RENDERED: May 7, 1999; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1997-CA-002662-MR

KENTUCKY BANK & TRUST
(FORMERLY THE GREENUP
COUNTY BANK) APPELLANT

v.

APPEAL FROM GREENUP CIRCUIT COURT
HONORABLE LEWIS NICHOLLS, JUDGE
ACTION NO. 91-CI-00557

RUSSELL C. HENSLEY AND
BEULAH FAYE HENSLEY APPELLEES

OPINION
AFFIRMING
** ** ** ** **

BEFORE: GUDGEL, CHIEF JUDGE; GUIDUGLI AND SCHRODER, JUDGES.

GUIDUGLI, JUDGE. This is an appeal by Kentucky Bank & Trust from an order of the Greenup Circuit Court on September 19, 1997, denying the appellant's motion to alter, amend or vacate its order of June 26,1997; denying the appellant's motion to set aside the order of confirmation of sale; and affirming its decision to sustain appellees' motion to redeem the real property. We affirm.

In October of 1991, the appellant filed a foreclosure action against the appellees, Russell C. Hensley and Beulah Fay Hensley. Some lengthy procedural maneuvering occurred between

the appellant and the appellees from October of 1991 through December 18, 1996, none of which is germane to the issue before this Court. On December 18, 1996, the trial court entered a second amended judgment and order of sale, placing for sale the appellees' mobile home and tract of real estate described as "containing 30 acres, more or less" excepting a 2.42 acre tract. The court appointed two (2) appraisers to appraise the approximately 28 acre tract of land pursuant to KRS 426.520.

One of the appraisers, Billy Watson (Watson), contacted Jeff Elswick (Elswick),an employee and agent of the appellant, over some confusion with regard to the boundaries of the 28 acre tract of land. Apparently there were two (2) mobile homes located on the total 30 acres. Watson inquired as to which tract of land the two (2) mobile homes were located, the 28 acre tract or the 2.42 acre tract. Elswick indicated to Watson that there was one (1) mobile home located on each tract. Thus, the appraisers appraised the 28 acre tract with one mobile home located thereon at $33,500.

On January 24, 1997, the appellant purchased the 28 acre tract for $18,000, an amount insufficient to foreclose the appellees' right of redemption pursuant to KRS 426.530. Thereafter, the appellant filed a motion to confirm the report of sale and deed and order of distribution (filed by the Master Commission on January 27, 1997), which was sustained by the trial court on February 13, 1997. On June 11, 1997, the appellees filed a motion to redeem the property pursuant to KRS 426.530 and tendered to the trial court the purchase price of $18,000 and

$400 for accrued interest. On June 23, 1997, the appellant filed a motion for an order of sale of the right of redemption pursuant to KRS 426.540 or, alternatively, to set aside the order of confirmation pursuant to CR 60.

On June 26, 1997, the trial court sustained the appellees' motion to redeem the real property and thereafter the appellant filed a motion to alter, amend or vacate that order. The trial court conducted an evidentiary hearing on the matter and on September 19, 1997, issued an order denying the appellant's motion to alter, amend or vacate its order of June 26, 1997; denying the appellant's motion to set aside the order of confirmation of sale; and affirming its decision to sustain appellees' motion to redeem the real property. The appellant filed a notice of appeal on October 17, 1997.

Initially we should point out that the appellees did not file an opposing brief. Although we are aware of our options under CR 76.12(8)(c), we choose not to exercise those options as we believe the trial court properly disposed of the appellant's motions. Under KRS 426.530, the appellees had the right to redeem the 28 acres within one (1) year from the date of the sale since the appellant paid only $18,000 for the 28 acre tract, an amount insufficient to foreclose the right of redemption as the property appraised for $33,500. Specifically, KRS 426.530(1) provides:

> If real property sold in pursuance of a judgment or order of a court, other than an execution, does not bring two-thirds of its appraised value, the defendant and his representatives may redeem it within a year from the date of the sale, by paying the

> original purchase money and ten percent annum interest thereon.

The appellant argues in this appeal that the appraisers made a mistake with regard to the appraisal of the 28 acre tract, which resulted in the tract being appraised for less than its actual value. Based upon this mistake, the appellant seeks to have the sale of the 28 acre tract set aside and cites CR 60 and various Kentucky cases as authority for such action.

There is no question that a mistake was made with regard to the appraisal of the 28 acre tract that resulted in the tract being appraised for less than its actual value. On this matter the evidence is clear. Watson testified at the hearing that he appraised the 28 acre tract with only one mobile home based upon the information he received from the appellant's agent, Elswick, when in fact there were two mobile homes located on the 28 acre tract. Watson further testified that his appraisal would have been different had he known there were two mobile homes on the 28 acre tract.

Appraisement of real property subject to foreclosure is "for the benefit of the debtor, and to secure him in his legal right to redeem if the land does not bring two-thirds of its appraised value." Vallandingham v. Worthington, Ky., 2 S.W. 772 (1887). Further, an incorrect appraisement may provide grounds to set aside the sale of real property if it is the product of mistake other than one arising from an erroneous opinion. Lawrence v. Edelen, 6 Bush 55; Kidd v. Stephens, Ky., 192 S.W. 44 (1917); Harris v. Gunnell, Ky., 9 S.W. 376 (1888). However, we

do not feel that setting aside this sale is justified under the unusual circumstances of this case.

The appellant in this case is not only the creditor that caused the foreclosure sale of the appellees' property but it is also the buyer of said property. However, as the buyer of the 28 acre tract, the appellant cannot have the sale set aside unless it can show that it was misled by the incorrect appraisement. Berry v. Berry, Ky., 156 S.W.2d 133 (1941); Landers v. Scroggy, Ky., 172 S.W.2d 557 (1943). The appellant cannot claim that it was misled in this case because its agent, Elswick, provided the information to the appraiser that led to the mistake in the appraisement. In essence, the appellant is the "misleader" instead of the misled. Had the appellant made a survey of the property it was about to purchase, as any reasonable, prudent buyer should have done, it would not have provided misleading information to the appraiser.

The appellant seeks relief from the trial court's order pursuant to CR 60.02, which provides:

> On a motion a court may, upon such terms that are just, relieve a party or his legal representative from its final judgment, order, or proceeding upon the following grounds: (a) mistake, inadvertence, surprise or excusable neglect;...or (f) any other reason of an extraordinary nature justifying relief. (emphasis added).

However, the appellant is not entitled to relief under CR 60.02 and here we adopt the trial court's reasoning:

> Relief from a judgment under CR 60.02 is an extraordinary proceeding. The Court should grant this type of relief only in instances where matters do not appear in the record, were not available by appeal, or otherwise,

> and were discoverable after rendition of judgment without fault of the party seeking relief. Board of Trustees of Policeman's and Fireman's Retirement Fund of City of Lexington v. Nuckolls,[Ky.,] 507 S.W.2d 183 (1974). [sic] In the case at bar, the [Appellant] caused this problem when it misinformed the Court's Appraisers that there was a mobile home on each tract of land. The Court's Appraisers, in good faith, relied on this information given to them by the [Appellant].

Under these circumstances, we see no just reason to set aside the sale of the 28 acre tract.

The appellant strategically bid under the two-thirds threshold taking into consideration what it could get out of the 28 acre tract when later sold. Although this generally may be a risk work taking, it backfired on this occasion. Further, there is absolutely no evidence in the record that the appellant would have bid any more than $18,000 for the 28 acre tract had it known that there were two mobile homes on the property instead of one or had the appraisal been higher. Thus, the appellees' would still have been able to redeem the 28 acre tract.

How and when the appellant "discovered" the mistake in the appraisal raises serious concerns. The appellant moved to have the sale confirmed on February 7, 1997, without noting any mistake in the appraisement at that time. The sale was in fact confirmed by the trial court on February 13, 1997. Some five (5) months pass before the appellees were able to come up with enough money to move for redemption of the property on June 11, 1997. During that five (5) months, the appellant never brought to the attention of the trial court any mistake in the appraisal. However, sometime in the twelve (12) day period between June 11,

1997, and June 23, 1997, after the appellees were able to come up with enough money to redeem the property, the appellant "discovered" the mistake and moved to have the sale set aside. Based upon these facts the timing of the "discovery" is suspect. As such, we cannot say that the mistake was "discoverable after rendition of judgment without fault of the" appellant.

Given the circumstances of this case, we do not feel that the trial court abused its discretion in denying appellant's motions. For the foregoing reasons, the decision of the trial court is affirmed.

SCHRODER, JUDGE, CONCURS.

GUDGEL, CHIEF JUDGE, DISSENTS.

BRIEF FOR APPELLANT:

Phillip Bruce Leslie
Greenup, KY

No brief for appellee