

Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-000309-MR

GREAT FINANCIAL BANK, F.S.B.

APPELLANT

v. APPEAL FROM MADISON CIRCUIT COURT
HONORABLE WILLIAM JENNINGS, JUDGE
ACTION NO. 97-CI-00540

HONORABLE EARL RAY NEAL,
ADMINISTRATOR OF THE
ESTATE OF RUBY ABRAMS;
BONITA HUMFLEET;
MIKE HUMFLEET; AND
ELIZABETH HALE

APPELLEES

AND: NO. 1998-CA-001523-MR

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ELIZABETH HALE;
HONORABLE DAVID BAIRD,
MASTER COMMISSIONER;
JOHN M. BOTKINS,
SALE PURCHASER; AND
CORA JEAN BOTKINS,
SALE PURCHASER

APPELLEES

OPINION
AFFIRMING APPEAL NO. 1998-CA-000309-MR
AFFIRMING APPEAL NO. 1998-CA-001523-MR
** **

BEFORE: CHIEF JUDGE GUDGEL, DYCHE, AND GUIDUGLI, JUDGES.

GUIDUGLI, JUDGE. Great Financial Bank, F.S.B. (the Bank) brings this consolidated appeal from several judgments of the Madison Circuit Court pertaining to real property once owned by Ruby R. Abrams (Abrams), now deceased. We affirm.

Abrams died intestate on February 2, 1997, leaving her daughters, Bonita Humfleet (Humfleet) and Elizabeth Hale (Hale) as her sole heirs. At the time of her death, Abrams owned a parcel of real property, which was encumbered by a first and second note and mortgage in favor of First Federal Savings and Loan Association of Richmond (the Bank's predecessor in title). Both notes contained the following language:

7. Protection of Lender's Security. If Borrower fails to perform the covenants and agreements contained in this Mortgage, or if any action or proceeding is commenced which materially affects Lender's interest in the Property, including, but not limited to, eminent domain, insolvency, code enforcement or arrangements or proceedings involving a bankruptcy or decedent, then Lender at Lender's option, upon notice to Borrower, may make such appearances, disburse such sums and take such action as is necessary to protect Lender's interest, including but not limited, to, disbursement of reasonable attorney fees....

18. Acceleration; Remedies....upon Borrower's breach of any covenant or agreement of Borrower in this Mortgage....Lender at Lender's option may declare all of the sum secured by this Mortgage to be immediately due and payable without further demand and may enforce the lien of the mortgage by judicial proceeding. Lender shall be entitled to collect in such proceeding all expenses of foreclosure, including, but not limited to, reasonable attorney fees, and cost of documentary evidence, abstracts and title reports.

At the time of her death, it appears that Abrams was current on the obligations of both notes.

Humfleet and Hale commenced administration of Abrams' estate within several weeks of her death. Earl Ray Neal (Neal) was ultimately appointed administrator of Abrams' estate by order of the probate court entered February 24, 1997. Neal presented his fiduciary bond on March 27, 1997, and was qualified as administrator by an order entered by the probate court on the same date.

Following Abrams' death, no mortgage payments were made to the Bank and it also appears that the Bank was unaware of Abrams' death. On March 17, 1997, the Bank sent certified letters to Abrams' address notifying her of the breach and seeking payment of two installments on each mortgage along with late fees. Humfleet signed for these letters on March 24, 1997. It appears that the Bank was then notified of Abrams' death as the record indicates that foreclosure notices were mailed to Neal's office on April 25, 1997. The Bank subsequently filed a proof of claim with the probate court on May 2, 1997.

On May 5, 1997, the Bank filed a complaint with the trial court against Neal, Humfleet, and Hale, seeking an in rem judgment to satisfy payment of the notes as well as foreclosure and sale of the property. The complaint further sought an award of "reasonable attorneys fees in the amount of \$2,000." On May 28, 1997, the Bank's attorney, Septtimous Taylor (Taylor) filed an affidavit claiming entitlement to attorneys fees in the amount of \$2,137.50.

Neal answered the Bank's complaint on May 29, 1997. As an affirmative defense, Neal contended that the Bank's action was premature on the ground that the estate had not yet responded to the Bank's proof of claim and that the time period for doing so had not yet passed. Neal also filed a motion to dismiss on the same day. In the motion, Neal acknowledged receipt of the Bank's proof of claim on May 3, 1997, and further alleged:

...

4. He has since spoken with counsel for the Plaintiff and advised same that this estate is solvent, that he intends to make payment in full to the Plaintiff, and that he intends to formally allow the claim as a valid claim against the estate in accordance with the provisions of KRS 396.055. The time within which to make allowance, as set forth in the said statute, has not yet elapsed.

5. Pursuant to the provisions of KRS 396.075, he is not, as administrator, presently at liberty to make payment of the claim.

6. He has been advised by Plaintiff's counsel that only payment in full of the claim together with attorney's fees will suffice to resolve this case.

7. Given the circumstances outlined hereinabove, it would not appear that

Plaintiff has an entitlement to attorney's fees, and he has so informed Plaintiff's counsel.

On June 4, 1997, Neal wrote a letter to Taylor acknowledging receipt of the Bank's proof of claim. In the letter, Neal stated:

Any part of the claim representing the balance owed on the promissory notes and mortgages...is hereby allowed. Pursuant to a fax transmission from your office, dated May 2, 1997, I understand that you are claiming attorney's fees in settlement of this claim. Please be advised that any portion of [the Bank's] claim relating to attorney's fees is hereby disallowed.

Neal also made another affirmation of his intent to allow the Bank's claim for principal and interest only during oral arguments on the motion to dismiss. The Bank's complaint was dismissed without prejudice by order entered June 6, 1997. No appeal was taken from this dismissal and no action was ever taken to revive this particular claim.

Approximately twelve days after the dismissal of its first complaint, the Bank filed another complaint against the same parties. The only difference between this complaint and the previous one was that the Bank was now seeking \$3,000 in attorney's fees.

Following the filing of the second complaint, Neal telephoned Taylor and requested pay-off figures on the two notes. Taylor faxed the pay-offs to Taylor reflecting the amounts incurred through June 25, 1997. Both pay-off calculations included attorney's fees. On the same day, Neal mailed two checks to Taylor in the total amount of \$40,317.02, being the

amount of the pay-offs less the amount sought as attorney's fees. In his answer filed with the trial court on July 1, 1997, Neal sought dismissal of the complaint on the ground that the notes had been satisfied. However, in a fax from the Bank to Neal on July 2, 1997, the Bank refused to accept the checks, stating that they were not sufficient to pay the notes in full. Taylor returned the checks to Neal on July 2, 1997, with a letter indicating that payment of \$43,897.15 was necessary to pay off the loans.

On August 1, 1997, the Bank propounded discovery in the form of requests for admissions to the appellees. Many of the requests concerned the non-payment of the notes herein. Most important to this appeal is Request No. 8:

The mortgages executed by Ruby Abrams...authorize the [Bank's] recovery and entitlement to collect all expenses of foreclosure including but not limited to, reasonable attorney fees, and/or costs of documentary evidence, abstracts and title reports, and/or costs of title requests.

It appears that the appellees never responded to the requests for admission.

The Bank filed a motion seeking summary judgment on August 4, 1997. Besides seeking payment of the principal and interest on the notes, the Bank also sought payment of attorney's fees in the amount of \$3,337.50.

On August 4, 1997, Neal filed a motion seeking, among other things, abatement of interest on the notes, permission to pay the amount in dispute to the court clerk, and a release of the mortgages. In support of his motion, Neal alleged that

interest on the notes should cease to accrue as of June 29, 1997, the date the payment was first tendered to the Bank. Neal acknowledged that he was prepared to make full payment of the notes, including attorney's fees, to the court clerk pending the resolution of the matter. Neal filed his own motion for summary judgment on September 2, 1997.

On November 20, 1997, it appears that Humfleet, apparently desperate to end this matter, requested the trial court to order the property to be sold by the Master Commissioner free and clear of the Bank's lien. Humfleet also requested that Neal be ordered to pay the Bank's claim. As grounds for relief, Humfleet stated that "[d]elay in payment does nothing more than injure the estate." The Bank responded to Humfleet's motion on December 8, 1997, indicating that it had no objection to the sale of the property provided that its claim was paid in full.

On December 11, 1997, the trial court entered an order directing that the property be sold by the Commissioner and the mortgages released of record. The trial court further directed the Commissioner to deduct costs of the auction from the proceeds and deposit the remaining balance with the trial court pending further orders. The order recognized the existence of the controversy regarding the attorney's fees and indicated that the issue would be passed pending further order. The Bank filed a CR 59.05 motion to amend on December 29, 1997.

On January 7, 1998, the trial court entered an additional order ruling on all pending motions. The order began by incorporating by reference the file in 97-CR-375 to provide "a

complete picture of the abuse of the judicial process that this case exemplifies." The trial court summarized the proceeding in the previous action. The trial court then noted that in its opinion both of the Bank's lawsuits were of questionable necessity and stated that "[s]ome might look at these cases and get the feeling that the only true purpose involved was to see how much attorney's fees could be charged to Ruby Abrams' estate." The trial court then entered the following judgment:

1. That the payment for the principal amount of the mortgage indebtedness, ad valorem and other fees, together with all accrued interest thereon, having been tendered on June 27 to the plaintiff and subsequently refused, works as an estoppel for the plaintiff to collect any further amounts other than that which was tendered.

2. That both of these civil actions, while arguably allowed by statute, were neither warranted nor justified under the circumstances; and that the actions took on the character of seeing how much unnecessary attorney fees can be sought just because there may exist a right to seek them. Therefore, good conscience, good faith, and pure equity demand that the plaintiff not be allowed to recover any attorney fees in connection with either of the actions.

3. That although counsel for the defendants have made requests for attorney fees (which may very well be justified under these gross facts), in the interest of fairness, none shall be awarded. However, in the event of appeal, which the court would consider frivolous, and a further total waste of judicial time and economy the Court will give thoughtful reconsideration to the issue of assessment of attorney fees and other sanctions on behalf of the defendants.

4. That the defendant, Honorable Earl-Ray Neal, as Administrator of the Estate of Ruby Abrams, shall deposit with the Clerk of this Court, the sum of \$40,317.02, which

represents the Estate's total indebtedness to the plaintiff (the same to be held in a non-interest bearing account); and that the plaintiff may within ten days of entry of this Order withdraw said funds from the Clerk upon proof of having released its mortgage lien on the subject property in the Madison County Court Clerk's office.

5. In the event the plaintiff chooses not to comply with the preceding paragraph, the Master Commissioner is hereby ORDERED AND AUTHORIZED to release said liens and to present the Court with an affidavit of the release fees together with his costs in so doing; and the same shall be deducted from the funds being held by the Clerk and the balance forwarded to the plaintiff.

It appears that Neal complied with the trial court's order and deposited the money with the court clerk. The Bank filed a CR 59.05 motion to amend on January 20, 1998. Its motion was denied on February 5, 1998.

Despite the rather stern tone taken by the trial court, the Bank persisted. On January 20, 1998, the Bank filed a motion seeking to consolidate No. 97-CI-375 with No. 97-CI-540. The motion was denied by order entered February 5, 1998, which stated in part, "motion to consolidate with case that was dismissed on June 5, 1997, which was never reviewed is overruled."

On February 6, 1998, the Bank filed a notice of appeal from the trial court's orders of December 11, 1997, and January 7, 1998. No supercedeas bond was filed by the Bank.

The Master Commissioner filed his report of sale on February 9, 1998. According to the report, the property sold at auction on January 31, 1998. The Commissioner filed a further affidavit on February 12, 1998, indicating that the Bank's mortgages were released of record on February 11, 1998.

On February 18, 1998, the Bank filed exceptions to the sale of the property and the Commissioner's report. The Bank argued that enforcement of the December 11, 1997, order was stayed by the filing of its CR 59.05 motion filed on December 29, 1997. The Bank further argued that:

In the event the Court's [1/7/98 order] was intended as an adjudication to the Plaintiff's Motion to Amend Judgment, the enforcement of said judgment was stayed...as a result of the Plaintiff's CR 59.05 Motion served January 16, 1998, and filed on January 20, 1998... . The Plaintiff's later Motion to Amend Judgment was not adjudicated by the Trial Court until February 5, 1998.

The Bank contended that the sale of the property was invalid because no enforceable judgment existed at the time of the sale.

On March 12, 1998, the trial court entered an order confirming the sale of the property. In a second order of the same date entered at motion hour, the trial court noted that no supercedeas bond had been filed by the Bank, confirmed the sale, and ordered that the balance of the sale proceeds be paid to Humfleet and Hale. On May 15, 1998, the trial court overruled the Bank's exceptions to the Commissioner's sale and report on the ground that the exceptions were mooted by confirmation of the sale. The Bank filed a notice of appeal from this order on June 15, 1998.

Although the two appeals were ultimately consolidated by order of this Court, we will address each appeal separately.

NO. 1998-CA-0309-MR

This section will address the Bank's appeal from the trial court's orders of December 11, 1997, and January 7, 1998.

The Bank alleges that the trial court erred in not granting its motion for summary judgment and order of sale. In support of its argument, the Bank alleges that (1) Abrams defaulted on her obligations, (2) the Bank complied with its obligation to give notice of its intent to accelerate the debt, (3) foreclosure proceedings were initiated in June 1997 due to default; and (4) foreclosure was necessary due to Neal's denial of the claim on June 5, 1997. The Bank also argues that due to the appellees' failure to respond to its requests for admissions, all of them stand admitted pursuant to CR 36.01(2) and 36.02.

The standard of summary judgment is as follows:

The function of summary judgment is to terminate the litigation when it appears that it would be impossible for the respondent to produce evidence at the trial warranting a judgment in his favor. It is proper where the movant shows that the adverse party could not prevail under any circumstances. [citations omitted]. The only duty of the court on a motion for summary judgment is to determine whether there are genuine issues to be tried and not to resolve them... . Generally when any claim has no substance or controlling facts are not in dispute, summary judgment can be proper... .

James Graham Brown Foundation, Inc. v. St. Paul Fire & Marine Ins. Co., Ky., 814 S.W.2d 273, 276-277 (1991).

If this case merely involved a simple foreclosure action seeking payment of principal and interest as well as related late fees due to non-payment of the notes, we would agree that summary judgment in favor of the Bank would have been proper. In fact contrary to the Bank's allegations, appellees have never denied payment of the principal and interest of both notes.

What the Bank fails to see is that there is a genuine issue of material fact in this case, mainly, whether it is entitled to payment of attorney's fees. As the Bank points out, the note provides that it is entitled to reasonable attorney's fees upon default. Appellees have constantly and consistently alleged that the Bank is not reasonably entitled to attorney's fees and the Bank has refuted appellees' position. This clearly constitutes a genuine issue of material fact which precludes summary judgment in favor of the Bank.

The Bank's argument concerning appellees' failure to respond to its requests for admission is also without merit. If we accept the Bank's argument that the requests stand admitted, the only facts that are admitted are (1) the notes are in default; (2) the outstanding principal and interest totals \$38,095.40 as of January 1, 1997, and that the mortgages allow for recovery of reasonable attorney's fees upon default. There was no request for admission dealing with whether the Bank was entitled to \$3,000 in attorney's fees or whether the fee sought was reasonable. Again, there is a question of fact remaining to be decided as to whether any award of attorney's fees is reasonable in this case. Thus, summary judgment in favor of the Bank would not have been proper.

The Bank also claims that the trial court's January order resulted in a short-fall to the Bank in the amount of \$6,831.72. Of this amount, \$4,100 is what the Bank maintains it is entitled to in attorney's fees above. The Bank claims that this amount represents "accrued interest, escrow advances

incurred for the preservation and protection of the mortgages' security interest in the property, foreclosure court costs, and attorney's fees incurred. All of the denied items of recovery are specifically authorized by the mortgage contracts, statutory authority and appellate decisions cited hereinabove." We disagree.

In regard to the amount of attorney's fees claimed by the Bank, we agree with the trial court's observation that this entire matter appears to be driven by the accumulation of attorney's fees alone. The Bank knew of Abrams' death as early as April 1997, and duly filed its proof of claim in her estate on May 2, 1997. Without even waiting to learn whether the claim would be allowed, the Bank stampeded on to foreclosure court within three days of filing its proof of claim. To make matters worse, the Bank persisted in pressing on with its claim despite repeated assurances by Neal that the claim would be paid in full by the estate and despite Neal's tender of checks sufficient to cover the principal, interest and late fees on June 25, 1997. While we realize that there was and always has been a dispute regarding the Bank's entitlement to attorney's fees, we find that the facts of this case show that the attorney's fees in this case were necessitated by the actions of the Bank itself, and not by any actions of the appellees herein. We agree with the trial court that due to the conduct of the Bank in this matter, any award of attorney's fees would be unreasonable.

In regard to the Bank's argument concerning the remaining \$2,731.72 which the Bank claims entitlement to, we

believe that the trial court was not in error in finding that Neal's tender of payment in June 1997 estopped the Bank from seeking further charges after that date. Had the Bank accepted payment in June 1997, we see no reason why it could have dismissed its claim for payment of the notes while allowing the dispute over the attorney's fees to continue without having to accrue any further charges. We agree wholeheartedly with Neal's assertion in his brief on appeal that

"bearing in mind that the dispute between the parties was one of [the Bank's] sole creation, [the Bank] should not be heard to complain of the trial court's ruling on the...estoppel issue."

The Bank also maintains that the trial court's dismissal of its complaint in No. 97-CI-375 was contrary to KRS 396.011(2). This issue is not preserved for our review as no appeal from the trial court's order of dismissal was ever perfected and that order is now final.

Contrary to the Bank's assertion, the trial court's incorporation by reference of No. 97-CI-375 into its order of January 1, 1998, does not open that case up for our review. It is clear that the trial court incorporated the earlier case to document what it perceived to be the Bank's abuse of judicial process. As the trial court noted in its denial of the Bank's motion to consolidate, the Bank has never taken any formal steps to revive or reopen the earlier case. Having failed to take such steps, and having failed to timely appeal from the order dismissing the earlier complaint, the Bank is not entitled to complain of that dismissal at this time.

Based upon our review of the parties' arguments on appeal, the trial court's orders of December 11, 1997, and January 7, 1998 are, affirmed.

NO.1998-CA-1523-MR

This appeal stems from the trial court's order of May 15, 1998, which found the Bank's exceptions to the sale of the property to be mooted by the confirmation of the sale of the property. This same issue was raised by the Bank in No. 98-CA-0309-MR, but we will address it in this section.

We agree with Neal's contention that the Bank's appeal on this aspect is untimely. As Neal demonstrates, the order confirming the sale was entered on March 12, 1997, and no appeal from this order was taken within 30 days as provided by CR 76.04, that order is now final.

To the extent that the Bank argues that its appeal is timely based on the fact that it is appealing from the order denying its previously filed exceptions to the report of sale entered May 15, 1998, we agree with the trial court's findings that the exceptions were mooted by the March 12, 1998 order confirming the sale. As no appeal was taken from that order, it became final, and its finality thus mooted any exceptions that Bank may have had. Due to the Bank's failure to timely appeal from the order confirming sale it became final, and its finality thus mooted any exceptions the Bank may have had. The Bank cannot attempt to sneak through the back door by challenging the wrong order.

The trial court's order of May 15, 1998 is affirmed.

ALL CONCUR.

BRIEF AND ORAL ARGUMENT FOR
APPELLANT:

Septtimous Taylor
Owensboro, KY

BRIEF AND ORAL ARGUMENT FOR
APPELLEE, EARL RAY NEAL:

Garrett T. Fowles
Richmond, KY