STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

Danny E. Lusk and Gordon M. Lusk, II,
Plaintiffs Below, Petitioners

vs) **No. 11-0665** (Mercer County 08-C-536 & 10-C-235)

First Century Bank, N.A., a national banking association; Regency Real Estate and Auction Company, a Virginia corporation; and Cooper Industries, LLC, a Delaware limited liability company, Defendants Below, Respondents

FILED
April 27, 2012
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioners, Danny E. Lusk and Gordon M. Lusk, II ("petitioners"), by counsel, Marc B. Lazenby, appeal from the Mercer County Circuit Court's Order entered on January 24, 2011, awarding summary judgment in favor of Respondent First Century Bank, N.A. ("Bank") on certain claims of petitioners in relation to a foreclosure sale of real estate. Petitioners also appeal from the adverse jury verdict rendered in favor of the Bank on claims of fraud and negligence; in favor of Respondent Regency Real Estate and Auction Company ("Regency") on claims of fraud and negligence; and in favor of Respondent Cooper Industries, LLC ("Cooper") on a claim of negligent violation of the West Virginia Hazardous Waste Management Act and its related regulations. In addition, petitioners appeal from the circuit court's order entered on April 8, 2011, denying their motion for new trial and their motion to alter or amend judgment filed pursuant to Rule 59(e) of the West Virginia Rules of Civil Procedure. The Bank appears by counsel, Christopher S. Smith and Nicola D. Smith; Regency appears by counsel, Shawn C. Gillispie and Eric T. Frye; and Cooper appears by counsel, Thomas R. Goodwin and Johnny M. Knisely II.

This Court has considered the parties' briefs and the record on appeal. The facts and legal arguments are adequately presented, and the decisional process would not be significantly aided by oral argument. Upon consideration of the standard of review, the briefs, and the record presented, the Court finds no substantial question of law and no prejudicial error. For these reasons, a memorandum decision is appropriate under Rule 21 of the Revised Rules of Appellate Procedure.

Petitioners purchased a parcel of real estate located in Bluefield, West Virginia, at an auction foreclosure sale conducted on March 29, 2006, by attorney Harold Brewster, Jr., as Trustee under a Deed of Trust, and by Eddie Pauley, an auctioneer with Regency. The record reflects that immediately prior to the commencement of the auction, petitioners conducted a brief walk-through of the building located on the property. Petitioners assert that based upon their walk-through and the representations made by Mr. Pauley, the auctioneer, and by a Bank representative that the real estate was "clean," they placed the high bid of $49,000 for the property. The Notice of Trustee's Sale and

Regency's advertising notice for the sale stated that the sale was subject to "environmental regulations" and that the property was being sold in an "as is" condition. Under the terms of the Deed of Trust, the property would be sold "without any covenant or warranty, express or implied."

The record reflects that for many years, various businesses cleaned and rebuilt electric motors, primarily for the coal industry, on the subject property, which led to the property being contaminated with various substances, including polychlorinated biphenyls (PCBs). Respondent Cooper acquired the property around 1985. It appears that Cooper did not resume operations on the property and, instead, closed the facility, which involved a cleanup of the hazardous waste left on the property. Thereafter, Cooper donated the property to a local charity which, in turn, sold the property to Lindon Taylor. Mr. Taylor's business, Lin-Electric,[1] was the last business to clean electric motors on the subject property. The property was encumbered by a deed of trust securing a loan made by the Bank to Mr. Taylor. Sometime after Lin-Electric went out of business, the loan went into default, which led to the subject foreclosure sale.

Following petitioners' purchase of the subject property, they each received a "Notice of Potential Liability" from the federal Environmental Protection Agency ("EPA") essentially notifying them they may be responsible under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended, for the cleanup of the subject property. At the time the parties filed their respective briefs in this Court, the EPA had neither demanded nor sued petitioners for any remediation costs.

On September 19, 2008, petitioners instituted the instant action alleging that the Bank (1) intentionally failed to disclose to petitioners at the foreclosure sale that the real estate was environmentally contaminated with hazardous waste materials, (2) committed negligence and gross negligence, (3) committed fraud and intentional misrepresentation, (4) breached its duty of good faith and fair dealing owed to petitioners, and (5) violated the West Virginia Hazardous Waste Management Act ("Act") by failing to disclose in the foreclosure deed that the property was previously used to store and dispose of hazardous waste materials.[2] Petitioners alleged that Cooper violated the Act and committed negligence and gross negligence by contaminating the property with hazardous materials and failing to remediate the contamination. Petitioners alleged that Regency committed negligence, gross negligence, fraud, and intentional misrepresentation at the foreclosure

[1]The record reflects that Lin-Electric is sometimes spelled "Lin Electric" and is sometimes referred to as "Lin Electric Company."

[2] The record reflects that the Bank filed a third-party action against the law firm of attorney Brewster, the Trustee under the Deed of Trust who conducted the foreclosure sale and prepared the foreclosure deed, claiming that if it were determined that the Bank was liable to petitioners, then the law firm was liable to the Bank. Attorney Brewster's law firm filed an independent action seeking a rescission of the foreclosure deed. In an order entered on January 24, 2011, the circuit court dismissed the law firm as a third-party defendant and dismissed the law firm's independent action. These matters are not directly involved in the instant appeal.

sale. Petitioners did not sue either Trustee Brewster or Lin Electric.[3]

On June 16, 2009, the Bank filed a motion for summary judgment. Petitioners responded contending there were genuine issues of material fact including whether certain Bank vice-presidents were aware that the subject property was contaminated prior to the foreclosure sale. The circuit court initially denied the Bank's motion for summary judgment, after which the Bank filed a supplemental motion for summary judgment on petitioners' claims for intentional non-disclosure, breach of good faith and fair dealing, and violations of the Act. On January 24, 2011, the circuit court entered an order granting, in part, the Bank's summary judgment motion as discussed below.

A jury trial began on January 25, 2011, on petitioners' remaining causes of action. At the close of the evidence, the Bank moved for judgment as a matter of law on petitioners' claim that it was negligent for proceeding with the foreclosure sale with knowledge that the real estate was environmentally contaminated. The circuit court granted the Bank's motion, and the case went to the jury on petitioners' remaining claims.

Petitioners objected to the verdict form used by the circuit court because it included a comparative fault line for Cooper and Lin-Electric[4] (a non-party), along with the Bank and Regency. Petitioners argued that the negligence of Cooper and Lin-Electric should not reduce the percentage of negligence attributable to the Bank and Regency. The circuit court denied the objection. On February 11, 2011, the jury returned its verdict and found that Cooper, the Bank, and Regency were each 0% at fault; that Lin-Electric (the last operator on the property) was 40% at fault; and that petitioners were 60% at fault. Prior to the comparative fault interrogatory, the verdict form set forth separate interrogatories addressing petitioners' various claims against respondents and Lin Electric. The jury answered each of these interrogatories and found that none of the respondents were liable to petitioners.

Petitioners filed a motion for a new trial on January 31, 2011. The circuit court denied the motion in an order entered on April 8, 2011.

I. Summary Judgment

Petitioners argue that the circuit court erred in granting summary judgment in favor of the Bank on the claims of intentional failure to disclose environmental contamination of the subject property and breach of the Bank's duty of good faith and fair dealing. Petitioners argue that a seller of real estate has an affirmative duty to disclose latent defects or conditions of the property to a purchaser and that the failure to do so constitutes constructive fraud. Petitioners further argue that the foreclosure deed that they received constitutes a contract between them and the Bank sufficient to form the basis for a claim for breach of duty of good faith and fair dealing.

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[3] It appears from the record that Lin Electric had ceased doing business years prior to petitioners bringing their cause of action, and that Lin Electric's owner, Lindon Taylor, had died.

[4] One of Cooper's defenses at trial was that Lin-Electric re-polluted the subject property, which was an intervening cause that relieved Cooper of liability for any negligence.

Regarding the claim of an intentional non-disclosure by the Bank that the property was contaminated, the circuit court found that foreclosure sales under a deed of trust are governed by the principle of *caveat emptor*. *Fleming v. Holt*, 12 W.Va. 143, 162 (1877). The circuit court also found that a trust creditor under a deed of trust does not own an interest in the real property. *State ex rel. Watson v. White*, 185 W.Va. 487, 491, 408 S.E.2d 66, 70 (1991). Relying upon these basic principles, the circuit court concluded that a creditor under a deed of trust is not required to make affirmative disclosures concerning the condition of the property being sold and that petitioners "purchased the property, having constructive notice, and therefore effectively actual notice, that the property was sold 'AS IS', without warranty, and subject to 'environmental regulations.'" On the claim of breach of duty of good faith and fair dealing, the circuit court found that petitioners did not have a contractual relationship with the Bank. The circuit court relied upon several prior decisions of this Court, including *Highmark West Virginia, Inc. v. Jamie*, 221 W.Va. 487, 655 S.E.2d 509 (2007), to conclude that in the absence of such a relationship, there was no duty of good faith and fair dealing.

This Court reviews a circuit court's entry of summary judgment under a de novo standard of review. Syl. Pt. 1, *Painter v. Peavy*, 192 W.Va. 189, 451 S.E.2d 755 (1994). Applying this standard to the record before the Court on appeal, the arguments of the parties, and the findings of fact and conclusions of law reached by the circuit court, we find no error.

II. Judgment as a Matter of Law

Petitioners challenge the circuit court's award of judgment as a matter of law in favor of the Bank on the claim that the Bank was negligent for proceeding with the foreclosure sale even though it had knowledge that the subject property was environmentally contaminated. Petitioners argue that a reasonably prudent bank would not have proceeded with the foreclosure sale of property that the bank knew was environmentally contaminated, therefore, the Bank's decision to proceed with the foreclosure sale constitutes negligence. In addressing this issue in the context of petitioners' motion for a new trial, the circuit court reiterated its earlier ruling that a secured party at a foreclosure sale is under no duty to make affirmative representations about the condition of the property to be sold and, without a duty, there can be no negligence.

This Court applies a de novo standard of review to the grant or denial of a pre-verdict or post-verdict motion for judgment as a matter of law. *Gillingham v. Stephenson*, 209 W.Va. 741, 745, 551 S.E.2d 663, 667 (2001). Having reviewed the record, the arguments of the parties, and the circuit court's findings and conclusions of law in this regard, we find no error.

III. Verdict Form

Petitioners objected to the verdict form used by the circuit court because it contained a comparative fault line for Cooper and Lin-Electric (a non-party), along with the Bank and Regency. Petitioners argue that the circuit court committed error in using a verdict form that allowed the jury to attribute a percentage of fault to Cooper and/or Lin-Electric with respect to the negligence of the Bank and Regency. We note that prior to the comparative fault interrogatory on the verdict form, there were separate interrogatories allowing the jury to determine the liability, if any, of Cooper, Regency, the Bank, and Lin-Electric. The jury answered these separate interrogatories and found

that neither Cooper, Regency nor the Bank caused petitioners to suffer any damages, which left the jury to determine comparative fault only as between petitioners and Lin-Electric.

"Generally, this Court will apply an abuse of discretion standard when reviewing a trial court's decision regarding a verdict form." Syl. Pt. 4, *Perrine v. E.I. du Pont de Nemours and Co.*, 225 W.Va. 482, 694 S.E.2d 815 (2010); *see also, Adkins v. Foster*, 195 W.Va. 566, 466 S.E.2d 417 (1995) (applying an abuse of discretion standard in reviewing a verdict form and related instructions). Under the circumstances of this case and based upon a review of the verdict form, we cannot conclude the circuit court abused its discretion in submitting the verdict form to the jury.

IV. Conclusion

For all of the foregoing reasons, we affirm.

Affirmed.

ISSUED: April 27, 2012

CONCURRED IN BY:

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

DISSENTING:

Justice Brent D. Benjamin