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ARKANSAS COURT OF APPEALS

DIVISION II
No. CA 10-887

CHASE MANHATTAN MORTGAGE CORP. APPELLANT V. FIRST SECURITY BANK OF CLARKSVILLE APPELLEE	**Opinion Delivered** March 16, 2011 APPEAL FROM THE JOHNSON COUNTY CIRCUIT COURT [NO. CV-09-48] HONORABLE DENNIS SUTTERFIELD, JUDGE REVERSED

WAYMOND M. BROWN, Judge

This appeal is between competing mortgage holders. While Chase Manhattan Mortgage Corporation, the first mortgage holder, did not want to pursue foreclosure, First Security Bank of Clarksville did. In the end, the circuit court allowed the foreclosure and ordered Chase to pay First Security's attorney's fees. Chase challenges the award, arguing that the circuit court had no authority to award them. Under these facts, the circuit court abused its discretion in entering an attorney-fee award against Chase. Therefore, we reverse.

The subject property is located on a county road near Clarksville. Chase held the first mortgage on the property; First Security held the second mortgage. The mortgagors defaulted on the loan from Chase in 2008. Chase initiated nonjudicial foreclosure proceedings in early 2009, and a foreclosure sale was scheduled for March 2009. The mortgagors also defaulted on

their loan from First Security, and First Security filed a foreclosure complaint in circuit court in February 2009. First Security filed for and obtained an order stopping Chase's nonjudicial foreclosure sale. Chase responded by filing an amended answer, counterclaim, and cross-claim seeking judicial foreclosure of the first lien.

In January 2010, counsel for Chase informed the court that the mortgagors had made their loan with Chase current. It sought an order dismissing its counterclaim and cross-claim. The court entered an order to this effect the next day. First Security, however, wanted to continue pursuing foreclosure. The court entered a foreclosure decree in February 2010. Chase retained its rights as first mortgagee, and First Security was allowed to foreclose on the property subject to Chase's mortgage.

On March 1, 2010, First Security asked the court to award it attorney's fees from Chase. In response, Chase conceded that First Security was entitled to attorney's fees on its foreclosure action from the mortgagors, but it asserted that there was no basis for recovering the fees from Chase. The court disagreed with Chase and entered an order requiring it to pay First Security's attorney's fees. This appeal followed.

The only question here is whether the circuit court was authorized to order Chase to pay First Security's attorney's fees. In a brief argument, Chase argues that there was no authority in the Arkansas Code or in the rules of civil procedure to award attorney's fees. First Security argues that, as the prevailing party in an action to recover on an open account or a promissory note, it was entitled to attorney's fees.

Attorney-fee awards are reviewed under the abuse-of-discretion standard.[1] In Arkansas, a court cannot award attorney fees unless they are expressly provided for by statute or rule.[2] First Security relies on Arkansas Code Annotated section 16-22-308 (Repl. 1999), arguing that the statute allows for attorney's fees in cases involving the foreclosure of a mortgage.[3]

We hold that the circuit court abused its discretion by ordering Chase to pay First Security's attorney's fees, as First Security was not a "prevailing party" in any cause of action

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[1] *See, e.g.*, *Southern Bank of Commerce v. Union Planters Nat'l Bank*, 375 Ark. 141, 289 S.W.3d 414 (2008).

[2] *Friends of Children, Inc. v. Marcus*, 46 Ark. App. 57, 876 S.W.2d 603 (1994).

[3] Arkansas Code Annotated section 16-22-308 provides:

> In any civil action to recover on an open account, statement of account, account stated, promissory note, bill, negotiable instrument, or contract relating to the purchase or sale of goods, wares, or merchandise, or for labor or services, or breach of contract, unless otherwise provided by law or the contract which is the subject matter of the action, the prevailing party may be allowed a reasonable attorney's fee to be assessed by the court and collected as costs.

First Security also contends that parties need not have direct privity of contract for section 16-22-308 to be applicable, citing *Howell v. Worth James Construction Co.*, 259 Ark. 627, 535 S.W.2d 826 (1976). We do not believe this case supports that proposition, as it involved a third-party beneficiary and a materialman's lien. That being said, we are mindful of the decision in *Douglas Companies, Inc. v. Commercial Nat'l Bank of Texarkana*, 419 F.3d 812 (8th Cir. 2005) (construing section 16-22-308 not to require that an action to recover on a negotiable instrument be only against a party to the negotiable instrument). We need not address whether privity of contract is necessary to obtain attorney's fees under section 16-22-308, as our resolution of this matter renders the question moot.

against Chase. In *ERC Mortgage Group, Inc. v. Luper*,[4] we explained the phrase "prevailing party":

> There can be but one prevailing party in an action at law for the recovery of a money judgment. It transpires frequently that in the verdict each party wins on some of the issues and as to such issues he prevails, but the party in whose favor the verdict compels a judgment is the prevailing party. Each side may score but the one with the most points at the end of the contest is the winner, and . . . is entitled to recover his costs.[5]

In finding that First Security was entitled to attorney's fees from Chase, the circuit court relied on the fact that First Security had to respond to Chase's nonjudicial foreclosure proceedings as well as Chase's answer, counterclaim, and cross-claim. Other than stopping Chase's nonjudicial foreclosure proceedings, however, First Security scored no "points" against Chase. When Chase initiated proceedings, it presumably had a valid foreclosure action against the mortgagors. Chase could not foreclose upon the property due to First Security's restraining order, and Chase ceased foreclosure proceedings once the mortgagors became current on the note. Meanwhile, First Security continued its foreclosure action against the mortgagors and succeeded. But First Security did not obtain a valid judgment against Chase, and anything that First Security receives is still subject to Chase's interest. In fact, the order acknowledges Chase's superior lien. First Security may be entitled to attorney's fees from the mortgagors, but nothing in these facts suggests that Chase should be liable for these fees.

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[4] 32 Ark. App. 19, 795 S.W.2d 362 (1990), *overruled in part on other grounds by Mosley Mach. Co. v. Gray Supply Co.*, 310 Ark. 448, 837 S.W.2d 462 (1992).

[5] *Id.* at 24, 795 S.W.2d at 364–65 (citing *Quapaw Co. v. Varnell*, 566 P.2d 164 (Okla. Ct. App. 1977)).

Other than thwarting Chase's initial efforts to foreclose upon the property, First Security did not prevail against Chase in any way. Under these facts, the circuit court should not have ordered Chase to pay First Security's attorney's fees. We reverse.

Reversed.

HART and WYNNE, JJ., agree.