

***COURT OF COMMON PLEAS OF PHILADELPHIA
ORPHANS' COURT DIVISION***

O. C. No. 68 of 1996

Estate of GUIDO VISCO, JR., Deceased

Before: BONAVIDACOLA, PRES. J., LAZARUS, J. and PAWELEC, S.J.

OPINION SUR EXCEPTIONS

PAWELEC, S.J.

This court en banc has before it exceptions to an Adjudication of Administrative Judge Tucker dated May 22, 2000.

Guido Visco, Jr., died on December 30, 1995. By Decree dated January 10, 1996, the Register of Wills admitted a writing dated July 24, 1991 to probate as the Last Will and Testament of Guido Visco, Jr., and, granted Letters Testamentary to Peter Zito, III.

On July 28, 1999, Peter Zito, III, filed his "First Interim Account" as executor. Rita Visco, mother of the decedent, appeared to claim principal, interest and attorneys fees under a mortgage which was executed by the decedent on November 1, 1994. Said mortgage contains a recital which reads as follows:

"WHEREAS, the Mortgagor, in and by a certain Obligation or Writing, obligatory under the hand and seal of the Mortgagor, duly executed, bearing even date herewith, stands firmly bound unto the Mortgagee in the sum of EIGHTY THOUSAND (\$80,000.00) Dollars, lawful money of the United States of America, conditioned for the payment to

the Mortgagee of the just sum of FORTY THOUSAND (\$40,000.00), WITH INTEREST AT THE RATE OF 8% PER ANNUM, PRINCIPAL AND INTEREST OF \$811.06 PAYABLE MONTHLY FOR A PERIOD OF SIXTY (60) MONTHS.....” (Emphasis supplied)

The mortgage contains a provision for default which reads as follows, in relevant part:

“PROVIDED, HOWEVER, and it is thereby expressly agreed, that if at any time default shall be made in the payment of said principal sum or any balance thereof at maturity, or of an installment of principal and of interest as aforesaid, for the space of 30 days after such payment thereof shall fall due;: then and in such case the whole principal debt aforesaid or so much thereof as shall then remain unpaid shall, at the option of the mortgagee, become due and payable immediately, and payment of said principal debt, or all unpaid installments thereof and all interest thereon, may be enforced and recovered at once, anything therein contained to the contrary notwithstanding; that thereupon a Writ of Execution is properly issued upon the judgment obtained upon said Obligation, or by virtue of said Warrant of Attorney, or a Complaint or any other legal proceeding is properly filed, based upon this Indenture of Mortgage, that an attorney’s commission for collection viz: Five per cent of the indebtedness or Two Hundred Dollars, whichever is the larger amount, shall be payable, and shall be recovered in addition to all principal and interest besides costs of suit, as in and by the said recited Obligation and the Condition thereof, relation being thereunto had, may more fully and at large appear.” (Emphasis supplied)

At hearings held April 18 and 19, 2000, the aforementioned mortgage was marked and received as Exhibit “R-Visco-2”. The accompanying bond and warrant was marked and received as Exhibit “R-

Visco-1". No evidence was offered or received as to whether or not the decedent had made any payments on the mortgage before he died on December 30, 1995. In her Adjudication dated May 22, 2000, the Auditing Judge, Administrative Judge Tucker, disposed of the claims on the mortgage in the following manner:

" The claimant has the burden of proof in establishing debts of decedent. Hartley Estate, 23 Fiduc.Rep. 47, 21 (1972). During the hearing testimony was presented regarding the claims of Rita Visco in the amount of \$99,510.00 but the only documentation supporting any claim was for the \$40,000.00 mortgage. It was stipulated by and between counsel that the \$40,000.00 mortgage did exist and was represented by Exhibit R.Visco 2. Under the terms of the mortgage the Decedent would repay \$40,000.00 over a 5 year period, \$811.06 monthly, at a rate of 8% interest per annum. Assuming the decedent made payments under the mortgage from December 1994 until the month of his death, December 1995, this would reduce the \$40,000.00 claim accordingly. The account will reflect that a mortgage balance of \$30,267.28." (Emphasis supplied)

The Auditing Judge then awarded the sum of \$30,267.28 to Rita Visco in full and final satisfaction of her claims to principal, interest and attorney's fees under the mortgage.

Rita Visco has filed exceptions to the Adjudication of Administrative Judge Tucker. One exception asserts error in assuming that payments were made when the estate of the deceased mortgagor presented no evidence that payments were made. A second exception asserts error in applying the entire amount of the "assumed" payments to

principal, that is, in failing to award interest to the mortgagee. A third exception asserts error in failing to award attorney's fees of \$2,000.00, that is, 5% of \$40,000.00.

The estate of the deceased mortgagor did not file exceptions to the Adjudication. In opposition to the exceptions of the mortgagee, the estate asserts that the mortgagee failed to meet her burden of proving that payments had not been made on the mortgage; that the mortgagee has cited no case law or statutory authority in support of her claim for interest under the mortgage; and, that the mortgage does not provide for payment of attorney's fees in the event of the death of the mortgagor. In Paragraph 9 of the "Reply to Exceptions", the estate takes the position that, "The Adjudication properly found a balance due on the mortgage of \$30,267.28." In the Conclusion of his Brief In Opposition to Exceptions, counsel for the estate makes the following statement: "The Executor does not dispute that the amount owing under the mortgage is \$32,256.82 and the interest at the rate awarded by the Court."

In disposing of exceptions to an Adjudication, this court en banc is, "....performing an essentially appellate function." In Re Duncan Trust, 480 Pa. 608 (1978) The scope of our review is set forth in Estate of Dembiec, 321 Pa.SuperiorCt. 515, 519-520 (1983), to wit,

“ On appeal, the findings of an Orphans’ Court judge who hears testimony without a jury are entitled to the weight of a jury verdict. *In re: Masciantonio’s Estate*, 396 Pa. 16, 151 A.2d 99 (1959). This rule is particularly applicable to

‘findings of fact which are predicated upon the credibility of the witnesses, whom the judge has had the opportunity to hear and observe, and upon the weight given to their testimony’ *Herwood v. Herwood*, 461 Pa. 322, 336 A.2d 306 (1975). In reviewing the Orphans’ Court’s findings, our task is to ensure that the record is free from legal error and to determine if the Orphans’ Court’s findings are supported by competent and adequate evidence and are not predicated upon capricious disbelief of competent and credible evidence. *In re: Estate of Damario*, 488 Pa. 434, 412 A.2d 842 (1980). However, we are not limited when we review the legal conclusions that Orphans’ Court has derived from those facts. *In re: Ischy Trust*, 490 Pa. 71, 415 A.2d 37 (1980).”

In the instant matter, the estate of the deceased mortgagor had the burden of proving that payments had been made under the mortgage.

This is because,

“The possession of an instrument in writing for the payment of money affords proof, *prima facie*, of a right in the holder to recover upon it according its terms. The holder is not required to prove that it has not been paid. His case is made by the production of the instrument in the first instance, and the burden of showing payment is on him who alleges it. Whether the instrument be a note, a bond, or a contract,, the rules of evidence are the same. The instrument makes for the holder a case, *prima facie*, on which he could recover before a jury,” *Whitney v. Hopkins*, 135 Pa. 246, 255 (1890).

See also *Snyder Estate*, 368 Pa. 393 (1951), *Cauffiel v. Glenn*, 345 Pa. 159 (1942), and, *Sears’s Estate*, 313 Pa. 407 (1934). There is no evidence in the record to support the assumption of the Auditing Judge, to wit, “.....that the decedent made payments under the mortgage from December 1994

until the month of his death, December 1995,” In making said assumption, the Auditing Judge committed legal error, and, made a finding which is not supported by any evidence. The court en banc notes that if the decedent had made thirteen monthly payments of \$811.06, from December 1994 through December of 1995, the total of said payments would be \$10,543.78, not \$9,732.72. Applying all \$10,543.78 against principal, as did the Auditing Judge, would reduce the principal debt from \$40,000.00 to \$29,456.22, not \$30,267.28. The court en banc must sustain the exception which asserts error in assuming that payments were made under the mortgage.

Having assumed that the decedent made \$9,732.72 in payments under the mortgage, the Auditing Judge applied that entire amount against principal, thus reducing the principal debt from \$40,000.00 to \$30,267.28, and, failing to award interest to the mortgagee. The holder of an instrument in writing is *prima facie* entitled to recover upon it according to its terms. See Whitney, supra. The instant mortgage expressly provides that the mortgagor is to pay interest at the rate of 8% per annum, and, that each of sixty monthly payments of \$811.06 is to be composed of both principal and interest. In awarding the sum of \$30,267.28 to the mortgagee, the Auditing Judge failed to award interest and thereby committed legal error. The court en banc must sustain the exception which asserts error in failing to award interest to the mortgagee.

Having assumed that the decedent made \$9,732.72 in payments under the mortgage, the Auditing Judge applied that entire amount against principal, thus reducing the principal debt from \$40,000.00 to \$30,267.28, and, failing to award attorney's fees to the mortgagee. Attorney's commissions, when specified in a mortgage, are recoverable in a proceeding in the Orphans' Court. Rowe's Estate, 22 Pa.SuperiorCt. 597 (1903). It has been held that,

“while stipulations for the payment of attorney's commissions in mortgages and other securities are valid, they are, nevertheless, subject to the equitable control of the court, and will be enforced only to the extent of compensating the plaintiff for reasonable and necessary expenses of collection.” Scott v. Carl, 24 Pa.SuperiorCt. 460, 461 (1904)

See Daly v. Maitland, 88 Pa. 384 (1879), and, Philadelphia Acceptance Corp. V. Krapf, 35 D&C3d 101 (1984). In determining the reasonableness of an attorney's fee in collecting upon a mortgage, the Court should consider,

“.....The amount and character of the services rendered; the labor, time and trouble involved; the character and importance of the litigation; and the amount of money or value of property affected; the professional skill and experience called for; the standing of the attorney in his profession; the ability of the client to pay; and the pecuniary benefit derived from the services,” Philadelphia Acceptance Corp., supra, at 105 (citation omitted)

The instant mortgage expressly provides that the mortgagor is to pay an attorney's commission for collection when any legal proceeding is properly filed to collect thereon. In this case, the estate of the deceased mortgagor

failed to make any payments under the mortgage following his death, and, disputed the amount due thereunder. The mortgagee was thus forced to retain counsel to enforce the mortgage. There is nothing in the record to indicate that the Auditing Judge even considered an award of attorney's fees to the mortgagee. In awarding the sum of \$30,267.28 to the mortgagee, the Auditing Judge failed to award attorney's fees and thereby committed legal error. The court en banc must sustain the exception which asserts error in failing to award attorney's fees to the mortgagee.

As a reviewing Court, this court en banc cannot make findings of fact. This matter should be referred back to the Auditing Judge to make a Supplemental Adjudication in accordance with the discussion in this Opinion. Accordingly, the matter will be referred to the Administrative Judge for assignment to another Auditing Judge.

BY THE COURT:

PAWELEC, S.J.

Gregory A. Baltz, Esquire
for Exceptant, Rita Visco

Blasco Mattioni, Esquire
Mattioni, Ltd
for Accountant, Peter Zito, III