

11-0428

IN THE CIRCUIT COURT OF RANDOLPH COUNTY, WEST VIRGINIA

KRISTI FORTNEY and
CHANDA COLLETTE,

Plaintiffs,

v.

Civil Action No. 10-C-157

ESTATE OF ROGER G. FUSSELL,
deceased, and ANDREA M. SIMMONS,
Executrix of the Estate of Roger G. Fussell,
decedent.

Defendants.

JUDGMENT ORDER

On December 1, 2010, this matter came on for final hearing and oral argument. Plaintiffs appeared in person and by counsel, Harry A. Smith, III; Defendants appeared by counsel, John J. Wallace, IV. The Court reviewed the pleadings and heard the arguments of counsel. The Court was of the opinion that there were no factual issues requiring the presentation of evidence and determined that this action could be adjudicated as a matter of law - - the Court's interpretation of the language contained in the will of Roger G. Fussell. The Court then took this action under advisement.

The Court now FINDS as follows:

1. The will of Roger G. Fussell was admitted to probate before the Clerk of the County Commission of Randolph County, West Virginia, on December 31, 2009, being of record in Will Book 48 at page 432.

2. The said will provides, in the "First" section thereof, that "all" of Mr. Fussell's "just debts be paid as soon as conveniently possible after the date of my death."

3. The "Third" section of the will devises to Plaintiff Kristi Fortney all of Mr. Fussell's interest in and to "my lot and house at 414 6th Street, Glenmore Addition, near Elkins, Randolph County, West Virginia." Mr. Fussell, as of his death, was the sole owner of this real estate, being Parcel 198 on Tax Map 27 in Leadsville District of Randolph County.

4. The "Fourth" section of the will devises to Plaintiff Chanda Collette all of Mr. Fussell's interest in and to "my lot and house located adjacent to King's Run Road in Randolph County, West Virginia." Mr. Fussell, as of his death, was the sole owner of this real estate, being Parcel 16 on Tax Map 131 in Beverly District of Randolph County.

5. The tracts of real estate devised to Plaintiffs are encumbered by a deed of trust, executed by Mr. Fussell on December 4, 1998, securing a loan from Davis Trust Company, Elkins, West Virginia, in the original amount of \$223,000.00. Payments to Davis Trust Company, as to the deed of trust, are \$1,768.82 per month.

6. As of the date of the filing of the Complaint herein, Defendant Andrea M. Simmons, as Executrix of Mr. Fussell's Estate, had paid the monthly payments to Davis Trust Company for January, 2010, and February, 2010.

7. Plaintiffs paid, or payments on their behalf have been made, to Davis Trust Company, from March, 2010, through August, 2010, in the total amount of \$10,612.92.

8. Defendant Simmons, pursuant to the Court's prior Orders, has paid the sum of \$1,368.82 per month toward the Davis Trust Company payments, for the months of September, 2010, through December, 2010, Defendant Simmons receiving a credit of \$400.00 per month from the \$1,768.82 payment due to rent collected by Plaintiff Collette.

9. Plaintiff Fortney has paid the second half 2009 real estate taxes on the property which was directed to her, said taxes being in the amount of \$446.42.

10. Plaintiff Collette has paid the second half 2009 real estate taxes on the property which was devised to her, said taxes being in the amount of \$558.85.

11. Plaintiffs seek a declaratory judgment providing that the real estate which they have acquired as devisees under Mr. Fussell's will shall be unencumbered by the Davis Trust Company deed of trust or by the 2009 real estate taxes.

12. Plaintiffs seek also a mandatory injunction requiring Defendants to pay off the secured debt to Davis Trust Company so that Plaintiffs are invested with unencumbered title to the real estate.

13. Plaintiffs seek further an order compelling Defendants to reimburse them for the 2009 taxes which they have paid and for all payments which they have made (and all \$400.00 rental payments for which Defendant Simmons has been given credit) to Davis Trust Company.

14. The testamentary language requiring the payment of all of Mr. Fussell's debts is inclusive of the debt which is secured by the real estate was devised to the Plaintiffs.

15. Since Mr. Fussell's will requires that all debts be paid by the Estate, the debt secured by the said Davis Trust Company deed of trust is to be paid by the Estate, resulting in Plaintiffs' acquiring unencumbered title to the real estate which was devised to them.

It is therefore ORDERED:

1. That Defendants shall pay in full the debt which is secured by the Davis Trust Company deed of trust, said deed of trust being dated December 4, 1991, being of record in the Office of the Clerk of the County Commission of Randolph County, West Virginia, in Trust Deed Book 296 at page 401. Defendants' obligation to pay this debt includes the obligation to make the January, 2011, payment.

2. That Defendants shall pay to Plaintiffs the sum of \$12,212.92, representing six monthly trust deed payments made by them, or on their behalf, plus total rental credits in the amount of \$1,600.00.

3. That Defendants shall pay Plaintiff Kristi Fortney the sum of \$446.91 for second half 2009 taxes paid by her.

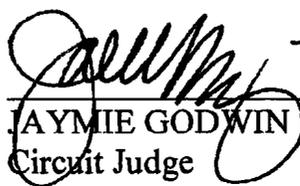
4. That Defendants shall pay Plaintiff Chanda Collette the sum of \$558.85, for second half 2009 taxes paid by her.

5. That Plaintiffs are entitled to their costs, in the amount of \$185.00.

6. That this action is dismissed and retired from the docket of the Court.

The Court notes the objections of Defendants to all rulings adverse to them and notes Defendants' exceptions thereto.

ENTER: February 10th, 2011, as of January 19, 2011.



JAYMIE GODWIN WILFONG
Circuit Judge

A TRUE COPY:
ATTEST:
PHILIP D. RIGGLEMAN
CLERK OF THE CIRCUIT COURT
BY Chowell DEPUTY

ENTERED

FEB 10 2011

Civil ORDER BOOK
NUMBER 87 PAGE _____
PHILIP D. RIGGLEMAN, CLERK
By: Chowell, Deputy

Prepared by:

cc: HARRY A. SMITH, III
Counsel for Plaintiffs
McNeer, Highland, McMunn and Varner, L.C.
P.O. Box 1909
Elkins, WV 26241

cc: Wallace

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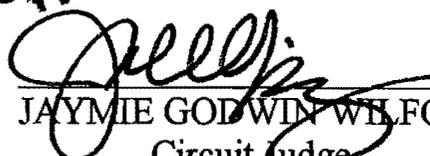
ORDER OF STAY

On the 25th of February 2011 came the defendant's in the above styled action by their counsel, Joseph A. Wallace to move the Court, via written motion, for a Stay of the Judgment in the above styled action. After review of Defendant's *Motion Of Stay* and upon mature consideration by the Court, it is hereby ORDERED:

Execution on the sum of \$12,212,92.00, as recited in the Court's Judgment Order of February 10, 2011, shall be stayed for the applicable period provided by Rule 28 of the Revised Rule of Appellate Procedures.

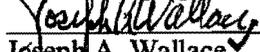
In all other regards, Defendant's Motion is denied. The Clerk is directed to provide counsel of records with copies of this Order.

Signed this 25th of February 2011.


JAYMIE GODWIN WILFONG
Circuit Judge

specifically, the Defendants are required to maintain the mortgage payments during the stay.


This Order prepared by:


Joseph A. Wallace
WV Bar #3907
P.O. Box 7
Elkins, WV 26241
(304)637-3800

cc:

cc: Smith

ENTERED

FEB 25 2011

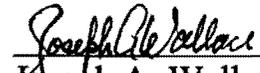
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ATTEST:
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BY C. Wallace DEPUTY

CERTIFICATE OF SERVICE

I, Joseph A. Wallace, one of counsel for the Defendant, hereby certify that the foregoing *Order Of Stay* was served upon counsel of record this ____ day of February, 2011 by hand delivery to:

Harry A. Smith, III, Esq.
McNeer, Highland, McMunn and Varner, L.C.
P.O. Box 1909
Elkins, WV 26241



Joseph A. Wallace
WV Bar #3907
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Elkins, WV 26241
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