

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 1997-CA-002135-MR

J.G. HILDEN

APPELLANT

v. APPEAL FROM BREATHITT CIRCUIT COURT  
HONORABLE LARRY MILLER, JUDGE  
ACTION NO. 95-CI-0379

FIRST NATIONAL BANK OF  
JACKSON KENTUCKY

APPELLEE

OPINION  
VACATING AND REMANDING

\* \* \* \* \*

BEFORE: KNOPF, KNOX, and MILLER, Judges.

KNOPF, JUDGE: J.G. Hilden appeals from a final judgment of the Breathitt Circuit Court awarding First National Bank the sum of \$133,210.15 and ordering the foreclosure of certain real property in order to satisfy this judgment. Although multiple issues are presented on appeal, only one is dispositive of this case: Did the trial court give the appellant reasonable notice of the trial date? Finding that the trial court failed to give the appellant reasonable notice of the final trial date, we vacate and remand for a new trial.

This case presents a complex factual and procedural history. For business and personal reasons, Dwight Raines took out a series of loans from the First National Bank of Jackson, Kentucky (First National), the appellee. Three (3) such loans are particularly relevant to this case: one in 1987, one in 1990, and one in 1992. As security for the 1987 and 1990 loans, Raines pledged some of his business equipment. Raines' friend, J.G. Hilden, the appellant, also mortgaged two (2) tracts of real property in Breathitt County in order to secure the loans. The 1987 and 1990 loan agreements contained language purporting to give First National the authority to use Hilden's property as security for any future loans made to Raines.

Based on this language, First National issued another loan to Raines in 1992. [Record on Appeal (ROA), p. 7]. Once again, the Hilden property and Raines' business equipment served to secure the debt, which totalled approximately \$170,500.00. Apparently, Raines stopped making payments sometime later and First National sold his machinery to offset the balance. On October 24, 1995, First National brought an action against Raines and Hilden in Breathitt Circuit Court for the unpaid balance, including interest, on the 1992 loan. (ROA, p. 1). Discovery commenced in February 1996 after several delays. In November 1996, the trial court scheduled a pretrial conference for May 9, 1997 and a trial for May 29, 1997. (ROA, p. 81). The record reveals that the court sent a copy of its scheduling order to Hilden at his Florida mailing address.

Hilden and Raines filed a motion for summary judgment on April 25, 1997. (ROA, p. 101). On the same day, they also made a motion entitled "Defendants' Motion to Hold in Abeyance", which asked the court to suspend the pretrial conference and the trial until it ruled on their motion for summary judgment. (ROA, p. 99). Both defendants then filed a notice with the court on May 2, 1997, asking for a hearing on both motions on May 29, 1997. (ROA, p. 163). For unknown reasons, Hilden was not present for the hearing on May 29th. On that day, First National filed a response to the summary judgment motion and asked the court for permission to amend its pleadings to clarify an earlier admission. (ROA, p. 171). While the record does not contain the trial court's response to any of these motions, the court apparently denied the defendants' motion for summary judgment and rescheduled trial for June 14, 1997. (ROA, p. 177).

Although Raines and Hilden had worked together on their case without counsel until this time, Raines hired an attorney to represent him separately. On June 3, 1997, Raines' attorney filed an entry of appearance and a motion for a continuance with the court. The certificates of service on both documents made no mention of Hilden. (ROA, pp. 176-78). On June 6, 1997, the court heard Raines' motions, granted him a continuance, and rescheduled trial for July 26, 1997. (ROA, pp. 179-80). It also scheduled a hearing for July 11, 1997, to rule on First National's motion to amend its pleadings. The record does not indicate what happened at the July 11th hearing, but we presume that the court granted

First National's motion to amend its pleadings. (ROA, p. 180). The trial court's calendar for June 6th does not refer to Hilden, nor does the record contain any indication that Hilden received notice of the final trial date of July 26th.

Hilden did not appear for the bench trial on July 26th. Although First National presented evidence, Raines closed without offering any proof. At the close of evidence on July 28th, the court entered a final judgment awarding \$133,210.15 to First National. (ROA, p. 180). This figure represents the principal and interest alleged by First National to be owed on the 1992 loan. The court also ordered the sale of the two (2) tracts of real property Hilden had pledged as security for this debt. Again, the judgment does not name Hilden and provides no indication that the court served him with notice of its decision. According to his brief, Hilden learned of the final judgment on August 12, 1997, when an associate arrived in Breathitt County to retrieve any documents that Hilden may have missed. Hilden then filed a timely notice of appeal on August 21, 1997, but he did not name Raines as a party. (ROA, p. 181).

The only dispositive issue in this case is whether the trial court gave Hilden reasonable notice of the final trial date. Hilden argues that although he did receive notice of the tentative trial date of May 29th, he was not given notice of the final trial date of July 26th. Furthermore, he claims he was never provided any formal notice that any final judgment had been entered. CR 40 requires the trial court to give reasonable

notice to all parties not in default of the day on which a trial date will be determined. When this rule is violated, and the party seeking relief was not in default, a new trial is the proper remedy. Combs v. Griffith, Ky., 429 S.W.2d 849, 851 (1968).

Because Hilden was not in default and because the record contains no indication that Hilden received notice of the final trial date, we conclude that the trial court failed to comply with CR 40. It is clear that Hilden received notice of the tentative trial date of May 29th. However, his absence on that date does not excuse the failure to give him notice of the final trial date of July 26th. Prior notices of days on which trial dates will be fixed are irrelevant when determining whether a court has complied with CR 40. Id. Had the trial actually occurred on June 14th (the date it was initially rescheduled), Hilden would have no grounds for arguing lack of notice. His failure to appear on May 29th would excuse the court from providing him notice of the June 14th trial date. Nonetheless, on June 6th, the court rescheduled trial for July 26th. This constituted a violation of CR 40 because Hilden was not advised of the change. Consequently, the trial court failed to comply with CR 40 and a new trial is required.

The procedural posture of this case limits the scope of the proceedings on remand. Because Hilden failed to name Raines as a party to this appeal, all issues regarding Raines' liability are res judicata. Levin v. Ferrer, Ky., 535 S.W.2d 79, 82

(1975). Nonetheless, Raines is not a necessary party to a determination of Hilden's liability as surety for the 1992 loan. Land v. Salem Bank, Ky., 130 S.W.2d 818, 820 (1939). The trial court can resolve that issue on remand without Raines being a party to that proceeding. Accordingly, the judgment of the Breathitt Circuit Court as it pertains to Hilden is vacated, and this matter is remanded for further proceedings. On remand, this Court suggests that the trial court consider the following. First, the trial court should determine whether Hilden's defense concerns an issue of fraud, or an issue of contract formation. Second, once the court frames the issue raised by Hilden's defense, it should determine whether Hilden raised the defense in a proper manner. Third, assuming he raised a timely defense, the court should determine whether Hilden is precluded from asserting it because of his prior admissions in the pleadings. Fourth, assuming that the defense was timely and that Hilden is not precluded from asserting it, the court should then conduct a trial limited to the issue of Hilden's liability.

KNOX, JUDGE, CONCURS.

MILLER, JUDGE, CONCURS IN RESULT.

BRIEF FOR APPELLANT:

J.G. Hilden, Pro Se  
Deland, FL

BRIEF FOR APPELLEE:

Darrell A. Herald  
Bryant, Herald & Herald  
Jackson, Ky.