

Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-001553-MR

CAROLYN DUVALL

APPELLANT

v. APPEAL FROM EDMONSON CIRCUIT COURT
HONORABLE RONNIE DORTCH, JUDGE
ACTION NO. 94-CI-00050

TIMOTHY DUVALL; BANK OF EDMONSON
COUNTY; MEDICAL CENTER AT BOWLING
GREEN; BOWLING GEEN RADIOLOGY
ASSOCIATES; BOWLING GREEN ASSOCIATED
PATHOLOGISTS; MDS RADIOLOGY PHYSICIANS;
GRAVES-GILBERT CLINIC, PSC; and
ROBERT H. FRANKLIN, M.D.

APPELLEES

OPINION
AFFIRMING
** **

BEFORE: GUDGEL, CHIEF JUDGE, KNOX, AND MCANULTY, JUDGES.

KNOX, JUDGE: This lien enforcement litigation began in April 1994, when a Grayson County bank (not a party to this appeal) sued appellant, Carolyn Duvall, and her ex-husband, appellee Timothy Duvall, in the Edmonson Circuit Court on a promissory note which Carolyn had executed in 1992. Carolyn admitted the indebtedness and, as such, in December 1994, summary judgment was

granted the bank against Carolyn. The matter, however, was not yet over, both Carolyn and Timothy having filed crossclaims against each other. Eventually, in March 1995, Carolyn obtained a judgment against Timothy in the amount of \$4,990.55. Shortly thereafter, Carolyn filed a judgment lien against Timothy's real estate.

By April 1996, Timothy had not yet satisfied the judgment. Thus, Carolyn moved the court to: (1) add all other lienholders of record to the action as necessary parties; (2) determine the priority of all liens asserted; and, (3) sell Timothy's property, which consisted of two small parcels of land, to satisfy the liens. Carolyn advised the court of two judgment liens filed prior to hers, one in November 1988 by appellee, Grayson County Hospital, and the other in August 1994 by appellees, Medical Center at Bowling Green, Bowling Green Radiology Associates, Bowling Green Associated Pathologists, MDS Radiology Physicians, Graves-Gilbert Clininc, PSC, and Robert H. Franklin, M.D. Additionally, Carolyn advised the court of a mortgage obtained by appellee, Bank of Edmonson County (the Bank), approximately three (3) years before she filed her judgment lien, and called upon the Bank to "enter its appearance herein setting forth any interest it has" in Timothy's real estate.

By order entered May 13, 1996, the court joined the above-referenced creditors as lien defendants. The hospital was served summons on May 30, 1996, and the remaining lien defendants, including the Bank, were served on May 31, 1996.

Appellee, Grayson County Hospital answered the summons, advising the court its lien had been satisfied. Appellees, Medical Center et al., also filed an answer, asserting their lien against Timothy's property. The Bank, however, neither answered the summons nor filed any responsive pleadings thereto, nor did it otherwise enter an appearance in the matter.

In mid-July 1996, Carolyn moved for an order of sale, apprising the court of those liens which had been asserted and, further, advising that the Bank had not answered the summons and had not otherwise asserted an interest in Timothy's property. On August 12, 1996, the court ordered the master commissioner to sell Timothy's property to satisfy, first, the Medical Center's judgment lien and, second, Carolyn's judgment lien. The court did not determine the priority of the Bank's lien, but rather, merely noted that the Bank had neither responded nor otherwise entered an appearance in the matter.

Thereafter, the master commissioner moved the court for clarification concerning its order of sale. Specifically, the commissioner questioned whether he could legally conduct the sale, given that the court had not concluded the Bank's interest in Timothy's property:

[B]y order dated and entered in this action August 12, 1996, [the master commissioner] was ordered to sell certain real property to be designated by the "Trial Defendant."

. . . .

[S]aid order states that the Bank of Edmonson County has failed to appear or plead in this action but indicates that said bank may hold a lien on said property.

[E]ven if said bank is in default, there appears to be no finding or recitation in the judgment that its lien, if any, is extinguished; and your Commissioner questions whether he can sell said property free of the lien, if any, of said defendant.

Wherefore your Commissioner moves the Court for an order of clarification.

The commissioner served his motion for clarification on the Bank, specifically to the attention of the chairman of the board and senior loan officer, Scottie Woodcock. The Bank, once again, did not respond. Two (2) weeks later, on September 9, 1996, the court amended its order of sale in response to the commissioner's motion, this time ordering Timothy's property to be sold "free and clear" of the Bank's lien.

Not long thereafter, on October 3, 1996, the sale of Timothy's property was advertised in the local newspaper, having been scheduled for October 19, 1996. On October 8th, however, Timothy filed a petition in bankruptcy and obtained an automatic stay against all collection procedures. In light of this development, the master commissioner canceled the sale of Timothy's property.

Over the course of the next year, Timothy fell behind in his bankruptcy plan payments. Consequently, on December 23, 1997, his bankruptcy case was dismissed. One month later, in January 1998, Carolyn moved the court to redocket her motions and to order, once again, the sale of Timothy's property. On February 9, 1998, the court granted Carolyn's motion and ordered the sale of the property, tentatively scheduled by the master commissioner to occur on March 7, 1998.

Just prior to sale, however, on February 27, 1998, the Bank moved the court to set aside the original order of sale and allow it leave to file an answer to the summons it had received nearly two (2) years earlier, on May 31, 1996. While the Bank admitted receiving notice of Carolyn's lien enforcement proceeding, it pleaded "excusable neglect" under CR 60.02, and in support thereof, submitted the affidavit of Scottie Woodcock, chairman of the board and senior loan officer at the Bank. After receiving notice in 1996 of Carolyn's lien enforcement proceeding, Mr. Woodcock testified, he spoke with Timothy's attorney, who informed him that Timothy intended to file a bankruptcy action. In light of the impending bankruptcy action and considering the Bank held a first mortgage on Timothy's property, Mr. Woodcock further testified, the Bank did not believe it was necessary to respond to Carolyn's motion for an order of sale. In fact, he testified, it was Timothy's attorney who advised as such:

I spoke with Tim Duvall about the circumstances and also spoke with his attorney and was told that Tim was going to file [b]ankruptcy and that since the Bank had the first mortgage we didn't need to do anything.

In the late summer or early fall the Bank received the Notice of Bankruptcy Action.

At some point in time after the bankruptcy filing, the Bank hired Bryan LeSieur to find out what[,] if anything[,] could be done about the lack of regular mortgage payments. It was a result of Bryan LeSieur's investigation into this court file and then him later telling us that this matter was back on the Edmonson Circuit Court [d]ocket to sell Mr. Duvall's real estate,

that the Bank became aware of this Court's ruling that the Bank had not asserted its lien.

Carolyn opposed the Bank's motion to have the order of sale set aside, arguing the Bank could not possibly establish excusable neglect at this late date since it had been duly noticed two (2) years earlier and had been given ample opportunity to assert its lien against Timothy's property. Nonetheless, on March 20, 1998, the court granted the Bank's motion, setting aside that portion of its order of August 12, 1996, wherein it extinguished the Bank's interest in the property. Further, the court allowed the Bank to file an answer to the summons of May 31, 1996.

In answering, the Bank asserted a first and prior lien against Timothy's property, alleging an amount due on the mortgage, including interest and penalties, of \$57,302.08, which was more than the value of the property. The Bank then proceeded to move the court to order the sale of Timothy's property for the purpose of satisfying its mortgage.

On May 29, 1998, the court entered judgment in favor of the Bank, finding it had a first and prior lien, and ordered that the proceeds of the sale of Timothy's property were to be applied, first, to delinquent taxes and, second, to the Bank's lien.

Carolyn has appealed to this Court, arguing that her lien enforcement action is controlled by KRS 426.006, which required the Bank to respond to the summons of May 31, 1996, in a timely manner and in accordance with the Rules of Civil

Procedure. Having failed to comply with the statutory mandate, Carolyn argues, the Bank lost its right to assert its interest in Timothy's real estate and to share in the proceeds of the sale thereof. Further, Carolyn maintains, the Bank did not establish excusable neglect under CR 60.02, and even if it had, its motion for relief thereunder was filed more than one (1) year after the August 12, 1996, order, in violation of the limitations period set out in CR 60.02. As such, she argues, the Bank's position fails.

The Bank counters that given its understanding that Timothy would be filing a bankruptcy action, accompanied by a stay of all collection proceedings, it saw no need to respond to what was, in essence, a collection proceeding. Further, the Bank maintains, it was not served the original order of sale and, thus, had no notice the court had extinguished its interest in Timothy's property. Finally, the Bank counters, CR 60.02's one-year period of limitations was not violated in that the automatic stay issued by the bankruptcy court tolled the period for approximately fourteen (14) months, until Timothy's bankruptcy proceeding was dismissed.

We believe that Carolyn's lien enforcement action was subject to KRS 426.006 and 426.690, both of which required Carolyn to join all lienholders of record as defendants in the action. This she did. Further, KRS 426.006 allows for a junior lienholder such as Carolyn to obtain a judgment for the sale of property even when a senior lienholder defendant, such as the Bank, does not answer the summons and assert his claim. The

result of such a failure to answer, according to the statute, is that the lienholder defendant will not share in the proceeds of the sale, at least until he comes forward and asserts his claim.

However, it is clear from the language in the statute that the order of sale must, in any event, provide for the satisfaction of all liens shown by the plaintiff to exist, even those liens held by non-answering defendants: "[Plaintiff] may ask for and obtain a judgment for a sale of the property to satisfy all of said liens which are shown to exist, though the defendants fail to assert their claims." KRS 426.006. (Emphasis added). In other words, in its order of sale, the Edmonson Circuit Court should have prioritized each lien alleged by Carolyn to exist, regardless of whether or not the lienholder had tendered a response to Carolyn's request for a sale of Timothy's property.

Further, the court should have ordered the property sold, not free and clear of the liens held by the non-answering defendants, but rather, subject to the liens in existence. See KRS 426.690, stating in part:

The plaintiff in an action to enforce a lien on real property shall state in his petition the liens, if any, which are held thereon by others, and make the holders defendants; and no sale of the property shall be ordered by the court prejudicial to the rights of the holders of any of the liens [T]he holder of an inferior lien, when the debt thereby secured is due, may enforce the same by a sale of land subject to a prior lien or liens thereon, where the debt or debts secured thereby are not yet due.

Carolyn did, in fact, ask the court to prioritize the existing liens and order the sale of Timothy's property subject thereto:

"[S]ell a sufficient portion or protions of the real property described in paragraphs I and II above for the satisfaction of all liens thereon in accordance with each liens' priority" (Emphasis added).

These two (2) statutes, KRS 426.006 and 426.690, formerly part and parcel of Kentucky's civil code of practice, have been in effect for over 100 years. Case law interpreting them has consistently held that it is, in fact, the "duty" of the senior lienholder to plead a prior note and mortgage when summoned and called upon to do so by a junior lienholder in the context of a lien enforcement action. See Bank of Tollesboro v. W.T. Rawleigh Co., 218 Ky. 516, 291 S.W. 1039 (1926).

Nonetheless, when the senior lienholder fails to answer the junior lienholder's petition, he is not necessarily barred from later asserting his claim, unless the petition sets out facts tolling his right to do so, e.g. the claim has been paid or discharged, or it is subordinate to that of the plaintiff. Id. at 1040.

Should the court order the sale of the property and in the course of doing so, extinguish the interest of the senior lienholder or hold it subordinate to that of the junior lienholder, and should the facts in the junior lienholder's petition fail to support such a result, the order will be held void insofar as it extinguishes, or holds subordinate, the senior lienholder's interest. Id. at 1041.

As such, although the Bank characterizes the court's original order of sale as a "default" judgment, we believe this

appeal more aptly addresses whether the court's order of sale, entered in August 1996, was void insofar as it extinguished the interest of the Bank in Timothy's property. We believe it was. Thus, the Bank's motion to set aside the order of sale must have been made, not within a one-year period as argued by Carolyn, but "within a reasonable time" after the judgment was entered. CR 60.02.¹

Certainly, the Bank had notice of Carolyn's lien enforcement action from the moment it was instituted. Furthermore, while the Bank was not served with the order which extinguished its interest in Timothy's property, it was, however, served with the master commissioner's motion for clarification expressing the fact that the court had failed to assign the Bank an interest in the property. Yet, the Bank did nothing. Four (4) months later, Timothy filed a petition in bankruptcy and obtained an automatic stay, effective for the next fourteen (14) months. Two (2) months after Timothy's bankruptcy action was dismissed, and following yet another order of sale issued by the court in response to Carolyn's motion to redocket her lien enforcement action, the Bank finally entered its appearance.

We do not condone, nor do we believe it prudent, to respond in so dilatory a manner when called upon to answer and defend a legal action. However, we recognize that as a matter of

¹As such, we see no need to address the Bank's argument that Timothy's petition in bankruptcy tolled the running of the one-year period of limitation. Likewise, we do not pass upon the Bank's excusable neglect argument under CR 60.02(a), having determined that this case is more aptly resolved under CR 60.02(e), relief from a judgment which is void.

law, the Bank did not forego its right to assert its interest in Timothy's property merely because it did not respond more timely. Further, Carolyn's motion for an order of sale did not allege facts which would support extinguishment of the Bank's lien, or subordination of it for that matter. On the contrary, the information which Carolyn provided the court concerning the Bank's lien clearly points to the superiority thereof.

The purpose of the order of sale is to bring the proceeds therefrom into court for adjudication. See Griffith v. Blue Grass Bldg. & Loan Ass'n, 57 S.W. 486, 487 (1900). Then, should a lienholder defendant wish to share in those proceeds, he must, if he has not already done so, assert his lien. In the case before us, the Bank asserted its interest in Timothy's property prior to the sale thereof and prior to establishment of the fund consisting of the proceeds from the sale. For purposes of this particular lien enforcement action, and given the procedural circumstances under which this case developed, we believe the Bank asserted its lien against Timothy's property within a "reasonable time," as that term is used in CR 60.02.

For the foregoing reasons, we affirm the judgment of the Edmonson Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

Harold D. Ricketts
Morgantown, Kentucky

BRIEF FOR BANK OF EDMONSON
COUNTY:

Bryan LeSieur
Brownsville, Kentucky