

RENDERED: July 24, 1998; 2:00 p.m.  
NOT TO BE PUBLISHED

NO. 96-CA-3209-MR

FIFTH THIRD BANK OF  
NORTHERN KENTUCKY, INC.

APPELLANT

v.

APPEAL FROM KENTON CIRCUIT COURT  
HONORABLE STEVEN R. JAEGER, JUDGE  
ACTION NO. 96-CI-000629

HENRY B. SCHMIDT and  
GWENDOLYN SCHMIDT

APPELLEES

OPINION  
AFFIRMING

\* \* \*

BEFORE: GUIDUGLI, KNOX, AND MILLER, JUDGES.

KNOX, JUDGE: Appellant takes this appeal from the ruling of the Kenton Circuit Court sustaining appellees' CR 60.01 motion to amend a judgment and order of sale entered in a foreclosure action. Appellees brought that motion on the grounds of clerical error approximately three (3) months after judgment had been entered.

This action arose as a foreclosure action. In April 1996, appellant bank (hereafter "Fifth Third) filed suit to enforce two notes, both of which had been signed by Mr. and Mrs. Schmidt. The first note, in the principal amount of \$50,000.00, was dated May 5, 1975, and was secured by real estate owned by the Schmidts at 1075 Montague Road, in Kenton County. On July 11, 1990, the Schmidts executed a credit agreement with the bank for up to \$125,000.00 secured by a second mortgage on the Montague Road property. The Schmidts defaulted on both notes, owing \$20,400.00 on the first note, and owing \$86,589.49 on the second note.

Prior to filing this action, Fifth Third had obtained a judgment against Mr. Schmidt in another action filed in Kenton Circuit Court styled Fifth Third Bank of Northern Kentucky, Inc. v. Henry B. Schmidt, for the enforcement of an unsecured personal loan to Mr. Schmidt. Mrs. Schmidt was neither a party to that suit nor a signatory on that loan. Fifth Third obtained judgment in that suit in March 1996 and filed a judgment lien against the Montague Road property in the amount of \$98,130.39.

This foreclosure action was referred by the trial court to the master commissioner. The master commissioner recommended that the Montague Road property be sold, with Fifth Third's mortgage securing the first note constituting a first lien, its mortgage securing the second note constituting a second lien, and its March 1996 judgment lien against Mr. Schmidt constituting a third lien. The trial court confirmed the commissioner's report, and on August 6, 1996, the trial court entered a judgment and order

of sale. With respect to Fifth Third's prior judgment against Mr. Schmidt, obtained in March 1996, the trial court's judgment and order of sale provided, at paragraph 3:

Plaintiff, Fifth Third Bank of Northern Kentucky, Inc. shall also recover judgment against the defendants Henry B. Schmidt and Gwendolyn Schmidt, in rem, and shall recover pursuant to its judgment lien in the total amount of \$98,130.39, plus interest thereon at the rate of 12% per annum from March 18, 1996 until paid, for all of which execution may immediately issue. To secure said bank in the above sums, said bank is adjudged a lien holder prior and superior to all liens and encumbrances, except ad valorem taxes for the year 1996, the costs of this action, and the prior lien for said bank described in paragraphs 1 and 2, above. [Emphasis added]

On October 23, 1996, the Schmidts moved the trial court, pursuant to CR 60.01, to correct its judgment of August 6, 1996, arguing that paragraph 3 contained a clerical error which should be corrected to provide that Fifth Third would recover its judgment for \$98,130.39 against Henry B. Schmidt's interest alone in the Montague Road property. After all, the March 1996 judgment was against Mr. Schmidt, not Gwendolyn. On October 28, 1996, the trial court entered a corrected judgment and order of sale, amending paragraph 3 of the original judgment to read:

Plaintiff, Fifth Third of Northern Kentucky, Inc., shall also recover judgment against defendant Henry B. Schmidt, individually, in rem, and shall recover pursuant to its judgment lien in the amount of \$98,130.39, plus interest thereon at the rate of 12% per annum from March 18, 1996 until paid, for all of which execution may immediately issue on one-half (1/2) the amount remaining from the proceeds of the sale of the property described in paragraph 1, above, after application of the proceeds of sale to satisfy the judgments

described in paragraphs 1 and 2 above. To secure said bank in the above sums, said bank is adjudged a lien holder prior and superior to all liens and encumbrances, except ad valorem taxes for the year 1996, the costs of this action, and the prior lien for said Bank described in paragraphs 1 and 2, above, on Henry B. Schmidt's undivided one-half (1/2) interest in the subject property.

Although appellees' motion was filed one week before the scheduled sale of the Montague Road property, the sale proceeded. The proceeds from the sale, less the sums due on appellant's first and second mortgages and the costs of sale, are currently being held in the escrow account of the Kenton Circuit Clerk.

Appellant moved for reconsideration of the court's ruling, or, in the alternative, for an evidentiary hearing on the issue of whether the inclusion of Mrs. Schmidt in paragraph 3 of the original judgment was a clerical mistake. That motion was overruled by the trial court. Fifth Third argues that by correcting the original judgment and order of sale in such a way as to insulate Mrs. Schmidt's interest in the Montague Road property from the bank's judgment lien on that property, the trial court did not correct a clerical error, but rather corrected an alleged legal mistake. Under such circumstances, Fifth Third asserts, CR 60.01 does not provide a mechanism for relief. CR 60.01 states:

Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders  
. . . .

Both parties have cited Jude v. Morwood Sawmill, Inc., Ky. App., 726 S.W.2d 324 (1987). In Jude, suit was brought against a corporate purchaser of lumber and its president in his individual capacity to collect money owed for lumber delivered. At trial, Jude, the guarantor, acknowledged that he had signed the personal guaranty. However, no instructions were given to the jury relating to Jude's liability, and no motion for directed verdict was offered by the plaintiff against Jude. The jury found in favor of the plaintiff, after which the trial court entered judgment against the "defendant," referring only to the corporate defendant. Two months later, the trial court, without notice or motion to do so, entered a corrected judgment stating that its original judgment was intended against the "defendants," and that the omission of the "s" was a clerical mistake which the court was correcting pursuant to CR 60.01. This Court disagreed that the omitted "s" was merely a clerical mistake and held that since the question of Jude's personal liability was not pursued at trial and since no judgment was taken against Jude, CR 60.01 could not be used to create liability.

In this case, the issues before the trial court were the Schmidts' liability on the 1975 promissory note, their liability on the credit agreement, and Fifth Third's right to foreclose upon the Montague Road property, which secured those two obligations. While Fifth Third's foreclosure complaint claimed an interest in the Montague Road property by virtue of the judgment lien claimed by it as a result of its March 1996 judgment against Mr. Schmidt, its

complaint made no claim that the judgment lien in any way affected Mrs. Schmidt's interest in the Montague Road property. Rather, the complaint stated that the plaintiff "claims an interest in the subject property" by virtue of its judgment lien issued in the action against Mr. Schmidt.

No proof was taken nor any issue made that Mrs. Schmidt's interest in the Montague Road property was subject to Fifth Third's judgment lien. In Jude, the court's corrected order created liability where liability had not been determined. Here, the trial court's corrected judgment deleted all reference to a liability where the record demonstrates that liability could not exist.

Under the circumstances of this case, we do not believe the trial court abused its discretion when it determined that inclusion of Gwendolyn Schmidt in paragraph 3 of the original judgment constituted a "clerical error" which could be addressed by CR 60.01. Mrs. Schmidt had no liability under the March 1996 judgment and thus, liability was nonexistent for purposes of paragraph 3. Further, there was no proof taken by the master commissioner concerning Mrs. Schmidt's liability. Noting that Rule 60(a) of the Federal Rules of Civil Procedure is identical to Kentucky's CR 60.01, and that it very likely serves a similar purpose, this Court in Jude stated: "Rule 60(a) is available to show that a thing was done at one time which ought to be shown at that time. It is an entry now [nunc pro tunc] for something previously done so that the record can accurately reflect the truth. Rule 60(a) is primarily for mistakes which do not attack

the party's fundamental right to a judgment at the time it was entered." Jude, 726 S.W.2d at 326 (citations omitted).

The truth of the matter here appears to be that, absent language at paragraph 3 of the original order, no liability for the judgment obtained in March 1996 by Fifth Third against Mr. Schmidt could accrue to Mrs. Schmidt. Where no proof had been demonstrated of Mrs. Schmidt's liability on that claim, and where indeed no claim appears to have been articulated against her for liability, we do not believe we can conclude the trial judge abused his discretion by correcting his judgment to delete any reference of liability for her on that claim.

From that, we do not believe the trial judge abused his discretion in refusing to hold an evidentiary hearing on whether his corrected order addressed a clerical error.

Accordingly, we affirm the judgment of the Kenton Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

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