In The

Supreme Court of Virginia

RECORD NO. 091244

AME FINANCIAL CORPORATION,

Appellant,

v.

PAUL G. KIRITSIS, EMILIE A. KIRITSIS, and GREENPOINT MORTGAGE FUNDING, INC.,

Appellees.

REPLY BRIEF OF APPELLANT

L. Steven Emmert (VSB No. 22334)
SYKES, BOURDON, AHERN & LEVY, P.C.
281 Independence Boulevard
Pembroke One, 5th Floor
Virginia Beach, Virginia 23462
(757) 499-8971 (Telephone)
(757) 456-5445 (Facsimile)
lsemmert@sykesbourdon.com

Counsel for Appellant

THE LEX GROUP ♦ 1108 East Main Street ♦ Suite 1400 ♦ Richmond, VA 23219
(804) 644-4419 ♦ (800) 856-4419 ♦ Fax: (804) 644-3660 ♦www.thelexgroup.com

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

PART I: REPLY TO THE KIRITSISES' BRIEF 1

1. This Court has jurisdiction over this appeal..... 1

2. The trial court abused its discretion by denying relief from default 2

3. The trial court improperly refused to rule on AME's demurrer to the Kiritsises' complaint 3

4. AME was prejudiced by the default ruling 4

PART II: REPLY TO GREENPOINT'S BRIEF 6

5. The record establishes that the trial court based GreenPoint's judgment on its default ruling 6

6. The trial court's default ruling was not harmless 7

7. AME did not invite error 8

CONCLUSION 9

CERTIFICATE 11

TABLE OF AUTHORITIES

Page(s)

CASES

Almy v. Grisham,
273 Va. 68, 639 S.E.2d 182 (2007) 4

Bernau v. Nealon,
219 Va. 1039, 254 S.E.2d 82 (1979) 5

Carlucci v. Duck's Real Estate,
220 Va. 164, 257 S.E.2d 763 (1979) 9

Costner v. Lackey,
223 Va. 377, 290 S.E.2d 818 (1982) 3

Waterfront Marine Constr. v. N. End 49ers, etc.,
251 Va. 417, 468 S.E.2d 894 (1996) 4

Wells v. Whitaker,
207 Va. 616, 151 S.E.2d 422 (1966) 1

STATUTE

Va. Code §8.01-676.1(C) 2

RULES

Va. Sup. Ct. R. 3:19 9

Va. Sup. Ct. R. 5:19(b) 2

OTHER AUTHORITY

K. Sinclair and L. B. Middleditch,
Virginia Civil Procedure (4th ed. 2007) 3

PART I

REPLY TO THE KIRITSISES' BRIEF

1. This Court has jurisdiction over this appeal.

The Kiritsises erroneously assert that the trial court's May 29, 2008 order[1] was final for purposes of appeal, because it adjudicated all of the claims in which they had an interest. This Court has conclusively foreclosed that argument by ruling that "a judgment is not final for purposes of appeal if it is rendered with regard to some but not all of the parties involved in the case."[2]

They also claim that the appeal should be dismissed because of a delay in filing (as opposed to securing) an augmented supersedeas bond. This Court rejected this contention when it denied the Kiritsises' motion to dismiss (asserting the same grounds) on September 9. As AME pointed out in its reply to that motion, the augmented bond

---

[1] A. 1444.

[2] *Wells v. Whitaker*, 207 Va. 616, 628, 151 S.E.2d 422, 432 (1966).

was duly filed well before the entry of final judgment, so it was in effect at all times "during the appeal."[3]

2. The trial court abused its discretion by denying relief from default.

The Kiritsises expend considerable argument on a proposition that is not in issue here: The invalidity of AME's initial answer. In their brief, the Kiritsises cite only six appellate opinions, and half of those are expended for this unnecessary purpose.[4]

All of these decisions predate the liberalization of the relief-from-default rule,[5] so the harsh results in those cases are precisely the evil that the 2006 amendment was designed to address. The new rule eased the previous rigid requirements for such relief. This Court should approve the

---

[3] Code §8.01-676.1(C).
[4] Kiritsises' brief at 14.
[5] Rule 5:19(b) (effective January 1, 2006).

approach described by Prof. Sinclair[6] when a trial court considers pre-judgment motions for relief from default.

3. The trial court improperly refused to rule on AME's demurrer to the Kiritsises' complaint.

There is no dispute that the trial court entered an order refusing to entertain AME's demurrer because of the underlying default ruling.[7] The Kiritsises now contend that the court later took up the demurrer.[8] But the argument to which they allude was on AME's motion to strike the Kiritsises' evidence on damages, not on the demurrer.[9]

"A motion to strike is in effect a motion for summary judgment . . .."[10] The standard for deciding a motion for summary judgment differs from the analysis of a

---

[6] K. Sinclair and L. B. Middleditch, *Virginia Civil Procedure* §11.4, cited in brief of appellant at 11-12.
[7] A. 182.
[8] Kiritsises' brief at 27.
[9] See A. 869, where AME's counsel makes this motion.
[10] *Costner v. Lackey*, 223 Va. 377, 381, 290 S.E.2d 818, 820 (1982).

demurrer.[11] In any event, the trial court never entered an order regarding the demurrer after its initial refusal to adjudicate the issue. As a court of record, it speaks through it orders.[12]

4. AME was prejudiced by the default ruling.

The Kiritsises insist that a litigant's rights are amply protected if it is permitted to watch in silence as another party advances arguments that the litigant might have raised on its own.[13] AME is unaware of any precedent for this principle of litigation by forced proxy, and the Kiritsises cite none. Fundamentally, AME should have been permitted to advance its own arguments, to call its own witnesses, and to carry out its own litigation strategy, instead of hoping that another litigant would effectively protect its interests.

---

[11] *Almy v. Grisham*, 273 Va. 68, 76, 639 S.E.2d 182, 186 (2007).
[12] *Waterfront Marine Constr. v. N. End 49ers, etc.*, 251 Va. 417, 427 n. 2, 468 S.E.2d 894, 900 (1996).
[13] Kiritsises' brief at 30.

The Kiritsises also suggest that AME's defense of GreenPoint's cross claim was a viable alternative to a direct defense against the Kiritsises' suit.[14] If that were true, and if AME had successfully defended the cross-claim, then the Kiritsises would have been bound to accept that result in their own case. Obviously, the doctrine of collateral estoppel does not operate in this manner; under our system of jurisprudence, each party carries out the prosecution or defense of the case independently.

Finally, the Kiritsises ask the Court to look outside the record to proceedings in a federal court.[15] This Court's precedent prohibits such an excursion.[16]

---

[14] Kiritsises' brief at 30-31.

[15] Kiritsises' brief at 31, relating to Civil Action #3:07cv095 in U.S. District Court (E.D. Va.)

[16] *Bernau v. Nealon*, 219 Va. 1039, 1043, 254 S.E.2d 82, 85 (1979).

PART II

REPLY TO GREENPOINT'S BRIEF

5. The record establishes that the trial court based GreenPoint's judgment on its default ruling.

GreenPoint correctly argues that the trial court conducted a trial on its cross-claim against AME. But even this trial was constrained by the court's initial ruling that AME was in default on the Kiritsises' allegations, and that it was bound by that default throughout the litigation.

At trial, GreenPoint conceded the binding effect of the default ruling on the key issue in the litigation, whether AME had the right to execute an amended note by virtue of a power of attorney:

> That ruling is binding on AME because of their default. That ruling is binding on GreenPoint because of the Court's ruling. The Court's order applies to AME and to GreenPoint and to Fidelity and to anybody else.[17]

[17] A. 1226.

The trial court confirmed the preclusive effect of its default ruling when it wrote, "The Court has already ruled that [AME's] Rob Duer improperly executed the note and that AME's conduct was fraudulent. There is no reason for GreenPoint to try that part of the case again."[18]

6. The trial court's default ruling was not harmless.

The trial court's finding of fraud by AME was essential to its judgment in favor of GreenPoint. Again, GreenPoint's argument in the trial court confirms this causal link:

> This whole mortgage industry operates on the assumption that when you sell paper forward, if there's a defect in it, it can be returned. . . . When we found out there was a defect in [the Kiritsis note], we . . . notified AME, down the chain, that they should take it back. The reason we're here today is they won't step up and accept that responsibility.[19]

---

[18] A. 1412 (court's letter to counsel ruling upon the issues tried on February 8, 2008 between AME and GreenPoint).
[19] A. 1232.

This argument encapsulates AME's position in this appeal. The fundamental premise of GreenPoint's claim is that the amended note was defective. If the note is not defective, then AME has no obligation to "take it back," and GreenPoint is entitled to no relief. But the default ruling prevented AME from even trying to establish that its execution of the corrected note was proper. AME seeks only an opportunity to litigate this essential element of GreenPoint's claim.

7. AME did not invite error.

GreenPoint's final contention is that AME could have avoided the effects of the default by acceding to GreenPoint's demand for repurchase, and then litigating against the Kiritsises from GreenPoint's non-defaulted position.

First, it is by no means clear that a party can avoid the preclusive effect of a default ruling simply by purchasing the

interest of a non-defaulting party. Indeed, GreenPoint cites no authority for this proposition.

Second, no party is required to surrender to an opponent in order to preserve its right to appeal. Doing as GreenPoint suggests would, of course, waive AME's right to insist that it owed no duty to GreenPoint to repurchase the note. This Court has held that a judgment debtor waives the right to appeal by voluntarily paying the judgment[20]; GreenPoint merely accelerates this process by insisting on payment in full even before judgment.

CONCLUSION

This Court should rule that under the version of Rule 3:19 that governed this case, AME is entitled to defend itself against the claim of fraud.

---

[20] *Carlucci v. Duck's Real Estate*, 220 Va. 164, 166, 257 S.E.2d 763, 765 (1979).

AME FINANCIAL
CORPORATION

By: _____
Of Counsel

L. Steven Emmert, Esq. (VSB #22334)
Sykes, Bourdon, Ahern & Levy, P.C.
Pembroke One, 5th Floor
Virginia Beach, Virginia 23462
Telephone (757) 499-8971
Facsimile (757) 456-5445
lsemmert@sykesbourdon.com

CERTIFICATE

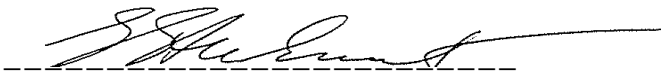
I hereby certify that, pursuant to Rule 5:26(d), fifteen copies of the foregoing Reply Brief of Appellant have been hand-filed with the Clerk of the Supreme Court of Virginia and three copies of the same have been mailed, postage prepaid, this 19th day of January, 2010, to the following:

Bradley P. Marrs, Esq.
Meyer Goergen & Marrs, PC
7130 Glen Forest Drive, Suite 305
Richmond, Virginia 23226
(804) 288-3600

Counsel for Appellees
Paul G. Kiritsis and Emilie A. Kiritsis

Robert L. Hodges, Esq.
McGuireWoods
One James Center
901 East Cary Street
Richmond, Virginia 23219
(804) 775-1000

Counsel for Appellee
GreenPoint Mortgage Funding, Inc.



L. Steven Emmert