

IN THE CHANCERY COURT OF CLAY COUNTY, MISSISSIPPI

BANK OF MISSISSIPPI

PLAINTIFF

VERSUS

NO. 98-0108

DAVID WHITEFOOT, AKA DAVID JONES,  
ELENA WHITEFOOT, AKA LINDA WHITEFOOT  
AKA LINDA JONES, AND EB, INC.

DEFENDANTS

OPINION AND ORDER

This cause came on to be heard upon pleadings and proof. The Defendant EB, Inc. has filed its consent to the relief sought by the Plaintiff against it, and the remaining Defendants, the Whitefoots, have defended pro se. The Plaintiff filed this suit on March 12, 1998. The Whitefoots have counterclaimed against the Plaintiff for certain relief.

The proof establishes that the Whitefoots in 1988 borrowed a large sum of money from the Plaintiff and agreed to secure that loan with a mortgage lien against their home and three acres upon which it was situated. The total acreage of the tract of land owned by the Whitefoots was 35 acres. The deed of trust given by the Whitefoots in 1988 described the whole 35 acre tract of land. Since the parties had agreed to only place the home and three acres as security to the Plaintiff, the Plaintiff executed a partial release from its deed of trust of the other 32 acres, and the Whitefoots mortgaged the said 32 acres to Eastover Bank for Savings.

The original loan from the Plaintiff to the Whitefoots was payable over a few years in monthly installments and with a substantial balloon payment at maturity. The Whitefoots renewed the loan at maturity and renewed the deed of trust securing the loan. The parties still intended that the house and three acres serve as collateral for the loan. In 1992 the Whitefoots filed Chapter 13 bankruptcy and listed the two creditors, Eastover and the Plaintiff, as secured by mortgages on the 32 acres and 3 acres respectively. The Bankruptcy Court was informed that the home was security for the Plaintiff and on the three acre tract.

Subsequently a survey in 1997 revealed that the home and the driveway were actually located on the 32 acre tract and not on the legal description in the Plaintiff's deeds of trust describing the three acre tract.

After 1988, an additional loan was made to the Whitefoots the Plaintiff. At trial it was revealed that the Whitefoots still owe the Plaintiff \$303.96 on this additional loan. On April 26, 1995 the Whitefoots refinanced the unpaid balance remaining from the original 1988 loan by a renewal note and renewal deed of trust payable by monthly payments and a balloon payment on May 8, 1997. It is not disputed that this renewal loan was to continue to be secured by the Whitefoots' home and three acres of land as per the original loan and original deed of trust. The legal description in this deed of trust is the same as found in the subsequent renewal deed of trust executed by the Whitefoots on June 26, 1997. The three acres of land, with the house intended to be located thereon, was described as a lot fronting on a road and being 365 feet by 365 feet.

On June 26, 1997 the Whitefoots renewed the 1995 renewal note another renewal note, and they executed a renewal deed of trust. The 1997 renewal note however left an unpaid interest payment owing on the 1995 renewal note in a sum for unpaid interest now totaling \$708.20. The 1997 renewal note stated it was secured by a three acre tract, but it made no mention of a house. The 1995 renewal note had included the house in the description of the security. The Whitefoots argue that this omission evidences the intention of the Plaintiff to abandon any mortgage lien on the house. The Whitefoots argue that the Plaintiff has now discovered that it made a mistake in not including the house in the 1997 renewal note, and that they, the Whitefoots, would have had no choice but to agree in 1997 that the house was securing their unpaid loan from the Plaintiff. The Whitefoots now argue that the Plaintiff only asked for a renewal deed of trust on the vacant three acre tract and did not seek the house as security for the 1997 renewal note, based

upon the omission of "house" from the 1997 renewal note and upon the failure to demand insurance on the house from the Whitefoots after the 1997 renewal. The Court finds this argument unpersuasive, The Court finds no agreement by the Plaintiff to waive or release its lien upon the house and an accompanying underlying three acre tract.

The Court finds beyond a reasonable doubt that the parties intended in 1988 to have the 1988 deed of trust secure the 1988 loan by a mortgage lien upon the house and three acres upon which the house was situated. The Court further finds beyond a reasonable doubt that said intention continued with each renewal note and renewal deed of trust through the discovery in 1997 by a survey, that the house was not located on the three acre described in the earlier deeds of trust.

In 1997 when the error was established by the survey and the loan came up for renewal, the loan was renewed and the deed of trust was renewed. The Whitefoots were in default on the 1995 note and wanted to believe that their house could not be foreclosed because the house was not included in the prior deeds of trust legal descriptions. The Plaintiff's loan officer did not have a legal description of a three acre lot on which the house was situated and renewed the loan and deed of trust as had been done before, with the exception of noting the described three acre tract was worth considerably less than the loan because no house was on it. This differed from earlier documentation which valued the three acres as containing the house. The Whitefoots seize upon this difference but without offering to do equity to the Plaintiff. The Whitefoots are reduced to picayune arguments in their hope to be relieved of their legal obligation to pay their debt by having their house foreclosed to raise the money to pay their debt to Plaintiff. They want the Plaintiff to have effectively relieved them of their obligation based upon an unbelievable intention of the Plaintiff to make them a gift of its security interest in the house or upon a mistake in doing so from which the Plaintiff would

be entitled to relief in equity. The proof is insufficient for a finding that the Plaintiff released its right to a mortgage lien on the house. The equities in this case clearly favor the Plaintiff, as does the law. "A court of equity will keep an incumbrance alive, or consider it extinguished, as will best serve the purpose of justice, and the actual and just intention of the parties. It must at all events, be an innocent purpose, and injurious to no one." *Starr v. Ellis*, 6 John. C.R. [N. Y.] 393, cited in *Lewis v. Starke*, 10 Smedes & M. 130 (Miss, 1848) .

A mere change in the form of the evidence of indebtedness will not operate to discharge a lien given to secure a debt unless it is apparent that the parties intended to extinguish the lien. *Gleason v. Wright*, 33 Miss. 247 (1876) To have the effect of extinguishing the lien, it must be shown that the intent of putting the debt in new form was to work an extinguishment. *Kausler v. Ford*, 47 Miss. 289 (1872). A party having a specific legal lien upon property, cannot be divested of it, except by some distinct act of his own, amounting to a waiver or absolute abandonment of it. The defense of waiver or abandonment should be made out and established by "full, clear and positive testimony." The rights of a mortgagee in his lien cannot be divested legally but in one of two ways: either by reconveyance by the mortgagee or by the absolute payment of the mortgage money. *Feard v. Evans*, 1 Freem. Ch. 79 (1843).

The mutual mistake of the parties entitles the Plaintiff to a reformation of all deeds of trust to include a legal description of three acres of land with the house upon it. The Whitefoots agreed in the 1997 deed of trust that the 1997 deed of trust was a renewal of the 1995 deed of trust, and the 1995 deed of trust was intended by the parties to include a legal description for the house and three acres. The Plaintiff may foreclose any of the reformed deeds of trust as the original debt has not been paid and is now in default and the original mortgage has never been satisfied. The Whitefoots are indebted to the Plaintiff in the total sum of \$46,163.57 and are in default in payment causing the total debt to

be now due and payable.

The Plaintiffs agreed to pay the Plaintiff a reasonable attorney's fees in collecting any debt in default. The Court finds the substantial portion of the attorney's fees to date requested by the Plaintiff relates to the error caused by the mutual mistake of the parties in the legal description. The Plaintiff should bear this expense as a regular cost of its business. No attorney's fees are awarded to the Plaintiff as of this stage of the proceeding. The Plaintiff is entitled to a reasonable attorney's fee in the collection of its debt. The Court will establish that sum at the conclusion of this litigation.

The Plaintiff shall cause a survey to be made to provide a legal description for three acres of land which includes the house and driveway with the curtilage appropriate thereto as is now existing. The Whitefoots may assist in the establishing of this survey or may object to the Plaintiff's survey and propose an alternative as the more probable intention of the parties in 1988 as to the three acre house site.

It is therefore ordered that the deeds of trust given to the Plaintiff by the Whitefoots beginning in 1988 through date, to secure the payment of the subject indebtedness to Plaintiff shall be reformed to contain a legal description to be approved by the Court after submission of the survey directed herein above to be made. It is further ordered that this cause remain on the docket for entry of such further orders and judgement as necessary in the premises, including but not limited to foreclosure by sale. The Whitefoots counterclaim against the Plaintiff is denied with prejudice. All court costs to date shall be taxed to the Whitefoots.

The Plaintiff in seeking equity must be willing to do equity. Upon determination of the proper legal description and the reformation of the deeds of trust, the Plaintiff shall in good faith attempt to negotiate with the Whitefoots a renewal of the subject indebtedness amortized over a sufficient period of time to

create an opportunity for the Whitefoots to pay the indebtedness and retain their homestead. Having sought judicial foreclosure, the Plaintiff shall not resort to its power of sale in the deeds of, trust while this suit is pending.

So ordered on this the 24th day of February, 1999.

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/s/  
CHANCELLOR

FILED ON THIS DATE  
CLAY COUNTY

7 FEB 25 1999