IN THE SUPREME COURT
IN AND FOR THE STATE OF FLORIDA
CASE NO: 69,371
DCA NO: BF-112

EVELYN M. BROWN,

Appellant,

vs.

SHELIA DAVIS; ROBERT B. PRUETT and wife, SHARON PRUETT; CARROLL DEMMON and wife, SARA DEMMON; BUDDY WILKINSON; WEST FLORIDA TITLE AND LAND COMPANY; and UNITED STATES OF AMERICA, acting by and through Farmers Home Administration, U.S. Department of Agriculture,

Appellees.

Appeal from the District Court of Appeal
First District of Florida

REPLY BRIEF OF APPELLEE UNITED STATES OF AMERICA

Respectfully submitted,
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STATEMENT OF THE CASE

Because the appellant, Evelyn Brown, the plaintiff below, has made a number of inaccurate statements pertaining to the controlling facts in the instant case, and because the facts are somewhat convoluted, the government will restate in some detail what it believes to be the controlling facts to the extent that they differ from Ms. Brown's. In addition, in order to make it easier to follow, the government in this brief will refer to all parties by their name.

I. NATURE OF THE CASE

This is an action brought by the plaintiff seeking ejectment. Both the defendant Davis and the government as an intervening defendant allege an number of equitable defenses including unjust enrichment, innocent mutual mistake, and equitable conversion.

II. COURSE OF PROCEEDINGS

The plaintiff filed her initial complaint in September 1982 against the defendant, Shelia Davis. Mrs. Davis filed an answer and a third party complaint against a number of entities, including the United States of America and its agent, Jack Drasko. On December 14, 1982, the government filed a motion to dismiss the complaint against it and its agent on the grounds the court lacked personal jurisdiction

and that Mrs. Davis had not properly perfected service on the government. During this period the plaintiff, Mrs. Brown, moved for summary judgment and Mrs. Davis, together with the Demmons, moved to dismiss. All matters were heard on February 8, 1983. At the conclusion of the hearing the court dismissed the government and its agent, Jack Drasko, as a party to the litigation. See, the court's order of May 31, 1983. The court also ruled on Mrs. Brown's Motion for Summary Judgment, granting it in part, as evidenced by the Court's order dated May 23, 1983.

On June 8, 1983, Mrs. Davis re-filed a third party complaint against the government and its agent Drasko and others. On August 8, 1983, the government again moved to dismiss the third party complaint against it and its agent.

On November 17, 1983, Mrs. Davis again attempted to amend the third party complaint to correct deficiencies. On December 9, 1983, the government again filed a Motion to Dismiss.

On September 13, 1984, the court held a hearing on all pending matters and a pre-trial conference. During this hearing, the court dismissed the government and its agent as third party defendants. The court issued its pre-trial order dated September 28, 1984, wherein it indicated that the remaining principal issues were the remedy due the

plaintiff and the issue of damages. Trial of the case was set for December 11, 1984, at 9:30 a.m. (App. 15). On September 20, 1984, the government filed a motion to intervene as a party defendant and also filed an answer.

At the close of the trial, the court found that the most equitable remedy for all concerned was to require both parties to exchange deeds and, in addition, awarded the appellant her costs and $500 in damages.

III. DISPOSITION OF LOWER TRIBUNAL

The trial court, after hearing all the witnesses and making a finding as to credibility, found that Mrs. Davis had innocently built a house on property owned by Mrs. Brown. It further made a factual finding that the two lots in question were substantially the same so as to be identical, based on the testimony of the various appraisers and the land surveyor. (Tr. 97). It directed the exchange of the lots and found that Mrs. Brown had sustained damages in the amount of $500. (Judge's Ruling, App. 16).

The appellant appealed the trial court's ruling and on September 2, 1986 the First District Court of Appeals affirmed in part and reversed in part, finding that the plaintiff had not received complete relief. It remanded the matter to the Circuit Court for further action consistent with its findings. It further certified the court's follow-

ing question: "Can a court, in equity, order an exchange of deeds of two lots when the owner of one lot mistakenly constructs on the adjacent lot of the other owner. (App. 1). The appellant further presents the question that if the answer to the certified question is yes, the facts in this instant case do not justify the trial court's ruling.

SUMMARY OF ARGUMENT

A COURT IN EQUITY CAN ORDER AN EXCHANGE OF DEEDS OF TWO LOTS WHEN THE OWNER OF ONE LOT MISTAKENLY CONSTRUCTS ON THE ADJACENT LOT OF THE OTHER OWNER WHERE THE LEGAL REMEDY DOES NOT ACCORD BOTH PARTIES COMPLETE, FULL AND TIMELY RELIEF.

Both the trial court and the First District Court of Appeal recognized the well established principle that equity can be invoked where the legal remedies, although existing, are not adequate. The strict letter of the statute in the instant case provides the plaintiff with a windfall while severely handicapping two equally innocent parties; clearly an inequitable result. The legal remedies left the defendants are meaningless in this case. Thus, the trial court's decision was just, proper and equitable.

ARGUMENT

THE DISTRICT COURT OF APPEALS DID NOT ERR IN APPLYING EQUITABLE PRINCIPLES TO THE FACTUAL SITUATION PRESENTED.

It is now well established in the State of Florida that equity is invoked when the remedy at law is inadequate. The mere existence of the legal remedy does not necessarily preclude application of an equitable remedy. The question is the adequacy of the legal remedy. See, West v. Shirly, 69 So.2d 182 (Fla. 1953). A court of equity gives remedies and enforces rights in view of the totality of all the facts and circumstances in a particular case. See, Creiss Potassium Phosphate Co. v. Knight, 89 Fla. 1004, 124 So. 751 (1927). The question certified to this court by the First District Court of Appeals is, simply: Are there any circumstances under which a court of equity can exchange the deeds of two lots adjacent to each other in order to cure the mistake of one of the owners? The answer is, simply, yes, the court can, under any circumstances in which the remedy at law is inadequate. The appellant, in her brief, submits the additional question that if so, is the case at bar such a circumstance?

The plaintiff, in her initial brief, takes a curiously ambivalent position regarding this issue. First, she states that Mrs. Davis has adequate remedies at law and therefore equitable principles should not have been applied. However, throughout her brief, she then states that the relief re-

quested is for the court to direct that Mrs. Brown be awarded the value of her lot, without improvements plus interest at the legal rates on the dates on which the improvements were made or, in the alternative, that she be granted possession of the improved lot. By so fashioning such a request, the plaintiff's attorney answered the question posed to this court as she is requesting equitable relief; albeit different in kind than that which the lower court granted initially. Therefore having relied on equity, the plaintiff in effect waives any objection she may have and now can no longer rely on this issue on the grounds of appeal. See, Rupp v. Pickford, 175 So.2d 72 (3rd DCA 1965); Holand v. Cates, 43 So.2d 848 (Fla. 1950); and Coleman v. Coleman, 191 So.2d 460 (1st DCA 1966). In addition, there are several other reasons why the equitable principles were properly applied by the court below in the instant case.

First: The plaintiff has overlooked the fact that the government, as an intervening defendant, has also sought equity in this case and as an innocent mortgage holder has no adequate remedy at law.

Second: The plaintiff has glossed over the fact that Mrs. Davis received her financing in order to permit her to purchase a home. This financing was received via the United States of America acting by and through the Farmers Home

administration, U.S. Department of Agriculture. The FmHA was acting in accordance with the provisions of Title 5 of the Housing act of 1949, as amended, 42 U.S.C. §1271. As stated in the Act, in order to qualify for financial assistance, Mrs. Davis had to demonstrate that she was unable to receive financing from any other commercial source.

Third: The plaintiff has ignored the fact that Mrs. Davis is an uneducated person who is neither financially able to hire an attorney nor is she capable to represent herself. She is, for all intents and purposes, at the mercy of the court.

Fourth: As the trial transcript reveals, the trial court, after considering the evidence presented during the trial, including the testimony of the plaintiff, the land surveyor, and two qualified appraisers, found, as a matter of fact, that there was negligible difference in the value between the two lots as unimproved and that the difference was approximately $500. The trial court awarded the appellant, Mrs. Brown, $500 in damages. By the appellant's own admissions, she made no improvements whatsoever to the land. (Tr. p. 45). Hence, any value over and above the value of the unimproved lot itself was through the efforts of Mrs. Davis. No where in the record is there any indication that

Mrs. Davis or the FmHA were aware of any mistake at the time the house was built.

Fifth: The appellant continues to maintain that she did not contribute to the problem whatsoever and therefore is more innocent than all the other parties involved. This self-serving declaration is simply not true for numerous reasons. Moreover, it is of only minimal importance where the court is attempting to fashion a decision fair to all parties involved.

It should be pointed out that the conclusions of the trial court come before the appellate court clothed with the presumption of correctness. See, Atlantic C.L.R. Co. vs. Baynard, 112 Fla. 544, 151 So. 5 (1933); St. Joe Paper Co. vs. State Dept. of Environmental Regulation, 371 So.2d 178 (1st DCA 1979). In support of these presumptions the appellee, as the prevailing party, is entitled to the benefit of all reasonable inferences that can be drawn from the evidence, viewed in the light most favorable to it. See, Atlantic C.L.R. Co. v. Baynard, supra. The evidence contained in the case is that the house was constructed in March 1980, (Tr. pp. 7, 84), yet Mrs. Brown never complained until the matter of the erroneous survey was brought to her attention by the appellee, Mrs. Davis, in 1982. (Tr. p.38). The record is also clear that Mrs. Brown, an experienced and li-

censed real estate broker (Tr. p. 33) purchased this lot as an investment (Tr. p. 35) and attempted without success to sell the tract of land for a profit. (Tr. p. 41). Mrs. Brown's testimony is that she made a habit of going to visit the lot each year; (Tr. pp. 36, 37); she missed only one year; (Tr. p. 37); that she intended to visit the property in 1981 but Mrs. Davis called her about the property before she had an opportunity to do so. (Tr. p. 37). On pages 39 through 50 of the transcript, the court posed a number of questions which impacted on Mrs. Brown's credibility concerning how she selected this particular lot.

The issue of appellant's credibility was brought into this case by the appellant herself when, at the outset of the hearing, she made three points very clear: (i) that the mistake in the case was not an "innocent mistake" (Tr. p. 13); (ii) that she, herself, was "totally innocent" in the case (Tr. p. 12); and (iii) appellant's statement through her attorney that she was entitled to the lot as improved (Tr. pp. 14, 16). The issue of the innocence of the appellant was therefore placed in issue by the appellant herself. Once the issue was placed into evidence, the credibility of the witness is one for the trier of fact to judge and within the discretion of the trier of fact. See, Hendley v. Parson, 433 So. 2d 458 (4th DCA 1984). It is also clear from

the record in this case that the court, recognizing its responsibility to determine whether to believe Mrs. Brown when she stated she had nothing to do with the mistake being made and did not know about the building of the house until some time after its completion, ruled that she in fact knew or should have known about the building and allowed the building to continue to completion. While there is no factual ruling on this point, it is, nevertheless, clear that the court was measuring Mrs. Brown's credibility. (Tr. p. 40). Based on the court's decision, it can be inferred that the court did not find Mrs. Brown to be worthy of belief. As stated above, the appellee, as the prevailing party is entitled to the benefit of all reasonable inferences that can be drawn from the evidence viewed in the light most favorable to it. In the instant case, viewing all the evidence contained in the record in a light most favorable to the government, it can be demonstrated that Mrs. Brown's credibility was suspect and the court, as the trier of fact, simply did not believe that it was reasonable that she had no knowledge of the construction of the house until the time she stated she did.

This inference is further buttressed by the fact that the appellant admits that she purchased the property for an investment. (Tr. pp. 34, 35). The cost to her was $2,843.

86. (Tr. p. 36). The events have proven that investment to be a poor one as Mrs. Brown at one time attempted to sell it for $5,000 and was unable to do so. (Tr. p. 41). The remaining evidence in the record is that the subdivision where the the two lots are located is presently not being developed and the land value of that subdivision is not appreciating at even the county average. (Tr. p. 79). In short, appellant made a bad investment and now believes she has found a way to recoup her money and make a profit at someone else's expense. It is simply inequitable to permit the appellant to do so.

As a general rule, it can be said that in order to preclude a resort to a court of equity, the remedy at law available must be as practical and as efficient to the ends of justice and its prompt administration as the remedy fashioned in equity. In other words, the jurisdiction in equity attaches unless the legal remedy both in respect to the final relief accorded the parties and the mode of attaining it is as efficient as the remedy which equity affords under the same circumstances. See, Roe v. Roe, 95 Fla. 488, 117 So. 108 (1928).

Applying that standard to the instant case, the facts of the case which must be considered are the rippling effects that the harsh results which the appellant seeks will

have on the various party defendants. The principal defendant, Mrs. Davis, is without the capability of hiring an attorney to represent her interest. Appellant's argument that she can recover from "the responsible party" is unfortunately an empty one. It is highly unlikely that the appellant would be able to find an attorney to represent her interest in any such action, assuming for the moment that the "responsible party" can be ascertained and that the statute of limitations has not expired. It is probable that she will be unable to determine just who is the "responsible party" and further, that the statute of limitations for bringing an action against that party has now expired thus leaving her with the alternative of either, at her expense, (utilizing funds made available to her by the Farmers Home Administration) remove the house - which appellant has argued she would resist - or, lose possession of her home entirely. Mrs. Davis' home is certainly unique to her and is certainly as unique as the land in question. Its loss would leave Mrs. Davis homeless but still responsible to the government for the repayment of the loan funds she received to purchase the home.

The government is also an innocent party. The appellant ignores this fact and further ignores the damage that the requested relief would impose on the government. The

government's only remedies would be: (i) to loan Mrs. Davis additional funds to purchase the home from the appellant and then foreclose upon it when she is unable to make the new and enlarged payments; (ii) not make any loan funds available to Mrs. Davis and upon her loss of her home to the appellant reduce the government's debt to judgment, the effect of this which would be to hamper Mrs. Davis' ability to improve her economic situation for the life of the judgment; or (iii) allow Mrs. Davis to lose her home and then forgive her of the debt. This in turn would create a taxable event for Mrs. Davis, thereby causing her further harm, and would result in the government's not being repaid for its loan. Under no circumstances can any of the above results be considered fair and equitable given the facts of the case.

Counterbalanced against these results is the fact the appellant purchased the property as an investment and subsequently learned that investment was a poor one. The court, at the time of trial, attempted to fashion an equitable result which would protect her investment (albeit a poor one) and compensate her for any loss in value occasioned by the new lot yet at the same time protect the interests of the innocent parties, i.e. Mrs. Davis and the government. That ruling, in effect, placed Mrs. Brown in the same situa-

tion she was in before. The real reason for Mrs. Brown's appeal is that she does not want to be in the same position she was previously because the property in which she invested was and is unmarketable and she stands to lose that investment.

The appellant then states that the controlling case law is inopposite and stresses five differences in the two lots, attempting to demonstrate that the result reached by the trial court was inequitable. While these differences are of form and not substance, all but one can be easily corrected upon remand. [1]

The appellant's argument on appeal is based on three points: (i) that the ordering of the exchange of the lots is an award of damages; (ii) that the court has other equitable

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[1] The government understands the first three differences cited by the appellant have already been cured. The fifth difference is a result of the appellant's failure to maintain the property, allowing the trees and underbrush on the property to grow. This condition of overgrowth would exist on any lot owned by the appellant as, by her own admission, she has taken no action to maintain the property. Moreover, it would take minimal effort to correct this difference by clearing away the underbrush. This difference, despite the appellant's characterization, was not found by the court to be substantial and the court found as a matter of fact that it had no real effect on the value of the two lots. The fourth difference cited by the appellant, that regarding the elevation of the two lots, was considered by the court and was presumably the reason for the award of $500 damage. It should be noted that the difference as to elevation is the only one presented by the appellant at the time of the hearing.

options available to it which it should have exercised and (iii) that the controlling case of Voss v. Forgue is factually distinguishable from the instant case in four respects.

Considering appellant's first argument, the court is confronted with the fact that the First District Court of Appeal in effect failed to follow the trial court's findings of fact and instead substituted its own judgment. This is improper as the First District Court of Appeal did not have the benefit of the live testimony and the benefit of judging the demeanor of the witnesses. Therefore, it should not have substituted its own factual findings for that of the trial court, especially where these findings pertain to "differences" in the property not originally presented to the trial court and which were easily correctible.

Point Two, the court must consider the historical purposes and reasons for equity jurisdiction. It is well established that "equity regards as done that which ought to be done". Appellant and the principal defendant, Mrs. Davis, should simply have exchanged the two lots involved without resorting to the courts, with one party making up any material differences in value to the other. This is what neighbors do and are expected to do. Instead, appellant initially sought, in effect, a windfall, possession of the improved property. (Tr. pp. 14-17). In her initial brief to

this court, appellant softened this rather unrealistic and calculating demand by stating she is willing to allow this court to order the principal defendant, Mrs. Davis, to buy the property from her at its fair market value, plus interest. Appellant justifies this action by citing a general rule that equity will not help one who has made improvements on the land of another by mistake where the true owner has not acquiesed in the improvements or knew of the improvements. As stated previously, while the trial court made no specific finding regarding this contention, it is clear that the trial court was considering the credibility of the appellant in ruling as it did. The clear inference is that the trial court found the appellant to be incredible. The First District Court of Appeal on review should not have reweighed the evidence and substituted its judgment for that of the trier of facts. In this regard, see Manufacturers Nat'l Bank of Hialeah v. Canmont Intern, Inc., 322 So.2d 565 (1975) and Dowling v. Loftin, 72 So.2d 283 (Fla. 1954).

CONCLUSION

In summary, the appellee/defendant, United States of America, would state that the lower court pondered all probative evidence in the case and determined that the principles of equity should be applied based on the facts of this case. Thereafter, the court correctly determined that the

controlling case in Florida is Voss v. Forgue, 84 So. 2d 563 (Fla. 1974). After finding the determinative facts in the case, the court found that it was in the best interest of all parties to require both the plaintiff and the principal defendant to exchange lots and, in addition, awarded the appellant $500 in damages. That ruling is based on the facts and is equitable to all parties involved. It is clear that as a general rule, the statutory legal remedy provided individuals for loss of property are not adequate in all instances particularly in instances where equity can fashion a remedy which would be plainer, more certain, more prompt, more sufficient and more fully complete and practical than the legal remedy afforded by statute. The remedy fashioned by the trial court in the case sub judice is superior to that at law and therefore equity should be invoked to grant the relief sought.

WHEREFORE, the United States of America respectfully submits that the appeal of the defendant is frivilous and should be denied.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Brief of Appellee/Defendant, United States of America, was furnished by regular course of mail this 14th day of November, 1986, to W.A. SWANN, JR., ESQ., Attorney at Law, P.O. Box 17687,

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Respectfully submitted,

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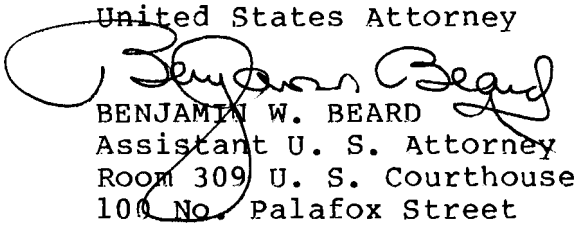

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