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Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-000996-MR,
NO. 2008-CA-000997-MR,
NO. 2008-CA-002239-MR,
&
NO. 2009-CA-000291-MR

JAMES MOLLETTE AND
DEBBIE MOLLETTE — APPELLANTS

v.

APPEALS FROM JOHNSON CIRCUIT COURT
HONORABLE JOHN DAVID PRESTON, JUDGE
ACTION NO. 07-CI-00205

UNITED MORTGAGE AND LOAN
INVESTMENT, LLC — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: DIXON, LAMBERT, AND WINE, JUDGES.

LAMBERT, JUDGE: James and Debbie Mollette appeal from three judgments entered by the Johnson Circuit Court. All of these judgments relate to the foreclosure of a judgment lien against their home by United Mortgage and Loan

Investment, LLC ("United Mortgage"), an assignee of Cit Group Consumer Finance, Inc. Finding no reversible error in the entry of these judgments, we affirm.

On July 21, 2000, the Mollettes executed a fifteen-year promissory note with Cit Group Consumer Finance, Inc. that was secured by a mortgage against their home. The principal amount of this note was thirty-six thousand five hundred seventy dollars ($36,570.00) and the interest rate was 12.35% per year. On September 11, 2006, United Mortgage filed a complaint against the Mollettes in Johnson Circuit Court for failure to make payments on the note. In its complaint, United Mortgage claimed that the amount due and owing on the note was thirty-seven thousand nine hundred forty-three dollars and forty-eight cents ($37,943.48) plus interest at the rate of 12.35% per year from March 31, 2001. The Mollettes were personally served with the complaint on November 4, 2006.

Despite personal service, the Mollettes never filed an answer to this complaint. Thus, on December 11, 2006, United Mortgage filed a motion for default judgment against the Mollettes. The motion was sent by regular mail to the Mollettes, and included a hearing notice for January 19, 2007. The Mollettes did not file a response or appear at the hearing. Accordingly, United Mortgage's motion was granted by the entry of a default judgment against the Mollettes on January 23, 2007.

On March 6, 2007, James Mollette sent a letter to the court asking that he be granted additional time to "appeal" the default judgment. Mollette stated

that he was currently in Afghanistan and that he failed to defend the above action because he believed he had orally entered into a settlement agreement with one of United Mortgage's loan counselors "a few days before my court date."

Thereafter, on September 10, 2007, the Mollettes employed an attorney who filed a motion to set aside the default judgment. This motion was set for hearing on October 5, 2007. An affidavit attached to this motion set forth the facts in Mollette's previous letter to the court. It further provided that James Mollette worked primarily in Afghanistan as a civilian contractor for the U.S. military. Mollette stated that he was served with the summons just one day prior to his return to Afghanistan. He alleged that the parties agreed to settle the debt for forty thousand dollars ($40,000.00) during a conversation held just a few days prior to the January 19, 2007, hearing date. Mollette further contended that he asked the employee about the court date and told him of his inability to make it since he was out of the country. According to Mollette, the employee advised him that "he would not foreclose on my house because we had an agreement."

In their response to this motion, United Mortgage denied entering into a settlement agreement with James Mollette. In support of this denial, United Mortgage attached system notes from their employee which indicated that he did have a conversation with James Mollette on January 12, 2007. According to the notes, Mollette thought that he might be able to borrow forty thousand dollars ($40,000.00) from a relative to settle the debt. According to the employee's note, the employee stated that if Mollette could confirm this, he would talk to the

investors about a settlement but could not promise anything. Mollette agreed to call back on January 16 to follow-up.

On January 22, 2007, the employee's notes reflect the following:

> [Talked to Mr. Mollette,] stated he had confirmed can get $40K, but cannot [advise] date, would not [advise] where from – I [advised] would need confirmation of that also, need financials – during conversation, signal weakened, finally cut off . . . next call will counter at $50K – [borrower] working out of country, probably making good money as subcontractor

According to United Mortgage, no further settlement negotiations were conducted with James Mollette.

On October 5, 2007, no one appeared on behalf of the Mollettes to argue their motion to set aside the default judgment. The trial court stated, however, that after reviewing the motion and James Mollette's affidavit, it was the trial court's determination that the Mollettes presented no actual defense to the lawsuit. Specifically, the trial court stated that Mollette's affidavit did not deny that he owed the money sought by United Mortgage. Therefore, the trial court overruled the Mollettes' motion to set aside the default judgment.

The Mollettes obtained new counsel, and on February 1, 2008, the Mollettes' new counsel filed a second motion to set aside the default judgment entered against them. In this motion, the Mollettes alleged that the loan and mortgage were void or voidable because United Mortgage's predecessor failed to seek the approval of the Kentucky Housing Authority prior to making the loan. The motion further alleged that United Mortgage obtained the judgment against the

Mollettes while James Mollette was out of the country and that "further facts with regards to [the Mollettes'] reliance upon statements made by [United Mortgage] . . . are fully stated in the Affidavit of James Mollette . . . ."

Eventually, the Mollettes' second motion was heard on April 18, 2008. During this hearing, the Mollettes' attorney first argued that the default judgment was unfair because James Mollette was out of the country at the time it was entered and that a United Mortgage representative told James Mollette that he did not need to file an answer or defend the lawsuit. When the trial court asked about the merits of the "underlying claim," the Mollettes' attorney replied that the mortgage loan was void or voidable because United Mortgage did not seek approval from the Kentucky Housing Authority to obtain a lien against the property.

On April 25, 2008, the Johnson Circuit Court entered an order denying the Mollettes' second motion to set aside the default judgment entered on January 23, 2007. An appeal from this order was filed on May 28, 2008.

As the above proceedings were progressing, a second complaint was filed by United Mortgage in Johnson Circuit Court. This complaint, filed on May 10, 2007, sought to foreclose against the Mollettes' home in order to satisfy the judgment lien obtained in the action referenced above. The Mollettes filed an answer to this complaint on July 6, 2007, generally denying all the allegations therein. On August 20, 2007, they filed a parallel motion to set aside the default

judgment which was entered in the action referenced above. This motion was denied by an order entered on September 10, 2007.

United Mortgage thereafter filed a motion for summary judgment. The Mollettes responded to this motion for summary judgment, arguing that the promissory note was void or voidable and that they were currently attempting to set aside the default judgment entered in the previous action.

On April 18, 2008, the trial court entered an *in personam* judgment against the Mollettes, which was amended, *nunc pro tunc*, on May 14, 2008. United Mortgage was granted a lien against the Mollettes' real property and the real property was ordered sold. An appeal from this order was filed on May 27, 2008.

A notice of sale against the property was entered by the Master Commissioner on May 9, 2008. The Master Commissioner ordered two disinterested appraisers to appraise the real property that same day. Both appraisers determined that the property was worth $35,000.00. On May 29, 2008, the Mollettes' real property was sold on the courthouse steps for $25,500.00. On June 9, 2008, the Mollettes noticed the filing of their bankruptcy petition. On June 10, 2008, an order approving the sale of the real property was entered. In light of the bankruptcy, this order was subsequently set aside and all proceedings were abated during the pendency of the bankruptcy.

On October 14, 2008, the Mollettes filed an objection to the approval of the sale of their real property. They claimed that the value of the property was

ninety-seven thousand dollars ($97,000.00), not thirty-five thousand dollars ($35,000.00), and thus, the sale of the property should be set aside due to this discrepancy. The buyer of the property thereafter moved for an order confirming the sale of the real property, as the Mollettes' bankruptcy action had been dismissed.

On November 4, 2008, the Johnson Circuit Court entered an order confirming the sale of the Mollettes' real property to the buyer. Thereafter, the Mollettes filed several motions seeking to alter, amend, or vacate this order pursuant to Kentucky Rules of Civil Procedure (CR) 60.02. On February 6, 2009, the trial court denied all of the Mollettes' pending motions and ordered them to vacate the premises. An appeal from this order was filed on February 17, 2009.

The fourth and final appeal involved an action for intermediate relief, which was filed in this Court on February 24, 2009. This action was denied on February 25, 2009. Thereafter, all of the appeals were consolidated for review before this panel.

On consolidated review, the Mollettes argue that the default judgment entered against them in United Mortgage's initial lawsuit should have been set aside. Failure to set aside the default judgment, the Mollettes contend, resulted in the erroneous foreclosure and sale of their home. Upon careful review, we find no reversible error and thus affirm.

The Kentucky Rules of Civil Procedure provides that "[f]or good cause shown the court may set aside a judgment by default in accordance with

Rule 60.02." CR 55.02. The standard for setting aside default judgments was set forth in *Asset Acceptance, LLC v. Moberly*, 241 S.W.3d 329 (Ky. 2007), as follows:

> As often noted, default judgments are disfavored and the trial court is vested with broad discretion to set them aside. Nevertheless, the moving party cannot have the judgment set aside and achieve his day in court if he cannot show good cause and a meritorious defense. Good cause is most commonly defined as a timely showing of the circumstances under which the default judgment was procured.

Id. at 332 (internal citations and quotations omitted). The *Moberly* Court further held that these circumstances must amount to one of the reasons specified in CR 60.02 in order to meet the "good cause" standard. *Id.*

The Mollettes argue that "good cause" existed in this case to set aside the default judgment because a representative of United Mortgage led James Mollette to believe that he had a settlement with them and told Mollette that he didn't need to worry about the legal proceedings because "he would not foreclose on my house because we had an agreement." United Mortgage denies that any of the above transpired. In support of its denial, United Mortgage submitted business records in the form of system notes which detailed the correspondence between the parties. The Mollettes additionally argue that United Mortgage engaged in "fraud" by "lulling [James Mollette] into a false sense of security and inaction" for the purpose of securing the default judgment. United Mortgage vehemently denies this claim as well.

The trial court did not address the existence of "good cause." Rather, it concluded that even if "good cause" existed, the Mollettes were not entitled to relief because they never presented a meritorious defense to the lawsuit. The Mollettes counter that they presented the following meritorious defenses: (1) accord and satisfaction; and (2) the amount claimed was excessive or incorrect. After careful review, we agree with the trial court's determination, and thus affirm.

An accord and satisfaction is defined as follows: "a method of discharging a claim whereby the parties agree to give and accept something other than that which is due in settlement of the claim and to perform the agreement. An 'accord' is the agreement, and 'satisfaction' is its execution or performance." *Bruestle v. S&M Motors*, *Inc.*, 914 S.W.2d 353, 354 n.1 (Ky. App. 1996). In this case, the Mollettes concede that they never performed the agreement they allegedly entered into with United Mortgage, i.e., they never paid United Mortgage the agreed sum. Thus, as a matter of law, "accord and satisfaction" was not present in this case.

As for the alleged existence of an accord, such a defense was not sufficiently set forth in any pleading or argument advanced by the Mollettes before the trial court. The only allegation of an oral accord is set forth in an affidavit attached to the Mollettes' motions to set aside the default judgment. Neither the pleadings nor the affidavit alleged that the Mollettes were willing or able to execute or perform the alleged accord. Moreover, an attempt to enforce the alleged oral accord was never made. No one appeared to argue the Mollettes' first motion

on October 5, 2007. As for the second motion, the Mollettes' attorney did appear, but he did not make any arguments advancing the existence or enforcement of an oral accord. In light of these facts, we hold that any defense of an oral accord which the Mollettes were ready and willing to perform was not sufficiently presented before the trial court for its consideration. Accordingly, this argument must fail as it is unpreserved. *See Regional Jail Authority v. Tackett*, 770 S.W.2d 225, 228 (Ky. 1989); *Commonwealth v. Maricle*, 15 S.W.3d 376, 379 (Ky. 2000). *Compare Brown v. Noland Co.*, 403 S.W.2d 33, 35 (Ky. 1966) (an accord is a contract that may be enforced under the general principles of contract law).

The Mollettes also argue that United Mortgage's claimed debt of thirty-seven thousand nine hundred forty-three dollars and forty-eight cents ($37,943.48) plus interest at the rate of 12.35% per year from March 31, 2001, was excessive and incorrect. With interest, this total debt approximates sixty-five thousand dollars ($65,000.00). However, the face amount of the note signed in 2000 was only thirty-six thousand five hundred seventy dollars ($36,570.00), and a statement in James Mollette's affidavit contends that a loan officer he was working with was told by a United Mortgage representative that the payoff would be approximately forty-three to forty-five thousand dollars ($43,000.00 to $45,000.00).

Yet, as argued by United Mortgage, this argument was never set forth before the trial court in any of the pleadings filed by the Mollettes. Neither the Mollettes nor their attorney appeared at the October 5, 2007, hearing to make such

an argument. The trial court at that time noted that the Mollettes never denied owing the money claimed by United Mortgage. On April 18, 2008, when the Mollettes were given a second chance to argue their motion to set aside the default judgment, they argued only that United Mortgage acted unfairly in obtaining the judgment and that the mortgage was void due to the fact that it was not authorized by the Kentucky Housing Authority. "The Court of Appeals is without authority to review issues not raised in or decided by the trial court." *Tackett*, 770 S.W.2d at 228 (Ky. 1989). Thus, the Mollette's second argument must also be rejected.

In their final argument, the Mollettes contend that the trial court erred in confirming the sale of their property because the court-ordered appraisal of thirty-five thousand dollars ($35,000.00) was clearly "irregular." To support their argument, they submitted computer printouts from the Johnson County Property Valuation Administrator (PVA) which indicated that the property was being taxed on an assessed value of ninety-seven thousand dollars ($97,000.00).

"When a party whose redemption rights are at stake believes the appraisal of his property is inadequate in any way, he is entitled to an evidentiary hearing to determine whether the appraisal was 'irregular, fraudulent, or so erroneous as to be unconscionable.'" *Eagle Cliff Resort, LLC v. KHBBJB, LLC*, 295 S.W.3d 850, 852-853 (Ky. App. 2009) (*quoting Burchett v. Bank Josephine*, 474 S.W.2d 66, 68 (Ky. 1971)). A trial court's determination of this issue is reviewed for clear error. *Id.* at 853. A determination is not clearly erroneous "if supported by substantial evidence, which is 'evidence of substance and relevant

consequence having the fitness to induce conviction in the minds of reasonable men.'" *Id.* (*quoting Owens-Corning Fiberglas Corp. v. Golightly*, 976 S.W.2d 409, 414 (Ky. 1998)).

In this case, the Mollettes do not dispute the fact that the thirty-five thousand dollar ($35,000.00) valuation was supported by the appraisals of "two disinterested, intelligent housekeepers of the county." Kentucky Revised Statutes (KRS) 426.520(1). Rather, they argue that the PVA's valuation should be weighted, as a matter of law, more heavily than the appraisals submitted pursuant to KRS 426.520.

We disagree that such a presumption is mandated as a matter of law. It is the trial court that is in the best position to make these determinations. In this case, the trial court determined that computer printouts of the Johnson County PVA were not sufficient to outweigh the appraisals of "two disinterested, intelligent housekeepers of the county." KRS 425.520(1). We hold that this finding is supported by substantial evidence. Accordingly, we find no reversible error in the trial court's confirmation of the sale of the Mollettes' property.

Having been presented with no reversible error, we hereby affirm the judgments and orders entered by the Johnson Circuit Court.

ALL CONCUR.

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