10-10-2011

Order on Cross-Motions for Summary Judgment (ELITE FLOORING & DESIGN)

Alice D. Bonner
Superior Court of Fulton County

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IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

ELITE FLOORING & DESIGN, INC., Plaintiff, v. JLB EON, LLC, and CAPITAL ONE, NATIONAL ASSOCIATION,[1] Defendants.	Civil Action File No. 2010-CV-190165

ORDER ON CROSS-MOTIONS FOR SUMMARY JUDGMENT

On September 15, 2011, counsel appeared before the Court to present oral arguments on the parties' cross-motions for summary judgment.[2] After hearing the arguments made by counsel, and reviewing the briefs submitted on the motions and the record in the case, the Court finds as follows:

I. Factual Background

Plaintiff Elite Flooring & Design, Inc. ("Elite") is a subcontractor who installed flooring for a commercial and condominium project owned by LCDP Condo Holdings I, LP ("LCDP") near the Lindbergh MARTA station in Atlanta, Georgia. Neither LCDP nor the general contractor, Lane Realty Construction, LLC ("Lane"), paid Elite for its work. Elite filed a claim of lien against the property and later filed a civil action against Lane and LCDP, which resulted in a judgment granting Elite a "special lien" against LCDP's interest in the property. It is undisputed that Elite's lien is junior to the first priority

[1] Capital One, National Association was dismissed from this action pursuant to Plaintiff's voluntary dismissal without prejudice of all claims against it filed on September 12, 2011.

[2] Elite Flooring filed a motion for partial summary judgment on Counts I-III. JLB's moves for summary judgment as to all claims.

security interest granted to Regions Bank in connection with a $56,325,000 construction loan. Regions Bank assigned its interests in the loan documents, including the security deed, to JLB EON, LLC ("JLB") in a transaction that closed on December 28, 2009. Thereafter, JLB conducted a non-judicial foreclosure of the property on January 5, 2010, at which it emerged as the highest bidder with a bid in the amount of $43 million.

In this action, Elite seeks to set aside the foreclosure due to the following alleged improprieties: (1) The Assignment of the Deed to Secure Debt ("Executed Assignment") to JLB was not properly recorded; (2) The version of the Assignment of the Deed to Secure Debt ("Recorded Assignment") that was actually recorded is patently defective; and (3) JLB failed to properly advertise the foreclosure. In the alternative, Elite asks the Court for an award in the amount generated by the foreclosure in excess of the amount JLB paid in connection with the assignment from Regions Bank. Elite and JLB have filed cross-motions for summary judgment on Elite's claims.

II. Parties' Cross-Motions for Summary Judgment

a. Count I

Elite asks the Court for a declaration that the foreclosure sale is void because the Executed Assignment was never recorded. In the transaction pursuant to which Regions Bank assigned to JLB its interest in the loan documents, including the security deed, to JLB, Regions Bank executed two assignment documents. The first, a "long form assignment," assigned all of the "Assigned Rights," which is defined to include the security deed. The second, a shorter-form assignment, expressly assigned the security deed to JLB. It appears that the signature page associated with the Executed

Assignment (short-form assignment) was replaced with the signature page from the long-form assignment. For that reason, Plaintiff contends that the actual Executed Assignment was never recorded and, consequently, that the foreclosure is void.

"In the absence of fraud, a deed which, on its face, complies with all statutory requirements is entitled to be recorded, and once accepted and filed with the clerk of the court for record, provides constructive notice to the world of its existence." Leeds Building Products Inc. v. Sears Mortgage Corp., 267 Ga. 300, 301 (1996).

The Court finds that it is not apparent from the face of the document that the signature pages were transposed. Thus, this "defect," if one at all, is latent and falls squarely within the holding of Leeds Building Products Inc. v. Sears Mortgage Corp., 267 Ga. 300, 301 (1996), which stands for the rule that a challenge to the validity of a recorded instrument must fail unless one can tell from the face of the instrument that the document is defective, or unless it fails to meet the requirements for recordation. Accordingly, summary judgment is **GRANTED** in favor of Defendant as to Count I.

b. Count II

Next, Elite asks the Court for a declaration that the foreclosure sale is void because the Recorded Assignment was ineligible for recording. In support of this argument, Elite points out that the document was dated December 28, 2009, while the acknowledgement is dated December 23, 2009, thus raising the inference, according to Elite, that the document was signed after it was acknowledged.

The Court finds this argument unpersuasive. Even if the unrebutted evidence did not establish that the document was actually signed on December 23, 2009, and merely

post-dated December 28, 2009, to reflect the date upon which the document was intended to go into effect, the different dates do not create an inconsistency that is apparent on the face of the document. Above the signatures, the document provides: "Dated this 28th day of December, 2009." It does not say it was *signed* "this 28th day of December, 2009." The only place that references the date upon which the document was signed is in the acknowledgement paragraph, where it says: "The foregoing instrument was acknowledged before me this 23rd day of December, 2009, by Thomas A. Neely, Executive Vice President of Regions Bank, an Alabama banking corporation....." The document is not inconsistent and therefore, not patently defective to render it ineligible for recording. See Leeds, 267 Ga. at 301. For this reason, the Court **GRANTS** summary judgment in favor of JLB as to Count II.

c. Counts III and IV

Counts III and IV attack the foreclosure advertisement. Specifically, Elite complains that: 1) The advertisement failed to identify JLB as the foreclosing party; 2) The amount outstanding on the underlying debt was overstated in the advertisement; 3) Regions Bank "chilled" the bidding by advertising the sale for five months before the actual sale was conducted; and 4) The sale was held at an unfavorable time—January 4, 2010, after the year end holidays. Elite argues that, given the totality of these circumstances, the manner in which the sale was advertised lacked good faith and adversely affected the bidding process.

As to the issue regarding whether the advertisement was required to reference JLB as the foreclosing party, the Court finds Elite's position undermined by a recent

ruling of the Court of Appeals. See Amirfazli v. VATACS Group, Inc., 2011WL 2899686 (Ga. App. July 21, 2011); see also The Hudson Trio, LLC v. Buckhead Community Bank, 304 Ga. App. 324 (2010). Elite cites Amirfazli for the requirement that JLB is required to demonstrate that the failure to advertise the sale in its name did not impact the bidding at the sale. However, the Court finds the circumstances in Amirfazli distinguishable to those in this case, where Elite has not alleged that the sale resulted in a price significantly lower than fair market value. In fact, JLB has submitted evidence to show that the property was sold for fair market value. In contrast, in Amirfazli, the plaintiff sued to set aside the foreclosure because the property at issue was sold at a price "significantly lower than the property's fair market value." Id. at *2.

With regard to the other alleged defects in the contents and manner of the advertisement, the Court finds that Elite's challenge fails due to its failure to point to any evidence to suggest that the price achieved at the sale was inadequate or that potential bidders were deterred from bidding at the sale.

> If a notice or advertisement of a foreclosure sale under power does not substantially meet the legal requirements, the sale should be set aside. However, in order to void the sale, the irregularity or deficiency in the advertisement must contribute to chilling the price on the sale of the property. Errors that would not confuse the bidding intentions of any potential bidder of sufficient mental capacity to enter a binding contract for the sale of the real property do not show a chilling of the sale so that a fair market value bid was not obtained.

Williams v. South Central Farm Credit, 215 Ga. App. 740, 742 (1994). In an interrogatory response and at its 30(b)(6) deposition, Elite admitted that it is unaware of any particular prospective bidder that was deterred or dissuaded from bidding. See Williams, 215 Ga. App. at 743. In contrast, JLB has provided two appraisals to show

that the sale realized fair market value. Summary judgment is **GRANTED** in favor of Defendant on Counts III and IV.

d. Count V

If the Court upholds the foreclosure sale, Elite alternatively requests an equitable distribution of the excess funds generated by the foreclosure above what JLB paid Regions Bank in connection with the assignment of its interest. The Court finds no support for this theory under Georgia law. See O.C.G.A. § 44-14-190 (money arising from the sale of mortgaged property is paid first to the person foreclosing or persons holding superior liens thereto and "when there is any surplus after paying off the mortgage and other liens, the surplus shall be paid to the mortgagor or his agent.") (emphasis added). Accordingly, summary judgment is **GRANTED** in favor of Defendant as to Count V.

e. Count VI

In light of the Court's ruling, summary judgment is **GRANTED** in favor of JLB as to Plaintiff's claim for attorneys' fees. Additionally, it is unnecessary for the Court to address Elite's Motion for Partial Summary Judgment, which is hereby **DENIED**.

III. Plaintiff's Motion to Strike the Affidavit of William H. Dodson, II

In reaching its decision, the Court did not consider the evidence at issue in Plaintiff's Motion to Strike the Affidavit of William H. Dodson, II. Accordingly, the Motion is **DENIED** as moot.

SO ORDERED this 11 day of October, 2011.

Alice D. Bonner

ALICE D. BONNER, SENIOR JUDGE
Superior Court of Fulton County
Atlanta Judicial Circuit

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