

**VIRGINIA:**

*In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Thursday the 10th day of December, 2020.*

Present: All the Justices.

Dwayne Ramon Smith, Appellant,

against Record No. 191559  
Circuit Court No. CL18-3893

Bank of America, N.A., et al., Appellees.

Upon an appeal from a judgment rendered by the Circuit Court of Chesterfield County.

Upon consideration of the record, briefs, and argument of counsel, the Court is of the opinion that there is error in the judgment of the circuit court, but that error is harmless.

In April 2012, Dwayne Ramon Smith (“Smith”) and Bank of America (“BANA”) entered into a Federal Housing Administration (“FHA”) mortgage loan involving real property in Chester, Virginia. The promissory note securing the loan (the “Note”) incorporated by reference FHA regulations administered by the Department of Housing and Urban Development (“HUD”). Section 6(B) of the Note states that, in the event the borrower defaults on payment, the lender “may, except as limited by regulations of the Secretary in the case of payment defaults, require immediate payment in full of the principal balance remaining due and all accrued interest.” This section further states that acceleration of the Note is not authorized “when not permitted by HUD regulations.” Additionally, the Note was secured by a deed of trust on the property which contained similar language regarding limitation on the acceleration of the Note.

In May 2014, Smith defaulted on the loan by failing to make the necessary payments under the terms of the Note and the deed of trust. On July 2, 2014, BANA sent Smith a letter informing him that it would be sending a representative to his house to meet with him and evaluate whether he could receive any loan assistance. The meeting with the representative did not occur. BANA continued to send additional correspondence to Smith, informing him that his property had been referred for foreclosure as well as offering him the possibility of avoiding foreclosure.

BANA subsequently appointed Equity Trustees, LLC (“Equity”) as substitute trustee on the deed of trust. On December 3, 2018, Equity conducted a public foreclosure sale of the property. BANA made the high bid and title was conveyed to it.

On December 21, 2018, Smith filed a complaint alleging breach of contract against BANA and breach of fiduciary duties against Equity. Specifically, Smith alleged that BANA failed to comply with 24 CFR § 203.604(d), which requires a lender to have a face-to-face meeting with the borrower or make a reasonable effort to arrange such a meeting, before the borrower falls more than three months into arrears. With regard to Equity, Smith claimed that it breached its fiduciary duties by conducting the foreclosure even though BANA had failed to conduct a face-to-face meeting as required by FHA regulations.

BANA and Equity demurred and filed pleas in bar. Additionally, BANA filed a motion craving oyer. In support of its plea in bar, BANA submitted an affidavit of a custodian of its business records indicating that National Creditors Connection, Inc. (“NCCI”) sent an agent to Smith’s home on July 5, 2014. In his brief in response to the pleas in bar, Smith stated that “[a]s regards the claim in the plea in bar that the home visit requirement was met, Smith is prepared to testify to the contrary.”

On June 13, 2019, the trial court heard oral argument on the demurrers and the motion craving oyer. When the trial court offered BANA the opportunity to make an argument with regard to the pleas in bar, BANA noted that Smith wanted to put on a witness and the time allotted for the hearing was running out. BANA subsequently stated:

We’re fine continuing the plea [in] bar if it works for Your Honor’s schedule, or we can let a ruling be had on the oyer and demurrer. And, then if it’s sustained, we can move on from there; if not, we can move on to plea [in] bar. It’s up to Your Honor.

When the trial court indicated that it would hear the argument and rely on the parties’ briefs on the matter, Smith argued that a plea in bar is an evidentiary matter and he had a witness that was “going to take some time.” BANA then clarified that it was offering to limit the hearing to just the motion craving oyer and the demurrers, and, depending on how the trial court ruled, a hearing on the pleas in bar could be rescheduled for a later date. When the trial court specifically asked if the parties wanted to wait to argue the pleas in bar, BANA confirmed that that was its request. In response, the trial court stated:

All right. Then we'll just take the plea [in] bar completely under advisement. I'll take the motion to crave oyer and the demurrer, with respect to the demurrer, today, under advisement. And I will respond to you within a week on the motion to crave oyer and the two demurrers. And then we'll set the plea [in] bar or not depending on how the Court rules.

On July 3, 2019, the trial court issued a letter opinion sustaining the pleas in bar and dismissed Smith's complaint with prejudice. Specifically, the trial court found that

BANA, through NCCI, paid a personal visit to [Smith's] residence to avoid foreclosure and have a face-to-face meeting. Smith was not available. The [c]ourt finds these efforts constitute reasonable effort on the part of BANA to arrange a face-to-face meeting before three full monthly installments due on the mortgage were unpaid. As such, BANA complied with 24 CFR § 203.604(b) and was authorized to proceed with the foreclosure.

In light of its ruling on the pleas in bar, the trial court determined that it "need not rule on BANA's demurrer, Equity's demurrer, or BANA's motion craving oyer."

On July 18, 2019, Smith moved for reconsideration, noting that he had not been given the opportunity to present evidence on the pleas in bar. On August 23, 2019, the trial court entered an order granting the pleas in bar "[f]or the reasons stated in the Letter Opinion issued on the matter on July 3, 2019, which is incorporated herein by reference." Smith objected on the grounds that he was denied the opportunity to present evidence in response to the pleas in bar.

On appeal, Smith argues that the trial court erred in granting the plea in bar without giving him the opportunity to present evidence to counter the evidence presented by BANA and Equity Trustees. Thus, the issue before the Court is whether the trial court erred in not affording Smith the opportunity to present his evidence. As this Court has repeatedly stated, a "trial court's exercise of its discretion in determining whether to admit or exclude evidence will not be overturned on appeal absent evidence that the trial court abused that discretion." *May v. Caruso*, 264 Va. 358, 362, 568 S.E.2d 690 (2002).

"An abuse of discretion . . . can occur in three principal ways: when a relevant factor that should have been given significant weight is not considered; when an irrelevant or improper factor is considered and given significant weight; and when all proper factors, and no improper ones, are considered, but the court, in weighing those factors, commits a clear error of judgment."

*Landrum v. Chippenham & Johnston-Willis Hosps., Inc.*, 282 Va. 346, 352 (2011) (quoting *Kern v. TXO Production Corp.*, 738 F.2d 968, 970 (8th Cir.1984)).

Here, the record clearly establishes that Smith explicitly requested the opportunity to present evidence and the trial court indicated that it would give him that opportunity if it overruled the demurrers and the motion craving over. By subsequently ruling on the pleas in bar without affording him the opportunity to present evidence, the trial court implicitly denied him the opportunity that he was entitled to under this Court’s jurisprudence. See *Hawthorne v. VanMarter*, 279 Va. 566, 577 (2010) (“The issue raised by a plea in bar may be submitted to the circuit court for decision based on a discrete body of facts identified by the parties through their pleadings, or developed through the presentation of evidence supporting or opposing the plea”) (emphasis added). Under the facts of this case, such a denial represents a clear error of judgment by the trial court. Accordingly, the trial court’s decision to grant the pleas in bar without giving Smith an opportunity to present any evidence was an abuse of discretion.

That said, the trial court’s error is ultimately harmless. This Court has recognized that, “where a trial court’s decision is correct, but its reasoning is incorrect, and the record supports the correct reason,” the judgment will be upheld under the “right result for the wrong reason doctrine.” *Haynes v. Haggerty*, 291 Va. 301, 305 (2016); see also *Spinner v. Commonwealth*, 297 Va. 384, 391 (2019) (referring to the doctrine as “the right result for a different reason”). Here, the record establishes that, in April 2016, BANA offered Smith a Trial Period Plan Agreement (the “TPPA”). Under the TPPA, Smith was required to make three monthly payments on time. If he did so, BANA agreed to offer him a permanent loan modification that would bring his loan current and avoid foreclosure. Smith complied with the TPPA and made all the required payments.\* He was then offered a permanent loan modification, but he failed to sign and return the required loan modification documents to BANA within the specified deadline. As a result, he was deemed ineligible for a loan modification.

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\* In its brief, BANA incorrectly claimed that “Smith failed to make the required payments under the [TPPA], which rendered him ineligible for a permanent loan modification.” However, a review of the payment history for Smith’s account demonstrates that he made additional payments for \$1,609.69 in the months of May, June and July, as required under the TPPA.

The Court notes that the TPPA served the same essential purpose as the face-to-face meeting. “[T]he purpose of the face-to-face meeting is to reduce the incidence of foreclosure by providing an environment in which the mortgagee employee can often determine the cause of the default, obtain financial information, establish a repayment schedule, and prevent foreclosure by influencing the payment habits of mortgagors.” (Internal quotation marks omitted.) Similarly, the TPPA required that Smith provide BANA with information regarding why he was in default as well as “all financial information requested” by BANA. Additionally, the TPPA was clearly intended to prevent foreclosure, as the result was a permanent loan modification which included a new payment schedule. Thus, Smith’s neglect or refusal to accept the permanent loan modification severed the causal connection between BANA’s alleged failure to make a reasonable attempt to conduct a face-to-face meeting and the damages Smith contends he suffered.

Moreover, the right result for a different reason doctrine also applies to Smith’s breach of fiduciary duty claim against Equity. This Court has recognized that a trustee “is the agent of both debtor and creditor” and “[i]t is incumbent upon him to act toward each with perfect fairness and impartiality.” *Powell v. Adams*, 179 Va. 170, 174 (1942). The requirement that a trustee act impartially has been interpreted to mean that “a trustee under a deed of trust must balance the conflicting positions of the creditor and debtor such that a benefit to one cannot come at a disproportionate expense of the other.” *Crosby v. ALG Tr., LLC*, 296 Va. 561, 569 (2018). Here, Smith takes the position that Equity breached its fiduciary duty and acted with partiality towards BANA when it conducted the foreclosure. The record establishes that, at the time it conducted the foreclosure, Equity was presented with evidence that Smith was extremely delinquent in his mortgage payments and that BANA had made a reasonable attempt to conduct a face-to-face meeting. There is nothing in the record that would give Equity reason to question the validity of the evidence BANA presented to it. Smith, however, insists that Equity should have inquired further into the matter, even in the absence of any allegations that BANA failed to make a reasonable attempt to conduct a face-to-face meeting. At its core, Smith’s claim is essentially that Equity should have favored Smith over BANA by disregarding BANA’s evidence. In the absence of any evidence to the contrary, Equity acted impartially by accepting evidence at face value and not conducting any further inquiry into whether a reasonable attempt

to conduct a face-to-face meeting had been made. Accordingly, the Court finds that Equity did not violate its fiduciary duty.

For the foregoing reasons, the judgment of the circuit court is affirmed.

This order shall be certified to the Circuit Court of Chesterfield County.

A Copy,

Teste:



Clerk