

Commonwealth Of Kentucky

Court Of Appeals

NO. 2000-CA-001092-MR

J.W. STEADMAN

APPELLANT

v. APPEAL FROM HARDIN CIRCUIT COURT
HONORABLE STEPHEN T. BLAND, JUDGE
ACTION NO. 93-CI-00169 & 93-CI-00368

RAYMOND SIMMS; BEN CUNDIFF;
NATE KEITH AND RUTH KEITH

APPELLEES

CONSOLIDATED WITH:
NO. 2000-CA-001317-MR

NATE KEITH AND RUTH KEITH

APPELLANTS

APPEAL FROM HARDIN CIRCUIT COURT
HONORABLE STEPHEN T. BLAND, JUDGE
ACTIONS NO. 93-CI-00169 & 93-CI-00368

J.W. STEADMAN; BONNIE STEADMAN;
RAYMOND SIMMS AND BEN CUNDIFF

APPELLEES

OPINION
AFFIRMING
** **

BEFORE: JOHNSON, KNOFF AND MILLER, JUDGES.

KNOFF, JUDGE: These appeals arise from two separate actions in the Hardin Circuit Court. In the first action, No. 93-CI-00169

(Case 1), Nate and Ruth Keith (the Keiths) sought to enforce a prior judgment against J.W. and Bonnie Steadman (the Steadmans). In the second action, No 93-CI-00368 (Case 2), various creditors, including the Keiths, sought to enforce their liens against the Steadmans' real property. Eventually, the real property was sold in Case 1, and the proceeds of the sale were paid into an account with the Master Commissioner. Following consolidation of the actions, the trial court conducted a hearing, and determined the priority among the various creditors to the proceeds of the judicial sale. The Steadmans now appeal from the judgment, primarily arguing that the judicial sale was invalid and that the sale proceeds should be returned to them. The Keiths also appeal, arguing that the trial court's findings of fact and conclusions of law regarding the other creditors' liens were erroneous. Finding no reversible error in either appeal, we affirm.

I. FACTS

While the actions below were not directly related, the trial court consolidated them to determine the rights of the various creditors to the proceeds of the foreclosure sale. Because the underlying transactions and the procedural histories in each case are relevant to the issues presented on appeal, we shall summarize the facts of each case at some length.

A. Case 1

On November 10, 1992, the Keiths loaned the Steadmans \$45,000.00. For security on the loan, the parties agreed to enter into a timber contract, giving the Keiths the right to cut

timber on a 39 acre tract adjacent to the Steadmans' residential property (the timber contract property). The timber contract property was subject to a \$70,000.00 mortgage held by Mildred Close, from whom the Steadmans bought the property. Shortly after they entered into the contract, Close filed an action to foreclose on the mortgage.¹ The Keiths intervened in that action to protect their interests in the timber. In an order dated June 25, 1993, the Hardin Circuit Court granted the Keiths a \$45,000.00 judgment against J.W. and Bonnie Steadman, jointly and severally. On June 30, 1993, the Keiths recorded this judgment with the Hardin County Clerk. The judgment in this action was not appealed.

On November 8, 1993, the Steadmans filed a complaint initiating Case 1. The complaint contained 25 counts against Cynthia Mandello, an attorney for whom J.W. had worked as a paralegal. The complaint also asserted claims against the Keiths and several other parties who are not part of this appeal. In response, the Keiths filed a counterclaim, alleging that the Steadmans had breached the timber contract.

On November 9, 1993, the Keiths filed a motion for a default judgment against Bonnie and a motion for summary judgment against J.W. Neither of the Steadmans responded to the motions, and the trial court entered separate judgments against J.W. and Bonnie, each in the amount of \$45,000.00. The Keiths recorded these judgments with the Hardin County Clerk's office on November 27, 1993. On February 11, 1994, the trial court denied the

¹ Action No. 93-CI-00464.

Steadmans' CR 60.02 motion to set aside the judgments. On a later motion by the Keiths, the trial court granted an additional judgment against the Steadmans for special damages in the amount of \$10,540.37 and attorney's fees of \$1,250.00. The Keiths filed notices of judgment liens on these judgments on April 3, 1998.

The Steadmans appealed from the November 9, 1993 judgments.² As surety for their superceded bond, J.W. and Bonnie posted a mortgage on the timber contract property in the amount of \$92,119.99.³ On April 25, 1994, this Court dismissed their appeal due to their failure to file a pre-hearing statement. The Keiths filed a motion to have the timber contract property sold to satisfy their judgments. On August 4, 1994, the property sold at commissioner's sale for \$1,000.00. On December 19, 1994, the Keiths purchased the Steadmans' right of redemption for \$26,000.00. Following the sale, the trial court ordered a \$25,211.00 credit in favor of the Steadmans against the judgments held by the Keiths.

The Keiths then sought to execute on other property which the Steadmans owned, including a house and 4 acre tract located at 440 Cedar Hill Road in Elizabethtown (the residential property). The Keiths issued notices to all of the lienholders of record. At this time, the proceedings in Case 2 became an issue. On January 3, 1997, the trial court issued an order

² J.W. Steadman and Bonnie Steadman v. Nate Keith and Ruth Keith, No. 1993-CA-2915.

³ According to the Keiths, the Steadmans paid the judgment to Close on the day before the foreclosure sale. Instead of releasing the mortgage, J.W. and Bonnie assigned it to Legal Software Specialist, Inc, a corporation owned solely by J.W.

directing the Master Commissioner to sell the residential property. The property was appraised at \$50,000.00, and was sold by the Master Commissioner for \$76,000.00 on March 13, 1997. On April 2, 1997, the trial court dismissed the Steadmans' complaint against Mandello, the Keiths and the other defendants for want of prosecution.⁴

B. Case 2

During this same period the Steadmans were involved in other transactions and litigation involving the residential property. In 1992, Raymond Simms loaned J.W. Steadman \$65,000.000. This loan is evidenced by a check for \$65,000.00 and a promissory note signed by J.W. on May 8, 1992. The loan was secured by a mortgage on the residential property, which Simms recorded on July 6, 1992. J.W. made a \$25,000.00 payment to Simms on November 11, 1992. On March 23, 1993, Simms recorded a mortgage and a promissory note in the amount of \$40,000.00. On the same date, Simms recorded a \$5,500.00 second mortgage on J.W.'s residential property.

Several other parties also asserted claims against the residential property. Ben Cundiff completed concrete and cement work on the Steadmans' residential property on October 1, 1993. He filed a mechanic's and materialman's lien on that property in the amount of \$4,143.57 on November 4, 1993. Hutch Pool and Spa, Inc. (Hutch Pool) built a swimming pool for the Steadmans on the residential property. On January 26, 1993, Hutch Pool filed a

⁴ CR 41.02.

notice of mechanic's and materialman's lien on the residential property in the amount of \$5,282.48.

On March 10, 1993, Hutch Pool filed a complaint against the Steadmans to collect on the unpaid debt and to enforce the lien. Five days later, Hutch Pool filed a *lis pendens* notice concerning the litigation involving the residential property. J.W. Steadman responded to the complaint and filed a counterclaim against Hutch Pool for breach of warranty. Bonnie Steadman did not file an answer. Hutch Pool also named Simms as a party, by virtue of his recorded mortgage on the property. Simms filed an answer, but he did not assert a cross-claim against the Steadmans to recover on his mortgages.

Cundiff filed an intervening complaint on February 2, 1994, to assert his claims against the property. However, at this time, neither J.W. nor Bonnie Steadman could be served with the summons. Eventually, the trial court appointed warning order attorneys to serve J.W. and Bonnie Steadman. The warning order attorneys filed their respective reports in September 1996, each noting that they were unable to serve J.W. or Bonnie Steadman. On February 11, 1997, Hutch Pool moved to appoint a guardian *ad litem* for J.W. after it discovered that he was incarcerated in the Hardin County Jail. The trial court appointed a guardian *ad litem* for J.W. Steadman on April 8, 1997. On the same day, the trial court allowed the Keiths to file an intervening complaint. In their complaint, the Keiths stated that they had received a judgment against J.W. and Bonnie Steadman in Action No. 93-CI-

00464 and that the residential property had already been sold by the Master Commissioner in Case 1. On June 3, 1997, the trial court granted Simms's motion for leave to file a counterclaim and a cross-claim asserting his mortgage interests in the property. The Keiths filed a response to Simms's counterclaim and cross-claim, asserting the affirmative defenses of accord and satisfaction, failure of consideration, illegality, fraud and payment.

C. Consolidated Actions

On January 27, 1998, the trial court entered an order consolidating Case 1 and Case 2. In the order consolidating the actions, the court directed the Master Commissioner to execute and record a deed releasing the claims of all parties to Case 2. The trial court further held that the claims of the parties in Case 2 shall attach to the proceeds of the commissioner's sale. The court would determine the validity and the priority of those claims following an evidentiary hearing.

The court received evidence and heard testimony on the various claims at a bench trial held on December 9, 1999. Following the hearing, the trial court issued its findings of fact, conclusions of law and judgment on April 25, 2000. After reviewing the facts of the underlying transactions, the trial court found that Simms, Cundiff and the Keiths had all proven their claims. On Simms's claims, the trial court found that the \$40,000.00 mortgage and promissory note recorded on March 23, 1993, was a renewal of the July 6, 1992 mortgage in the amount of \$65,000.00. The trial court also found that the \$5,500.00

mortgage from Steadman to Simms recorded on March 23, 1993 had not been released. The court further concluded that Simms's failure to file a counterclaim asserting these mortgages was cured by the court's later order allowing him to file the counterclaim.

On Cundiff's claim, the court found that he had properly perfected his mechanic's and materialman's lien as required by KRS 376.080. The court also found that Cundiff had timely intervened in Case 2. Although there was evidence that Bonnie Steadman had paid Cundiff for some of his work, the trial court found that the Steadmans did not prove that Cundiff was paid for the balance of his work. Since the lien was properly perfected, the court found that Cundiff was entitled to a judgment of \$4,143.57. Lastly, the trial court found that the Keiths' claims had been reduced to judgments of \$45,000.00, \$10,540.37 in special damages, and \$1,250.00 in attorney's fees. The Keiths conceded that only one of the three \$45,000.00 judgments could be collected because they all arise from the same transaction.

Since the proceeds from the sale of the residential property were not sufficient to pay all of these judgments, each creditor asserted that his or her claim should have priority. The trial court made the following findings concerning priority of the claims:

6. Under KRS 382.520, for priority purposes, the \$40,000 mortgage relates back to the original \$65,000 mortgage and is considered as having been recorded on July 6, 1992. Thus, for priority purposes, this debt

is first in priority because it is the earliest recorded.

7. Under KRS 376.010(1), Cundiff's mechanic's/materialman's lien in the amount of \$4,143.57 relates back to the time of the commencement of the labor, which the Court has found to be in October of 1992. By statute, this lien is superior to any mortgage or lien created subsequent to the commencement of the labor. Id. This lien is entitled to second priority.

8. The \$5,500 mortgage from Steadman to Simms was recorded on March 23, 1993, but does not relate back to the July 7, 1992 mortgage. Therefore, this debt is third in priority, behind the \$40,000 mortgage and the \$4,143.57 mechanic's/materialman's lien

9. The priority of the Keith's (sic) judgment liens is determined by the date of the recording of the judgment liens. The \$45,000.00 judgment lien was recorded on July 6, 1993. The \$10,540.37 judgment lien was recorded on April 3, 1998. These judgment liens have the last priority in this pool.⁵

J.W. and Bonnie Steadman filed a notice of appeal from the judgment on May 2, 2000. (Appeal No. 2000-CA-001092). Nate and Ruth Keith filed their notice of appeal on May 23, 2000. (Appeal No. 2000-CA-001317). This Court consolidated the appeals and the issues presented are now submitted for our review.

II. ISSUES

While for the most part the Steadmans and the Keiths raise different issues, each challenges the sufficiency of the trial court's findings of fact and conclusions of law regarding the validity and priority of the claims. CR 52.01 provides in part that findings of fact shall not be set aside unless clearly erroneous with due regard given to the opportunity of the trial

⁵ Amended Findings of Fact, Conclusions of Law, and Judgment, April 26, 2000 (Case 2 Record on Appeal at Vol VI, pp. 799-800).

judge to assess the credibility of the witnesses.⁶ Findings of fact are not clearly erroneous if supported by substantial evidence.⁷ Substantial evidence is evidence which, when taken alone or in the light of all the evidence, has sufficient probative value to induce conviction in the minds of reasonable persons.⁸ However, the trial court's conclusions of law, including its determination of the priority of the liens, are subject to independent appellate determination.⁹

Given the procedural posture of these appeals, we shall consider the issues raised in the Steadmans' appeal first. We shall then address the only issue which is common to the two appeals: the validity of the mortgages claimed by Simms. Lastly, we shall consider the remaining issues in the Keiths' appeal.

A. Steadman appeal

1. The Steadmans first argue that the Keiths' November 9, 1993 judgments are barred under the doctrine of *res judicata*. The rule of *res judicata* is an affirmative defense which operates to bar repetitious suits involving the same cause of action.¹⁰ The Steadmans contend that the latter two judgments are void because the Keiths had already obtained a judgment

⁶ Reichle v. Reichle, Ky., 719 S.W.2d 442, 444 (1986).

⁷ See Black Motor Company v. Greene, Ky., 385 S.W.2d 954 (1965).

⁸ Kentucky State Racing Commission v. Fuller, Ky., 481 S.W.2d 298, 308 (1972).

⁹ A & A Mechanical, Inc. v. Thermal Equipment Sales, Inc., Ky. App., 998 S.W.2d 505, 509 (1999).

¹⁰ Yeoman v. Commonwealth, Health Policy Board., Ky., 983 S.W.2d 459, 464-65 (1998).

against them for the same transaction in Action No. 93-CI-00464. Since the judicial sale of the residential property was based upon the later judgments, Steadman asserts that the sale also must be set aside.

We agree with the Steadmans that the Keiths were not entitled to the separate judgments in Case 1. The Keiths had already obtained a judgment against the Steadmans for the same transaction and in the same amount. However, we find that the Steadmans are not entitled to the relief which they seek. *Res judicata* is an affirmative defense to a judgment, and must be raised in a timely manner.¹¹ They did not raise their *res judicata* defense prior to the entry of the judgments in Case 1. Furthermore, their appeal from that judgment was dismissed by this Court on April 25, 1994. Thus, any error is deemed to have been waived.

Nevertheless, the Steadmans assert that CR 60.02 permits them to challenge the November 9, 1993 judgments. We disagree. Relief cannot be granted from the judgment under a CR 60.02 proceeding where the grounds were known or could have been ascertained by the exercise of due diligence prior to the entry of the questioned judgment.¹² The Steadmans have shown no good cause why they could not have raised this issue prior to the entry of the judgments. Lastly, the Keiths concede, and the

¹¹ CR 8.03; Hardaway Management Co. v. Southerland, Ky., 977 S.W.2d 910, 915 (1998).

¹² Board of Trustees of Policemen's & Firemen's Retirement Fund of the City of Lexington v. Nuckolls, Ky., 507 S.W.2d 183, 186 (1974).

trial court so found, that they are only entitled to collect on one of these judgments. Moreover, the Steadmans have not argued that the prior judgment has been fully satisfied by the prior order of sale. Consequently, the Steadmans will suffer no unfair prejudice due to the trial court's refusal to set aside the November 9, 1993 judgments.

2. The Steadmans next argue that the January 3, 1997 Order of Sale is invalid because the trial court failed to appoint a guardian *ad litem* for J.W. prior to entry of the order. As previously noted, J.W. was incarcerated in the Hardin County Jail during this time. For the same reason, he contends that the trial court erred in its order of April 2, 1997 dismissing his claims against Cynthia Mandello in Case 1. Upon our review of the record, we find no reversible error.

As the Steadmans correctly note, CR 17.04 requires the trial court to appoint a guardian *ad litem* for any incarcerated defendant in a civil action. "[N]o judgment shall be rendered against the prisoner until the guardian *ad litem* shall have made defense or filed a report stating that after careful examination of the case he or she is unable to make defense."¹³ The requirements of CR 17.04 are mandatory whenever a prisoner fails to defend for any reason.¹⁴

In this case, however, J.W. did not timely raise this issue. Although the trial court appointed the guardian *ad litem*

¹³ CR 17.04(1).

¹⁴ Davidson v. Boggs, Ky. App., 859 S.W.2d 662, 665 (1993).

for J.W. on April 8, 1997, J.W. did not move to set aside the January 3, 1997 order of sale until February 11, 1998. J.W.'s objection, coming 15 days after the order confirming the sale and some 10 months after appointment of the GAL, was too late. An order confirming a judicial sale is final and conclusive as to the rights of all parties in the property.¹⁵ Since J.W. was represented by counsel and failed to raise the objection until after the sale was confirmed, he must be deemed to have waived the objection.¹⁶

We also find that the trial court did not err in dismissing the counts in the Steadmans' complaint without appointing a guardian *ad litem* for J.W. The requirements of CR 17.04 do not apply to actions brought by an incarcerated litigant.¹⁷ Consequently, the trial court's order of April 27, 1997 dismissing the complaint for lack of prosecution was proper. Moreover, the Steadmans failed to name Mandello as a party to this appeal. Therefore, the issue is not properly submitted to the Court.

B. Issue Common to Steadmans' and Keiths' Appeals

J.W. lastly argues that he has proven an unrebutted *prima facie* case that Simms does not have a valid mortgage on the

¹⁵ Maynard v. Boggs, Ky. App., 735 S.W.2d 342, 343 (1987).

¹⁶ We also note that J.W. had the opportunity to raise this issue earlier. On April 22, 1997, the trial court entered a default judgment in favor of Cundiff for \$4,143.57. J.W.'s guardian *ad litem* filed a motion on June 4, 1997 to set aside the default judgment. The trial court granted the motion and set aside the default judgment on July 29, 1997.

¹⁷ May v. Coleman, Ky., 945 S.W.2d 426, 427 (1997).

residential property. The Keiths raise this same issue, arguing that Simms failed to prove that his mortgages are valid debts. Both couples insist that the trial court erred in finding that the mortgages were valid and entitled to priority over the Keiths' liens. Upon reviewing the record, we find no error.

J.W. Steadman testified that he and Simms often loaned money back and forth, and that these transactions were usually in cash. J.W. stated that he was "sure" that he had paid Simms on both the \$40,000.00 mortgage and the \$5,500.00 note. Nate Keith also testified that Simms admitted to him in 1996 that the notes and mortgages had been satisfied. However, in 1997 Simms's guardian refused to release the mortgages. The Keiths also note that Simms filed a complaint against the Steadmans in 1994 to recover money owing on 13 separate promissory notes,¹⁸ but he did not assert claims against the Steadmans on either the \$40,000.00 mortgage or on the \$5,500.00 mortgage. Based upon this evidence, the Steadmans and the Keiths both assert that the trial court erred in finding that Simms had valid claims for these debts.

Satisfaction and payment are both affirmative defenses under CR 8.03. Simms proved the existence of the debt through the evidence of the prior recorded and unreleased mortgages. The Steadmans and the Keiths were required to produce evidence to show that the debts had been paid or satisfied.¹⁹ Simms did not bear the burden of proving that the mortgages had not been

¹⁸ Raymond Simms v. J.W. Steadman and Bonnie Steadman, Action No. 94-CI-00664 (Hardin Circuit Court, filed May 18, 1994).

¹⁹ CR 43.01.

satisfied.²⁰ The evidence presented by the Steadmans and the Keiths could support a reasonable inference that Simms had been paid on the debts underlying both mortgages. On the other hand, Simms presented detailed records of his financial transactions, none of which showed that the Steadmans repaid the loans. Under the circumstances, we cannot conclude that the evidence was so overwhelming that the Steadmans and the Keiths were entitled to judgments in their favor.²¹ Consequently, the trial court's finding to the contrary was not clearly erroneous.

C. Keiths' Appeal Issues

1. In their appeal, the Keiths raise several additional grounds asserting that the trial court erred in giving priority to Simms's mortgage. The Steadmans have not raised these issues on appeal. Thus in any event, Simms's judgment against them would not be affected by our ruling on these matters. The Keiths first contend that the trial court abused its discretion when it determined that Simms's failure to file a mandatory counterclaim under CR 13.01 was cured by the trial court's entry of the order of June 3, 1997. The Keiths argue that they were unfairly prejudiced by the trial court's order allowing Simms to bring his counterclaim on the mortgages. Since the counterclaim relates back to the date of the filing of his answer, the Keiths assert that the trial court abused its discretion because the untimely counterclaim affected their priority rights to the proceeds of the judicial sale. They also

²⁰ Raymer v. Raymer, Ky. App. 752 S.W.2d 313, 314-15 (1988).

²¹ See Coulter v. Hensley, Ky., 353 S.W.2d 547 (1962).

note that at the time Simms filed his counterclaim, he had been declared incompetent in a disability proceeding. As a result, they were unable to obtain full discovery concerning their defenses of satisfaction and payment.

CR 13.01 requires a party to file a counterclaim if the claim arises out of the transaction or occurrence that is the subject matter of the opposing party's claim. In 1994, Hutch Pool filed its complaint in Case 2 against the Steadmans to enforce its mechanic's and materialman's lien. Hutch Pool named Simms as a defendant because he had a recorded mortgage interest on the residential property. At that point, none of the other defendants had asserted a cross-claim against Simms. Accordingly, Simms was not obligated to file a cross-claim against Steadman at that time.²²

Furthermore, a motion to amend a pleading rests in the sound discretion of the trial court, and its ruling will not be disturbed unless an abuse of discretion is clearly shown.²³ Simms filed his cross-claim against Steadman promptly upon the trial court's order granting the Keiths leave to intervene in Case 2. The Keiths were on notice of Simms's prior recorded mortgages against the residential property. Therefore, we find that the trial court did not abuse its discretion when it allowed

²² Ecker v. Clark, Ky., 428 S.W.2d 620, 621 (1968).

²³ CR 15.01; Johnston v. Staples, Ky., 408 S.W.2d 206, 207 (1966).

the cross-claim to relate back to the filing of Simms's original answer.²⁴

Nor can we find that the Keiths were unfairly prejudiced by the trial court's order permitting Simms to assert his cross-claim. The Keiths did not intervene in Case 2 until after Simms had been declared incompetent. Furthermore, very little discovery had occurred in Case 2 up to that point because the Steadmans could not be served. Thus, any prejudice to the Keiths was not the result of Simms's failure to bring the counterclaim earlier.

In its findings of fact, the trial court stated that no party objected to its order of June 3, 1997 allowing the amendment. Simms filed his motion to amend his answer on May 27, 1997. The trial court heard and ruled on the motion on June 3, 1997. The Keiths contend that this notice was insufficient to allow them to appear at the hearing or otherwise to respond to the motion.

Nevertheless, we find no indication that the Keiths filed a timely motion to set aside the trial court's order of June 3, 1997. Indeed, the record does not show that they raised the issue of the sufficiency of their notice while they were before the trial court. Therefore, the Keiths have waived any error in this regard.

2. The Keiths next argue that neither Simms's nor Cundiff's judgment was entitled to priority over their claims. They take the position that the trial court's order of January

²⁴ CR 15.03.

27, 1998, releasing the claims of all parties to the residential property, changed the interests of the parties. Consequently, the Keiths contend that KRS 382.440 required Simms and Cundiff to file a new *lis pendens* notice. Since they failed to do so, the Keiths argue that Simms and Cundiff waived their priorities to the proceeds of the judicial sale. We disagree.

KRS 382.440 provides that no action concerning the title, possession, or use of any real property shall affect the right or interest of a subsequent purchaser of said property unless notice of the action is filed in the office of the county clerk of the county in which the property lies. The statute is not intended to establish priority among creditors, but to give notice to subsequent purchasers of property of a cloud on the title.²⁵ Furthermore, the purpose of the trial court's order of January 27, 1998 was to confirm the judicial sale and to allow the Master Commissioner to issue a deed and clear title to the purchaser. Consequently, we find that KRS 382.440 does not affect the priorities among the parties to the action.

3. The Keiths next allege that their priority is superior to Cundiff's because their lien was perfected before Cundiff's judgment and Cundiff failed to prosecute his suit with reasonable diligence. The trial court's findings refute this argument. The trial court found that Cundiff filed a mechanic's and materialman's lien against the Steadmans' residential property on November 4, 1993. Thus, he filed the lien within six months after completing the work as required by KRS 376.080.

²⁵ Strong v. First Nationwide Mortgage Corp., Ky. App., 959 S.W.2d 785 (1998).

Furthermore, Cundiff brought his claim to enforce the lien in January 1994. Cundiff perfected his mechanic's lien before the Keiths obtained their judgments against the Steadmans.²⁶ As a result, the trial court properly gave priority to Cundiff's lien.

4. Lastly, the Keiths contend that "equity cannot prevail unless the Keiths' debt is satisfied from the proceeds of the sale of J.W. & Bonnie's 4 acres." Essentially, the Keiths argue that they have been chasing the Steadmans for the longest time and that the other creditors have stepped forward at the last moment. They further assert that the other creditors (particularly Simms) have either sat on their rights or that they come to the table with unclean hands. Thus, the Keiths assert that the doctrine of laches bars Simms's or Cundiff's priorities.

We find no basis for applying the doctrine of laches in this case. Laches is an equitable doctrine, the elements of which are short of an estoppel, and the time in which it may ripen is short of the applicable period of limitation. The doctrine is invoked in equity to defeat a tardy litigant on account of his or her inexcusable delay, after possession of knowledge of the facts. The Keiths contend that laches permits them to defeat Simms's recovery or defense because they have materially changed their situation in reliance upon Simms's

²⁶ See also Middletown Engineering Co. v. Main Street Realty, Inc., Ky., 839 S.W.2d 274 (1992).

inaction.²⁷ Laches is always a question of fact to be determined by the circumstances of each case.²⁸

As previously noted, the trial court acted within its discretion in allowing Simms to file his cross-claim, and Cundiff acted with due diligence to enforce his lien against the residential property. On the other hand, the Keiths obtained judgments against the Steadmans for the transactions involving the timber contract. They executed the judgments on the timber contract property and obtained a partial satisfaction of the judgment. The Keiths then sought to attach other property owned by the Steadmans.

In 1997, the Keiths succeeded in obtaining a judicial sale of the residential property. However, the Steadmans' other creditors had been attempting to enforce their liens against the residential property for three years when the Keiths filed their motion to intervene in Case 2. There is no evidence that the claimants in Case 2 engaged in any unnecessary delay in pursuing their claims. Furthermore, the trial court rejected the Keiths' claims that the transactions between Simms and J.W. Steadman were collusive and intended to defraud creditors. Rather, the trial court specifically found that the mortgages are unreleased and valid claims against the residential property. Consequently, laches does not bar Simms and Cundiff from asserting the priority of their claims over the Keiths' judgment.

IV. Conclusion

²⁷ P.V. & K. Coal Co. v. Kelly, 301 Ky. 180, 191 S.W.2d 231, 233-34 (1945).

²⁸ Anspacher v. Utterback's Administrator, 252 Ky. 666, 68 S.W.2d 15, 18 (1934).

The factual and procedural histories of these cases are extremely complex. Two different actions against the residential property were proceeding at the same time. In addition, a number of different judges presided over these cases below. As a result, the record shows some inconsistencies among the various rulings by the court. However, those inconsistencies either did not affect the substantial rights of the parties or they were not raised in a timely manner.

The trial court did an admirable job in sorting out the validity and priority of the claims in this action. While another court might have made different findings, we cannot say that this trial court's findings are clearly erroneous. Nor can we agree with the Keiths' suggestion that the trial court gave undue preference to parties represented by local counsel. To the contrary, the trial court made every reasonable effort to protect the rights of all of the parties. Again while another court might have made different discretionary rulings, we find no abuse of discretion in this case.

Accordingly, the judgment of the Hardin Circuit Court is affirmed.

ALL CONCUR.

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