

Commonwealth Of Kentucky

Court Of Appeals

NO. 1996-CA-002986-MR

CAROLYN ANGELUCCI

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE THOMAS CLARK, JUDGE
ACTION NO. 90-CI-02594

BANK ONE, LEXINGTON, N.A.;
WILLIAM S. STONE; and
ANN K. STONE

APPELLEES

OPINION
AFFIRMING
** **

BEFORE: BUCKINGHAM, COMBS, McANULTY, Judges.

COMBS, JUDGE: The appellant, Carolyn Angelucci (Carolyn), appeals from the order of the Fayette Circuit Court denying her motion to set aside its previous orders. Having reviewed the record, we find no error and affirm order of the circuit court.

This case arises from a mortgage foreclosure action filed by Bank One.¹ In August 1989, the marriage of Carolyn and

¹ First Security National Bank and Trust Company of Lexington was Bank One's predecessor in interest. First Security initiated the action, but during the pendency of the litigation Bank One became its successor by merger. To avoid confusion, we shall only refer to Bank One in explaining the facts.

Ralph Angelucci was dissolved. In the division of the marital property, Carolyn was awarded title to the house located at 601 Autumn Lane, Lexington, Kentucky, which was encumbered by a mortgage held by First Security. During their marriage, Carolyn and Ralph each signed a guaranty agreement, securing by a mortgage on their home the payment of all of the indebtedness of Ralph Angelucci Homes, Inc., owed to Bank One. Ralph Angelucci Homes, Inc., defaulted on its loans and, in July 1990, Bank One initiated a mortgage foreclosure action against Carolyn, Ralph, Ralph Angelucci Homes, Inc., and Lexington Federal Savings & Loan Association.

After approximately four years of lengthy pre-trial activity, the court entered an order on May 17, 1995, granting summary judgment in favor of Bank One on the issue of whether Carolyn was liable on the notes secured by mortgages on her house. The court reserved the issues of setoff and recoupment and directed the Master Commissioner to conduct an evidentiary hearing. After conducting an evidentiary hearing, the Master Commissioner filed his report and recommendations with the court on October 4, 1995, recommending that judgment be entered in favor of Bank One. On November 29, 1995, the court entered Judgment and Order of Sale, finding in favor of Bank One and ordering that the house be sold by the Master Commissioner at a public auction to be held on January 8, 1996.

The Master Commissioner filed his Report of the Sale on January 9, 1996, informing the court that the house had been sold for \$173,000.00 at the public auction held January 8, 1996.

Carolyn filed exceptions to the Master Commissioner's report of sale. She maintained that she was unable to attend the auction due to a severe winter storm; she sought to have the court set aside the sale and order that another auction be held. On March 11, 1996, the court confirmed and approved the Master Commissioner's Report of Sale. The court ordered the Master Commissioner to deliver the deed conveying title to the house to the purchasers, the Stones, and to distribute the money from the sale; Carolyn was ordered to vacate the house.

Subsequently, on March 20, 1996, the court denied Carolyn's motion to set aside the sale of the house and held her in contempt of court for remaining in the house in violation of the court's order; she could purge the contempt by vacating the premises. On the same date, Carolyn filed for bankruptcy and an automatic stay went into effect, prohibiting the Master Commissioner from delivering the deed to the Stones or from distributing the funds from the sale. The automatic stay with regard to the house on Autumn Lane was terminated on June 26, 1996.

On July 11, 1996, Carolyn filed an appeal from the order of the circuit court entered May 17, 1996. However, her appeal was ultimately dismissed by this Court on the ground that the order of May 17, 1996, was interlocutory and, therefore, that it was not a final and appealable order. We also noted that her appeal was not timely filed. On July 18, 1996, the court entered an order directing the Master Commissioner to deliver the deed to

the Stones and to disburse the funds from the sale. The court also ordered Carolyn to vacate the premises.

On September 30, 1996, Carolyn filed a motion to set aside the court's orders of February 6, 1996; March 11, 1996; and July 8, 1996; she requested a jury trial. After conducting a hearing, the court entered an order on October 7, 1996, denying her motion. The court also reinstated its order directing Carolyn to vacate the house on Autumn Lane. On October 15, 1996, Carolyn filed an appeal from the court's order of October 7, 1996. Bank One filed a motion to dismiss Carolyn's appeal. This Court denied the motion to dismiss, stating that Carolyn's motion to set aside orders "was in the nature of a motion pursuant to CR 60.02 from which an appeal may be taken as a matter of right so as to seek review of the circuit court's exercise of discretion in denying the motion."

Our standard of review for relief under CR 60.02 is whether the trial court abused its discretion. Dull v. George, Ky. App., 892 S.W.2d 227 (1998). "Any action under Cr 60.02 addresses itself to the sound discretion of the court and the exercise of that discretion will not be disturbed on appeal except for abuse." Richardson v. Brunner, Ky., 327 S.W.2d 572, 574 (1959). In exercising its discretion, the court must consider: (1) whether the movant had a fair opportunity to present his claim on the merits; and (2) whether the granting of Cr 60.02 relief would be inequitable to the other parties. Fortney v. Mahan, Ky., 302 S.W.2d 842 (1957).

In the case before us, we have examined whether the court abused its discretion in denying Carolyn's motion to set aside its three previous orders. The record shows that during the six years that this case was before the circuit court, Carolyn endeavored to exercise the numerous opportunities available to her to defend against the disclosure action. Moreover, it is evident that inequity would have inevitably resulted to the other parties if the trial court had set aside its orders since the house had been sold and the funds from the sale had been disbursed.

In this very difficult and emotionally wrenching case, we find no abuse of discretion by the trial court. Therefore, we affirm.

ALL CONCUR.

BRIEF FOR APPELLANT *PRO SE*:

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Lexington, KY

BRIEF FOR APPELLEE BANK ONE:

Richard Warne
Harvie B. Wilkinson
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BRIEF FOR APPELLEES WILLIAM S.
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David A. Franklin
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