

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2009-CA-000398-MR

JANET DAMRON

APPELLANT

v.

APPEAL FROM PIKE CIRCUIT COURT  
HONORABLE EDDY COLEMAN, JUDGE  
ACTION NO. 06-CI-00501

FAMILY BANK AND  
WRIGHTWAY LAND, LLC

APPELLEES

OPINION  
AFFIRMING

\*\* \*\* \* \* \* \* \*

BEFORE: COMBS, CHIEF JUDGE; DIXON, JUDGE; BUCKINGHAM,<sup>1</sup>  
SENIOR JUDGE.

COMBS, CHIEF JUDGE: Janet Damron appeals from a post-judgment order of the Pike Circuit Court of February 5, 2009, granting the appellee's motion for a writ of possession. We affirm.

On April 29, 2002, Family Bank, FSB, loaned nearly \$345,000.00 to Damron Furniture Company, Inc. The debt was secured by mortgages against the

---

<sup>1</sup> Senior Judge David C. Buckingham sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

corporation's real property and the real property of Racine Damron, the corporation's president. In addition, commercial guaranties were signed by Racine's son, Jeffrey Damron. Jeffrey Damron is the corporation's vice-president.

In 2003, Racine deeded a portion of her mortgaged property to Jeffrey Damron and his wife, Janet Damron. Janet Damron is the appellant. The deed was recorded shortly after the transaction was completed.

In 2006, First Commonwealth Bank made the Damrons (Jeffrey and Janet) a construction loan of \$637,500.00. The promissory note was secured by a mortgage of their property at Lovers Leap Subdivision and, in addition, by a mortgage of the property deeded to them by Racine Damron in 2003. These mortgages were duly recorded. Family Bank did not file a release of its senior mortgage.

On April 17, 2006, Family Bank filed this foreclosure action against Damron Furniture Company, Racine Damron, Jeffrey Damron, and other individual guarantors, all of whom were properly served.<sup>2</sup> The corporation, Racine Damron, and Jeffrey Damron hired counsel to represent them, and they filed an answer on January 26, 2007. The other guarantors did not defend the foreclosure action. The circuit court determined that Family Bank was entitled to judgment as a matter of law and, on May 20, 2008, the court's judgment and order of sale were entered.

---

<sup>2</sup> After Family Bank recorded its Notice of *Lis Pendens*, Racine Damron and Damron Furniture executed two deeds attempting to convey all of the mortgaged property to Jeffrey and Janet Damron. No issue is raised as to this purported conveyance.

For three weeks, the master commissioner advertised the upcoming sale of the corporation's real property and the parcel mortgaged by Racine -- including the portion that had been deeded to the appellant and Jeffrey Damron in 2003. Court-appointed appraisers prepared and submitted reports; the sale was conducted; and on August 6, 2008, the master commissioner filed her report of sale. No objections were lodged, and on September 2, 2008, Family Bank filed its motion to confirm the sale. On September 10, 2008, the circuit court confirmed the sale and ordered delivery of a deed to the highest bidder, Wrightway Land, LLC. Wrightway Land, the appellee, took the property subject to the mortgage of First Commonwealth Bank.

On October 10, 2008, Wrightway Land filed a motion for a writ of possession. In its motion, Wrightway Land explained that Jeffrey and Janet Damron had leased to a third party a dwelling located on a portion of the real property purchased at the sale -- thus depriving Wrightway of its of rightful possession. Wrightway sought a writ and requested the sheriff's assistance in securing the property.

At a hearing in December 2008, Jeffrey Damron conceded that his interest in the real property had been extinguished by the master commissioner's deed. Janet Damron contended that her interest in the property had not been extinguished since she had never been made a party to the foreclosure action. She denied that she had wrongfully deprived Wrightway Land of its right to possession.

Evidence was presented indicating that Janet Damron had had actual knowledge of the foreclosure action and that she had actively sought to protect her interest in the real property. Therefore, the trial court found that her involvement and participation -- coupled with her husband's virtual representation of her interests -- were sufficient to cause her to be bound by the judgment. The court concluded that Janet Damron's interest in the disputed parcel had been extinguished by the master commissioner's deed of conveyance and that Wrightway Land was entitled to possession of the property. This appeal followed.

Janet seeks to vacate the judgment of foreclosure and sale, to revoke the public sale, and to set aside the commissioner's deed conveying the entirety of the property to Wrightway Land. Janet contends that because she was a necessary party to the foreclosure proceedings, she should have been allowed to defend against Family Bank's complaint and to raise any and all defenses available to a party to a foreclosure action.

At the court's hearing, Janet conceded that she was fully aware of the dire financial condition of Damron Furniture. She testified that she and her husband had informally assumed some of the company's financial obligations, including payment of the mortgage to Family Bank. Janet admitted that she became aware of the foreclosure action at or near the time that her husband was served with process. Family Bank's complaint clearly alleged that her interest in the disputed property was directly subject to its mortgage, and she and Jeffrey had consulted together with an attorney who had filed an answer on Jeffrey's behalf.

Janet was a necessary party to the action in the strictest sense. If she had endeavored to intervene to protect her interest in the property, her motion would most certainly have been granted.

After considering the testimonial evidence, the trial court concluded that despite Janet Damron's absence as a party, her involvement and participation in the foreclosure action (along with her husband's virtual representation of her interests) were sufficient to bind her to the judgment as a matter of law. The court based its findings on Janet's testimony that she had been aware that her interest was directly implicated in the foreclosure action; that she had collaborated with her husband's attorney about the matter; that she had discussed the details of the foreclosure action and the pending sale with a Family Bank representative; that she had also discussed the matter with Family Bank's attorney; that she had appeared at the master commissioner's office to discuss the pending auction; that she had known the details of the sale following its completion; and that she had met with a Wrightway Land representative subsequent to its purchase of the property.

Kentucky has long adhered to the rule that even where a person is not a party, "one who participates in litigation, and openly and actively assumes and manages its prosecution or defense" will be bound by the judgment. *Harris v. Jackson*, 192 S.W.3d 297, 303 (Ky. 2006), citing *Metropolitan Cas. Ins. Co. of New York v. Albritton*, 214 Ky. 16, 282 S.W.187, 189 (Ky. 1926). "The courts look beyond the nominal parties, and treat all those whose interests are involved in the litigation and who conduct and control the action or defense as real parties, and

hold them concluded by any judgment which may be rendered.” *McKenzie v. Hinkle*, 112 S.W.2d 1019, 1021- 1022 (Ky. 1938), *citing Amburgey v. Adams* 245 S.W. 514, 516 (Ky.1922).

We have reviewed the entirety of the trial court’s proceedings in this matter. The court concluded that Janet Damron conducted herself throughout the pendency of the litigation so as to bring herself within this rule. That conclusion was amply supported by the record. Although she was careful to avoid appearing as a real party in the litigation, Janet was extremely active in promoting her position with respect to the foreclosure. She did nearly everything that a formal litigant would have done. Her conduct satisfied the *McKenzie* holding that the court correctly looked at the nominal parties and bound her by its judgment.<sup>3</sup>

The trial court also concluded that Janet and Jeffrey Damron had a common interest in the property and that Jeffrey had effectively represented Janet’s interests throughout the litigation. This issue of virtual representation has been addressed by sound authority:

The doctrine [of virtual representation] under which a person not a party to a suit may be bound by a judgment therein is not strictly *res judicata*. . . . It is based upon privity between a party to the original suit and the person who should be bound by the judgment. This privity is in turn founded upon such an identity of interest that the party to the judgment represented the same legal right. The rule is essentially one of justice and fairness. . . .

---

<sup>3</sup> We note that there has never been an allegation of fraud or of any collusion between Family Bank and Wrightway Land. Wrightway Land undertook a thorough title examination and survey of the property prior to the sale, and it was a *bona fide* purchaser for value.

*Harris*, 192 S.W.3d at 303, citing *State Farm Mut. Auto. Ins. Co. v. Shelton*, 368 S.W.2d 734, 737 (Ky. 1963). Representation through another under these circumstances comports with due process. *Hansberry v. Lee*, 311 U.S. 32, 61 S.Ct. 115, 85 L.Ed.22 (1940).

In the 2003 conveyance, Janet and Jeffrey Damron took undivided interests in property that secured the debt of Racine Damron and Damron Furniture. Their interests were subject to Family Bank's mortgage. At the time of the litigation, Janet and Jeffrey's interests in the property remained identical. Jeffrey's self-interest and his relationship to Janet reasonably insured that her interest would be protected by his participation in the litigation. Consequently, the trial court was justified in inferring that Janet's interest in the foreclosure action was virtually represented by her husband. We are persuaded that the court did not err in concluding that Janet was bound by the judgment.

Finally, Janet Damron argues that the bank's failure to name junior lien holders as parties to the foreclosure action is ground for reversal of the judgment in favor of Family Bank and the order of sale. In light of the procedural posture of this matter, we refrain from addressing this argument as unnecessary and moot.

The order of the Pike Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Lawrence R. Webster  
Pikeville, Kentucky

BRIEF FOR APPELLEE FAMILY  
BANK:

Stephen L. Hogg  
Pikeville, Kentucky

BRIEF FOR APPELLEE  
WRIGHTWAY LAND, LLC:

David L. Baird  
Pikeville, Kentucky