

**STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS**

**Jennifer J. Grafton-Gore,
Defendant Below, Petitioner**

vs.) No. 101615 (Berkeley County 09-C-774)

**Centra Bank, Inc.,
Plaintiff Below, Respondent**

FILED

January 13, 2012
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioner Jennifer J. Grafton-Gore appeals the circuit court's summary judgment in favor of Respondent Centra Bank, Inc. (hereinafter "Centra") in its action seeking the deficiency balance based upon a promissory note which matured on November 10, 2007. Petitioner raised counterclaims, more properly construed as affirmative defenses, in the proceedings below to her having to pay the deficiency. The instant appeal was timely filed by the *pro se* petitioner with only a portion of the record being designated on appeal. Centra also filed a response. The Court has carefully reviewed the written arguments contained in the petition and the response thereto, and the case is mature for consideration.

Pursuant to Revised Rule 1(d) of the Revised Rules of Appellate Procedure, this Court is of the opinion that this matter is appropriate for consideration under the Revised Rules. Having considered the petition and the relevant decision of the lower tribunal, the Court is of the opinion that the decisional process would not be significantly aided by oral argument. Upon consideration of the standard of review, the Court determines that there is no prejudicial error. This case does not present either a new or significant question of law. For these reasons, a memorandum decision is appropriate under Rule 21 of the Revised Rules of Appellate Procedure.

In 2006, petitioner sought to purchase the 53.7-acre Hickory Ridge Subdivision, consisting of Lots 34.1, 37, 37.1, 37.2, and 38 for \$5,143,000.00. Petitioner financed her purchase of Hickory Ridge via a purchase money loan from Centra in the amount of \$2,300,000.00. She also obtained secondary financing from the seller, Hickory Ridge, LLC. The purchase money loan from Centra was secured by a deed of trust, and petitioner provided a second deed of trust to the seller to secure that loan as well.

Petitioner's purchase of Hickory Ridge closed on March 7, 2006, and she executed the promissory notes and deeds of trusts required for the loans. The deed conveying Hickory Ridge to her was recorded with the Clerk of the Berkeley County Commission. Petitioner's

deed of trust to Centra was also recorded. The parties agreed to extend the maturity date of the promissory note held by Centra several times. The final maturity date requiring repayment of the principal of the loan was November, 10, 2007. Until that time, petitioner was allowed to make interest-only payments.

Through a scrivener's error by attorney David Pill, the deed conveying Hickory Ridge to petitioner inadvertently omitted Lot 38, consisting of 0.7 acres, from the conveyance. According to petitioner, Lot 38 was important because it contains the entrance to Hickory Ridge. Mr. Pill informed petitioner of the error in the deed on October 19, 2007. In a separate lawsuit petitioner and her husband subsequently filed against Mr. Pill and his law firm, there was an admission by Mr. Pill and the firm that "they were agents of [Petitioner] for the purposes of performing this settlement and preparing the deed transferring the land."

Notwithstanding the intention of all parties that petitioner was to be conveyed Lot 38 as part of her purchase, the issue could not be resolved through a corrective deed because, in the interim, the seller had filed for bankruptcy. Thus, federal bankruptcy law prevented the lot's conveyance without the approval of the bankruptcy court. Centra initiated a proceeding within the bankruptcy action seeking the bankruptcy court's approval for the lot's transfer. The bankruptcy court subsequently permitted Lot 38's conveyance to Centra, which conveyance was consummated on December 17, 2008.

Meanwhile, petitioner did not repay the principal of her loan to Centra on the promissory note's final maturity date. On February 10, 2009, Centra notified her that foreclosure proceedings would be commenced. Foreclosure began one week later on February 18, 2009, and concluded with Centra's purchase of the other lots making up Hickory Ridge at auction on March 25, 2009. Centra paid \$1,760,000 for the remaining lots, 80% of their fair market value. Centra sued petitioner for the deficiency balance she owed it on the promissory note. She responded by filing a five-count Counterclaim alleging the following: (1) Breach of contract; (2) Breach of fiduciary duty; (3) Negligence; (4) Contributory negligence, and (5) Conspiracy to defraud.

By separate final judgment orders entered on July 1, 2010, the circuit court granted summary judgment in favor of Centra on its claims for the deficiency balance and against all of petitioner's counterclaims against it. The circuit court entered judgment in the amount of \$916,023.93 plus pre- and post-judgment interest along with attorney's fees and court costs as provided for by the Deed of Trust petitioner signed. In a separate order entered on September 15, 2010, the circuit court evaluated the reasonableness of Centra's claim for attorney's fees under *Aetna Casualty & Surety Co. v. Pitrolo*, 176 W.Va. 190, 342 S.E.2d

156 (1986), and then granted Centra attorney's fees and costs in the total amount of

\$11,957.82 plus post-judgment interest. Petitioner now appeals.¹

The circuit court also granted Centra summary judgment on all of petitioner's counterclaims including her claims of breach of fiduciary duty, negligence, and contributory negligence (i.e., that Centra contributed to her not being able to pay back her loan). "[T]he determination of whether a plaintiff is owed a duty of care by a defendant must be rendered by the court as a matter of law." Syl. Pt. 5, *Aikens v. Debow*, 208 W.Va. 486, 541 S.E.2d 576 (2000). The circuit court determined no special relationship existed between Centra and petitioner in what was a legal arrangement that normally does not give rise to a duty of care. A traditional lender is not "in any way the insurer of the property that is the subject of the loan." *Glascok v. City National Bank of West Virginia*, 213 W.Va. 61, 67, 576 S.E.2d 540, 546 (2002). The only way petitioner could have shown Centra had a special relationship with her was through the involvement of Mr. Pill. He prepared the closing documents for petitioner's purchase of the Hickory Ridge subdivision and the deed of conveyance that omitted Lot 38. Mr. Pill's listing in Martindale-Hubbell indicates that he had represented Centra in the past. However, according to an admission Mr. Pill made pursuant to a request for admissions from petitioner and her husband in their separate case against him, he and his law firm "were agents of [petitioner] for the purposes of performing this settlement and preparing the deed transferring the land." The circuit court properly granted judgment as a matter of law on petitioner's claims of breach of fiduciary duty, negligence, and contributory negligence.

Petitioner's two other claims were for breach of contract and conspiracy to defraud. "Summary judgment is appropriate if, from the totality of the evidence presented, the record could not lead a rational trier of fact to find for the nonmoving party, such as where the nonmoving party has failed to make a sufficient showing on an essential element of the case that it has the burden to prove." Syl. Pt. 2, *Williams v. Precision Coil, Inc.*, 194 W.Va. 52, 459 S.E.2d 329 (1995). These two claims did not survive summary judgment because the circuit court found that petitioner failed to present evidence sufficient to carry them forward to trial. On the breach of contract claim, the circuit court determined that petitioner's contentions could not be substantiated because she failed to present sufficient evidence.

On the conspiracy claim, the circuit court determined both that petitioner failed to introduce any false statements that were made by Centra regarding the Hickory Ridge subdivision which secured the loan and that petitioner also failed to offer any evidence indicating that Centra acted in concert with anyone to commit an unlawful act. Petitioner designated only a portion of the record for her appeal. Attached to petitioner's response to

¹ Petitioner does not address the issue of the circuit court's award of attorney's fees to Centra. Therefore, that issue is considered waived on appeal.

respondent's motion for summary judgment is correspondence between Mr. Pill and various persons and between the Regional Counsel of the title insurance company and an attorney from Kratovil & Amore, PLLC. This correspondence concerns petitioner's purchase of Hickory Ridge, the fact that Lot 38 was omitted from her deed of conveyance, and how to purchase the lot from the trustee in Hickory Ridge's former owner's bankruptcy case. Nothing in the correspondence indicates that Centra conspired with anyone to defraud Petitioner. Therefore, the circuit court did not err in granting Centra summary judgment and in awarding the deficiency balance petitioner owed it on her promissory note in the amount of \$916,023.93 plus pre- and post-judgment interest along with attorney's fees and court costs in the amount of \$11,957.82 plus post-judgment interest.

For the foregoing reasons, we find no error in the decision of the circuit court and the summary judgment awarded to Respondent Centra Bank, Inc. is affirmed.

Affirmed.

ISSUED: January 13, 2012

CONCURRED IN BY:

Chief Justice Menis E. Ketchum
Justice Robin Jean Davis
Justice Brent D. Benjamin
Justice Margaret L. Workman
Justice Thomas E. McHugh