REL: April 5, 2019

ALABAMA COURT OF CIVIL APPEALS

OCTOBER TERM, 2017-2018

2170639

Todd Ayers

v.

John Robert Mays

2170640

John Robert Mays

v.

Todd Ayers

Appeals from Randolph Circuit Court
(CV-14-900098)

2170639 and 2170640

MOORE, Judge.

In appeal number 2170639, Todd Ayers appeals from a judgment of the Randolph Circuit Court ("the trial court") regarding the foreclosure of a mortgage on certain property owned by John Robert Mays. In appeal number 2170640, Mays cross-appeals from that same judgment. In both appeals, we affirm the judgment in part and reverse the judgment in part.

Background

On January 5, 2005, Mays borrowed $225,000 from David Hewitt. Mays executed a promissory note ("the note") agreeing to repay Hewitt the principal amount of the note plus interest by January 5, 2007. Contemporaneously with the execution of the note, Mays executed a mortgage ("the mortgage") in favor of Hewitt on a 208-acre parcel of property Mays owned in Randolph County ("the property") as security for repayment of the note. In September 2014, Ayers sent Mays a letter notifying him that Ayers had acquired the note and mortgage through an assignment. In that letter, Ayers asserted that Mays had defaulted on the note and that, unless the default was cured, Ayers would exercise his rights under the mortgage to foreclose on the property. In October 2014, Ayers

foreclosed on the property and purchased the property for $365,000 at the foreclosure sale.

On October 24, 2014, Mays filed a multicount complaint against Ayers. In his complaint, Mays asserted that he had executed the note and mortgage for the benefit of JMays, LLC ("the LLC"), that he and several other members of the LLC had paid the debt evidenced by the note, and that the note had been discharged. Mays averred that Ayers had wrongfully foreclosed on the property because the note had been discharged and the mortgage satisfied. In his first count, Mays requested that the trial court quiet title to the property by declaring that Mays was the rightful owner. In his second count, Mays asserted that Ayers had breached a contract by foreclosing on the property, thereby causing damage to Mays. In his third count, Mays sought a judgment declaring that, in the event a valid assignment and foreclosure had occurred, no interest was payable on the note after January 5, 2007. In his fourth count, Mays asserted that, if the trial court determined that the foreclosure was valid, he was owed approximately $140,000 from the foreclosure sale.

Ayers filed a counterclaim, asserting that Mays had breached the terms of the note by failing to pay the principal and accruing interest. Mays filed a reply to the counterclaim denying that the note had not been paid. Mays subsequently amended his complaint to add a request for a judgment declaring that the statute of limitations established in Ala. Code 1975, § 7-3-118, barred Ayers from collecting on the note through his counterclaim or through foreclosure proceedings and ordering that the proceeds of the foreclosure sale, excepting the costs of the sale, be paid over to Mays. Ayers filed an answer denying the allegations in the amended complaint and asserting various affirmative defenses.

After denying the parties' respective motions for a summary judgment, the trial court conducted a bench trial in September 2016. On June 30, 2017, the trial court entered a final judgment. Upon consideration of a postjudgment motion filed by Ayers, the trial court vacated the final judgment, and, on February 3, 2018, the trial court entered an amended final judgment. In that judgment, the trial court determined that the applicable statute of limitations barred Ayers's counterclaim seeking to enforce and to collect on the note but

that Ayers had validly foreclosed on the property pursuant to the terms of the mortgage. The trial court determined that the note had not accrued interest after January 5, 2007, and that the mortgage secured an indebtedness of only $208,000. The trial court found that $208,000 of the proceeds of the foreclosure sale was to be paid to Ayers and that Mays should receive the remainder of the foreclosure proceeds, less the costs of the sale, amounting to $155,708.

Ayers filed a notice of appeal to the Alabama Supreme Court on March 14, 2018; Mays filed a cross-appeal on March 16, 2018. The Alabama Supreme Court transferred the appeal and cross-appeal to this court, pursuant to § 12-2-7(6), Ala. Code 1975. This court heard oral arguments regarding the appeal and the cross-appeal on January 31, 2019.

Facts

Mays testified that the LLC had been formed for the purposes of owning and operating a mica mine. At all material times, Mays, Charles Merchant, Tom Powers, Crandall Kennedy, Rex Addison, and Margaret Addison were members of the LLC. (Merchant, Powers, Kennedy, and the Addisons are sometimes hereinafter referred to collectively as "the LLC members").

On January 5, 2005, Mays borrowed $225,000 from Hewitt, a local businessman. Mays testified that he incurred the debt on behalf of the LLC because, he said, the LLC was negotiating to sell the LLC's mining assets to a third party and needed funds to purchase necessary grinding equipment to keep the business going in the meantime. Mays conceded, however, that he did not have anything in writing to indicate that the LLC members had agreed that the LLC would assume the loan or that the loan would be paid by the LLC or the LLC members. The LLC members who testified at trial denied that Mays had incurred a corporate debt. Mays testified that he had used the proceeds of the loan to satisfy some past debts, including $40,000 to repay an advance that he had taken and $49,000 to pay on an outstanding loan to Colonial Bank, and that he had paid the remainder into the LLC, as evidenced by its internal financial records.

To obtain the loan, Mays executed the note and the mortgage in favor of Hewitt. According to the terms of the note, Mays promised to pay Hewitt, on or before January 5, 2006, one-half of the principal plus all accrued interest on the full loan amount and to pay the remaining balance by

January 5, 2007. The terms of the note called for 10% interest during the first year and 12% during the second year, should the prime interest rate reach or exceed 7% during the note term, which it did. Mays further agreed that, in the event any installment remained unpaid for as much as 5 days after its due date, a late penalty of 10% of the amount of the installment payment due would be payable.

Mays testified that, when interest in the amount of $22,500 and one-half of the principal amount of the note became due on January 5, 2006, he did not have sufficient funds to make the payments. Merchant, a managing member of the LLC, testified that the LLC loaned Mays the money to pay the first year's interest in May 2006. Mays testified that he did not pay any part of the principal at that time. Mays testified further that, as the maturity date of the note was approaching, he informed Merchant that the money had been borrowed on behalf of the LLC and requested that the LLC "make my obligation good." Mays indicated that the LLC had previously paid other similar obligations Mays had incurred. Mays thereafter solicited the LLC members, including Merchant,

to come up with the funds to satisfy the outstanding debt to Hewitt.

Merchant testified that he had discussed with Powers, Kennedy, and the Addisons that they should acquire the note by assignment, which, he said, they all agreed to do. According to Merchant, he contacted Chad Lee, Hewitt's real-estate attorney, who had indicated that it would cost $257,000 to purchase the note and the mortgage. Thereafter, Merchant arranged for wire transfers to be made to Lee's trust account totaling $257,000, consisting of $100,000 from Powers and Associates General Contractors, Inc., an entity Powers was affiliated with, $20,000 from Margaret Addison, $50,000 from Kennedy, $12,000 from Rex Addison, and $75,000 from Titan Mining, a company Merchant had developed. Merchant testified that the money was intended to "buy the note" from Hewitt and not as a gratuitous payment of the debt on behalf of Mays.

Kennedy testified that Merchant had telephoned him and informed him that Hewitt held a "lien" on the property and that the LLC members needed to raise $250,000 to avoid foreclosure of the "lien." Kennedy stated that he had agreed to contribute $50,000, which, he said, he had understood would

be used to pay off the Hewitt loan and to satisfy the mortgage. Kennedy testified that he had considered the $50,000 to be a loan to Mays but that he did not know how that loan would be repaid. Kennedy denied that anyone had discussed an assignment of the note and the mortgage with him, but, he said, he had understood that, upon payment, the debt Mays owed to Hewitt would be transferred from Hewitt to the LLC members. Rex Addison testified that he and his wife, Margaret, had agreed to loan Mays $32,000 to avoid foreclosure on the property. Addison could not recall anyone discussing an assignment of the note and the mortgage with him at the time, but, he said, he had expected that appropriate documents would be drawn up to reflect his right to repayment. Powers did not testify.

Mays stated that he went to Lee's office on December 28, 2006, to pay off the loan. According to Mays, Lee informed him that the payoff amount was $265,500, $257,000 of which had already been wired to Lee's trust account from the LLC members. Mays agreed to pay $3,000 of his own money and borrowed $5,500 from Lee to cover the remaining amount needed "to pay off the note." Mays testified that he had not

discussed an assignment of the note and the mortgage with anyone, but, he said, he had understood that the money contributed by the LLC members was to be used solely to satisfy the note. Mays testified that he had left Lee's office with the understanding that the note had been paid in full. Mays admitted, however, that he did not have any document memorializing the payment and discharge of the note.

Hewitt later arrived at Lee's office, and Lee presented to Hewitt a check, drawn on Lee's trust account, that was made payable to Hewitt in the amount of $265,500. Lee testified that the check was paid to Hewitt for "the balance due on the mortgage." Hewitt testified that he went to Lee's office on December 28, 2006, with the expectation that he would be "paid off" and that he would be "out of it" without any concern or involvement in the dealings between the LLC members. Hewitt stated that he obtained the check from Lee, "signed the documents," and considered the note and the mortgage to be fully satisfied, having no remaining value.

Hewitt testified that no one had discussed with him the contents of the "documents" he signed on December 28, 2006. Hewitt acknowledged that, without reading it, he had signed a

document entitled "Assignment of Mortgage,"[1] which provided, in pertinent part:

> "For valuable consideration in hand paid to the undersigned, David Hewitt, the receipt of which is hereby acknowledged, the undersigned does hereby grant, bargain, sell, convey, and assign:
>
> > "Unto Rex and Margaret Addison - a 12.451% interest
> >
> > "Unto Charles H. Merchant, Sr. - a 29.182% interest
> >
> > "Unto Crandall Kennedy - a 19.455% interest
> >
> > "Unto Powers & Associates General Contractors, Inc. - a 38.912% interest
>
> "in and to that certain mortgage executed by John Robert Mays in favor of David Hewitt bearing date of January 5, 2005 ... and that certain provisory note dated January 5, 2005 executed by John Robert Mays in favor of David Hewitt, together with the debt thereby secured and the property therein described and all rights, privileges, and remedies contained therein."[2]

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[1]The record does not indicate who prepared this document. All witnesses who were asked denied authorship or any recollection of authorship.

[2]At trial, the parties interrogated several witnesses regarding the term "provisory" note. Because no one recalled authoring the assignment, no one could explain the meaning of that term or whether the word "provisory" was intended to be "promissory."

Hewitt testified that he had not previously discussed any assignment of the note and the mortgage before signing the document.

Merchant testified that Lee had mailed him the assignment and that he, Merchant, recorded the assignment in the office of the local probate court on January 22, 2007. At trial, Mays introduced as an exhibit another document that was later recorded in the office of the probate court and that stated "December 29th, 2006. John's mortgage on his land paid off by Rex and Margaret, Charles, Crandall, and Tom." Merchant, Kennedy, and Rex Addison testified that that statement accurately reflected the December 28, 2006, transaction. Lee and Kesa Dunn, another local real-estate attorney, testified that that document, although unsigned, would have led them to inquire further as to whether the mortgage on the property had been satisfied; however, neither Lee nor Dunn definitively opined that the document had any particular legal effect.

Mays testified that, in 2012, he learned of the assignment when he discovered that it had been recorded in the office of the probate court. Mays testified that he went to see his attorney regarding the matter, that he had not done

anything further regarding the matter because "there was nothing to do," and that he had not discussed the situation with any of the LLC members. Mays stated that, at that point, none of the LLC members had ever asserted to him that he owed them any money on the note and no one had claimed any interest in the property. Mays testified that he had held undisturbed possession of the property up to the time of the trial.

Ayers testified that, in 2014, he had purchased the interest of the LLC members in the note and the mortgage for $208,000.[3] In September 2014, Mays received a letter from Ayers's attorney formally notifying him that Ayers had become the holder of the note and the mortgage. In the letter, Ayers's attorney asserted that Mays had defaulted on the note, that he could cure the default by paying Ayers $568,475.30 within 30 days but that, if Mays did not cure the default, the property could be sold through foreclosure of the mortgage. Mays testified that the letter was the first notice that he had that anyone was claiming an interest in the property and

[3]Merchant testified that he had previously acquired the interests of Kennedy and Powers in the note and the mortgage, which, he said, he then sold to Ayers. Rex Addison testified that Merchant had arranged for the sale of the Addisons' interest in the note and the mortgage to Ayers.

that he had had no prior knowledge that Ayers had "somehow wound up" with the note and the mortgage. Mays testified that an advertisement for the foreclosure sale of the property ran in a local newspaper. Mays attended the public foreclosure sale, but did not voice any objection to the process. Mays identified a foreclosure deed dated October 16, 2014, indicating that the property had been sold at the foreclosure sale to Ayers for $365,000.

Discussion

The parties challenge the judgment on a number of grounds. In his appeal, Ayers argues that the trial court erred in concluding that the statute of limitations barred his counterclaim to collect on the note, in calculating the indebtedness due on the mortgage, and in awarding Mays a surplus from the foreclosure sale. Mays, on the other hand, argues that the trial court erred in determining that the note and the mortgage had been validly assigned, in finding that the note had not been paid and discharged, in recognizing Ayers had a right to foreclose on the mortgage, in determining the amount of indebtedness due on the mortgage, and in awarding Ayers any part of the proceeds of the foreclosure

sale. To best dispose of the issues raised, the court addresses them in their logical order.

Satisfaction of the Note

Mays primarily argues that the judgment should be reversed because the trial court should have concluded that the note had been paid and discharged. Mays contends that once he and the LLC members tendered payment of the amounts due under the note and Hewitt accepted the payment, the note was paid in full and the debt underlying the note was discharged. When Hewitt assigned the note to the LLC members, Mays argues, they received only a worthless document evidencing a debt that had already been satisfied, which they later assigned to Ayers. See generally Nissan Motor Acceptance Corp. v. Ross, 703 So. 2d 324, 326 (Ala. 1997) (holding that an assignee acquires only the rights inuring to the assignor under the contract assigned). Because the debt had been discharged, Mays continues, Ayers could not execute on the mortgage, making the foreclosure wrongful and invalid.

The note, as a negotiable instrument, would be considered paid "to the extent payment is made (i) by or on behalf of a party obliged to pay the instrument, and (ii) to a person

entitled to enforce the instrument." § 7-3-602(a), Ala. Code 1975 (emphasis added). Generally speaking, once a note is paid in full, the underlying debt it evidences is discharged. Id. Mays argues that the evidence at trial established that on January 5, 2005, he incurred a debt on behalf of the LLC and that he and the LLC members extinguished that debt by paying it in full on December 28, 2006.

The testimony and other evidence cited by Mays in his brief does tend to support the factual scenario advocated by Mays; however, other evidence disputes Mays's account. The LLC members who testified at trial denied that Mays had borrowed the funds from Hewitt on behalf of the LLC, and the note and the mortgage do not contain any language providing that Mays executed those documents on behalf of the LLC. See § 7-3-402(b)(2), Ala. Code 1975 (providing that an individual is personally liable on a note when signing the note without indicating representative capacity). Furthermore, Mays used his own real property as security for the loan. Those factors suggest that Mays incurred the debt in his individual, and not a corporate, capacity.

In its final amended judgment, the trial court specifically found that the LLC members "wire transferred money to [Lee's] [t]rust [a]ccount to pay off the promissory note and [the] mortgage to avoid foreclosure on [Mays's] property." However, the trial court did not specifically find that the note had, in fact, been paid and discharged. The trial court instead determined that, after the payments by the LLC members, a debt remained outstanding and that Ayers could recover on that debt through foreclosure of the mortgage that had been assigned to him. As Ayers asserts, the trial court must have impliedly found that the payment on December 28, 2006, had not satisfied the note but, instead, had served only as consideration for the assignment of the note and the mortgage from Hewitt.

On appeal, we must assume that the trial court made those findings that would be necessary to support its judgment. See Transamerica Commercial Fin. Corp. v. AmSouth Bank, N.A., 608 So. 2d 375, 378 (Ala. 1992). Under the ore tenus rule, all implicit findings of fact necessary to support a trial court's judgment carry a presumption of correctness and will not be held to be erroneous unless they are plainly and palpably

wrong. Id. Substantial evidence in the record supports the implicit findings of fact made by the trial court in this case. Merchant testified that he and the LLC members had agreed to purchase the note and that Lee had informed them that the purchase price would be $257,000. Kennedy disputed that he and Merchant had discussed an assignment, but agreed that the funds he provided were intended as a loan to Mays to pay Hewitt and that the debt would be then transferred to the LLC members. Rex Addison testified that he had loaned Mays money with the intention that repayment would be made through appropriate documentation. It is undisputed that Hewitt signed an assignment of the note and the mortgage in favor of the LLC members, and excluding Mays, contemporaneously with the receipt of the $257,000 that they had provided. The foregoing evidence indicates that the note was not paid but, instead, was assigned to the LLC members.

In cases in which the evidence conflicts, the trial court is free to choose which evidence it believes, and it is up to the trial court to resolve the conflicts. Watkins v. Montgomery Days Inn, 455 So. 2d 23, 24 (Ala. Civ. App. 1984). It is not this court's duty to weigh evidence; instead, we

should "indulge in all favorable presumptions to sustain the conclusions reached by the trial court" and will reverse only upon a showing that the trial court's findings are plainly erroneous or manifestly unjust. Gann & Lewis Roofing Co. v. Sokol, 359 So. 2d 815, 816 (Ala. Civ. App. 1978). For this court to reverse the trial court's judgment, the record must show that there is no credible evidence to support the implicit findings of the trial court. Gann, supra. Based on the record before us, we conclude that the trial court did not commit any error in determining that the December 28, 2006, payment to Hewitt did not satisfy and discharge the note.

Validity of the Assignment

In his brief to this court, Mays argues alternatively that the trial court should have found that the assignment of the note and the mortgage from Hewitt to the LLC members was invalid because Hewitt did not positively assent to the assignment, instead having merely signed the assignment without reading it and agreeing to its terms beforehand. See DeVenney v. Hill, 918 So. 2d 106 (Ala. 2005) (generally discussing contractual nature of an assignment). Mays points out that no one negotiated directly with Hewitt to obtain the

assignment and asserts that Hewitt was deceived into signing the assignment, which Mays theorizes, had been prepared by Merchant as part of a fraudulent scheme to obtain the note and the mortgage. However, in the proceedings below, Mays, through his attorney, repeatedly indicated that he was not contesting the validity of the assignment.

During opening arguments, Ayers, through his attorney, pointed out that the parol-evidence rule prevented Mays from attempting to impeach the validity of the assignment. The parol-evidence rule generally provides that a trial court cannot receive evidence that varies or contradicts a written contract. See Richard Kelley Chevrolet Co. v. Seibold, 363 So. 2d 989, 993 (Ala. Civ. App. 1978). Mays, through his attorney, acknowledged the parol-evidence rule and indicated that Mays would not, during the course of the trial, try "to alter or vary or contradict or subtract from" the terms of the written assignment and that "[w]e're not trying to impeach the validity of the language" of the assignment. Mays's attorney repeated that position throughout the course of the trial proceedings, including in closing remarks to the trial court. At no point did Mays contend that he could use parol evidence

to prove that the assignment had been obtained by fraud. See, e.g., Jones v. The Village at Lake Martin, LLC, 256 So. 3d 119, 123 (Ala. Civ. App. 2018) (recognizing fraud exception to the parol-evidence rule). Rather, as explained above, Mays insisted that he was presenting the evidence of the circumstances leading up to the execution of the assignment solely to show that the assignment, although valid, did not pass anything of value to the LLC members because, Mays argued, the note had been paid and discharged at the time the assignment was made.

Mays clearly indicated to the trial court that he did not contest that Hewitt had validly assigned his rights to the note and the mortgage to the LLC members through the assignment. Having maintained throughout the trial-court proceedings that he would not question the validity of the assignment itself, Mays cannot on appeal raise for the first time the issue whether Hewitt validly assigned his rights in the note and the mortgage to the LLC members. "[An appellate court] cannot consider arguments raised for the first time on appeal; rather, our review is restricted to the evidence and arguments considered by the trial court." Andrews v. Merritt

Oil Co., 612 So. 2d 409, 410 (Ala. 1992). Moreover, the trial court did not make any findings of fact that the assignment had been procured by fraud, and, ultimately, the trial court enforced the assignment, indicating that it did not accept Mays's fraud theory, and this court cannot usurp the fact-finding function of the trial court to decide otherwise. See Curtis White Constr. Co. v. Butts & Billingsley Constr. Co., 473 So. 2d 1040, 1041 (Ala. 1985). Thus, for the purposes of this appeal and cross-appeal, we consider the assignment to be valid and also consider the LLC members to have acquired all the rights arising from the note and the mortgage formerly held by Hewitt. See Ross, supra.[4]

Statute of Limitations

Section 7-3-118(a), Ala. Code 1975, provides, in pertinent part, that "an action to enforce the obligation of a party to pay a note payable at a definite time must be commenced within six years after the due date or dates stated in the note." In this case, as the trial court correctly

[4]Accordingly, we do not consider whether the assignment complied with the transfer and enforcement provisions of the Alabama Uniform Commercial Code, which issue was not raised by Mays at any point.

found, the note was payable at a definite time, i.e., January 5, 2007. Ayers commenced his action to enforce the obligation of Mays to pay the note when he filed his counterclaim on November 25, 2014, more than six years after the due date stated in the note. In its final judgment, the trial court determined that the counterclaim was barred by the statute of limitations and entered judgment on the counterclaim in favor of Mays.

Ayers argues that § 6-8-84, Ala. Code 1975, preserved his counterclaim despite the statute of limitations. Section 6-8-84 provides:

> "When the defendant pleads a counterclaim to the plaintiff's demand, to which the plaintiff replies the statute of limitations, the defendant is nevertheless entitled to his counterclaim, where it was a legal subsisting claim at the time the right of action accrued to the plaintiff on the claim in the action."

Ayers contends that the trial court committed reversible error in failing to apply § 6-8-84 to conclude that the statute of limitations did not bar his counterclaim.

A review of the record indicates that Ayers raised the application of § 6-8-84 for the first time in his postjudgment motion. At the hearing on the postjudgment motion, the trial

court indicated that it had already determined that the statute of limitations had run on the action to collect on the note asserted in the counterclaim, but stated further that the statute of limitations did not bar Ayers's right to foreclose on the mortgage. The trial court subsequently amended its judgment, but it did not change any language in that part of the judgment ruling that the statute of limitations barred the counterclaim. Nothing in the record indicates that the trial court actually considered the argument that § 6-8-84 applied to save the counterclaim from the operation of § 7-3-118(a).

In Espinoza v. Rudolph, 46 So. 3d 403, 416 (Ala. 2010), Antonio Ben Espinoza and Antonio Espinoza d/b/a Jabez Land Company (hereinafter referred to collectively as "Jabez"), the buyers at a tax sale of real property, brought an action against Maxine Rudolph, the redemptioner, seeking a declaration that the redemption was void. After a judgment was entered in favor of Rudolph, Jabez filed a postjudgment motion arguing that the redemption was void because Rudolph had not complied with the procedures for redemption set forth in Ala. Code 1975, § 40-10-122(d). After the trial court maintained its judgment in favor of Rudolph, Jabez appealed to

our supreme court, arguing that the trial court had erred in failing to grant his postjudgment motion. The supreme court held as follows:

> "Not until his postjudgment motion did Jabez argue that the redemption was invalid because Rudolph had not submitted a written request for an itemization of Jabez's expenses or because she had otherwise failed to comply with the requirements of § 40-10-122(d). '"[A] trial court has the discretion to consider a new legal argument in a post-judgment motion, but is not required to do so."' Special Assets, L.L.C. v. Chase Home Fin., L.L.C., 991 So. 2d 668, 678 (Ala. 2007) (quoting Green Tree Acceptance, Inc. v. Blalock, 525 So. 2d 1366, 1369 (Ala. 1988)). There is no indication that the trial court considered the merits of the legal argument raised for the first time in Jabez's postjudgment motion, and we will not presume that it did. See Special Assets, 991 So. 2d at 678. Jabez offers no justification for the delayed presentation of his argument. The trial court did not exceed its discretion in refusing to grant Jabez's postjudgment motion on the basis of Rudolph's failure to request an itemization of expenses Jabez incurred to improve the property. See Green Tree Acceptance, Inc. v. Blalock, 525 So. 2d 1366, 1370 (Ala. 1988) ('Based on the record before this Court on appeal, we conclude that there was no justification given by Green Tree for failing to raise the argument prior to its post-judgment motion.').
>
> "For these reasons, we will not reverse the trial court's judgment on the basis of Jabez's contention that Rudolph failed to comply with § 40-10-122 in redeeming the property."

46 So. 3d at 416.

In the present case, the issue of the statute of limitations had been raised by Mays when he filed his first amended complaint on June 12, 2015. The parties extensively briefed the issue to the trial court in their respective motions for a summary judgment and the oppositions to those motions. Ayers did not mention § 6-8-84 in any of his filings in the trial court, nor did he make any argument that his counterclaim should be considered a compulsory counterclaim for recoupment unaffected by the statute of limitations. See Romar Dev. Co. v. Gulfview Mgmt. Corp., 644 So. 2d 462 (Ala. 1994) (explaining the operation of § 6-8-84 to revive compulsory counterclaims for recoupment otherwise barred by the statute of limitations when the counterclaim arises out of the same transaction as set forth in the complaint). In this case, after the trial court completed the trial of the case and entered a judgment determining that § 7-3-118(a) barred Ayers's counterclaim, Ayers filed on July 13, 2017, a motion for a new trial or, alternatively, to alter or amend the judgment to assert the applicability of § 6-8-84. Ayers did not provide any justification for the delayed presentation of that argument.

Based on the similarity between this case and Espinoza, we will not presume that the trial court actually considered the argument Ayers raised for the first time in his postjudgment motion. Given the lack of any explanation for the tardy assertion of his argument asserting the applicability of § 6-8-84, we conclude that the trial court did not exceed its discretion in refusing to grant Ayers's postjudgment motion insofar as it requested that the trial court amend its ruling that the statute of limitations barred his counterclaim. We will not reverse the judgment on the basis of Ayers's contention that § 6-8-84 saved the counterclaim from the bar of the statute of limitations.

"Indebtedness" Secured by the Mortgage and the Interest Payable

In its judgment, the trial court determined that, although the statute of limitations barred the counterclaim to enforce the note, Ayers retained the right under the mortgage to foreclose on the property to recover for any indebtedness owed by Mays. In his cross-appeal, Mays does not challenge that ruling, so we consider that issue waived, see Boshell v. Keith, 418 So. 2d 89, 92 (Ala. 1982) ("When an appellant fails to argue an issue in its brief, that issue is waived."), and

we proceed under the premise that the trial court correctly determined that Ayers could foreclose on the mortgage despite the expiration of the statute of limitations on the action to collect on the note.

The mortgage provides that Mays "is justly indebted to" Hewitt "in the sum of Two Hundred, Twenty-Five Thousand and 00/100 Dollars, evidenced by promissory note of even date herewith." The mortgage further provides for the distribution of the proceeds of a foreclosure sale, in pertinent part, as follows:

> "First, to the expenses of advertising, selling and conveying, including a reasonable attorney's fee; Second, to the payment of any amounts that may have been expended, or that it may then be necessary to expend, in paying insurance, taxes, or other encumbrances, with interest thereon; Third, to the payment of said indebtedness in full, whether the same shall or shall not have fully matured at the date of sale, but no interest shall be collected beyond the day of sale; and Fourth, the balance, if any, to be turned over to the said Mortgagor ...."

In the final judgment, as amended, the trial court determined that the property was sold at the foreclosure sale for $365,000. The judgment awards Ayers $1,292 for expenses associated with the sale and $208,000 "as the balance due on

the debt." The judgment awards Mays $155,708, the balance of the proceeds of the foreclosure sale.

We agree with the parties that the trial court erred in determining that the "indebtedness" secured by the mortgage totaled $208,000. The terms of the mortgage itself proclaims the "indebtedness" to be the $225,000 debt owed to Hewitt by Mays, as evidenced by the note. See Crescent Credit Corp. v. Union Bank & Tr. Co. of Montgomery, 51 Ala. App. 683, 686, 288 So. 2d 744, 746 (Civ. App. 1974) (holding that the indebtedness secured by a mortgage is to be determined from the intent of the parties as expressed in language of mortgage documents and admissible collateral facts). Thus, the indebtedness would be the amount due under the terms of the note, as both parties appear to agree. The sum of $208,000 appears in the record solely as the consideration paid by Ayers for the assignment of the note and the mortgage and not as a reflection of the indebtedness secured by the mortgage. Both parties agree that the $208,000 amount found by the trial court is not supported by substantial evidence.

In his brief to this court, Ayers accepts that the amount due on the note as of December 28, 2006, was $265,500,

consisting of $225,000 in principal and $40,500 in interest and penalties. Ayers notes that Mays paid $8,500 on the note, thereby reducing the debt to $257,000. In the proceedings below, the parties contested whether the note bore any interest after January 5, 2007. In the final judgment, as amended, the trial court determined that the terms of the note called for the accrual of interest only during the first two years and did not provide for any further interest. The trial court therefore ruled that no interest accrued on the note after January 5, 2007. In his appeal, Ayers argues that the trial court erred in determining that no interest had accrued on the note after January 5, 2007, because, he says, the note itself calls for interest to be paid so long as the principal debt remains unpaid and because, even if the terms of the note do not clearly provide for interest after two years, § 7-3-112, Ala. Code 1975, applies to impute interest at the judgment rate of 12%.[5] See Ala. Code 1975, § 8-8-10.

The note provides as follows:

[5]At the time the note matured in 2007, § 8-8-10, Ala. Code 1975, provided for a rate of interest on a money judgment of 12%. That statute was amended in 2011 to reduce the rate of interest on a money judgment to 7.5%.

> "The undersigned, for value received, promises to pay to the order of David Hewitt the sum of Two Hundred Twenty-Five Thousand and 00/100 Dollars ($225,000.00), together with interest upon the unpaid portion thereof from the date of this instrument, at 10 percent per annum for the first 12 months. At the end of the first twelve months, on or before January 5, 2006, the undersigned John Robert Mays shall pay to David Hewitt ½ of the principal, the sum of $112,500.00, plus all accrued interest on the full loan amount. If the prime interest rate at any point in time during the entire two year term (between January 5, 2005 and January 5, 2007) reaches 7 percent or more, the interest rate for the entire second 12 months of this note (months 13 through 24, being January 5, 2006 through January 5, 2007) shall be 12 percent. The balance of the principal and all accrued interest shall be paid to David Hewitt on or before January 5, 2007."

In determining the interest due on a note, the court ascertains the intent of the parties as expressed in the language of the instrument. See generally Spragins v. McCaleb, 237 Ala. 658, 188 So. 251 (1939). We agree with the trial court that the note calls for interest on the unpaid portion of the debt during the first two years, being at an annual rate of 10% for the first year, and, as a result of the conditions of the note having been fulfilled, at an annual rate of 12% for the second year. Ayers parses out the phrase "together with interest upon the unpaid portion thereof from the date of this instrument" to argue that the note provides

for interest from the date of execution to the date of final payment, but "the provisions of a contract are to be interpreted in context; specific provisions are not read in isolation." Booth v. Newport Television, LLC, 111 So. 3d 719, 725 (Ala. Civ. App. 2011). Following the phrase "together with interest upon the unpaid portion thereof from the date of this instrument," the note specifically sets out the interest rate and the duration of the interest as contemplated by the parties. When read as a whole, the terms of the note do not support Ayers's position.

Section 7-3-112 provides:

> "(a) Unless otherwise provided in the instrument, (i) an instrument is not payable with interest until dishonor, and (ii) interest on an interest-bearing instrument is payable from the date of the instrument.
>
> "(b) Interest may be stated in an instrument as a fixed or variable amount of money or it may be expressed as a fixed or variable rate or rates. The amount or rate of interest may be stated or described in the instrument in any manner and may require reference to information not contained in the instrument. If an instrument provides for interest, but the amount of interest payable cannot be ascertained from the description, interest is payable at the judgment rate in effect at the place of payment of the instrument and at the time interest first accrues."

(Emphasis added.) We conclude, as did the trial court, that the last clause of § 7-3-112 does not apply. That clause operates only when "an instrument provides for interest, but the amount of interest payable cannot be ascertained from the description." The parties omitted any reference to interest accruing after January 5, 2007, so the note does not "provide for interest" after that date, and the amount of interest payable during the first two years can be ascertained from the terms of the note.

As the dissent notes, ___ So. 3d at ___, § 8-8-8, Ala. Code 1975, provides that all unpaid contracts for the payment of money shall bear interest from the date payment was due. Under § 8-8-8, when a note does not provide for interest after the date of maturity, ordinarily, interest may be imputed at what our caselaw often refers to as the "legal rate" of interest of 6% established in Ala. Code 1975, § 8-8-1. In his principal brief on appeal, Ayers does cite § 8-8-8, but he does not argue that the legal rate of 6% interest as set forth in § 8-8-1 should be imputed to all unpaid sums after the date of maturity of the note. Specifically, Ayers argues as follows:

> "Section 8-8-8, Code of Alabama 1975 does not specify the rate but does provide that all contracts for the payment of money bear interest, in some amount, from the date it should have been paid. Section 7-3-112(b) provides the rate, in this case, at 12%."

In his reply brief, Ayers offers, for the first time, an argument that the legal rate of interest established in § 8-8-1 should be applied, stating:

> "Given that interest is due after this note matured, the question then becomes what rate of interest is due. We answered that in our initial brief. It is, at a minimum the 'lawful rate' of 6% under § 8-8-1, Code of Alabama 1975. But as we pointed out in our initial brief, the provisions of § 7-3-112(b), Code of Alabama 1975 provide for interest in this case at the judgment rate of 12%."

With all due respect to counsel for Ayers, the initial brief did not contain any argument regarding the "lawful rate" of interest contained in § 8-8-1. "It is a well-established principle of appellate review that we will not consider an issue not raised in an appellant's initial brief, but raised only in the reply brief." Lloyd Noland Hosp. v. Durham, 906 So. 2d 157, 173 (Ala. 2005). Hence, we do not consider the applicability of § 8-8-1.

Based on the foregoing analysis, and considering the stipulations of Ayers in his brief to this court, we conclude

that the "indebtedness" referred to in the note consists of $257,000 plus interest on the principal amount of $225,000 at an annual rate of 12% from December 28, 2006, to January 5, 2007. By our calculations, a 12% interest rate yields interest in the amount of $73.97 per day. In the eight days from December 28, 2006, to January 5, 2007, $591.78 in interest accumulated. Adding that amount to the $257,000 that was past-due under the note produces a total balance due on the note of $257,591.78. We find that this amount reflects the indebtedness owed at the time of the foreclosure sale.

The foreclosure sale yielded $365,000. Of that amount, Ayers was entitled to $1,292 for the expenses associated with the foreclosure sale and $257,591.78 for "payment of said indebtedness" under the terms of the mortgage. Mays, as mortgagor, was entitled to the balance of $106,116.22. We therefore reverse the final judgment, as amended, insofar as it determined that the amount of the indebtedness owed under the terms of the mortgage was $208,000 and insofar as it ordered distribution of the proceeds of the foreclosure sale based on that incorrect amount.

Conclusion

As to Ayers's appeal and Mays's cross-appeal, we reverse those portions of the trial court's judgment determining the indebtedness owed under the terms of the mortgage and incorrectly distributing the proceeds of the foreclosure sale, and we remand the case to the trial court for it to enter a revised judgment in accordance with this opinion. We affirm the judgment in all other respects.

2170639 -- AFFIRMED IN PART; REVERSED IN PART; AND REMANDED WITH INSTRUCTIONS.

2170640 -- AFFIRMED IN PART; REVERSED IN PART; AND REMANDED WITH INSTRUCTIONS.

Thompson, P.J., and Donaldson and Hanson, JJ., concur.

Edwards, J., concurs in part and dissents in part as to the rationale and concurs in the result.

EDWARDS, Judge, concurring in part and dissenting in part as to the rationale and concurring in the result.

I agree with the main opinion that Todd Ayers, the purchaser of the promissory note and associated mortgage, is precluded from seeking reversal of the trial court's judgment on the basis of his late-asserted statute-of-limitations argument under Ala. Code 1975, § 6-8-84. However, although I also agree that the trial court erred in concluding that the indebtedness secured by the mortgage was $208,000, I cannot agree with the main opinion that the promissory note did not accrue interest after its maturity date, and, therefore, I cannot concur in that portion of the main opinion determining that the indebtedness secured by the mortgage is $257,591.78.

Ayers, relying in part on Ala. Code 1975, § 7-3-112(b) and § 8-8-8, argues that the promissory note accrued interest after its maturity date. Although the promissory note provided for interest of 10% for the first year and 12% during the second year of the term of the note such that the language of § 7-3-112(b) would not apply to the promissory note, I believe that § 8-8-8 applies to require the imposition of the legal rate of interest to the debt due under the promissory note after its maturity date on January 5, 2007.

Section 8-8-8 provides, in pertinent part: "All contracts ... for the payment of money ... bear interest from the day such money ... should have been paid ...." This comports with long-standing authority regarding the imposition of interest on a debt: "Unless there is an agreement to the contrary, interest attaches as incident to a debt or money demand ... from the time of its maturity or when payment is due or may be demanded." Zimmern v. Standard Motor Car Co., 205 Ala. 580, 585, 88 So. 743, 747 (1921).

Unlike the main opinion, I cannot conclude that the failure of the note to specify a rate of interest on the debt after maturity equates to an agreement by the parties that the debt would not accrue interest. The fact that David Hewitt testified that he would not have allowed the debt to remain unpaid and would have immediately proceeded to a foreclosure of the mortgage does not alter my opinion that interest accrued from the date of maturity. Hewitt indicated throughout his testimony that the note was for only two years, that "he wanted his money," and that he "wanted out" of the deal at the end of the term of the note. He did not indicate that he intended not to charge interest on the note if it had

not been timely satisfied; in fact, the tenor of his testimony leads me to conclude otherwise.

The rule regarding the proper rate of interest after maturity appears to depend on the language of the instrument. See Davis v. Anderson, 224 Ala. 400, 140 So. 423 (1932). The supreme court has explained that "where the contract fixes the rate generally or until maturity, that rate obtains only until maturity, and the legal rate obtains after maturity, but, if the contract fixes the rate 'until paid,' the rate so fixed continues until the debt is paid or collected." Davis, 224 Ala. at 402, 140 So. at 424. In its opinion in Zimmern, our supreme court explained that "our court has adhered to the view that the conventional rate of interest reserved before maturity will not apply after maturity, but that the instrument will draw the legal rate until paid; that is, unless the terms of the instrument clearly imply that the special rate was to continue after maturity." 205 Ala. at 586, 88 So. at 748. In De Moville v. Merchants & Farmers Bank of Greene County, 237 Ala. 347, 354, 186 So. 704, 710 (1939), our supreme court again explained that, "after maturity[,] the agreement is not binding to fix the rate [of interest] since

it is not stipulated to be at that rate till paid." Thus, the failure of the promissory note to contain language indicating that the 12% interest rate would apply until the debt was paid results not in the conclusion that no interest would be imposed after maturity, but, instead, in the conclusion that the legal interest rate applicable to such debts would apply to the debt remaining on the note after its maturity date.

I recognize that Ayers did not effectively argue in his initial appellate brief that the promissory note would have accrued interest of 6% after its maturity date. However, because the law requires the imposition of the legal rate of interest to the debt remaining unpaid at maturity and because "the term 'legal interest' [means] ... the rate of interest established by law in this State," Crawford v. Branch Bank at Mobile, 6 Ala. 12, 14 (1844), I believe that this court can and should impose the proper rate of interest, even in the face of Ayers's failure to assert the correct interest rate. According to Ala. Code 1975, § 8-8-1, the legal interest rate is 6%. Therefore, I would reverse the judgment of the trial court insofar as it failed to calculate interest on the amount due under the promissory note after the date of maturity and

would remand the cause for the trial court to make the appropriate calculations to determine the indebtedness secured by the mortgage. I agree with the main opinion in all other respects.