

May 19 1927
(DECIDED)

564

THE STATE OF ALABAMA - - - - JUDICIAL DEPARTMENT

THE SUPREME COURT OF ALABAMA

OCTOBER TERM, 1926-27/

1 Div. 432.

William Feerster

v.

Charlotte H. Swift,

Appeal from Baldwin Circuit Court,
in Equity.

GARDNER, J.

One I. B. Swift executed a mortgage on certain real estate in Baldwin County, Alabama, which was duly foreclosed on February 7, 1924, by the State Bank of Foley, assignee thereof, the said bank becoming the purchaser, and subsequently, on March 10, 1924, conveying its interest in said land to William Feerster. Complainant as the widow of said mortgagor, filed this bill on February 6, 1926, against said Feerster, seeking the exercise of the statutory right of redemption. - § 10140, Code of 1923. The appeal is by the respondent from a decree overruling his demurrer to the bill as amended.

2.

It is not alleged in the bill there was any tender made to respondent, nor is there a payment of any sum into court. - Francis v. White, 160 Ala. 523; Looy v. Hewler, 206 Ala. 679; Lewis v. McBride, 176 Ala. 134; Seals v. Rogers, 172 Ala. 681; Johnson v. Williams, 212 Ala. 319.

In paragraph four of the amended bill (which will appear in the report of the case) are found the allegations upon which complainant rests as an excuse for a failure to make such tender. It thus appears complainant places some reliance upon section 10144 of the Code of 1923, in that she avers written demand was made upon respondent for a statement in writing of the debt and lawful charges claimed, but this demand was made just one day previous to the filing of the bill, while the above cited statute gave respondent a period of ten days within which to comply therewith. True, complainant was forced to file the bill at that time to come within the statutory period of two years, but the above noted section was adopted primarily for the benefit of the redemptioner, and if he delays to make the demand as therein authorized for a statement until too late for the purchaser or his vendee to have the benefit of the ten day period allowed by the statute for a compliance, then he can claim no benefit thereunder. Any hardship resulting from a loss of the privileges therein bestowed is the result of his own lack of diligence.

But it is insisted the bill is sufficient without regard to the foregoing statute, in that the averments thereof suffice as an excuse for a failure to make the tender. We do not construe these allegations as disclosing an absolute refusal on respondent's part to give a statement, but only a postponement of the matter until he could see his attorney and ascertain his rights and obligations. While it is averred that complainant did not know the amount necessary for redemption, yet there is no allegation that by the exercise of due diligence she could not have ascertained the same. "If the debtor

3.

knows the exact amount which he must pay or tender, or if by the exercise of due diligence he can ascertain it without the aid of the court, then his bill for this purpose would be without equity. -
Francis v. White, 5482.

The authorities relied upon by counsel for appellee (among them Slaughter v. Webb, 205 Ala, 334) are to like effect. Respondent was the vendee of the purchaser at the foreclosure sale. His declination to furnish a statement until consultation with his attorney and complainant's ignorance of the sum necessary for redemption, would not suffice if by due diligence complainant could have ascertained the same. For aught appearing in the bill the amount may have been readily ascertainable by the exercise of due diligence. The tenth and eleventh assignments of demurrer sufficiently point out this defect in the bill, and should have been sustained.

For the error indicated, the decree will be reversed and the cause remanded.

Reversed and remanded.

Anderson, C.J., Sayre and Bouldin, JJ., concur.

THE STATE OF ALABAMA—JUDICIAL DEPARTMENT

THE SUPREME COURT OF ALABAMA

1 Div., No. 432

William Hoerster, Appellant,

vs.

Charlotte H. Swift, Appellee,

From Baldwin Circuit Court.

The State of Alabama,
City and County of Montgomery.

I, Robert F. Ligon, Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing pages, numbered from one to three inclusive, contain a full, true and correct copy of the opinion of said Supreme Court in the above stated cause, as the same appears and remains of record and on file in this office.

Witness, Robert F. Ligon, Clerk of the Supreme Court of Alabama, at the Capitol, this the

19 day of May, 1927

Robert F. Ligon,
Clerk of the Supreme Court of Alabama.

564

The Supreme Court of Alabama

October Term, 1926-7

1 Div., No. 432

William Goerster

Appellant,

vs.

Charlotte H. Swift

Appellee.

From Baldwin Circuit Court.
(In Equity)

COPY OF OPINION

BROWN PRINTING CO. MONTGOMERY.

Filed May 23/1927
J. W. Beaman
Register

Charlotte H. Swift,
Complainant.

vs

William Forester,
Respondent.

) IN THE CIRCUIT COURT OF BALDWIN COUNTY
ALABAMA.

) IN EQUITY.

Comes the Respondent, William Forester and files the following additional grounds of demurrers to the bill of complaint in this cause, numbered ten (10) and Eleven (11) and twelve (12) respectively.

10. Because Complainant fails to aver that he is ready, willing and able to pay the debt, interest and lawful charges.

11. Because said bill fails to allege that the Complainant could not have ascertained the amount of the lawful charges, without the aid of a Court of Equity.

12. Because said bill fails to show that Complainant by the exercise of due dilligence could not have ascertained the amount due to redeem said property.


SOLICITOR FOR RESPONDENT.

564
Forester
of
Sewell

2
Given Oct 13/926
The Museum
Regent

JOS. C. RICH

J. GAILLARD HAMILTON

RICH & HAMILTON
ATTORNEYS AND COUNSELLORS AT LAW
MOBILE, ALABAMA

August 6, 1927.

Mr. F. W. Herrmann,

Mobile, Ala.

Dear Sir:-

In the matter of Charlotte H. Swift vs. William Foerster, on the Equity Side of the Circuit Court of Baldwin County, Alabama, which was recently reversed in the Supreme Court on appeal by Mr. Foerster, I beg to advise that in view of the ruling of the Supreme Court I do not propose to attempt to proceed further in this matter and will not plead over. So far as the complainant is concerned this suit may be dismissed by the defendant upon the said express statement that he will not plead further.

You may show this letter to the Court or to the Clerk.

Yours very truly,

Rich & Hamilton
J. G. Hamilton
S. M. for Counselor

H/S

Charlotte Swift

OS

Mr Forster

Filed Aug 8/927

J. W. Wheeler
Proctor

Charlotte H. Swift,
Complainant.

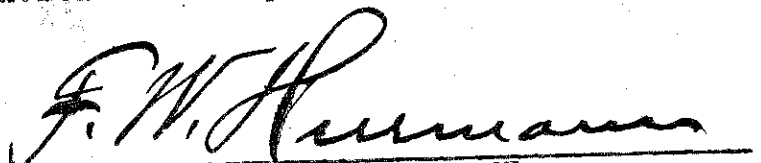
vs

William Færster,
Respondent.

IN THE CIRCUIT COURT OF BALDWIN COUNTY.
IN EQUITY.

Comes the Respondent William Foerster and demurs to the bill of complaint, and to each paragraph thereof, seperately and severally upon the following seperate and several grounds, to wit:-

1. Because there is no equity in the bill.
2. Because if the allegation of the bill of complaint are true, that the Complainant demanded a statement in writing of the debt secured by said mortgage and all lawful charges of Respondent on February 5th. 1926 and suit was filed on February 6th. 1926, no cause of action had accrued at said time in favor of Complainant.
3. Because Respondent had ten (10) days from February 5th. to furnish said statement and only one day had elapsed when Complainant filed his said bill of complaint in this cause.
4. Because said bill of complaint fails to aver a tender to Respondent of the amount due under said mortgage foreclosure, and lawful charges, before the filing of this bill of complaint.
5. Because it is not averred in said bill of complaint that the money due to redeem from said foreclosure sale has been deposited in this court with the filing of this bill of complaint.
6. Because Respondent was not in default according to law, in furnishing Complainant with a statement of the debt and lawful charges due at the time of the filing of this bill of complaint, Respondent being entitled to ten (10) days to furnish said statement after receiving the same, and only one day having elapsed from the time he received said statement before the filing of this bill of complaint.
7. Because the bill does not show that the Respondent ever refused to furnish Complainant a statement of the debt and lawful charges due.
8. Because Complainant could have ascertained the debt and lawful charges from the public records of Baldwin County, as there being no improvements on said property.
9. Because the fact and allegation averred in the bill of complaint are not sufficient to entitle the Complainant to the relief prayed for.


SOLICITOR FOR RESPONDENT.

³
Charlotte H. Burwell

vs
William Forster

Denver

Filed Mar 13th 1926

T. W. Whipple
Register

Re-filed after
Amendment of
Bill Sept 13/1926

T. W. Whipple
Register

RECORDED

Charlotte H. Swift,

Complainant.

vs

William Forester,

Respondent.

) IN THE CIRCUIT COURT OF BALDWIN COUNTY
ALABAMA.

) IN EQUITY.

Comes the Respondent, William Forester and files the following additional grounds of demurrers to the bill of complaint in this cause, numbered ten (10) and Eleven (11) and twelve (12) respectively.

10. Because Complainant fails to aver that he is ready, willing and able to pay the debt, interest and lawful charges.

11. Because said bill fails to allege that the Complainant could not have ascertained the amount of the lawful charges, without the aid of a Court of Equity.

12. Because said bill fails to show that Complainant by the exercise of due diligence could not have ascertained the amount due to redeem said property.


SOLICITOR FOR RESPONDENT.

Additional
Demands

Be filed after
Amendment of Bill
Sept 13th 1926
The Revenue
Bureau

RECEIVED

OFFICE OF
F. W. HERMANN
ATTORNEY AT LAW
202 POLLOCK BUILDING
HOME PHONE 1715, BELL PHONE 1267
P. O. BOX 1227
MOBILE, ALA.

October 16th. 1926.

F. W. Richerson
Clerk of the Circuit Court
Baldwin County,
Bay Minnette, Ala.

Dear Sir:

Will you please get up the transcript in the matter of Swift vs Forrester and mail same to me, let it contain the bill as filed, the demurrers to the bill, the sustaining of the demurrers with leave to amend to the Plaintiff of his bill, the amendment of the bill by Plaintiff, the re-filing of the demurrers to the amended bill and submission of the cause to the court, the final ruling of the court on same, you need not include the summons to the Defendant, as their is an appearance in the cause.

Yours truly,

F. W. Hermann

Bill
Demurrers
Sustaining Demurrers
Leave to Amend Bill

The State of Alabama, }
Baldwin County—Circuit Court.

To the Sheriff of the State of Alabama—Greeting:

Whereas, at a Term of the Circuit Court of Baldwin County, held on the

~~eight Monday after~~ ~~Monday~~ ~~the~~ ~~11th~~ ~~of~~ ~~Sept,~~ ~~1926,~~ ~~191~~

in a certain cause in said Court wherein Charlotte H. Swift,

Plaintiff, and William Foerster,

Overruling ~~the~~ demurrers of Deft, *me*
Defendant, a judgment was rendered against

said William Foerster,

to reverse which the said William Foerster,

has on this day applied for and obtained from this office an **APPEAL**, returnable to the
present, Term of our Supreme Court of the State of Alabama, to be held

at Montgomery, on the 4th day of October, 1926, next,

and the necessary bond having been given by the said William Foerster,

with Girard Dade,

Emma Schmohl, John Everett, sureties,

Now, You are Hereby Commanded, without delay, to cite the said

~~and~~ Charlotte H. Swift,

or Rich & Hamilton, attorney, to appear at the

present, Term of our said Supreme Court, to defend against the
said Appeal, if they, think proper.

WITNESS, T. W. Richerson, Clerk of the Circuit Court of said County,

this 11th day of Oct 1926, A. D. 191

Attest:

T. W. Richerson Clerk.

Original

CIRCUIT COURT
BALDWIN COUNTY, ALA.

Charlotte H. Swift,

VS. } CITATION IN APPEAL

William Foerster,

Issued 11th day of Oct, 19126.

BALDWIN TIMES PRINT. BAY MINETTE.

*Service returned
Citation accepted
Rich. Haulley
Oct 25/26
Att's Office*

The State of Alabama, }
Baldwin County.

CIRCUIT COURT OF BALDWIN COUNTY,
IN EQUITY.

To any Sheriff of the State of Alabama—GREETING :

WE COMMAND YOU, That you summon William Foerster,

of Baldwin County, to be and appear before the Judge of the Circuit Court of Baldwin County, exercising Chancery jurisdiction, within thirty days after the service of Summons, and there to answer, plead or demur, without oath, to a Bill of Complaint lately exhibited by

Charlotte H. Swift,

against said William Foerster,

and further to do and perform what said Judge shall order and direct in that behalf. And this the said Defendant shall in no wise omit, under penalty, etc. And we further command that you return this writ with your endorsement thereon, to our said Court immediately upon the execution thereof.

WITNESS, T. W. Richerson, Register of said Circuit Court, this 6th day of

February, 1926.

T. W. Richerson Register.

N. B.— Any party defendant is entitled to a copy of the bill upon application to the Register.

Original

RECORDED

THE STATE OF ALABAMA,
BALDWIN COUNTY.

SERVE ON.....
Circuit Court of Baldwin County
In Equity.

Received in office this February 6th
day of..... 192 6

No.

W.R. Stuart
Sheriff.

SUMMONS.

Charlotte H. Swift.

Executed this 17th day of
February 192 6

by leaving a copy of the within Summons with

vs.

William Foerster
Defendant.

William Foerster.

W.R. Stuart
Sheriff.

By..... Deputy Sheriff.

*Deft 9 of 10
miles from Fla*

Rich & Hamilton.

Solicitor for Complainant

Recorded in Vol. Page

12

Filed Aug. 30th 1874
D. M. Cannon
Register

RECORDED

STATE OF ALABAMA,
COUNTY OF BALDWIN.

Charlotte H. Swift,)
vs)
William Forester)

IN THE CIRCUIT COURT OF BALDWIN COUNTY,
IN EQUITY.

In this cause, the Defendant taking the appeal, we the undersigned, hereby acknowledge ourselves, security for the cost of appeal to the Supreme Court in this cause.

Witness our hands this October 8th 1926.

William Forester
Grant Dade
Emma Schmohl
John Everett

In my opinion the sureties on this bond are good sufficient and would be accepted by me.
~~Left Smith~~ ~~John Everett~~
Court, Mobile Ala.

Taken and approved
Oct 11th 1926
J. W. Williams
Register

Security for
Trust of Appeal

Filed Oct 11/1926
T W Pierson
Register

RECORDED