

FILED

08/28/2023

Clerk of the
Appellate Courts

IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
May 16, 2023 Session

JCR, LLC ET AL. v. VICKI HANCE ET AL.

Appeal from the Circuit Court for Knox County
No. 2-421-17 William T. Ailor, Judge

No. E2022-00765-COA-R3-CV

D. MICHAEL SWINEY, C.J., dissenting.

Because “[t]here is absolutely no doubt that wrongful foreclosure can be raised as an affirmative defense to an unlawful detainer action brought by the purchaser of property in foreclosure[,]” *Davis v. Williams*, No. E2010-01139-COA-R3-CV, 2011 WL 335069, at *3 (Tenn. Ct. App. Jan. 31, 2011), *no appl. perm. appeal filed* (citations omitted), I respectfully dissent. The reasoning behind this defense is evident—to protect those who are wrongfully foreclosed upon from losing their home. The Hances availed themselves of the defense of wrongful foreclosure, just as Tennessee law provides. The Hances’ wrongful foreclosure lawsuit against Nationstar is still pending.¹ While I cannot know the future outcome of the wrongful foreclosure lawsuit, neither can the majority. Under the majority’s holding, the decision in the wrongful foreclosure suit is immaterial. The Hances could prevail in their wrongful foreclosure lawsuit against Nationstar and still be ejected from their home by JCR leaving them with the hollow “victory” of attempting to collect on a money judgment against Nationstar. Their home would be lost to them despite their win. Such a result would be deeply unjust and contrary to longstanding Tennessee precedent that wrongful foreclosure is a defense to a detainer action.

Granting that JCR is a bona fide purchaser for value, it is still subject to the Hances’ wrongful foreclosure defense. To hold otherwise would create an exception for certain purchasers who are not the mortgage lender, an exception that does not currently exist in Tennessee law. To be sure, in the context of wrongful foreclosure, a bona fide purchaser is as innocent as those who live in the wrongfully foreclosed residence. However, whatever the policy considerations, Tennessee law is clear that wrongful foreclosure is a defense to a detainer action. Allowing a bona fide purchaser to end-run the affirmative defense of wrongful foreclosure would eviscerate that defense. It would be a defense that cannot work

¹ In a response to an order by this Court to submit a brief or show cause as to why this matter should not be submitted on the briefs on file, Nationstar stated that “all claims remain pending against Nationstar in the trial court and no final, appealable orders have been entered as to Nationstar.”

from the start, no matter how meritorious. In other words, under the majority opinion, those whose homes are wrongfully foreclosed upon—no matter how blatantly wrongful or even outright fraudulent the foreclosure process—would face certain ejection from their homes provided the purchaser was bona fide. I do not believe Tennessee law requires or even allows such an unjust result.

JCR's detainer action is and must be bound up in the success or failure of the Hances' wrongful foreclosure lawsuit against Nationstar, which is still pending. It is insufficient to merely allow for the possibility that the Hances may obtain monetary redress against Nationstar while having to lose their home to JCR in any event. As this Court has stated in the context of specific performance on contracts, "real property is unique, and more often than not, an award of damages is simply not an adequate remedy." *GRW Enterprises, Inc. v. Davis*, 797 S.W.2d 606, 614 (Tenn. Ct. App. 1990) (citations omitted).² The Hances should not lose their home if they were wrongfully foreclosed upon, a claim they have timely raised and which is as of yet unresolved.

I, respectfully, dissent from the majority's opinion. I would reverse JCR's dismissal from the wrongful foreclosure case, as well as the grant of summary judgment to JCR in the detainer action.

D. MICHAEL SWINEY, CHIEF JUDGE

² It takes no great leap of imagination to foresee a situation where the real property, a family farm perhaps, may have been in the property owner's family for generations and, under the majority's position, yet be lost to the family forever because of a wrongful foreclosure and resulting sale to a bona fide purchaser.