

No. 119208-A

IN THE COURT OF APPEALS
OF THE STATE OF KANSAS

COREFIRST BANK & TRUST F/K/A
COMMERCE BANK & TRUST,
Plaintiff/Appellee,

vs.

TIMOTHY F. DEGGINGER A/K/A,
TIMOTHY DEGGINGER, ET AL.,
Defendant/Appellant.

REPLY BRIEF OF APPELLANT TIMOTHY F. DEGGINGER

Appeal from the District Court of Shawnee County, Kansas
The Honorable Judge Larry D. Hendricks
District Court Case Number 2015-CV-412

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NATURE OF APPELLANT'S REPLY

Appellant/Defendant Timothy F. Degginger respectfully shows this Honorable Kansas Court of Appeals that the Appellee/ Plaintiff CoreFirst Bank & Trust's Brief of has erroneously adopted certain strawman "Uncontroverted" Findings of Fact [Paragraphs 8 and 9 of the Honorable District Court Judge Larry D. Hendricks' June 14, 2017 Memorandum Decision and Order] awarding summary judgment in favor of the Appellee/Plaintiff Bank, and for which he contends that this Amended Record on Appeal requires a conclusion that such material findings are either unsupportable as a matter of fact or are erroneous to support its premise that a valid mortgage exists to support a foreclosure as a valid or proper conclusion of law, to-wit:

"8. On October 4, 1958, the three children of George and Elizabeth Degginger deeded their interest to the real estate to Elizabeth Degginger." (Elizabeth Degginger was the Paternal Grandmother of the Appellant/Defendant Timothy F. Degginger.)

"9. On November 4, 1958, Elizabeth Degginger deeded her interest in the real estate to her son and daughter-in-law, which was the defendant Degginger's parents, Timothy F Degginger and Mary E Degginger, as joint tenants with right of survivorship." (Amended R.O.A., Vol. 2, P. 79.)

Appellant/Defendant respectfully submits to the Honorable Appellate Panel that the above "Uncontroverted "Findings of Fact 8 and 9 were in fact repeatedly controverted by Affidavits provided by the Defendant in Appellant/Defendant's Motion to Dismiss filed quite early in this litigation on March 23, 2016 (Amended R.O.A., Vol. 1, P.P. 163-181.); and which were known to the Bank's Stewart Title Guaranty Company; and which in review of these records occurred at the Mortgage's inception of December 3, 2004;

and which clearly concluded that the title to the subject property for which a mortgage is pursued by this Appellee/Plaintiff must be classified as “unmarketable”. (Amended R.O.A., Vol. 1, P.P. 175-181.) (See also Appellant’s Opening Brief at Appendix “B” – Stuart Loan Policy #C0901060.) Such Findings of Fact of the Honorable Judge Larry D. Hendricks, it is respectfully submitted to this Appellate Panel do not arise to any permissible conclusion as a matter of law as being “Uncontroverted”; to permit the Court’s apparent independent inference that title to the subject real estate had properly been necessarily “quieted”; or to allow this Appeal the luxury of an inference that the interests of the Heirs of the George J. Degginger (whose Estate had never been probated) had been located and determined (not by an impermissible Quiet Title Determination, but which would have required a change in existing Kansas Mortgage Law, as the Appellant has always argued, and even if permitted as a matter of law, which he has cited in his brief is disallowed, to be finally determined by a Determination of Descent Proceeding to effectively pass title by virtue of the defective title arising out of the presented facts subsequent to the January 2, 1936 tenants in common and not joint tenancy with right of survivorship deed as executed between George and his Wife Elizabeth. (Amended R.O.A., Vol. 1, P.P. 163-165.) Notwithstanding the District Court’s granting judgement in permitting the unrealized pursuit of a quieting of title in this fashion, Appellant/Defendant has always asserted such an attempted remedy is neither favored nor approved when applying Kansas Law in determining the formation and existence of rights attendant when a valid mortgage exists. (Amended R.O.A., Vol. 1, P.P. 236-258.)

Appellant/Defendant Timothy F. Degginger further respectfully shows this Kansas Court of Appeals that the District Court in fact did not ever reach the determination of a successful quiet title action in making requisite findings of fact and conclusions of law to permit appellate review, but baldly determined without factual justification that the above “Uncontroverted” Facts 8 and 9 permitted the Court to determine grant Judgment to the Appellee/Plaintiff Bank on June 14, 2017, and the subject of this instant appeal.

The Appellant/Defendant’s Claim that “Controverted Fact” as Opposed to “Uncontroverted Fact” as a Matter of Law Requires this Appellate Court to Apply Mortgage Law of Kansas to Act as a Bar in the Bank’s Attempt to Foreclose their Pretended Mortgage

As early as March 23, 2016, as above shown, the Appellant/Defendant raised material facts existing in this Amended Record on Appeal as above noted that the Bank did not hold marketable title to the real estate and that it could not meet the Unity Rules of the existence of a foreclosable mortgage as required in the seminal case of *In re: Estate of Lasater*, 30 Kan. App. 2d 1021, 54 P. 3d 511 (2002).

Appellant/Defendant respectfully asserts that from a careful review of the extensive Amended Record on Appeal which the Appellate Court has before it, that clearly undeniable factual controversy assertions exist by way of Affidavits filed as early as October 21, 2015 (Amended R.O.A., Vol. 1, P.P. 81-82.) for which the District Court did not address until it entered the Court’s Judgment on the Appellee/Plaintiff’s “Motion to Dismiss Defendant’s Counterclaims to his Answer” that was filed on March 13, 2017

on June 14, 2017. (Amended R.O.A., Vol. 1, P.P. 362-401.) Additionally, all issues and defenses that were raised by the Plaintiff/Appellee Bank that were at issue concerning Appellant/Defendant's claims that a quiet title proceeding would not cure a deficient mortgage claim (Amended R.O.A., Vol. 1, P.P. 236-258.); and the alleged existence that a fraud on the Court had occurred when the Plaintiff Bank alleged that it knew of no reason to disqualify its claim that it held a valid commercially marketable mortgage to the real estate. (Amended R.O.A., Vol. 1, P.P. 362-401.)

As simplistic as it seems, the Appellant/Defendant respectfully asserts that a Trial Court may not ignore hotly contested issues to filed dispositive Motions left unattended for almost two years in advance of the Court "finally" issuing its Judgement of June 14, 2018 here appealed. Such issues advanced Appellant/Defendant asserts were raised and re-raised, controverted and re-controverted in the Appellant/Defendant's Motions to Dismiss (Amended R.O.A., Vol. 1, P.P. 160-171), first filed on March 23, 2016 with two supporting Affidavits (Amended R.O.A., Vol. 1, P.P. 166-168; and P.P. 169-171.) directly controverting Appellee/ Plaintiff Bank's assertion that it held a valid mortgage via marketable title to the real estate; and, then again, the second which was again filed on February 16, 2017 raising the issue asserted directly again, in his filed "Renewed Motion to Dismiss and Request for Appellate Certification" with supporting Affidavit. (Amended R.O.A., Vol. 1, P.P. 354-360.)

Appellant/ Defendant respectfully asserts that the Trial Court, inadvertent or not, untimely ignored substantive legal claims in the above Motions to Dismiss and Response to the Appellee/Plaintiff Bank's first Motion for Summary Judgment that was filed on

August 6, 2015 (Amended R.O.A., Vol. 1, P.P. 49- 77); and that the Trial Court was further in error in not making timely required findings of fact and conclusions of law pursuant to Kansas Supreme Court Rule 165(a) in compliance with K.S.A. 60-252; and finally, that such delay was to his detriment. Such suggests as a matter of law possessed a duty to make findings of fact and conclusions of law in a timely manner. Appellant/Defendant believes that the Trial Court's delay is especially grievous in that the content of all his responses clearly illustrating controverted fact, as again shown (Amended R.O.A., Vol. 1, P.P. 81-82.), and for which the Trial Court should have been presumed to have been made aware of the existence of material fact controversy at the time it rendered its June 14, 2017 Judgement, here appealed.

The Appellant/Defendant respectfully requests the Court of Appeals to direct its attention to the authority of *Bouton v. Byers*, 50 Kan. App. 2d 35, 321 P. 3d 780 (2014) requiring that any party filing a motion for summary judgment has a duty and obligation to the Court, as a matter of law, as the moving party, that its motion and underlying justification is "based on appropriate evidentiary principles", that there were no disputed issues of material fact, and that judgment could, therefore, have been entered in his favor as a matter of law.

Conclusion

Appellant/Defendant in Reply respectfully requests that the above factual matter and authority shown be considered and weighed as this Honorable Appellate Court

determines proper, appropriate, and just.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the above and foregoing Appellant's Reply Brief, was electronically filed upon the Clerk of the Appellate Courts, Kansas Judicial Center, 301 SW 10th Street, Topeka, Kansas, 66612-1507, and/or further by electronic service, on this 28th day of November, 2018, upon the following:

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