STATE OF MICHIGAN

COURT OF APPEALS

FRED BERRY, conservator for NASSAB BERRY, a protected person, Plaintiff-Appellant, v JILL MYSLINSKI, Defendant-Appellee.	UNPUBLISHED December 11, 2012 No. 305564 Wayne Circuit Court LC No. 10-001855-CH

Before: SAAD, P.J., and K. F. KELLY and M. J. KELLY, JJ.

PER CURIAM.

Following a bench trial, plaintiff appeals as of right from an order affirming defendant's right to foreclose on certain property. At issue in the case was whether the signatures on the loan documents were that of Nassab Berry or whether they were forgeries. The trial court concluded that the signatures were not forgeries and that defendant was within her right to foreclose on the property when payments ceased. Giving due deference to the trial court's findings of facts, we affirm.

I. BASIC FACTS

This case arises out of several purported mortgages between Nassab and defendant regarding a commercial property on Ford Road in Dearborn Heights, Michigan. Nassab had five children: Robert Berry, the oldest, Fred Berry, Lawrence Berry, Don Berry, and Mona Amen. Robert and Nassab were frequent business partners.

In 1990, Nassab purchased a commercial property located at 25845 Ford Road, Dearborn Heights, Michigan 48127, which Robert managed. In 1997, Robert had a heart attack. After the heart attack, he was depressed. He began to drink and gamble more. According to Fred, starting in 2003, Robert became secretive about his business interactions with Nassab. Around this time, the family discovered that Robert had convinced Nassab to sign for and purchase a property in Taylor, Michigan. Robert then took a mortgage out on the property. Robert also convinced Nassab to take an $85,000 mortgage on another property that she owned. Eventually the family decided to give Lawrence power of attorney over Nassab's financial affairs due to Robert's apparent instability, and Nassab's problems with the early stages of dementia.

In November of 2004, Robert mentioned to defendant, who was his coworker at Real Estate One in Dearborn, Michigan, that Nassab had a balloon payment on the Ford Road property due in December of 2004. Not knowing of any of Robert's personal problems, defendant agreed to loan Nassab (through Robert) $46,000 at 14 percent interest, secured by a mortgage on the Ford Road property. Robert drafted the mortgage and loan documents. Nassab was physically present at the December 2, 2004 closing. Defendant watched Nassab sign the December 2, 2004 mortgage. Ostensibly, the December 2, 2004, closing was held in order to obtain a release on the prior lien because a second closing on the property was held on December 14, 2004. The two December mortgages had identical terms. Defendant did not witness Nassab sign the documents, but there was a notary present.

In April of 2005, Robert approached defendant to negotiate a second loan for $80,000. Defendant, believing that the property was worth $400,000 to $500,000, agreed to loan Nassab (again, through Robert) the additional money. The parties drafted a revised mortgage and promissory note for $125,000 (including the original $46,000 loan and the more recent $80,000 loan). Defendant testified that Nassab was present at the April 22, 2005 closing. Defendant asked Nassab for her identification and Medicare cards, and made a copy of them. Defendant was called away before the signing, so she did not witness Nassab signing the April mortgage or promissory note. However, a notary, Daniel McAnulty, was present at the closing. McAnulty witnessed Nassab sign the mortgage and note.

A couple weeks after the closing, Robert paid defendant $20,000, and then a couple of weeks later, he paid defendant an additional $5,000. Thereafter, Robert made a $1,500 payment to defendant every month until his death in 2007. His wife, Virginia, then made the payments, but had to stop because the property was no longer being leased and she did not have the income. The family began to doubt the legitimacy of the mortgage. Initially, Lawrence and Fred, under advisement of an attorney, decided to continue to pay the mortgage to avoid foreclosure, but then they decided to stop making payments. Defendant initiated foreclosure by advertisement proceedings and purchased the Ford Road property at a sheriff's sale on February 3, 2010, for approximately $92,000.

On February 12, 2010, plaintiff filed a complaint requesting that the trial court rescind the sheriff's foreclosure sale. Plaintiff alleged that defendant improperly conducted a sheriff sale on the property, that Nassab did not sign or authorize the April 2005 mortgage, and that defendant committed fraud by intentionally forging the loan documents.

At trial, Nassab testified that she did not authorize Robert to take any loans out on the property. Nassab also denied signing either the December 14, 2004 mortgage, or the April 22, 2005 mortgage. Lawrence stated that the signatures on the mortgages "absolutely [were] not my mother's signature." Similarly, Fred testified that the signatures were not Nassab's signature. Nassab stated that she had met defendant in a meeting; however, Nassab could not recall what the meeting was regarding.

Robert Kullman, a forensic document analysis expert retained by plaintiff, determined that the signatures on the two mortgages were likely made by the same person, and that Nassab's known signature samples (both recent and historical samples) were likely signed by the same person. He further determined that the signatures on the mortgages, compared to the known

signature samples, had "substantial significant differences" and "no significant similarities." Kullman concluded that, "to a high degree of probability" Nassab did not sign the mortgages. Kullman noted that he did not have original signatures from the samples, and therefore, the "high degree of probability" is the highest opinion he could offer regarding the comparison, given the photocopy limitation.

At the close of proofs, the trial court made the following relevant findings of fact and law:

> Nassab Berry presently is suffering from some form of dementia. And the testimony she gave because of her dementia cannot be believed.
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> ***
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> I don't believe they're forgeries, for these reasons.
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> One, I find the testimony of Jill Myslinski believable and credible. I find the testimony of Mr. McAnulty believable and credible. In addition, there is no other way that Myslinski would have in her possession a copy of the driver's license and Medicare card of Nassab Berry unless it didn't go down just the way she said it happened on April 22, 2005. And that is very compelling evidence to me. [sic] Because as a trial judge, what I look for is evidence that corroborates the testimony of witnesses. And that testimony is corroborated.
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> In addition, I look for witnesses who are independent. And to a certain extent Mr. McAnulty is not independent because he worked with and knew Myslinski but I don't believe he'd lie for her and the relationship is not that strong for him to lie for her.
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> When we're dealing with expert testimony like the testimony that Mr. Kullman presented, I have to have evidence that corroborates that testimony. I'm not gonna rely just upon expert testimony. Why? Because the facts have to support the conclusion that the expert reaches. Moreover, the expert is being paid. And so that always makes their testimony somewhat suspect. So from my perspective, I'm looking for evidence that supports Kullman's opinion. And I don't see it there. The facts support Myslinski's testimony. So, I find that, in fact, the mortgages were not forged.

On July 22, 2011, the trial court issued an order finding that the foreclosure was proper. The court stated that the amount due on the mortgage was $109,609.67. The trial court further ordered that plaintiff would have until December 16, 2011 to redeem the property, which plaintiff did. Plaintiff now appeals as of right.

II. ANALYSIS

Plaintiff argues that the trial court clearly erred when it determined that Nassab Berry had signed the loan documents held by defendant. We disagree.

"We review for clear error a [trial] court's findings of fact. MCR 2.613(C). Clear error exists when the reviewing court is left with a definite and firm conviction that a mistake has been made." *CG Automation & Fixture, Inc v Autoform, Inc*, 291 Mich App 333, 337-338; 804 NW2d 781 (2011) (internal citation and quotation omitted). "[R]egard shall be given to the special opportunity of the trial court to judge the credibility of the witnesses who appeared before it." MCR 2.613(C).

As a preliminary matter, we reject defendant's contention that the issue is moot in light of the redemption and subsequent discharge of the mortgage. "An issue becomes moot when a subsequent event renders it impossible for the appellate court to fashion a remedy." *Kieta v Thomas M Cooley Law Sch*, 290 Mich App 144, 147; 799 NW2d 579 (2010).

Even though plaintiff paid off the mortgage, this Court could still "fashion a remedy" if it concluded that the trial court clearly erred and defendant's foreclosure was improper. Additionally, contrary to defendant's argument, plaintiff did not acknowledge the validity of the mortgage by paying it off. If plaintiff had failed to redeem by December 16, 2011, she risked losing her interest in the property as well as legal standing to challenge the validity of the mortgage. Finally, defendant argues that plaintiff should have filed a lis pendens to stay the proceedings, instead of paying off the mortgage. "A lis pendens is notice of what is involved in the suit. . . . A lis pendens has no effect on fixed property rights that already exist at the time the lis pendens is filed." *Ligon v City of Detroit*, 276 Mich App 120, 128; 739 NW2d 900 (2007) (internal quotation marks and citations omitted). Filing a lis pendens would not have substituted for redeeming the property.

As for the merits of this case, we conclude that the trial court did not clearly err in findings that plaintiff's witnesses were either not credible or their conclusions were not supported by the evidence. "[W]e respect the trial court's superior position to assess the credibility of the witnesses appearing before it and will not revisit those assessments in this forum." *Shann v Shann*, 293 Mich App 302, 307; 809 NW2d 435 (2011); see also MCR 2.613(C).

Nassab testified that she did not authorize the loans or sign the mortgages. However, on cross-examination, she stated that she had met with defendant but could not remember what the meeting was regarding. Furthermore, as the trial court pointed out, Nassab has been suffering from dementia and related memory problems since 2003. Therefore, the trial court properly concluded that Nassab's testimony was not believable.

Nassab's sons, Lawrence Berry and Fred Berry, both testified that the signatures on the mortgages were not Nassab's signature. However, there is no indication that Lawrence and Fred were actually present at any of the signings. Therefore, it was not clearly erroneous for the trial court to find Lawrence's and Fred's testimony unreliable.

Finally, although plaintiff's handwriting expert, Robert Kullman, testified with a high degree of certainty that Nassab did not sign the mortgages, "[t]he [trier of fact] determines the weight given to expert testimony." *Krohn v Sedgwick James of Michigan, Inc*, 244 Mich App 289, 304; 624 NW2d 212 (2001). In this case, the experienced and learned trial judge stated that Kullman's testimony was not reliable because the facts did not support the conclusion that

Kullman reached. Furthermore, the court reasoned that Kullman had a financial bias because plaintiff was paying him to testify. It is not this Court's role to determine the weight of an expert's testimony, or judge the credibility of the witnesses. *Id.*; *Shann*, 293 Mich App at 307.

Nor did the trial court clearly err in finding that defendant and the notary, Daniel McAnulty, were credible witnesses. Defendant testified that Nassab was present at the December 2, 2004, and April 22, 2005, closings. McAnulty testified that he actually witnessed Nassab sign the April 22, 2005, mortgage. The trial court specifically stated that it believed both defendant's and McAnulty's testimony. The trial court acknowledged that it had considered McAnulty's potential bias – McAnulty worked with defendant and Robert at Real Estate One and rented a home from defendant. Nevertheless, the trial court did not think that McAnulty had enough of a motive to lie for defendant. Therefore, it cannot be said that there is a definite and firm conviction that a mistake has been made.

Affirmed. As the prevailing party, defendant may tax costs. MCR 7.219.

/s/ Henry William Saad
/s/ Kirsten Frank Kelly
/s/ Michael J. Kelly