

Commonwealth Of Kentucky

Court Of Appeals

NO. 1997-CA-001417-MR

KENTUCKY HOUSING CORPORATION

APPELLANT

v.

APPEAL FROM WHITLEY CIRCUIT COURT
HONORABLE PAUL BRADEN, JUDGE
NO. 95-CI-000406

ROY E. JOHNSON;
JUDY JOHNSON;
BETTY R. JOHNSON (Now
Betty F. Smith);
UNKNOWN SPOUSE OF
BETTY R. SMITH; and
FARMERS NATIONAL BANK

APPELLEES

OPINION
AFFIRMING

* * * * *

BEFORE: BUCKINGHAM, EMBERTON and GUIDUGLI, Judges.

GUIDUGLI, JUDGE. Appellant, Kentucky Housing Corporation (KHC), appeals from the May 20, 1997, amended order of the Whitley Circuit Court vacating a previous order, which had set aside a foreclosure sale and allowed post-judgment joinder of a second mortgage holder as a party defendant. We hold the trial court properly vacated the prior order, by entry of the amended order and therefore affirm.

On July 27, 1995, KHC filed a collection and mortgage foreclosure action against appellees, Roy and Betty Johnson (the Johnsons), on certain real estate owned by the Johnsons, and upon which KHC held the first mortgage. During all relevant times, appellee, Farmers National Bank (Farmers) held a valid, properly recorded, second mortgage on the same property. This controversy began when KHC, for whatever reason, failed to name, or later join, Farmers as a party defendant in the foreclosure action.

Upon motion by KHC, a default judgment, summary judgment and order of sale was entered by the trial court on November 16, 1995, against the Johnsons. The judgment and order of sale adjudicated all the rights of both KHC and the Johnsons in the real estate. Because they were the only parties before the court at that time, it was a final and appealable order. Security Federal Sav. & Loan Ass'n. v. Nesler, Ky., 697 S.W.2d 136, 138 (1985); Cerwin v. Taub, Ky. App., 552 S.W.2d 675 (1977); CR 54.01.

If the November 16, 1995, order was incorrect or incomplete for any reason, a motion under CR 59.05 to alter, amend or vacate, filed within ten days, was the proper remedy. Security Federal, supra, at 139. KHC did not file a CR 59.05 motion in this case. Nor did KHC file a notice of appeal within thirty days from the November 16, 1995, final judgment. The judgment entered was correct as between KHC and the Johnsons and adjudicated all issues as to all parties before the court at that time.

A notice of commissioner's sale was filed December 27, 1995. The property was appraised for \$25,000 on January 18, 1996. At the January 22, 1996, commissioner's sale, KHC was the highest bidder at \$23,500. The Master Commissioner filed a report of sale on January 31, 1996. Thereafter, any interested party had ten days to file objections to the Master Commissioner's report. CR 53.06(2). No objections were filed. In fact, KHC filed an acknowledgment that it "purchased the property...on January 22, 1996." This document was filed of record on February 23, 1996.

Apparently, sometime after February 23, 1996, KHC discovered the second mortgage of Farmers and realized it had purchased the property subject to that mortgage. At this point in time, the only remedy available to KHC was a motion under CR 60.02. Instead of filing a motion under CR 60.02(a) admitting a "mistake" had been made (whether in this case by "inadvertence" or "excusable neglect"), KHC persisted in seeking relief not authorized by the Kentucky Rules of Civil Procedure. These actions included two motions to set aside the sale and a motion to amend the complaint to join Farmers as a party defendant. By order entered May 7, 1996, the Whitley Circuit Court entered two separate orders. One set aside "the sale of the subject property" and the other granted KHC's motion to amend its complaint to name Farmers as a party defendant.

Thereafter, a new division of the Whitley Circuit Court was created and this case was assigned to that new division. On May 15, 1997, the court entered findings of fact, conclusions of

law, and an order in which the pending motions by both KHC and Farmers were decided. In that order the court denied the motion it meant to grant and granted the motion it meant to deny. This mistake was corrected by amended order entered five days later on May 20, 1997, in which the Circuit Court: (1) granted the motion of Farmers National Bank to vacate the May 7, 1996, order which had improperly set aside the sale of the property at issue and permitted KHC to add Farmers as a party, and; (2) denied KHC's motion for judgment on the pleadings against Farmers on the issue of priority of liens on the property. KHC appeals from the amended order.

KHC argues it was impossible for the trial court to properly adjudicate the rights of the necessary parties without joining Farmers. KHC claims Farmers was an "indispensable party" under CR 19.01 and complete relief cannot be obtained by KHC in the absence of Farmers. This argument misses the point. CR 54.01 states in relevant part, "[a] final or appealable judgment is a final order adjudicating all the rights of all the parties in an action or proceeding, or a judgment made final under Rule 54.02." As stated previously, the judgment and order of sale entered November 16, 1995 was a final judgment because it adjudicated all the rights of all the parties in the action. The rules of civil procedure do not require the judgment to adjudicate the rights of all necessary parties. We understand the judgment does not adjudicate the rights of Farmers, a second mortgage holder which should have been made a defendant originally by KHC pursuant to KRS 426.006. However, the trial

court cannot set aside the judgment after the expiration of six months, without a motion under CR 60.02 filed by KHC requesting the court to do so. A CR 60.02 order cannot be entered sua sponte by the court.

We agree with the trial court that the plain language of CR 60.02 clearly limits relief under that rule to "not more than one year after the judgment, order or proceeding was entered or taken." KHC never filed a CR 60.02 motion to set aside the November 16, 1995, final judgment, or any motion which could be liberally construed as a CR 60.02 motion. Therefore, after the expiration of one year, the trial court lost authority to set aside the judgment.

Therefore, we affirm the May 20, 1997, order of the Whitley Circuit Court.

BUCKINGHAM, JUDGE, CONCURS.

EMBERTON, JUDGE, CONCURS IN RESULT ONLY.

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BRIEF FOR APPELLEE:

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