IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
December 16, 2015 Session

# BAC HOME LOANS SERVICING v. INGE GOODSON

**Appeal from the Circuit Court for Hickman County**
**No. 10CV5052 Michael Binkley, Judge**

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**No. M2014-02566-COA-R3-CV – Filed July 6, 2016**

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Defendant in detainer action appeals the grant of summary judgment to Plaintiff. In ruling on the motion, the trial court declined to consider testimony from four depositions taken in related federal lawsuits which Defendant argued established disputed issues of material facts and precluded summary judgment. We have determined that three of the four depositions were not admissible and the fourth should have been admitted. Considering the record, we affirm the grant of summary judgment.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed**

RICHARD H. DINKINS, J., delivered the opinion of the court, in which FRANK G. CLEMENT, JR., P.J., M.S., and W. NEAL MCBRAYER, J., joined.

Henry F. Todd, Jr., Dickson, Tennessee, for the appellant, Inge Goodson.

Bret J. Chaness, Peachtree Corners, Georgia, for the appellee, BAC Home Loans Servicing, LP.

## OPINION

### I. FACTUAL AND PROCEDURAL HISTORY

In March 2008, Inge Goodson ("Ms. Goodson") received a $235,226.00 loan from Taylor, Bean, & Whitaker Mortgage Corp. ("TBW"); Ms. Goodson executed a promissory note, secured by a deed of trust on her property on McAdoo Branch Road in Lyles, Tennessee, located in Hickman County. The note called for monthly payments in the amount of $1,372.72, commencing on May 1, 2008. The deed of trust was executed on March 21, 2008 and recorded in the Register's office for Hickman County on April 2,

2008, and identified Ms. Goodson as the borrower, Ticor Title as Trustee,[1] Mortgage Electronic Registration Systems, Inc. as Beneficiary "solely as nominee[2] for Lender and Lender's successors and assigns," and TBW as Lender. By this document, Ms. Goodson "irrevocably grant[ed] and convey[ed] to Trustee, in trust, with power of sale" her property. The deed of trust contained a notice of the parties' rights in the event of default and a waiver of any right of redemption held by Ms. Goodson.

Ms. Goodson defaulted on her payments and foreclosure proceedings were initiated. A notice of the trustee's sale to occur on August 3, 2010, was sent by the substitute trustee, Shapiro & Kirsch, to Ms. Goodson via certified mail on July 6; the letter was returned with the notation "not deliverable as addressed" after three attempts to deliver were made. A notice of the Substitute Trustee's sale was published in the *Hickman County Times* on three consecutive weeks in July 2010.

The foreclosure sale was held on August 3, 2010, and BAC Home Loans Servicing LP ("BAC") purchased the home.[3] Shapiro & Kirsch sent a letter to Ms. Goodson on August 8 to vacate the property. She did not vacate, and a detainer action was initiated by "BAC Home Loans Servicing c/o Shapiro & Kirsch" against Ms. Goodson in Hickman County General Sessions Court on August 10; the warrant asserted that Ms. Goodson's "right to possession has now terminated because of . . . Foreclosure Sale 8-3-10." Default judgment was entered in favor of BAC on October 6. Ms. Goodson timely appealed to the circuit court.

On March 10, 2011, BAC moved for summary judgment and filed a statement of undisputed material facts, with supporting proof.[4] Ms. Goodson filed a response to

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[1] The record contains an instrument entitled "Substitution of Trustee" executed July 31, 2009, and recorded on August 6, 2009. In that document, TBW acknowledged it had appointed Shapiro & Kirsch as substitute trustee for Ticor Title "prior to the first notice of publication as required by T.C.A. § 35-5-101 and ratifies and confirms all actions taken by [Shapiro & Kirsch] subsequent to the date of substitution and prior to the recording of this substitution."

[2] A nominee is defined as "[a] party who holds bare legal title for the benefit of others or who receives and distributes funds for the benefit of others." NOMINEE, *Black's Law Dictionary* (10th ed. 2014).

[3] At some point during the pendency of this case, BAC merged into Bank of America, N.A.

[4] The documents on which BAC relied included: the affidavit of Denise Griffin, who signed the unrecorded Substitute Trustee's Deed as the "Managing Foreclosure Attorney" of Shapiro & Kirsch, LLP; the Substitution of Trustee document recorded August 6, 2009; the Deed of Trust (which was missing its fourth page); two identical letters to Ms. Goodson sent by Shapiro and Kirsch on July 6 containing the notice of the trustee's sale scheduled for August 3; the certified mail and registered mail envelopes which contained the notification letters, both bearing handwritten initials and stamp identifying that the items were undeliverable; an affidavit of publication from a representative of the *Hickman County Times*; the

BAC's statement of undisputed material facts, to which she attached a "Substitution of Trustee" document executed by a representative of BAC on July 27, 2010, and recorded on August 2. The court denied BAC's motion for summary judgment on May 3, 2011, holding that a genuine issue of material fact existed "as to the status of legal owner of the property in question." On May 12, Ms. Goodson moved to dismiss the action, and BAC filed a response; the court never ruled on the motion.[5]

BAC renewed its motion for summary judgment and filed a Renewed Statement of Undisputed Material Facts on June 9, 2014, relying on materials previously filed in support of its initial motion and, in addition, attaching the original deed of trust and a Substitute Trustee's Deed, which was dated March 7, 2014, and recorded on March 27, conveying the property to "Bank of America, N.A., successor by merger to BAC Home Loans Servicing, LP f/k/a Countrywide Home Loans Servicing, LP."

In response, Ms. Goodson filed a document styled "Defendant's Response to 'Plaintiff's Renewed Statement of Undisputed Material Facts' And Defendant's Counterstatement of Material Facts"; she did not attach her affidavit or any of the depositions cited in her response as exhibits. Three days later, she filed "Defendant's Corrected Response to 'Plaintiff's Renewed Statement of Undisputed Material Facts' And Defendant's Counterstatement of Material Facts." Attached to this filing were excerpts from the depositions of Thomas Weakland, the designated representative of Ginnie Mae; Amber King, the corporate designee of Bank of America; Sharon Fewell, a designated representative of Shapiro & Kirsch; and Bonnie Culp, also a designated representative of Shapiro & Kirsch. These depositions were taken in two lawsuits Ms. Goodson had filed in United States District Court against Shapiro & Kirsch, LLP and Bank of America, N.A.[6]

The court held a hearing on the motion on October 28 and entered an order on December 2, granting BAC summary judgment. The court found the following facts

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notice of Substitute Trustee's Sale as published in the *Hickman County Times*; Substitute Trustee's Deed, executed by Denise Griffin on behalf of Shapiro & Kirsch and notarized on August 3, 2010 but not recorded; and a letter from Shapiro & Kirsch to Ms. Goodson dated August 8, 2010, that notified her that the property had been sold at a foreclosure sale and she would need to vacate the premises immediately.

[5] No issue is raised in this appeal with respect to the motion to dismiss.

[6] According to Ms. Goodson's brief on appeal, the suit against Shapiro & Kirsch alleged violations of the Fair Debt Collection Practices Act. BAC's brief in this appeal states that this case was settled and voluntarily dismissed with prejudice; Ms. Goodson does not dispute this characterization of the resolution. In the suit against Bank of America, the district court granted summary judgment to Bank of America, which was affirmed on appeal. *Goodson v. Bank of Am., N.A.*, 600 Fed. Appx. 422, 423, 2015 WL 364045 (6th Cir. 2015).

undisputed:

> On or about March 21, 2008, Defendant obtained a loan from Taylor, Bean & Whitaker Mortgage Corp. To secure the loan, Defendant executed a Deed of Trust ("Deed of Trust") conveying the real property at 6914 McAdoo Branch Road, Hickman County, Tennessee ("Property"), to Ticor Title, as Trustee, for Mortgage Electronic Registration Systems, Inc., as nominee for Taylor, Bean & Whitaker Mortgage Corp. See Pl. Ex. A. The Deed of Trust is recorded in Book 22, Pages 7904-7912, of the Hickman County Register's Office. In the Deed of Trust, Defendant agreed in the event the Property was foreclosed upon, she or any person holding possession of the Property would immediately surrender possession to the purchaser at the sale or otherwise become a tenant at will of the purchaser and pay reasonable rent for the Property after the sale. Additionally, Defendant maintained no right of redemption under the Deed of Trust. In 2009, Shapiro & Kirsch, LLP was appointed as Substitute Trustee by an instrument as of record in Book 29, Page 7971, Hickman County Register's Office. On August 3, 2010, Shapiro & Kirsch, LLP conducted a non-judicial foreclosure sale of the Property, and a Substitute Trustee's Deed evincing the foreclosure sale to Plaintiff was executed and recorded in Book 31, Page 9150, Register's Office for Hickman County, Tennessee on March 7, 2014. See Pl. Ex. B.

The court held that the deposition testimony from Ms. Goodson's federal lawsuits was not admissible in this case and ultimately concluded that:

> The Plaintiff has offered prima facie evidence of ownership of the Property by virtue of its purchase of the Property at the foreclosure sale, as evinced in the recorded Substitute Trustee's Deed. Pl. Ex. B. Defendant has rebutted this evidence with no competent evidence of her own. By virtue of the fact the Deed of Trust provides Defendant shall vacate the Property immediately after the foreclosure sale, see Pl. Ex. A, and by virtue of the lack of evidence offered by Defendant to rebut Plaintiffs allegation that a legal foreclosure sale indeed took place, Plaintiff must be declared the legal owner of the Property.

Ms. Goodson appeals, raising four issues, three of which concern the trial court's decision to not consider the deposition testimony from the federal lawsuits against Shapiro & Kirsch and Bank of America; the fourth asks us to review the grant of summary judgment.

## II. STANDARD OF REVIEW

Tenn. R. Civ. P. 56.01 provides:

> A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of thirty (30) days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof.

To assist the Court in its determination of whether any material facts are in dispute, the moving party must file "a separate concise statement of the material facts as to which the moving party contends there is no genuine issue for trial . . . Each fact shall be supported by a specific citation to the record." Tenn. R. Civ. P. 56.03. A party is entitled to summary judgment only if the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits . . . show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Tenn. R. Civ. P. 56.04. The existence of disputed facts warrants denial of a motion for summary judgment only when those facts are material. *See* Tenn. R. Civ. P. 56.04. "To be material, a fact must be germane to the claim or defense on which the summary judgment is predicated." *Green v. Green*, 293 S.W.3d 493, 514 (Tenn. 2009) (citing *Eskin v. Bartee*, 262 S.W.3d at 732; *Luther v. Compton*, 5 S.W.3d 635, 639 (Tenn.1999)).

We review the trial court's ruling on a motion for summary judgment *de novo* with no presumption of correctness, as the resolution of the motion is a matter of law. *Rye v. Women's Care Ctr. of Memphis, MPLLC*, 477 S.W.3d 235, 250 (Tenn. 2015), *cert. denied*, No. 15-1168, 2016 WL 1077577 (U.S. May 23, 2016). We view the evidence in favor of the non-moving party by resolving all reasonable inferences in its favor and discarding all countervailing evidence. *Stovall v. Clarke*, 113 S.W.3d 715, 721 (Tenn. 2003); *Godfrey v. Ruiz*, 90 S.W.3d 692, 695 (Tenn. 2002).

## III. ANALYSIS

In order to prevail on its motion for summary judgment, BAC was required to set forth undisputed facts that established the elements of an unlawful detainer action and that entitled it to judgment as a matter of law. Thus, BAC was required to set forth undisputed facts that established: (1) constructive possession of the property and (2) subsequent loss of possession by the defendant's act of unlawful detainer. *See Foster v. Hill*, 510 S.W.2d 520, 522 (Tenn. Ct. App. 1973).

We have reviewed the proof on which BAC's Statement of Material Facts relied. For the following reasons, we conclude BAC established both elements.

The recitations in the 2014 substitute trustee's deed include: Shapiro & Kirsch were requested by the holder to, upon proper advertisement and notice, sell the property pursuant to the terms of the Deed of Trust; that proper notice and advertisement of the foreclosure sale were made; that the property was sold for the sum of $260,643.41, "that being the highest and best bid offered," to Bank of America, N.A. successor by merger to BAC Home Loans Servicing, LP f/k/a Countrywide Home Loans Servicing, LP; that the purchaser paid the Substitute Trustee the expenses of the sale, the balance of which was applied to Ms. Goodson's indebtedness; that as a result of this payment, Shapiro & Kirsch conveyed the property to the purchaser in fee simple and warranted the title to the property "against the lawful claims of all persons claiming by, through or under it, as such Substitute Trustee." In accordance with Tenn. Code Ann. § 24-5-101,[7] these provisions provide *prima facie* evidence that BAC purchased the home at the non-judicial foreclosure sale, was conveyed the property, and was therefore entitled to possession of the property.

The deed of trust includes a provision requiring that, in the event the property was foreclosed upon, Ms. Goodson immediately surrender possession to the purchaser or otherwise become a tenant at will of the purchaser and pay reasonable rent for the property after the sale. This provision, coupled with the materials previously filed in support of BAC's motion for summary judgment and upon which BAC relied in the renewed motion, established element (2), Ms. Goodson's continuing possession in violation of the deed of trust.[8] Thus, BAC put forth evidence that established the elements of an unlawful detainer action, and the burden shifted to Ms. Goodson to demonstrate that a genuine issue of material fact existed, such as to preclude summary judgment. *See* Tenn. R. Civ. P. 56.03.

In replying to BAC's motion, Ms. Goodson filed a response to the statement of material facts as well as a Counterstatement of Material Facts in which she cited facts

[7] Tenn. Code Ann. § 24-5-101 provides:

> All instruments of conveyance executed in official capacity by any public officer of this state or by any person occupying a position of trust or acting in a fiduciary relation shall be admitted, held, and construed by the courts as prima facie evidence of the facts in such instruments recited, insofar as such facts relate to the execution of the power of such office or trust. All such instruments now of record shall be admitted, held, and construed in accordance with this section.

[8] At no point in the record before us does Ms. Goodson challenge the terms of the deed of trust requiring her to vacate upon foreclosure or dispute that she remained in the home following the foreclosure.

contained in, *inter alia*, the four depositions as well as her affidavit to establish a genuine issue of material fact. We first consider whether the court erred in its ruling as to the admissibility of these depositions.[9]

### A. Whether the Court Should Have Admitted the Depositions from the Federal Lawsuits

BAC objected to the admissibility of the depositions, and both parties submitted briefs on whether the depositions should be admitted.[10] The trial court concluded that they were not admissible, stating, in pertinent part:

> . . . Defendant has not sufficiently explained the claims upon which the other lawsuits were based and has not sufficiently explained how Shapiro & Kirsch, LLP can be a predecessor in interest to its former client, Plaintiff, in a lawsuit against the firm itself. Further, Defendant has not shown how the depositions can be competent evidence in light of Plaintiff's objection that they are hearsay evidence. The only information given to the Court about the claims asserted in the federal litigation is that they related to the alleged foreclosure of the Deed of Trust at issue in the present case. . . . Nevertheless, even if Shapiro & Kirsch, LLP was a predecessor in interest, any testimony so related cannot be admitted under Rule 804(b). Finally, although Defendant argues the depositions are otherwise admissible because they are exempt from the hearsay prohibition in the Tennessee Rules of Evidence, Defendant has not positively indicated the individual deposed in Inge Goodson v. Bank of America, N.A., Plaintiffs corporate designee, Amber King, is unavailable to testify at trial or otherwise offer

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[9] "Because only admissible evidence can be used to support or to oppose a summary judgment motion, a trial court's first order of business is to resolve all challenges to the admissibility of evidence." *Shipley v. Williams*, 350 S.W.3d 527, 566 (Tenn. 2011) (Koch, J., concurring in part and dissenting in part); *id.* at 557 (Holder, J., concurring). A trial court's ruling on the admissibility of evidence is within the sound discretion of the trial court, and issues regarding the admission of evidence are reviewed by this court under the abuse of discretion standard. *Dickey v. McCord*, 63 S.W.3d 714, 723 (Tenn. Ct. App. 2001).

[10] Ms. Goodson did not timely file the depositions or her affidavit with the court when she filed her response and counterstatement. BAC filed its responses to her statements, many of which included language similar to the following: "This fact is disputed and should not be considered by this Court because it cites to a deposition transcript from a federal case to which BANA was not a party . . . , and this deposition transcript is not on file in this case." The court continued the hearing and ordered the parties to file supplemental briefs on the issue of whether deposition transcripts and other discovery material from another case can be considered as evidence. After supplemental briefing was received, the court noted in a footnote in its opinion that it did not consider the untimely filing "to be dispositive of whether the depositions are admissible." We are of the same mindset.

evidence. . . .

Ms. Goodson asserts that the depositions were admissible pursuant to Tenn. R. Civ. P. 32.01(4), Fed. R. Evid. 804(b)(1), and Tenn. R. Evid. 803(1.2). Upon our review of the record, we have determined that the court correctly applied the Tennessee Rules of Evidence as to three of the depositions when it concluded that they were not admissible pursuant to Tenn. R. Evid. 804 or Tenn. R. Civ. P. 32.01.

Tenn. R. Civ. P. 56.04 permits the use of depositions to demonstrate whether a genuine issue of material fact exists in a summary judgment proceeding. See *Dial v. Harrington*, 138 S.W.3d 895, 899 (Tenn. Ct. App. 2003). "For facts to be considered at the summary judgment stage, they must be included in the record, Tenn. R. Civ. P. 56.03, and they must be admissible in evidence." *Green v. Green*, 293 S.W.3d 493, 513 (Tenn. 2009. The use of depositions in this context is governed by Tenn. R. Civ. P. 32.01, which is "primarily a rule of evidence." *Dial*, 138 S.W.3d at 898 (citing *Wilkes v. Fred's, Inc.,* No. W2001–02393–COA–R3–CV, 2002 WL 31305202, at *4 (Tenn. Ct. App. Aug. 20, 2002)). "[D]epositions filed in support or opposition to motions for summary judgment shall be treated as affidavits for that purpose and *insofar as they are admissible into evidence* shall be received by the court as evidence." *Roddy v. Hardison*, No. 01-A019011CH00394, 1991 WL 53427, at *2 (Tenn. Ct. App. Apr. 12, 1991) (emphasis added). Tenn. R. Civ. P. 32.01 reads:

> At the trial or *upon the hearing of a motion* or an interlocutory proceeding, any part or all of a deposition, *so far as admissible under the Tennessee Rules of Evidence applied as though the witness were then present and testifying*, may be used against any party who was present or represented at the taking of the deposition or who had reasonable notice thereof in accordance with any of the following provisions:
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> **(1)** Any deposition may be used by any party for the purpose of contradicting or impeaching the testimony of deponent as a witness.
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> **(2)** The deposition of a party or of anyone who at the time of taking the deposition was an officer, director, or managing agent, or a person designated under Rule 30.02(6) or 31.01 to testify on behalf of a public or private corporation, partnership or association, governmental agency or individual proprietorship *which is a party* may be used by an adverse party for any purpose.
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> **(3)** The deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds that the witness is "unavailable" as

> defined by Tennessee Rule of Evidence 804(a). But depositions of experts taken pursuant to the provisions of Rule 26.02(4) may not be used at trial except to impeach in accordance with the provisions of Rule 32.01(1).
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> **(4)** If only part of a deposition is offered in evidence by a party, an adverse party may require the introduction at that time of any other part which ought in fairness to be considered contemporaneously with it.
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> Substitution of parties pursuant to Rule 25 does not affect the right to use depositions previously taken. When an action in any court of Tennessee, of the United States, or of any other state has been dismissed and an action involving the same subject matter is afterwards brought, all depositions lawfully taken in the former action may be used in the latter against any party who had both an opportunity and similar motive to develop the testimony at the prior deposition by direct, cross, or redirect examination. A deposition previously taken may also be used as permitted by the Tennessee Rules of Evidence.

Tenn. R. Civ. P. 32.01 (emphases added).

Tenn. R. Civ. P. 32.01 (1) and (4) are inapplicable to this case.[11] Tenn. R. Civ. P. 32.01(2) allows depositions of corporate or governmental designees to be admitted, so long as the entity they speak on behalf of is a party to the suit. Shapiro and Kirsch is not a party to this suit, and therefore the depositions of Sharon Fewell and Bonnie Culp are not admissible pursuant to Rule 32.01(2). Similarly, the deposition of Thomas Weakland, corporate designee for Ginnie Mae, would not be admissible, inasmuch as Ginnie Mae is not a party to this suit.

Neither are the depositions admissible pursuant to Rule 32.01(3), which would allow them provided the witnesses were "unavailable" as defined by Tenn. R. Evid. 804(a).[12] In examining subsection (3), this Court has observed that "[a]t the summary

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[11] Though Ms Goodson attempted to rely on Rule 32.01(4), the portion of the rule to which she cites is not part of subsection (4) but a separate, final paragraph of the rule. That paragraph is inapplicable to the facts of this case. The parties have not argued, and the record does not reveal, that a substitution of parties occurred pursuant to Tenn. R. Civ. P. 25. Furthermore, the case at bar was filed first, and thus was not "afterwards brought." Finally, we have no proof before us that both suits "involve[ed] the same subject matter." While the underlying facts giving rise to all three lawsuits may be the same, we do not have before us any pleadings from the federal lawsuits indicating the precise nature of those claims.

[12] Tenn. R. Evid. 804 states, in pertinent part:

judgment stage, consideration of a . . . deposition presents no more unfairness than admission of an affidavit. In both instances, the sworn statement is reviewed by the trial court only to determine whether a disputed issue of material fact exists. . . . Rule 32 provides a hearsay exception for the use 'by any party for any purpose' of a deposition of a witness defined by the rule as unavailable." *Dial,* 138 S.W.3d at 900 (citing Tenn. R. Civ. P. 32.01(3)). Thus, the deposition may be used pursuant to this provision at the summary judgment stage if the deponent is unavailable; the burden was on Ms. Goodson, as proponent of the deposition, to show that the witnesses were unavailable. Ms. Goodson failed to file any affidavits or other proof that the witnesses were unavailable and, therefore, failed to make the showing required to admit these depositions under Tenn. R. Evid. 804. *Bilbrey v. Parks*, No. E2013-02808-COA-R3CV, 2014 WL 4803126, at *4 (Tenn. Ct. App. Sept. 29, 2014) ("[t]he burden of establishing unavailability is on the proponent of the evidence") (quoting *Wilkes v. Fred's, Inc.,* No. W2001–02393–COA–R3–CV, 2002 WL 31305202 at *5 (Tenn. Ct. App. Aug. 20, 2002); citing *State v. McCoy*, No. 01C01–9103–CR–00090, 1991 WL 242932 at *3 (Tenn. Crim. App. Nov. 21, 1991)).[13]

In order to be considered by the court, the depositions must be admissible in

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> **(a) Definition of Unavailability.** "Unavailability of a witness" includes situations in which the declarant:
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> (6) for depositions in civil actions only, is at a greater distance than 100 miles from the place of trial or hearing.
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> A declarant is not unavailable as a witness if exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of a statement for the purpose of preventing the witness from attending or testifying.

[13] Citing *State v. Causby*, 706 S.W.2d 628 (Tenn. 1986), Ms. Goodson asserts that Tennessee has adopted Fed. R. Evid. 804, which permits former testimony of an unavailable witness to be "offered against a party who had--or, in a civil case, whose predecessor in interest had--an opportunity and similar motive to develop it by direct, cross-, or redirect examination." Fed. R. Evid. 804(b)(1)(B). Her reliance on *Causby* is misplaced, as that case preceded the adoption of the Tennessee Rules of Evidence. Tenn. R. Evid. 804 contains language that is almost identical to the federal rule, except in one very important regard: the Tennessee rule of evidence requires the party against whom the unavailable witness's testimony is offered be the same as the party who had the same opportunity and motive to develop the testimony in the previous deposition. The advisory commission's comment to Tenn. R. Evid. 804(b)(1) states, "The rule makes admissible former testimony even though one of the present parties was not at the earlier hearing, but only if the former testimony is offered *against the party common to both hearings"* (emphasis added). In contrast, the federal rule permits such testimony to be admitted against a party if he or his predecessor in interest who had the same opportunity and motive to develop the testimony. Tenn. R. Evid. 804, which is the rule we must apply, is different than Fed. R. Evid. 804 and would not permit the testimony from the suit against Shapiro & Kirsch to be admitted. Thus, none of the depositions could be admitted pursuant to Tenn. R. Civ. P. 32.01(3) or Tenn. R. Evid. 804.

evidence. *See Roddy*, 1991 WL 53427, at *2; *Dial*, 138 S.W.3d at 899, 900. Tenn. R. Civ. P. 32.01(3) would have allowed for the depositions to be admitted if the witnesses were unavailable, a showing that Ms. Goodson did not make. Accordingly, the trial court did not abuse its discretion in not admitting the depositions of Thomas Weakland, Bonnie Culp, and Sharon Fewell.[14]

We have determined, however, that the deposition of Amber King, designee of Bank of America, successor by merger to BAC, was admissible in this proceeding under Tenn. R. Civ. P. 32.01(2) and will examine the portions of Ms. King's deposition which were cited by Ms. Goodson to determine if the testimony established a genuine issue of material fact such that summary judgment should not have been granted.

### B. Whether Summary Judgment was Properly Granted

We now address whether Ms. Goodson demonstrated the existence of a genuine issue of material fact as to BAC's title, and thereby, its constructive possession of the property. The documents upon which she relied, other than the inadmissible depositions as well as her affidavit, which is not present in the record before us, were: the Substitution of Trustee document executed on July 27, 2010, and recorded on August 2, 2010; the Substitute Trustee's Deed, executed March 7, 2014, and recorded on March 27, 2014; the deposition of Amber King; and the affidavit of Denise Griffin, an attorney at Shapiro & Kirsch. Upon our review, the materials do not establish a genuine issue of material fact as to BAC's constructive possession of the property obtained as a result of its purchase of the property at the foreclosure sale.

The July 27, 2010, substitution of trustee instrument established the appointment of Shapiro & Kirsch as substitute trustee.[15] The substitute trustee's deed attests that a

[14] Ms. Goodson attempted to introduce depositions taken in unrelated cases to satisfy her burden of establishing a genuine issue of material fact; in so doing, she had the additional burden, pursuant to Rule 32.01, of showing that the depositions were "admissible under the Tennessee Rules of Evidence." Pursuant to Tenn. R. Civ. P. 56.06, had Ms. Goodson used affidavits of these same witnesses instead, she would not have had to establish the witnesses' unavailability in order for the court to consider the testimony. We see no practical reason for this additional burden and discern no reason for the inconsistency but are bound to apply the applicable law and rules.

[15] Ms. Goodson argues that the substitution of trustee instrument is "false" because it "stat[es] that 'the owner and holder of said indebtedness has appointed the Substitute Trustee prior to the notice of first publication as required by T.C.A. § 35-5-101.'" Her contention does not preclude summary judgment because the instrument contains the language required by Tenn. Code Ann. § 35-5-114(b)(3) and reflects compliance with Tenn. Code Ann. § 35-5-101. Thus, the timing of the filing of the substitute trustee instrument is of no consequence, *see id.* § 35-4-114(b)(3)(B), as long as it was recorded prior to the deed evidencing sale, which it was in this case.

foreclosure sale was held upon proper advertisement and notice, at which the property was sold to BAC, and that the property was conveyed by the substitute trustee. The testimony of Ms. King is not evidence that establishes a disputed fact as to BAC's right to possess the property. Rather, it relates to events occurring months after the foreclosure sale and has nothing to do with BAC's title to the property.[16] The affidavit of Ms. Griffin attests that the property was sold to BAC for $260,643.41 and that a Substitute Trustee's Deed was executed and consideration exchanged on August 3, 2010.

The Substitute Trustee's Deed establishes that BAC was entitled to possession of the property, and the evidence on which Ms. Goodson relies does not establish a genuine issue of material fact as to BAC's right of possession. Ms. Goodson concedes that she has defaulted on her loan, had no right of redemption, and has not vacated the property. Accordingly, BAC was entitled to summary judgment and possession of the property, and we therefore affirm the judgment of the trial court.

## IV. CONCLUSION

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

RICHARD H. DINKINS, JUDGE

[16] Ms. Goodson argues that no consideration was paid for the property at the foreclosure sale and asserts that the deposition of Amber King "provides for a disputed material fact that the alleged foreclosure did not comply with section 18(b) of the original Deed of Trust . . . as there was not an application of cash nor credit to the sums secured." Ms. King testified that, though "the paperwork indicates that we purchased the property at sale," she did not know if money exchanged hands at the foreclosure sale; that nothing in BAC Home Loan Servicing LP's files indicated whether money exchanged hands at the foreclosure sale, and that she "didn't come across anything" when she searched Bank of America's records, "but that doesn't mean that it doesn't exist." This testimony is not sufficient to overcome the statutory presumption at Tenn. Code Ann. § 24-5-101 or to establish an issue of material fact as to BAC's constructive possession of the property.