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Commonwealth Of Kentucky

Court of Appeals

NO. 2014-CA-001312-MR and 2014-CA-001393-MR

SHAWNA JOY MARTINEZ (NOW STERLING) — APPELLANT/ CROSS-APPELLEE

v.

APPEAL AND CROSS-APPEAL FROM BATH CIRCUIT COURT
HONORABLE BETH LEWIS MAZE, JUDGE
ACTION NO. 12-CI-90042

BRUNER LAND COMPANY, INC. — APPELLEE/ CROSS-APPELLANT

OPINION
AFFIRMING IN PART,
REVERSING IN PART,
AND REMANDING

** ** ** ** **

BEFORE: ACREE, D. LAMBERT AND VANMETER, JUDGES.

D. LAMBERT, JUDGE: This matter is before this Court on appeal and cross-appeal from the judgment of the Bath Circuit Court following a jury trial. The Appellant/Cross-Appellee, Shawna Joy Martinez (now Sterling), appears *pro se*

and asserts multiple errors in the trial court's entry of judgment in favor of the Appellee/Cross-Appellant, Bruner Land Company, Inc. (hereinafter "Bruner"). In its cross-appeal, Bruner asserts a single error in the trial proceedings. After careful examination of the record, we affirm the trial court as to its rulings on the appeal and reverse on the cross-appeal.

I. FACTUAL AND PROCEDURAL HISTORY

This appeal originated as an action to enforce a security interest by foreclosure. Bruner is a corporation primarily engaged in the business of purchasing undeveloped land for later subdivision and resale. In 2008, Bruner purchased approximately 80 acres of land located in Bath County. It subsequently sold approximately 72 of those acres to a non-party to this action.

Sterling[1] purchased a four-acre portion of the eight acres of that land still owned by Bruner in 2009. This parcel had a residence located on it, in which Sterling intended to live with her daughter. Sterling also financed her purchase through Bruner. The contract stated the purchase price of $79,000.00 at a rate of interest of 9.9% over a period of 30 years. The agreement contained a "rent to own" component by which Sterling would live in the residence and make monthly payments which would be applied to the purchase price as her down payment. Under this arrangement, Sterling paid Bruner $6,430. Her occupancy of the

[1] Though her legal name for the majority of the proceedings prior to this appeal was Shawna Martinez, the Appellant petitioned to change her legal surname to Sterling on January 14, 2014, and refers to herself by such name in her brief. This Court will use Sterling, to avoid confusion.

property began in December of 2008, though title to the property did not pass until 2009, when she had remitted funds equaling the down payment.

Karen Chapman, the agent of Bruner who had negotiated the 2008 transaction, contacted Sterling later in 2009 by with an offer to sell the other four unsold acres. Sterling accepted and the parties renegotiated the agreement to include the residence and eight acres for a purchase price of $102,600, at the same interest rate and loan duration. Sterling testified that her acceptance of the offer was at least partially motivated by her not wanting to disappoint Chapman.

Sterling then fell severely ill, and consequently began receiving disability benefits. Experiencing financial difficulties, Sterling sought assistance from Gateway Community Action (hereinafter, "Gateway") in winterizing the home. During Gateway's work, it was discovered that the home contained lead-based paint. Gateway then provided Sterling with the disclosure documentation mandated by 42 U.S.C.A. § 4852d and 40 C.F.R. 745.118(d). Bruner admittedly never provided any such documentation as the seller of the property, nor did it offer any other evidence of compliance with 42 U.S.C.A. § 4852d or 40 C.F.R. 745.118(d).

The record reflects testimony that the discovery of the lead-based paint hazards immediately diminished the value of the property to approximately $40,000. Sterling then made inquiries regarding "giving the house back" to Bruner.

On June 24, 2010, Chapman, acting on Bruner's behalf, entered into another contract with Sterling amending the terms of the purchase contract by lowering the principal amount to $80,000 for the entire property. While operating under this contract, Sterling paid to Bruner a total of $7,657.65 in interest, and late charges in the amount of $556.96.

Sterling testified that she no longer wanted to live in the home, but after the discovery of the lead paint, she was unable to sell it. Due to the combination of Sterling drawing entitlement benefits and the negative equity in the home, she was unable to refinance the mortgage. Jennifer Parsons, the originator of the mortgage on behalf of Bruner, testified that she had told Sterling the home could be refinanced if she paid the balance down to the home's actual value, however, that would entail making two monthly payments of $696.15, where she had previously only made one payment per month in that amount.

Sterling made her final payment on February 22, 2012, which Bruner applied to a delinquent payment from the previous June. Bruner rejected any further attempts at payment and instituted foreclosure proceedings.

Sterling retained counsel to defend her in the foreclosure action and file a counter-claim, but after Sterling and her counsel could "no longer agree upon the appropriate way to proceed" in the matter, the trial court granted the motion allowing Sterling's counsel to withdraw on March 20, 2013. Sterling represented herself from that point forward, including during trial.

As her primary defense, as well as the basis for her counter-claim, Sterling asserted that Bruner's failures to disclose the possibility of lead-based hazards in the home prior to purchase, combined with Bruner's lack of a license to operate as a mortgage lending company in Kentucky, precluded a foreclosure action. Sterling later attempted to argue that Bruner obtained her agreement through fraud, and because of this fraud, the contract was subject to rescission. According to Sterling's argument, Bruner was therefore not entitled to foreclosure. Sterling sought to recover in the amount of all funds she paid to Bruner toward her purchase of the property, punitive damages, and her attorney fees.

The trial court ordered, on November 7, 2013, that if Sterling wished to amend her counter-claim, she must do so within thirty days. She failed to do so, and on July 3, 2014, just seven days prior to trial, Sterling filed a pleading entitled "Defendant's Motion for Leave to File Amended Counterclaim and Counterclaim by Supplemental Pleading and Memorandum of Law in Support." The trial court denied this motion.

Bruner argued at trial that Sterling presented no proof contradicting the fact that she had agreed to the terms of the contract, nor did Sterling refute the alleged failure to make the payments as agreed. Bruner further argued in its defense to Sterling's counter-claim that it was exempt from the licensing requirement as it makes four or fewer residential mortgages per year. Bruner admitted its failure to provide the lead-based hazard disclosures mandated by federal law, but argued that such failure was immaterial in light of the fact that

Gateway had already provided her such information prior to her entering into the final contract in 2010, which was the operative contract at the time of the initiation of the foreclosure proceedings.

The trial court granted Bruner's motions for directed verdict as to the foreclosure and on Sterling's counter-claim. The only remaining matter for the jury to decide was the measure of damages: whether Bruner was entitled only to the principal of the loan, or the principal plus interest, penalties, and fees assessed by Bruner. The trial court instructed the jury, which then returned an eleven to zero unanimous handwritten verdict,[2] contrary to the instructions the trial court had given it, that Bruner was entitled to zero. Also, on the page containing Instruction No. 2 (and not on any provided verdict form), the jury handwrote another "finding," indicating a vote of eleven to zero that "They are a loan company."

Immediately following the verdict, the parties and the court conducted a bench conference while in the presence of the jury. The parties argued the issue of whether the verdict was appropriate given the court had already determined, as a matter of law, that Bruner was entitled to foreclosure, and the jury could not reach a zero verdict in light of that prior ruling. The court then instructed the jury further and released them to deliberate again. The jury then returned a verdict awarding Bruner $80,000, with a further handwritten notation: "return property only."

The trial court entered judgment and referred the matter to the Master Commissioner for judicial sale. The judgment included a directive for Sterling to

[2] The jury foreman indicated his abstention, believing he was not permitted to vote.

vacate the premises by the time of the sale. The sale proceeded, despite Sterling's failure to vacate, and the order confirming the sale was entered on November 7, 2014. Bruner was the purchaser at the judicial sale, and filed a motion to remove Sterling from the premises, which the court granted.

This appeal followed, wherein Sterling asserts several allegations of error. The first allegation is that the trial court erred in granting Bruner's directed verdict motion as to the foreclosure. The second allegation is that the trial court erred in granting Bruner's directed verdict motion as to Sterling's counter-claim. The third allegation of error is that the trial court violated Civil Rule ("CR") 51(2) when conducting a bench conference post-verdict within the jury's presence, and that the same behavior allowed Bruner to commit jury tampering. The fourth allegation is that the trial court erred in denying her motion to file an amended counter-claim. Sterling's fifth allegation is that the trial court erred in denying her access to forcible detainer proceedings before ordering her to vacate the premises.

Bruner also filed a cross-appeal, which consists of one issue. Bruner's only allegation is that the trial court erred in allowing Sterling to present evidence and allowing the jury to determine whether it was a mortgage loan company after having granted directed verdict in Bruner's favor.

II. ANALYSIS

A. STANDARD OF REVIEW

Sterling's primary contention is that the trial court improperly granted Bruner's motions for directed verdict. The standard of appellate review of a

directed verdict consists of a two-pronged analysis. *Daniels v. CDB Bell, LLC*, 300 S.W.3d 204 (Ky.App. 2009). The first prong is a requirement that "there is a complete absence of proof on a material issue…." *Id.* (quoting *Bierman v. Klapheke*, 967 S.W.2d 16, 18-19 (Ky. 1998). If there has been proof presented, second prong requires that such evidence creates "no disputed issues of fact exist upon which reasonable minds could differ." *Id.* Much like a motion for summary judgment, a motion for directed verdict admits the veracity of the non-moving party's evidence. *Nat'l Collegiate Athletics Ass'n v. Hornung*, 754 S.W.2d 855 (Ky. 1988). When examining a trial court's ruling on a directed verdict motion, "[a] reviewing court does not reevaluate the proof because its only function is to consider the decision of the trial judge in light of the proof presented." *Commonwealth v. Benham*, 816 S.W.2d 186, 186 (Ky. 1991).

Bruner argued the trial court committed an error in instructing the jury. "When the question is whether a trial court erred by: (1) giving an instruction that was not supported by the evidence; or (2) not giving an instruction that was required by the evidence; the appropriate standard for appellate review is whether the trial court abused its discretion." *Sargent v. Shaffer*, 467 S.W.3d 198, 203 (Ky. 2015). "[I]n deciding whether to give a requested instruction the trial court must decide 'whether the evidence would permit a reasonable juror to make the finding the instruction authorizes.'" *Id.* (quoting *Springfield v. Commonwealth*, 410 S.W.3d 589, 594 (Ky. 2013)). However, if a jury instruction improperly sets forth

the law, the appellate standard of review is *de novo*. *Hamilton v. CSX Transp., Inc.*, 208 S.W.3d 272 (Ky.App. 2006).

Sterling's argument regarding amended pleadings necessarily invokes CR 15.01. That rules states that a party may amend a pleading "as a matter of course at any time before a responsive pleading is served," otherwise an amendment requires either leave of the trial court or written consent of the adverse party. CR 15.01. While under that rule, leave to amend is to be freely given by the trial court, questions of whether to allow an amendment is ultimately left to the sound discretion of the trial court. *Caldwell v. Bethlehem Mines Corp.*, 455 S.W.2d 67 (Ky. 1970). Thus, the standard of review for the trial court's limitation on Sterling right to amend her counter-claim is reviewed for abuse of discretion.

The familiar standard for this Court when determining whether a judicial action amounted to an abuse of discretion is found in *Commonwealth v. English*, 993 S.W.2d 941 (Ky. 1999). A trial court's decision will not be reversed as an abuse of discretion unless it is "arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Id.* at 945.

B. THE TRIAL COURT APPROPRIATELY GRANTED BRUNER'S MOTION FOR DIRECTED VERDICT AS TO BRUNER'S RIGHT TO FORECLOSE ON THE PROPERTY

Bruner correctly identifies the facts it needed to prove in order to prevail in its action to foreclose: existence of the secured debt and non-payment of the same. The uncontested evidence indicated that Sterling agreed to the terms,

executed the note in accordance with that agreement, and failed to make the payments as reflected in the agreement. Sterling presented no evidence that Bruner had forgiven or waived any payments. The salient question became whether Sterling could assert an affirmative defense.

Sterling argued before the jury that Bruner failed to comply with several statutory and regulatory provisions, and further that such failures constituted fraud. Such alleged fraud precluded foreclosure because it created grounds to rescind the contract. She first argued that Bruner failed to comply with the provisions of 42 U.S.C.A. § 4852d and 40 C.F.R. 745.118(d), which require disclosure by the seller of a home constructed prior to 1978 that the residence might contain lead-based paint. Further, KRS 286.8-220(2)(b),(h), and (i), define "unlawful acts" to include violations of federal statutory or regulatory schemes related to transactions involving the mortgage lending process. She also argued that Bruner was a mortgage loan company as defined in KRS 286.8-010(20), and the Bruner's failure to obtain a license to conduct such business operated to preclude the collection action pursuant to KRS 286.8-030(1)(a).

1. THE LANGUAGE OF KRS 286.8-030 DOES NOT OPERATE TO PREVENT FORECLOSURE ACTIONS

Interpretation of statutory provisions is a matter of law. *Bd. of Educ. v. Hurley-Edwards*, 396 S.W.3 879, 882 (Ky. 2013).

Bruner expends much effort in arguing that it is not a mortgage loan company subject to licensure. The language of KRS 286.8-020 exempts

"mortgage loan companies" as defined in KRS 286.8-010(20) from the licensure requirement if that entity makes no more than four mortgage loans within a calendar year "secured by residential real property," unless the entity holds itself out as engaging in the mortgage loan business as its primary business. KRS 286.8-020(1)(d).

Uncontested testimony established that for the years 2009 and 2010, the only residential mortgage made by Bruner in Kentucky was Sterling's, though Bruner had made more than four non-residential mortgages during that span of time. Testimony also established that Bruner's primary business is the purchase of undeveloped property for the purpose of subdivision and resale.

More importantly, the issue of whether Bruner was exempt from the licensure requirement of acting in violation of these statutory provisions is immaterial to the issue of foreclosure. Even had Bruner not been exempt, and was improperly acting as an unlicensed mortgage loan company, the consequences of such behavior are contemplated in KRS 286.8-030(3): "Any mortgage loan company… who willfully transacts business in Kentucky in violation… of this section shall have no right to collect, receive, or retain any interest or charges whatsoever on a loan contract, *but the unpaid principal shall be paid in full*." (emphasis added). The provision on which Sterling relies to argue that foreclosure is inappropriate in fact states the opposite: it explicitly states that even unlawful actors are entitled to recover the outstanding principal balance. Further, the Kentucky Supreme Court, interpreting a predecessor statutory scheme to KRS

Chapter 286, held in *Bennett v. Bourne*, 5 S.W.3d 124 (Ky. 1999), that a mortgage made by an unlicensed and non-exempt mortgage loan company did not justify voiding the mortgage where there was no mistake of such character that indicates a meeting of the minds never occurred. *Bennett* at 126.

2. STERLING'S ASSERTION OF A FRAUD DEFENSE FAILED TO PRESENT A QUESTION OF FACT FOR THE JURY

Having concluded that whether Bruner is an unlicensed or licensed mortgage loan company has no bearing on its procedural right to foreclose, the Court's analysis now moves to Sterling's challenge to Bruner's substantive right to foreclose (*i.e.* whether an enforceable security interest exists at all). She correctly states in her brief that mortgages obtained based on fraud are subject to rescission. "Mistake, misrepresentation, duress and fraud have always been grounds for the recision [*sic*] of a mortgage." *Bennett* at 125 (quoting 59 C.J.S. *Mortgages* § 120 *et seq.*).

Sterling proceeded at trial relying solely on her allegations of statutory violations, essentially arguing that Bruner had committed a fraud *per se* of sorts. Her answer and counter-claim only recited violations of federal and state statutory and regulatory authorities, but also contained a blanket invocation of all defenses authorized in CR 8 and 12 for the purpose of preservation, including fraud. The allegations and evidence supports two possible theories of fraud: common law fraud in the inducement and common law fraud by omission.

To recover for common law fraud in the inducement, six elements must be proven by clear and convincing evidence. A material representation must have been made. Such representation must have been false. The party making such representation must have known of its falsity or made the representation recklessly. The party making the representation must have intended it to be acted upon by the party hearing it. The party hearing the representation must have acted in reliance on the representation. That reliance must have operated to the detriment of the party hearing the representation. *Bear, Inc. v. Smith*, 303 S.W.3d 137 (Ky.App. 2010).

The record contains no evidence suggesting Bruner ever made a material representation regarding lead paint. In fact, Sterling's entire counter-claim rests on the failure to make any affirmative material representations. Common law fraud in the inducement is therefore not a viable defense or cause of action in this matter.

Fraud by omission is fundamentally different than fraud perpetrated by an affirmative misrepresentation, and it requires proof on distinctly different elements. *Rivermont Inn, Inc. v. Bass Hotels, Inc.*, 113 S.W.3d 636, 641 (Ky.App. 2003). The defendant must have had a duty to disclose a material fact. The defendant must have failed to disclose that fact. The defendant's failure to disclose that material fact must have induced the plaintiff to act. The plaintiff must have suffered damages. *Giddings & Lewis, Inc. v. Industrial Risk Insurers*, 348 S.W.3d 729, 747 (Ky. 2011) (citing *Rivermont* at 641). The duty incumbent upon the

defendant to disclose a material fact may be created by a confidential or fiduciary relationship between the parties, or imposed by statute. *Rivermont* at 641 (citing *Dennis v. Thompson*, 43 S.W.2d 18 (Ky. 1931)).

In the circumstances presented in this action, the proof presented does not give rise to a question of fact upon which reasonable minds could differ. The federal authorities cited herein unquestionably impose multiple duties on sellers of residential property related to disclosure of potential lead-based paint hazards to purchasers, and KRS 286.8-220(2)(h) and (i) make those violations of federal law parallel violations of state law. Further, Bruner admitted failing to comply with said duties, instead arguing that Sterling had entered into the 2010 mortgage agreement armed with actual knowledge of the potential lead paint hazards. The operative question is whether Sterling reasonably relied on the lack of the undisclosed information to her detriment when entering into the contract to purchase the home, not merely the 2010 contract modifying its terms.

Sterling, however, offered no evidence tending to prove she would not have entered into the transaction but for Bruner's admitted failure to make the mandated lead-based hazard disclosures. Her efforts at trial were instead directed at supporting her contention that Bruner lacked a license to operate as a mortgage loan company in Kentucky.

The trial court's grant of a directed verdict, in light of the preceding, was not reversible error.

C. THE TRIAL COURT APPROPRIATELY GRANTED BRUNER'S MOTION FOR DIRECTED VERDICT AS TO STERLING'S COUNTER-CLAIM

The Court's reasoning applied to Sterling's affirmative defenses also applies to the same fraud allegations when stated as her counter-claim. As discussed above, the pleadings lacked a question of fact necessitating a jury to resolve. Sterling presented no evidence supporting a finding of detrimental reliance, a critical element of her allegations of fraud to the jury.

The trial court thus committed no error in granting Bruner's motion as to the counter-claim.

D. THE TRIAL COURT DID NOT VIOLATE CR 51(2), NOR DID IT PERMIT JURY TAMPERING

Sterling argues that after the jury returned the initial verdict, the trial court erred in two ways: in failing to dismiss the jury, and in allowing Bruner to present an argument to the court regarding the defective judgment in its presence.

The relevant text of CR 51(2) reads:

> After considering any tendered instructions and motions to instruct and before the commencement of the argument, the court shall show the parties the written instructions it will give the jury, allowing them an opportunity to make objections out of the hearing of the jury. Thereafter, and before argument to the jury, the written instructions shall be given.

The Kentucky Supreme Court has previously held the purpose of CR 51 is to "obtain the best possible trial at the trial court level by giv[ing] the trial judge an

opportunity to correct any errors before instructing the jury." *Sand Hill Energy, Inc. v. Smith*, 142 S.W.3d 153, 162 (Ky. 2004) (footnotes and internal quotations omitted). The purpose of conducting such arguments outside the presence of the jury is to prevent improper extrajudicial influence on the jury before its deliberations.

The situation contemplated in the rule is not the situation at bar. The court had already instructed the jury, the parties had already presented closing arguments, the jury had already deliberated, and it had already returned a verdict. However, the jury returned a verdict inconsistent with the instructions the court gave it. The bench conference took place to discern how to best resolve the issue of the jury's clear misunderstanding of the instructions, not to re-litigate the propriety of the instructions themselves.

Further, Bruner addressed the trial court with the clear and unambiguous intention of advocating its position as to the propriety of the verdict in relation to the instructions, not to improperly influence the jurors' decision. To rule as Sterling asks—that arguments made during bench conferences in the jury's presence are indirect communications with the jury capable of supporting a felony charge of jury tampering—would have a chilling effect on the speech of attorneys in the courtroom and damage the administration of justice as a whole.

This Court concludes that neither CR 51, which requires arguments about jury instructions take place outside the jury's presence, nor KRS 524.090,

prohibiting and defining jury tampering, apply to this situation. As such, we cannot conclude the trial court acted outside its authority.

E. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING STERLING'S MOTION TO AMEND HER COUNTER-CLAIM

Sterling argues that the trial court's imposition of a December 7, 2013 deadline on any amended pleadings and the trial court's denial of her motion to amend filed just seven days before trial amounted to reversible error.

Specifically, Sterling contends that the trial court's order preventing her from filing an amended counter-claim after the deadline it had set left her "open to Bruner's attacks" for the months leading up to trial. She contends that because her contractual relationship with Bruner did not end in December, the trial court effectively permitted Bruner to engage in further "fraudulent acts that caused [her] damages" subsequent to her original filing of the counter-claim. While the rule allows amended pleadings where good cause is shown, Sterling did not specify what these acts might have been, or how they would have been redressed by an amendment to her counter-claim.

Appellate courts have consistently upheld the discretion of the trial court in issuing scheduling orders. *See, e.g.*, *Blankenship v. Collier*, 302 S.W.3d 665 (Ky. 2010); *Edwards v. State Farm Mut. Auto. Ins. Co.*, 389 S.W.3d 641 (Ky.App. 2012). In *Edwards*, this Court upheld the trial court's imposition of a deadline for dispositive motions sixty days prior to trial as within its discretion.

Though the period between December 2013 and the following July would have been longer than the sixty-day deadline in *Edwards*, the dispositive motions in that case would not have required additional discovery, or potentially result in a continued trial date, as new claims asserted by a party would have in this case.

Much like *Edwards*, this Court cannot conclude that imposition or enforcement of a pre-trial deadline is an abuse of the trial court's discretion, particularly here, where the party seeking leave to amend offered insufficient cause to do so as required by CR 15.01.

F. THE TRIAL COURT DID NOT ERR IN REFUSING TO REQUIRE BRUNER TO INSTITUTE FORCIBLE DETAINER PROCEEDINGS

Sterling argues that the trial court improperly ordered that she vacate the premises prior to the judicial sale. She contends that because she made a jury demand in this action, and the jury did not issue a forcible detainer writ, then the trial court lacked authority to order her to vacate the premises.

Forcible entry and detainer are governed by KRS 383.200 *et seq.* The definition of forcible detainer is found in KRS 383.200:

> (2) A forcible entry is:
>
> > (a) An entry without the consent of the person having the actual possession;
> >
> > (b) As to landlord, an entry upon the possession of his tenant at will or by sufferance, whether with or without the tenant's consent.

(3) A forcible detainer is:

> (a) The refusal of a tenant to give possession to his landlord after the expiration of his term; or of a tenant at will or by sufferance to give possession to the landlord after the determination of his will;
>
> (b) The refusal of a tenant of a person who has made a forcible entry to give possession, on demand, to the person upon whose possession the forcible entry was made;
>
> (c) The refusal of a person who has made a forcible entry upon the possession of one who acquired it by a forcible entry to give possession, on demand, to him upon whose possession the first forcible entry was made;
>
> (d) The refusal of a person who has made a forcible entry upon the possession of a tenant for a term to deliver possession to the landlord, upon demand, after the term expires; and, if the term expires whilst a writ of forcible entry sued out by the tenant is pending, the landlord may, at his cost and for his benefit, prosecute it in the name of the tenant.

However, interpretation of these provisions requires guidance from another subsection, KRS 383.545(15), which provides the definition of "tenant." A tenant is "a person entitled under a rental agreement to occupy a dwelling unit to the exclusion of others." KRS 383.545(15).

In this instance, the trial court's order confirming sale extinguished any and all interest Sterling had in the property. "[A]n order confirming a judicial sale is final and conclusive as to the rights of all parties in the property." *Smith v.*

Decker, 374 S.W.2d 487 (Ky. 1964). The order confirming the sale was entered on November 11, 2014. Sterling's interest in the property was thus extinguished.

As an occupant in a building who lacks any interest in the premises, Sterling did not fall into the definition of "tenant" for the purposes of a forcible detainer action. KRS 383.210(2) does not require a writ to remove a trespasser or squatter. Moreover, KRS 426.260 does not require the purchaser of property at a judicial sale to seek forcible detainer to take possession, only ten days' notice to vacate filed with the circuit court presiding over the underlying action. Such notice was given here, prior to the court's issuance of an order removing Sterling.

The trial court thus did not err in refusing to require Bruner to initiate forcible detainer proceedings.

G. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN INSTRUCTING THE JURY OF THE OPTION TO FIND THAT BRUNER WAS A NON-EXEMPT MORTGAGE LOAN COMPANY

In its counter-claim, Bruner's sole contention is that the trial committed reversible error in including Instruction Nos. 2, 3, and 4 in the jury instructions. Instruction No. 2 provided the definitions of the terms "mortgage loan" and "mortgage loan company." Instruction Nos. 3 and 4, invited the jury to make findings that Bruner was either exempt or not exempt, respectively, from the registration/licensure requirement. Bruner contends on appeal that these instructions were not supported by the evidence. Resolving this issue requires this

Court to examine both the statutory provisions governing mortgage transactions, and the evidence presented during trial.

1. ONLY RESIDENTIAL MORTGAGES FOR REAL PROPERTY LOCATED IN KENTUCKY ARE INCLUDED IN THE EXEMPTION PROVISION

Bruner contends this is an issue of first impression, requiring an interpretation as to whether KRS 286.8-020(1)(d) applies to all residential mortgages a company makes or only those made in Kentucky. Indeed the exemption provision does not address whether they apply only to those residential mortgages made in Kentucky.

Precedent demands the courts interpret statutes dealing with similar subject matter in such a way that reconciles their differences rather than negating the force and effect of one or the other. *Commonwealth v. Phon*, 17 S.W.3d 106 (Ky. 2000), *Pearce v. Univ. of Louisville*, 448 S.W.3d 746 (Ky. 2014).

KRS 286.8-030 requires a license or certificate of registration in order to transact business in Kentucky as a mortgage loan company or broker. KRS 286.8-030(1)(a). As noted above, mortgage loan companies which are involved in four or fewer residential mortgages per year are exempt from the licensure or registration requirement. KRS 286.8-020(1)(d). The phrase "transact business in Kentucky" is defined in KRS 286.8-010(34) as "participat[ing] in any meaningful way in the mortgage lending process, including the servicing of mortgage loans, with respect to any residential real property located in Kentucky[.]" Subsection 31

defines "residential real property" in two ways, first by referencing the definition provided for the word "dwelling" in the Federal Truth in Lending Act (15 U.S.C.A § 1602(w)), and second as "any real property upon which it is constructed or intended to be constructed a dwelling as so defined." KRS 286.8-010(31).

Reading these provisions together, the conclusion to be drawn is that only residential mortgages attached to real property located within Kentucky are to be counted toward the annual limitation for exemption from the registration/licensure requirement. "Transacting business in Kentucky" relates solely to residential real property located in Kentucky for the purpose of requiring a license under KRS 286.8-030. It stands to reason that because KRS 286.8-010(34) limits transacting business for the purpose of this statute to transactions relating to realty in Kentucky, then foreign mortgage transactions should not be considered. To ignore such definition for the purpose of exempting a mortgage loan company under KRS 286.8-020(1)(d) would deprive KRS 286.8-010(34) of any real force in the exemption context where there is no difference in the business activity other than the number of transactions. Such construction is forbidden by *Phon* and *Pearce*.

2. THE JURY INSTRUCTIONS WERE ERRONEOUS

In light of the Court's conclusion as to the proper interpretation of KRS 286.8-020(1)(d), the jury instructions, and their resulting findings, become suspect. Neither Instruction No. 3 nor Instruction No. 4 limits the jury to

considering mortgage transactions relating to residential real property located in Kentucky.

Testimony established that Bruner made only one residential mortgage on realty located in Kentucky in 2009 or 2010, though the record reflects Bruner made more than four mortgages during those years in the several states in which it transacts business. Testimony also established that Bruner engages primarily in the business of purchasing large tracts of undeveloped land for the purpose of subdivision and resale.

The jury indicated, by handwritten notation on the page containing Instruction No. 2, that "They [Bruner] are a loan company." On Jury Verdict Form 2, the jurors signed their names signifying their verdict, and found Bruner only entitled to the principal amount of the 2010 loan. This verdict is consistent with a finding that Bruner was a non-exempt mortgage loan company based on Instruction No. 4.

It is well-settled that trial judges have a duty "to prepare and give instructions on the whole law of the case… [including] instructions applicable to every state of the case deducible or supported to any extent by the testimony." *Holland v. Commonwealth*, 114 S.W.3d 792, 802 (Ky. 2003) (citing *Taylor v. Commonwealth*, 995 S.W.2d 355, 360 (Ky. 1999)). By giving an instruction allowing the jury to consider all residential mortgages rather than limiting the scope to those residential mortgages connected to land in Kentucky, the trial court

failed to give an accurate statement of the law. The jury instructions were thus erroneous.

III. CONCLUSION

This Court, having reviewed the record and the authorities cited herein, hereby AFFIRMS the ruling of the trial court as it relates to Sterling's appeal. As it relates to Bruner's cross-appeal, we hereby REVERSE the trial court and REMAND for further proceedings consistent with this opinion.

ALL CONCUR.

BRIEF FOR APPELLANT:
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