214 N.C. 196
Supreme Court of North Carolina.

VIRGINIA TRUST CO.
v.
DUNLOP et al.

No. 121. | Sept. 28, 1938.

Appeal from Superior Court, Buncombe County; A. Hall Johnston, Judge.

Action by the Virginia Trust Company against Laura S. Dunlop, Joseph P. Dunlop, Jr., and Charles S. Dunlop, executors of the estate of Joseph P. Dunlop, deceased, upon a guaranty made by the deceased on certain notes secured by a trust deed. From a judgment denying the plaintiff's motion to strike a certain defense, the plaintiff appeals.

Affirmed.

West Headnotes (3)

[1] **Appeal and Error** On Motion Relating to Pleadings

Although the plaintiff's right to appeal from judgment refusing to strike out a certain answer and defense was not clear because the question could have been raised on objections to the evidence and, if necessary, reviewed on appeal from final judgment, and it did not appear that any substantial right had been affected, the Supreme Court would decide the matter on the merits, since the holding of the Supreme Court was adverse to the plaintiff's contention and the appeal had precedent. C.S. § 638.

12 Cases that cite this headnote

[2] **Guaranty** Defenses

In action on guaranty against executors of deceased guarantor of notes secured by trust deed, the executors could avail themselves of statutory defense that the trust deed was foreclosed and the land was purchased by a subsidiary of the mortgagee for the mortgagee and that the land had a market value in excess of the guaranteed indebtedness, and that, therefore, no deficiency judgment could be claimed, as against contention that the statute

relied upon was not available to a guarantor of the mortgage indebtedness. Code 1935, § 2593(d); C.S. §§ 3101-3103.

5 Cases that cite this headnote

[3] **Pleading** Insufficient Allegations or Denials

On a motion to strike, the test of relevancy of a pleading is the right of the pleader to present in the evidence upon the trial the facts to which the allegation relates.

13 Cases that cite this headnote

The plaintiff sued the defendants, executors of the will of Joseph P. Dunlop, deceased, upon a guaranty made by said Dunlop on certain notes of Charles S. Dunlop, secured by a trust deed.

The plaintiff filed its complaint, alleging in substance that Charles S. Dunlop made the notes to bearer and executed a deed of trust securing the same to P. B. Watt and W. B. Jerman, Trustees; and that after the execution of the notes and deed of trust, and before delivery or negotiation of said notes, or the delivery and recording of the deed of trust, Joseph P. Dunlop, defendants' testator, for value received, and as a condition precedent, endorsed and signed upon the promissory notes the following guaranty:

"The undersigned hereby guarantees the prompt payment of the within obligation, both principal and interest, as and when same becomes due according to its terms, and agrees not to claim any right to be subrogated to the rights of the holder thereof until after the payment in full of all obligations described in the within mentioned deed of trust. The undersigned further agrees to remain bound notwithstanding any extension of time which may be granted to the maker of the within obligation, hereby waiving all claim to any homestead exemption as to this obligation. Witness the following signature and seal on the day and year of the within mentioned obligation.

Jos. P. Dunlop (Seal)"

It was further alleged that the notes so guaranteed were negotiated for full value, and before maturity and default, to the plaintiff, and that the deed of trust was delivered and recorded. That upon default in the payment of the notes, and after notice to both maker and guarantor, the deed of trust was duly foreclosed and the net proceeds from the foreclosure sale credited on the amount then due on the notes, leaving a balance of $3,975.14 still due. That Dunlop died testate, leaving the defendants as executors of his will; and when plaintiff filed proof of claim for the amount alleged to be due, with interest, the defendants denied the claim. That by reason of these facts the

estate of Dunlop is indebted to the plaintiff in the sum aforesaid, with interest thereon, recovery of which plaintiff demanded.

The defendants, in their further answer, set up as a defense against plaintiff's claim that the plaintiff had caused the property to be bought in at the foreclosure sale by the Investors Service Corporation for ***646** plaintiff's benefit; that the Investors Service Corporation was a subsidiary of the plaintiff, which held all or a substantial part of the capital of said subsidiary; that plaintiff was the owner and in control of the corporation; and that an understanding existed between the Investors Service Corporation and the plaintiff at the time of the foreclosure that the Investors Service Corporation would accept and hold the title to the lands so foreclosed, and would hold and dispose of the title thereto at the direction and for the use and benefit of the plaintiff.

The defendants further alleged that the plaintiff was really the purchaser of the foreclosed land, and that the same was indirectly conveyed to the plaintiff by a conveyance thereof to the Investors Service Corporation by deed dated September 1, 1937. That the Investors Service Corporation paid no consideration for the land described in the deed of trust, or that if it did, the consideration was provided by the plaintiff. That at the time of the sale of the land, and improvements thereon, it was reasonably and fairly worth the amount of the debt secured by said deed of trust and that its market value was in excess of such indebtedness; and that under the law the debt of the plaintiff was fully satisfied and paid, and the estate of Joseph Dunlop was thereby fully released and discharged.

The plaintiff moved to strike out this further defense, on the ground that the statutory defense provided in Chapter 275 of the Public Laws of 1933 (Section 2593 (d), Michie's 1935 Code), is available only to defendants in a suit “against the mortgagor, trustor or other maker of any such obligation whose property has been so purchased [at foreclosure]”, and that such special defense is unavailable to a guarantor of the debt.

The statute referred to provides substantially that where a foreclosure of property has been made by a mortgagee, trustee, or other person authorized to make the same, at which the mortgagee, payee, or other holder of the obligation thereby secured becomes the purchaser and takes title, either directly or indirectly, and thereafter sues for and undertakes to recover a deficiency judgment “against the mortgagor, trustor or other maker of any such obligation whose property has been so purchased, it shall be competent and lawful for the defendant against whom such deficiency judgment is sought to allege and show as matter of defense and off-set * * * that the property sold was fairly worth the amount of the debt secured by it at the time and place of sale * * * and, upon such showing, to defeat or off-set any deficiency judgment against him, either in whole or in part”.

The trial judge refused to strike out the further answer and defense, and plaintiff excepted and appealed.

Attorneys and Law Firms

DuBose & Orr, of Asheville, for appellant.

Parker, Bernard & Parker, of Asheville, for appellees.

Opinion

SEAWELL, Justice.

[1] On a motion to strike out, the test of relevancy of a pleading is the right of the pleader to present the facts to which the allegation relates in the evidence upon the trial. Pemberton v. Greensboro, 203 N.C. 514, 515, 166 S.E. 396; Patterson v. Southern Railway Co., 214 N.C. 38, 43, 198 S.E. 364. If, then, the defense provided in Chapter 275, Public Laws 1933, is available to the defendants in this case, they are entitled to introduce evidence of the facts constituting such defense on the trial.

[2] At this juncture of the case we are not able to agree with the plaintiff that the suggested defense is not available to defendants as executors of the guarantor of the notes upon which this suit is brought.

It might be contended, with reason, that a proper construction of the statute should regard the act of a mortgagee, or trustee, or holder of the notes secured by the mortgage, in acquiring the mortgaged premises at a foreclosure sale had at his instigation and for his benefit, as an act going to the discharge of the instrument and giving to the guarantor the benefit of this defense under the Negotiable Instruments Law, C.S. §§ 3101-3103. It would not be an unreasonable interpretation of the statute to hold that it proceeds upon the equitable assumption that the debtor has received payment in full when, by his own choice, he takes the land, and that the purpose of the law is, under such circumstances, to discharge the debt.

It is not, of course, for us to say whether the defendants can make good the allegations of their further defense: We only say that at this stage of the case we do not deny their right to make it.

***647** [3] We are not sure of plaintiff's right to appeal on this matter under C.S. § 638, since the same question could have been raised on objections to the evidence and, if necessary, reviewed on appeal from the final judgment, and it does not now appear that any substantial right has been affected. Pemberton v. Greensboro, supra. But since the holding is adverse to plaintiff's contention, and the appeal has precedent, we prefer to decide the matter upon the merits.

The judgment denying the plaintiff's motion is affirmed.

Parallel Citations

198 S.E. 645