

Commonwealth Of Kentucky

Court Of Appeals

NO. 2000-CA-000188-MR

THE CIT GROUP/CONSUMER FINANCE, INC.

APPELLANT

v.

APPEAL FROM BULLITT CIRCUIT COURT
HONORABLE THOMAS L. WALLER, JUDGE
ACTION NO. 98-CI-00442

GLORIA L. SHAKE, AND
THOMAS L. STEWART

APPELLEES

OPINION
REVERSING AND REMANDING
** **

BEFORE: HUDDLESTON, JOHNSON, and SCHRODER, JUDGES.

JOHNSON, JUDGE: The CIT Group/Consumer Finance, Inc., appeals from the judgment of the Bullitt Circuit Court entered on December 22, 1999, that found it had negligently communicated a mortgage payoff amount and negligently failed to immediately correct the error. As a result of this finding, the trial court ordered CIT Group to immediately release its mortgages of record on the property purchased by appellees, Gloria Shake and Thomas Stewart. Having determined that the trial court improperly granted summary judgment, we reverse and remand.

The underlying action in this case was initiated on June 23, 1998, when CIT Group commenced a foreclosure action, on its first and second mortgages, on real property located in Mt. Washington, Kentucky. During the course of this foreclosure proceeding, Shake and Stewart on July 31, 1998, purchased the subject property.

In effort to effectuate the closing, Shake and Stewart requested that counsel for CIT Group provide the necessary mortgage payoff information. Upon the receipt of this information from CIT Group, CIT Group's counsel communicated the monetary sum to Shake and Stewart. Unbeknownst to CIT Group's counsel and Shake and Stewart, the payoff amount conveyed only covered the first mortgage. Unaware of this error, the parties closed the property transaction, and the mortgage proceeds were delivered to counsel for CIT Group.

Thereafter, through the course of post-closing procedures, it was recognized that CIT Group had yet to release its mortgages of record. Shake and Stewart then delivered a written request that it do so. On November 20, 1998, CIT Group informed Shake and Stewart that the previously provided payoff amount was incorrect and monies remained due from the original mortgagor. As a result of the original mortgagor not satisfying the outstanding debt, CIT Group continued its effort to foreclose on the subject property and amended its foreclosure complaint naming Shake and Stewart as defendants.

In response thereto, Shake and Stewart filed their answer, counterclaim and cross-claim. CIT Group filed its answer

to the counterclaim.¹ Prior to any discovery being taken, Shake and Stewart filed a motion for a "hearing on all issues." After a hearing was conducted on December 13, 1998, the trial court rendered its findings of fact, conclusions of law and judgment directing CIT Group, as a result of its negligent conduct, to immediately release its mortgages. This appeal followed.

For this Court to decide this appeal, we must first review the procedural posture of the proceedings below and, in particular, the December 13, 1998, "hearing". First, we note that Shake and Stewart's motion for a "hearing on all issues" was functionally the equivalent of a judgment on the pleadings.² Second, the Kentucky Rules of Civil Procedure provide that where a party has moved for a judgment on the pleadings and matters outside the pleadings are presented for consideration, the motion shall be treated as one for summary judgment and disposed of in accordance with CR 56.³

The record reflects that Shake and Stewart presented proof at the December 13, 1998, hearing, which was not otherwise in the record.⁴ This evidence included the canceled check reflecting the mortgage proceeds paid to CIT Group as well as the letter requesting the release of CIT Group's mortgage liens. The

¹Neither party requested a jury trial.

²Kentucky Rules of Civil Procedure (CR) 12.03; La Vielle v. Seay, Ky.App., 412 S.W.2d 587 (1966).

³CR 12.03.

⁴We note that the record does not include either a transcript or a videotape of the December 13, 1998, hearing. Rather, a narrative statement of that proceeding was designated in the record.

trial court's findings of fact and conclusions of law refer to this evidence that was not previously in the record. Thus, the December 13, 1998, hearing regarding a judgment on the pleadings was in fact a hearing on a motion for summary judgment.⁵ Accordingly, we must determine whether summary judgment was properly granted.

The purpose of summary judgment and the standard to be used in reviewing such an action require that the procedure is designed to expedite the disposition of cases. The grounds for summary judgment are that there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. The circuit court is not authorized to render a summary judgment if there exists a material fact which requires a trial.⁶

In Welch v. American Publishing Company of Kentucky,⁷ the Supreme Court further explained the standard for summary judgment:

[T]rial judges are to refrain from weighing evidence at the summary judgment stage; [] they are to review the record after discovery has been completed to determine whether the trier of fact could find a verdict for the non-moving party. The inquiry should be whether, from the evidence of record, facts exist which would make it possible for the non-moving party to prevail. In the analysis, the focus should be on what is of record rather than what might be presented at trial [citations omitted].⁸

⁵CR 12.03; CR 56; Old Mason's Home of Kentucky, Inc. v. Mitchell, Ky.App., 892 S.W.2d 304, 306 (1995).

⁶James Graham Brown Foundation, Inc. v. St. Paul Fire & Marine Insurance Co., Ky., 814 S.W.2d 273, 276 (1991).

⁷Ky., 3 S.W.3d 724, 730 (1999).

⁸See also Blevins v. Moran, Ky.App., 12 S.W.3d 698 (2000).

The parties' narrative statement indicates that during the December 13, 1998, hearing CIT Group raised the affirmative defense of contributory negligence. Although contributory negligence was not alleged in any of CIT Group's pleadings, as required by CR 8.03, where such a defense is ultimately raised without objection, it will be treated as though it were properly raised in the pleadings.⁹ Since the defense of contributory negligence raised a genuine issue of material fact, summary judgment was not proper.

The order of the Bullitt Circuit Court is reversed and the matter is remanded for further proceedings consistent with this Opinion.

ALL CONCUR.

BRIEF FOR APPELLANT:

Charlie Gordon
Lee W. Grace
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BRIEF FOR APPELLEES:

John W. Wooldridge
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⁹CR 15.02; Bailey v. Thompson, Ky., 300 S.W.2d 235, 237 (1957).