Circuit Court for Carroll County
Case No. 06-C-15-069030 FC

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 274

September Term, 2018

GAYLA SMUCK

v.

BRADFORD I. WEBB

Kehoe,
Berger,
Beachley,

JJ.

Opinion by Kehoe, J.

Filed: July 3, 2019

Gayla Smuck appeals from a judgment of the Circuit Court for Carroll County, the Honorable J. Barry Hughes, presiding, which reformed a mortgage executed by Gayla Smuck as mortgagor. The appellee is Bradford I. Webb, Esquire, the assignee of the mortgage for purposes of foreclosure. Ms. Smuck presents one issue, which we have reworded slightly:

> Did the trial court err in reforming a mortgage instrument, even though it was unambiguous on its face?

We find no flaw in Judge Hughes's resolution of the issues before us. We affirm the judgment.

Background

We summarize the relevant evidence in the light most favorable to Webb as the prevailing party. *See, e.g., Dynacorp Ltd. v. Aramtel Ltd.*, 208 Md. App. 403, 451 (2012).

In 2005, Ms. Smuck executed a deed of trust on property owned by her in Eldersburg, Maryland. The deed of trust note was subsequently acquired by Vericrest Financial, Inc. In 2007, Ms. Smuck signed a second mortgage, in an original principal amount of $325,000, to her parents, Mr. and Mrs. Byers. By November 2010, Ms. Smuck was in financial difficulties. The principal balance on the Vericrest note was approximately $397,000, and she owed nearly $27,000 in past due monthly payments. Vericrest was threatening to accelerate the loan and foreclose on the property if the loan were not brought current.

Ms. Smuck approached Jacob H. France, Jr., for a loan.[1] On December 1, 2010, Ms. Smuck and her husband signed a memorandum which stated:

> Any money that William A. [and] Gayle Smuck owes me Jacob H. France, Jr. now and in the future will be added to the Morg – at 2400 Liberty Rd. Carroll Co. up to Two Hundred Thousand Dollars.

France requested his attorney, Arthur L. Rhoads, Esquire, to draft the necessary loan documents. Rhoads prepared a mortgage that Ms. Smuck signed on December 20, 2010. The mortgage was in the principal amount of $200,000 and the document provided that the loan secured by the mortgage was due on December 31, 2011. Appended to the mortgage was an affidavit signed by France stating that $200,000 "was paid over and disbursed by the Mortgagee[, that is, by France himself,] to either the Mortgagor or the person responsible for the disbursement of funds in the closing transaction." The trial court found that the affidavit was false: it was undisputed that no money changed hands at settlement, and, although the evidence showed that France had lent some money to the Smucks before the mortgage was signed, no one asserted that France had advanced $200,000, or anything close to that amount, prior to the closing.

On the day after the closing took place, Ms. Smuck persuaded her parents to sign a subordination agreement (also prepared by Rhoads), which subordinated their mortgage to the France mortgage. This document referred to Mr. and Mrs. Byers as the "Second

[1] Mr. France and Mr. Smuck had previously been engaged in a series of real estate development ventures.

Lender," and their mortgage as the "Second "Mortgage," and identified France as the "Third Lender," and the mortgage to him as the "Third Mortgage." Rhoads then recorded both instruments in the Carroll County land records.

There is no doubt that France advanced sums from time to time to Ms. Smuck and Mr. Smuck after the mortgage was signed. At least one of the advances was documented by a memorandum, dated December 26, 2011 and signed by Mr. Smuck, which stated:

> IOU Jacob H. France: three thousand dollars cash[.] Add this loan to the Morg[.]

The record is also clear that Mr. or Ms. Smuck made payments to France on occasion, the last being made prior to France's death. He died in 2013, and the personal representative of his estate assigned the Smuck mortgage to Webb for foreclosure. On June 8, 2015, Webb filed an order to docket foreclosure together with the various documents required by Maryland Code, Real Property Article § 7-105.1. Ms. Smuck filed a counterclaim, which was later amended.

We need not belabor the procedural history; eventually, the various issues raised by Ms. Smuck crystalized into two: (1) a claim against Webb for malicious use of civil process, specifically, filing the foreclosure action when he knew that the mortgage was fraudulent; and (2) a claim against the France estate for damages and attorney's fees

pursuant to Real Property Article § 7-406,[2] which was also based on the theory that the mortgage was fraudulent. For his part, Webb sought alternative relief: first, to enforce the mortgage according to its terms; second, as an alternative, to reform the instrument to reflect the actual intent of the parties; and, in any event, to determine the actual amount due on the loan.

After a two-day, non-jury trial, the court issued a written memorandum opinion and order. The court found that, although no money was paid to Ms. Smuck at closing, "[f]rom April 7, 2010 through February 28, 2012, France made loans to or on behalf of [Ms. Smuck] and/or her husband who, in turn, made repayments to France[.]" The court further found that the mortgage was not fraudulent because Ms. Smuck failed to prove that she detrimentally relied upon its terms:

> The Court concludes that [Ms. Smuck] knew the affidavit of consideration was false when made, and that therefore, the enforcement of the mortgage is not barred due to fraud. . . .

[2] R.P. § 7-406 states in pertinent part:

> (a)(1) In addition to any action authorized under this subtitle and any other action otherwise authorized by law, a person may bring an action for damages incurred as the result of a violation of this subtitle.
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> • • •
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> (b) A person who brings an action under this section and who is awarded damages may also seek, and the court may award, reasonable attorney's fees.
>
> (c) If the court finds that the defendant violated this subtitle, the court may award damages equal to three times the amount of actual damages.

Pertinent to the issue raised on appeal, the court found (emphasis added):

> Defendant argues that this action is barred by the fact that this mortgage is a fixed sum mortgage, not a line of credit, and that the wording used in the document is unambiguous and therefore cannot be foreclosed upon, given that all parties admit that the stated consideration was admittedly not paid. *The Court agrees that the document is unambiguous*; however, "contractual provisions as to the payment of the purchase price are not merged with the deed and may subsequently be shown by evidence dehors the deed." Dorsey v. Beads, 288 Md. 161, 171 (1980). *It therefore does not automatically follow that the mortgage cannot be enforced*. That issue can only be determined after further analysis.
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> As to how the mortgage should be enforced, *it is clear from the actions of both parties that neither intended this mortgage serve as security for a Two Hundred Thousand Dollars ($200,000) loan paid upon execution. Rather, this mortgage was intended to secure present and future debts owed by Defendant to Plaintiff*. Why the preprinted mortgage providing otherwise was used by the scrivener is a mystery. . . . Nevertheless, *the Court will reform and enforce the mortgage to comply with the intent of the parties by providing security to France for sums proven to be due from Defendant as of and following the execution of the mortgage*.
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Based upon the evidence, the trial court found that the principal due on the mortgage was $86,869.17, with accrued interest through February 28, 2018 of $43,072.50. The court entered judgment accordingly. Finally, in order to expedite appellate review, the court directed that the judgment be entered as final pursuant to Md. Rule 2-602(b).

Analysis

To this Court, Ms. Smuck argues that the trial court erred as a matter of law by considering parol evidence to vary the terms of the mortgage, which the court concluded to be unambiguous on its face. Whether the terms of a mortgage are ambiguous is a legal

issue that appellate courts review *de novo*. *See, e.g.*, *Calomiris v. Woods*, 353 Md. 425, 434 (1999).

Ms. Smuck is correct that, as a general rule, parol evidence is not admissible to vary the terms of a written instrument, such as a contract, a deed, or a mortgage. *See, e.g.*, *Calomiris*, 353 Md. at 436; *First Union Bank v. Steele Software Systems*, 154 Md. App. 97, 171 (2003). However, the parol evidence rule is subject to exceptions. Three are applicable to this case.

First, parol evidence is admissible to prove intentional fraud. *See Creamer v. Helferstay*, 294 Md. 107, 116–17 (1982); *Shulton, Inc. v. Rubin*, 239 Md. 669, 686 (1965). Ms. Smuck presented parol evidence, in the form of her own testimony, to support her contention that the mortgage was fraudulent.

Second, parol evidence can be considered to show that there is a variance between the consideration asserted in the instrument and the consideration actually paid. *Dorsey v. Beads*, 288 Md. 161, 171 (1980) ("[T]he consideration stated in a deed may usually be contradicted and the true consideration may be shown by parol." (quoting *Rinaudo v. Bloom*, 209 Md. 1, 8 (1956)). At trial, Ms. Smuck testified that, notwithstanding the statement in the affidavit of disbursement, she did not receive $200,000 from France when the mortgage was signed. (On appeal, Ms. Smuck argues that *Dorsey* is distinguishable from the present case because *Dorsey* involved a dispute over a deed as opposed to a

mortgage, but this is a distinction without a meaningful difference. Mortgages, just like deeds, must be supported by consideration.)

Third, parol evidence is admissible to show that the parties to a contract, deed, or mortgage were laboring under a mutual mistake. *See, e.g.*, *Higgins v. Barnes*, 310 Md. 532, 538 (1987); *Hoffman v. Chapman*, 182 Md. 208, 210 (1943); *Hearn v. Hearn*, 177 Md. App. 525, 541–43 (2007). As Judge Meredith explained for this Court in *Hearn*: "this principle is an exception to the 'general rule of common law that parol evidence is inadmissible to vary or contradict the terms of a written instrument.'" *Id.* at 541 (quoting *Hoffman*, 182 Md. at 210)).

If mutual mistake is proven, then Maryland courts "will reform a written instrument to make it conform to the real intention of the parties[.]" *Hoffman*, 182 Md. at 210. However, the evidence of mistake must be "so clear, strong and convincing as to leave no reasonable doubt that a mutual mistake was made in the instrument contrary to their agreement." *Id.*; *see also Brady v. Berke*, 33 Md. App. 27, 31 (1976) (same). Maryland law is also clear that a scrivener's error or oversight can be the basis to reform an instrument based upon mutual mistake. *Hoffman*, 182 Md. at 214 ("Where a deed . . . fails to express the manifest intention of the parties on account of a mistake of the draftsman, whether from carelessness, forgetfulness or lack of skill, equity will rectify the mistake to make the deed express the real intention of the parties.").

Returning to the case before us, the trial court did not err when it permitted Ms. Smuck to introduce parol evidence in her effort to prove that the mortgage was fraudulent. Nor did the court err in allowing Ms. Smuck to present parol evidence to show that she did not receive $200,000 from France on or before the date of settlement, regardless of the statement to the contrary in the affidavit of disbursement appended to the mortgage. The trial court similarly did not err in permitting Webb to present parol evidence, including the handwritten memoranda signed by Ms. Smuck and/or her spouse, to show that the parties to the mortgage intended it to secure repayment of past and future loans by France to Ms. Smuck and her spouse. All of these evidentiary rulings by the trial court were completely proper.

As we have noted, the evidence of mistake must be clear and convincing. "To be clear and convincing, evidence should be 'clear' in the sense that it is certain, plain to the understanding, and unambiguous and 'convincing' in the sense that it is so reasonable and persuasive as to cause [the factfinder] to believe it." Maryland Pattern Jury Instructions-Civil 1:15 (5th Ed. 2018). In deciding whether this or any other standard of proof is satisfied in a particular case, we:

> must consider evidence produced at the trial in a light most favorable to the prevailing party and if substantial evidence was presented to support the trial court's determination, it is not clearly erroneous and cannot be disturbed. The trial court is not only the judge of a witness' credibility, but is also the judge of the weight to be attached to the evidence. It is thus plain that the appellate court should not substitute its judgment for that of the trial court on its findings of fact but will only determine whether those findings are clearly erroneous in light of the total evidence.

Ryan v. Thurston, 276 Md. 390, 392 (1975) (cleaned up).

In our view, the relevant documentary evidence, including the December 1, 2010 and the December 26, 2011 memoranda, coupled with Ms. Smuck's own testimony, was a sufficient basis for the court to conclude by clear and convincing evidence that the language of the mortgage and the affidavit of disbursement did not reflect the actual intent of the parties. The court did not abuse its equitable powers in reforming the mortgage to reflect the intent of the parties.[3]

THE JUDGMENT OF THE CIRCUIT COURT FOR CARROLL COUNTY IS AFFIRMED. APPELLANT TO PAY COSTS.

[3] Ms. Smuck does not assert that the trial court erred in its calculation of the amount due under the mortgage. Apparently, at one point, Webb did, because he filed a notice of cross-appeal. However, he explicitly abandoned his cross-appeal in his brief.