

# Commonwealth of Kentucky

## Court of Appeals

NO. 2005-CA-002144-MR

MORTGAGE ELECTRONIC REGISTRATION SYSTEMS,  
INC. AS NOMINEE FOR LENDER AND WASHTENAW  
MORTGAGE COMPANY

APPELLANTS

v. APPEAL FROM FAYETTE CIRCUIT COURT  
HONORABLE PAMELA R. GOODWINE, JUDGE  
ACTION NO. 03-CI-02614

DONALD A. CLARK AND BARBER G. CLARK, HIS WIFE;  
COUNTRYWIDE HOME LOANS, INC.;  
MARTIN BRADSHAW AND CECILE BRADSHAW

APPELLEES

OPINION  
AFFIRMING

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BEFORE: ACREE, DIXON, AND KELLER, JUDGES.

DIXON, JUDGE: Washtenaw Mortgage Company appeals the Fayette Circuit Court's denial of its motion to amend, alter or vacate an order dismissing Washtenaw's complaint. After reviewing the record on appeal, we affirm.

Donald and Barber Clark ("The Clarks") were the owners of a mortgage company known as Consolidated Mortgage, Inc., in Lexington, Kentucky. On November

1, 2002, the Clarks executed a mortgage to Washtenaw Mortgage Company (“Washtenaw”) for \$161,128.82 to refinance their home in Lexington. Washtenaw issued a check to Elam & Miller, PSC, the law firm handling the loan closing. The funds advanced by Washtenaw were to pay off the first mortgage on the house held by Countrywide Home Loans (“Countrywide”) for approximately \$137,000. The remaining funds were to pay off the Clarks' credit card debt. The Clarks subsequently defaulted on the Washtenaw mortgage, and Washtenaw initiated foreclosure proceedings in Fayette Circuit Court on June 20, 2003.

However, Countrywide's first mortgage on the property was not properly paid by the proceeds of Washtenaw's mortgage. Allegations of criminal misappropriation of funds have been made against Consolidated Mortgage, Barber Clark, and Elam & Miller. We note that, while the criminal accusations are tangential to the case at bar, only the foreclosure litigation is presently before us.

Washtenaw sought to foreclose on the property and acknowledged Countrywide's interest had not been discharged. As part of their defense, the Clarks admitted that their credit card debt was properly paid with Washtenaw's funds, but claimed they were not otherwise liable for repayment of the missing \$137,000.00.<sup>1</sup>

Washtenaw also named Martin Bradshaw and Cecile Bradshaw as defendants because a

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<sup>1</sup> Although it was not raised before the trial court, we note that the Clarks did not file an answer to Washtenaw's complaint.

lien existed in their favor on the property deed.<sup>2</sup> Countrywide filed an answer to Washtenaw's complaint on August 7, 2003.

After a year of inaction, Washtenaw filed a motion to stay the proceedings, or alternatively for a protective order, on July 9, 2004. Washtenaw argued it had filed a lawsuit in federal court seeking to recover the funds at issue in the foreclosure case. The federal court action involved Consolidated Mortgage and Elam & Miller, PSC.<sup>3</sup> Although the Clarks objected to staying the circuit court proceedings, the court held a hearing and ultimately granted a stay for ninety days. Once the stay was lifted, the parties exchanged written discovery. A pretrial conference was held December 22, 2004. At the request of Washtenaw, the court set a trial date as far in advance as possible on the chance the federal litigation would resolve. The court set the case for trial on October 31, 2005, and ordered that discovery be completed by August 15, 2005. The court noted all witnesses not identified by the deadline would be excluded. All parties signed off on the court's pretrial order.

A final pretrial conference commenced on September 15, 2005. The court was displeased to learn that no further action had been taken by Washtenaw since the December pretrial conference. Washtenaw's counsel, Matthew Coogle, had also neglected to file a witness list by the August 15 deadline. Coogle represented to the court he made a "calendar error" by failing to note the discovery deadline. Coogle also implied

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<sup>2</sup> The Bradshaws could not be located by a warning order attorney; consequently, they did not take part in the circuit court litigation.

<sup>3</sup> Washtenaw did not name the Clarks individually in the federal suit.

that it would be beneficial for the trial court to wait for the federal litigation to conclude rather than holding the trial as scheduled. The Clarks' attorney, Thomas Clay, pointed out the Clarks were not a party to the federal lawsuit and argued the circuit court case should be dismissed due to Coogle's dilatory conduct and failure to prosecute the claim. Clay also emphasized that the Clarks were prejudiced by the protracted litigation, as they were precluded from selling their property during the pendency of the circuit court case. The trial court granted the motion to dismiss the complaint with prejudice, noting that Washtenaw failed to pursue the claim and failed to comply with the court's discovery schedule. Washtenaw filed a motion to alter, amend or vacate the order of dismissal, and the court held a hearing on October 7, 2005. The court entered an order denying the motion because Washtenaw failed to prosecute the matter and failed to comply with the court's pretrial order.

Washtenaw contends the trial court abused its discretion by dismissing the complaint with prejudice six weeks before trial. Washtenaw specifically asserts that it conducted limited discovery in the circuit court case because extensive discovery took place in the federal court litigation. Likewise, Washtenaw argues its failure to file a witness list and perceived failure to prosecute were insufficient reasons to order dismissal with prejudice. Finally, Washtenaw argues the trial court improperly based its decision to dismiss on its perception that during the final pretrial conference Washtenaw sought a continuance for the trial date.

We infer the trial court's dismissal of the complaint was pursuant to Kentucky Rules of Civil Procedure (CR) 41.02(1), which reads: “For failure of the plaintiff to prosecute or to comply with these rules or any order of the court, a defendant may move for dismissal of an action or of any claim against him.” Dismissing a cause of action with prejudice is undoubtedly the harshest sanction a trial court may impose; consequently, courts must tread with extreme caution when considering an involuntary dismissal. *Polk v. Wimsatt*, 689 S.W.2d 363, 364-65 (Ky. App. 1985). However, we are mindful that the trial court has the utmost discretion to utilize the sanctions available under CR 41.02. *Thompson v. Kentucky Power Co.*, 551 S.W.2d 815, 816 (Ky. App. 1977). Accordingly, we will not disturb the lower court's decision unless “the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles.” *Sexton v. Sexton*, 125 S.W.3d 258, 272 (Ky. 2004) citing *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999).

In *Ward v. Housman*, 809 S.W.2d 717 (Ky. App. 1991), this Court adopted a six factor analysis for trial courts to consider before granting an involuntary dismissal pursuant to CR 41.02(1):

- 1) the extent of the party's personal responsibility;
- 2) the history of dilatoriness;
- 3) whether the attorney's conduct was willful and in bad faith;
- 4) meritoriousness of the claim;
- 5) prejudice to the other party, and
- 6) alternative sanctions.

*Id.* citing *Scarborough v. Eubanks*, 747 F.2d 871, 875-78 (3rd Cir. 1984).

In the recent case *Toler v. Rapid American*, 190 S.W.3d 348 (Ky. App. 2006), a panel of this Court held, “[t]he responsibility to make such findings as are set forth in *Ward* before dismissing a case with prejudice falls solely upon the trial court.” *Id.* at 351.

In this case the court issued a written order denying Washtenaw's motion to alter, amend or vacate the dismissal of its complaint. The order states in part:

This case sat dormant for almost a year before this Court's pre-trial conference in December, 2004. During said pre-trial conference, counsel for Defendants Donald Clark and Barber Clark moved the Court to dismiss this action for failure of [Washtenaw] to prosecute the action. Rather than dismiss the action at that time, the Court ordered scheduling deadlines through August of 2005 with an October 2005 trial date.

At the final pre-trial conference held on September 15, 2005, the Court discovered that nothing had been done in this case since the December 2004 pretrial order was entered by this Court. [Washtenaw] filed no discovery nor complied with any of the other court-ordered deadlines. Instead counsel argued that he did not receive a copy of the pre-trial order and he was not able to determine that the order had been entered. The Court reminded counsel that he was, in fact, present at the pre-trial conference as noted by his signature on the pre-trial order and that he was given a copy of the order the same day. The record was also clear that the Order had, in fact, been entered in December 2004. [Washtenaw] again requested that the case be continued due to the pendency of a federal court action. Counsel for the Clarks reminded the Court that the Clarks were not parties to the federal action.

Based on [Washtenaw's] failure to prosecute this matter and its failure to comply with this Court's Pre-Trial Order of December 2004, this matter is hereby DISMISSED with prejudice.

Additionally, a review of the hearing held October 7, 2005, reveals the trial judge discussed the factors of *Ward v. Housman* in open court. The trial court emphasized the prejudice to the Clarks, noting they were unable to sell their home to a willing buyer due to the pendency of the foreclosure litigation. The court also attributed the delay in prosecution to Washtenaw's counsel, pointing out that Coogle blatantly disregarded the court's pretrial order establishing scheduling deadlines.

Although Washtenaw argues that *Ward* dictates a result in its favor, we are compelled to disagree. Based upon our exhaustive review of the record in this case, we find the trial court properly considered the gravity of dismissal in light of the circumstances of the case. *See Toler*, 190 S.W.3d at 351 citing *Gill v. Gill*, 455 S.W.2d 545, 546 (Ky. 1970) (“Moreover, it is incumbent on the trial court to consider each case ‘in light of the particular circumstances involved; length of time alone is not the test of diligence.’”). Without a doubt, the trial court afforded Washtenaw numerous opportunities to keep the litigation on track. Accordingly, we find the trial court did not abuse its discretion by dismissing Washtenaw's complaint.

As a procedural matter, two pending motions were passed to this panel for consideration with the merits of this case. On June 16, 2006, after the appellate briefs were submitted, the Clarks moved this Court “to clarify the status of the parties.” The Clarks asserted that Chicago Title Insurance Company paid Washtenaw's demand of \$161,128.82 under a closing protection insurance policy. Subsequently, on June 28, 2006, Washtenaw filed a notice of assignment of claims and substitution of parties.

Washtenaw's motion purported to assign its interest to Elam & Miller, PSC and substitute Elam & Miller as the appellants herein. The Clarks filed a responsive motion objecting to the assignment and substitution. On July 25, 2006, Elam & Miller filed a motion for leave to file supplemental exhibits to the notice of assignment of claims and substitution of parties. The motion panel of this Court granted Elam & Miller leave to file exhibits, which are in the record and have been reviewed by this panel.

In light of our affirmance on the merits, the pending motions are DENIED.

For the reasons stated herein, the order of Fayette Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANTS:

Matthew F. Coogle  
Louisville, Kentucky

BRIEF FOR APPELLEES

Thomas E. Clay  
Louisville, Kentucky