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ARKANSAS COURT OF APPEALS

DIVISION IV
No. CV-21-464

JACOB LEVITT AND PAIGE LEVITT
APPELLANTS

V.

TODAY'S BANK, AN ARKANSAS BANKING CORPORATION; STATE OF ARKANSAS *EX REL.* DEPARTMENT OF FINANCE AND ADMINISTRATION; FIRST SECURITY BANK; MOORE'S RETREAD & TIRE COMPANY, INC.; LARRY WALLS; CRYSTAL HOWERTON, LLC; AND TIMBER RIDGE SUBDIVISION PROPERTY OWNERS' ASSOCIATION, INC.
APPELLEES

Opinion Delivered September 21, 2022

APPEAL FROM THE WASHINGTON COUNTY CIRCUIT COURT
[NO. 72CV-18-3120]

HONORABLE JOHN C. THREET, JUDGE

REVERSED AND REMANDED

PHILLIP T. WHITEAKER, Judge

Paige and Jacob Levitt appeal a Washington County Circuit Court order granting summary judgment in favor of Today's Bank in a foreclosure action. Jacob and Paige appeal, arguing that there are genuine issues of material fact as to their defenses of duress and prevention of performance sufficient to defeat summary judgment and that the circuit court erred in finding that their affirmative defenses to the foreclosure action had been purchased by a third party in bankruptcy. We agree and reverse and remand for further proceedings.

Because this case involves numerous interrelated parties and entities and concerns multiple loans, we provide the following chronology of events to facilitate an understanding of the parties involved and the issues at play in this appeal.

I. *Factual and Procedural History*

A. Early Transactions

Paige and Jacob Levitt are husband and wife. Jacob was the sole shareholder of NWA Refrigerated Carriers, Inc., a trucking entity. Jacob and Paige also jointly owned Levitt Transportation, LLC, another trucking company.

In 2013, Levitt Transportation entered into business transactions with Jerome Ramsey, Paige's father. As part of this arrangement, Ramsey agreed to purchase eight refrigerated trailers for the sole purpose of leasing them to Levitt Transportation. In October 2014, Levitt Transportation and Ramsey borrowed $200,000 from Larry Walls and secured the loan with two trailers owned by NWA Refrigerated Carriers and the eight trailers owned by Ramsey.

In February 2015, Jacob and Paige began some business reorganization. They formed Levitt's Holding, LLC, which then purchased all the assets of Levitt Transportation and NWA Refrigerated Carriers. They also agreed with Ramsey to refinance the 2014 loan with Larry Walls. As part of the refinancing, Ramsey was to relinquish his ownership in the eight refrigerated trailers in return for Levitt's Holding assuming responsibility for the debt. Jacob and Paige upheld their end of the refinancing agreement they reached with Ramsey by refinancing the Walls note with Today's Bank (hereafter, the Bank). Ramsey, however, did

not uphold his part of the agreement and never relinquished ownership of the eight refrigerated trailers.

B. Today's Bank

The transactions between Jacob, Paige, and the Bank are at the heart of this matter. In January 2016, Jacob and Paige refinanced the Walls notes with the Bank in "Loan 627." Loan 627 was secured, in part, with the eight trailers Ramsey had allegedly agreed to transfer to Levitt's Holding.[1] Jacob and Paige claim that they informed Nate Robinson, an assistant vice president for the Bank, of the nature of their agreement with Ramsey—that Ramsey had agreed to transfer ownership of the trailers, that he was the title owner of the trailers, and that they provided Robinson with the copies of the titles in Ramsey's name. They further claim that Robinson agreed to perform the necessary steps to transfer title and perfect the bank's security interest in the trailers. The Bank does not dispute that "at some point it was provided copies of titles showing ownership by a third party."[2]

In May 2016, Jacob, Paige, and Levitt Transportation took out a $50,000 line of credit with the Bank (hereinafter Loan 739) in order to establish a line of credit for the expenses of their diesel shop. Loan 739 was secured by a mortgage on the Levitt's home located at 4032 Tahoe Circle Drive in Springdale, Arkansas.

For reasons unclear from the record, Ramsey repossessed and sold the eight trailers in June 2016. With the loss of this equipment, Jacob and Paige experienced a difficult

[1]We note that, while the promissory note listed Levitt Transportation and the Levitts as the borrowers, the security agreement lists Levitt's Holding as the debtor.

[2]This language is in paragraph 7 of the Bank's answer to amended counterclaim.

financial position in their trucking business. They contacted Robinson at the Bank to inform him and the Bank of their situation. They claim that Robinson admitted his mistake in failing to have title transferred and seemed concerned he would lose his job as a result. They claim that Robinson requested that they continue to pay on the note as if nothing had happened. Being uncomfortable with this request, they demanded a meeting with the Bank president.

Jacob and Paige had a meeting with Larry Olsen, the president of the Bank. They claim that Olsen threatened them with criminal charges if they did not immediately offer their home as substitute collateral for Loan 627 and agree to a debt modification converting Loan 739 into a traditional loan. As a result of this meeting, in October 2016, Jacob, Paige, Levitt Transportation, and Arkansas Diesel & Equipment Repair, LLC,[3] executed new loan agreements. This resulted in "Loan 925," which refinanced Loan 627; [4] and "Loan 739," which was modified so as to convert the existing line of credit into a traditional loan. Both loans were secured, at least in part, by mortgages on the Levitts' home in Springdale.

C. Default/Bankruptcy/Foreclosure

Jacob and Paige subsequently defaulted on Loan 925 in March 2018. In April 2018, they filed for bankruptcy, but their petition was dismissed for failure to cure deficiencies. In May 2018, they defaulted on Loan 739. Additionally, in July 2018, Jacob and Paige defaulted on "Loan 126," which was owned by Integrity Bank. Loan 126 was secured by a first

[3]Paige and Jacob Levitt are members of Arkansas Diesel & Equipment Repair.

[4]Loan 925 also refinanced Loan 606—a prior $30,000 loan between the parties and the Bank.

priority mortgage on the Levitts' home in Springdale. They again filed for bankruptcy in August 2018, with the same result—the petition was dismissed for failure to cure deficiencies. In September 2018, the Bank acquired an assignment of Loan 126 from Integrity Bank. Jacob and Paige filed a third bankruptcy in November 2018. Because two petitions for bankruptcy had been filed and dismissed within the previous year, the bankruptcy court determined that the bankruptcy stay provisions did not apply to prevent prosecution of foreclosure actions.

In November 2018, the Bank filed a complaint[5] in foreclosure as to Loans 925 and 739.[6] Jacob, Paige, Levitt Transportation, and Levitt's Holding subsequently answered and counterclaimed, alleging that the Bank's negligence in failing to secure the transfer of title on the trailers owned by Ramsey resulted in the destruction of their trucking business and rendered them unable to make payments on the loans.

Meanwhile, the bankruptcy proceeding continued. In October 2019, the bankruptcy trustee sold Arkansas Diesel & Equipment Repair, LLC, Levitt's Holding, LLC, and Levitt Transportation, LLC, to Property Management 40830, LLC (hereinafter, Property Management). Property Management also purchased all claims of Paige and Jacob

[5]The complaint also named State of Arkansas ex rel. Department of Finance and Administration; First Security Bank; Moore's Retread & Tire Company, Inc.; Larry Walls; Crystal Howerton, LLC; and Timber Ridge Subdivision Property Owners' Association, Inc., as persons or entities that might have an interest in the property. Moore's Retread & Tire Company and Timber Ridge Subdivision Property Owners' Association were found to be in default, and their interests in the property were foreclosed. The other entities had their lien priorities determined in a subsequent order on summary judgment. None of these entities appealed.

[6]In January 2019, the Bank amended its complaint to include foreclosure on Loan 126.

Levitt (whether or not asserted)—including those asserted against the Bank in the foreclosure action. Larry Olson, the president of the Bank, is also the manager of Property Management.

Shortly after this acquisition, Property Management, by and through Larry Olsen and on behalf of all the previously owned Levitt entities,[7] executed a joint resolution agreeing to dismiss all claims against the Bank in the foreclosure action. Property Management also directed Paige and Jacob Levitt to do the same. Counsel for Property Management,[8] as owner of the Levitt entities, then entered an appearance in the foreclosure action and requested the dismissal of their counterclaims. As a result, the court dismissed with prejudice the counterclaims of Arkansas Diesel & Equipment Repair, LLC; Levitt's Holding, LLC; and Levitt Transportation, LLC, in November 2019.

D. Summary Judgment

Shortly after obtaining the dismissal of the Levitt entities, the Bank moved for summary judgment[9] as to the counterclaims filed by Jacob and Paige asserting that Property Management was the owner of these claims and that it wished to confess judgment on the

[7]Arkansas Diesel & Equipment Repair, LLC; Levitt's Holding, LLC; Levitt Transportation, LLC.

[8]Jay Williams and D. Joel Kurtz of the Williams Law Firm entered their appearances as counsel for the Levitt entities at the request of Property Management. Williams and Kurtz also served as counsel for the Bank in the foreclosure action.

[9]The Bank had previously filed a combined motion for default judgment against Moore's Retread & Tire Company and Timber Ridge Subdivision Property Owners' Association and summary judgment on the remaining claims. As to the summary-judgment portion of the combined motion, the Bank argued that it had shown a prima facie entitlement to foreclosure against the Levitts and the Levitt entities and that its liens had priority over the liens of the other defendants. The Bank titled this more recent motion as "Additional Motion for Summary Judgment as to the Counterclaims of Jacob L. Levitt and Paige J. Levitt."

counterclaims. In response, Jacob and Paige admitted that Property Management had the authority to dismiss their counterclaims but asserted that the motion for summary judgment should be denied because the actions of the Bank were the direct and proximate cause of their inability to pay on the loans. They further alleged that any affirmative defense properly raised was not a part of the bankruptcy purchase and was not owned by Property Management. In their amended answer, Jacob and Paige raised the affirmative defense of duress.

The court conducted a hearing on the motions for summary judgment, after which the court entered an order granting summary judgment as to Loans 739 (the conversion of the line of credit into a traditional loan) and 126 (the acquisition of the note from Integrity Bank), finding that no genuine issues of fact existed with respect to the allegations regarding those loans. The court also granted summary judgment on Jacob and Paige's counterclaims. In an oral ruling, the court denied summary judgment as to Loan 925 (the refinancing of the Walls note). After the hearing, the Bank filed for a voluntary dismissal without prejudice of its foreclosure action on Loan 925, and the motion was granted. This appeal ensued from the order granting summary judgment.[10]

II. *Standard of Review*

The law is well settled regarding the standard of review used by this court in reviewing a grant of summary judgment. *Fed. Nat'l Mortg. Ass'n v. Taylor*, 2015 Ark. 78, 455 S.W.3d 811. A circuit court will grant summary judgment only when it is apparent that

[10]Jacob and Paige previously appealed the order granting summary judgment, but the appeal was dismissed on motion for lack of a final order. *Levitt v. Today's Bank*, CV-20-290. A 54(b) certificate was obtained, and the matter is now properly before us.

no genuine issues of material fact exist requiring litigation and that the moving party is entitled to judgment as a matter of law. *Id.* The burden of proof shifts to the opposing party once the moving party establishes a prima facie entitlement to summary judgment, and the opposing party must demonstrate the existence of a material issue of fact. *Id.* Thus, the Bank, as the moving party, had the burden of establishing a prima facie case showing entitlement to summary judgment, and once established, the burden shifted to Jacob and Paige to meet proof with proof demonstrating the existence of a material issue of fact in order to survive summary judgment. After reviewing the undisputed facts, the circuit court should deny summary judgment if, under the evidence, reasonable minds might reach different conclusions from the same undisputed facts. *Id.* However, in deciding whether genuine issues of material fact exist, the court is not to weigh the evidence or the credibility of the evidence. *See Turner v. Nw. Ark. Neurosurgery Clinic, P.A.*, 84 Ark. App. 93, 105, 133 S.W.3d 417, 424 (2003).

On appellate review, we determine if summary judgment was appropriate by deciding whether the evidentiary items presented by the moving party in support of its motion leave a material fact unanswered. *Taylor*, *supra.* This court views the evidence in the light most favorable to the party against whom the motion was filed, resolving all doubts and inferences against the moving party. *Id.*

III. *Issues on Appeal*

A. Duress

Jacob and Paige first contend that the circuit court erred in granting summary judgment because there were genuine issues of material fact presented as to whether they

entered into the modification of Loan 739 under duress.[11] To establish duress that will justify voiding a contract, a party must show that he or she involuntarily accepted the terms of the opposing party, that the circumstances permitted no other alternative, and that the circumstances resulted from coercive acts by the opposing party. *Cox v. McLaughlin*, 315 Ark. 338, 867 S.W.2d 460 (1993). The party must show more than a reluctance to accept the contract or the possibility of financial embarrassment. *Id.* He must show that the duress resulted from the other party's wrongful and oppressive conduct and not by his own necessity. *Id.* In addition, he must show that the wrongful conduct deprived him of his own free will and volition. *Id.* Duress consisting of threats exciting a fear of such a grievous wrong as death, great bodily injury, or unlawful imprisonment would probably justify a cancellation of a contract if the party, acting under such threats, moved to cancel it promptly. *Sims v. First Nat'l Bank*, 267 Ark. 253, 590 S.W.2d 270 (1979). Finally, duress must be shown by clear, cogent, and convincing testimony. *Id.*

Responding to this first contention, the Bank asserts that the court was correct in granting summary judgment on Loan 739, contending that the claim of duress applies only to Loan 925 and not to Loan 739. It argues that Loan 739 was already collateralized by a mortgage on the Levitts' home. Since Jacob stated in his affidavit that Olsen had threatened him with civil and criminal action if the Levitts did not immediately place their home up for collateral, this alleged threat pertained only to Loan 925 and not Loan 739. Second, the Bank argues that the only alleged "duress" as to Loan 739 contained in the affidavit related

[11]None of these arguments apply to Loan 126 since the assignment of the loan was not executed until well after the alleged duress occurred.

to Jacob's fear of losing his home. It claims such a fear cannot support a claim of duress because there was no evidence that the Bank threatened him with foreclosure if he did not sign the loan modifications. Next, the Bank contends that Jacob and Paige ratified the contract by remaining silent regarding the alleged duress until after the Bank had initiated foreclosure proceedings. Finally, the Bank argues that Jacob and Paige were not prejudiced by the loan modification and, in fact, benefited from its conversion to a traditional loan.

In their reply brief, Jacob and Paige counter that their pleadings expressly assert the claim of duress with regard to Loan 739 and that, in their counterclaim, they alleged the bank threatened to file a foreclosure action if they refused to modify the terms of the loan.

We hold that the circuit court erred in finding that the facts were not sufficient to constitute duress or at least in holding that there was no dispute of material fact. Below, Jacob filed an affidavit attached to the response to the motion for summary judgment. In it, he averred that Larry Olsen threatened them with civil and criminal penalties and threatened to foreclose on their home if they (he and Paige) did not agree to the loan modifications. Thus, Jacob and Paige raised an issue of fact concerning duress. While the Bank denied these allegations in its response to their counterclaims, it presented no evidence responding to or disputing these assertions of duress in its reply brief.

Clearly, Jacob and Paige presented evidence that they did not assent to the modification, but they agreed to the modification only after the Bank threatened to bring criminal charges against them for the false statements in the security agreement for Loan 925 and because they feared the Bank would call their note and foreclose on their home. Citing *Sims*, the Bank claims that its threat to prosecute Levitt can only form the basis for

cancellation on account of duress if the charges were fabricated and that there was no proof that the fraud charges had been fabricated. We disagree.

Here, the evidence to support the Levitts' claim of duress was sufficient to raise material issues of fact to survive summary judgment. Jacob and Paige refinanced the Walls note with the Bank. They alleged that they informed the Bank, through its agent, Nate Robinson, that a third party owned the collateral at issue and even provided the Bank with copies of the titles to the trailers owned by Ramsey. While the Bank denied knowledge of Ramsey's ownership of the trailers or the alleged agreement to facilitate the transfer, it admitted it had been provided copies of titles showing ownership by a third party "at some point." On the basis of these facts, the circuit court denied summary judgment with regard to Loan 925 because genuine issues of material fact remained. Despite the Bank's argument to the contrary, we hold that those same facts surrounded the modification of Loan 739. Thus, when viewing the evidence in a light most favorable to the Levitts and resolving all doubts and inferences against the Bank, genuine issues of material fact exist as to whether the Levitts refinanced Loan 925 and agreed to modify Loan 739 under duress.[12]

Further, summary judgment was not appropriate because there is a genuine issue of material fact as to whether Jacob and Paige ratified the loan agreement. A contract executed

[12]It is important to note the different procedural posture of this case compared to that of *Sims*. In *Sims*, the case was presented to us after it had been decided by a jury. After a jury trial, we view the evidence and all reasonable inferences arising therefrom in the light most favorable to the party on whose behalf judgment was entered. *Ark. Realtors Ass'n v. Real Forms, LLC*, 2014 Ark. 385, 442 S.W.3d 845. That is not the case with a decision granting summary judgment. In summary-judgment cases, we view the evidence in the light most favorable to the party against whom the motion was filed, resolving all doubts and inferences against the moving party. *Mitchell*, *supra*.

under duress may be ratified after the duress is removed. Such ratification results if the party entering into the contract under duress accepts the benefits growing out of it or remains silent or acquiesces in the contract for any considerable length of time after opportunity is afforded to avoid it or have it annulled. *Oberstein v. Oberstein*, 217 Ark. 80, 228 S.W.2d 615 (1950); *see also Sims v. First Nat'l Bank of Harrison*, 267 Ark. 253, 590 S.W.2d 270 (1979). Again, citing *Sims*, the Bank claims that Jacob and Paige ratified the contract by remaining silent regarding the alleged duress until after the Bank initiated foreclosure proceedings. We disagree. Viewing the facts of this case in the light most favorable to Jacob and Paige, they still faced the possibility that criminal charges or forfeiture proceedings could be instituted against them, even after execution of the loan documents. Thus, what constitutes a "considerable length of time" to avoid the contracts is an issue of fact for the jury to decide. Likewise, the Bank's argument that Jacob and Paige were not prejudiced by the loan modification but, in fact benefited from its conversion to a traditional loan is subject to interpretation and remains a question of fact for a jury to decide.

B. Affirmative Defense Sold in Bankruptcy

Next, Jacob and Paige argue that the circuit court erred in finding that their affirmative defenses were sold to Property Management in the bankruptcy proceeding and that they were thus precluded from asserting said defenses as to the foreclosures of Loans 739 and 126. We agree.

According to the report of sale from the bankruptcy proceeding, Property Management purchased

> [a]ll *claims* of Jacob L. Levitt and Paige Levitt now existing (whether or not asserted), to include those that have been asserted against Today's Bank in a matter now

> pending in the Circuit Court or Washington County, Arkansas, Case No. 72CV-18-3120 (the "State Court Litigation").

(Emphasis added.) By the plain language of the report of sale, Property Management purchased only the claims of Jacob and Paige—not their defenses. Our conclusion is further bolstered by the joint resolution in which Property Management directs Jacob and Paige to dismiss with prejudice their claims against the Bank. The resolution does not direct them to withdraw their defenses. Thus, to the extent that the circuit court's order concludes that Jacob and Paige lost any defenses by virtue of the bankruptcy sale, we disagree.

C. Prevention of Performance

Finally, Jacob and Paige argue that there were genuine issues of material fact regarding whether the Bank assumed a duty to obtain title to the trailers that were pledged as security for the loan and whether the Bank's failure to do so caused the Levitts' inability to perform their obligations under the loan agreements. They contend that the party whose own conduct prevents or hinders the other party's performance under the contract cannot complain of nonperformance.

In *Willbanks v. Bibler*, 216 Ark. 68, 224 S.W.2d 33 (1949), the Arkansas Supreme Court held that "he who prevents the doing of a thing shall not avail himself of the nonperformance he has occasioned." *Id.* at 72, 224 S.W.2d at 35; *see also* 5 Samuel Williston, *A Treatise on the Law of Contracts* § 677 (3d ed. 1961). This principle is expressed in 17A Am. Jur. 2d *Contracts* § 703 (1991):

> One who prevents or makes impossible the performance or happening of a condition precedent upon which his liability by the terms of a contract is made to depend cannot avail himself of its nonperformance. Even more broadly, where a promisor prevents or hinders the occurrence, happening, or fulfillment of a condition in a contract, and the condition would have occurred except for such hindrance or

> prevention, the performance of the condition is excused and the liability of the promisor is fixed regardless of the failure to perform the condition. Moreover, while prevention by one party to a contract of the performance of a condition precedent excuses the nonperformance of the condition, it must be shown that the nonperformance was actually due to the conduct of such party; if the condition would not have happened whatever such conduct, it is not dispensed with.

A party has an implied obligation not to do anything that would prevent, hinder, or delay performance. *See Housing Auth. of the City of Little Rock v. Forcum-Lannom, Inc.*, 248 Ark. 750, 454 S.W.2d 101 (1970); *Dickinson v. McKenzie*, 197 Ark. 746, 126 S.W.2d 95 (1939); *Townes v. Okla. Mill Co.*, 85 Ark. 596, 109 S.W. 548 (1908); *Smith v. Unitemp Dry Kilns, Inc.*, 16 Ark. App. 160, 698 S.W.2d 313 (1985); *City of Whitehall v. S. Mech. Contracting, Inc.*, 269 Ark. 563, 599 S.W.2d 430 (Ark. App. 1980).

Here, the Levitts presented evidence that Jacob informed the Bank of the planned transfer of ownership of the Ramsey trailers; that the Bank (through Assistant Manager Robinson) agreed to facilitate the transfer; that the Bank subsequently failed to effectuate the transfer; that Ramsey repossessed and sold the trailers; that Robinson admitted the error was his fault; that the trailers were vital to their businesses; and that the loss of the trailers devastated their business, resulting in an inability to pay their loans. Viewing the evidence in the light most favorable to the Levitts and resolving all doubts and inferences against the Bank, we concluded that genuine issues of material fact exist as to whether the actions of the Bank prevented the Levitts from performing under the contracts.

IV. *Conclusion*

For the foregoing reasons, we reverse the circuit court's grant of summary judgment and remand for further proceedings.

Reversed and remanded.

VIRDEN and KLAPPENBACH, JJ., agree.

The Law Offices of Watson and Watson, PLLC, by: *Tim Watson Jr.*, for appellants.

Williams Law Firm of Arkansas, by: *D. Joel Kurtz* and *Jay B. Williams*, for separate appellee Today's Bank, an Arkansas Banking Corporation.