

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-002245-MR

LOGAN DAVIS AND
CARRIE AMERSON DAVIS

APPELLANTS

v. APPEAL FROM JESSAMINE CIRCUIT COURT
HONORABLE C. HUNTER DAUGHERTY, JUDGE
ACTION NO. 08-CI-00667

CITIBANK N.A., AS TRUSTEE FOR
THE HOLDERS OF BEAR STEARNS
ARM TRUST; AND CHRISTOPHER L.
STANSBURY, JESSAMINE COUNTY
MASTER COMMISSIONER

APPELLEES

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: ACREE AND TAYLOR, JUDGES; BUCKINGHAM,¹ SENIOR
JUDGE.

¹ 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 Kentucky Revised Statutes (KRS) 21.580.

BUCKINGHAM, SENIOR JUDGE: Logan and Carrie Amerson Davis appeal from a summary judgment of the Jessamine Circuit Court ordering the sale of real property and assigning them the responsibility to pay the master commissioner's costs associated with an earlier cancelled sale. We find no error and thus affirm.

The Davises purchased property and borrowed \$600,000 from Countrywide Bank with the loan secured by a first mortgage lien. Countrywide transferred the mortgage to Citibank but retained the servicing rights. The Davises then borrowed an additional \$200,000 from Central Bank as an equity line of credit. That loan was secured by a second mortgage on the property.

When the Davises defaulted, Citibank instituted a foreclosure proceeding to recover its balance owed of \$599,599.49. The Davises failed to file an answer to the complaint. Central Bank filed a response and cross-claim alleging an outstanding balance owed on the equity line of \$199,473 for a total remaining indebtedness of \$799,072.49.

Citibank then obtained a default judgment and order of sale, and the case was referred to the master commissioner for sale of the property. Ten days prior to the sale, the Davises filed a motion to set aside the default judgment and suspend the sale. Logan Davis included an affidavit stating that the parties had reached an agreement concerning the payment of arrearages on the loans.

In actuality, the agreement was a letter from the Davises' attorney to Countrywide proposing a short sale of the property for a price of \$450,000. There

was no indication that Citibank or Central Bank consented to the proposed settlement. Several days later, the court-appointed appraisers determined that the property had a value of \$600,000.

After a hearing, the trial court granted the Davises' motion to set aside the default judgment and order of sale, but the order directed the Davises "to pay costs incurred." Those costs were determined by the master commissioner's report, and in an order confirming cancellation, the Davises were directed to pay \$3,140.62 for costs incurred by the master commissioner in preparation for the cancelled sale.

Citibank moved for summary judgment and provided an affidavit from Countrywide noting that the first mortgage loan did not qualify for an extended repayment plan and that it had been in default since December 1, 2007. The Davises opposed the motion and provided what they claimed was an agreement to sell the property for \$765,000. That agreement to purchase stated:

It is agreed by both parties that the selling price of the property is \$765,000 and that the sum of \$500.00 will be deducted from the selling price for each and every month that the Buyer pays Seller, the monthly payment of \$3,750.00 not to exceed 60 months. Further, Buyer agrees to purchase said property within 60 months from the date herein or sooner with no prepayment penalty due Seller.

The Davises further stated that they had assigned that sale agreement to Countrywide and Central Bank and that they had executed a quitclaim deed in lieu

of foreclosure. Central Bank also filed a motion for summary judgment, which the Davises did not oppose.

We agree with Citibank that the so-called sale agreement was, in fact, a rent-to-own agreement and not a contract for sale. Further, the sale price of \$765,000 was not sufficient to pay the outstanding balances of \$799,072.49 due on the two loans. The Davises argue they proposed a payment schedule to service the loan amounts until the funds from the agreement to purchase became due and payable but that the agreement was rejected by Countrywide which allegedly requested the Davises not contact Countrywide again because it would “slow the process down.” The Davises also indicated Countrywide informed them to not send any payments until a new payment plan was in place and they had received written confirmation and instructions.

The Davises first argue that it was error for the trial court to grant summary judgment absolving Citibank of any duty to mitigate damages. We disagree. Summary judgment is appropriate only where the “right to judgment is shown with such clarity that there is no room left for controversy.” *Steelvest, Inc. v. Scansteel Serv. Ctr., Inc.*, 807 S.W.2d 476, 482 (Ky. 1991). “Ordinarily under breached contracts there is a duty to minimize damages.” *Dulworth v. Hyman*, 246 S.W.2d 993, 996 (Ky. 1952). “While under the rule in damage cases it is the duty of a party to use ordinary care to minimize damages, this rule has no application to a contract to pay absolutely a certain sum of money.” *Superior Woolen Co. Tailors v. M. Samuels & Co.*, 219 Ky. 539, 293 S.W. 1078, 1079 (1927).

Contrary to the Davises' assertion, there was no compromise agreement. Further, the banks were under no legal duty to substitute another party in place of the Davises, particularly when the terms of the proposed new contracts were significantly different from the terms of the original loans. The trial court did not ignore any question of material fact when it determined that Citibank had not failed to properly mitigate damages. There was no error in this regard.

The Davises' final argument is that it was error for the trial court to assign the master commissioner's costs for the cancelled sale to them. We disagree. "It is well settled that the decision whether to award costs and attorney's fees to a party is within the sound discretion of the trial court and its decision will not be disturbed on appeal absent an abuse of discretion." *Giacalone v. Giacalone*, 876 S.W.2d 616, 620-21 (Ky. App. 1994).

Here, the Davises allowed the entry of a default judgment against them. The cancellation of the initial sale was at the sole request of the Davises, and any benefit to the cancellation inured to them. The costs incurred were not attorney fees of the bank but were costs incurred by the master commissioner who serves the trial court. We find no abuse of discretion in the allocation of those costs to the party who caused that cancellation and benefited, even temporarily, from it.

The judgment of the Jessamine Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANTS:

Jason L. Hargadon
Lexington, Kentucky

BRIEF FOR APPELLEE, CITIBANK
N.A., AS TRUSTEE FOR THE
HOLDERS OF BEAR STEARNS
ARM TRUST:

M. Elizabeth Hils
Cincinnati, Ohio