



NOT FOR OFFICIAL PUBLICATION

IN THE COURT OF CIVIL APPEALS OF THE STATE OF OKLAHOMA
DIVISION II

FILED
COURT OF CIVIL APPEALS
STATE OF OKLAHOMA

SEP 16 2022

AMERICAN ADVISORS GROUP,)
)
Plaintiff/Appellee,)
)
vs.)
)
LISA MICHELLE JACKSON-ROUSE,)
)
Defendant/Appellant.)

JOHN D. HADDEN
CLERK

Case No. 120,107

APPEAL FROM THE DISTRICT COURT OF
OKLAHOMA COUNTY, OKLAHOMA

HONORABLE CINDY TRUONG, TRIAL JUDGE

VACATED AND REMANDED

David N. Livingston
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For Plaintiff/Appellee

Andrew J. Waldron
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Oklahoma City, Oklahoma

For Defendant/Appellant

OPINION BY GREGORY C. BLACKWELL, JUDGE:

The defendant, Lisa Michelle Jackson-Rouse, appeals the trial court's grant of summary judgment in favor of the plaintiff, American Advisor's Group (American), in a foreclosure suit, on both the plaintiff's claim for foreclosure and Jackson-Rouse's counterclaims. Jackson-Rouse also appeals the denial of her motion to reconsider both judgments. On appeal, we find that Jackson-Rouse had raised genuine disputes of material fact that should have precluded

summary judgment on any claims. Accordingly, we vacate the trial court's judgment and remand for further proceedings.

BACKGROUND

On October 17, 2013, Velma Clark, now deceased, executed a promissory note for \$60,000, secured by a mortgage on real property that she owned in Oklahoma County. Velma died on August 4, 2017. In September of that year, Lisa Jackson-Rouse, Velma's niece, was appointed as the personal representative of Velma's estate.

On December 17, 2017, American, as successor-in-interest to the note and mortgage, filed a petition for foreclosure, alleging an unpaid principal balance of \$23,396.58 plus accrued interest and various fees and costs. Jackson-Rouse filed an answer and counterclaim on August 10, 2018, alleging that Jackson-Rouse held Velma's power of attorney at the time of the note's execution and that Velma was not competent to make the note and mortgage in question. Jackson-Rouse counterclaimed for accounting, conversion, trespass, abuse of process, reverse wrongful imprisonment,¹ tortious interference with economic relations, violations of the Federal Fair Debt Collection Practices Act, intentional infliction of emotional distress, and punitive damages.

¹ Jackson-Rouse made the novel claim of reverse false imprisonment, alternatively pled as denial of right of entry. Our research indicates that the courts of Oklahoma have not embraced such a tort. The only court we found that has discussed even the possibility of such a tort is the Court of Appeals of Wisconsin, which concluded "this species of tort is not recognized in Wisconsin." See *Webber v. Froedtert Mem'l Lutheran Hosp.*, 160 Wis. 2d 931, 468 N.W.2d 211 (Ct. App. 1991).

American moved for summary judgment in February 2020, and the matter was heard the next month. The trial court granted summary judgment in favor of American and a journal entry was entered to that effect. The journal entry found that American was entitled to judgment on the note and to foreclose on the mortgage and that Jackson-Rouse's defenses and counterclaims all "lacked merit." Jackson-Rouse filed a motion to reconsider the summary judgment order, which was denied. Jackson-Rouse appeals both the judgment and the denial of her motion to reconsider.²

STANDARD OF REVIEW

"Where, as here, our assessment of the trial court's exercise of discretion in denying defendants a new trial rests on the propriety of the underlying grant of summary judgment, the abuse-of-discretion question is settled by our *de novo* review of the summary adjudication's correctness." *Reeds v. Walker*, 2006 OK 43, ¶ 9, 157 P.3d 100.

Summary judgment resolves issues of law, and we review a district court's grant of summary judgment *de novo*. Using the *de novo* standard, we subject the record to a new and independent examination without regard to the trial court's reasoning or result. All inferences and conclusions are to be drawn from the underlying facts contained in the record and are to be considered in the light most favorable to the party opposing summary judgment. If reasonable individuals could reach different factual conclusions under the evidentiary materials, summary judgment is improper.

Snow v. Town of Calumet, 2022 OK 63, ¶ 5, 512 P.3d 369, 372 (internal citations omitted).

² A motion to reconsider filed within ten days of a judgment operates to extend the time to appeal the underlying judgment until thirty days after the date the order denying the motion is filed. 12 O.S. § 990.2(A). That was accomplished here.

ANALYSIS

Jackson-Rouse argues on appeal that the trial court erred in granting summary judgment because genuine disputes of material fact exist on two general grounds: (1) that Velma was initially incompetent to take on the indebtedness at issue, and (2) that American's allegedly tortious conduct against Jackson-Rouse after Velma's death provided a basis for recoupment against the indebtedness.

Velma's Capacity to Form a Contract

Jackson-Rouse first argues summary judgment should have been denied because questions of material fact exist as to whether Velma was competent to give a note and mortgage on the instant property, and whether American failed to properly conduct due diligence to discover that Velma was incapable of entering into an agreement with American.

In Oklahoma, the capacity to contract is governed by statute. See 15 O.S. §§ 11-34. Jackson-Rouse's argument is that Velma, due to mental incompetency, lacked the capacity to legally form a contract with American to take on mortgage debt. Lack of competency, which Jackson-Rouse has the ultimate burden to prove, is a basis for lack of capacity. See 15 O.S. §§ 22, 23; Oklahoma Uniform Jury Instruction No. 23.31.

Jackson-Rouse included numerous exhibits purporting to show Velma's incapacity to take on any indebtedness in 2013 in her response to summary judgment. Jackson-Rouse offered evidence that she held a power of attorney (POA) from Velma at the time she and American entered into the note agreement.

The POA included the power to “exercise general supervision and control” over Velma’s property. Jackson-Rouse’s evidence also included affidavits from herself and a nurse attending Velma, as well as medical reports purporting to show that Velma suffered from bipolar affective disorder at the time of the note and mortgage.

American responded to this evidence in two ways. First, it provided a copy of an email, allegedly sent by Jackson-Rouse to James Blythe, an employee of America’s predecessor in interest, on or before October 14, 2013, that states in part:

My aunt is medically & physically competent to handle her own business matters but since I run her errands & complete her taxes she has asked that I stay the mailing address for my Aunt’s residential address. Once my Aunt has secured a perimeter around the front & back yard she will have some of this mail returned to her residential address.

Second, American attached an affidavit from an employee stating that:

Plaintiff maintained detailed notes of communications with the mortgagor as well as any of her representatives. The notes show that there were several phone conversations with the Defendant, Lisa Rouse, a/k/a Lisa Michelle Jackson-Rouse regarding the status of lapsed insurance and unpaid taxes during the administration of this loan and prior to the death of Velma R. Clark.

However, no notes, screen printouts, details of any conversations, or affidavits of any employee who had talked to Jackson-Rouse were attached to the summary judgment motion.

Jackson-Rouse responded that she had not sent the email in question. She claims that the email was sent by Velma herself through an account that Jackson-Rouse set up for her use, and that Velma had actually sent it to falsify

Jackson-Rouse's approval of her entering into a mortgage while Jackson-Rouse held a power of attorney over her property, and that this action is emblematic of Velma's erratic behavior.³

The question on summary judgment is whether one party is entitled to judgment as a matter of law because there are no material disputed factual questions. *Carmichael v. Beller*, 1996 OK 48, ¶2, 914 P.2d 1051, 1053. American appears to rely largely on this email as being dispositive as a matter of undisputed fact regarding Velma's competence. A printed copy of the email was attached to American's response. It shows a sender's address as lisajrouse@gmail.com and was initially sent to one James Blythe. It was then forwarded to one Kim O'Neal. Loan servicer Brenda M. Phillips then stated by affidavit that, on personal knowledge, this email was "contained in the predecessor in interest's files." The affiant did not swear at any time to the authenticity of the attached forwarded copy of the email, however.

Pursuant to 12 O.S. § 2056, when a party seeks summary judgment, "[i]f a paper or part of a paper is referred to in an affidavit, a sworn or certified copy must be attached to or served with the affidavit." As such, the email, which was neither sworn nor certified, was not properly presented here as evidence sufficient to show no material question of fact. Further, when this email is

³ Examining the POA, it does not appear to prevent Velma from conducting her own affairs or require any approval for her to do so, but merely gives Jackson-Rouse the power to do the same. The POA does provide that it is durable upon incompetence. As such, it acts only as evidence that Velma needed help in maintaining her affairs, and possibly that she contemplated incompetence, not that she was legally prevented from acting on her own account at the time of the mortgage.

juxtaposed against Jackson-Rouse's affidavit that she did not send it, a question of fact remains as to whether it represents a confession of Velma's competency by Jackson-Rouse at the time the mortgage was taken. Further, what weight to ascribe to the email in question, even if it is proven to have come from Jackson-Rouse, is not immediately clear, and is certainly not ascertainable as a matter of law.

American next relied on the same affidavit to demonstrate that it had personal knowledge of "notes of communications" with Jackson-Rouse regarding the status of lapsed insurance and unpaid taxes on the house during the administration of this loan and prior to Velma's death. Whether the affiant, Ms. Phillips, had actually seen or reviewed these notes, or simply knew of their existence, is unclear. No further details were given, and no such notes were produced in the record in support of summary judgment.

What undisputed facts American intended this affidavit to demonstrate are unclear. Its summary judgment motion argues only the "records of numerous phone conversations" testified to by affidavit "provides uncontradicted evidence that the statements made by the defendant are false and an attempt to defraud both this court and the plaintiff."⁴ Attempting to decode this rhetoric, it appears that American argues either that Jackson-Rouse stated during these

⁴ Despite the fact that there is no fraud claim here, the summary judgment motion uses some combination of the words "false, fraud, fictitious or dishonest" at least eleven times to describe Jackson-Rouse's arguments. It complains specifically of "the dishonesty" of "[Jackson-Rouse's] attorney." This constitutes a serious allegation of a breach of the duty of candor of opposing counsel. If American's counsel has evidence of such a breach of duty, he should avail himself of the procedures set forth in 12 O.S. § 2011, report his accusations to the state bar, or both. If he does not, he is admonished to moderate his rhetoric.

conversations that Velma was competent, or that she somehow ratified the original transaction via her power of attorney by discussing mortgage-related matters without objection.

No notes, screen printouts, details of any conversations, or affidavits of any employee who had actually talked to Jackson-Rouse were attached to the summary judgment motion, however. At best, the affidavit states that American employees could produce “notes of conversations” with Jackson-Rouse regarding “lapsed insurance and unpaid taxes.” Given that the content of these notes remains unknown, the affidavit was clearly insufficient to support summary judgment here.

Considering the evidence in the light most favorable to the non-moving party, Jackson-Rouse, there are genuine disputes of material fact as to whether Velma was competent to enter into the transaction, whether Velma or Jackson-Rouse sent the purported email from Jackson-Rouse’s email account, and whether Jackson-Rouse admitted Velma’s competency or ratified the mortgage in later conversations.

Jackson-Rouse’s Counterclaims

The second set of issues on appeal concerns Jackson-Rouse’s counterclaims against American. Jackson-Rouse urges this court that the trial court erred in affirming summary judgment in favor of American on her counterclaims because fact questions remain as to these claims.

The court’s journal entry stated that these claims were “without merit” and that “Plaintiff is hereby granted summary judgment as to each and every

affirmative defense and counterclaim contained therein.” How the court found that American had shown, as matter of law, that Jackson-Rouse’s counterclaims were subject to summary judgment is uncertain, as American *presented no argument regarding the counterclaims* in its summary judgment motion.⁵ Further, the trial court stated no rationale in its order, and hence we do not have even the most basic facts regarding this decision, such as whether the court made its decision on the basis of “undisputed facts” or some fundamental legal defect in Jackson-Rouse’s theories.⁶

The initial burden on summary judgment lies with the moving party to show that there is no substantial controversy as to any material fact and hence it was entitled to judgment as a matter of law. *Citizens Against Taxpayer Abuse, Inc. v. City of Oklahoma City*, 2003 OK 65, 73 P.3d 871. American did not meet, or even attempt to meet, that burden here. As such, the trial court erred in granting summary judgment in favor of American on Jackson-Rouse’s counterclaims.

For these reasons we vacate the summary judgment entered and remand this matter for further proceedings. Because we find judgment was erroneously entered, we have no reason to review the order denying the motion to reconsider.

⁵ The motion has a heading titled “grounds for sustaining summary judgment in favor of plaintiff on the claim and counterclaim” but contains no further argument of any kind regarding the counterclaims, or what undisputed facts or legal theories would indicate that judgment was appropriate on those claims.

⁶ This analysis assumes, without confirming, that a district court may construct its own independent theories as to why summary judgment is appropriate, and grant judgment *sua sponte* based on those theories, rather than the arguments actually submitted by the parties.

VACATED AND REMANDED.

WISEMAN, P.J., concurs, and HIXON, J. (sitting by designation), concurs specially.

HIXON, J., concurring specially:

I write specially to address the issue of Velma's lack of capacity to contract on the basis of mental incompetence.

In general terms, lack of mental competence can support a determination that a person lacked capacity to form a contract. In more specific terms, 15 O.S.2011, § 11, provides that all persons are capable of contracting, with certain exceptions, including persons of "unsound mind." "Persons of unsound mind" are defined by 15 O.S.2011, § 16 as "incapacitated persons or partially incapacitated persons, as such terms are defined by Section 1-111 of Title 30 of the Oklahoma Statutes." 30 O.S.2011, § 1-111 defines an incapacitated person a person:

a. who is impaired by reason of:

- (1) mental illness as defined by Section 1-103 of Title 43A of the Oklahoma Statutes,
- (2) intellectual or developmental disability as defined by Section 1430.2 of Title of the Oklahoma Statutes,
- (3) physical illness or disability,
- (4) drug or alcohol dependency as defined by Section 3-403 of Title 43A of the Oklahoma Statutes, or
- (5) such other similar cause, and

b. whose ability to receive and evaluate information effectively or to make and to communicate responsible decisions is impaired to such an extent that the person:

- (1) lacks the capacity to meet essential requirements for physical health or safety, or
- (2) is unable to manage financial resources.

Whenever in the Oklahoma Statutes the term “incompetent person” appears and refers to a person who has been found by a district court to be an incompetent person because of an impairment or condition described in this paragraph it shall have the same meaning as “incapacitated person” but shall not include a person who is a partially incapacitated person;¹

30 O.S.2011, § 1-111.2.²

15 O.S.2011, § 22 further provides that “a person entirely without understanding has no power to make a contract of any kind, but he is liable for the reasonable value of things furnished to him necessary to his support or the support of his family.” However, “a conveyance or other contract of a person of unsound mind, but not entirely without understanding, made before his

¹A “partially incapacitated person” means:

an incapacitated person whose impairment is only to the extent that without the assistance of a limited guardian said person is unable to:

- a. meet the essential requirements for his physical health or safety, or
- b. manage all of his financial resources or to engage in all of the activities necessary for the effective management of his financial resources. A finding that an individual is a partially incapacitated person shall not constitute a finding of legal incompetence. A partially incapacitated person shall be legally competent in all areas other than the area or areas specified by the court in its dispositional or subsequent orders. Such person shall retain all legal rights and abilities other than those expressly limited or curtailed in said orders. . . .

30 O.S. 2011, § 1-111.

² Section 1-111 was amended in 2019 and 2021, after Velma executed the promissory note, but the definitions of incapacitated and partially incapacitated person remains the same.

incapacity has been judicially determined, is subject to rescission without prejudice to the rights of third persons, as provided in the article on extinction of contracts.” *Id.*

Pursuant to these statutes, if a party did not understand nature and effect of transaction and lacked insufficient mental capacity to understand it, the transaction is void. *Sooner Federal Sav. & Loan Ass’n v. Smoot*, 1987 OK 7, ¶ 14, 735 P.2d 555. On the other hand, if the party is otherwise of unsound mind, but had capacity to and did understand transaction, the contract would be voidable, as addressed in 15 O.S. § 22. *Id.* However, there is a presumption that the party executing a contract or deed has the capacity to do so, and the party claiming lack of capacity bears the burden of demonstrating that fact by clear and convincing evidence. *See e.g. Watson v. Johnson*, 1965 OK 115, ¶ 20, 411 P.2d 498; *Sooner Federal*, 1987 OK 7, at ¶ 11. “[T]he test of the capacity to make a contract is whether the party had the ability to comprehend in a reasonable manner the nature and effect of the act in which he engaged and the business he transacted.” *Matthews v. Acacia Mut. Life Ins. Co.*, 1964 OK 106, ¶ 16, 392 P.2d 369 (citation omitted).

Thus, to oppose American’s motion for summary judgment to foreclose on the mortgage, Jackson-Rouse bore the burden of demonstrating a question of fact as to whether Velma lacked capacity, or was of unsound mind, and was not

capable of understanding the nature and consequences of the transaction.³ Neither party briefed or fully addressed the required showing necessary to establish lack of capacity under Oklahoma law, or Velma's ability to understand the nature of the transaction. However, I agree that the summary judgment record contains sufficient information to raise a fact question on whether Velma was of unsound mind and had the capacity to understand the nature and consequences of the transaction, when taking inferences in the light most favorable to the non-moving party and applying applicable law.

Apart from records suggesting Velma had been diagnosed with bipolar disorder, her home care nurse testified by sworn affidavit that, in the year prior to execution of the note, Velma was often not lucid, suffered from bipolarity and depression, various physical ailments, that she often stared into space and was unresponsive, needed help to remember to take medication and was neither mentally or emotionally stable. Jackson-Rouse also contended that, on the date the note was executed, Velma was under heavy medication, was confined to the house on oxygen, used a walker, and could not have attended a closing outside of her home. Taking this testimony as true for purposes of summary judgment, the record raises a question of fact on Velma's capacity to contract. I therefore agree the trial court erred.

September 16, 2022

³ There is no evidence of record that, at the time the promissory note was executed, Velma had been judicially determined to be incompetent. Thus, there is also the possibility that she was of unsound mind, but not entirely without understanding.

I, John D. Hadden, Clerk of the Appellate Courts of the State of Oklahoma do hereby certify that the above and foregoing is a full, true and complete copy of the _____ open _____ in the within entitled cause, as the same remains on file in my office.

In Witness Whereof I hereunto set my hand and seal of said Court at Oklahoma City, this 10th day of _____ Oct

2002

By _____ Clerk
DEPUTY