

Commonwealth Of Kentucky

Court Of Appeals

NO. 2000-CA-001020-MR

BANKERS TRUST COMPANY OF CALIFORNIA

APPELLANT

v. APPEAL FROM SIMPSON CIRCUIT COURT
HONORABLE WILLIAM R. HARRIS, JUDGE
ACTION NO. 99-CI-00097

JOE COFFEE, D/B/A COFFEE CONSTRUCTION,
THE MORTGAGE STORE, LLC, REVERE CAPITAL
MORTGAGE, LLC, CLAY HUNTER, JR., and
BECKY HUNTER

APPELLEES

AND: NO. 2000-CA-001021-MR

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REVERE CAPITAL MORTGAGE, LLC

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OPINION
AFFIRMING

** ** * * * **

BEFORE: BUCKINGHAM, COMBS, AND SCHRODER, JUDGES.

BUCKINGHAM, JUDGE: Bankers Trust Company of California and The Mortgage Store, LLC, d/b/a Revere Capital Mortgage, have filed separate appeals from an order of the Simpson Circuit Court overruling their respective objections to a commissioner's report of sale of real property. The appellant's arguments are without merit, and we thus affirm.

In April 1998, Appellee Joe Coffee, d/b/a Coffee Construction, provided labor and materials for the installation of siding, underpinning, and other improvements to a house located at 408 Chestnut Street in Franklin, Kentucky. Clay Hunter, Jr., and Becky Hunter owned the house, and it was subject to a mortgage held by The Mortgage Store. The Hunters never paid Coffee the \$5,750 owed to him for labor and materials. Thus, on July 16, 1998, Coffee filed a mechanics' and materialman's lien against the property.

On April 2, 1999, Coffee filed a complaint in the Simpson Circuit Court requesting the sale of the property to satisfy his lien. He named the Hunters, The Mortgage Store, and Bankers Trust as defendants in the action. Although Bankers Trust had no interest in the property, Coffee named it as a defendant because he believed it was the assignee of a mortgage on the property to The Mortgage Store.

After service of process on the parties and no answer having been filed on behalf of any defendant, Coffee filed a motion for a default judgment. On the following day, Bankers Trust filed an answer, cross claim, and counterclaim in which it attempted to assert a mortgage interest in the subject property.

Coffee responded to Bankers Trust's counterclaim in an answer stating that the property to which Bankers Trust made reference in its counterclaim was located on Fairview Avenue and was not the property which was the subject of this action.

On July 12, 1999, the trial court held a status conference pursuant to a written order it had entered previously. Following the status conference, at which Coffee's attorney was the only attorney in attendance, the trial court entered a default judgment and order of sale. Therein, the court awarded a judgment in favor of Coffee and against the Hunters and adjudged that Coffee had a first and prior lien against the property. As The Mortgage Store had not responded and asserted its mortgage lien in the action, the trial court found it to be in default and made no mention of the mortgage in the judgment. Further, the judgment stated that Bankers Trust had failed to assert a lien against the property and therefore had no lien against it.

The appraisers who were appointed to appraise the property filed a report stating their opinion that the value of the property was \$22,000. Prior to the sale, an amended and supplemented default judgment and order of sale was entered by the court. That judgment again held that Coffee had a first and a prior lien against the property and that Bankers Trust had no lien interest in it.

The master commissioner of the court sold the property at a public auction on December 17, 1999, for \$21,675.00. Although it had no mortgage interest in the property, Bankers Trust was the high bidder. Bankers Trust thereafter refused to

consummate the purchase of the property, and Coffee moved the court to compel Bankers Trust to do so. Bankers Trust then filed a motion pursuant to CR¹ 60.02 to "vacate" the commissioner's sale. In support of its motion, Bankers Trust asserted that it had become confused because there were other properties owned by Hunter involved in foreclosure proceedings in which it had an interest and that it did not desire to purchase this property.² After a hearing, the trial court denied Bankers Trust's motion to vacate the sale and granted Coffee's motion to compel Bankers Trust to purchase the property in accordance with its high bid.

On March 9, 2000, the master commissioner filed his report of sale. Bankers Trust filed an objection to the report and argued that the sale should be vacated due to its excusable neglect in bidding upon the property even though it had no interest in it. The Mortgage Store, who was represented by the same law firm as Bankers Trust, also filed an objection to the report of sale. It alleged that it was not properly served with process because Coffee caused the CT Corporation to be served as the agent of Revere Capital Mortgage rather than serving The Mortgage Store's agent, D. Wayne Thompson.³ A hearing on the objections to the report of sale was held on March 27, 2000, and the trial court entered an order on March 30, 2000, overruling the objections of Bankers Trust and The Mortgage Store. Separate

¹ Kentucky Rules of Civil Procedure.

² Bankers Trust blamed their confusion on title reports by their attorney.

³ The mortgage lists the mortgagee as "The Mortgage Store, LLC DBA Revere Capital Mortgage."

appeals from this order were filed by Bankers Trust and The Mortgage Store.⁴

BANKERS TRUST'S APPEAL

Bankers Trust argues in its appeal that the trial court abused its discretion when it failed to vacate the sale pursuant to CR 60.02 due to excusable neglect. In support of its argument, it cites Bargo v. Lewis, Ky., 305 S.W.2d 757 (1957). In that case, the appellate court approved an action of the trial court setting aside a default judgment pursuant to CR 55.02 and CR 60.02 due to the excusable neglect of the party in default.

CR 60.02(a) allows a party to be relieved from a court's final judgment, order, or proceeding due to excusable neglect. Coffee argues that Bankers Trust may not utilize CR 60.02 to obtain relief since it is not seeking relief from a "final judgment, order, or proceeding" but rather is seeking relief from its bid at a judicial sale of real property. Regardless, we agree with Coffee that relief on the ground of excusable neglect is not appropriate in this case. Coffee's pleadings in the case as well as orders of the trial court repeatedly stated that Bankers Trust had no interest in the subject property. Further, counsel for Bankers Trust did not appear at the status conference ordered by the trial court. Had counsel appeared at the conference, it is likely that Bankers Trust would have learned the true state of facts and would no longer have been confused. In light of these facts, any

⁴ Because the two appeals arose out of the same case, they will both be addressed in this opinion.

confusion that Bankers Trust might have had concerning its lack of an interest in the property was caused by its own actions and may not be deemed to constitute excusable neglect so as to afford it relief under CR 60.02(a).

Thus, the order of the trial court is affirmed as to Bankers Trust.

THE MORTGAGE STORE'S APPEAL

The Mortgage Store argues in its appeal that "the default judgment against The Mortgage Store should be deemed void pursuant to C.R. 60.02(e) due to insufficient service of process[.]" The fallacy of this argument is that The Mortgage Store never made a motion for relief pursuant to CR 60.02. Rather, it only filed an objection to the report of sale.

A judicial sale of real property "ought not to be lightly disapproved where it was conducted in a fair and regular manner, and confirmation ought not to be refused except for substantial reasons." Gross v. Gross, Ky., 350 S.W.2d 470, 471 (1961). Although the trial court did not state its reasons for overruling The Mortgage Store's objection to the report of sale, we conclude that the trial court did not err or abuse its discretion in doing so. When The Mortgage Store's objection to the report of sale was filed, a default judgment had already been entered against it. Exceptions or objections to a master commissioner's report of sale to real property are pleadings,⁵

⁵ See Burchett v. Bank of Josephine, Ky., 474 S.W.2d 66, 68 (1971).

and parties in default may not file such pleadings.⁶ Therefore, we fail to perceive how The Mortgage Store would have any standing to object to the sale proceedings due to its default status unless the default judgment against it was set aside. The Mortgage Store failed to file any motion pursuant to CR 55.02 or CR 60.02 to have the judgment set aside. Therefore, we conclude that the trial court did not err or abuse its discretion in overruling The Mortgage Store's objection.⁷

Thus, the order of the trial court as to The Mortgage Store is likewise affirmed.

ALL CONCUR.

⁶ See 46 Am Jur 2d, Judgments, Section 320, Page 639 (1994), for discussion of effect of default judgments.

⁷ Although we have rejected The Mortgage Store's argument on the ground that it could not challenge the commissioner's report because a default judgment had been entered against it, Coffee asserts that its service of process on The Mortgage Store was proper at any rate. The Mortgage Store stated that its designated process agent in the Kentucky Secretary of State's Office was D. Wayne Thompson. However, The Mortgage Store was doing business in Kentucky as Revere Capital Mortgage, LLC, and its designated process agent was CT Corporation, the entity served in this case. Further, The Mortgage Store's mortgage on the subject property listed it as "THE MORTGAGE STORE, LLC D/B/A REVERE CAPITAL MORTGAGE" with an address of 357 Riverside Drive, Ste. 99, Franklin, Tennessee 37064. This is the same address as the principal address listed for Revere Capital Mortgage, LLC, with the Kentucky Secretary of State.

BRIEF FOR APPELLANT BANKERS
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