

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-002032-MR

MELISSA ROSE

APPELLANT

v.

APPEAL FROM CARTER CIRCUIT COURT
HONORABLE REBECCA K. PHILLIPS, JUDGE
ACTION NO. 09-CI-00084

THE CITY OF OLIVE HILL

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: COMBS, STUMBO AND WINE, JUDGES.

STUMBO, JUDGE: Melissa Rose appeals from Findings of Fact, Conclusions of Law, Summary Judgment and Order of Sale rendered by the Carter Circuit Court in an action filed by the City of Olive Hill, Kentucky, to enforce liens on two parcels of residential real property owned by Rose. Rose raises several arguments in support of her contention that the circuit court erred in granting summary

judgment in favor of Olive Hill. We find no error in the entry of summary judgment and accordingly affirm.

On or about March 15, 2006, Rose received notices of ordinance violations from the City of Olive Hill, Kentucky. The notices alleged that the structures located on the parcels were “in such a state of dilapidation, deterioration or decay, as to endanger the health and safety of the public” The notices required that the structures be extensively repaired or razed and they warned that a fine of \$25 per day, per parcel, could be imposed for noncompliance.

On August 13, 2006, Rose requested a hearing before the Code Enforcement Board (“the Board”). The Board responded by scheduling a hearing on the matter, notice of which was mailed to Rose on August 25, 2006, by Board secretary Alberta McCoy. Rose did not attend the hearing and the Board found Rose to be in violation of the relevant ordinance. It assessed a fine of \$25 per day for each parcel, which continued to accrue until the violations were corrected. Significantly, she did not appeal the Board’s order.

Rose did not correct the violations, and on April 9, 2007, filed an action against the City of Olive Hill in United States District Court. She alleged therein that she was denied due process of law based on the alleged failure of the Board to give proper notice of the hearing. That action resulted in summary judgment in favor of the City.

After Rose continued to disregard the demand for corrective action, the City filed liens on the parcels. On March 2, 2009, the City filed a complaint in

Carter Circuit Court seeking to enforce the liens and bring about a judicial sale of the parcels. Rose responded *pro se* with a general denial in which, among several arguments, she claimed that she did not receive notice of the hearing before the Board. After the City twice moved for summary judgment, to which Rose did not respond, the circuit court rendered its Findings of Fact, Conclusions of Law, Summary Judgment and Order of Sale on January 6, 2010. It determined that the City was entitled to a judgment as a matter of law and it rendered a judgment in favor of the City in the amount of \$22,600.00 plus \$25 per day and interest accruing on the first parcel, and \$22,575.00 plus \$25 per day and interest accruing on the second parcel. The court went on to acknowledge the City's statutory liens and it ordered a sale of the parcels to satisfy the judgment.

Rose filed a motion to reconsider, in which she maintained that she did not receive until several weeks later the first of the City's two motions for summary judgment. The first motion was filed by Hon. George M. Hogg and was certified as having been mailed to Rose on November 20, 2009. The second motion was filed by Hon. James H. Moore, III, and the notice of which having been certified as filed on December 11, 2009. The two motions were noticed by the court to be heard together on December 21, 2009.

In adjudicating Rose's motion to reconsider, the court noted that even if it were true that she did not receive the November 20, 2009 notice, it could not explain her failure to attend the hearing with regard to the second motion. The court concluded that it would be highly unusual for a defendant not to receive

notice of either motion, especially as the notices were certified as having been filed by separate attorneys on different dates and neither notice was returned as undeliverable. Contributing to the court's skepticism was Rose's contention that she also had not received notice of the hearing conducted before the Board. The circuit court went on to conclude that Rose's underlying arguments, i.e., lack of notice by the Board and its alleged unlawful exercise of authority in opposing the fine, should have been raised, if at all, by way of prosecuting an appeal from the Board's order. The court denied Rose's motion, and amended the judgment to note that Rose had not availed herself of the statutory procedures established for appealing an order of the Code Enforcement Board. This appeal followed.

Rose now argues *pro se* that the circuit court erred in rendering summary judgment in favor of the City and overruling her motion for reconsideration. She contends that the fines were arbitrary and not supported by substantial evidence; that her properties did not constitute nuisances; that the City's exercise of authority was not supported by the law; that the fines constitute a taking without just compensation; and, that the City unconstitutionally interfered with her right to use and enjoy her property. Rose also maintains that the doctrines of collateral estoppel and *res judicata* should bar the entry of summary judgment, and she argues that the summary judgment improperly resulted from lack of notice, fraud and "ill practice." In sum, Rose seeks an order reversing the summary judgment and remanding the matter for trial.

Having closely examined the record and the law, we find no error in the Carter Circuit Court's entry of summary judgment or its denial of Rose's motion to reconsider. From the outset, it merits noting that Rose did not appeal from the Board's order finding her to be in violation of the nuisance ordinance, and the time to do so had long passed. Additionally, Rose unsuccessfully prosecuted an action in United States District Court which disposed of the underlying issues she now raises in support of her claim that summary judgment was improperly rendered. Accordingly, those issues are *res judicata* and not subject to further review. *City of Louisville v. Louisville Professional Firefighters Association, Local Union No. 345*, 813 S.W.2d 804 (Ky. 1991). Thus, challenges to the Board's order could not be addressed by the circuit court for jurisdictional reasons.

At issue, however, is whether the circuit court properly determined that Rose did not demonstrate that notice of the November 20, 2009 summary judgment motion was either improper or lacking. When examining this issue, the circuit court looked to the totality of the record, as we shall now do. Rose's claim that she did not receive the November 20, 2009 notice until some weeks later must be considered in light of the uncontroverted evidence of record that a second notice was made by mail on a different date and by a different attorney to the same address she uses now and used then, and that neither notice was returned as undeliverable. The court also properly noted that Rose had previously claimed that she did not receive notice mailed by the Board during pendency of that proceeding. By looking to the totality of the record, the court was not persuaded by Rose's

claim of inadequate notice. We cannot conclude that the circuit court erred in this determination.

Summary judgment “shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Kentucky Rules of Civil Procedure (CR) 56.03. “The record must be viewed in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor.” *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 480 (Ky. 1991). Summary judgment should be granted only if it appears impossible that the nonmoving party will be able to produce evidence at trial warranting a judgment in his favor. *Id.* “Even though a trial court may believe the party opposing the motion may not succeed at trial, it should not render a summary judgment if there is any issue of material fact.” *Id.* Finally, “[t]he standard of review on appeal of a summary judgment is whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law.” *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky. App. 1996).

When viewing the record in a light most favorable to Rose and resolving all doubts in her favor, we must conclude that the circuit court correctly found that there were no genuine issues as to any material fact and that the City was entitled to judgment as a matter of law. It was uncontroverted that the Board

found Rose to be in violation of the nuisance ordinance, that Rose failed to appeal that finding, that the City filed liens on the parcels in compliance with the statutory law, and the court properly rejected Rose's claim of improper notice. Accordingly, we find no error.

For the foregoing reasons, we affirm the Findings of Fact, Conclusions of Law, Summary Judgment and Order of Sale of the Carter Circuit Court.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Melissa Rose, *pro se*
Olive Hill, Kentucky

BRIEF FOR APPELLEE:

James H. Moore, III
Ashland, Kentucky

George M. Hogg
Olive Hill, Kentucky