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-DEFENDANTS**

VS.

JAMES D. HOBSON, JR. — **APPELLEE-PLAINTIFF**

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

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

ORAL ARGUMENT REQUESTED

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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 disqualification or recusal.

1. Chase Home Finance, L.L.C., Appellant/Defendant;

2. Priority Trustee Services of Mississippi, L.L.C., Appellant/Defendant;

3. C. Lee Lott III and Alicia S. Hall of Baker, Donelson, Bearman, Caldwell & Berkowitz, P.C., counsel of record for Chase Home Finance, L.L.C. and Priority Trustee Services of Mississippi, L.L.C.;

4. Mark H. Tyson of McGlinchey Stafford, PLLC, counsel of record for Chase Home Finance, L.L.C.;

5. James D. Hobson, Jr., Appellee/Plaintiff;

6. Kenneth B. Rector and Allison McDonald Brewer of Wheeless, Shappley, Bailess & Rector, LLP, counsel of record for Respondent/Plaintiff;

7. Honorable Isadore W. Patrick, presiding Circuit Court Judge; and

8. Honorable John S. Price, Jr., presiding County Court Judge.

ALICIA S. HALL

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Other Sources

STATEMENT OF THE ISSUES

The general issue presented is whether the Circuit Court erred in affirming the grant of the Plaintiff's Motion for Summary Judgment as to liability for breach of contract. The specific issues presented are:

1. IF A BORROWER REINSTATES A DEED OF TRUST SHORTLY BEFORE A FORECLOSURE SALE, IS THE SALE ABSOLUTE, EVEN THOUGH THE PROSPECTIVE BUYER IS CHARGED WITH CONSTRUCTIVE NOTICE OF ALL TITLE ISSUES?

2. DOES A LIVE FORECLOSURE AUCTION ENCOMPASS A VALID "OFFER" AND "ACCEPTANCE" SUCH THAT AN ORAL CONTRACT FOR THE SALE OF LAND IS FORMED, EVEN IF A RECEIPT IS PROVIDED TO A BIDDER EVIDENCING THE INTENT OF THE PARTIES REGARDING THE RISK OF REINSTATEMENT BY A BORROWER?

STATEMENT OF THE CASE

A. Nature of the Case

This is an interlocutory appeal from The Honorable Isadore W. Patrick's Order affirming the Plaintiff's Motion for Summary Judgment as to liability. R.E. 2; R. 199-200.[1] The underlying suit is a breach of contract action arising out of a public foreclosure sale that occurred on March 20, 2008, at the Warren County, Mississippi courthouse. R.E. 5; R. 5-8. James D. Hobson, Jr. ("Hobson") appeared at the foreclosure sale and offered the highest cash bid for the subject property, tendering a cashier's check for $60,948.82 to the agent hired to conduct the foreclosure sale. *Id.*; R.E. 20; R. 84. Shortly thereafter, Chase Home Finance, L.L.C. ("Chase"), Priority Trustee Services of Mississippi, L.L.C. ("Priority"), (collectively "Chase/Priority") and/or their agents, returned Hobson's check to him. R.E. 5, 10; R. 7, ¶ 8, 89, ¶ 5. The borrower under the Deed of Trust, Deborah Hood Quimby ("Quimby"), (R.E. 16; R. 29-35) reinstated her loan shortly before the foreclosure sale, voiding the sale. R.E. 10; R. 88.

Hobson complained that the contract could not be voided, and he moved for summary judgment based on the bona fide purchaser doctrine and his contention that the parties entered a valid and binding contract. R.E. 8; R. 60. The primary issue on appeal is whether the lower court should have granted summary judgment to Hobson based on the evidence before it. The Circuit Court's Order does not explain its rationale for affirming the decision of the County Court as to liability for breach of contract. The Order simply finds "(1) that a contract between the Appellee and Appellants did exist and (2) that the Appellants [Chase/Priority] had breached said contract." R.E. 2; R. 199.

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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].

The Courts below have erroneously applied the law to the unique set of facts involved in this case. Triable issues of fact remain disputed, and in spite of these disputes, the Circuit Court affirmed summary judgment in favor of Hobson. This Court's review of the Circuit Court's Order, via interlocutory appeal, provides the opportunity to rectify the flawed legal basis for summary judgment.

B. Course of the Proceedings and Disposition in the Courts Below

Hobson filed a Complaint in the County Court of Warren County on April 24, 2008, claiming breach of contract, and claiming that the breach was so tortious that it entitled Hobson to punitive damages. R.E. 5; R. 5-8. Petitioners filed separate Answers denying the allegations (R. 12-24), and before any discovery was conducted, Hobson filed a Motion for Summary Judgment on September 12, 2008. R.E. 6-8; R. 25-65. Priority removed the case to federal court on September 24, 2008 (R. 66), and it was remanded to state court on August 31, 2009. R. 72. No discovery was conducted while the issue of remand was being decided. Chase/Priority opposed Hobson's Motion for Summary Judgment in briefing on September 9, 2009. R.E. 9-11; R. 73-100.

Hobson's Motion for Summary Judgment set forth his "Itemization of Facts Relied Upon and Not Genuinely Disputed." R.E. 7; R. 54-56. These allegedly undisputed facts included:

- the fact that Quimby executed a Deed of Trust, and the details therein;
- the fact that the Deed of Trust was assigned to Chase Home Finance, L.L.C.;
- the fact that Quimby defaulted in paying the loan secured by the Deed of Trust;
- the fact that Chase substituted Priority as its Trustee in the land records, authorizing and directing Priority to exercise the power of sale contained in the Deed of Trust by conducting a public foreclosure sale of the subject property;
- the fact that the Substitute Trustee's Notice of Sale was advertised in The Vicksburg Post with an indication of the date, time and terms of the foreclosure sale;

- the fact that Hobson personally appeared at the foreclosure sale and made the highest cash bid for the property;
- the fact that Hobson delivered a Regions Bank cashier's check for $60,948.82, which was accepted by Chase/Priority and/or their agent;
- the fact that Chase/Priority did not tender a trustee's deed to Hobson;
- the fact that Chase/Priority did not deliver possession of the subject property to Hobson; and
- the fact that Chase/Priority and/or their agent returned the cashier's check to Hobson no more than two weeks after the sale, with a letter explaining that Quimby had cured her default prior to the foreclosure sale.

R.E. 7; R. 54-56.

In support of these factual contentions, Hobson attached the following documentation to his Motion for Summary Judgment:

- the Deed of Trust, R.E. 15; R. 29-35;
- the Assignment of the Deed of Trust, R.E. 16; R. 36;
- the Substitution of Trustee, R.E. 17; R. 37-38; and
- the Affidavit of James D. Hobson, R.E. 18; R. 39-41.

Noticeably absent from Hobson's supporting documentation are the following:

- the Notice of Sale from The Vicksburg Post;
- a written contract for the purchase of the subject property (because such a contract does not exist); and
- the letter sent to Hobson by Chase/Priority, returning the check.

Although the Notice of Sale and the letter are referenced as Exhibits to Hobson's Affidavit, they are absent from the record, and the only significance that should be imputed to them on appeal is the importance of their absence. The Circuit Court did not have these documents available to it in determining whether summary judgment was appropriately granted. In fact, there is no proof that they were ever filed.

In response to Hobson's Motion for Summary Judgment, Chase/Priority filed their own "Material Facts as to Which No Genuine Issue Remains to be Tried." R.E. 10; R. 88-90. The following facts differ from Hobson's statement of the facts, and they establish disputed issues of material fact:

- "Prior to the foreclosure sale of the property, Ms. Quimby complied with all reinstatement requirements that were conveyed to her." R. 88;
- "After the crying of the foreclosure, Plaintiff was given a receipt." R. 89;
- "Th[e] terms of the receipt specifically reserve the ability to void the sale based on a timely reinstatement." R. 89; and
- "Plaintiff's tender was returned to him pursuant to the receipt." R. 89.

Chase/Priority provided the following documentation to refute Hobson's contention that no issues of material fact existed:

- the Affidavit of LaShun Palmer, Reinstatement/Payoff Representative, R.E. 19; R. 81-83; and
- the Receipt, stating that the law firm and/or its agent received a cashier's or official bank check in the amount of $60,948.82 from Hobson, and which contained the following language: "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).

By "Supplemental Opinion" on November 10, 2009, the County Court granted Summary Judgment to Hobson, providing attorney's fees based on gross negligence. R.E. 4; R. 105. The County Court entered a more detailed Judgment on December 1, 2009, finding that Hobson was entitled to (1) summary judgment based on undisputed material facts, (2) compensation reflecting the difference between the appraisal value of the property and the amount attempted to be paid by the Plaintiff, (3) prejudgment interest from the date of the foreclosure sale, and (4) attorney's fees based on a finding that the "Defendants' breach was grossly negligent and

therefore amounted to an independent tort." R.E. 3; R. 108-09. The total County Court judgment was $105,919.78. *Id.*

On December 7, 2009, Petitioners retained the undersigned counsel to prosecute an appeal. R. 106. Petitioners timely appealed the County Court decision to the Circuit Court of Warren County, in accordance with section 11-51-79 of the Mississippi Code. R. 112-113.

Following briefing, oral argument, and correction of certain clerical errors in the initial versions of the Order, the Circuit Court issued its Order affirming the liability portion of the County Court's decision. R.E. 2; R. 199-200. The Circuit Court affirmed the County Court decision that there was a contract between the parties, and that Chase/Priority breached that contract. *Id.* The Circuit Court reversed the decision as to damages, however, leaving damages to a jury. *Id.* Accordingly, Chase/Priority do not include any argument regarding damages in this brief, although they anticipate response to this issue on Cross-Appeal.

The current disposition of this case is that a jury trial will go forward with liability for breach of contract judicially predetermined. The liability issue will have been judicially predetermined in spite of fact issues regarding (1) Hobson's notice that the property could be reinstated, (2) the validity of an oral contract between the parties, and (3) presuming a valid contract is found, the terms of the contract.

C. Statement of the Facts

Deborah Hood Quimby a/k/a Deborah Hood Weatherford ("Quimby") executed a Deed of Trust in 1996 for property in Warren County, Mississippi. R.E. 15; R. 29-35. The property was assigned to Chase, and Chase appointed Priority as Substitute Trustee. R.E. 16-17; R. 36-38. Priority was authorized to exercise the power of sale contained in the Deed of Trust by conducting a public foreclosure sale on behalf of Chase. *Id.*

Quimby's delinquent mortgage payments led to the property being scheduled for a foreclosure sale in 2008. R.E. 19; R. 82. The property was offered for sale on March 20, 2008 at the Warren County Courthouse. *Id.* Hobson appeared at the foreclosure sale and offered the highest cash bid, which was $60,948.82, and he tendered a cashier's check for this amount. R.E. 20; R. 84. Hobson was provided with a receipt that stated: "[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." *Id.* The parties dispute whether the receipt was provided at the foreclosure sale, or several days after the sale. *See* Affidavit of LaShun Palmer, R.E. 19; R. 82 ("*after* the sale, a receipt was given"); Brief of Appellees to Circuit Court, R.E. 13; R. 152 ("'receipt,' which was issued to Hobson ***several days after*** the conclusion of the foreclosure sale and payment of the purchase price.") (emphasis in original, although there is no record evidence that supports this "several days" timeline).

Unbeknownst to the agent that cried the foreclosure sale or to Hobson, Quimby reinstated her loan shortly before the foreclosure sale. R.E. 19; R. 82. While an agent of Chase/Priority took reasonable steps to cancel the crying of the foreclosure sale, the agent's communication was unsuccessful and the sale was cried. *Id.* No more than two weeks later, Chase/Priority returned Hobson's check to him and refused to deliver a Deed of Trust or possession of the property, as it was no long Chase/Priority's property to convey. R.E. 10; R. 89.

REQUEST FOR ORAL ARGUMENT

Chase/Priority respectfully request oral argument. While application of the law to this case should be relatively straightforward – Hobson was required to show that no genuine issues of material fact existed, and he failed to do so – oral argument may be helpful in resolving the issues of whether a foreclosure sale purchaser is charged with notice of possible rescission based on a borrower's right to reinstate, and whether an oral contract for the sale of land constitutes a binding contract, even where a writing evidences contrary intent of the parties. These issues are vitally important at a time when foreclosure sales are, unfortunately, frequent. Borrowers, lenders, trustees, and prospective foreclosure sale purchasers will benefit from this Court's clear guidance and comprehensive examination of these issues.

SUMMARY OF THE ARGUMENT

Mississippi does not have clear case precedent addressing the rare situation of a last-minute reinstatement by a borrower prior to a live foreclosure auction, where the reinstatement is not communicated to the prospective purchaser before a bid is accepted. Hobson even believes that this case presents "an issue of first impression in Mississippi." R.E. 8; R. 60. Indeed, Hobson relied almost exclusively on another jurisdiction's case law throughout briefing: *Udall v. T.D. Escrow Services, Inc.*, 154 P.3d 882, 912 (Wash. 2007). Reliance on Washington's jurisprudence is unnecessary. Mississippi contract law and property law are dispositive, and need only be clarified under this set of circumstances.

Both the County Court and Circuit Court misunderstood how contract law applies to this case. It seems that the courts attempted to apply traditional contract principles without giving deference to the fact that real property was an element of this alleged transaction. As real property is detailed in public records, a claimant is charged with notice of title issues and defects. Moreover, even under traditional contract principles, the courts misapprehended important rules of contract law regarding the intent of the parties, ignoring the single piece of writing that evidenced intent as to reinstatement.

This interlocutory appeal provides this Court with the opportunity to specifically charge a foreclosure sale purchaser with notice of public records, and the conditions and terms in those public records. This appeal also provides this Court with a unique set of facts, under which traditional principles of contract interpretation must still be upheld. Finally, this appeal should serve as clarification for our State's trial courts about the nature of material facts in a case such as this, and a reminder that where disputed issues of material fact exist, summary judgment is not allowed.

ARGUMENT

A. Summary judgment is inappropriate when genuine issues of material fact regarding notice and contract formation remain.

A grant of summary judgment is subject to *de novo* review by the appellate court. *See Albert v. Scott's Truck Plaza, Inc.*, 978 So. 2d 1264, 1266 (Miss. 2008) (citing *Green v. Allendale Planting Co.*, 954 So. 2d 1032, 1037 (Miss. 2007); *Hurdle v. Holloway*, 848 So. 2d 183, 185 (Miss. 2003)). When conducting its analysis, this Court will view all evidence in the light most favorable to the non-moving party. *See Miller v. Meeks*, 762 So. 2d 302, 304 (Miss. 2000). If there are indeed triable issues of fact, a trial court's summary judgment order will be reversed. *Id.* In determining whether the lower court's entry of summary judgment was appropriate, this Court should make its own determinations on the motion, "separate and apart from that of the trial court." *Matthews v. Horseshoe Casino*, 919 So. 2d 278, 280 (Miss. Ct. App. 2005). If "the undisputed facts can support more than one interpretation, the Court will not hesitate to reverse and remand for a trial on the merits." *Canizaro v. Mobile Communications Corp. of America*, 655 So. 2d 25, 28-29 (Miss. 1995).

The standard for summary judgment is well established. Pursuant to Rule 56 of the Mississippi Rules of Civil Procedure, summary judgment should only be entered in cases where "the pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits, if any, show that there is no genuine issue of material fact . . ." Miss. R. Civ. P. 56(c). "[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." *Id.* at Rule 56, cmt. Consequently, the movant carries the burden of establishing that no genuine issue of material fact exists. *Miller v. Meeks*, 762 So. 2d at 304.

Issues of fact sufficient to require a denial of a motion for summary judgment "are obviously present where one party swears to one version of the matter in issue and another says the opposite." *Miller v. Meeks,* 762 So. 2d at 304. According to this Court,

> [a]n issue of fact may be present where there is more than one reasonable interpretation of undisputed testimony, where materially different but reasonable inferences may be drawn from uncontradicted evidentiary facts, or when the purported establishment of the facts has been sufficiently incomplete or inadequate that the trial judge cannot say with reasonable confidence that the full facts of the matter have been disclosed.

Id. at 304-05.

The party opposing summary judgment need only "establish a genuine issue of material fact by the means available under the rule." *Matthews v. Horseshoe Casino*, 919 So. 2d 278, 280 (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)). The existence of a genuine issue of material fact precludes summary judgment. *Massey v. Tingle,* 867 So.2d 235, 238 (Miss. 2004). The trial court must give the non-movant "the benefit of the doubt." *McCullough v. Cook*, 679 So. 2d 627, 630 (Miss. 1996).

Finally, where evidence is "not made known to the trial court for its decision on summary judgment, it should not be considered on *de novo* review of the trial court's decision on summary judgment." *U.S. Fidelity and Guar. Co. of Miss. v. Martin*, 998 So. 2d 956, 961 (Miss. 2008) (citing *Mitchell v. Nelson,* 830 So. 2d 635, 640 (Miss. 2002)). Disputed issues of material fact are apparent when the record of this appeal is considered alone.

Summary judgment in favor of Hobson, especially without discovery that might have resolved some of the disputed issues of fact, was inappropriate. Disputed questions of fact include: (1) whether Hobson had constructive notice that the property could be reinstated, (2)

whether a contract existed, and (3) if a valid contract existed, what the terms of that contract were.

This Court should not hesitate to reverse the lower courts' findings that no genuine issue of material fact existed. Chase/Priority submitted evidence, through Affidavit (R.E. 19; R. 81-83) and a receipt from the subject transaction (R.E. 20; R. 84), that refuted Hobson's "Facts Relied Upon and Not Genuine Disputed." The Circuit court did not give Chase/Priority the benefit of the doubt to which they were entitled, and the Circuit Court's Order should be reversed.

B. Foreclosure sales are not absolute sales, especially where a purchaser has constructive notice that the sale may be voided by a borrower's last-minute reinstatement.

This case calls for application not only of contract law, but also real property law. One cannot claim to be a bona fide purchaser, having no notice of an adverse claim, when public land records and industry knowledge prove otherwise. Moreover, foreclosure sales can be conditioned on a procedural irregularity, like a borrower's reinstatement.

1. Hobson is not a bona fide purchaser because he had constructive notice of Quimby's right to reinstate.

Hobson has consistently argued that he is a bona fide purchaser. *See* Complaint, R.E. 5, ¶ 9; R. 7 ("Plaintiff is a bona fide purchaser for value without notice of any alleged cure of default."); Plaintiff's Memorandum in Support of Summary Judgment, R.E. 8, R. 60 ("Plaintiff is a bona fide purchaser. . . ").

Under Mississippi law, "a purchaser in good faith for a valuable consideration and without notice of the prior adverse claims is protected against certain suits brought by the holders of such claims." *West Center Apartments Ltd. v. Keyes*, 371 So.2d 854, 856 (Miss. 1979). The essential elements of the bona fide purchaser rule are: (1) valuable consideration, (2) the absence of notice, and (3) the presence of good faith. *Id.*

It is questionable whether this doctrine even applies to this case, as the only holder of a "prior adverse claim" is Quimby, and Quimby is not asserting a claim against Hobson. Nevertheless, because Hobson relied on the bona fide purchaser doctrine so extensively, Chase/Priority will presume the doctrine applies for argument's sake. Under the doctrine, Hobson fails to satisfy the second element of the rule, having failed to prove the absence of notice.

Generally, "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 in this case was recorded with the Warren County Chancery Clerk in 1996, available for Hobson's or any member of the public's examination. R.E. 15; R. 29-35. Paragraph 18 provides – in bold letters – a provision for the "Borrower's Right to Reinstate." R. 31. Under this provision, the Borrower is entitled to reinstate the loan by paying all sums necessary to cure a default. *Id.* A prospective purchaser should not be able to claim sole reliance on the terms of a newspaper notice of sale (that is absent from this record), when comprehensive

details about the title to the property are public record. Hobson, and purchasers like Hobson, should be charged with constructive knowledge of the provisions of a recorded Deed of Trust.

Moreover, Hobson has been a licensed appraiser, real estate broker, and real estate developer in Warren County for "many years" and he "regularly" follows foreclosure sales, so he is familiar not only with the meaning of the reinstatement provision in the Deed of Trust, but also with the possibility that borrowers may reinstate their loans prior to foreclosure sales. R.E. 18; R. 39-41.

Hobson argued in past briefing that Petitioners raised the issue of constructive notice for the first time on appeal. This is untrue. In responding to summary judgment in County Court, Petitioners noted that "Plaintiff took the Property with the constructive knowledge that the debt could be reinstated and the foreclosure sale would not be valid." R.E. 9; R. 76. Constructive notice involves the presumption that buyers are apprised of the contents of public land records, and the stronger presumption that a sophisticated buyer knows that a borrower may reinstate at the eleventh hour. Thus, a live foreclosure auction is not absolute in the sense that a borrower maintains the right to reinstate until the moment the auctioneer cries the sale.

2. Foreclosure sales are conditional when procedural irregularities void the sale.

In his brief to the Circuit Court, Hobson argued that Miss. Code Ann. § 13-3-187 "does not leave room for conditional foreclosure sales." R.E. 13; R. 154. The statute, when read in its entirety, only applies to a seller that has right, title and interest, in a piece of property: "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). Chase/Priority did not have the right to convey the subject property at the foreclosure sale, because Quimby reinstated under the Deed of Trust.

Hobson has relied heavily upon non-binding authority throughout this case: *Udall v. T.D. Escrow Services, Inc.*, 154 P. 3d 882 (Wash. 2007). *See, e.g.* R.E. 8; R. 58-65; R.E. 13; R. 154-55. Hobson contends that *Udall* supports his contentions that there can be no conditional foreclosure sale, and that when the auctioneer lowers his hammer and announces the property as "sold," the purchase is irrevocable. However, *Udall*'s holding is not this broaad, and its facts are distinguishable.

Like Hobson, William Udall purchased property at a foreclosure sale, and Udall was given a receipt, but not the deed of trust. *Id.* at 906. Unlike Hobson's case, the *Udall* defendant attempted to renege the sale when it discovered that the auctioneer had opened bidding $100,000 lower than the defendant had authorized. *Id.* It was the auctioneer's error in price – not an error in whether the property was actually available for sale – that induced the Udall defendant to refuse to tender the deed of trust. *Id.*

Hobson directed the lower courts to selective language from *Udall*, such as "delivery of the deed to the purchaser is a ministerial act, symbolizing conveyance of property rights to the purchaser." *Id.* at 911. *See* Hobson's Memorandum in Support of Motion for Summary Judgment, R.E. 8, R. 61. Yet, Hobson ignores the key exception outlined by the *Udall* court.

A trustee must deliver the deed of trust to a purchaser following a foreclosure sale "absent a procedural irregularity that voids the sale." *Udall v. T.D. Escrow Services, Inc.*, 154 P. 3d 882, 906 (emphasis added). And again, "[t]he trustee cannot withhold delivery unless the sale itself was void due to a procedural irregularity that defeated the trustee's authority to sell the property." *Id.* at 911 (emphasis added). "Examples of procedural irregularities that void a nonjudicial foreclosure sale include the borrower's presale bankruptcy filing." *Id.* The automatic

stay imposed by a bankruptcy filing voids a creditor's actions that violate that stay, "and a pending action on the obligation secured by the deed of trust." *Id* (internal citations omitted).

Quimby's timely reinstatement of her mortgage was a procedural irregularity that defeated Chase/Priority's authority to sell the subject property. The automatic stay imposed by a bankruptcy filing in many ways mirrors Quimby's eleventh hour reinstatement of her mortgage. A bankruptcy filing could theoretically be made shortly before a foreclosure sale, but without sufficient time to notify creditors. Similarly, a mortgage can theoretically be (and in this case, was) reinstated by a borrower under the Deed of Trust shortly before a foreclosure sale, but leaving insufficient time to notify the auctioneer of the reinstatement. Hobson's receipt even contemplates "timely re-instatement" and "an order of the Bankruptcy Court" as the two procedural irregularities that might void the sale. R.E. 20; R. 84.

The case for reinstatement, however, is even stronger than the automatic stay that accompanies a bankruptcy filing. A creditor's action taken in violation of an automatic stay (i.e. proceeding with a foreclosure sale of property that just came into a bankruptcy estate) "are not void, but rather they are merely voidable, because the bankruptcy court has the power to annul the automatic stay." *In re Jones*, 63 F.3d 411, 412 (5th Cir. 1995).

In contrast, a borrower whose Deed of Trust contains a "Right to Reinstate" clause, as did Quimby's, has the right to reinstate her mortgage loan until the last possible moment, voiding the lender's right to conduct a foreclosure sale. If the lender and/or trustee do not have the right to conduct the foreclosure sale, they cannot convey the property to a third party. Especially where a third party has notice of the risk of reinstatement, because the risk is recorded in public land records, actual reinstatement is a procedural irregularity that renders the sale void.

Finally, Hobson has questioned whether Quimby actually satisfied all conditions to reinstate her loan. Tr. 43 ("there's nothing in the record other than that very non-specific

affidavit [of LaShun Palmer] that even proves or even p[u]rports to prove that she complied, that Ms. Quimby complied with the statute of deceleration. . . says you've got to pay all the cost. . . we don't even know whether she did that or not. . . They just say that. . . the property was redeemed. We don't know whether that's true or not.")

Chase/Priority disagree and maintain that Quimby reinstated her loan prior to the foreclosure sale. Regardless, this is a genuine issue of material fact that prohibits summary judgment. Paired with the issue of Hobson's constructive notice, the Circuit Court's Order affirming liability for breach of contract should be reversed.

C. Even if the parties formed a valid, oral contract for the sale of land, the terms of the contract are genuine issues of material fact.

Hobson alleges in his Complaint that the parties formed a contract at the foreclosure sale on March 20, 2008. R.E. 5; R. 5-8. Yet, Hobson has never identified a written contract. He is alleging an oral contract for the sale of land.[2] 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 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 jury will be tasked with determining the most reasonable

[2] Although the Statute of Frauds would ordinarily apply, this issue/defense is not presently before this Court because it was not initially pleaded in Chase/Priority's Answers. Chase/Priority note, however, their disagreement with Hobson's sweeping use of *Canizaro v. Mobile Communications Corp. of America*, 655 So.2d 25, 30 (Miss. 1995), in prior briefing on this point. The *Canizaro* Court held that the statute of frauds defense could be waived on two grounds, and at least one of those grounds is distinguishable from the instant case. First, *Canizaro* held that "[i]n transactions governed by the Mississippi Uniform Commercial Code, the Statute of Frauds does not preclude a waiver of rights" *Id.* (citing *Miss. Code Ann.* § 75-2-209(4) (1972)). This appeal is not governed by the U.C.C., and this portion of *Canizaro* is inapplicable. Second, the *Canizaro* Court held that a party could waive the statute of frauds by failing to raise the defense in its answer to a complaint. *Canizaro*, 655 So. 2d 25, 30 (citing Miss.R.Civ.P. 8(c)). As a practical matter, Chase/Priority should be permitted liberal amendment of their answer if this case is remanded to the trial court. However, Chase/Priority concede that this matter is not properly before this Court right now.

interpretation of the contract. *Royer Homes of Miss., Inc. v. Chandeleur Homes, Inc.*, 857 So. 2d 748, 752 (Miss. 2003) (internal citations omitted). Parole or extrinsic evidence (such as a receipt) may be used to ascertain the parties' intent. *Id.*

This Court has identified helpful factors for determining whether contracting parties intended to be bound by an informal agreement prior to the execution of a contemplated formal writing. *WRH Properties, Inc. v. Estate of Johnson*, 759 So. 2d 394, 397 (Miss. 2000). This question of intent is "determined by the surrounding facts and circumstances of each particular case." *Id.* The factors that may determine intent include: "(1) whether the contract is usually one put in writing; (2) whether there are few or many details; (3) whether the amount involved is large or small; (4) whether it requires a formal writing for a full expression of the covenants and promises; and (5) whether the negotiations themselves indicate that a written draft is contemplated as the final conclusion of the negotiations." *Id.* (citing *Mid-Continent Tel. Corp. v. Home Tel. Co.*, 319 F. Supp. 1176, 1189 (N.D. Miss. 1970); 17A Am. Jur. 2d *Contracts* § 39 (1991)).

The alleged contract between Hobson and Chase/Priority is one that is almost always put in writing – the sale of land. There are substantial details involved in the proper conveyance of a piece of real estate, and the purchase price was significant – over $60,000.00. The Deed of Trust would have to be conveyed to Hobson for full execution of the contract, as Hobson surely knew that a written conveyance would be required to conclude the transaction.

Hobson appears to be somewhat confused in identifying the "offer" and "acceptance" in this alleged oral contract. Hobson labeled the notice of sale as an "offer," while also deeming his bid at the foreclosure sale an "offer." R.E. 5; R. 6. Hobson labels Chase/Priority's actions as the "acceptance" that created the alleged contract. R.E. 5; R. 7. This Court is being called upon to

determine whether, absent any written contract, a valid offer and acceptance transpired at any point in the parties' dealings.

No contract was formed, and thus, no breach occurred. The receipt (R.E. 20; R. 84) contained a condition of acceptance that was not satisfied: "The sale will not be considered final until all requirements have been met and may be withdrawn based on a timely re-instatement." *Id.* 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. No written contract exists, and the receipt is the sole piece of writing in this record, revealing the parties' intent.

This intent is a question of fact for a jury, not a question of law that should have been decided in summary judgment. A reasonable fact-finder could find that the receipt's reinstatement provision evidences the intent of the parties to accept the risk of reinstatement and the contract-voiding consequences of the same.

Conditional receipts have also been examined by this Court in the life insurance context. *See Franklin Life Ins. Co. v. Hamilton*, 335 So. 2d 119 (Miss. 1976). Where the terms of a conditional receipt were clear and unambiguous, the conditions of the conditional receipt were not fulfilled, a policy was never issued, and the insurance company returned the first monthly premium back to the prospective insured approximately two months after its conditional acceptance of that premium, a contract for life insurance was never formed. *Id.* at 122 (citing *Life & Casualty Insurance Co. v. Harvison*, 187 So. 2d 847 (Miss. 1966)). The *Franklin* case involved facts and issues so clear that this Court reversed and rendered judgment in favor of the insurance company. *Franklin Life Ins. Co. v. Hamilton*, 335 So. 2d 119, 122.

Similarly, the conditional receipt in this case has a clear and unambiguous term regarding reinstatement: "[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. Chase/Priority contend that Quimby timely reinstated her loan, triggering the condition of the receipt. R.E. 10; R. 88, ¶ 2. It is undisputed that Chase/Priority never transferred the Deed of Trust to Hobson. R.E. 7, ¶ 6; R. 55. Moreover, Hobson acknowledges that Chase/Priority "returned the Regions check to plaintiff by letter dated March 31, 2008 which was received by the plaintiff on April 3, 2008," with said letter indicating that Quimby had cured her default and reinstated her loan prior to the foreclosure sale. R.E. 7, ¶ 6, R. 55-56. Hobson's check was returned to him within two weeks, significantly less than the two months at issue in *Franklin*.

Unlike *Franklin*, there appears to be a fact issue regarding whether Quimby properly reinstated in accordance with the conditional receipt. Chase/Priority explicitly presented this issue to the County Court in their "Statement of Material Facts," contending that "[p]rior to the foreclosure sale of the property, Ms. Quimby complied with all reinstatement requirements that were conveyed to her." R.E. 10, ¶ 2; R. 88. Hobson may doubt the reinstatement, but there is no record evidence to the contrary. Summary judgment was inappropriate in the face of doubt regarding a valid contract and the intent-revealing reinstatement provision of the conditional receipt.

CONCLUSION

Chase/Priority respectfully ask that this reverse the Circuit Court's affirmance of summary judgment for Hobson, as to breach of contract liability. A foreclosure sale should not be absolute when constructive knowledge is imputed to the prospective purchaser. Purchasers are responsible for title information contained in public records, and this should especially apply to sophisticated purchasers. There was no contract for the sale of land because the reinstatement condition of the receipt voided the contract. Even if there was a contract, the existence of an oral contract and the terms of such a contract are questions for a jury. 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.

This 27th day of June, 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
Warren County Circuit Court
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SO CERTIFIED, this 27th day of June, 2011.

ALICIA S. HALL