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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-002989-MR

RONNIE WHEELER AND
EVELYN DUCKER WHEELER — APPELLANTS

v.

APPEAL FROM GARRARD CIRCUIT COURT
HONORABLE ROBERT J. JACKSON, JUDGE
ACTION NO. 1995-CI-00008

JOEL D. REDWINE; CAROLYN K. HUGHES;
COUNTY OF GARRARD; AND MIKE COTTRELL
& ASSOCIATES, INC. — APPELLEES

OPINION
VACATING AND REMANDING

** ** ** ** **

BEFORE: BUCKINGHAM, KNOPF, AND McANULTY, JUDGES.

KNOPF, JUDGE: Ronnie Wheeler and his wife, Evelyn Ducker Wheeler, appeal from a November 4, 1998, summary judgment of the Garrard Circuit Court ordering that a parcel of real estate be sold and the proceeds applied to tax liens and a mortgage affixed to the property. Appellees Joel Redwine and Carol Hughes hold the liens and mortgage. The Wheelers maintain that the trial court applied an excessive portion of the proceeds to the mortgage. Being unable to say with the requisite certainty that there is no material factual dispute on this issue, we are

obliged to vacate the trial court's judgment and remand for additional proceedings.

In 1977 Ronnie Wheeler owned a small, unimproved parcel of Garrard County real estate. During that year he borrowed money from the First National Bank of Nicholasville, Kentucky, to purchase an automobile. In exchange for the loan, Wheeler gave the bank a promissory note for the principle (approximately $3,000.00 at the time of default) and interest (19.06%), a security interest in the automobile, and a mortgage on the Garrard County property. Wheeler defaulted on the note in 1983 and soon thereafter sought and was awarded relief under Chapter 7 of the bankruptcy code. 11 U.S.C. § 701 *et seq.* Persuaded, perhaps, that Wheeler's unimproved realty did not promise a sufficient return to justify foreclosure, the bank took no action to enforce its mortgage. Nor did Wheeler, who apparently believed that the mortgage had been removed by his bankruptcy discharge, do anything to disencumber the property. So the matter stood until 1994. During that year, prior, apparently, to learning of the appellees' claims, Wheeler began building a residence on the Garrard County property. In December 1994, the appellees purchased the mortgage from First National Bank for $100.00. They then brought suit to enforce their mortgage in January 1995.[1]

[1]The appellees had also purchased several certificates of tax delinquency on the property. Their suit sought recovery on that basis as well. The Wheelers acknowledge their liability for the delinquent taxes, and that aspect of the case plays no part in this appeal.

We need not relate in detail the convoluted history of the appellees' suit, which is before this Court now for the second time. It suffices to note two facts. First, in their initial motion for summary judgment, the appellees discussed their mortgage-based claim as follows:

> However, Defendant Ronnie Wheeler has commenced construction on the subject property and it is no longer an undeveloped one-half acre. In the interest of equity, the plaintiffs suggest to the Court that the value of the property in 1994, prior to commencement of the construction, be set at $2,500.00 which is the value of the property in 1994 for tax assessment purposes. . . . The plaintiffs could then be awarded what they were due under law, the value of the unimproved land, and the defendant would not suffer undue hardship since he has improved the land during the litigation period.

Second, in 1997, with the appellees' summary judgment motion pending, Wheeler reopened his bankruptcy case. He objected to the appellees' claim and sought an order compelling the appellees to release the mortgage for $500.00, the alleged value of the real estate in 1983 at the time of the original bankruptcy proceeding. Denying this relief, the bankruptcy court explained that, "[t]he mortgage, which the herein creditors hold as assignees, survived as an enforceable consensual mortgage lien, the discharge of the debtor." The bankruptcy court went on to rule that

> creditors Redwine and Hughes hold a valid secured claim in the amount of $32,175.88 as of the date of filing of their proof of claim, plus interest. Of this amount, $31,591.98 derives from the assigned mortgage. Their proof of claim is allowed in full with interest as provided by the underlying note . . . .

When the bankruptcy stay was lifted, the circuit court proceeding resumed. Wheeler maintained that the appellees' recovery pursuant to the mortgage should be limited to the $2,500.00 they had requested in their original motion; Redwine and Hughes maintained that, under the bankruptcy court's ruling, they were entitled to the full value of the outstanding note plus interest (increased since the bankruptcy court's ruling to approximately $40,000.00). The circuit court agreed with the appellees. In granting their (implicitly modified) motion for summary judgment and ordering the property to be sold, it ruled that collateral estoppel precluded any reconsideration of the claim's value. It also ruled that the appellees' prior request for only $2,500.00 did not constitute a "judicial admission" limiting the amount they could recover. Redwine and Hughes, the only bidders, purchased the property at a commissioner's sale in December 1998 for the amount then due under the note.

Because summary judgments involve no fact finding, this Court reviews such judgments *de novo*, in the sense that we owe no deference to the conclusions of the trial court. As did the trial court, we ask whether material facts are in dispute and whether the party moving for judgment is clearly entitled thereto as a matter of law. Under this state's rules of practice, summary judgments are to be granted cautiously; they are appropriate only when it appears impossible for the non-movant to prove facts establishing a right to relief or release, as the case may be. Steelvest, Inc. v. Scansteel Service Center, Inc.,

Ky., 807 S.W.2d 476 (1991). For the following reasons, we are concerned that here this strict standard has not yet been met.

Our concern focuses on what seems to be an ambiguous use of the word "claim" in the parties' briefs and in the trial court's judgment. On the one hand, as the bankruptcy court held and as the appellees insist, Wheeler's note-based liability to the bank, the bank's "claim," was not extinguished by Wheeler's discharge in bankruptcy. The discharge only precluded the bank from enforcing its claim against Wheeler personally. The mortgage, however, survived the bankruptcy, so that the "claim," calculated according to the terms of the note, remained enforceable against whatever property was encumbered thereby. In re Willis, 199 B.R. 153 (B.W.D.Ky. 1995); In re Hornlein, 130 B.R. 600 (B.M.D.Fla. 1991). In this sense, the value of the "claim" was indeed determined by the bankruptcy court, and we agree with the trial court that Wheeler, who did not appeal the bankruptcy court's ruling, is collaterally estopped from challenging that valuation. Moore v. Commonwealth of Kentucky, Cabinet for Human Resources, Ky., 954 S.W.2d 317 (1997); Herring Mining Company v. Roberts Brothers Coal Company, Inc., Ky. App., 747 S.W.2d 616 (1988).

On the other hand, as a practical matter the appellees' "claim" is limited by the value of the collateral against which the claim may be asserted, and that value in turn depends upon a determination of what the collateral is. The bankruptcy court did not address that question. Consequently, collateral estoppel does not bar Wheeler from challenging the "claim" in this sense.

Sedley v. City of West Buechel, Ky., 461 S.W.2d 556 (1971). Wheeler contends that the mortgage encumbers his lot but not the residence added thereto. He insists that the appellees have admitted as much and should be bound by their admission, and further that their admission was incorporated in the judgment that preceded the first appeal of this matter and thus has become *res judicata*. This second argument need not detain us, for the first appeal was dismissed upon the determination that the prior judgment was interlocutory, not final, and the doctrine of *res judicata* applies only to final judgments. Cartmell v. Urban Renewal and Community Development Agency of the City of Maysville, Ky., 419 S.W.2d 719 (1967).

Wheeler's other assertion, however--that the dwelling is not encumbered by the mortgage and that the appellees have admitted this--presents a more difficult question. To be sure, such a mortgage would represent a deviation from standard practice, according to which a mortgage on real property attaches, as a general rule, to improvements added at a later date. Kentucky Lumber & Mill Work Co. v. Kentucky Title Savings, 184 Ky. 244, 211 S.W. 765 (1919); Miladin v. Istrate, 119 N.E.2d 12 (Ind. 1954). By itself, furthermore, the portion of the appellees' summary judgment motion quoted above does not amount to a binding judicial admission that the mortgage should be construed as Wheeler would have it. The quoted portion of the appellees' motion seems to have been intended more as a demonstration of appellees' "reasonableness" and "good faith" than as a testamentary concession. And it addressed gratuitously

an evidentiary matter with regard to which the appellees are not likely to have intended a waiver. In these circumstances, the presumption against judicial admissions is controlling. Goldsmith v. Allied Building Components, Inc., Ky., 833 S.W.2d 378 (1992); Sutherland v. Davis, 286 Ky. 743 , 151 S.W.2d 1021 (1941).

Nevertheless, it cannot be denied that the appellees' plea for relief in their summary judgment motion is significantly inconsistent with the position they now maintain. Nor is Wheeler's assertion about the mortgage a legal impossibility. Upon further development, the facts could conceivably justify a finding that the mortgage was not intended to apply to Wheeler's dwelling, or that the appellees pursued it with that understanding. This possibility, the unusual equities created by the true creditor's virtual abandonment of its claim and by the long period during which the claim lay dormant, and the further possibility that the trial court deemed itself precluded by the bankruptcy court's ruling from critically assessing Wheeler's mortgage and the appellees' pleading in regard thereto, lead us to conclude that summary judgment was premature. The scope of Wheeler's mortgage must be addressed. Accordingly, we vacate the November 4, 1998, judgment of the Garrard Circuit Court and remand for additional proceedings consistent herewith.

McANULTY, JUDGE, CONCURS.

BUCKINGHAM, JUDGE, CONCURS IN RESULT.

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