

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
February 3, 2010 Session

ROXANN F. ALLEN v. BRANCH BANKING & TRUST COMPANY ET AL.

**Appeal from the Chancery Court for Wilson County
No. 08351 Charles K. Smith, Chancellor**

No. M2009-00920-COA-R3-CV - Filed March 18, 2010

Husband fraudulently encumbered a tenancy by the entirety without his wife's consent. The wife and the bank claim interests in the proceeds from the sale of the property owned by tenancy by the entirety. Having determined that the bank retained a right of survivorship in the property, we vacate the trial court's decision and remand for further proceedings.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Vacated
and Remanded**

ANDY D. BENNETT, J., delivered the opinion of the Court, in which PATRICIA J. COTTRELL, P.J., M.S., and RICHARD H. DINKINS, J., joined.

Brett A. Oeser, Carrie W. McCutcheon, and Robert R. Carl, Nashville, Tennessee, for the appellant, Branch Banking & Trust Company.

Jessie Ray Akers, Jr., Nashville, Tennessee, for the appellee, Roxann F. Allen.

OPINION

FACTUAL AND PROCEDURAL BACKGROUND

Roxann Allen and Michael Allen, a married couple, owned real property located on Elizabeth Drive in Mount Juliet as tenants by the entirety. In February 2007, Branch Bank & Trust Company ("BBT") entered into a loan agreement with Mr. Allen for \$150,000, and Mr. Allen executed a deed of trust on the Elizabeth Drive property. On the deed of trust, Mr. Allen was described as an "unmarried individual." In October 2007, BBT entered into a second loan agreement with Mr. Allen for \$125,000, and Mr. Allen executed another deed of trust on the Elizabeth Drive property. Roxann Allen's name and purported signature appeared on the second deed of trust along with her husband's name and signature.

The Allens received a foreclosure notice from BBT on July 28, 2008. On August 13, 2008, Ms. Allen filed the present action for a declaratory judgment and injunctive relief against BBT, BB&T Collateral Service Corporation, trustee, Michael Allen, and the notary public who notarized Ms. Allen's purported signature on the second deed of trust. Ms. Allen alleged that she did not consent to either loan and that her purported signature on the second deed of trust was not her signature. She requested the court to order that, "if the property is foreclosed and sold, the proceeds be directly deposited into escrow with the Clerk of this Court, pending final hearing." None of the defendants filed an answer to the petition.

On October 27, 2008, Ms. Allen filed a motion requesting relief pursuant to Tenn. R. Civ. P. 22¹ and Tenn. Code Ann. § 29-14-101 *et seq.*² In her motion, Ms. Allen stated that "an offer has been made and accepted for the sale of the real property at issue, and the closing is set for November 17, 2008" and that the defendants, except the notary, asserted rights to the proceeds of the sale. Ms. Allen moved the court to order that "the proceeds from the sale of the real property at issue be deposited immediately after closing with the Clerk of this Court . . . pending further orders or the final hearing in this cause."

At a hearing in early November 2008, counsel for BBT appeared and informed the court that BBT had no objection to Ms. Allen's motion. The court granted Ms. Allen's motion, approved the sale of the property, and ordered BBT and the trustee to deposit the sale proceeds with the court clerk. The matter was set for final hearing on March 27, 2009. In an amended agreed order, the court ordered that "upon closing the sale of the property . . ., the title shall pass free and clear of any liens placed upon the property by Branch Banking and Trust Company and/or BB&T Collateral Service Corporation."

At the final hearing in March 2009, counsel for BBT and Ms. Allen informed the court that none of the facts in the petition were in dispute and that the only matter remaining for the court to decide was the disposition of the sale proceeds. None of the parties put on proof but argued their positions to the court.³ The court made the following statement:

Let the record reflect, first, that everybody agrees, and I so order, based upon the statements and pleadings and so forth, that Mr. Allen, at the time he was married to [Roxann Allen], goes to Branch Bank and Trust and forges his

¹Tenn. R. Civ. P. 22.02 provides, in part, that, "Any property or amount involved as to which the party seeking interpleader admits liability may, upon order of the court, be deposited with the court or otherwise preserved, or secured by bond in amount sufficient to assure payment of the liability admitted."

²Tenn. Code Ann. §§ 29-14-101 – 113 address declaratory judgments.

³BBT, the trustee, Ms. Allen, and the notary were represented at the hearing.

wife's name on one note and tells the notary that she had signed it and lied to the notary and got the notary to notarize both signatures, and that this was a forgery. And then he also went in once to the same bank, different notary, and told them that he owned the property outright and borrowed some money against it. Apparently, they didn't do a very good title search, and they loaned him money against this property. She did not sign, because he claimed that he owned it outright as a single man, not married. I find that those are the stated facts and so order that those are stipulated and agreed upon facts.

During the arguments that followed, BBT's attorney represented to the court that the Allens were divorced pursuant to the court's final order entered on October 21, 2008, and that Mr. Allen had agreed for Ms. Allen to get all of the parties' property.

The final order entered on April 3, 2009, includes the following pertinent findings:

The Court further finds that the property at issue was sold with consent of the parties and the Court, and that the Plaintiff and Defendant Michael Allen were divorced prior to the sale, and Michael Allen executed a Quit Claim Deed prior to the sale. Therefore, the Plaintiff owned the property at issue fee simple absolute at the time of the sale.

The Court further finds that Defendants Branch and BB&T failed to perform a proper title search regarding the February 6, 2007 Deed of Trust, that Branch and BB&T released their interest in the property by not asserting their interest in the divorce action and by allowing the funds to be placed in escrow, that Defendant Michael Allen committed an act of forgery and fraud, and that Defendant Nathan Logsdon was negligent in his duties and obligations as a Notary Public.

The court therefore ruled that Ms. Allen was entitled to 100% of the sale proceeds.

On appeal, BBT raises several issues in support of its position that the trial court erred in awarding all the sale proceeds to Ms. Allen. Because the trial court heard no proof regarding the Allens' divorce decree or the quit claim deed that Mr. Allen allegedly executed after the divorce, the trial court's findings regarding the import of those documents are not supported by evidence in the record. This court cannot consider any issues raised by the

parties regarding the effect of those documents.⁴ We will confine our consideration to the issue of what interest BBT received from Mr. Allen as a result of the deeds of trust.

STANDARD OF REVIEW

The relevant facts are not in dispute. We are presented with an issue of law: what interest, if any, Mr. Allen transferred to BBT by virtue of executing the deeds of trust. We review questions of law de novo, with no presumption of correctness. *Johnson v. Johnson*, 37 S.W.3d 892, 894 (Tenn. 2001).

ANALYSIS

The answer to the question presented hinges on the nature of the Allens' ownership of the property at issue. The Allens owned their home by tenancy by the entirety, an estate that our Supreme Court has described as follows:

An estate by the entirety is one limited to the lifetime of the husband and wife; indeed, it is one limited to the continuance of the relationship of husband and wife. It is an estate which can be ended by the joint conveyance of husband and wife. It is like a joint estate, in that each is entitled to an equal interest and to take the whole upon the death of the other. It is unlike a joint estate, in that neither can separate his interest from the other except by the joint action of both or by operation of law. This result is based upon the legal notion of the unity of two persons who are husband and wife.

Covington v. Murray, 416 S.W.2d 761, 764 (Tenn. 1967) (quoting *McGhee v. Henry*, 234 S.W. 509 (Tenn. 1921)). Tenants by the entirety own the property as one. *Ames v. Norman*, 36 Tenn. (4 Sneed) 684, 692 (Tenn. 1857). Each spouse has a right of survivorship; when one spouse dies, the other spouse takes the whole estate. *Id.*

What is the effect of one spouse's attempt to transfer an interest in an estate by the entirety without the consent of the other spouse? This question has been previously addressed by our courts. A spouse's attempt to transfer or encumber a tenancy by the entirety without the consent of the other does not affect the interest of the nonconsenting spouse. *Robinson v. Trousdale County*, 516 S.W.2d 626, 632 (Tenn. 1974); *Covington*, 416 S.W.2d at 764; *Clark v. Clark*, 620 S.W.2d 536, 537-38 (Tenn. Ct. App. 1981). A spouse "cannot

⁴Contrary to Ms. Allen's assertion, we do not consider the colloquy between the court and the attorneys with reference to the Allens' divorce and Mr. Allen's execution of a quit claim deed to constitute stipulations.

sell or encumber anything but [his or her] own interest in an estate owned by the entirety.” *Clark*, 620 S.W.2d at 538 (citing *Irwin v. Dawson*, 273 S.W.2d 6, 7 (Tenn. 1954)). Thus, a spouse’s transfer or encumbrance of property owned by tenancy by the entirety without the consent of the other spouse transfers or encumbers only the first spouse’s right of survivorship. *In re Crim*, 81 S.W.3d 764, 770 (Tenn. 2002); *Robinson*, 516 S.W.2d at 632. Furthermore, it has been held that a divorce that destroyed a tenancy by the entirety had no effect on the rights of a purchaser of a survivorship interest. *Third Nat’l Bank v. Knobler*, 789 S.W.2d 254, 255 (Tenn. 1990) (citing *Ames*, 36 Tenn. at 696-97).

Applying these principles to the facts at hand, we must conclude that Mr. Allen transferred to BBT his survivorship interest in the Elizabeth Drive property and that BBT’s interest in the property was not affected by the parties’ subsequent divorce.

Ms. Allen argues that any interest held by BBT was extinguished by its consent to the sale of the Elizabeth Drive property free of any liens. We disagree. BBT consented to Ms. Allen’s motion, thereby allowing the proposed sale of the property and the deposit of the proceeds with the court clerk pending resolution of the parties’ claims. We do not interpret BBT’s actions as relinquishing its interest in the sale proceeds.⁵

CONCLUSION

The judgment of the trial court is vacated and the case remanded for further proceedings consistent with the opinion. Costs of appeal are assessed against the appellee, for which execution may issue if necessary.

ANDY D. BENNETT, JUDGE

⁵This conclusion should not, however, be interpreted as condoning the bank’s lax attitude toward this case as reflected by its failure to file an answer to Ms. Allen’s petition.