

RENDERED: OCTOBER 17, 2003; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2002-CA-001527-MR

EARLIE RUPERT and
KAREN RUPERT

APPELLANTS

v. APPEAL FROM HENDERSON CIRCUIT COURT
HONORABLE STEPHEN A. HAYDEN, JUDGE
ACTION NO. 98-CI-00852

OHIO VALLEY NATIONAL BANK

APPELLEE

OPINION

AFFIRMING

** ** * * * * *

BEFORE: BUCKINGHAM, COMBS, AND TACKETT, JUDGES.

BUCKINGHAM, JUDGE: Earlie and Karen Rupert appeal from a judgment of the Henderson Circuit Court resulting from a jury verdict finding that they were in default on a mortgage loan from Ohio Valley National Bank and that they owed the bank \$21,106.88. We affirm.

On August 29, 1997, the Ruperts executed two promissory notes and mortgages with Ohio Valley. The first note was in the amount of \$39,000.00 and was secured by a mortgage on property located at 923 Powell Street in Henderson, Kentucky. The second note was in the amount of \$29,150.00 and was secured by a mortgage on property located at 508 Eighth Street in Henderson, Kentucky. The Ruperts eventually defaulted on the loans, and on December 4, 1998, Ohio Valley filed a complaint in the Henderson Circuit Court seeking an order of sale for the two properties to satisfy the indebtedness owed on the notes.

On January 4, 1999, the Ruperts filed a petition for Chapter 13 bankruptcy. Notice of voluntary conversion of the Chapter 13 bankruptcy to a Chapter 7 bankruptcy was filed on June 1, 1999, and a discharge in bankruptcy was entered on September 8, 1999. In conjunction with the bankruptcy proceeding, on August 27, 1999, the Ruperts executed reaffirmation agreements on the August 1997 loans, the validity of which is disputed. Following the bankruptcy proceeding, Ohio Valley renewed its motion for a judgment and an order of sale on the properties.

On May 31, 2002, Ohio Valley served an amended complaint. In the amended complaint, Ohio Valley stated that the note and mortgage relating to the Powell Street property had been paid, and it accordingly dropped the claim related to that

loan. The amended complaint sought a total of \$21,106.88 on the Eighth Street property note and mortgage. Further, the complaint sought to proceed against the Eighth Street property as an *in rem* action and stated that Ohio Valley would not attempt to seek a personal judgment against the Ruperts for any deficiency which might result from the sale of the property.

After several continuances, the trial was set for June 3, 2002. Immediately prior to the scheduled start of the trial, the Ruperts filed a motion for a continuance, which was denied. At the conclusion of the trial, the jury returned a verdict in favor of Ohio Valley in the amount of \$21,106.88. This appeal followed.

At the outset we note that the Ruperts' brief fails to comply with CR¹ 76.12(4)(c). Nevertheless, we address the arguments we have been able to garner from our review of their brief.

First, the Ruperts contend that foreclosure was improper because they had not executed a valid reaffirmation agreement. The Ruperts argue that the reaffirmation agreements produced by Ohio Valley were fraudulent, not binding, not in compliance with 11 U.S.C. 524(c), and should be held null and void. In conjunction with this argument, the Ruperts allege that following the discharge in bankruptcy, Ohio Valley was

¹ Kentucky Rules of Civil Procedure.

precluded from going forward with its foreclosure suit in the absence of valid reaffirmation agreements.

We agree with Ohio Valley that its right to enforce the mortgage on the Eighth Street property was unaffected by the discharge of the Ruperts' personal liability in the Chapter 7 bankruptcy proceeding. The United States Supreme Court addressed this issue in Johnson v. Home State Bank, 501 U.S. 78, 111 S.Ct. 2150, 115 L.Ed.2d 66 (1991), as follows:

A mortgage is an interest in real property that secures a creditor's right to repayment. But unless the debtor and creditor have provided otherwise, the creditor ordinarily is not limited to foreclosure on the mortgaged property should the debtor default on his obligation; rather, the creditor may in addition sue to establish the debtor's *in personam* liability for any deficiency on the debt and may enforce any judgment against the debtor's assets generally. See 3 R. Powell, The Law of Real Property P467 (1990). A defaulting debtor can protect himself from personal liability by obtaining a discharge in a Chapter 7 liquidation. See 11 U. S. C. § 727. However, such a discharge extinguishes only "the personal liability of the debtor." 11 U. S. C. § 524(a)(1). Codifying the rule of Long v. Bullard, 117 U.S. 617, 29 L. Ed. 1004, 6 S. Ct. 917 (1886), the Code provides that a creditor's right to foreclose on the mortgage survives or passes through the bankruptcy. See 11 U. S. C. § 522(c)(2); Owen v. Owen, 500 U.S. 305, 308-309, 114 L. Ed. 2d 350, 111 S. Ct. 1833 (1991); Farrey v. Sanderfoot, 500 U.S. 291, 297, 114 L. Ed. 2d 337, 111 S. Ct. 1825 (1991); H. R. Rep. No. 95-595, [p. 361 (1977)].

501 U.S. at 82-83, 111 S.Ct. at 2153, 115 L.Ed.2d at 74. As Ohio Valley's mortgage lien survived the Ruperts' discharge of personal liability on the Eighth Street loan, Ohio Valley was entitled to pursue foreclosure on the lien regardless of the Ruperts' Chapter 7 bankruptcy filing or the execution of a valid reaffirmation agreement.

Next, the Ruperts contend that the trial court improperly denied their motion to compel Ohio Valley to produce all notes and mortgages entered into between them and the bank. On July 16, 2001, the trial court entered an order requiring "that the Plaintiff, Ohio Valley National Bank shall provide to the Ruperts within fifteen (15) days of this Order a copy of any and all notes and mortgages entered into between Ohio Valley National Bank and the Ruperts from January 1, 1992 to date, as well as a summary of all payments made by the Ruperts to Ohio Valley National Bank from January 1, 1992 to date."

Alleging that Ohio Valley had failed to provide the necessary documents, on April 15 and April 17, 2002, the Ruperts filed motions to compel Ohio Valley to provide the unsupplied documents. The motions were argued before the court on April 22, 2002, at which time Ohio Valley asserted that it had filed all of the documents required under the July 16, 2001, order. Further, it agreed to file additional documents requested by the Ruperts but not covered by the July 2001 order. The bank also

stated that it did not have certain documents sought by the Ruperts because of expiration under the applicable record retention requirements. On the basis of Ohio Valley's representations, the trial court denied the Ruperts' motion to compel.

"It is a well established principle that a trial court has broad discretion over disputes involving the discovery process." Sexton v. Bates, Ky. App., 41 S.W.3d 452, 455 (2001). From their brief it is unclear precisely what documents the Ruperts contend Ohio Valley failed to produce or how they were prejudiced by Ohio Valley's failure to produce the documents. Ohio Valley claims that it produced all documents to the Ruperts well in advance of trial. Under these circumstances, we cannot say that the trial court abused its discretion by denying the Ruperts' motion to compel.

Next, the Ruperts contend that the trial court erred by permitting Ohio Valley to amend its complaint. The amended complaint was served on May 31, 2002, and did three basic things. First, because the Powell Street loan had been paid in full, the amended complaint deleted those portions of the original complaint seeking to collect on the Powell Street mortgage. Second, the amended complaint reduced the amount being claimed as due on the Eighth Street mortgage. Third, the amended complaint sought to proceed on the Eighth Street

mortgage as an *in rem* action and disclaimed any entitlement to seek a personal judgment against the Ruperts or to collect any deficiency which could result from the sale of the property.

CR² 15.01 provides, in pertinent part, that a party may amend its pleading, following the twenty-day period after it is served, "only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires." Although leave to amend shall be freely given when justice so requires, the decision is within the discretion of the trial court. Lambert v. Franklin Real Estate Co., Ky. App., 37 S.W.3d 770, 779 (2000). Furthermore, the discretion of the trial court will not be disturbed absent an abuse of discretion. Id.; M.A. Walker Co., Inc. v. PBK Bank, Inc., Ky. App., 95 S.W.3d 70, 74 (2002).

In this case, the modifications proposed by Ohio Valley in its amended complaint all worked to the benefit of the Ruperts. Further, the amended complaint merely recognized events which had occurred since the filing of the original complaint, namely, the Chapter 7 bankruptcy proceeding and the pay-off of the Powell Street loan. Under these circumstances, the trial court did not abuse its discretion by permitting Ohio Valley to amend its complaint.

² Kentucky Rules of Civil Procedure.

Next, the Ruperts contend that the trial court erred by granting Ohio Valley's motion in limine to exclude any testimony concerning the reaffirmation agreements. As previously noted, under its amended complaint, Ohio Valley sought only to enforce its mortgage lien, which survived the Ruperts' Chapter 7 bankruptcy, as an *in rem* action, and did not seek to hold the Ruperts personally liable on the Eighth Street loan. Reaffirmation agreements are applicable only in situations where the debtor and creditor seek to reinstate the terms of a promissory note which would otherwise be discharged in bankruptcy, in which case the note "rises from the tomb of bankruptcy like a latter day Lazarus." Hibbitts v. Cumberland Valley Nat. Bank & Trust Co., Ky. App., 977 S.W.2d 252, 254 (1998) (quoting In re Hotujac, 102 B.R. 733, 735 (Bankr.W.D.Mo. 1989)).

Review of the trial court's decision on whether to exclude evidence based on relevancy is subject to the abuse of discretion standard. Love v. Commonwealth, Ky., 55 S.W.3d 816, 822 (2001); Partin v. Commonwealth, Ky., 918 S.W.2d 219, 222 (1996). As Ohio Valley was not seeking to hold the Ruperts liable under a reaffirmed note but, rather, was seeking to proceed *in rem* on the mortgage, the reaffirmation agreements were irrelevant, and the trial court did not abuse its

discretion by ruling that evidence of the agreements was inadmissible.

Finally, in light of Ohio Valley's amended complaint and the trial court's ruling on Ohio Valley's motion to exclude mention of the reaffirmation agreements, the Ruperts contend that they were entitled to a continuance. The trial court has broad discretion in granting or denying a continuance. Pelfrey v. Commonwealth, Ky., 842 S.W.2d 524, 525 (1992). This court will not reverse for failure to grant a continuance absent a showing that the trial court abused its discretion. Abbott v. Commonwealth, Ky., 822 S.W.2d 417, 418 (1992); Grant v. Dortch, Ky. App., 993 S.W.2d 506, 508 (1999).

Here, the developments just before trial - the amendment of the complaint and the trial court's in limine ruling - if anything, simplified matters. The Ruperts mention that they should have been given a continuance to provide them the opportunity to hire an attorney; however, the case had been pending for three and one-half years, the Ruperts had retained at least two attorneys in the course of the litigation, and the Ruperts had ample time to have retained another attorney well before the scheduled trial date. Under these circumstances, we cannot say that the trial court abused its discretion by denying the Ruperts' motion for a continuance.

For the foregoing reasons, the judgment of the
Henderson Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Earlie Rupert, pro se
Karen Rupert, pro se
Henderson, Kentucky

BRIEF FOR APPELLEE:

Dorin E. Luck
Henderson, Kentucky