

No Right to a Short Sale After Default  
A Review of *Jorge A. Alfonso, et al. v. Linda V. Bailey, Executrix and  
Personal Representative of the Estate of Robert M. Bailey, et al.*  
By Kate Lachowsky

*Jorge A. Alfonso, et al. v. Linda V. Bailey, Executrix and Personal Representative of the Estate of Robert M. Bailey, et al.* is a case that ultimately holds that once a mortgagor defaults, absent an agreement between the mortgagor and mortgagee to delay foreclosure to permit a short sale, the mortgagee has the right to proceed with foreclosure. Further, knowledge of ongoing short sale discussions between the mortgagor and mortgagee does not prevent a third party purchaser from bidding and purchasing real property at a foreclosure sale.

In 2013, Mr. Jorge A. Alfonso and his wife, Madelyn Alfonso (“Plaintiffs”), owned real property in Sevier County, Tennessee and they experienced difficulty in making their mortgage payments owed to CitiMortgage, Inc. (“Citi”), resulting in default. In hopes of avoiding foreclosure on their property, Plaintiffs worked with Citi to pursue a short sale. According to Plaintiffs’ complaint, Plaintiffs had buyers for the short sale ready to close on the sale of their property and Citi “slow-dragged talks on a prospective short sale.” *Alfonso v. Bailey*, 2016 Tenn.App. LEXIS 569 (Tenn. Ct. App. 2016). In their complaint, Plaintiffs alleged Citi made excuses as to why the short sale could not be completed, including the need for an “internal document” which was allegedly never generated or acknowledged by Citi. *Id.* During these short sale discussions, the foreclosure action progressed and one of the Defendants was informed by Plaintiffs’ agent that a short sale was pending and that it was expected that the foreclosure sale would be postponed. On October 1, 2013, Plaintiffs’ property was sold to three investors (“Defendants”) who attended the foreclosure sale and were the highest bidders.

In February 2014, Plaintiffs sued Citi and Defendants in the Chancery Court for Sevier County (“Trial Court”) seeking declaratory relief and damages arising from the following ten claims: (1) violation of the Tennessee Consumer Protection Act; (2) fraudulent misrepresentation; (3) fraud; (4) unjust enrichment; (5) civil conspiracy; (6) inducement of breach of contract; (7) breach of contract; (8) tortious interference with contract rights; (9) intentional interference with contract rights; and (10) fraudulent concealment.

In April 2014, Citi filed a motion to dismiss and the Trial Court granted Citi’s motion. In its June 2014 order, the Trial Court found that Plaintiffs failed to state any of their ten claims and dismissed all ten claims with prejudice. *Id.* The Trial Court found that the Plaintiffs failed to identify any wrongful activity on the part of Citi and that even though Plaintiffs were engaged in short sale discussions with Citi, Citi had the right to pursue foreclosure under the terms of the security instrument executed by Plaintiffs. Ultimately, the Trial Court held that “Citi had no legal duty to complete a short sale, or to even discuss the same.” *Id.*

Plaintiffs filed a motion to alter or amend judgment as to the Trial Court’s June 2014 order and the Trial Court denied the motion by order entered September 18, 2014. Plaintiffs did not appeal this final order and Citi is not a party on appeal, rather, Plaintiffs pursued the case against the third party purchasers. Defendants filed a motion to dismiss and the Trial Court granted their motion, holding that Plaintiffs’ complaint “failed to state a claim against the Defendants upon which relief could be granted.” *Id.* Plaintiffs timely appealed this order to the Court of Appeals of Tennessee at Knoxville (“Court of Appeals”) and raised the following issue on appeal: whether the Trial Court erred in granting Defendants’ motion to dismiss.

In determining whether the Trial Court erred in granting Defendants' motion to dismiss, the Court of Appeals reviews the trial court's legal conclusions regarding the adequacy of the complaint *de novo* without a presumption of correctness. *Id.* (citing *Lind v. Beaman Dodge, Inc.*, 356 S.W.3d 889, 895 (Tenn. 2011); *Highwoods Props., Inc. v. City of Memphis*, 297 S.W.3d 695, 700 (Tenn. 2009)).

In their appeal, Plaintiffs argued that their complaint alleged facts sufficient to withstand a motion to dismiss for failure to state a claim upon which relief may be granted. *Id.* In the Court of Appeals' opinion, the Court explained that in Plaintiffs' brief on appeal, "Plaintiffs summarize their argument as follows: 'Plaintiffs, facing foreclosure, had entered into a contract for a short sale...[Defendants]...were made aware that Plaintiffs believed the foreclosure was postponed, and proceeded to purchase the property at foreclosure, inducing the contract for short sale to be breached resulting in a higher deficiency, damages, incurred by Plaintiffs.'" *Id.* Plaintiffs recited elements of claims but did not apply the facts to the case to support said claims. In response, Defendants correctly argued that they had no duty to refrain from purchasing the property at the foreclosure auction.

In the Trial Court's June 2014 order, the Trial Court explicitly held: "Absent such an agreement or contractual obligation, Citi had no legal duty to complete a short sale, or to even discuss the same." *Id.* This order was made final pursuant to Rule 54.02 of the Tennessee Rules of Civil Procedure and has not been appealed, thus, it represents the law of this case. *Id.* Because Plaintiffs did not have a written contract with Citi concerning a short sale, Citi had the right to proceed with foreclosure under the terms of the security instrument and Defendants were free to bid and purchase the subject property. Thus, the Court of Appeals affirmed the judgment of the Trial Court.

From a practical standpoint, requiring mortgagees to provide time for short sales may be overly burdensome, costly, and may result in lengthy, unnecessary delays to foreclose. Often times, mortgagees are agreeable in working with mortgagors with short sales, however, mortgagees often require proof of funds and a copy of a signed contract before they agree to postponement of a foreclosure sale. This case is not unusual as most standard security instruments are silent as to short sales, which makes Plaintiffs' claims of breach of contract, fraud, and intentional interference with contract rights to be far-reaching. Similarly, knowledge of short sale discussions or other types of loss mitigation negotiations between the mortgagor and mortgagee should not bar interested parties in bidding and purchasing real property and the Court of Appeals points out that Plaintiffs point to no law suggesting it should. *Id.*