

IN THE COURT OF APPEALS OF TENNESSEE
AT JACKSON
August 30, 2000 Session

**LAURIE M. THORNTON v. COUNTRYWIDE HOME LOANS, INC., ET AL.
SOUTHTRUST BANK, N.A. v. LAURIE M. THORNTON**

**Direct Appeals from the Chancery Court for Shelby County
Nos. 99-0725-2 and 99-0723-2 The Honorable Floyd Peete, Jr., Chancellor**

Nos. W1999-02086-COA-R3-CV and W1999-02087-COA-R3-CV - Filed October 23, 2000

This is a consolidated appeal of two cases, each involving a trust deed on residential real property owned by Husband and Wife as tenants by the entirety. Husband was individually indebted to the holders of the trust deeds, and wife joined in the trust deeds to convey her "marital" interest in the property. Wife contends that her execution of the trust deeds merely conveyed her survivorship interest and did not convey her current possessory interest. Also, as to one of the loans, Wife contends that it was a consumer loan, and the lender/holder of the trust deed violated the Truth and Lending Act, 15 USC § 1601 *et seq.* The chancery court granted summary judgment to the holders of the trust deeds, and Wife has appealed.

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

W. FRANK CRAWFORD, P.J., W.S., delivered the opinion of the court, in which DAVID R. FARMER, J. and HOLLY KIRBY LILLARD, J., joined.

Louis R. Lucas; Memphis, For Appellant, Laurie M. Thornton

Michael F. Rafferty; Jonathan E. Scharff, Memphis, For Appellee, SouthTrust Bank

Clifford D. Pierce, Jr., Memphis, For Appellee, Countrywide Home Loans

OPINION

Both cases in this consolidated appeal originated in the Shelby County Chancery Court on August 16, 1999. On that date, plaintiff, SouthTrust Bank National Association (hereinafter Southtrust), filed a complaint against the defendant, Laurie M. Thornton (hereinafter Ms. Thornton), for a declaratory judgment that it has a proper first lien on plaintiff's ownership interest in the described property. On the same date, Ms. Thornton, filed a complaint against defendants, Countrywide Home Loans (hereinafter Countrywide) and SouthTrust, seeking a declaratory

judgment that in both trust deeds to the defendants, she conveyed only her survivorship interest and not her current possessory interest and that she is the “unencumbered owner” of the property. Ms. Thornton also seeks to enjoin the foreclosure planned by SouthTrust. The cases are before this Court on Tenn.R.App.P. 3 appeals.¹ Because of the somewhat confused mixture of cases, we will refer to the parties by name.

In support of the motions for summary judgment, the parties filed affidavits which, along with the pleadings, provide the following facts:

On May 2, 1994, Ms. Thornton’s husband, Lewis W. Thornton, III, borrowed \$521,200.00 from Financial Federal Savings Bank and executed a promissory note on that date evidencing the loan. This loan was later assigned to Countrywide. The purpose of the loan was to purchase a residence at 4470 Tuckahoe in Memphis, and title to the property was taken in the names of Louis W. Thornton, III, and wife, Laurie M. Thornton, as tenants by the entirety. The deed of trust securing the promissory note dated May 2, 1994, designates the grantor as Louis W. Thornton, III. The trust deed provides, among other things, “[t]he terms and conditions of the spousal joinder attached hereto as page 6(a) are incorporated as if set forth verbatim herein.” The incorporated clause states as follows:

Title to the aforescribed real property is vested in Louis W. Thornton, III and Laurie M. Thornton, his wife. Laurie M. Thornton, wife of the said Louis W. Thornton, III, joins herein for purposes of conveying any and all rights arising by virtue of her marriage to the said Louis W. Thornton, III, and does hereby convey all such rights, but the said Laurie M. Thornton does not join in the covenants and warranties of this indenture, and in no way is obligated for the repayment of the indebtedness secured hereby.

In June of 1997, Louis W. Thornton, III approached Thomas R. Stephenson, President and Chief Executive Officer of SouthTrust regarding an “emergency” loan Mr. Thornton needed to pay a \$265,000.00 bill for legal services Mr. Thornton’s business had incurred. Mr. Stephenson agreed to make the loan but informed Mr. Thornton that Southtrust would require collateral to secure the debt. Because Mr. Thornton needed to pay the bill for legal services before Southtrust could complete the proper documentation for the loan, Southtrust agreed to make Mr. Thornton a temporary “swing” loan in the amount of \$265,000.00 which would be paid off when the permanent loan closed. Both Ms. Thornton and her husband signed the note for this swing loan. Ms. Thornton then deposited the proceeds of the loan in the Thornton Commodity Company, L.L.C., business account, and drew a check on that same account payable to Louis W. Thornton, III in the amount of \$255,000.00. The memo on the face of that check indicated that the check was for legal expenses.

¹ In a rather confusing sequence of events, the trial court initially granted Tenn.R.App.P. 9, interlocutory appeal in both cases; but, subsequently, the record indicates that final judgments were entered in both cases, and proper notices of appeal were filed in both cases.

On June 25, 1997, after completing the necessary paperwork, SouthTrust made the Thorntons a \$400,000.00 permanent loan (the "SouthTrust Loan"), the proceeds of which the Thorntons used to pay off the \$265,000.00 swing loan and a \$98,000.00 second mortgage on the couple's residence. The Thorntons used the remaining \$37,000.00 for some of the couple's personal debt. As with the Countrywide Loan, the SouthTrust Loan was evidenced by a note signed by Louis W. Thornton, III. The deed of trust securing the SouthTrust Loan designates both Louis W. Thornton, III and Laurie M. Thornton as "parties of the first part" in the granting clause, and is signed by both Ms. Thornton and her husband. In addition, the SouthTrust Deed of Trust provides:

Title to the aforescribed real property is vested in Louis White Thornton, III and Laurie M. Thornton. Laurie M. Thornton, wife of Louis White Thornton, III, for the consideration expressed herein, joins for the purpose of granting, bargaining, selling, conveying and confirming and does hereby grant, bargain, sell, convey and confirm unto the party of the second part, its successors and assigns, all rights, claims, and interests of every kind, character and description whatsoever which she now has or may acquire in the future by virtue of her marriage, including but not limited to homestead and any interest in the above described real property as all or a part of an elective share of a surviving spouse as provided by the laws of the State of Tennessee. Further, Laurie M. Thornton does not join in the covenants and warranties of this indenture and is not in any way obligated for the payment of the indebtedness secured hereby.

On April 6, 1999, SouthTrust declared its loan in default and demanded payment. On June 1, 1999, Plaintiff's husband filed a voluntary bankruptcy under Chapter 7 of the United States Bankruptcy Code. On July 22, 1999, the U.S. Bankruptcy Court for the Western District of Tennessee granted SouthTrust relief from the stay in order to pursue foreclosure on the Tuckahoe property. SouthTrust initiated foreclosure proceedings by publication and set the foreclosure date for September 7, 1999.

These suits were then filed as heretofore noted. Ms. Thornton has appealed the orders granting summary judgment to SouthTrust and Countrywide. The primary issue is whether the trial court erred in granting SouthTrust and Countrywide summary judgments. To reach a decision on these issues, the Court must determine (1) whether Ms. Thornton effectively conveyed both her present possessory interest and future survivorship interest in the Tuckahoe property in the Deeds of Trust executed in favor of Defendants; and (2) whether Defendant SouthTrust's loan to Ms. Thornton's husband was subject to the Federal Truth in Lending Act and, if so, whether Defendant SouthTrust violated the Act by failing to provide Plaintiff with a Notice of Right to Rescind. For the reasons below, we affirm the trial court and hold that Ms. Thornton effectively conveyed all of her interest in the subject property and that the SouthTrust loan was not subject to the Truth in Lending Act's provisions regarding disclosure or rescission. The issue regarding the Deeds of Trust requires an interpretation of the instruments.

Issues relating to the interpretation of written contracts involve legal rather than factual issues. *See Rapp Constr. Co. v. Jay Realty Co.*, 809 S.W.2d 490, 491 (Tenn. Ct. App. 1991). These essentially legal questions can be resolved using summary judgment when the relevant facts are not in dispute. *See Rainey v. Stansell*, 836 S.W.2d 117, 118 (Tenn. Ct. App. 1992).

A motion for summary judgment should be granted when the movant demonstrates that there are no genuine issues of material fact and that the moving party is entitled to judgment as a matter of law. Tenn. R. Civ. P. 56.03. Summary judgment is only appropriate when the facts and the legal conclusions drawn from the facts reasonably permit only one conclusion. *See Carvell v. Bottoms*, 900 S.W.2d 23, 26 (Tenn. 1995). Since only questions of law are involved, there is no presumption of correctness regarding a trial court's grant of summary judgment. *See Bain v. Wells*, 936 S.W.2d 618, 622 (Tenn. 1997). Therefore, our review of the trial court's grant of summary judgment is *de novo* on the record before this Court. *See Warren v. Estate of Kirk*, 954 S.W.2d 722, 723 (Tenn. 1997).

In *Rainey v. Stansell*, 836 S.W.2d 117 (Tenn. Ct. App. 1992), this Court said:

The cardinal rule for interpretation of contracts is to ascertain the intention of the parties and to give effect to that intention consistent with legal principles. *Bob Pearsall Motors, Inc. v. Regal Chrysler-Plymouth, Inc.*, 521 S.W.2d 578 (Tenn. 1975). A primary objective in the construction of a contract is to discover the intention of the parties from a consideration of the whole contract. *Mckay v. Louisville & N.R. Co.*, 133 Tenn. 590, 182 S.W. 874 (1916); *Burns v. Temperature Control Co.*, 52 Tenn.App. 51, 371 S.W.2d 804 (1962). In construing contracts, the words expressing the parties' intentions should be given their usual, natural and ordinary meaning, *Taylor v. White Stores, Inc.*, 707 S.W.2d 514 (Tenn. App. 1985), and neither party is to be favored in the construction. *Ballard v. North American Life Ins. Co.*, 667 S.W.2d 79 (Tenn. App. 1983).

The court, in arriving at the intention of the parties to a contract, does not attempt to ascertain the parties' state of mind at the time the contract was executed, but rather their intentions as actually embodied and expressed in the contract as written. *Petty v. Sloan*, 197 Tenn. 630, 277 S.W.2d 355 (1955); *Sutton v. First Nat'l Bank of Crossville*, 620 S.W.2d 526 (Tenn. App. 1981). All provisions of a contract should be construed as in harmony with each other, if such construction can be reasonably made, so as to avoid repugnancy between the several provisions of a single contract. *Bank of Commerce & Trust Co. v. Northwestern Nat'l Life Ins. Co.*, 160 Tenn. 551, 26 S.W.2d 135, 68 A.L.R. 1380 (1930).

Id. at 118-19. The primary objective in the construction of a contract is to discover the intention of the parties from a consideration of the whole contract. *See McKay v. Louisville & N.R. Co.*, 133 Tenn. 590, 182 S.W. 874, 875 (1916).

Under Tennessee law, when a husband and wife take title to real property, they hold that property as a tenancy by the entirety unless there is clear evidence to the contrary. *See Bennett v. Hutchens*, 133 Tenn. 65, 179 S.W. 629, 630 (1915); *In re Arango*, 992 F.2d 611, 613 (6th Cir.1993). Tenancy by the entirety is a form of property ownership unique to married persons. *See See Grahl v. Davis*, 971 S.W.2d 373, 378 (Tenn. 1998). The essential characteristic of a tenancy by the entirety is that each spouse owns the whole. *See Id.* Upon the death of one of the parties, the survivor takes no new title or estate, because the survivor is in possession of the whole from its inception. *See Catt v. Catt*, 866 S.W.2d 570, 573 (Tenn. Ct. App. 1993).

The plain and ordinary meaning of the words contained in both the SouthTrust and Countrywide deeds of trust is unambiguous. Plaintiff clearly and effectively conveyed her entire interest in the Tuckahoe property in order to secure her husband's loans. We believe that a reasonable person in Plaintiff's position would have understood that if her husband defaulted on the loans the Tuckahoe residence secured, Plaintiff risked losing her home. Contracts must be interpreted and enforced as written, even if by their terms they can be considered harsh or unjust. *See NSA DBA Benefit Plan, Inc. v. Connecticut Gen. Life Ins. Co.*, 968 S.W.2d 791, 795 (Tenn. Ct. App. 1997).

We find additional support for our holding in Tennessee's statutes concerning conveyances of property:

~~Every grantor or devisee, passing full estate,~~ Every grantor or devisee, shall pass all the estate or interest of the grantor or devisor, ***unless the intent to pass a less estate or interest shall appear by express terms***, or be necessarily implied in the terms of the instrument.

T.C.A. § 66-5-101 (1982)(emphasis added). *See also Covington v. Brothers*, 1989 WL 102516, at *2 (Tenn. Ct. App. Sept. 8, 1989)(applying T.C.A. § 66-5-101 to a testamentary gift of real property). Neither deed of trust contains any language expressly conveying only Plaintiff's future right of survivorship or reserving her current possessory estate in the property. In fact, the SouthTrust deed specifically conveys all Ms. Thornton's "rights, claims, and interest of every kind, character and description whatsoever." In the Countrywide deed, Ms. Thornton similarly "conveys any and all rights" in the property she holds with her husband.

Ms. Thornton argues she was not a grantor on either deed of trust. This is clearly incorrect as to the SouthTrust deed, in which she is represented as a "party of the first part" along with her husband, a term the deed clearly substitutes for the more traditional "grantor." While we agree with Plaintiff that she is not termed a "grantor" on the Countrywide deed, we do not find this fact dispositive. The Countrywide deed of trust secured the loan which the couple used to purchase their home. Ms. Thornton signed the deed of trust at the bottom, under her husband's signature, in order to convey her interest in the home. We do not believe that Countrywide's failure to list Ms.

Thornton as a grantor has any effect upon her conveyance. It is simply unbelievable that a bank would consent to secure the entire amount of the purchase price of a home with something less than a complete interest in the property. We hold, therefore, that the Countrywide deed of trust effectively conveyed all of Ms. Thornton's possessory interest, present and future, in the Tuckahoe property.

Ms. Thornton also asserts that the trial court erred in finding that the SouthTrust Loan was not subject to the Truth in Lending Act ("TILA"). We disagree. The Act provides that, in "consumer" loans, lenders must make certain disclosures and provide borrowers with a Right of Recission Notice. *See* 29 C.F.R. § 226, et seq. The Act defines a "consumer" transaction as "one in which the party to whom credit is offered or extended is a natural person, and the money, property, or services which are the subject of the transaction are **primarily for personal, family, or household purposes.**" 15 U.S.C.A. § 1602(h) (1998)(emphasis added). Transactions which are primarily for business purposes are exempt from the TILA. *See* 15 U.S.C.A. § 1603(1) (1998).

A loan transaction in which the proceeds are used for both business and consumer purposes is often called a "hybrid" loan transaction. *See Toy Nat'l Bank of Sioux City v. McGarr*, 286 N.W.2d 376, 379 (Iowa 1979). Hybrid transactions often arise in situations where a bank loans an individual money, and a portion of the proceeds of that loan are used to pay off an existing mortgage on property used for personal purposes. Although Tennessee courts have not specifically addressed the issue of how to classify such a loan, courts in other jurisdictions provide guidance in making such a determination. Courts generally review the loan transaction as a whole and look to the purpose for which the bank extended credit. *See Tower v. Moss*, 625 F.2d 1161, 1166 (5th Cir. 1980).

In *Toy Nat'l Bank*, the Supreme Court of Iowa applied a predominating purpose analysis in classifying a loan secured by the Defendant's family residence. 286 N.W.2d @ 379. The Iowa court rejected a "shifting" concept of loan transactions because, under this theory, a loan could be classified as "consumer" based upon the fact that when the original business loan was refinanced, the bank required the Defendant's home as collateral. *Id.* at 378. Instead, the court applied a predominant purpose test and determined that, since "the ratio of private purpose funds to business purpose funds is only slightly greater than one-to twelve", the loan was not a consumer transaction subject to the TIL. *Id.* at 379.

In the case at bar, Ms. Thornton contends that the primary purpose of the SouthTrust loan was to cover personal debts, and that the loan should be considered a consumer loan. As we noted above, the fact that a portion of the proceeds of a loan are personal in nature does not necessarily render the loan a consumer transaction. In examining the SouthTrust loan, we note that the proceeds were used to cover three things: (1) to pay off the \$265,000.00 "swing" loan the Defendant and her husband used to pay off her husband's legal expenses incurred through his business; (2) the \$98,000.00 second mortgage on the couple's residence; and (3) \$37,000.00 in personal expenses, including payment of the Thornton children's school tuition. Even assuming, *arguendo*, that the second mortgage payoff was a personal expense, we note that more than 66% of the SouthTrust loan

was for Mr. Thornton's business. For these reasons, we hold that the SouthTrust Loan is exempt from the TILA.

In conclusion, we agree with the trial court that there are no genuine issues of material fact and that Defendants Countrywide and SouthTrust are entitled to summary judgment as a matter of law. Accordingly, the order of the trial court is affirmed and this case is remanded to the trial court. Costs of this appeal are assessed against Ms. Thornton and her surety.

W. FRANK CRAWFORD, PRESIDING JUDGE, W.S.