

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

LOIS ARNOLD,

Appellee, Plaintiff Below

v.

DAVID G. PALMER, Trustee, CHRISTINA
J. PALMER, Trustee, ADVANTAGE BANK,
an Ohio Corporation, and JEFFREY SCOTT
ARNOLD, Executor of the Last Will and
Testament of Jeffrey A. Arnold, Deceased,

Defendants.

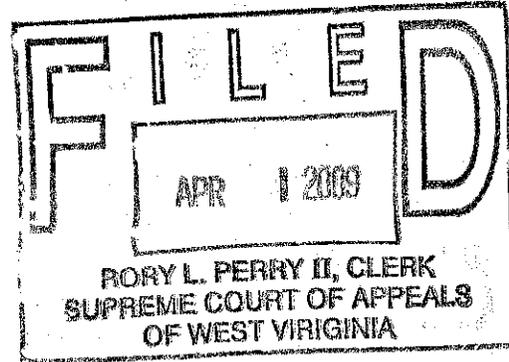
ADVANTAGE BANK,

Appellant, Defendant and Third-Party Plaintiff Below,

v.

JEFFREY SCOTT ARNOLD, Individually,
SAMANTHA NICOLE FOGGIN,
MELISSA ANN DAILEY, and KELLI BETH
ARNOLD, Beneficiaries of the Estate of Jeffrey
A. Arnold, Deceased,

Third-Party Defendants.



Appeal No. 082315

BRIEF OF APPELLANT

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I. INTRODUCTION

Now comes the Appellant, Advantage Bank, and submits this *Brief of Appellant* seeking relief from the Honorable J.D. Beane's Order of August 18, 2008 denying Appellant's Motion for Summary Judgment. Appellant respectfully requests relief from this Order, which wrongfully precluded Appellant's Trustee from foreclosing on Appellant's Deed of Trust. Appellant avers this ruling is in conflict with 1) W.Va. Code § 44-2-28; 2) the foundational tenants of West Virginia real property law; and 3) the terms and conditions of the subject Deed of Trust. The circuit court's Order, if left to stand, will force lenders to require both joint-tenant spouses to assume personal liability on the debt when one spouse seeks credit secured by their jointly held property, though such practice is explicitly barred by federal banking regulation 12 CFR § 202.7.

II. KIND OF PROCEEDING AND THE NATURE OF THE RULING BELOW

On November 13, 2007, the Appellee-Plaintiff, Lois Arnold ("Appellee"), filed her *Complaint for Injunctive Relief* against three Defendants: Appellant, its Trustee and the Executor of her late husband's Estate ("the Estate"). Therein, Appellee sought a temporary and permanent injunctive order 1) precluding Appellant's Trustees from foreclosing on Appellant's Deed of Trust and 2) compelling the Estate to satisfy any remaining obligations under the Deed of Trust such that Appellee "may be secure and unmolested in the use, possession and ownership of the real estate involved herein." (Complaint, P. 11).

Appellant filed its *Answer to Complaint for Injunctive Relief* and iterated claims against any distributions made by the Estate, pursuant to W.Va. Code § 44-2-26 and 44-2-27, via *Counterclaim, Cross-Claim and Third-Party Complaint*.

No discovery was conducted by any party, as there appeared to be no disagreement regarding the facts set forth in the *Complaint for Injunctive Relief*. Accordingly, Appellant filed its *Motion for Summary Judgment* on March 28, 2008.

Counsel for the Estate filed a *Response to Motion for Summary Judgment*. Counsel for Appellee did not respond.

The circuit court heard Appellant's *Motion for Summary Judgment* on April 17, 2008.

On August 18, 2008, approximately four (4) months after Appellant's *Motion for Summary Judgment* was heard, the circuit court entered an *Order* denying Appellant's *Motion for Summary Judgment*. It is from this Order that Appellant seeks redress.

III. STATEMENT OF THE FACTS

Appellee is the fee simple owner of residential real property located in the District of Clay, Wood County, West Virginia. Appellee's ownership arises by virtue of a Deed bearing date November 3, 1998 from Jeffrey A. Arnold and Lois Lynn Arnold, husband and wife, to the same as joint tenants with right of survivorship. (Complaint, P. 2 ¶ III).

On November 5, 2003, Appellee and her husband, Jeffrey A. Arnold ("Decedent"), executed a purchase money Deed of Trust in favor of Debora K. Martin Lee, Appellant's then Trustee. This Deed of Trust secured the real property at issue as collateral for the repayment of a Promissory Note in the original principal sum of \$128,000.00. (Complaint, P. 3 ¶ III). The Note was executed solely by Jeffrey A. Arnold. (Complaint, P. 4 ¶ VI).

On January 20, 2007, Jeffrey A. Arnold died testate in Wood County, West Virginia. Pursuant to right of survivorship in the real property at issue, title thereto vested in Appellee immediately upon the death of Mr. Arnold. (Complaint, P. 4 ¶ VI). The Last Will and Testament of Jeffrey A. Arnold directed the Executor named therein to pay his just debts as soon as practicable. (Complaint, P. 5 ¶ X).

The Estate of Jeffrey A. Arnold was referred to Gerald R. Townsend, Fiduciary Commissioner. The Fiduciary Commissioner published notice to the Estate's creditors and established June 9, 2007 as the last date upon which claims against the estate may be filed. (Complaint, P. 3 ¶ XII). Appellant, as a fully secured creditor, did not file a claim against the Estate. (Complaint, P. 8 ¶ XIII).

The Estate defaulted on the subject loan. (Complaint, P. 5 ¶ X). Accordingly, Appellant sought to foreclose on the subject Deed of Trust¹. (Complaint, P. 8 ¶ XVI). Thereafter, counsel for Appellee demanded that Appellants's Trustees cease and desist all foreclosure activities. (Complaint, P. 9 ¶ XVI).

Appellee filed her Complaint for Injunctive Relief alleging that Appellant should be enjoined from foreclosure because "when, as here, the creditor is estopped from enforcing the obligation secured by a promissory note, it is likewise precluded by operation of law from enforcing the lien of the deed of trust." (Complaint, P. 8 ¶ XV).

Appellant then filed its Motion for Summary Judgment seeking affirmation of its right to foreclose. Counsel for Appellee did not respond thereto. Counsel for the Estate filed a Response generally disagreeing with Appellant's averments of law. (Response to Defendant Advantage Bank's Motion for Summary Judgment, P.7 ¶ 2).

The circuit court's Order of August 18, 2008 denied Appellant's Motion for Summary Judgment. In its Order, the circuit court stated the issue before it was "whether or not the Trustees may foreclose on the subject Deed of Trust when the Plaintiff is the sole owner of the property pursuant to operation of the right of survivorship clause in the Deed." The circuit court reasoned that Appellant could not foreclose because "in a suit to enforce a lien securing a negotiable note, the same defenses are generally available as would be in a suit on the note itself. In this case, it appears that the Plaintiff [Appellee] would have a defense to the Note in that she is not liable for the debt of the Note ... As such, it follows that the Plaintiff [Appellee] has a defense to the Deed of Trust securing the Note." (Order of August 18, 2008, P.4 ¶ 4).

¹ On October 9, 2007, Appellant nominated David G. Palmer and Christina J. Palmer as substitute Trustees in place of the original named Trustee. (Complaint, P. 3 ¶ III).

IV. STANDARD OF REVIEW

Generally, findings of fact are reviewed for clear error and conclusions of law are reviewed *de novo*. Syl. Pt. 1, in part, State ex rel. Cooper v. Caperton, 196 W. Va. 208, 470 S.E.2d 162 (1996). In this case, only conclusions of law are at issue.

V. ASSIGNMENTS OF ERROR

1. THE CIRCUIT COURT ERRONEOUSLY DENIED APPELLANT'S MOTION FOR SUMMARY JUDGMENT

A. APPELLANT'S DEED OF TRUST IS NOT INHIBITED BY ANY FAILURE TO FILE A CLAIM AGAINST THE DECEDENT'S ESTATE

B. THE CIRCUIT COURT'S ORDER CONTRADICTS WELL-ESTABLISHED WEST VIRGINIA REAL PROPERTY LAW

C. THE CIRCUIT COURT'S ORDER FAILS TO ENFORCE THE PLAIN TERMS OF THE DEED OF TRUST

D. APPELLANT COULD NOT HAVE REQUIRED APPELLEE TO EXECUTE A NOTE OR GUARANTEE UNDER FEDERAL BANKING REGULATIONS.

VI. DISCUSSION OF LAW

1. THE CIRCUIT COURT ERRONEOUSLY DENIED APPELLANT'S MOTION FOR SUMMARY JUDGMENT

The circuit court's Order recited the issue to be whether Appellant's Trustees may foreclose on the subject Deed of Trust after Appellee, a co-signor under the Deed of Trust, became the sole owner of the encumbered property pursuant to right of survivorship. This obscures Appellee's position that foreclosure on the Deed of Trust is barred because the underlying Promissory Note is unenforceable 1) as to Appellee because she did not sign it and 2) as to the Estate because no timely claim was filed against the Estate by Appellant.

The circuit court concluded that Appellee is not subject to the Deed of Trust because she is not liable on the Note.

Appellee's argument and the circuit court's conclusion contradict West Virginia statutory authority, case law and the express terms and conditions of the subject Deed of Trust. Further, any argument that Appellant could have protected its security interest by requiring Appellee to execute a Note, or otherwise guarantee her decedent's debt, ignores federal banking regulations strictly prohibiting such a practice.

A. APPELLANT'S DEED OF TRUST IS NOT INHIBITED BY ANY FAILURE TO FILE A CLAIM AGAINST THE DECEDENT'S ESTATE

Appellee argues the subject Deed of Trust is unenforceable because the underlying Promissory Note is unenforceable. In part, Appellee contends the Note is unenforceable due to Appellant's failure to file a claim against the Estate.

This proposition wholly contradicts W.Va. Code § 44-2-28. W.Va. Code § 44-2-28 mandates that no deed of trust, created by a decedent within his lifetime, shall be barred because the decedent's creditor fails to present a claim against the decedent's estate.

W.Va. Code § 44-2-26 delineates that creditors who do not timely present their claims to the Fiduciary Commissioner are barred from recovering such claim from the decedent debtor's personal representative, or from thereafter setting off the same against the personal representative in any action or suit whatever. This section also establishes the right of a creditor who has missed the claims deadline to file suit against the estate if there is an undistributed surplus. W.Va. Code § 44-2-27 authorizes suit against any estate beneficiary within two (2) years after the beneficiary receives a distribution of the estate's surplus.

W.Va. Code § 44-2-28 squarely addresses when a creditor's right to enforce its claim against a decedent's real estate shall become barred:

When enforcement of lien to secure claim barred -

When the right to bring action or suit against distributees and legatees on any claim against the decedent shall become barred, the right to enforce such claim against real estate shall also become barred to the extent such claim could have been collected out of the personal assets of the decedent. The provisions of this section shall not apply to liens upon real property acquired or created in the lifetime of the decedent, made or created to secure claims due and payable in future installments.

W.Va. Code § 44-2-28 (emphasis added)

Per W.Va. Code § 44-2-28, a creditor's right to enforce a claim against a decedent's real estate may be lost if the creditor 1) fails to file a claim against the decedent's Estate and 2) fails to pursue the remedies authorized by § 44-2-26 and § 44-2-27.² However, W.Va. Code § 44-2-28 makes clear that a deed of trust (being a lien created within the decedent's lifetime to secure claims due and payable in future installments) is never barred under Chapter 44 but is preserved despite a creditor's inability to enforce its underlying debt.

² It is relevant, but not critical, to note Appellant did preserve its claims under W.Va. Code § 44-2-26 and § 44-2-27 by Counterclaim, Crossclaim and Third-Party Complaint in the underlying Wood County Civil Action.

Neither the circuit court's Order nor Appellee's *Response* to Appellant's *Petition for Appeal* cited W.Va. Code § 44-2-28 or addressed its applicability to the case at bar. § 44-2-28 speaks clearly and authoritatively to the issue of "liens to secure claims" and, inarguably, preserves enforceability of Appellant's Deed of Trust.

B. THE CIRCUIT COURT'S ORDER CONTRADICTS WELL-ESTABLISHED WEST VIRGINIA REAL PROPERTY LAW

i. No Deed of Trust is Barred When the Underlying Note Becomes Unenforceable

Appellee argued, and the circuit court essentially concluded, that Appellant's Deed of Trust is unenforceable because recovery upon the underlying Promissory Note is barred. The argument and the conclusion contradict well-established West Virginia real property law.

There is a distinction between the right to foreclose [on] a mortgage and the right to enforce a personal liability upon the note secured thereby. G.T. Fogle & Co. v. King, 132 W.Va. 224, 236, 51 S.E.2d 776, 788 (1948)(Citing Syl. Pt. 3, Emmons v. Hawk, 62 W.Va. 526, 59 S.E. 519 (1907)). It is a well known principle that a note secured by a deed of trust may be barred, but that fact does not bar the lien of that deed, the note being one thing, the mortgage another; the one dead, the other yet alive. The creditor may not be able to maintain an action on the note, but can resort to its mortgage, though the note is barred. Gooch v. Gooch, 70 W.Va. 38, 42, 73 S.E. 56, 62 (1910). See also Criss v. Criss, 28 W.Va. 388 at 396 (1886), Seymour v. Alkire, 47 W.Va. 302, 34 S.E. 953, 956 (1899), Pitzer v. Burns, 7 W.Va. 63 (1873).

Morganton v. Farmington Coal & Coke Co. 97 W.Va. 83, 124 S.E. 591 (1924) is totally inapposite Appellee's argument and the circuit court's conclusion of law. In Morganton, it was similarly claimed that a creditor's lien was barred because the lien secured an unenforceable note. The Court absolutely rejected this argument.

We cannot see that the remedy on the lien would be changed in character because the note itself could not be enforced. The loss of the remedy on the note would not change the character of the debt or the lien which secured it. The theory by which the holder of the note after it is barred by limitation can proceed to enforce the lien securing it, is that the creditor has two remedies and we cannot see that the loss of one remedy would change the other and make it less effective.

Morganton at W.Va. 89, S.E. 597. (Citing Criss, supra)(emphasis added).

Rather than recognize foreclosure as a remedy separate and apart from the Note, the circuit court herein predicated foreclosure on the availability of a remedy upon the Note. Insofar as the circuit court's Order directly contradicts Criss and its progeny, it should be reversed.

ii. Both Appellee and the Estate Plainly Misread Dobbins v. Cunningham as Dispositive of the Underlying Case

Both responses to Appellant's *Petition for Appeal* rely heavily upon Dobbins v. Cunningham, 217 W.Va. 580, 618 S.E.2d 589 (2005)(per curiam).³ In Dobbins, the Court held that one joint tenant is not responsible for a debt owed by the other joint tenant. The Court did not, even indirectly, implicate the deed of trust securing such debt. Accordingly, there is no conceivable reason Dobbins should be applied to this case.

Dobbins specifically dealt with proceeds from a partition sale of jointly held property. The circuit court therein, erroneously, assessed one joint tenant's share of proceeds from the partition sale for repayment of a promissory note solely executed by the other joint tenant. Id. at W.Va. 582, S.E.2d 591. The Estate claims "remarkably, the facts in Dobbins are almost exactly the same [as the present facts]...the only difference is in Dobbins, the marriage ended in divorce instead of the death of a spouse". See Estate's *Response to Petitioner's Petition for Appeal*, P.

³ Initially, Appellee relied upon Richardson v. Kennedy, 197 W.Va. 326, 328, 475 S.E.2d 418, 410 (1996) to support her contention that she owns the property at issue unencumbered. See Complaint for Injunctive Relief, P. 4, ¶ VII. Richardson addressed the proper party to file a wrongful death action. It has no conceivable bearing on any issue in the subject case and cannot rationally be interpreted to bar Appellant's Deed of Trust in any manner. Richardson was conspicuously absent from citation in Appellee's *Note of Argument by Lois Arnold Contra Petition for Appeal* herein.

12. The cases are actually only similar insofar as two joint tenants executed a deed of trust securing the male joint tenant's debt. In Dobbins, there was 1) no default on the promissory note and 2) no possession of the property by the non-debtor joint tenant.

Despite this wide factual disparity, Appellee (and the Estate) argue Dobbins should be interpreted as making Appellant's Deed of Trust unenforceable. Dobbins, however, disclaimed any effect upon the deed of trust securing the parties' debt:

Prior to the filing of the partition action, the appellant and appellee jointly owned the tract of land subject to a deed of trust. Now, appellee is the sole owner of the tract of land subject to the same deed of trust. The bank – which is not a party to this case and had not declared the promissory note to be in default – continues as before and its interest in securing the loan with the tract of land continues to be preserved.

Id. at W.Va. 582, S.E.2d 591 (emphasis added)

As the Court specifically stated, there was no reason for the parties' deed of trust to be implicated in Dobbins. There is, accordingly, no basis for extrapolating Dobbins to impede enforceability of Appellant's Deed of Trust.

C. THE CIRCUIT COURT'S ORDER FAILS TO ENFORCE THE PLAIN TERMS OF THE DEED OF TRUST

The circuit court's Order concludes that a joint tenant may co-sign a Deed of Trust, yet evade foreclosure thereunder because she did not sign the underlying Promissory Note. This conclusion ignores that, under Paragraph 13 of Appellant's Deed of Trust, Appellee clearly pledged her interest in the subject real property as security for the underlying Promissory Note:

13. Joint and Several Liability; Co-signers; Successors and Assigns Bound. Borrower covenants and agrees that Borrower's obligations and liability shall be joint and several. However, any Borrower who co-signs this Security Instrument but does not execute the Note (a "co-signer"): (a) is co-signing this Security Instrument only to mortgage, grant and convey the co-signer's

interest in the Property under the terms of this Security Instrument; (b) is not personally obligated to pay the sums secured by this Security Instrument; and (c) agrees that Lender and any other Borrower can agree to extend, modify, forebear or make any accommodations with regard to the terms of this Security Instrument or the Note without the co-signor's consent.

Complaint for Injunctive Relief, Exhibit B, P. 10 ¶ 13. (emphasis added)

By executing the subject Deed of Trust, Appellee agreed to share joint and several liability under the Deed of Trust. According to the terms set forth in Paragraph 13, Appellee declined personal responsibility on the Promissory Note but, nevertheless, pledged her interest in the subject real property as security for the Note.

In Watson v. White, 185 W.Va. 487, 408 S.E.2d 66 (1991), this Court recited the plain definition and intent of a deed of trust:

A deed of trust is a charge on property which secures the indebtedness described therein for the benefit of a money lender. The lender is protected because the property owners convey the property to a trustee under certain terms, conditions, and covenants which are designed to ensure that the loan is repaid. However, neither the trustee nor the lender have any interest in the property which is conveyed as long as the property owner complies with the terms, conditions, and covenants which are set forth in the deed of trust.

Id. at W.Va. 491, S.E.2d 70 (Citing Minor v. Pursglove Coal Mining Co., 118 W.Va. 170, 176, 189 S.E. 297, 233 (1936)(emphasis added).

Watson predicates the right of foreclosure under a Deed of Trust solely upon the property owner's failure to meet the terms, conditions and covenants set forth in the deed of trust. In this case, the circuit court simply eschewed Appellee's failure to meet the terms, conditions and covenants of the Deed of Trust she executed. Rather, the circuit court looked to some extraneous factor (Appellee's liability on the Note) to absolve her of any responsibility under the Deed of Trust.

W.Va. Code § 38-1-3, which provides the general rules for foreclosure under a Deed of Trust, does not predicate foreclosure on the availability of other remedies:

The trustee in any trust deed given as security shall, whenever required by any creditor secured or any surety indemnified by the deed, or the assignee or personal representative of any such creditor or surety, after the debt due to such creditor or for which such surety may be liable shall have become payable and default shall have been made in the payment thereof, or any part thereof, by the grantor or other person owing such debt, and if all other conditions precedent to the sale by the trustee, as expressed in the trust deed, shall have happened...

Id. (emphasis added)

In this case, the debt (separately set forth in the Promissory Note and the Deed of Trust) has inarguably come due, and all other conditions precedent to foreclosure by Appellant's trustee have occurred. No arguments were made before the circuit court to the contrary. The circuit court has interjected a condition precedent to foreclosure which has no basis in statute, common law, or the Deed of Trust itself. For these reasons, the circuit court's Order should be reversed.

D. APPELLANT COULD NOT HAVE REQUIRED APPELLEE TO EXECUTE A NOTE OR OTHER GUARANTEE UNDER FEDERAL BANKING REGULATIONS

The Estate argues that Appellant could have simply required Appellee to execute the underlying note and suggests that Appellant willingly 'assumed the risk' that Mr. Arnold would die without re-paying his debt, i.e., "The property was vested in the husband and wife as joint tenants with rights of survivorship long before the loan was obtained. The bank produced the documents and had the ability to either grant or refuse the loan unless both owners of the property were willing to sign the Note and be responsible for the loan." *See Estate's Response to Petitioner's Petition for Appeal*, P. 15.

Had Appellant done what the Estate suggests, i.e., required Appellee to execute a note or guarantee, Appellant would have been in clear violation of federal banking regulation 12 CFR § 202.7 (Equal Credit Opportunity – Regulation B), which states in pertinent part:

(d) *Signature of spouse or other person—*

(1) *Rule for qualified applicant.* Except as provided in this paragraph, a creditor shall not require the signature of an applicant's spouse or other person, other than a joint applicant, on any credit instrument if the applicant qualifies under the creditor's standards of creditworthiness for the amount and terms of the credit requested. A creditor shall not deem the submission of a joint financial statement or other evidence of jointly held assets as an application for joint credit.

(2) *Unsecured credit ...*

(4) *Secured credit.* If an applicant requests secured credit, a creditor may require the signature of the applicant's spouse or other person on any instrument necessary, or reasonably believed by the creditor to be necessary, under applicable state law to make the property being offered as security available to satisfy the debt in the event of default, for example, an instrument to create a valid lien, pass clear title, waive inchoate rights or assign earnings.

(5) *Additional parties.* If, under a creditor's standards of creditworthiness, the personal liability of an additional party is necessary to support the credit requested, a creditor may request a cosigner, guarantor, endorser, or similar party. The applicant's spouse may serve as an additional party, but the creditor shall not require that the spouse be the additional party.

Id. (emphasis added)

In this case, Appellant extended credit to the Appellee's decedent, Mr. Arnold, in the manner prescribed by the above-referenced federal banking regulations. Upon extending credit to Mr. Arnold, it required Appellee to sign the subject Deed of Trust, that is, the only instrument "necessary under applicable state law to make the property being offered as security available to satisfy the debt in the event of default, for example, an instrument to create a valid lien, pass

clear title". Id. at 12 CFR § 202.7 (d)(4). Appellant could not have required Appellee to execute a note or guarantee and, had it done so, would have been in violation of 12 CFR § 202.7. Appellant simply could not do what the circuit court's Order would require of a lender to be absolutely secured when extending credit to one spouse.

VII. CONCLUSION AND PRAYER FOR RELIEF

The circuit court's Order of August 18, 2008 cannot be reconciled with W.Va. Code § 44-2-28 (poignantly titled "when liens to secure claims are barred"). Appellant avers § 44-2-28 is clear and in harmony with the statutes and West Virginia case law cited herein, and clearly preserves Appellant's Deed of Trust notwithstanding whether the remedy upon its Promissory Note is lost. The circuit court's Order, however, is irreconcilable and in utter disharmony with W.Va. Code § 44-2-28 and related case law in its evisceration of Appellant's Deed of Trust.

Appellant prays this Court reverse the circuit court's Order of August 18, 2008.

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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Appellee, Plaintiff Below

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J. PALMER, Trustee, ADVANTAGE BANK,
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ARNOLD, Beneficiaries of the Estate of Jeffrey
A. Arnold, Deceased,

Third-Party Defendants.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 31st day of March, 2009, he served the foregoing and hereto annexed BRIEF OF APPELLANT, by mailing a true copy thereof, via the United States Postal Department, postage prepaid to:

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