

Commonwealth Of Kentucky

Court Of Appeals

NO. 1999-CA-000258-MR

THE ESTATE OF CARL J. MABRY;
BILLY JACK MABRY, Individually
and as Executor of the Estate
of CARL MABRY; and JOYCE MABRY

APPELLANTS

V. APPEAL FROM CARTER CIRCUIT COURT
HONORABLE SAMUEL C. LONG, JUDGE
ACTION NO. 97-CI-00325

COMMERCIAL BANK OF GRAYSON

APPELLEE

OPINION AFFIRMING IN PART, AND REVERSING AND REMANDING IN PART

* * * * *

BEFORE: GUDGEL, Chief Judge; COMBS and MILLER, Judges.

GUDGEL, CHIEF JUDGE: This is an appeal from a summary judgment granted by the Carter Circuit Court. For the reasons stated hereafter, we affirm in part, and reverse and remand in part.

The relevant facts, although relatively uncomplicated, are unique and must be recited in some detail. Essentially, this action involves three separate and distinct promissory notes and a loan agreement, as well as the efforts of appellee Commercial Bank of Grayson to collect the unpaid balances owed on each of the four obligations.

Carl Mabry executed promissory notes in favor of appellee in May 1994 and June 1996, and he entered into a cash reserve agreement with appellee in November 1995. Repayment of all three loan obligations was secured by a perfected security interest in a motor vehicle.

Carl Mabry and his wife, Gladys Mabry, additionally executed a 1984 promissory note as evidence of a mortgage loan, the repayment of which was secured by a first mortgage on their residence in Olive Hill, Kentucky. The mortgage loan was refinanced in 1992. As part of the mortgage loan refinancing transaction, a note was executed not only by Carl and Gladys Mabry, but also by their son and daughter-in-law, appellants Billy Mabry and Joyce Mabry. Moreover, the elder Mabrys executed a mortgage extension agreement whereby they agreed that the maturity date of the note and the mortgage securing its repayment would be extended for a sufficient number of years to cover the repayment period set forth in the new note executed as part of the refinancing transaction. Thus, when the widowed Carl Mabry died in January 1997, he owed appellee four separate and distinct debts evidenced by four separate and distinct contractual obligations, i.e., by three promissory notes and a cash reserve agreement. Although the record is not sufficiently developed to establish this fact, it appears that the elder Mabrys' refinancing of the residential mortgage debt may have been at the request and for the benefit of their son and daughter-in-law, who provided no security to appellee regarding the repayment of their obligations under the 1992 mortgage note. Because they were not parties to the 1984 mortgage agreement, the younger Mabrys were

not bound by any of the covenants and agreements set forth in that document.

Billy Mabry was appointed executor of his father's estate in early 1997. Several months later, appellee filed a proof of claim respecting Carl Mabry's outstanding indebtedness to it. In September 1997, after payment of the indebtedness was not forthcoming, appellee instituted this action against Carl Mabry's estate and against Billy Mabry, both individually and as the estate's executor. The initial complaint sought a judgment for the unpaid amounts owed on all of Carl Mabry's obligations other than the amount owed on the 1992 note secured by the 1984 mortgage. In November 1997, after the vehicle securing repayment of those three obligations was sold and the net proceeds thereof were applied in partial satisfaction of the indebtedness due, the court granted appellee a default judgment against the estate and its executor for the amount of the deficiency balance due. Appellee then proceeded to perfect a judgment lien against Carl Mabry's residence, which obviously was second and inferior to its 1984 first mortgage against the property. That judgment lien secured payment of the default judgment in derogation of the rights of any other creditors of the estate, and regardless of whether any such creditors were entitled to priority. See KRS 396.095.

Next, appellee filed an amended complaint seeking to recover the balance owed on the 1992 mortgage note, and requesting that the mortgaged property be sold and that the net proceeds thereof be applied toward the balance due on the note. The foreclosure claim was asserted not only against Carl Mabry's

estate, but also against Billy Mabry, both individually and as the estate's executor, and against Joyce Mabry individually. Appellants defended against the action on the ground that the 1992 mortgage note was not in default, and that a foreclosure action therefore was premature.

On December 1, 1998, after limited discovery occurred, the court granted a summary judgment and order of sale awarding appellee a personal judgment against Billy Mabry, both individually and as the estate's executor, and against Joyce Mabry individually, in the amount of \$19,436.30. The court directed that the mortgaged property should be sold, and that the sale's net proceeds should be applied in satisfaction of not only the mortgage indebtedness, but also the judgment lien against the property stemming from the November 1997 default judgment. This appeal followed.

At the outset, it is appropriate to analyze the posture of this litigation as it has been presented to this court. First, it is clear that the November 1997 default judgment against Carl Mabry's estate and its executor is valid and enforceable. Although KRS 396.135 clearly prohibited any levy or execution on that judgment against Carl Mabry's property, the parties have acknowledged that such a levy was effected. However, the record contains no documentation to establish this fact. Moreover, the record neither includes any order regarding the distribution of the funds, nor otherwise shows whether the net proceeds derived from the sale of the mortgaged property were sufficient to satisfy the balance due on the 1992 mortgage note, the amount of the judgment lien, and/or the claims of creditors.

Presumably, if the assets were sufficient to pay all outstanding claims, both of appellee's judgments would have been fully satisfied. On the other hand, if the assets were not sufficient to pay all outstanding claims, the available funds should have been distributed to creditors consistent with the dictates of KRS 396.095(1) and (2), except insofar as appellee, as a secured creditor, was entitled to priority in regard to the net proceeds from the judicial sale of the residence.

Next, we note that contrary to appellants' arguments, the trial court clearly did not err by permitting appellee's foreclosure action to proceed to judgment and a judicial sale of the mortgaged property. Not only did Carl and Gladys Mabry both sign the 1992 mortgage note, but they also both executed the mortgage which secured repayment of the debt evidenced by the note, agreeing therein that if they died, appellee would be entitled to accelerate payment of the balance due on the note and to enforce its mortgage lien if the accelerated debt was not paid. Here, the record shows that after the deaths of Carl and Gladys Mabry, appellee gave Billy Mabry, as the estate's executor, written notice that payment of the balance due on the note was being accelerated consistent with the agreement. Billy Mabry was further notified that if the amount due was not paid within thirty days, appellee would institute collection procedures. Thereafter, an amended complaint seeking to enforce the note and mortgage was filed. Because Carl Mabry executed both the note and the mortgage, agreeing therein that in the event of his death payment of the balance due on the note could be accelerated, and because appellants filed nothing in

opposition to appellee's claim which created a genuine issue of material fact as to Carl Mabry's liability on the note and/or which raised a defense to the note's enforcement or to the sale of the mortgaged property, it is clear that appellee was entitled to seek the judgment and order of sale granted herein. Thus, we must affirm the December 1998 order and judgment insofar as it awards a personal judgment against Carl Mabry's estate and Billy Mabry as the executor thereof, and insofar as it directs the court's commissioner to sell the mortgaged property and to apply the proceeds thereof in satisfaction of the unpaid mortgage debt.

The portion of the judgment assessing joint and several liability on the mortgage note against Billy and Joyce Mabry, however, is another matter as neither of them was a party to the mortgage. Therefore, they were not bound by or subject to the provisions of the mortgage executed by Carl Mabry, including the clause regarding acceleration in the event of death. Thus, although Carl Mabry's death allowed appellee to accelerate payment of the mortgage debt as to him, the note itself afforded no basis for accelerating payment of the obligation assumed by Billy and Joyce Mabry. Rather, their obligations to appellee must be determined solely according to the provisions of the mortgage note, which addresses the issue of default in Paragraph 7. Subparagraph C of Paragraph 7 requires the mortgage holder to give thirty days written notice of any default to the makers of the note. Here, the record contains no written notice of default and nothing indicates that such notice was given. Indeed, as far as the record shows, the only notice given was that which accelerated Carl Mabry's payment as a result of his death. Thus,

because the record shows that appellee did not attempt to comply with the 1992 note's default provisions, appellee was not entitled either to accelerate the obligations of Billy and Joyce Mabry under that note, or to obtain a personal judgment against them for the balance due. Accordingly, so much of the court's December 1, 1998, summary judgment as adjudges Billy and Joyce Mabry individually liable for the balance due on the mortgage note must be reversed.

In summary, we affirm the November 1997 and December 1998 judgments as to the liability of Carl Mabry's estate and Billy Mabry as executor thereof. Moreover, we also affirm so much of the December 1998 judgment as directs a sale of Carl Mabry's mortgaged property and orders the net proceeds thereof to be applied in satisfaction of the balance due thereon. However, any additional net proceeds derived from that judicial sale must be distributed consistent with the dictates of KRS 396.095 and KRS 396.135. Finally, the personal judgment against Billy and Joyce Mabry, respecting their liability on the 1992 mortgage note, must be reversed since it was not established below that they were in default with respect to their obligations thereunder. On remand, Billy and Joyce Mabry may not be adjudged personally liable on the 1992 mortgage note for more than any difference between the balance due on the note on the date of judgment, and the net proceeds realized from the sale of the mortgaged property.

For the reasons stated, the court's judgment is affirmed in part, and reversed and remanded in part for further proceedings consistent with our views.

ALL CONCUR.

BRIEF FOR APPELLANTS:

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BRIEF FOR APPELLEE:

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