Not Designated for Publication

ARKANSAS COURT OF APPEALS

DIVISION IV
No. CA08-520

MONTE RED and MICHELLE RED APPELLANTS V. U. S. BANK APPELLEE	**Opinion Delivered** APRIL 1, 2009 APPEAL FROM THE SALINE COUNTY CIRCUIT COURT, [NO. CV-07-534-2] HONORABLE GARY ARNOLD, JUDGE AFFIRMED

KAREN R. BAKER, Judge

This appeal involves a statutory foreclosure proceeding on the home of appellants Monte and Michelle Red, husband and wife, that was initiated on behalf of appellee U.S. Bank. Appellants allege improprieties surrounding the sale and the actions taken subsequent to the sale. While appellee has urged this court in repeated motions and in its argument on appeal to dismiss this matter for a lack of jurisdiction, for the reasons stated herein, we decline to dismiss. However, finding no error in the trial court's disposition, we affirm.

On June 14, 2007, a complaint for forcible entry and detainer was filed by appellee. Attached as "Exhibit A" to the complaint was a mortgagee's deed filed May 22, 2007, identifying appellee as the purchaser of the appellants' property at the appointed sale on May 8, 2007, at 11:00 a.m. at the Saline County Courthouse in Benton, Arkansas. "Exhibit B" to

the complaint was a notice to vacate within three days of the notice with proof of service on May 23, 2007. Service of the complaint for forcible entry and detainer was made upon Michelle Red at home on June 18, 2007. Subsequent pleadings indicate that shortly thereafter, appellant contacted the law offices of Dustin Dyer and F. Parker Jones, III. On July 9, 2007, Mr. Jones filed an answer and objection to the forcible entry and detainer on behalf of appellants. Defenses included estoppel, payment, and acceptance.

On July 27, 2007, appellee filed a motion for summary judgment and a brief in support of the motion asserting that its complaint demonstrated a prima facie entitlement to a writ of possession and appellants' answer was insufficient to show that there were genuine issues for trial. The matter was set for a hearing on November 5, 2007. Without responding to the motion for summary judgment, counsel for appellants filed a motion to withdraw on August 29, 2007. On September 7, 2007, the trial court entered summary judgment for appellee, and on September 25, 2007, the court granted appellants' attorney's motion to withdraw.

Appellee's assertion of a lack of jurisdiction is based upon the fact that the summary judgment was entered on September 7, 2007, and that the appellants failed to move to set aside the order, failed to respond to the motion for summary judgment, and never appealed the entry of the summary judgment. Appellee further argues that appellants "should have made any claims or defenses prior" to the foreclosure sale pursuant to Arkansas Code Annotated section 18-50-116. Appellee relies, both below and on appeal, upon appellants' failure to assert claims or defenses prior to the sale or dispute the facts in the motion for

summary judgment. Appellants respond that, unknown to them at the time, F. Parker Jones was in a law partnership with counsel for appellee. They suggest that the conflict excuses their failure to respond to the motion for summary judgment. They do not challenge the summary judgment order on the basis that the order was entered prior to the date of the scheduled hearing.

Appellants state their specific points on appeal in the form of the following questions and subquestions:

> (A) Did the trial court err in refusing to allow the appellants the opportunity to demonstrate fraud and improper process in their Motion to Set Aside Foreclosure Sale?
>
> > 1. Did the appellants have standing to petition the court to set aside the foreclosure sale based on fraud and improper process?; and
>
> (B) Did the agreement to reinstate the loan between the appellants and the appellee create a claim for fraud and promissory estoppel for the appellants when the trustee for appellee carried through foreclosure sale in violation of that agreement?
>
> > 1. Were the facts articulated by the appellants in their Motion to Set Aside Default sufficient to show that the appellee acted with fraud?
> >
> > 2. Should the equitable doctrine of promissory estoppel afford the appellants relief based on the appellee's conduct?

The specific order from which appellants appeal was filed January 23, 2008. In that order, the court (1) denied appellants' motion to enlarge time to answer the original complaint; (2) set aside the order staying the writ of assistance; (3) stated that the summary judgment order was in full force and effect; (4) stated that the writ of assistance was in full force and effect; (5) denied appellants' motion to enlarge time to answer appellee's motion

for summary judgment; (6) denied appellants' motion to set aside the foreclosure sale; (7) ordered appellants to return the home to appellee by midnight on February 8, 2008, and deliver the key to office of appellee's counsel; (8) directed the clerk to surrender the $5000 cash bond to appellee's attorney; and (9) directed the sheriff to remove appellants from the home on February 9, 2008, if appellants remained in the home at that time.

Appellee insists that appellants' failure to timely appeal the trial court's entry of summary judgment is fatal to appellants' argument. *See Dwiggins v. Elk Horn Bank & Trust Co.*, 364 Ark. 344, 219 S.W.3d 181 (2005) (holding that an automatic stay provided by mortgagors' bankruptcy filing did not toll the time mortgagors had to file notice of appeal from trial court's grant of mortgagee's motion for partial summary judgment on fraud and other claims filed by mortgagors against mortgagee, even though that action had been consolidated with mortgagor's subsequent foreclosure action, and thus mortgagors' notice of appeal was untimely and supreme court lacked jurisdiction to entertain the appeal). Further, appellee argues that Ark. Code Ann. § 18-50-116(d) (2008) requires that any challenge to the sale be made prior to the sale or be forever barred.

On appeal appellants argue that Arkansas Code Annotated sections 18-50-116(d)(B)(i) and (ii) allow challenges on the basis of fraud or failure to strictly comply with the statute as was alleged in this case. Arkansas Code Annotated section 18-50-116(d)(B) states:

> (B) Provided, however, that any such claim or defense shall be asserted prior to the sale or be forever barred and terminated, except that the mortgagor may assert the following against either the mortgagee or trustee:

(i) Fraud; or

(ii) Failure to strictly comply with the provisions of this act, including but not limited to subsection (c) of this section.

However, sections 18-50-116(d)(B)(i) and (ii) were not in effect at the time of the sale, and accordingly are inapplicable to this case.

Appellants did not argue that the Arkansas Rules of Civil Procedure provide this court with jurisdiction to hear their allegations of fraud. Nonetheless, Arkansas Rule of Civil Procedure 60 (c) (4) provides that a trial court shall have the power to set aside a judgment for misrepresentation or fraud by an adverse party after the expiration of ninety days. Our supreme court has stated that the only limitation on the exercise of the power to set aside a judgment pursuant to Rule 60 is addressed to the sound discretion of the court. *See RLI Ins. Co. v. Coe,* 306 Ark. 337, 813 S.W.2d 783 (1991); *see also Watson v. Connors*, 372 Ark. 56, 270 S.W.3d 862 (2008) (it is within the discretion of the circuit court to determine whether it has jurisdiction under Rule 60 to set aside a judgment, and the question on appeal becomes whether there has been an abuse of that discretion). Appellants alleged that opposing counsel and their own original counsel were partners. They argued that their counsel's failure to properly plead and then a total failure to respond to the summary judgment motion, followed by counsel's withdrawal, led to the entry of the judgment. Appellants retained new counsel prior to the scheduled hearing. Their argument is consistent with an expectation that their motion to enlarge time in which to respond to the motion for summary judgment, filed on November 1 and prior to the originally scheduled hearing date of November 5, would have

been timely if they had remained unaware of the entry of the summary judgment before the scheduled hearing. Appellee repeatedly relied upon the lack of response by appellants' previous counsel to assert that appellants were barred from asserting any claims or defenses. Under these circumstances, the trial judge had discretion to evaluate the proceedings and determine whether a fraud had been committed that would justify setting aside a previous order. Therefore, we do not dismiss the appeal for want of jurisdiction.[1]

Although nothing in the record explains when appellants actually received notice that the summary judgment had been entered, they were clearly aware of its entry when they filed their Motion to Stay the Writ of Assistance on November 1, 2007. Still, they did not seek to set aside the summary judgment or tender an answer to the summary judgment motion. Additionally, appellants unequivocally stated that they were merely asking for an enlargement of time to answer the summary judgment motion, had not answered, and were not prepared to answer.

It is due to this failure to challenge the summary judgment that we affirm. Rule 6(b) of the Arkansas Rules of Civil Procedure permits a trial judge to grant an extension of time to respond to a summary judgment motion. The granting of an extension is discretionary. While the trial court had jurisdiction to consider appellants' allegations of fraud in the procurement of its orders, we cannot say its order was in error where appellants failed to challenge the summary judgment itself. It was not error to refuse to grant an enlargement of

[1]Both appellee's motion to dismiss and appellants' motion for sanctions are denied, along with all other pending motions.

time to answer a summary judgment motion when a summary judgment order had already been entered and appellants did not present evidence to the Court to dispute the judgement's validity. The summary judgment resolved the issues against appellants upon which the other requested relief was based.

Accordingly, we find no error and affirm.

PITTMAN and GRUBER, JJ., agree.