RENDERED: February 23, 2001; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2000-CA-000189-MR

KENNETH R. SCOTT — APPELLANT

v.

APPEAL FROM LYON CIRCUIT COURT
HONORABLE BILL CUNNINGHAM, JUDGE
ACTION NO. 99-CI-00164

MERCANTILE BANK OF KENTUCKY
AND SUSAN A. SCOTT — APPELLEES

OPINION
AFFIRMING
** ** ** ** **

BEFORE: DYCHE, GUIDUGLI, AND SCHRODER, JUDGES.

SCHRODER, JUDGE: This is an appeal from a summary judgment entered in favor of a lender in an action to collect on a promissory note and mortgage which were in default. The mortgagor argues that summary judgment was premature because he had filed a notice to take depositions in the matter. He also argues that the trial court erroneously amended the judgment and ordered the sale of the property after he had filed his notice of appeal. Upon review of appellant's arguments, the record herein and the applicable law, we adjudge all three arguments to be without merit. Hence, we affirm.

In February of 1999, appellant, Kenneth Scott, and his now ex-wife, Susan Scott, borrowed $82,295 from appellee, Mercantile Bank of Kentucky ("Mercantile"), and executed a mortgage on a piece of property in Eddyville as security for the promissory note. By October of 1999, the Scotts were in default on the note and mortgage and, thus, on October 1, 1999, Mercantile brought an action to call the note due and enforce the mortgage. Filed with the complaint were copies of the note and mortgage. By that time, Kenneth Scott and Susan Scott were divorced. On October 28, 1999, Kenneth Scott filed an answer and cross-claim against Susan Scott alleging that she was obligated under the divorce decree to pay the note and mortgage. Susan Scott never filed an answer to the complaint or cross-claim and defaulted.

On December 3, 1999, Mercantile filed a motion for summary judgment. Attached to the motion was the affidavit of Bill Hall, a corporate officer at Mercantile, stating that the Scotts were in default on the note and mortgage, that there was an acceleration clause, and the current amount due with interest and attorney fees. Said motion was noticed for a hearing on January 3, 2000.

On December 15, 1999, Kenneth Scott filed a response to the motion for summary judgment claiming that the motion was premature because Scott had filed a notice to take a discovery deposition on January 3, 2000 and because no proof had been taken or submitted by the plaintiff. Scott's notice to take the discovery deposition on January 3, 2000 was filed on the same

date as his response to the motion for summary judgment, December 15, 1999. On December 16, 1999, Scott filed a notice to change the deposition date from January 3, 2000 to January 27, 2000. On December 17, 1999, Mercantile filed a notice to take the deposition of Scott on January 27, 2000. The trial court entered summary judgment in favor of Mercantile on January 4, 2000, and ordered the sale of the property to satisfy the judgment.

Scott filed a notice of appeal of the summary judgment on January 18, 2000 without posting a supersedeas bond. Because the summary judgment did not resolve the cross-claim against Susan Scott and contained no finality language, the appeal was from an interlocutory order. CR 54.02. On January 31, 2000, without motion of either party, the court *sua sponte* entered an order amending the January 4 summary judgment to add the requisite finality language. The Report of Commissioner's Sale was filed by the Master Commissioner on February 10, 2000 stating that the property at issue had been sold at public auction on February 8, 2000 to Mercantile for $53,400.

On appeal, Scott argues first that the trial court erred in entering the summary judgment for Mercantile when he had filed notice to take a discovery deposition in the matter and he had not been given the opportunity to take said deposition. Summary judgment is proper where there are no genuine issues of material fact and the movant is entitled to judgment as a matter of law. Fischer v. Heckerman, Ky. App., 772 S.W.2d 642 (1989); CR 56.03. Summary judgment should only be used to terminate

litigation when, as a matter of law, it appears that it would be impossible for the respondent to produce evidence at trial warranting a judgment in his favor and against the movant. Steelvest Inc. v. Scansteel Service Center, Inc., Ky., 807 S.W.2d 476 (1991). However, the above standard does not negate the respondent's burden to present some proof of the existence of a genuine issue of material fact. Neel v. Wagner-Shuck Realty Co., Ky. App., 576 S.W.2d 246 (1978). As to what form that proof must take, CR 56.06 states that it shall be by affidavit which the courts have construed as including any other pertinent materials which will assist the court in adjudicating the merits of the motion. Conley v. Hall, Ky., 395 S.W.2d 575 (1965). However, the party opposing the motion cannot rely on his pleadings alone to show the existence of a material issue of fact. Hartford Insurance Group v. Citizens Fidelity Bank & Trust Company, Ky. App., 579 S.W.2d 628 (1979).

Scott argues that his notice to take deposition was such sufficient proof to resist summary judgment. We do not agree. CR 56.03 provides that the respondent may serve opposing affidavits prior to the day of hearing. Scott never filed an affidavit in the case and did not file his notice to take deposition until some two months after the action had been filed and after the motion for summary judgment had been filed. The proposed deposition was not to be taken until after hearing on the summary judgment motion. The notice to take deposition was nothing more than a chance to possibly obtain sufficient proof to

withstand summary judgment. It was not, in and of itself, sufficient proof of the existence of a material fact.

In Hartford Insurance Group, 579 S.W.2d at 630, it was held that the party opposing the motion need only be given the opportunity to complete discovery before summary judgment is entered against that party. "It is not necessary to show that the respondent has actually completed discovery, but only that respondent has had an opportunity to do so." Id. Scott had three months to at least file an affidavit or complete discovery in the present case, and we deem that sufficient opportunity to complete discovery. Accordingly, summary judgment was properly entered against Scott.

The next argument we shall address is Scott's claim that the circuit court erred when it *sua sponte* amended the judgment of January 4, 2000. We are somewhat confounded by this argument because, if the circuit court had not amended the January 4 order to contain the requisite finality language, Scott's appeal to this Court would have been interlocutory and he would not now be before this Court. CR 54.02. In any event, Scott contends that the circuit court lost jurisdiction to amend the judgment after he filed his notice of appeal to this Court. It has been held that a premature notice of appeal is deemed to relate forward to the effective date that the trial court enters a final order. Johnson v. Smith, Ky., 885 S.W.2d 944 (1994). Since Scott's notice of appeal was interlocutory, this Court did not have jurisdiction until the order was made final. See Huff v. Wood-Mosaic Corp., Ky., 454 S.W.2d 705 (1970). CR 54.02

provides that an interlocutory order "is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties." Hence, the trial court did not err in amending the January 4 order.

Scott next argues that the trial court likewise lost jurisdiction to order the sale of the property after he filed his notice of appeal. However, since Scott did not execute a supersedeas bond in the case, the enforcement of the judgment against him could not be stayed. CR 62.03(1); CR 73.04. Accordingly, the trial court did not err in proceeding with the sale of the property.

For the reasons stated above, the judgment of the Lyon Circuit Court is affirmed.

GUIDUGLI, JUDGE, CONCURS.

DYCHE, JUDGE, CONCURS IN RESULT ONLY.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE, MERCANTILE BANK OF KENTUCKY:

Kerry S. Smith
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