

Commonwealth Of Kentucky

Court of Appeals

NO. 2006-CA-000327-MR

SUSAN O'CONNELL

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE THOMAS B. WINE, JUDGE
ACTION NO. 04-CI-010440

ABN AMRO MORTGAGE GROUP, INC.

APPELLEE

OPINION
REVERSING AND REMANDING

** ** * * * * *

BEFORE: TAYLOR AND STUMBO, JUDGES; PAISLEY,¹ SENIOR JUDGE.

TAYLOR, JUDGE: Susan O'Connell brings this appeal from a January 12, 2006,

Opinion and Order of the Jefferson Circuit Court dismissing her action for damages to

her real property for failure to state a claim under Ky. R. Civ. P. (CR) 12.02. We reverse

and remand.

¹ Senior Judge Lewis G. Paisley sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

On April 6, 2004, ABN Amro Mortgage Group, Inc. (ABN) was the successful bidder at a foreclosure sale of real property located at 6753 Vandre Avenue, Louisville, Kentucky (foreclosed property). Four days later, on April 10, 2004, a fire started at the foreclosed property and spread to the adjoining property located at 6751 Vandre Avenue (adjoining property), which was owned by O'Connell. The sale of the foreclosed property was subsequently confirmed on September 9, 2004, whereupon ABN obtained legal title by a commissioner's deed.²

O'Connell subsequently filed a complaint against ABN seeking to recover for the "extensive" fire damage suffered to O'Connell's property. Therein, O'Connell particularly claimed:

6. The Defendant had an affirmative duty to the Plaintiff to secure and make safe the property located at 6753 Vandre Avenue, Louisville, Kentucky and the Defendant's failure to so act constitutes a breach of the duty owed to the Plaintiff.

7. The damage to the Plaintiff's aforesaid property was a direct and proximate result of the Defendant's failure to adequately and appropriately secure and make safe that property located at 6753 Vandre Avenue, Louisville, Kentucky.

8. As a consequence of the Defendant's negligence in this matter, the Plaintiff has suffered damage to her real property and the reasonable cost of repair of said property is in excess of the minimum jurisdictional threshold of the Jefferson Circuit Court.

ABN filed an answer and a motion to dismiss for failure to state a claim upon which relief could be granted under CR 12.02. By opinion and order entered

² The sale was originally confirmed by order entered May 13, 2004, but was subsequently set aside when a secured creditor had not been paid from the sale proceeds. When this issue was resolved, the order confirming sale was entered September 9, 2004.

January 12, 2006, the circuit court granted the motion and dismissed the action. This appeal follows.

O'Connell contends that the circuit court improperly dismissed her action pursuant to CR 12.02. Although ABN did not hold legal title, O'Connell contends that equitable title of the foreclosed property passed to ABN before the fire and that the circuit court erred by concluding otherwise. For reasons hereinafter stated, we agree.

Initially, it must be pointed out that attached to ABN's motion to dismiss were various court documents from the foreclosure action (Action No. 02-CI-04849) and also the commissioner's deed conveying the foreclosed property. As matters outside the pleadings were entered into the record, we shall treat the circuit court's order dismissing the instant action as a summary judgment. *See Gailore v. Alsabi*, 990 S.W.2d 597 (Ky. 1999). Summary judgment is proper where there exist no material issues of fact and movant is entitled to judgment as a matter of law. CR 56; *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476 (Ky. 1991). Our review shall proceed accordingly.

In its opinion and order, the circuit court determined:

ABN now argues that it had no right to possession of the property on April 10, 2004, and thus no legal obligation to secure and make safe the property, relying on KRS 426.575.

KRS 426.575 provides, "*A conveyance by a commissioner shall not pass any right until it has been examined and approved by the court; which approval shall be endorsed on the conveyance and recorded with it.*" (Emphasis added.) The trial judge did not confirm the sale until May 13, 2004.

Although there appears to be no case law in Kentucky dealing with a similar fact situation, there are comparable

circumstances. In *Bryant v. Transamerica*, 572 S.W.2d 614 (Ky.App., 1978), the Court found the Appellant had no insurable interest in the property because a previous court order had directed her to convey the property to a third party. The Commissioner's conveyance did not occur until after the property had been destroyed. In *Lowther v. Moss*, 39 S.W.2d 501 (Ky., 1931), the purchaser acquired equitable title with a confirmed sale and execution of bond. While the purchaser at a judicial sale may acquire equitable title even before the deed is made, the purchaser must have taken steps to comply with the terms of the bid. *Smith v. National Union Fire Insurance Company*, 39 S.W.2d 189 (Ky., 1931).

In the case *sub judice*, the Defendant had not paid any deposit (by agreement) or performed any other steps to comply with the bid.

While this Court agrees that a deed alone is not determinative in deciding equitable title, this Court also agrees that, simply being a successful bidder sans further action by the purchaser, does not vest the purchaser with any title.

The circuit court concluded that a purchaser at a judicial sale may acquire equitable title if the purchaser took "steps to comply with the terms of the bid." Applying this principle of law, the circuit court observed that ABN "had not paid any deposit (by agreement) or performed any other steps to comply with the bid." Consequently, the circuit court believed that equitable title had not passed to ABN at the time of the fire.

A more accurate statement of the law is that equitable title of property passes to the purchaser through a valid judicial sale upon the execution of the statutory bond required by Kentucky Revised Statutes (KRS) 426.705.³ *Cook's Adm'r v. Franklin Fire Ins. Co.*, 224 Ky. 360 6 S.W.2d 477 (Ky. 1928); *Kentucky Farm Bureau Mutual*

³ KRS 426.705 requires the purchaser of property sold at judicial sale to give "bond for the price, with good surety, approved by the officer making the sale"

Insurance Co. v. Conley, 428 S.W.2d 122 (Ky. 1973). In this case, the record is unclear as to whether ABN executed and delivered the bond. However, the report of sale of the foreclosed property appeared to have required ABN to execute such a bond.⁴ As a material issue of fact exists, we believe the circuit court erroneously entered summary judgment dismissing the action.

O'Connell also argues that the circuit court improperly denied her the opportunity to conduct discovery by entering summary judgment. O'Connell sought to depose employees of ABN as to whether they had entered the foreclosed property prior to the fire. O'Connell filed her complaint on December 13, 2004. By agreement of the parties, ABN was granted an extension to file its answer, which was filed on January 21, 2005. There is no other activity reflected in the record of this case until ABN filed its motion to dismiss on September 22, 2005. The circuit court's order dismissing the action was entered January 12, 2006.

As a general proposition, the control over discovery, including any disputes, is a matter of judicial discretion. *Sexton v. Bates*, 41 S.W.3d 452 (Ky.App. 2001). However, discovery rules are to be liberally construed so as to provide both parties with relevant information to properly litigate the case. *Primm v. Isaac*, 127 S.W.3d 630 (Ky. 2004).

⁴ The report of sale was appended to ABN Ampro Mortgage Group, Inc.'s motion to dismiss under Ky. R. Civ. P. 12.02. Additionally, the court's order confirming the sale entered September 9, 2004, reflects that ABN "fully complied with the terms of the sale."

Considering the procedural history of this case (or the lack thereof) and our reversal of the summary judgment due to the existence of a factual dispute, we believe O'Connell should be allowed a reasonable time to conduct discovery upon remand.

For the reasons stated, we hold that the circuit court erroneously granted summary judgment for ABN. Accordingly, the Opinion and Order of the Jefferson Circuit Court is reversed and this cause remanded for proceedings not inconsistent with this opinion.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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BRIEF FOR APPELLEE:

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