4-8-1977

Burrell Registration Co. v. McKelvey

IN THE SUPREME COURT OF THE STATE OF COLORADO

No. 27292

BURRELL REGISTRATION COMPANY, et al,

Plaintiffs-Appellants,

-vs-

EDWIN L. MC KELVEY, et al,

Defendants-Appellees.

APPEAL FROM THE DISTRICT COURT IN AND FOR THE COUNTY OF LA PLATA

THE HONORABLE FREDERIC B. EMIGH
District Judge

REPLY BRIEF OF APPELLANT

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STATEMENT OF THE CASE

A. PROCEEDINGS BELOW

Appellee states that supersedeas bond pending appeal has been withdrawn.

By Order of January 13, 1977, (attached to Appellee Brief), the Trial Court stated that any withdrawal without Order of the Court is ineffective. No Order of the Court based on notice and hearing has been entered revoking the stay of judgment. The stay of judgment remains effective until a court hearing ordering otherwise.

B. SUMMARY OF ARGUMENT

Plaintiffs add to their summary of argument as follows:

V. Supersedeas bond staying judgment on appeal remains effective until otherwise ordered by the proper court.

ARGUMENT

I. Princeville Corp. v. Brooks, 88 Colo. 37, 533 P 2d 916 (1975) held that Rule 120 may (distinguish must or should) be used to determine if other factors besides military service warrant a continuing judicial supervision.

Although Princeville cited the U. S. Supreme court cases, it did not rule accordingly. Prior to this the Colorado Courts only had Hastings v. Security Thrift to rely on.

Appellees try to distinguish the state action of Fuentes from that of real estate foreclosure. They claim that the mortgage debtor still has ownership of the property through the redemption period. Although technically correct, in reality once the Notice of Election and Demand is filed and the sale held, the mortgagor does not have unfettered use of the property. The loss of the use rather than the loss of title is the initial property deprivation.

Rule 120 prior to revision stated:

> (c)"---No motions or pleadings shall be required or permitted to be filed by anyone other than the person who filed the motion for order authorizing sale."

The notice says that they "may appear" but it does not say that they may controvert the allegations of default.

Although this Court should find that Rule 120 procedure was improper prior to revision, it does not necessarily follow that all prior foreclosures are subject to attack. If no objection is made prior to Public Trustee's Deed being issued the error is waived. In the great majority of foreclosures, the debtor would have no complaint.

We don't need to speculate as to what Judge Emigh would have ruled if other persons would have attended the Rule 120 hearing. We need only look at what he was authorized to do by rule, statute, or legal precedent. By Court interpretation of Rule 120 the judge is limited to considering military service. There was and is no legislative provision for preforeclosure hearing,

and the legal precedent confronting the trial judge was Hastings v. Security Thrift.

The Texas case Armenta v. Nussboum, is distinguished from our case in that Texas does not have a statutory Public Trustee. Deeds of Trust run to private trustees and are foreclosed according to private argument without state involvement.

Self-help remedy is not the question here. The Public Trustee, a state agent, is the acting party.

II. The creditor did not specify at all that it was only an opinion that the default was not curable, but rather, stated:

> "You are hereby advised that the holders of the Promissory Note contend that the default which exists is not subjected to cure by the payment of money under the terms and provisions of the statute."

Creditors made this statement with the intent that the Public Trustee rely thereon and indeed he did rely thereon as noted in Exhibit "C" (Defendants Jon deposition).

Mr. Mc Kelvey, the Public Trustee, specifically stated at Folio 103 - 106 of the Trial Transcript that he would only have accepted the cure money in a trust capacity and turned it over to the Court.

Appelles brief at Page 5, Second Paragraph misstates the record. At the line five quoted in Burrell deposition he stated that he didn't have Sixteen Thousand Dollars ($16, 000. 00) in cash; not that he did not have access to such funds.

III. Plaintiffs treatment at a prior Rule 120 hearing is not determinative of this case but the impression he received at a prior Rule 120 hearing and his resultant state of mind are certainly relevant in explaining why he didn't appear at the October 17, 1974 Rule 120 hearing.

The offer of proof at Transcript Folio 133 - 142 was sufficient to advise the judge of what the tendered eveidence would be and to give him a chance to rule on the admissability of such tendered evidence. His ruling was made with an understanding of the implications.

Appellees brief admits the Colorado exception to the hearsay rule, that evidence of state of mind may be admissable. What state of mind was created in Plaintiff when he was told by Judge Emigh that he couldn't protest a foreclosure of his property is relevant to his later conduct.

IV. Webster's applicable definition of equity is: "the money value of a property or of an interest in a property in excess of claims or liens against it." Black's definition of equity is: "the remaining interest belonging to one who has pledged or mortgaged his property, or the surplus of value which may remain after the property has been disposed of for the satisfaction of liens. The amount of value of a property above the total liens or charges" Des Moines Joint Stock Land Bank of Des Moines v. Allen, 220 Iowa 443, 261 N. W. 912. Funk and Wagnalls fourth definition of equity is: "In business or property, the value remaining in excess of any liability or mortgage." Appellants definition of the equity in their property is what they could realize by selling it. In this case, the owners' appraisal of the property value was the best evidence of value.

Another valuation of the property was the evidence of the Public Trustee's bid. As Appellees admit on Page 6 of their brief, it was a forced sale. As a general rule, the price at a forced sale is substantially lower than one negotiated at arms length. Some buyers are precluded at a foreclosure sale by the requirement of a cash payment. The forced-sale bid would be on the low side of fair-market value.

V. The Trial Court found that there was no default on August 30, 1973. The recent decision of Mutual Federal Savings and Loan v. American Medical Services, Inc., 66 Wisc. 2d 210, 223 N. W. 2d 921 (1974) supports the Trial Courts decision. A variance from the terms of the contract which does not jeopardize the creditors security is no reasonable basis for an acceleration of a promissory note or for levying penalties. Mortgagees should not rely on enforcing every provision in mortgages without analyzing the relationship of the breach to the vendors legitimate security interest.

The reasonableness of attorneys' fee is solely within the discretion of the Trial Court. No abuse of discretion has been shown.

VI. SUPERSEDEAS BOND STAYING JUDGMENT ON APPEAL REMAINS EFFECTIVE UNTIL OTHERWISE ORDERED BY THE PROPER COURT.

Pending appeal, no final disposition has been made of this case. No action has been taken by any Court affecting the stay of execution. Appellees assert that Plaintiffs withdrawal of Supersedeas Bond extinguishes the stay of execution. At the same time they say that the bond remains effective for their protection. It can't be both.

In the absence of a final decision by the Supreme Court or a judicial hearing following notice, no independent action taken by Plaintiffs' changes the bond or the stay of execution.

Respectfully Submitted,

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