IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED

TIMOTHY FRANTZ,

Appellant,

v. Case No. 5D19-379

EM PAVING CORP., MANA INTERNATIONAL CORP., MARGHERIO CONSTRUCTION, INC. AND DENNIS SCHEK & SON, INC.,

Appellees.
_____/

Opinion filed January 31, 2020

Appeal from the Circuit Court
for Lake County,
Lawrence J. Semento, Judge.

Gray R. Proctor, of Law Office of Gray Proctor, Richmond, VA, for Appellant.

Barry Kalmanson, Maitland, for Appellee, EM Paving Corp.

No Appearance for other Appellees.

COHEN, J.

Timothy Frantz, Esq., appeals the final judgment of garnishment entered against him in favor of EM Paving Corporation ("EMP").

Mana International Corporation ("Mana") hired Margherio Construction Corporation ("Margherio") to construct a commercial building on its property in Lake County. Margherio subcontracted with EMP for labor and materials. EMP was not paid in full, and consequently, filed a two-count complaint against Mana and Margherio; count 1

was for foreclosure of a construction lien against Mana, alleging Mana owed it $63,578.61, and count 2 was for breach of the subcontract agreement against Margherio, alleging Margherio owed it the same amount. Margherio retained Frantz for representation.

The trial court entered a final judgment in favor of EMP against Margherio for $63,578.61 plus interest. A few months later, the trial court entered a default final judgment of foreclosure against Mana for $63,578.61 plus fees, costs, and attorney's fees. The clerk held a foreclosure sale; EMP won the property for $100, and the clerk issued a certificate of title.

Years later, EMP filed a motion for writ of garnishment against Frantz, alleging that Margherio could not satisfy the monetary judgment and that Frantz held Margherio's funds. Throughout the garnishment hearing, Frantz maintained that EMP had no right to a judgment of garnishment against him because it did not have an enforceable judgment against Margherio. He argued that because EMP was awarded two judgments based on one set of facts and enforced the judgment of foreclosure first, it could no longer enforce the monetary judgment; it needed to obtain a deficiency judgment against Margherio, which it had not.

The trial court entered a final judgment of garnishment against Frantz.[1] It held that because EMP lost title to the property shortly after the foreclosure sale and received no financial benefit from its ownership of the property, it recovered no value from the foreclosure sale to offset the judgment against Margherio.

[1] The evidence at the garnishment hearing demonstrated that Frantz represented Margherio in an unrelated settlement agreement, which provided that Frantz was to wire the settlement funds directly to Margherio's president, rather than the corporation. The trial court found that the settlement funds deposited in Frantz's account belonged to Margherio, not its president. Frantz does not dispute that finding.

On appeal, Frantz maintains EMP was required to obtain a deficiency judgment against Margherio before the trial court could issue the judgment of garnishment. He also argues that the trial court erred in determining the deficiency amount because the issue was not noticed for hearing. Alternatively, Frantz asserts that the trial court erred in finding that EMP received no value from the foreclosure sale.

We agree with Frantz that EMP was required to obtain a deficiency judgment against Margherio before the trial court could enter a judgment of garnishment against him. If a trial court issues two judgments for the same debt—one monetary judgment and one judgment of foreclosure—and the prevailing party chooses to foreclose first, that party must obtain a deficiency judgment before subsequently collecting on the remaining debt. See Hammond v. Kingsley Asset Mgmt., LLC, 144 So. 3d 673, 675 (Fla. 2d DCA 2014). Without a deficiency proceeding to determine the value the foreclosing party received from the foreclosure sale, there is a risk that the party will recover twice for the same debt. See id. at 676.

EMP contends that it could not have obtained a deficiency judgment against Margherio because Margherio was not involved in the foreclosure. We disagree. Section 713.28(3), Florida Statutes (2010), provides that following a construction lien foreclosure sale, if there is a deficiency to pay the judgment, "the judgment or decree may be enforced for the deficiency against any person liable therefor in the same manner and under the same conditions as deficiency decrees in mortgage foreclosures." § 713.28(3), Fla. Stat. (emphasis added). Accordingly, we conclude that EMP was required to obtain a deficiency judgment against Margherio before it could recover any remainder of the final judgment against Margherio through a judgment of garnishment against Frantz.

As to Frantz's second argument—that the trial court erred in deciding whether a deficiency existed during the garnishment hearing—EMP does not dispute that the deficiency issue was required to be noticed for hearing but was not. However, we agree with EMP that the issue was tried by implied consent.

"An issue is tried by consent when there is no objection to the introduction of evidence on that issue, unless the evidence is relevant to other, properly pled issues." Book v. City of Winter Park, 718 So. 2d 945, 947 (Fla. 5th DCA 1998) (citations omitted).

> [T]he key test of determining whether an issue has been tried by implied consent is whether the party opposing introduction of the issue into the case would be unfairly prejudiced thereby. [A]n unpleaded issue is considered as having been tried or not tried by implied consent under two interrelated criteria involving (a) whether the opposing party had a fair opportunity to defend against the issue and (b) whether the opposing party could have offered additional evidence on that issue if it had been pleaded.

Fed. Home Loan Mortg. Corp. v. Beekman, 174 So. 3d 472, 475 (Fla. 4th DCA 2015) (quoting Smith v. Mogelvang, 432 So. 2d 119, 122 (Fla. 2d DCA 1983) (internal quotation marks omitted)).

During the hearing, EMP called Omar Munoz, who testified that EMP received no value from the foreclosure sale or payments from Margherio; Munoz's testimony was wholly irrelevant to EMP's entitlement to a judgment of garnishment against Frantz based on his handling Margherio's money. Derouin v. Universal Am. Mortg. Co., 254 So. 3d 595, 603 (Fla. 2d DCA 2018) (explaining that party's failure to object to questions and answers irrelevant to any pled issue evidences party's implied consent to try unpled issue). Frantz did not object to this line of questioning; to the contrary, he continued questioning Munoz about the value EMP received from the property during cross-examination.

Frantz was not prejudiced by the introduction of the issue and had a fair opportunity to defend against it; he effectively cross-examined Munoz, eliciting that Munoz did not recall the property's fair market value or whether EMP had the property appraised. Beekman, 174 So. 3d at 475. Although Frantz may have been able to offer additional evidence related to the value EMP received from the foreclosure sale had the issue been noticed for hearing, we find that Frantz's lack of objection and persistent questioning amounted to trial of the issue by consent.[2]

Further, as to Frantz's third argument, we agree that the trial court's finding that EMP received no value from the foreclosure sale is not supported by competent substantial evidence. Section 713.28(3) provides that a deficiency decree issued following the foreclosure of a construction lien may be enforced in "the same manner and under the same conditions as deficiency decrees in mortgage foreclosures." "[T]he correct formula to calculate a deficiency judgment is the total debt, as secured by the final judgment of foreclosure, minus the fair market value of the property, as determined by the court." Morgan v. Kelly, 642 So. 2d 1117, 1117 (Fla. 3d DCA 1994) (citations omitted). The applicable date of the fair market value is the date of the foreclosure sale. Estepa v. Jordan, 678 So. 2d 876, 878 (Fla. 5th DCA 1996). The burden of proving the fair market value of the property is on the secured party. See Coral Gables Fed. Sav. & Loan Ass'n v. Whitewater Enters., Inc., 614 So. 2d 682, 682–83 (Fla. 5th DCA 1993).

EMP presented no evidence of the property's fair market value on the day of the foreclosure sale. The trial court's finding that EMP received "no value" for the property

[2] Frantz's argument that Margherio was not present at the garnishment hearing is disingenuous. Margherio was named as a defendant in EMP's motion to set the garnishment issue for hearing, and the transcript of the hearing indicates that Frantz appeared at the hearing on behalf of himself and Margherio.

was not supported by competent substantial evidence; at a minimum, on the date of the foreclosure sale, the property was worth $100—the amount EMP paid for it. The fact that EMP subsequently lost its interest in the property does not affect the determination of the value received for the property on the date of the foreclosure sale. See Hatton v. Barnett Bank of Palm Beach Cty., 550 So. 2d 65, 68 (Fla. 2d DCA 1989) (explaining that where appellee won property in foreclosure sale but lost title to superior mortgagee prior to moving for deficiency judgment, deficiency amount was nevertheless amount fixed in judgment of foreclosure minus "the higher of either the successful bid at the judicial sale or the fair market value at the time of the judicial sale" (citing Gottschamer v. August, Thompson, Sherr, Clark & Shafer, P.C., 438 So. 2d 408 (Fla. 2d DCA 1983))). Accordingly, the evidence presented during the hearing was insufficient to support a finding that EMP received no value for the property.

Therefore, we reverse the trial court's finding that EMP received no value from the foreclosure sale and remand for the trial court to determine the deficiency amount, if possible.

AFFIRMED IN PART; REVERSED IN PART; and REMANDED.

ORFINGER and EISNAUGLE, JJ., concur.