REL: June 26, 2020

ALABAMA COURT OF CIVIL APPEALS

OCTOBER TERM, 2019-2020

2180699

Terri Barnes

v.

U.S. Bank National Association, as trustee for NRZ Pass-Through Trust V

Appeal from Jefferson Circuit Court
(CV-17-901127)

HANSON, Judge.

Terri Barnes appeals from a final judgment of the Jefferson Circuit Court entered in favor of U.S. Bank National Association ("U.S. Bank"), as trustee for NRZ Pass-Through

Trust V, in an ejectment action arising from a mortgage foreclosure.[1] Because we conclude that U.S. Bank's predecessors in interest, in contravention of Ex parte Turner, 254 So. 3d 207 (Ala. 2017), failed to strictly comply with the notice provisions required in the 22d numbered paragraph ("paragraph 22") of the mortgage instrument executed by Barnes in order to effect foreclosure of the mortgage, we reverse.

In the trial court, the parties stipulated to the existence of a number of pertinent facts underlying the action. On December 11, 2002, Autrey Fletcher, who is now deceased, executed a note payable to Hometown Mortgage Services, Inc. ("HMS"), the repayment of which was secured by

[1]U.S. Bank contends that Barnes's appeal is moot because Barnes is no longer in actual possession of the real property described in the mortgage at issue after having been dispossessed of the property on or about May 2, 2019, by a county sheriff under a writ of execution issued after the entry of the judgment in the ejectment action; however, the appeal is not moot because Barnes has the potential power to compel restitution notwithstanding her involuntary loss of possession. It remains the law of Alabama that "when ... property [is] taken from [one person] under orders of the court, and then by other orders [that person] becomes entitled to be repossessed of the property, the [circuit] court has the power, and in pursuit of justice will exercise it, to restore possession to [that person]." Ex parte Robertson, 235 Ala. 184, 186-87, 177 So. 902, 904 (1937); see also Lehman-Durr Co. v. Folmar, 154 Ala. 480, 45 So. 289 (1907).

a mortgage on a parcel of property located in Birmingham; the mortgage instrument was signed by both Fletcher and Barnes as "Borrower[s]" in favor of HMS and its nominee Mortgage Electronic Registration Services, Inc. Paragraph 22 of the mortgage instrument, in pertinent part, specified that HMS, which was identified in the mortgage instrument as the "Lender," "shall give notice to Borrower [i.e., Fletcher and Barnes] prior to acceleration following Borrower's breach of any covenant or agreement" in the mortgage instrument. Under paragraph 22, the required notice was to include the following specifications: the default, actions required to cure the default, a date on or before which the default was to be cured, and a disclosure that failure to cure the default may result in acceleration of the due date of paying the outstanding balance owed. Paragraph 22 also stated that "[t]he notice shall further inform Borrower of the right to reinstate after acceleration and the right to bring a court action to assert the non-existence of a default or any other defense of Borrower to acceleration and sale" of the mortgaged property (emphasis added).

After Fletcher died in 2008, Barnes assumed all liability under the note and the mortgage, and in 2012 The Bank of New York Mellon Trust Company, National Association ("BONY"), as Trustee for RAMP 2003-RZ1, succeeded to HMS's rights as lender under the mortgage. After Barnes had defaulted on her obligation to make payments on the note secured by the mortgage on the subject property, a third-party loan servicer acting on behalf of BONY, i.e., Ocwen Loan Servicing, LLC ("Ocwen"), sent a notice of default to Barnes on October 28, 2016. In pertinent part, Ocwen's notice of default disclosed that Barnes owed a total of $834.34 in past-due sums; informed her that failure to pay such sums on or before December 3, 2016, could result in an election to accelerate repayment of the full balance of the note, collection from Barnes of expenses incident to foreclosure, and exercise of the power of sale provided in the mortgage instrument; and contained the following additional pertinent statement: "You may have the right to assert in court the non-existence of a default or any other defense to acceleration or foreclosure." In January 2017, Barnes was sent a notice of acceleration and, thereafter, a notice of foreclosure sale by BONY's counsel,

and three newspaper advertisements were placed in a newspaper of general circulation in Jefferson County informing of the upcoming foreclosure sale.

On February 22, 2017, BONY was issued a foreclosure deed to the property after placing the highest bid for the property at a public auction. Thereafter, on March 2, 2017, counsel for BONY sent Barnes a notice to vacate the property; because Barnes did not vacate the property in response to that notice, BONY commenced the ejectment action on March 21, 2017, naming Barnes as a defendant and seeking both possession of the property and damages.[2] Barnes, acting through counsel, answered the complaint, admitting that a foreclosure sale had occurred; however, Barnes's answer "denie[d] that [BONY had] lawfully foreclosed her interest in the property and demand[ed] strict proof thereof."

BONY moved for the entry of a summary judgment in its favor on its ejectment claim, to which Barnes filed a response asserting that the notice of default ocwen sent to her was not in strict compliance with paragraph 22 and that, therefore,

[2]BONY also purported to name Fletcher as a defendant; however, upon discovering that Fletcher was deceased, BONY dismissed Fletcher as a defendant.

the foreclosure sale was void; the trial court denied the summary-judgment motion. The parties then filed trial briefs, with BONY asserting that Barnes had waived "all affirmative defenses" to BONY's claim such that her defense based upon paragraph 22 should be rejected, that Barnes did not rely on any alleged deficiencies in the notice of default in her answer, that Barnes did not comply with provisions in the mortgage instrument relating to grievances, and that the notice of default Ocwen sent to Barnes was in strict compliance with paragraph 22. Barnes filed a brief asserting that she had sufficiently injected the defense of illegality of the foreclosure sale into the action and reiterating her contention that paragraph 22 had not been strictly complied with; she subsequently sought a summary judgment in her favor on the issue of the voidness of the foreclosure sale. Thereafter, the parties entered into their joint stipulation of facts, in which it was agreed that BONY had conveyed its interests in the property to U.S. Bank, and stipulated to the presence of five legal issues in the case: (1) whether Barnes properly asserted or had waived affirmative defenses; (2) whether the filing of Barnes's answer required that a prima

facie case be proved; (3) whether Barnes's failure to specifically plead failure of a condition precedent was excused by the absence of an averment in the complaint that all conditions precedent had been fulfilled; (4) whether the notice of default sent to Barnes satisfied the requirements of paragraph 22; and (5) whether a prima facie case for ejectment had been proved.

On January 9, 2019, the trial court entered a final judgment, and it amended that judgment on its own motion two days later. In its judgment, as amended, the trial court made factual findings in conformity with the parties' factual stipulations and reached the following legal conclusions: (1) that U.S. Bank had proved all the elements set forth in Steele v. Federal National Mortgage Ass'n, 69 So. 3d 89, 92 (Ala. 2010), to establish a prima facie case of entitlement to a judgment in ejectment; (2) that Barnes's assertion of the illegality of the foreclosure sale upon which U.S. Bank's right of possession rested was a sufficient invocation of an affirmative defense under Rule 8(c), Ala. R. Civ. P.; and (3) that the notice of default sent to Barnes "strictly complied" with paragraph 22 because the notice had "informed [Barnes]

... of ... her right to assert non-existence of default and other defenses in court" so as to render Turner inapplicable and because, that court determined, no evidence of actual prejudice was adduced. The judgment awarded U.S. Bank a writ of possession as to the property plus damages in the amount of $13,381.83 representing mesne profits for 21 months at $637.23 per month,[3] subject to Barnes's right to supersede the judgment by posting a bond in the amount of $24,851.97. Pursuant to Rule 59, Ala. R. Civ. P., Barnes filed a motion to alter, amend, or vacate the judgment on February 7, 2019; further, in response to the issuance of a writ of execution on February 26, 2019, Barnes filed a motion to stay the judgment pending the disposition of her postjudgment motion. The trial court, apparently without holding a hearing on the postjudgment motion, denied that motion on March 26, 2019,

[3]That damages award distinguishes this case from situations in which an order awarding possession of disputed property without mention of ancillary relief demanded in an ejectment complaint will be deemed nonfinal (compare Delevie v. Carrington Mortg. Servs., LLC, [Ms. 2180245, March 3, 2020] ___ So. 3d ___ (Ala. Civ. App. 2020), in which a summary judgment was held to address only possession and not other relief sought in the complaint).

rendering the stay motion moot.[4] Based upon that ruling, Barnes timely appealed from the trial court's judgment on May 7, 2019, see Rule 4(a)(3), Ala. R. App. P.; her appeal was transferred to this court pursuant to Ala. Code 1975, § 12-2-7(6).

Barnes posits, and U.S. Bank does not dispute, that the judgment under review is entitled to no presumption of correctness. We agree with that proposition. "On review by this court from a trial court's finding based on stipulated facts, a question of law is presented, and this court reviews such a case without presumption favorable to the judgment of the court below." Ike v. Board of Sch. Comm'rs of Mobile Cty., 601 So. 2d 1014, 1016 (Ala. Civ. App. 1992).

[4]Barnes purported to move for "reconsideration" of the trial court's order denying the postjudgment motion, and the trial court purported to grant that relief. Neither the motion to "reconsider" nor the order purporting to grant "reconsideration" are permitted under Alabama law. "[A]fter a trial court denies a Rule 59[, Ala. R. Civ. P.,] post-judgment motion, the trial court no longer has jurisdiction over the case and the aggrieved party's only remedy is to appeal." Ex parte Allstate Life Ins. Co., 741 So. 2d 1066, 1071 (Ala. 1999).

We start our analysis by noting that a distinction must be drawn between a direct attack and a collateral attack on a foreclosure:

> "An ejectment action following a nonjudicial foreclosure ... is not a 'foreclosure action,' and a defense in such an action asserting errors in the foreclosure process is a collateral attack on a foreclosure. ...
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> "In a direct attack on a foreclosure -- that is, an action seeking declaratory and injunctive relief to halt the foreclosure sale before it occurs ... or an action to set aside the sale after it has occurred ... -- any circumstance in the foreclosure process that would render the foreclosure sale void or voidable may be asserted. In a proceeding involving a collateral attack on a foreclosure, however, only those circumstances that would render the foreclosure sale void may be raised as an affirmative defense."

Campbell v. Bank of Am., N.A., 141 So. 3d 492, 494 (Ala. Civ. App. 2012) (some emphasis added). In Campbell, for example, this court held that a mortgagee's failure to comply with federal financial-loss-mitigation regulations was an "irregularity" that, at most, would render an ensuing foreclosure sale "voidable" in a direct attack rather than utterly "void" so as to support a collateral attack (141 So. 3d at 495-500).

In this case, Barnes ceased making payments on the note originally executed by Fletcher, and U.S. Bank's predecessor in title, BONY, took steps to foreclose the mortgage Barnes and Fletcher had executed. It is undisputed that Barnes did not initiate a civil action seeking to prevent the foreclosure sale or to set aside that sale so as to directly attack the propriety of the foreclosure sale. Rather, the first instance in which Barnes asserted of record any challenge to the validity of the foreclosure sale was in her answer to BONY's ejectment action,[5] which challenge Campbell classifies as a collateral attack on the foreclosure and as encompassing only a narrow range of permissible grounds under which a mortgagor can obtain relief.

However, the fact that the law acknowledges only a "narrow range" of permissible grounds for a collateral attack

[5]We, like the trial court, agree that an ejectment defendant's answer admitting the existence of a foreclosure sale, but specifically asserting that a plaintiff did not "lawfully foreclose[]" the defendant's interest in a parcel of property, bears a sufficient "state[ment] in short and plain terms" of the affirmative defense of "illegality" under subsections (b) and (c) of Rule 8, Ala. R. Civ. P. See Bechtel v. Crown Cent. Petroleum Corp., 451 So. 2d 793, 795 (Ala. 1984) (classifying affirmative defenses as those that assume the truth of the pleading to which they are directed).

on a foreclosure sale is not equivalent to the proposition that no grounds will support such an attack. For example, in Jackson v. Wells Fargo Bank, N.A., 90 So. 3d 168 (Ala. 2012), our supreme court considered the correctness of a summary judgment entered in favor of a mortgage holder and a loan servicer on two mortgagors' claims of, among other things, breach of contract. Like Barnes in this case, the mortgagors in Jackson asserted that they had not received a notice that complied with the portion of their mortgage instrument addressing notices required before acceleration and foreclosure (which, as in this case, appeared in paragraph 22 of their mortgage instrument), although the mortgagors in Jackson claimed that the notice sent to them had, rather than disclosing any right to cure their default within 30 days in order to prevent acceleration, simply stated that their loan had been accelerated. Our supreme court, indicating approval of the proposition that a failure to give a required notice consistent with a contractual obligation amounted to a valid basis for preventing a party holding a power of sale from exercising that power, reversed the summary judgment in favor

of the holder and servicer and remanded the cause for further proceedings. 90 So. 3d at 172-74.

Notably, Jackson was decided in a procedural context different from that presented here: rather than awaiting an ejectment proceeding, the mortgagors in Jackson made a direct attack on the foreclosure sale in which they sought both damages and declaratory and injunctive relief quieting title in the mortgagors (90 So. 3d at 170). As we have noted, in a direct attack seeking to set aside a foreclosure sale, a party may rely upon grounds that render that foreclosure sale void or voidable, see Campbell, 141 So. 3d at 494, and it was arguably not necessary for our supreme court to decide in Jackson whether the defective notice at issue in that case rendered the foreclosure sale void or merely voidable.

The question Jackson did not need to decide would later be answered in Ex parte Turner, supra, in which our supreme court, on certiorari review, considered whether a defect in the form of a required notice would vitiate the legality of the ensuing foreclosure sale so as to constitute a defense in an ejectment action brought by a mortgagee against the mortgagors after that sale. In Turner, as in this case, the

pertinent mortgage-instrument provision addressing required notices and remedies in the event of a claimed default (again, numbered 22) mandated that the pre-acceleration notice "'"shall further inform the Borrower of the right to reinstate after acceleration and the right to bring a court action to assert the non-existence of a default or any other defense of Borrower to acceleration and sale."'" 254 So. 3d at 208 (emphasis added). However, the notice sent to the mortgagors in Turner stated that the mortgagors "'"ha[d] the right to assert in foreclosure[] the non-existence of a default or any other defense to acceleration and foreclosure."'" Id. at 209-10 (emphasis added). Rejecting the view that the foregoing notification had satisfied the notice requirements of paragraph 22 of the mortgage instrument under a substantial-compliance analysis, our supreme court, agreeing with the mortgagors' reading of Jackson, held that "strict compliance, not merely substantial compliance," with the mortgage instrument was a prerequisite to a valid foreclosure (id. at 210):

> "In Jackson, as evidenced by its reliance on Dewberry v. Bank of Standing Rock, 227 Ala. 484, 150 So. 463 (1933), Bank of New Brockton v. Dunnavant, 204 Ala. 636, 87 So. 105 (1920), and Fairfax County

> Redevelopment & Housing Authority v. Riekse, 281 Va. 441, 707 S.E.2d 826 (2011), this Court held that a party seeking to institute foreclosure proceedings must do so in strict compliance with the terms of the mortgage. In the present case, [the mortgagee] did provide the [mortgagors] with notice of its intent to accelerate the debt. However, although required to do so under the terms of the mortgage, [the mortgagee] failed to notify the [mortgagors] of their right to bring a court action challenging the foreclosure."

254 So. 3d at 211-12. Citing in a footnote this court's opinion in Campbell, supra, that had set forth the crucial distinctions between defenses available to mortgagors in actions directly attacking foreclosures and the more limited defenses available to collaterally attack foreclosures, our supreme court concluded that, "[a]lthough the [mortgagors] were given notice of certain of their rights under the terms of the mortgage, they were given no notice of their right to bring a court action directly attacking the foreclosure." Ex parte Turner, 254 So. 3d at 212 & n.2 (emphasis added). Notably, a majority of our supreme court adhered to that conclusion over a dissenting opinion that argued, among other things, that a notice of default that substantially complies with the terms of a mortgage instrument should not be held sufficient to render an ensuing foreclosure sale void even if

that notice omits disclosure of the mortgagor's right to bring a court action. Id. at 214-15 (Sellers, J., dissenting).

Moreover, in reaching its decision in Ex parte Turner, our supreme court, in a footnote, expressed its approval of the reasoning employed in Pinti v. Emigrant Mortgage Co., 472 Mass. 226, 33 N.E.3d 1213 (2015), an opinion of the highest court of Massachusetts, a state that was identified as "a nonjudicial-foreclosure jurisdiction" similar to Alabama. Ex parte Turner, 254 So. 3d at 212 n.1. Our supreme court noted that the Massachusetts court, when confronted with a notice that had merely "informed the defaulting mortgagors only of their right '"to assert in any lawsuit for foreclosure and sale the nonexistence of a default or any other defense [they] may have to acceleration and foreclosure and sale,"'" had concluded that that notice "did not strictly comply with the terms of the mortgage because the notice did not inform the mortgagors of their right and need to initiate legal action to challenge the validity of the foreclosure" and that that defect rendered the subsequent foreclosure sale of the mortgaged property void. Ex parte Turner, 254 So. 3d at 212 n.1 (quoting Pinti, 472 Mass. at 237, 33 N.E.3d at 1222-23).

As noted by our supreme court in its footnote in Ex parte Turner, Pinti reasoned that a failure to notify defaulting mortgagors of the right to bring an action in court has the potential to mislead such mortgagors into the erroneous belief that there is "'no need to initiate a preforeclosure action against the mortgagee but [that they] could wait to advance a challenge or defense to foreclosure as a response to a [foreclosure] lawsuit initiated by the mortgagee -- even though, as a practical matter, such a lawsuit would never be brought.'" Ex parte Turner, 254 So. 3d at 212 n.1 (quoting Pinti, 472 Mass. at 237, 33 N.E.3d at 1222).

In this post-foreclosure ejectment case, which Barnes did not initiate,[6] Barnes has consistently asserted, in the trial court and on appeal,[7] that BONY's foreclosure sale of the

[6]We reject U.S. Bank's argument -- which was undisputedly not made before the trial court -- that Barnes's assertion of the insufficiency of Ocwen's notice as a defense to the ejectment action somehow amounted to her "commence[ment of]" or "join[ing in]" a "judicial action ... alleg[ing] that" the mortgagee "has breached ... any duty owed by reason of [the mortgage instrument]" so as to require a pre-action notice to the mortgagee of that insufficiency under paragraph 20 of the mortgage instrument.

[7]U.S. Bank's argument that Barnes has improperly requested that this court set aside the foreclosure sale is not well-taken. A close review of Barnes's brief indicates that she

subject property was unlawful because Ocwen's default notice did not strictly comply with paragraph 22. That default notice, as we have noted, stated only that Barnes "may have the right to assert in court the non-existence of a default or any other defense to acceleration or foreclosure" (emphasis added). Contrary to the trial court's conclusion, and U.S. Bank's appellate argument, Ocwen's default notice does not "strictly comply" with paragraph 22 in at least two respects. First, like the notice condemned by the Massachusetts court in Pinti, Ocwen's notice contains no reference to a right to affirmatively seek relief in a court action directly challenging the foreclosure in which, as we noted in Campbell, a wider range of defenses would be available to a mortgagor who is alleged to be in default. Second, the reference in Ocwen's notice is not unequivocal because it refers to what rights Barnes "may" have; as a federal court applying Alabama

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has asserted that the foreclosure sale of the subject property, upon which sale the ejectment claim in this action relies, is due to be set aside (because, she says (and we agree), that sale was void); however, she does not specify which court should or can grant relief operating directly upon the foreclosure sale itself, and Campbell indicates that a direct attack upon the foreclosure sale would be the appropriate vehicle to effectuate a "setting aside" of that sale.

law recently observed, a notice that informs mortgagors only that they "'may have ... to bring an action to have [a] foreclosure [proceeding] dismissed'" improperly "insists rights [that mortgagors] unconditionally possess [under paragraph 22] -- including their right to present defenses they 'may' have in a lawsuit -- are subject to some unknown and unspecified condition." Federal Home Loan Mortg. Corp. v. Capps, No. 2:16-CV-01713-JHE, March 4, 2019 (N.D. Ala. 2019) (not published in Federal Supplement); accord Federal Nat'l Mortg. Ass'n v. Marroquin, 477 Mass. 82, 90, 74 N.E.3d 592, 598 (2017) (applying Pinti and holding that loan servicer's use of word "may" in default notice did not strictly comply with paragraph 22 of mortgage instrument because that word improperly indicated that the right to bring a court action was "merely conditional, without specifying the conditions, and that the mortgagor may not have the right to file an action in court").

U.S. Bank asserts that the strict-compliance standard espoused by our supreme court in Jackson and Turner has never required a direct quotation of paragraph 22 in a notice. We are confident that a mortgagee, a loan servicer, or another

party tasked with sending a notice of default to mortgagors pursuant to provisions such as paragraph 22 has considerable latitude in the means to be employed to comply with such notice requirements. However, the foregoing authorities make clear that that latitude does not extend so far as to allow characterization of unequivocal rights in a default notice as conditional, nor to omit therefrom the fact that a mortgagor has the right to affirmatively file a civil action directly attacking a proposed or executed foreclosure sale. Neither are we long detained by the proposition that a mortgagor's right to raise the inadequacy of a default notice is somehow dependent upon previously having cured the default, as U.S. Bank also suggests; there is no indication in Ex parte Turner that the mortgagors in that case had cured their default before asserting the invalidity of the notice of default they had been sent, nor does paragraph 22 itself refer to any mitigating condition upon the rights required to be disclosed to mortgagors in a notice of default.

U.S. Bank also asserts that the strict-compliance standard set forth in Jackson and Turner, which it calls "vague" and "standardless," impairs contractual obligations,

infringes upon the due-process rights of litigants, and has "wreaked havoc" on the judiciary. However, those arguments, having been made to an intermediate appellate court that is bound by the precedents of our supreme court, see Ala. Code 1975, § 12-3-16, necessarily must fall upon deaf ears. If our supreme court -- if certiorari review is applied for and is granted in this case and the merits of U.S. Bank's arguments are reached (or if that court is otherwise properly confronted with substantially similar arguments) -- should agree that the constitutional concerns advanced here warrant overruling Turner and/or Jackson, that court is the sole body with the authority to do so, see Ala. Code 1975, § 12-2-13, and Rule 15, Ala. R. App. P.[8]

Finally, U.S. Bank asserts that the judgment of the trial court is due to be affirmed notwithstanding the question of the sufficiency of Ocwen's notice of Barnes's default, citing this court's pre-Turner opinion in Perry v. Federal National Mortgage Ass'n, 100 So. 3d 1090 (Ala. Civ. App. 2012), which declined to reverse an ejectment judgment on the basis of a

[8]Alternately, U.S. Bank may seek from our legislature a change in the common law of Alabama, see Ala. Code 1975, § 1-3-1.

failure on the part of a mortgage lender to comply with statutory (not contractual) obligations concerning advance public notice of a foreclosure sale, as well as Tidmore v. Citizens Bank & Trust, 250 So. 3d 577 (Ala. Civ. App. 2017), which quoted Perry as conditionally warranting affirmance if it were assumed that the appellant in that case had adequately preserved the issue of adequacy of notice. Perry and Tidmore, U.S. Bank asserts, stand for the proposition that defects in a mortgagee's notice will not invalidate a foreclosure sale when a mortgagor does not demonstrate actual "prejudice" resulting from the errant notice. However, the United States Court of Appeals for the Eleventh Circuit, in Dysart v. Trustmark National Bank, 729 F. App'x 722 (11th Cir. 2018) (not selected for publication in Federal Reporter), correctly discounted the precedential value of Perry (and, by implication, Tidmore) in the context of an improper notice of default:

> "Although Perry did not require the lender to strictly comply with the statutory requirements governing notice to the public before a foreclosure sale, nothing in the opinion addressed whether this harmless error standard also applies when a lender fails to comply with a mortgage's notice requirements before accelerating a loan. We conclude that it would be inappropriate to extend

> the reasoning in Perry from the context of a lender failing to comply with statutory public disclosure requirements to that of a lender failing to comply with a mortgage's disclosure requirements because to do so would be inconsistent with the Alabama Supreme Court's Turner and Jackson decisions requiring strict compliance with mortgage disclosure obligations."

729 F. App'x at 727. In other words, our supreme court's espousal of a strict-compliance standard in the specific context of the required contents of a notice of default under paragraph 22 may properly be deemed a specific instance in which an inconsistent "prejudice" standard (much like the doctrine of substantial compliance) is not to be applied.

For the reasons stated herein, the foreclosure sale underpinning U.S. Bank's claim to the subject property was void. We, therefore, reverse the judgment of the Jefferson Circuit Court ejecting Barnes from the subject property. The cause is remanded for the entry of a judgment in conformity with this opinion.

REVERSED AND REMANDED.

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

Edwards, J., concurs in the result, without writing.