

## ARKANSAS COURT OF APPEALS

DIVISION II  
No. CA09-118

RAYMOND ELLIS, EXECUTOR OF  
THE ESTATE OF MILDRED  
FREEMAN, Deceased

APPELLANT

V.

STATE FARM BANK, F.S.B. a/k/a  
STATE FARM FINANCIAL SERVICE  
F.S.B. and D. DENISE GRIFFIN,  
Attorney In Fact

APPELLEES

**Opinion Delivered** SEPTEMBER 9, 2009

APPEAL FROM THE FAULKNER  
COUNTY CIRCUIT COURT  
[NO. CIV 2008-712]

HONORABLE RHONDA WOOD,  
JUDGE

REVERSED AND REMANDED

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**ROBERT J. GLADWIN, Judge**

Appellant Raymond Ellis, executor of the estate of Mildred Freeman, deceased, appeals the December 11, 2008 order of the Faulkner County Circuit Court, which granted summary judgment in favor of appellee State Farm Bank, refusing to quash appellee's mortgagee's deed obtained through a non-judicial foreclosure. Appellant contends that the circuit court erred in finding that notice was given to appellant pursuant to Arkansas Code Annotated section 18-50-104(c) (Repl. 2003), and in its "failure to hold a hearing in this case in which [a] genuine material issue of fact alleging appellees failed to file a claim" pursuant to Arkansas Code Annotated section 28-40-111 (Repl. 2004). We reverse and remand, holding that, because questions of fact remain, the granting of summary judgment was inappropriate.

Upon Mildred Freeman's death, appellant Raymond Ellis was appointed executor of her estate, and as such, filed suit challenging the mortgagee's deed obtained by appellee State Farm Bank pursuant to a non-judicial foreclosure of property that had been owned and mortgaged by Mildred Freeman. The sale of the property was held on February 21, 2008, and appellant did not appear at the sale nor did he assert any claim or defenses to the sale. Appellee filed a mortgagee's deed on April 1, 2008, transferring the interest in the property to appellee.

On July 30, 2008, appellant filed a complaint seeking to quash the mortgagee's deed. He alleged in his complaint that the mortgagee's deed was invalid because appellee gave no notice to him or his designated agent for service in the probate proceedings of Mildred Freeman's estate. He alleged that because no claim was filed against the estate after proof of publication of notice had been filed in the probate matter, the mortgagee's deed was invalid and should be quashed. Appellee answered and filed a motion for summary judgment alleging that the mortgagee's deed contained prima facie evidence concerning mailing and publication of notice of default and intent to sell pursuant to Arkansas Code Annotated section 18-50-111 (Repl. 2003), which codifies the effect of the mortgagee's deed. A hearing was set for the motion, but appellant did not appear. Appellant disputes receiving notice of the hearing on the summary judgment motion.

The trial court granted summary judgment on December 11, 2008, stating:

1. That the statutory foreclosure held on or about April 1, 2008, was in accordance with Arkansas Code Annotated [section] 18-50-101 et seq.
2. Pursuant to the Statute the Plaintiff's claims are forever barred and terminated.

3. That on July 30, 2008, a complaint was filed by the Plaintiff seeking to quash the mortgagee's deed filed April 1, 2008.
4. That on August 14, 2008, an answer was filed to the complaint.
5. That on September 25, 2008, the Defendant filed a motion for summary judgment.
6. From the pleadings and associated case law the Court has ruled the summary judgment motion is granted.
7. The Plaintiffs did not show to the sale to assert any claims or defenses that they may have had to the foreclosure as outlined in ACA 18-50-116.
8. The Plaintiff's complaint attaches a notice that they had received giving them the time, place, and manner of the sale, yet they did not show to the sale nor seek any type of injunctive relief.
9. [Plaintiff] shall have until Dec. 31, 2008, in which to vacate the premises and return the same to the [defendant]. Should the Plaintiff not vacate the premises the sheriff is directed to remove the plaintiff from the home.

On December 29, 2008, appellant filed a notice of appeal from the above order, and this appeal followed.

The applicable standard of review is as follows:

Summary judgment is appropriate when there are no genuine issues of material fact, and the moving party is entitled to judgment as a matter of law. Once the moving party has established a prima facie entitlement to summary judgment, the opposing party must meet proof with proof and demonstrate the existence of a material issue of fact. On appellate review, this court determines if summary judgment was appropriate based on whether the evidentiary items presented by the moving party in support of the motion leave a material fact unanswered. This court views the evidence in a light most favorable to the party against whom the motion was filed, resolving all doubts and inferences against the moving party. Our review focuses not only on the pleadings, but also on the affidavits and other documents filed by the parties.

*Hanks v. Sneed*, 366 Ark. 371, 377-78, 235 S.W.3d 883, 888 (2006) (citing *Fegans v. Norris*, 351 Ark. 200, 89 S.W.3d 919 (2002)) (internal citations omitted).

#### *Notice*

Appellant claims that the trial court erred in finding that notice of the statutory foreclosure, as required by Arkansas Code Annotated section 18-50-104(c), was given to him

or his agent for service. In support of this claim, he states that Mildred Freeman “was the owner of her land [which] was an asset in her estate.” He states that Ms. Freeman had been dead and her estate filed for probate for more than two years before the non-judicial foreclosure proceedings were begun on November 21, 2007. He claims that appellee failed to do a title search “of the record” until after the mortgagee’s deed was issued pursuant to the foreclosure sale to the bank. He contends that if they had performed the search, they would have learned of the probate proceedings, which appellant claims are still pending.

Appellant states that pursuant to Arkansas Code Annotated section 18-50-104(c), notice of the mortgage default and intention to sell should have been given to him as the executor of Ms. Freeman’s estate. He claims that no such notice was given. He further contends that he raised before the trial court the issues of Ms. Freeman’s death, the pending probate matter, and lack of notice, arguing that these constituted genuine issues of material fact sufficient to defeat a motion for summary judgment. He points out that appellee’s motion for summary judgment lacked supporting evidentiary documents and that his complaint was supported by exhibits showing genuine fact issues.

Appellee contends that the trial court did not err in finding that notice was given to appellant pursuant to section 18-50-104. Appellee claims that notice was given to the entire world pursuant to Arkansas Code Annotated section 18-50-105 (Repl. 2003), which addresses publication of notice of statutory foreclosures, and that appellant has never stated in any pleading that he did not receive notice of the sale. However, whether appellee complied with section 18-50-104 is a question of fact not satisfactorily answered at the trial-court level.

Appellee contends that notice of the sale must be given in five separate places: 1) a newspaper of general circulation in the county where the property is situated; 2) on the internet by a third party; 3) in the county courthouse in which the property is located; 4) sent to the debtor by first-class mail; and 5) sent to the debtor by certified mail. *See* Ark. Code Ann. §§ 18-50-104–105.

Appellee points out that under Arkansas Code Annotated section 18-50-111, upon filing of the deed for record with the recorder of the county in which the property is situated, the recitals shall be prima facie evidence of the truth of the matters set forth. Here, appellee claims that the mortgagee’s deed filed May 22, 2007, contained all the necessary recitals of notice as outlined by section 18-50-105. Further, pursuant to Arkansas Code Annotated section 18-50-116(d)(2)(B) (Supp. 2007), “[A]ny such claim or defense shall be asserted prior to the sale or be forever barred or terminated[.]” Appellee claims that in the present case appellants knew of the sale date, time, place and manner, but failed to do anything with regard to the sale. However, the mortgagee’s deed does not recite that notice was given in the five places established in section 18-50-105, thus leaving another question to be considered at the trial-court level.

*Statute of Nonclaim*

Appellant claims that the circuit court clearly erred in its “failure to hold a hearing in this case in which a genuine material issue of fact alleging appellees failed to file a claim pursuant to Arkansas Code Annotated section 28-40-111.” He contends that in his complaint, he argued that the mortgagee’s deed should be quashed because appellee did not

file a timely claim against the estate pursuant to the above-referenced statute. He cites *Goins v. Sneed*, 229 Ark. 550, 317 S.W.2d 269 (1958), and *A.R. Bowdre & Company v. Pitts*, 94 Ark. 613, 128 S.W. 57 (1910), for the proposition that the statute of nonclaims does not begin to run until letters of administration are issued on the estate. He contends that the five-year statute of limitation had not expired in the instant matter as letters of administration were issued on December 7, 2005. He then states that the notice to creditors was duly published on December 8 and 15, 2005, and a genuine material fact must be determined at trial. He concludes by stating, “The allegation that no claim was filed pursuant to the Arkansas nonclaim statute is a genuine material fact to be determined at trial.”

Appellee contends that the trial court did not err by failing to hold a hearing. The trial court set a hearing on the summary judgment motion for a date certain and the parties were notified. Appellant failed to show, and the trial court ruled on the pleadings.

Appellee claims that summary judgment was appropriate as there were no issues of fact or law to be determined. Because there is a note and mortgage securing the property, appellant could have identified appellee as a creditor. Therefore, appellee asserts that it is undisputed that it is a reasonably ascertainable creditor. Appellee contends that appellant cannot simply rely on a publication of notice to attempt to gain a fee simple interest in a property when a known creditor, mortgagee/appellee, was not given actual notice. Appellee cites *In re Estate of Spears*, 314 Ark. 54, 858 S.W.2d 93 (1993), where our supreme court held that actual notice of the death is required to reasonably ascertainable creditors. Because all the executor did in the instant matter was publish notice, he failed in his duty to send actual

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notice to appellee. *See also Tulsa Professional Collection Services, Inc. v. Pope*, 485 U.S. 478 (1988). Because these arguments identify material questions of fact that must be determined at the trial court level, we hold that summary judgment was inappropriate and reverse and remand for further findings by the trial court.

Reversed and remanded.

VAUGHT, C.J., and PITTMAN, J., agree.