

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-000060-MR

U.S. BANK, N.A., IN ITS CAPACITY AS
TRUSTEE FOR THE REGISTERED HOLDERS
OF CSFB HOME EQUITY PASS-THROUGH
CERTIFICATES, SERIES 2005-FIX1,
SUCCESSOR IN INTEREST TO THIRD-PARTY
DEFENDANT, CROSS/COUNTERCLAIM
PLAINTIFF, THE CIT GROUP/CONSUMER
FINANCE, INC.

APPELLANT

v. APPEAL FROM BOYD CIRCUIT COURT
HONORABLE C. DAVID HAGERMAN, JUDGE
ACTION NO. 08-CI-00536

LESTER E. LYND; AND
ERCEL RATLIFF

APPELLEES

OPINION REVERSING
AND REMANDING

** ** * ** * ** *

BEFORE: DIXON AND WINE, JUDGES; SHAKE,¹ SENIOR JUDGE.

JUDGE WINE: U.S. Bank, N.A., in its Capacity as Trustee for the Registered

Holders of CSFB Home Equity Pass-Through Certificates, Series 2005-FIX1, as

¹ Senior Judge Ann O'Malley Shake sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

Successor-in-Interest to The CIT Group/Consumer Finance, Inc. (hereinafter, “US Bank”), appeals from a summary judgment of the Boyd Circuit Court finding that a subsequent mortgage held by Lester E. Lynd was entitled to priority over its prior mortgage on the same property. We agree with the trial court that the property description in US Bank’s mortgage describes a different property than described in the deed. However, that description is sufficiently ambiguous to permit the introduction of extrinsic evidence regarding the parties’ intent. Furthermore, Lynd had notice of the potential existence of the prior mortgage and may have been required to make further inquiry beyond a mere review of the public record. Since these involve genuine issues of material fact, we conclude that summary judgment was not appropriate. Hence, we reverse and remand for additional proceedings.

The underlying facts of this matter are not in dispute. Ercel Ratliff (“Ratliff”) is the owner of multiple tracts of real estate in Boyd County, Kentucky. Two of those tracts are the subject of this action. The first tract is Lot 69 in the Rockdale Subdivision near Ashland, Kentucky (hereinafter, “the Rockdale property”). The address of the Rockdale property is 8142 Ray Drive, Ashland. Ratliff acquired the Rockdale property by a deed dated May 7, 1976, recorded in Deed Book 467, page 979, in the Boyd County Clerk’s records.

The second tract is known as Lot Numbers 29, 30 and 31 of the Springhaven Addition in the City of Cattlettsburg (hereinafter, “the Springhaven property”). The mailing address of the Springhaven property is 3303 Springhaven, Cattlettsburg. Ratliff acquired the Springhaven property by a deed dated April 22,

1997, recorded in Deed Book 606, page 695, in the Boyd County Clerk's records. The Boyd County Property Valuation Administrator (PVA) assigned the Springhaven property the parcel number 040-02-05-014.00.

On November 20, 2003, Ratliff executed a promissory note and a mortgage to US Bank's predecessor, The CIT Group/Consumer Finance, Inc. ("CIT"). The mortgage included the legal description of the Springhaven property, as well as the source of title, PVA number, and mailing address for the Springhaven property. However, the mortgage also includes two references to the Rockdale property. The address for the Rockdale property appears on the first page of the mortgage and on an attached rider. This mortgage is recorded in the Boyd County Clerk's records at Mortgage Book 910, page 76.

On February 11, 2005, Ratliff executed a promissory note and a mortgage to Lester Lynd ("Lynd"). To secure the note, Ratliff executed a mortgage on the Rockdale property in favor of Lynd. This mortgage refers to the Rockdale property by legal description and by lot number. (The mortgage also encumbered several other tracts which are not at issue in this case.) However, the mortgage also states that the property is subject to a prior mortgage in favor of CIT, and references that mortgage by Mortgage Book and page. This mortgage is recorded in the Boyd County Clerk's records at Mortgage Book 966, page 77.

On April 18, 2008, Citizens National Bank filed an action to foreclose on several tracts owned by Ratliff, but this action did not involve either the Springhaven property or the Rockdale property. Lynd was named as a defendant

because of his interest in a different tract. Thereafter, on May 23, 2008, Lynd filed a third-party complaint against Ratliff, CIT, and others, seeking to enforce his mortgage against the Rockdale property. In his third-party complaint, Lynd contended that his was a first mortgage against the Rockdale property.

On June 9, 2008, US Bank, as successor-in-interest to CIT, filed an answer to Lynd's third-party complaint. In a subsequent amended answer and counterclaim, US Bank asserted, among other things, that the 2003 mortgage was intended to cover the Rockdale property, but the legal description was incorrectly drafted to describe the Springhaven property. Consequently, US Bank requested of the trial court that the 2003 mortgage be reformed to substitute the Rockdale property for the Springhaven property.

On July 25, 2008, Lynd filed a motion for summary judgment seeking a determination that his mortgage was the first mortgage on the Rockdale property. US Bank opposed the motion, presenting evidence that CIT and Ratliff had intended that the 2003 mortgage would cover the Rockdale property. US Bank also argued that the references to the Rockdale property in the 2003 mortgage documentation and in Lynd's mortgage were sufficient to place Lynd on inquiry notice of the prior unrecorded lien.

In an order entered on August 3, 2009, the trial court granted Lynd's motion for summary judgment. The court concluded that the specific legal description of the Springhaven property in the 2003 mortgage controlled over the general references to the mailing address of the Rockdale property. The trial court

further concluded that “[t]he instrument which was prepared and recorded by CIT was legally insufficient to put Lynd or anyone else for that matter on notice that CIT claimed a security interest in the Rockdale property.” Consequently, the court held that Lynd’s mortgage on the Rockdale property is the first mortgage in priority.

US Bank filed a motion to alter, amend or vacate under Kentucky Rule(s) of Civil Procedure (“CR”) 59.05, reiterating its position that there were genuine issues of material fact on its claims. The trial court denied the motion by order entered on November 10, 2009. The trial court entered a Judgment and Order of Sale for the Rockdale property on December 11, 2009. That judgment incorporated the trial court’s prior rulings regarding priority of mortgages.

On appeal, US Bank argues that the trial court erred by granting summary judgment to Lynd because it holds a prior mortgage with priority over Lynd’s. However, US Bank did not argue to the trial court that it was entitled to summary judgment on its claim; only that there were genuine issues of material fact which precluded summary judgment in favor of Lynd. Therefore, the issue on appeal is limited to whether the trial court properly granted summary judgment to Lynd.

The standard of review governing an appeal of a summary judgment is well settled. We must determine whether the trial court erred in concluding that there was no genuine issue as to any material fact and that the moving party was entitled to a judgment as a matter of law. *Scifres v. Kraft*, 916 S.W.2d 779, 781

(Ky. App. 1996). Summary judgment is appropriate “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.” CR 56.03. In *Paintsville Hosp. Co. v. Rose*, 683 S.W.2d 255, 256 (Ky. 1985), the Supreme Court of Kentucky held that for summary judgment to be proper, the movant must show that the adverse party cannot prevail under any circumstances. The Court has also stated that “the proper function of summary judgment is to terminate litigation when, as a matter of law, it appears that it would be impossible for the respondent to produce evidence at the trial warranting a judgment in his favor.” *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 480 (Ky. 1991). Because a summary judgment involves no fact-finding, this Court reviews it *de novo*, in the sense that we owe no deference to the conclusions of the trial court. *Blevins v. Moran*, 12 S.W.3d 698, 700 (Ky. App. 2000).

In granting summary judgment for Lynd, the trial court focused on the sufficiency of the description of the property in the 2003 mortgage. Although US Bank holds the prior mortgage over Lynd, the trial court found that the property description in the 2003 mortgage clearly described the Springhaven property and that the fleeting references to the Rockdale property were not sufficient to suggest that the mortgage applied to any other property. Consequently, the trial court concluded that the 2003 mortgage was inadequate to place any third party on actual or even inquiry notice that CIT claimed an interest in the Rockdale property. We

agree with the trial court that the rules for construction of deeds would support this conclusion.

The particular legal description of the Springhaven property generally would control over the general identification of the Rockdale property by physical address. *Billips v. Hughes*, 259 S.W.2d 6, 7 (Ky. 1953). Furthermore, the 2003 mortgage specifically refers to the source of title for the Springhaven property. Where a deed refers to an antecedent, recorded deed for a particular description of the property, the description contained in the recorded deed must be read into the description contained in the deed under examination to identify the property conveyed. *Bland v. Kentucky Coal Corp.*, 306 Ky. 1, 206 S.W.2d 62, 63 (Ky. 1947).

However, this matter is complicated by the fact that Ratliff specifically notified Lynd of the existence of the CIT's 2003 mortgage. As noted above, the 2005 mortgage includes language specifically stating that the Rockdale property was subject to CIT's 2003 mortgage and referring to the location of the mortgage in the public record. Consequently, the sufficiency of the property description must be viewed in light of Lynd's actual notice of the existence of CIT's mortgage.

Of course, the matter of Lynd's notice of CIT's mortgage is moot unless US Bank can first show that CIT had a recognizable mortgage interest in the Rockdale property. While the legal description in the 2003 mortgage identifies the Springhaven property as the mortgaged property, Lynd concedes that the 2003

mortgage contains conflicting descriptions identifying the mortgaged property. Since the property description in the 2003 mortgage was ambiguous, US Bank was entitled to present extrinsic evidence to determine the intention of the parties.

Caudill v. Citizens Bank, 383 S.W.2d 350, 352 (Ky. 1964).

When interpreting an ambiguous deed, the court may consider the nature of the instrument, the situation of the parties executing it, and the objects which they had in view. *Handy v. Standard Oil Co.*, 468 S.W.2d 302, 304 (Ky. 1971); *Sword v. Sword*, 252 S.W.2d 869, 870 (Ky. 1952). Furthermore, the subsequent acts of the parties, showing the construction they have put upon the agreement, may be looked to, and are entitled to great weight in determining what the parties intended. *Sword, supra*, at 870. In this case, US Bank presented parol evidence supporting its assertion that CIT and Ratliff intended the 2003 mortgage would apply to the Rockdale property. Although this evidence was by no means overwhelming and it is contradicted by the canons for construction of deeds, as applied by the trial court. Nevertheless, we conclude that US Bank presented sufficient evidence to make a colorable claim that it has an equitable mortgage on the Rockdale property.

At this point, the issue of Lynd's notice becomes relevant to determine the priority of the competing mortgage liens. Kentucky is a race-notice jurisdiction. Kentucky Revised Statute(s) ("KRS") 382.270; *State Street Bank & Trust Co. of Boston v. Heck's, Inc.*, 963 S.W.2d 626, 630 (Ky. 1998). In the event of competing mortgage interests, it is not the first to record, but the first to record

without notice who achieves priority. *Minix v. Maggard*, 652 S.W.2d 93, 96 (Ky. App. 1983). The Kentucky Supreme Court has construed the phrase “without notice” to mean “without actual knowledge of the existence of a mortgage, either unrecorded or improperly recorded, or knowledge of such facts as would lead a reasonably prudent person under like circumstances to inquire into the matter and discover the existence of that mortgage.” *Heck’s* at 630.

Given the ambiguity in the recorded instrument and the actual notice in the 2005 mortgage, Lynd could not satisfy his duty to inquire simply by looking at the public record. *See Francis v. U.S. Bank Nat’l Ass’n*, 2008 WL 1921491 (Ky. App. 2008)(2004-CA-001064-MR), at *4. The extent of this duty depends upon the circumstances which existed at the time Lynd and Ratliff executed the 2005 mortgage. The trial court must determine whether Lynd could have discovered through a reasonable and prudent inquiry that US Bank claimed an interest in the Rockdale property. This is a factual issue which precludes entry of summary judgment.

On the other hand, CIT’s negligence in drafting the property description may estop US Bank from claiming an equitable mortgage on the Rockdale property. The property description in CIT’s recorded mortgage identified an entirely different property from the tract in which US Bank now claims an interest. The court could find that Lynd reasonably relied on the description in the 2003 mortgage and was not obliged to inquire further about the

notice in his mortgage. Again, this is an issue of fact which precludes summary judgment.

Accordingly, the summary judgment of the Boyd Circuit Court is reversed and this matter is remanded for further proceedings on the merits of US Bank's claim.

ALL CONCUR.

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