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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-002048-MR

JAMES MCCORD AND
EDITH MCCORD — APPELLANTS

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE A. C. MCKAY CHAUVIN, JUDGE
ACTION NO. 08-CI-008199

COUNTRYWIDE HOME LOANS
SERVICING, LP — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: LAMBERT AND MOORE, JUDGES; ISAAC,[1] SENIOR JUDGE.

LAMBERT, JUDGE: This is an appeal from a summary judgment and order of sale entered in a foreclosure action. Homeowners James and Edith McCord contend that Countrywide Home Loans Servicing, LP, was not entitled to a

[1] Senior Judge Sheila R. Isaac 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.

judgment as a matter of law and that summary judgment was prematurely entered because discovery had not been completed and contested issues of material fact remained. After carefully considering the record and the parties' respective arguments in their briefs, we affirm.

On October 19, 2005, James McCord executed a note promising to pay the sum of $115,500.00 to the lender, Countrywide Home Loans, Inc. (CHL). To secure the note, James and his wife, Edith McCord, gave a mortgage to Countrywide encumbering their property at 5118 Mile of Sunshine Drive in Louisville, Kentucky. The mortgage was filed of record on November 3, 2005, and indicates that Mortgage Electronic Systems, Inc., (MERS) was acting as a nominee for CHL. McCord defaulted on his payments pursuant to the terms of the note.

On August 5, 2008, Bank of New York as Trustee for the Certificateholders CWALT, Inc. Alternative Loan Trust 2005-73CB Mortgage Pass-Through Certifications, Series 2005-73CB (Bank of New York), as holder and owner of the note and mortgage, filed an action in Jefferson Circuit Court seeking the amount due of $112,316.00 along with interest from January 1, 2008, and thereafter as well as foreclosure and sale of the real property. Because the complaint stated that a copy of the note was not available, the McCords immediately moved to dismiss the action pursuant to Kentucky Rules of Civil Procedure (CR) 12, stating that Bank of New York lacked standing to bring suit against them and that the complaint failed to state a claim upon which relief could

be granted. The McCords argued that because Bank of New York was not in possession of the note, it was not the holder of the note, citing KRS 355.1-201(1) of Kentucky's Uniform Commercial Code. It followed, then, pursuant to KRS 355.3-301, that because it was not the holder of the note, Bank of New York did not have the right to enforce it. Bank of New York responded to the motion to dismiss and attached a copy of the note dated October 19, 2005, as well as an undated document entitled "ENDORSEMENT AND ASSIGNMENT OF NOTE" in which CHL endorsed the note to Bank of New York. Also attached was a document dated August 5, 2008, in which MERS, as nominee for CHL, assigned the mortgage to Bank of New York. That document was recorded on August 8, 2008. Based upon the response and production of the note, the circuit court denied the motion to dismiss on January 5, 2009, and permitted the action to proceed.

On January 16, 2009, the McCords filed an answer to the complaint as well as a counterclaim alleging that Countrywide Financial Corp. was the servicer of their loan and that it had breached its assumed duty to them that arose from its membership in Hope Now, an alliance of counselors, servicers, investors, and other mortgage market participants that has a mission to help people like the McCords keep their homes and prevent foreclosure.

A few weeks later, Bank of New York moved to file an amended complaint and substitute Countrywide Home Loans Servicing, LP (Countrywide) as the party plaintiff. Bank of New York stated that Countrywide was the current assignee of the note and mortgage and was therefore the real party plaintiff in

interest. In support, it attached a copy of a document dated January 6, 2009, in which Bank of New York assigned the mortgage to Countrywide. The document also contained language assigning the promissory note along with the mortgage. The assignment was recorded on January 20, 2009. The circuit court granted the motion, substituted Countrywide as the plaintiff, and permitted the filing of an amended complaint listing Countrywide as the plaintiff. The McCords filed an answer to the amended complaint, provisionally pleading the affirmative defenses available to them under CR 8 and CR 12, and restating their counterclaim.

On July 10, 2009, Countrywide filed a motion for summary judgment, arguing that no genuine issues of material fact existed, that the McCords had not put forth any meritorious defense, and that it was entitled to a judgment as a matter of law. Attached to the motion was an affidavit from David Perez, which stated that he is the Assistant Vice President of Countrywide Home Loans as servicing agent for Bank of New York. The affidavit stated that the McCords were in default starting with the payment due on February 1, 2008. It further stated that Countrywide had offered the McCords loan modification two times but that James McCord failed to return requested documents on one occasion, and the other was denied based on his financial situation.

The McCords objected to the motion, first stating that discovery had not been completed. They indicated that they received Countrywide's response to their request for production only after the summary judgment motion had been filed and that they still needed to review the produced documents. They also

needed additional discovery to prove their counterclaim. Second, the McCords stated that factual issues existed regarding the breach of assumed duty based on Countrywide's membership in Hope Now. The McCords stated that the discovery they did receive did not include the requested loss mitigation guidelines. Furthermore, they contended that the statement in the motion that Countrywide had reviewed and denied their loss mitigation offer created an issue of fact regarding whether Countrywide satisfied its duty to them.

In reply, Countrywide stated that the discovery response had been sent months earlier, but had not been received. However, Countrywide neither heard from the McCords regarding the lack of response, nor did they file a motion to compel. It argued that discovery was complete and that no issues of material fact remained.

The Master Commissioner reviewed the judgment tendered by Countrywide, noting that the McCords' answer did not deny the existence of the debt or their default in payment. The Master Commissioner further stated that the McCords' response did not establish or suggest the existence of any genuine issue of material fact or any potential affirmative defenses. The McCords objected to the Master Commissioner's report, stating that they had a viable counterclaim based on breach of an assumed duty.

The circuit court entered a final judgment and order of sale on October 9, 2009, finding that no genuine issues of material fact existed and that Countrywide was entitled to a judgment as a matter of law. This appeal follows.

On appeal, the McCords raise two arguments; namely, 1) that Countrywide was not entitled to a judgment as a matter of law because it did not have authority to enforce the note and 2) that summary judgment was premature because discovery was incomplete and because issues of material fact existed related to their counterclaim.

In *Lewis v. B & R Corp.*, 56 S.W.3d 432, 436 (Ky. App. 2001), this Court set forth the standard of review in an appeal from the entry of a summary judgment:

> The standard of review on appeal when a trial court grants a motion for 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." The trial court must view the evidence in the light most favorable to the nonmoving party, and 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. The moving party bears the initial burden of showing that no genuine issue of material fact exists, and then the burden shifts to the party opposing summary judgment to present "at least some affirmative evidence showing that there is a genuine issue of material fact for trial." The trial court "must examine the evidence, not to decide any issue of fact, but to discover if a real issue exists." While the Court in *Steelvest[, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 480 (Ky. 1991),] used the word "impossible" in describing the strict standard for summary judgment, the Supreme Court later stated that that word was "used in a practical sense, not in an absolute sense." Because summary judgment involves only legal questions and the existence of any disputed material issues of fact, an appellate court need not defer to the trial court's decision and will review the issue *de novo*. [Citations in footnotes omitted.]

The McCords' first argument addresses whether Countrywide was entitled to a judgment as a matter of law based upon their argument that Countrywide lacked standing to enforce the note.

As they did below upon the filing of the complaint when Bank of New York indicated that the note was not available, the McCords contend that Countrywide was not the holder of the note securing the mortgage. Rather, Bank of New York was the holder of the note by virtue of the endorsement and assignment by CHL as memorialized in the circuit court's order denying their motion to dismiss. They cite to KRS 355.1-201(2)(u)(1), which defines a "holder" as "[t]he person in possession of a negotiable instrument that is payable either to bearer or to an identified person that is the person in possession[.]" The record reflects that Bank of New York assigned the mortgage to Countrywide, was removed as the plaintiff in this action on its own motion, and Countrywide was substituted in its place. The McCords state that although the record contains the assignment of the mortgage to Countrywide, the record does not contain an assignment of the note, despite, we presume, the language in the document assigning the mortgage. Therefore, they argue that Bank of New York continues to be the holder of the note, meaning that Countrywide is not the holder and that it cannot seek to enforce the note.

Countrywide disputes their argument, stating that it is the holder of the note and is in possession of the original note. Countrywide also points out that the McCords did not raise this issue of fact before the circuit court regarding its status

as the holder or its right to enforce the note. We agree with Countrywide that the McCords' failure to raise lack of standing in their response to the motion for summary judgment or in their objection to the Master Commissioner's report acts as a waiver of the affirmative defense of lack of standing, and they are precluded from raising that issue for the first time on appeal.

As a general rule, it is well settled that a party is not permitted to raise an issue for the first time on appeal. "The Court of Appeals is one of review and is not to be approached as a second opportunity to be heard as a trial court. An issue not timely raised before the circuit court cannot be considered as a new argument before this Court." *Lawrence v. Risen*, 598 S.W.2d 474, 476 (Ky. App. 1980). "It is an unvarying rule that a question not raised or adjudicated in the court below cannot be considered when raised for the first time in this court." *Combs v. Knott County Fiscal Court*, 283 Ky. 456, 141 S.W.2d 859, 860 (1940). *See also Regional Jail Auth. v. Tackett*, 770 S.W.2d 225, 228 (Ky. 1989) (an appellate court "is without authority to review issues not raised in or decided by the trial court."). However, there are circumstances where unpreserved issues may be raised, such as in situations addressing subject-matter jurisdiction. *See Hisle v. Lexington-Fayette Urban County Gov't*, 258 S.W.3d 422, 430-31 (Ky. App. 2008) (holding that because subject-matter jurisdiction concerns the nature and origin of a court's power to act, it may not be waived and may be raised at any time in the proceeding).

The issue in this case concerns Countrywide's alleged lack of standing to enforce the note and, for purposes of this analysis, whether lack of standing may be waived. The Supreme Court of Kentucky recently and extensively addressed the issue of standing and its relationship to subject-matter jurisdiction in *Harrison v. Leach*, 323 S.W.3d 702 (Ky. 2010). *Harrison* involved a child custody dispute whereby the grandparents, who were not found to be *de facto* custodians, were nevertheless awarded permanent sole custody of their grandchildren. The father appealed the ruling to this Court. Although not raised at the lower court level, this Court, acting on its own motion, determined that the grandparents did not have standing to seek custody of their grandchildren due to the repeal of KRS 403.420. Thus, the Court vacated the custody ruling and remanded the matter for dismissal of the proceedings. On review, the Supreme Court vacated the opinion of the Court of Appeals, holding that lack of subject-matter jurisdiction and lack of standing are not synonymous and that lack of standing may be waived if not raised before the trial court.

The *Harrison* Court specifically addressed the standing issue as follows:

> We begin our analysis by quoting from Kentucky precedent, which unambiguously holds that "where a court has general jurisdiction of the subject matter, a lack of jurisdiction of the particular case, as dependent upon the existence of particular facts, may be waived." Although that quote does not use the term standing, we believe its clear thrust is that an opposing party may waive any question regarding another party's inability to bring a particular action under particular facts.

We are aware that "[a] lack of standing cannot, in some jurisdictions, be waived." It appears, however, that the conclusion that lack of standing cannot be waived is premised upon the flawed concept that standing is inextricably interwoven with a trial court's subject-matter jurisdiction. But we have already explained that a trial court's subject-matter jurisdiction is distinct from standing, so we reject a commingling of the terms to reach a conclusion that a lack of standing defeats or somehow overrides a trial court's subject-matter jurisdiction.

Instead, we join with the courts of our sister states who have held that any question regarding a lack of standing is waived if not timely pled. It has been held that a right to contest standing may be waived, even in child custody cases. This application of waiver to standing is entirely consistent with our precedent, which holds that "where a court has general jurisdiction of the subject matter, a lack of jurisdiction of the particular case, as dependent upon the existence of particular facts, may be waived." So we conclude that lack of standing is a defense which must be timely raised or else will be deemed waived.

This use-it-or-lose-it approach to standing is logical because, as an Illinois appellate court noted, "the purpose of . . . defenses, such as lack of standing, is to afford the defendants the means of obtaining at the outset of litigation summary disposition of issues of law or easily proved issues of fact." Since a defendant benefits from early termination of a case due to a plaintiff's lack of standing, we believe a defendant should not be permitted to stand mute at the trial court level regarding standing, only to raise the issue on appeal (or, as in this case, continue to ignore the issue but ultimately benefit from an appellate court's raising it on its own). Such an approach would be a grossly inefficient use of the time and resources of the parties and of trial courts and would be a disincentive for attorneys to comply with their duty thoroughly and timely to determine the legal standing of all parties at the infancy of litigation.

Id. at 707-09 (footnotes omitted). The Court then concluded: "In summary, therefore, the concepts of standing and subject-matter jurisdiction are distinct. Since a lack of standing does not deprive a trial court of subject-matter jurisdiction, a party's failure to raise timely his or her opponent's lack of standing may be construed as a waiver. Since standing may be waived, an appellate court errs by injecting it into a case on its own motion." *Id.* at 709.

While the McCords did in fact raise the issue of standing when the complaint was originally filed, that issue was decided when the circuit court denied their motion to dismiss when Bank of New York supplied the necessary documents, including the note and the document assigning the note to it. Although the McCords provisionally pled CR 12 affirmative defenses in their answers, they did not raise the issue again or specifically plead lack of standing as an affirmative defense. In their response to Countrywide's motion for summary judgment and the objection to the Master Commissioner's report, the McCords limited their objections to arguments that summary judgment was premature as discovery was incomplete and that issues of material fact remained related to their counterclaim. In neither document did they assert the affirmative defense of lack of standing. Based upon *Harrison*'s holding, we must deem the McCords' failure to raise the defense of lack of standing as a waiver. Therefore, we shall not address the McCords' argument that Countrywide lacked standing.

Next, the McCords argue that summary judgment was premature, first because discovery was incomplete. In support of this argument, they cite to

Pendleton Bros. Vending, Inc. v. Com. Finance and Admin. Cabinet, 758 S.W.2d 24, 29 (Ky. 1988), in which the Supreme Court stated that "[a] summary judgment is only proper after a party has been given ample opportunity to complete discovery, and then fails to offer controverting evidence." The McCords contend that Countrywide failed to provide them with the loss mitigation guidelines, as they requested. Without these guidelines, the McCords argued that they could not establish their counterclaim by determining what was necessary to qualify for loan modification and, in turn, whether Countrywide complied with its duty as a member of the Hope Now Alliance.

Countrywide argues that the McCords had ample time to complete discovery during the trial court proceedings, noting that *Pendleton Bros.*, *supra*, holds that the standard hinges on the opportunity to complete discovery, not whether the party actually completed discovery. Countrywide points out that the proceedings below were commenced in August 2008, the McCords made their first appearance in September 2008, and the motion for summary judgment was not filed until July 2009, giving them ample time to request, obtain, and review discovery responses.

While we note that the McCords did not file their answer and counterclaim until January 2009 after the trial court denied their motion to dismiss, we nevertheless agree with Countrywide that the McCords had ample time to complete discovery prior to the filing of the summary judgment motion. Countrywide states, and the record reflects, that the McCords did not undertake to compel the discovery responses when they were not timely received. Had that happened,

Countrywide would have been able to re-serve its response just as it did when contacted upon the filing of the motion for summary judgment. Therefore, we find no merit in the McCords' argument that summary judgment was premature based upon incomplete discovery.

Finally, the McCords' second argument supporting its contention that summary judgment was premature is that material issues of fact still exist related to the subject matter of their counterclaim for breach of Countrywide's assumed duty. The gist of their argument is that by joining Hope Now, Countrywide assumed a duty to help homeowners, such as the McCords, avoid foreclosure. This is based upon Hope Now's mission statement, which provides:

> HOPE NOW is an alliance between counselors, mortgage companies, investors, and other mortgage market participants. This alliance will maximize outreach efforts to homeowners in distress to help them stay in their homes and will create a unified, coordinated plan to reach and help as many homeowners as possible. The members of this alliance recognize that by working together, they will be more effective than by working independently.

Hope Now, http://www.hopenow.com/alliance-statement.php (last visited Dec. 14, 2010). On the other hand, Countrywide argues that it did not voluntarily assume a duty to the McCords by participating in Hope Now, since it never undertook to render a service to them. Furthermore, Hope Now's guidelines do not provide for third-party beneficiaries.

Both parties cite to *Grand Aerie Fraternal Order of Eagles v. Carneyhan*, 169 S.W.3d 840, 847 (Ky. 2005), for its analysis of assumption of duty: "It is well

established that a breach of a voluntarily assumed duty can give rise to tort liability. A threshold inquiry under this doctrine is whether the putative tortfeasor has actually and specifically undertaken to render the services allegedly performed without reasonable care." *Id*. at 847.

> Before such a voluntarily assumed duty can be found, one of three further preconditions must exist: (1) the failure to exercise reasonable care in performing the undertaking must increase the risk of harm; (2) the duty undertaken must already be owed to the third person by another; or (3) the third person must rely on the undertaking. *Ostendorf v. Clark Equip. Co.*, 122 S.W.3d 530, 538 (Ky. 2003); Restatement (Second) of Torts § 324A (1965). *See also* Restatement (Third) of Torts: Liability for Physical Harm § 43 (Proposed Final Draft No. 1, 2005).

Carneyhan, 169 S.W.3d at 855 n.2.

While we certainly sympathize with the McCords and other families facing foreclosure in these difficult economic times and appreciate the McCords' analysis of the problems inherent in the federal government's attempts to reverse the financial crisis in the housing market, we must agree with Countrywide that no disputed issues of material fact exist that would prevent the entry of a summary judgment in this matter. Despite questions regarding the review procedures in general and the review of the McCords' application specifically, we cannot hold that those questions represent issues of material fact pursuant to the laws of the Commonwealth. Based on the language from the guidelines attached to Countrywide's brief from Hope Now's website, the McCords cannot benefit as third parties from whatever contractual rights or duties, if any, arise from

participation in the alliance. Furthermore, they cannot establish the requirements necessary to establish that Countrywide assumed a duty to them beyond that of a lender/borrower relationship. Therefore, we must hold that the McCords have failed to establish the existence of any material issues of fact and that the trial court properly as a matter of law entered summary judgment in favor of Countrywide.

For the foregoing reasons, the judgment of the Jefferson Circuit Court is affirmed.

ALL CONCUR

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