

Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-001192-MR

BRENDA KIRK SAUL

APPELLANT

v. APPEAL FROM BOYD CIRCUIT COURT
HONORABLE C. DAVID HAGERMAN, JUDGE
ACTION NO. 97-CI-00957

TIMOTHY W. FIELDS and
PAULA SUE FIELDS

APPELLEES

OPINION
AFFIRMING
** **

BEFORE: GUDGEL, CHIEF JUDGE; BUCKINGHAM, AND KNOX, JUDGES.

KNOX, JUDGE: Appellant, Brenda Kirk Saul, appeals from a judgment of the Boyd Circuit Court awarding appellees, Timothy and Paula Fields, damages in the amount of \$15,228.00 as a result of appellant's failure to perform the terms of a real estate contract. We affirm.

On May 7, 1997, appellant entered into a purchase and sale agreement whereby she agreed to purchase appellees' real property consisting of 20.58 acres for \$155,000.00. The contract included the sale of appellees' horses and their furniture located inside the property's residence, for an additional

\$3,750.00. Appellant took possession of the property upon signing the contract.

The contract price was to be paid in installments, the last of which was due on August 31, 1997. On October 2, 1997, appellees filed suit in Boyd Circuit Court, alleging that appellant had paid only \$2,750.00 toward the contract price of \$158,750.00. Appellant made no appearance in the matter and, as such, default judgment was entered against her on November 11, 1997. Subsequent orders awarded appellees possession of the property and directed appellant to arrange for removal of her belongings from the residence. On January 6, 1998, the court addressed the issue of damages, at which hearing appellant appeared in person. Appellees were directed to submit an affidavit setting forth the damages they were claiming and, in turn, the court afforded appellant the opportunity to file objections to appellees' affidavit within ten (10) days after receiving it.

Appellees prepared the affidavit, claiming a total of \$15,228.00 in damages. Specifically, appellees claimed damages representing rent of \$4,000.00 as well as amounts owed for: property taxes; insurance; boarding fees; furniture; hay and wood; installation of locks; attorney fees; expenses incurred for a trip appellees made from their home in Montana to Boyd County; and, repairs made to the garage door, fence, and barn. Meanwhile, appellant had failed to remove her personal property from the house, as she had been ordered to do. As such, appellees moved the court for permission to sell appellant's

property to satisfy any award of damages the court may issue. By order entered February 6, 1998, the court granted appellees' motion.

Appellant filed exceptions to appellees' affidavit of damages, taking issue with the amount of rent appellees claimed she owed, as well as with other specific items claimed. Having considered appellant's arguments, the court overruled appellant's objections to appellees' affidavit of damages, by order entered February 10, 1998. In response, appellant filed a CR 59 motion, which the court heard the following month. On April 14, 1998, the court denied appellant's CR 59 motion. It is from this order that appellant appeals.

We would add that on April 24, 1998, one day prior to the sale of appellant's personal property, appellant's adult children moved the court for a restraining order preventing the sale, arguing that much of the property inside the residence was theirs, not their mother's. They asked the court to allow them to remove their belongings from the house prior to the sale of the remaining personal property belonging to their mother. The court denied their motion, finding they were not parties to the action, and had not moved to intervene at any time although there had been ample opportunity to do so. Thus, the court concluded, they had no standing to seek such relief.

Appellant first argues that the default judgment was improperly entered.¹ However, we do not believe appellant has

¹Appellant maintains that appellees were represented by an experienced attorney who should have ascertained that appellant
(continued...)

properly preserved this issue. None of appellant's pleadings of record establish that she placed this issue before the trial court, even after judgment was rendered and she was ordered, several times, to remove herself and her belongings from the residence on appellees' property. In fact, appellant filed no pleadings whatsoever in this matter until February 9, 1998, three (3) months after the default judgment was issued against her, and did so for the specific purpose of interposing objections on the issue of damages alone.

Further, appellant's CR 59 motion in this action addressed only the issue of damages and the judgment, entered February 6, 1998, by which the court awarded them.² At no point in this litigation did appellant move the trial court to set aside the default judgment. Rather, it appears that at the trial court level, appellant contested, and the court reviewed, only the issue of damages.³

There is no indication the trial court reviewed the issue on its merits, appellant's never having contested entry of

¹(...continued)
may not have understood the charges against her and was unaware of the need to retain counsel or defend herself in this matter. Further, while appellant admits having been personally served the initiating complaint, she argues that subsequent pleadings should have been served upon her either in the same manner or by registered mail.

²While appellant states that the issue was addressed during the hearing on her CR 59 motion, the record of this matter contains neither a videotape, audiotape, nor transcript of the hearing which would confirm appellant's assertion.

³We further believe it is significant that, on appeal, appellant raised only the issue of damages in her prehearing statement.

the default judgment. "The Court of Appeals is without authority to review issues not raised in or decided by the trial court." Regional Jail Auth. v. Tackett, Ky., 770 S.W.2d 225, 228 (1989) (citations omitted). Thus, we decline to address appellant's arguments on this issue.

Appellant next argues that the trial court erred when it denied appellant's children the opportunity to remove their belongings from the residence located on appellees' property. Likewise, we do not believe this issue can be raised by appellant before this Court, given that appellant has no interest in the subject matter of the order she is appealing, i.e. she has no interest in her children's personal property. Her children's having failed to intervene in this matter in a timely and appropriate manner, appellant may not now appeal to this Court on their behalf. As such, we decline to address this issue.

Lastly, appellant argues that the court erred in awarding appellees each and every item of damages they claimed. Appellant maintains appellees did not produce sufficient evidence to support their claims. It appears the court fully addressed the issue of damages on March 13, 1998, at which time appellant's CR 59 motion was heard. Although appellant was not present at the hearing, her counsel and counsel for appellees were afforded the opportunity to present their positions. However, there is neither an audio or video tape of the hearing included in the record, nor has there been tendered to this Court a transcript of the proceeding. We are unaware of what type of evidence the court considered in overruling appellant's CR 59 motion, nor does

the order accomplishing same specify the basis of the court's decision. As such, we are unable to pass upon the merits of appellant's argument concerning damages.

For the foregoing reasons, the judgment of the Boyd Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Bradley F. Wallace
Louisa, Kentucky

BRIEF FOR APPELLEE:

Anna H. Ruth
Ashland, Kentucky