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IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
January 25, 2022 Session

JENIFER SCHARSCH v. CORNERSTONE FINANCIAL CREDIT UNION ET AL.

Appeal from the Chancery Court for Rutherford County
No. 20CV-248 J. Mark Rogers, Judge

No. M2020-01621-COA-R3-CV

After a borrower defaulted on a note and deed of trust, the lender sent a cure notice and, later, a notice of foreclosure. But the borrower did not receive either notice. When the borrower failed to cure the default, the home was sold at foreclosure. The borrower then sued to set aside the sale, arguing that the lender breached the deed of trust and violated Tennessee law by failing to deliver proper notice. The trial court granted summary judgment in favor of the lender, concluding that the notices only needed to be sent to, not received by, the borrower. We agree and affirm.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed

W. NEAL MCBRAYER, J., delivered the opinion of the court, in which ANDY D. BENNETT, J., and J. STEVEN STAFFORD, P.J., W.S., joined.

Benjamin Lewis, Murfreesboro, Tennessee, for the appellant, Jenifer Scharsch.

Dudley A. Cheadle, Nashville, Tennessee, for the appellees, Cornerstone Financial Credit Union and John R. Cheadle, Jr.

OPINION

I.

A.

Jenifer Scharsch and her husband, Jason Scharsch, owned real property in Murfreesboro, Tennessee. The couple obtained a loan from Cornerstone Financial Credit Union, which they secured by a deed of trust on the property.

Mr. and Mrs. Scharsch stopped paying property taxes in 2017. And in May 2019, they stopped making loan payments. As a result, on September 11, 2019, Cornerstone sent the couple a 30-day cure notice by certified and first class mail. The notice outlined the reason the loan was in default, the amount required to cure the default, and the date by which the default must be cured. It also explained that Cornerstone could accelerate the loan and sell the property if the Scharsches failed to timely cure the default.

On January 23, 2020, John R. Cheadle, Jr., the trustee under the deed of trust, sent the couple a notice of foreclosure by certified and first class mail. The United States Postal Service returned the notice sent certified mail as "unclaimed." Cornerstone also published notice of the sale in the *Daily News Journal* in Rutherford County, Tennessee.

On February 6, 2020, the Scharsches received a letter from Mr. Cheadle. The letter came through first class mail and informed the couple that the foreclosure sale was scheduled for February 14, 2020. The Scharsches were unable to bring the loan current.

B.

On the morning of the foreclosure sale, Mrs. Scharsch filed a petition to enjoin the sale. But the trial court denied the petition as untimely. *See* Tenn. Code Ann. § 29-23-201(a) (2012) (prohibiting a court from "grant[ing] an injunction to stay the sale of real estate conveyed by deed of trust . . . unless the complainant gives five (5) days' notice to the trustee or mortgagee of the time when, place where, and of the judge or chancellor before whom, the application for injunction is to be made"). After the foreclosure sale, Mrs. Scharsch filed a nearly identical amended petition asking the court to set aside the sale. She alleged that she did not receive any communications from Cornerstone or Mr. Cheadle until she received Mr. Cheadle's letter on February 6, 2020. Thus, she argued, Cornerstone did not provide the notice required by the deed of trust and Tennessee law.

Cornerstone and Mr. Cheadle moved for summary judgment, arguing that they complied with all relevant notice requirements. In support of their motion, they filed the affidavit of Christy Pratt, Cornerstone's member resolutions manager; a copy of the deed of trust; and a copy of all the communications sent by Cornerstone and Mr. Cheadle.

Mrs. Scharsch responded that there was no evidence that she received any communications other than Mr. Cheadle's February 6 letter. The certified mail receipt for the cure notice was signed by an "agent." But Mrs. Scharsch did not authorize anyone to sign on her behalf, and no one could identify who signed the receipt. And the Scharsches

did not learn of the foreclosure sale until one week before it was scheduled to occur. So genuine disputes of material fact precluded summary judgment.

Following a hearing, the trial court orally granted the motion for summary judgment and instructed defense counsel to draft a proposed order. But when counsel submitted the proposed order, Mrs. Scharsch objected. She argued that the proposed order did not accurately reflect the court's oral ruling and did not state the legal grounds for the ruling as required by Tennessee Rule of Civil Procedure 56.04. The trial court disagreed and adopted the proposed order as its final order.

II.

Summary judgment may be granted only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." TENN. R. CIV. P. 56.04. The party moving for summary judgment has "the burden of persuading the court that no genuine and material factual issues exist and that it is, therefore, entitled to judgment as a matter of law." *Byrd v. Hall*, 847 S.W.2d 208, 211 (Tenn. 1993). If the moving party satisfies its burden, "the nonmoving party must then demonstrate, by affidavits or discovery materials, that there is a genuine, material fact dispute to warrant a trial." *Id.*

Here, the parties moving for summary judgment did not bear the burden of proof at trial. Thus, the burden of production on summary judgment could be satisfied "either (1) by affirmatively negating an essential element of the nonmoving party's claim or (2) by demonstrating that the nonmoving party's evidence *at the summary judgment stage* is insufficient to establish the nonmoving party's claim or defense." *Rye v. Women's Care Ctr. of Memphis, MPLLC*, 477 S.W.3d 235, 264 (Tenn. 2015). Satisfying this burden requires more than a "conclusory assertion that summary judgment is appropriate," rather the movant must set forth specific material facts as to which the movant contends there is no dispute. *Id.*

If a motion for summary judgment is properly supported, the nonmoving party must then come forward with something more than the allegations or denials of its pleadings. *Id.* at 265. The nonmoving party must "by affidavits or one of the other means provided in Tennessee Rule 56, 'set forth specific facts' *at the summary judgment stage* 'showing that there is a genuine issue for trial.'" *Id.* (quoting TENN. R. CIV. P. 56.06).

A trial court's decision on a motion for summary judgment enjoys no presumption of correctness on appeal. *Martin v. Norfolk S. Ry. Co.*, 271 S.W.3d 76, 84 (Tenn. 2008); *Blair v. W. Town Mall*, 130 S.W.3d 761, 763 (Tenn. 2004). We review the summary judgment decision as a question of law. *Martin*, 271 S.W.3d at 84; *Blair*, 130 S.W.3d at 763. So we must review the record de novo and make a fresh determination of whether the

requirements of Rule 56 of the Tennessee Rules of Civil Procedure have been met. *Eadie v. Complete Co.*, 142 S.W.3d 288, 291 (Tenn. 2004); *Blair*, 130 S.W.3d at 763.

A.

Mrs. Scharsch raises two issues on appeal. We address her second issue first, whether the trial court erred in signing the proposed order prepared by counsel for Cornerstone and Mr. Cheadle. She argues that the court's oral ruling did not specify the facts it found to be material or the legal grounds for the grant of summary judgment. And she argues that the proposed order did not reflect the court's oral ruling.

Under Rule 56.04 of the Tennessee Rules of Civil Procedure, the trial court must "state the legal grounds upon which the court denies or grants" a motion for summary judgment. TENN. R. CIV. P. 56.04. This standard requires trial courts to "fashion[] a considered, independent ruling based on the evidence, the filings, argument of counsel, and applicable legal principles." *Smith v. UHS of Lakeside, Inc.*, 439 S.W.3d 303, 315 & n.24 (Tenn. 2014) (citing John J. Brunetti, *Searching for Methods of Trial Court Fact-Finding and Decision-Making*, 49 HASTINGS L.J. 1491, 1502 (1998)). In doing so, a trial court may use counsel-prepared orders as long as two conditions are satisfied: "the findings and conclusions . . . accurately reflect the [court's] decision" and the record does not "create doubt that the decision represents the trial court's own deliberations and decision." *Smith*, 439 S.W.3d at 316.

After a review of the oral ruling, we conclude the court sufficiently identified the facts it found material and the legal grounds upon which it granted summary judgment. Although it did not use the word "material," the court implicitly concluded that the facts in dispute did have to be resolved in order to determine the merits of Mrs. Scharsch's claims. *See Byrd*, 847 S.W.2d at 215 (describing a disputed fact as "material if it must be decided in order to resolve the substantive claim or defense at which the motion is directed"). And the court provided the legal grounds for its ruling by stating what the foreclosure statutes and deed of trust required in terms of notice to the Scharsches. The written order accurately reflects these rulings. Although the court's oral ruling did not identify the specific statutes and the order does, both the motion for summary judgment and Mrs. Scharsch's response identify the statutes at issue.

B.

For her other issue, Mrs. Scharsch contends there is a genuine dispute of material fact about whether she received the notice required by the deed of trust and Tennessee law. She first argues that Cornerstone did not provide a cure notice as required by the deed of trust. Paragraph 22 of the deed of trust provides, in relevant part, as follows:

> 22. Acceleration; Remedies. Lender shall give notice to Borrower prior to Acceleration . . . . The notice shall specify: (a) the default; (b) the action required to cure the default; (c) a date, not less than 30 days from the date the notice is given to Borrower, by which default must be cured; and (d) that failure to cure the default on or before the date specified in the notice may result in acceleration of the sums secured by this Security Instrument and sale of the Property.

Section 15 of the deed of trust specifies the manner of notice. It provides that any "notice to Borrower . . . shall be deemed to have been given to Borrower when mailed by first class mail or when actually delivered to Borrower's notice address if sent by other means."

Ms. Pratt stated in her affidavit that Cornerstone sent the Scharsches a cure notice by both first class and certified mail on September 11, 2019. The letter outlined the reason their loan was in default, the amount required to cure the default, and the date by which the default must be cured. The letter also specified that Cornerstone could accelerate the loan and sell the property if the default was not timely cured.

Mrs. Scharsch does not dispute that Cornerstone sent the cure notice by the means described by Ms. Pratt.[1] Instead, she argues that there exists a genuine dispute of material fact about whether she physically received it. But under Section 15 of the deed of trust, notices are considered given to the borrower when mailed by first class mail. So whether Mrs. Scharsch received the cure notice was not material for purposes of summary judgment. *See id.*

Mrs. Scharsch also argues that the September 11, 2019 letter did not satisfy the Tennessee Home Loan Protection Act.[2] *See* Tenn. Code Ann. § 45-20-104(b) (2020). That statute requires a lender to send a borrower a cure notice "[n]ot less than thirty (30) days prior to publishing notice of foreclosure . . . or commencing an action for judicial foreclosure." *Id.*[3] But like the deed of trust, section 45-20-104(b) only requires that a lender or servicer send a notice. It does not require that the borrower receive it. *See id.* ("[A] notice of the right to cure the default *shall be sent* to the borrower . . .") (emphasis added).

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[1] In both the trial court and on appeal, the Scharsches complained that there was no proof that a notice was sent via regular mail. But Ms. Pratt's affidavit supplied the necessary proof to meet Cornerstone's and Mr. Cheadle's burden of production.

[2] The Tennessee Home Loan Protection Act applies to "high-cost home loans." Tenn. Code Ann. § 45-20-111. The parties conceded at oral argument that the Act applied.

[3] The statute also requires that the cure notice contain certain information. Tenn. Code Ann. § 45-20-104(b). Mrs. Scharsch does not dispute that the September 11, 2019 letter contained the required information.

Finally, Mrs. Scharsch complains that she did not receive timely notice of Cornerstone's election to sell the property or of the foreclosure sale. Paragraph 22 of the deed of trust provides that "[i]f Lender invokes the power of sale, Lender shall give Borrower . . . notice of Lender's election to sell the Property." And "Trustee shall give notice of sale by public advertisement for the time and in the manner prescribed by Applicable Law."

By statute, "[i]n any sale of land to foreclose a deed of trust . . . , advertisement of the sale must be made at least three (3) different times in some newspaper published in the county where the sale is to be made." *Id.* § 35-5-101(a) (2021). The first publication must be at least twenty days before the date of the sale. *Id.* § 35-5-101(b). And the trustee or other party selling the property must send the debtor notice of the sale "on or before the first date of publication . . . by registered or certified mail." *Id.* § 35-5-101(e). As this Court has recognized, "the statute only provides that the trustee shall 'send' the notice." *Smith v. Hughes*, 639 S.W.3d 627, 640 (Tenn. Ct. App. 2021). "There is no statutory requirement that the notice be received by the debtor." *Davis v. Wells Fargo Home Mortg.*, No. W2016-02278-COA-R3-CV, 2018 WL 1560077, at *11 (Tenn. Ct. App. Mar. 29, 2018).

The foreclosure sale occurred on February 14, 2020. Notice of the sale appeared in the *Daily News Journal* on January 24, 2020, January 31, 2020, and February 7, 2020. And Mr. Cheadle sent the Scharsches a notice of the foreclosure sale by certified mail on January 23, 2020. Even if Mrs. Scharsch never received the letter, Cornerstone and Mr. Cheadle satisfied the requirements of the deed of trust and Tennessee Code Annotated § 35-5-101. So whether Mrs. Scharsch received the notice of the foreclosure sale was not material for purposes of summary judgment. *See Byrd*, 847 S.W.2d at 215.

III.

Because the deed of trust and Tennessee law did not require receipt of either the cure notice or notice of the foreclosure sale, the trial court properly concluded that Cornerstone and Mr. Cheadle were entitled to summary judgment. And, in granting summary judgment, the court fulfilled the requirements of Tennessee Rule of Civil Procedure 56.04 and its order accurately reflected its decision. So we affirm.

s/ W. Neal McBrayer

W. NEAL MCBRAYER, JUDGE