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ALABAMA COURT OF CIVIL APPEALS

SPECIAL TERM, 2008

2060962

Jimmie Marie Franklin

v.

Genevieve A. Etheridge

**Appeal from Jefferson Circuit Court
(CV-04-4449)**

MOORE, Judge.

Jimmie Marie Franklin, the mortgagee on a 1986 mortgage ("the mortgage") executed by Willie T. Etheridge, Sr., appeals from a judgment of the Jefferson Circuit Court in an action brought by Genevieve A. Etheridge ("Etheridge"), the current

2060962

mortgagor, to ascertain the remaining balance owed on the mortgage.

On June 22, 2004, Etheridge filed a complaint in the trial court stating that she had made several written demands to Franklin requesting that Franklin provide her with a statement of the remaining balance due on the mortgage. In her complaint, Etheridge requested that the trial court order Franklin to provide her with a statement of the remaining principal balance and interest due on the mortgage. On September 14, 2006, Etheridge filed an amendment to her complaint in which she alleged that the mortgage indebtedness had been satisfied on February 6, 2006. Franklin answered, and, on October 12, 2006, she filed a counterclaim in which she requested that the trial court enter a judgment declaring the balance of the remaining indebtedness on the mortgage. Franklin also requested in her counterclaim that the trial court order foreclosure of the property if Etheridge failed to promptly pay the remaining mortgage balance.

The trial court held a trial on November 9, 2006. At the trial, Franklin presented evidence tending to establish that Etheridge owed \$151,142.56 on the mortgage. Etheridge

2060962

presented evidence regarding the balance remaining on the mortgage, including the testimony of Van Gravlee, a certified public accountant. Gravlee testified that he had prepared four estimates of the balance remaining on the mortgage based on four sets of assumptions regarding the timing of payments made by Etheridge. Those estimates ranged from the first, which indicated that Etheridge had overpaid on the mortgage, to the fourth, which indicated that Etheridge still owed \$39,354 on the mortgage.

On February 12, 2007, the trial court entered an order purporting to dispose of the pending claims. On appeal, Franklin contends that the judgment did not sufficiently adjudicate the central claim in the litigation, namely, the amount owing on the mortgage. The trial court's February 12, 2007, order reads as follows:

"This case comes before the Court on [Etheridge's] complaint against [Franklin] asking the Court to determine the amount due on [the mortgage]

"Etheridge presents evidence that she had great difficulty in obtaining a payoff figure on the mortgage balance from Franklin. [Etheridge's] counsel made requests for such balance from Franklin without success. In the trial of this case, Etheridge presented evidence of a series of payments, some partial and nearly all late.

[Etheridge's] exhibit 10 dated September 11, 1997, purports to show that a statement was issued by [Franklin] indicating that Etheridge was 26 payments behind, (\$30,279.75), but that [she] would consider allowing that to be paid in four equal installments and that would then bring the payoff balance to \$76,341.73 as of October 5, 1997, which was in accordance with the amortization schedule, [Etheridge's] exhibit 8. [Etheridge] then paid \$21,000.00 but there is no evidence that the other \$9,279.75 was then paid. Etheridge presented to the Court a number of checks and money orders, some of which had no endorsements on them.

"The evidence presented by Franklin primarily consisted of a number of envelopes which were supposedly used by Etheridge to make her payments. This was Franklin's primary 'accounting' system. While such method may support the time and frequency of Etheridge's payments it did not account for the computation or allocation of interest, principal or late charges. [Etheridge] presented Van Gravlee, CPA as an expert witness who testified that he made computations based on the evidence and some assumptions as to certain credits for Etheridge. Mr. Gravlee presented calculations that showed that Etheridge owed at least \$32,433.99 on the mortgage. The Court finds such testimony credible.

"Counsel for both parties did an excellent job presenting their respective case. Each had to contend with inadequate records, death of a party and unsophisticated record keeping. In such case, the Court cannot compute damages with mathematical precision. ...

"Considering all of the submissions of the parties, the Court finds ... the subject mortgage balance to be not less than \$32,433.99, plus \$1976.28 ad valorem taxes paid by Franklin. [Franklin's] claim for attorney fees are found to be valid, and if the parties cannot agree on such

2060962

amount, either may apply for a hearing to prove such fees. Costs are taxed to [Franklin]."

(Emphasis added.)

Franklin argues that the trial court's finding that the balance owing on the mortgage is "not less than \$32,433.99" does not adjudicate with finality the balance owed.

"Our supreme court has stated: 'An appeal ordinarily will lie only from a final judgment -- i.e., one that conclusively determines the issues before the court and ascertains and declares the rights of the parties involved.' Bean v. Craig, 557 So. 2d 1249, 1253 (Ala. 1990); see also BB & S Gen. Contractors, Inc. v. Thornton & Assocs., Inc., 979 So. 2d 121, 123 (Ala. Civ. App. 2007); Trousdale v. Tubbs, 929 So. 2d 1020, 1022 (Ala. Civ. App. 2005). This court has recognized:

"'The issue of whether a judgment is final is jurisdictional.' Hardy v. State ex rel. Chambers, 541 So. 2d 566, 567 (Ala. Civ. App. 1989). Matters of jurisdiction are of such importance that a court may consider them ex mero motu. Bacadam Outdoor Adver., Inc. v. Kennard, 721 So. 2d 226 (Ala. Civ. App. 1998) (citing Nunn v. Baker, 518 So. 2d 711 (Ala. 1987), and Wallace v. Tee Jays Mfg. Co., 689 So. 2d 210 (Ala. Civ. App. 1997)). When an appellate court determines that an order from which an appeal is taken is not final and will not support an appeal, that court must dismiss the appeal on its own motion. Hardy v. State ex rel. Chambers, supra.'

"Trousdale v. Tubbs, 929 So. 2d at 1022"

2060962

Owen v. Hopper, [Ms. 2070016, May 23, 2008] ___ So. 2d ___,
___ (Ala. Civ. App. 2008).

"A final judgment is a terminative decision by a court of competent jurisdiction which demonstrates there has been complete adjudication of all matters in controversy between the litigants within the cognizance of that court. That is, it must be conclusive and certain in itself. Gandy v. Hagler, 245 Ala. 167, 16 So. 2d 305 [(1944)]; Bell v. Otts, 101 Ala. 186, 12 So. 43 [(1893)]. All matters should be decided; damages should be assessed with specificity leaving the parties with nothing to determine on their own. A judgment for damages to be final must, therefore, be for a sum certain determinable without resort to extraneous facts."

Jewell v. Jackson & Whitsitt Cotton Co., 331 So. 2d 623, 625
(Ala. 1976).

"Where the amount of damages is an issue, as here, the recognized rule of law in Alabama is that no appeal will lie from a judgment which does not adjudicate that issue by ascertainment of the amount of those damages." Moody v. State ex rel. Payne, 351 So. 2d 547, 551 (Ala. 1977).

In the present case, it is not clear whether the trial court's February 12, 2007, judgment ascertains the amount owing on the mortgage. Although the order states that Etheridge owes "at least" \$32,433.99, that order does not make clear whether \$32,433.99 is the extent of the mortgage balance

2060962

owed by Etheridge to Franklin. Accordingly, we remand the case for the trial court to determine with certainty the outstanding balance of the indebtedness owed by Etheridge on the mortgage. Due return shall be made to this court within 21 days of the release of this opinion.

REMANDED WITH INSTRUCTIONS.

Thompson, P.J., and Pittman, Bryan, and Thomas, JJ.,
concur.