that the full facts of the matter have been disclosed, including the full contents of the Notice of Sale, the timing of when the borrower reinstated the loan, and other unresolved facts based on the total lack of discovery; and

(4) Hobson and Chase/Priority's swearing to opposite versions of the terms of the alleged contract for the sale of the subject property.

This Court should reverse the Circuit Court's finding that no genuine issue of material fact existed as to the existence of a contract and the breach of that contract.

B. Hobson knew the foreclosure sale could be rescinded based on a timely reinstatement.

Hobson argues that he was unaware that the foreclosure sale could be cancelled if the borrower timely reinstated her mortgage loan prior to the sale. *See, e.g.* Hobson Brief pp. 11, 13. He contends that it would be unfair to charge him with knowledge of this condition after-the-fact. Hobson's argument has two flaws.

1. Actual Notice

First, Hobson's only evidence that he was actually unaware of the condition is his own testimony (R.E. 18; R. 39-41) and his counsel's argument that he was unaware. Chase/Priority opposed Hobson's contention in County Court briefing, arguing that Hobson took the property with both explicit and constructive knowledge that a reinstatement would cancel the sale. R. 75-76. Chase/Priority satisfied their duty to oppose summary judgment with regard to Hobson's actual knowledge of the contract's reinstatement condition.

2. Constructive Notice

Second, there is a genuine issue of material fact regarding constructive notice based on the Deed of Trust and Hobson's industry experience.

As outlined in Chase/Priority's principal brief, constructive notice is "information or knowledge of a fact imputed by law to a person (although he may not actually have it), because he could have discovered the fact by proper diligence, and his situation was such as to cast upon him the duty of inquiring into it." *Doe ex rel. Brown v. Pontotoc County School Dist.*, 957 So.2d 410, 417 (Miss. Ct. App. 2007) (citing Black's Law Dictionary 1062 (6th ed. 1990)). In Mississippi, every purchaser of real property is charged with notice of every statement of fact made in the various conveyances constituting his chain of title, and he is further charged with the duty to investigate all facts to which his attention may be directed by those conveyances:

> When one seeks to acquire property the law in Mississippi is that. . . [a] purchaser of land is charged with notice not only of every statement of fact made in the various conveyances constituting his chain of title, but he is bound to take notice of and to fully explore and investigate all facts to which his attention may be directed by recitals and conveyances.

Harrell v. Lamar Co., 925 So.2d 870, 876 (Miss. Ct. App. 2005).

The Deed of Trust for the subject property was available to Hobson and any member of the public through the Warren County Chancery Clerk. R.E. 15; R. 29-35. Paragraph 18 of the Deed of Trust provided for the borrower's right to reinstate, and this was a risk about which Hobson was – or should have been – aware.

Hobson, and purchasers like Hobson, should be charged with constructive knowledge of the provisions of a recorded Deed of Trust, including the possibility of a borrower's reinstatement. Chase/Priority urge this Court to clarify the law on this point, applying the real property principles of *Harrell* to the contract law issues involved in a live foreclosure sale. An

oral contract for the sale of land at a foreclosure sale must include the bidder's constructive knowledge of all public records regarding the land.

3. Interpretation of the Deed of Trust

Hobson argues that the Deed of Trust does not give Chase the unfettered discretion to nullify a foreclosure sale (Hobson Brief p. 15), but this is not Chase/Priority's argument. Chase/Priority do not contend that they could have reversed the foreclosure sale for any reason – they contend that they had the right to cancel the sale in the event of the borrower's timely reinstatement, pursuant to Paragraph 18 of the Deed of Trust.

Hobson admits that the Deed of Trust provides constructive notice that a mortgagor has the right under applicable law to prevent a foreclosure sale by curing his or her default. (Hobson Brief p. 15). Yet, Hobson argues that because the sale went forward, he was induced to believe that the borrower had not timely reinstated the loan. *Id.* Whether Hobson had notice of the possibility of reinstatement, and whether he was induced to believe that the borrower had not reinstated, are disputed facts that make summary judgment improper.

4. Hobson's Experience

Hobson's experience as a licensed appraiser, real estate broker, and real estate developer in Warren County for "many years" and his admission that he "regularly" follows foreclosure sales, also goes to the issue of constructive notice. R.E. 18; R. 39-41. He is aware of the possibility – however faint – that a borrower could reinstate her loan right before a foreclosure sale, invalidating the lender/trustee's authority to sell the subject property to a prospective buyer.

These issues of actual and constructive notice should have resulted in a denial of Hobson's Motion for Summary Judgment. This Court should reverse the Circuit Court's affirmance of liability for breach of contract in light of these unresolved fact issues.

C. There is no written contract, so even if the parties formed an oral contract for the sale of land, the terms of the contract are subject to parole evidence, like the receipt evidencing the parties' intent.

Hobson argues that this case involves "an unconditional offer to sell [the subject property] to the highest bidder for cash. . . which offer was accepted by Hobson." (Hobson Brief p. 11). Although Hobson contends that the terms of the contract are crystal-clear, he cannot point to a written contract memorializing those terms – there is no written contract.

The terms of an oral contract are a question of fact to be resolved by a fact-finder. *R.C. Construction Co. v. National Office Sys., Inc.*, 622 So. 2d 1253, 1255 (Miss. 1993) ("The existence of an oral contract is a fact issue.") The lower courts erred in granting and affirming summary judgment in light of the unresolved terms of this alleged oral contract. The lower courts were not in a position to ascertain the intent of the parties in summary judgment proceedings. "The first rule of contract interpretation is to give effect to the intent of the parties." *Herring Gas Co., Inc. v. Pine Belt Gas, Inc.*, 2 So. 3d 636, 639 (Miss. 2009) (internal citations omitted). If a contract is ambiguous, a fact-finder will be tasked with determining the most reasonable interpretation of the contract. *See Royer Homes of Miss., Inc. v. Chandeleur Homes, Inc.*, 857 So. 2d 748, 752 (Miss. 2003) (internal citations omitted).

Hobson argues at length that the receipt could not have been prepared prior to the sale. (Hobson Brief pp. 9-11). Hobson wrongly interprets this to mean that the receipt cannot evidence the intention of the parties. *Id.* To the contrary, parole or extrinsic evidence may be used to ascertain the parties' intent in an ambiguous contract. *Royer Homes of Miss., Inc. v. Chandeleur Homes, Inc.*, 857 So. 2d 748, 752. Chase/Priority do not argue that the receipt constitutes a contract that should have been provided prior to the foreclosure sale. Rather, the receipt is evidence of the parties' intent, providing that the sale could be "withdrawn" upon "re-instatement." R.E. 20; R. 84. The receipt is the sole piece of writing in the Record that reveals

the parties' intent. The other evidence of the parties' intent is the contradictory testimony and contentions of the parties. Even without the receipt, the terms of the contract are not clear, which means that it was improper to grant summary judgment to Hobson.

Hobson criticizes Chase/Priority's analogy to the conditional insurance receipt in *Franklin Life Ins. Co. v. Hamilton*, 335 So. 2d 119 (Miss. 1976). The case is helpful, though, in understanding a conditional contract. The *Franklin* contract was enforceable only if the insured satisfied the conditions required by the insurance company, even though the hopeful insured paid a premium in advance. *Id.* at 122. Similarly, the conditional receipt in this case provided that "[t]he sale will not be considered final until all requirements have been met and may be withdrawn based on a timely re-instatement and/or by an order of the Bankruptcy Court." R.E. 20; R. 84. Even though Hobson tendered payment, the sale was subject to withdrawal, as evidenced by the receipt.

Hobson repeats his argument that Miss. Code Ann. § 13-3-187 leaves no room for conditional foreclosure sales, which he argues defeats the possibility that this contract was conditional. (Hobson Brief p. 13). The statute may mean that, like the *Udall* case Hobson has relied on so extensively, an officer at a foreclosure sale cannot change his mind after the sale about whether the price was sufficient. *Udall v. T.D. Escrow Services, Inc.*, 154 P. 3d 882 (Wash. 2007). But this case is very different than the *Udall* situation.

Chase/Priority did not have the right to convey the subject property, based on the borrower's timely reinstatement. The statute, then, does not support Hobson's argument: "When lands are sold by virtue of any writ of execution or other process, the officer making the sale shall, on payment of the purchase-money, execute to the purchaser a conveyance which shall vest in the purchaser all the right, title and interest which the defendant had in and to such lands, and which, by law, could be sold under such execution or other process." Miss. Code Ann. § 13-

3-187 (emphasis added). Since Chase/Priority did not have the right, title, and interest in the property, this was, in fact, a conditional foreclosure sale. The borrower's timely reinstatement of her mortgage was the type of "procedural irregularity" described in *Udall* that defeats the lender/trustee's authority to sell the subject property.

Hobson argues that he entered an unconditional oral contract for the sale or land, so clear that summary judgment should be affirmed in his favor. Mississippi law, however, does not permit a trial court to make findings of fact in summary judgment proceedings about parties' intent in an oral contract. The parties' differing versions of the terms of this contract, paired with evidence of their intent found in the receipt, mean that Hobson's Motion for Summary Judgment should have been denied. This Court should hold that conditional foreclosure sales are permissible where procedural irregularities – like a borrower's reinstatement – occur.

D. Chase/Priority presented genuine issues of material fact regarding whether the borrower actually reinstated the loan prior to the foreclosure sale.

Hobson also questions the credibility of a key defense of Chase/Priority (Hobson Brief pp. 18-19) – that the borrower reinstated the loan before the foreclosure sale, but that Chase/Priority were unable to communicate the reinstatement to the auctioneer before the sale commenced. Despite Hobson's apparent suspicion of this defense, summary judgment is not about the credibility of evidence, but whether disputed facts exist.

Chase/Priority acknowledge that the exact timing of the reinstatement is unresolved by the Record, but Chase/Priority satisfied their obligation to submit this fact to the lower courts through LaShun Palmer's Affidavit: "[T]he borrower for the subject loan that was in default was provided with reinstatement requirements and she complied with those requirements prior to the foreclosure sale that was cried on March 20, 2008." R.E. 19; R. 81-83 (emphasis added). Chase/Priority maintain, pursuant to LaShun Palmer's Affidavit, that the reinstatement occurred

prior to the foreclosure sale, but that Chase/Priority were unable to communicate this to the auctioneer before the sale. While discovery may help establish a more specific reinstatement time, the unresolved issue of whether reinstatement occurred before the foreclosure sale means that summary judgment was inappropriate. The Circuit Court's Order affirming liability for breach of contract should be reversed and remanded to the Circuit Court.

II. RESPONSE TO CROSS-APPEAL

Although Chase/Priority urge this Court to reverse the liability portion of the Circuit Court's Order, Chase/Priority hereby respond to Hobson's cross-appeal regarding damages, which is only relevant if this Court affirms liability for breach of contract.

Hobson argues that he presented "undisputed, uncontradicted evidence, through appraisal and supporting affidavits [actually just Hobson's own affidavit], that the value of the property on the date of the foreclosure sale was $156,000.00." (Hobson Brief p. 21). The Circuit Court, however, disagreed that the damages were this clear. The Circuit Court was well-within its discretion to disagree.

Sitting in *de novo* review of the County Court's decision, the Circuit Court found that "the issue as to whether or not compensatory and punitive[2] damages existed and if so in what amount presented genuine issues of fact and the Appellants were entitled to have said issues tried in County Court." R. 199. The Circuit Court had the discretion to determine whether genuine issues of fact should have precluded summary judgment as to damages.

There are several reasons why genuine issues of fact exist as to damages. As argued above, there is no written contract in this case. Thus, there is no liquidated damages clause that would make a judicial determination of damages appropriate. Hobson cites *Theobald v. Nosser*,

[2] Chase/Priority agree that the County Court did not grant punitive damages, but attorney's fees based on a similar standard.

752 So. 2d 1036 (Miss. 1999) for the proposition that breach of contract damages should be an expectation interest. *Id.* at 1042. *Theobald* involved a written promissory Note with a specific purchase price of $175,000. *Id.* In contrast, there is no writing evidencing the real value of the alleged contract between Hobson and Chase/Priority.

Moreover, the appraisal (R. 42-53) and Hobson's own calculation of the property value through his Affidavit (R. 39-40) are subject to cross-examination. The absence of discovery in this case inhibited Chase/Priority's ability to attack the propriety of the valuation and to possibly have their expert opine about the value of the property on the date of the sale. The value of a piece of real estate on a particular date – especially whether the property could have actually sold for that amount – is incredibly speculative, and it is inappropriate for summary judgment determination. As argued above, Chase/Priority contend that there was no breach of an alleged contract, so the grant of attorney's fees for the manner in which the contract was allegedly breached is inappropriate. Even if there was a breach – and Chase/Priority again contend that there was no breach - there is no Record evidence that supports a finding of gross negligence in the way the contract was allegedly breached.

Hobson also argues that Chase/Priority somehow waived their right to contest damages in this appeal. (Hobson Brief p. 22). First, the issue of damages was not segregated in the appeal to the Circuit Court, so Hobson's selective excerpting of Circuit Court briefing is not on point. Additionally, it is not just the measure of damages for a breach of contract action that is questionable – it is the value of the property itself that makes such a calculation impossible on summary judgment determination. The Circuit Court's reversal of damages should be affirmed, if it is not moot after this Court makes a liability determination.

CONCLUSION

Chase/Priority satisfied their obligations to oppose Hobson's Motion for Summary Judgment, by presenting genuine issues of material fact. Hobson had actual and constructive notice that the foreclosure sale was conditional. The existence of an oral contract and the terms of such a contract are questions for a jury, and a conditional foreclosure sale is possible if procedural irregularities exist. There are also genuine issues of material fact remaining about whether the reinstatement occurred before the foreclosure sale and the timing of the reinstatement. This Court should reverse the Circuit Court's Order affirming the liability portion of Hobson's Motion for Summary Judgment and remand this case for proceedings in the Circuit Court. Chase/Priority also ask this Court to clarify and instruct the Circuit Court on the applicable contract and property law involved in this case.

If this Court affirms on liability, it should also affirm the Circuit Court's reversal of the damages question. The value of the property is not so clear that a judicial determination of damages was appropriate on summary judgment, and there is no Record evidence to support gross negligence attending the alleged breach. The Circuit Court was acting in its discretion to reverse the issues of damages, and if this issue is reached by this Court, the Circuit Court's decision to remand for a trial on damages should be affirmed.

This 7th day of September, 2011.

Respectfully submitted,

CHASE HOME FINANCE, LLC AND PRIORITY TRUSTEE SERVICES OF MISSISSIPPI, LLC

By Its Attorneys,

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CERTIFICATE OF SERVICE

I, Alicia S. Hall, one of the attorneys of record for the Appellants, hereby certify that I have this day caused to be served, via U.S. Mail, postage prepaid, a true and correct copy of the foregoing instrument, in the manner described below, upon each of the following:

TRIAL COURT JUDGE:

Honorable Isadore W. Patrick
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SO CERTIFIED, this 7th day of September, 2011.

ALICIA S. HALL