

Commonwealth Of Kentucky
Court of Appeals

NO. 2003-CA-002122-MR

CONSOLIDATED MORTGAGE, INC.

APPELLANT

v.

APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE ROGER L. CRITTENDEN, JUDGE
ACTION NO. 03-CI-00416

THE DEPARTMENT OF FINANCIAL INSTITUTIONS

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: BUCKINGHAM, DYCHE, AND SCHRODER, JUDGES.

SCHRODER, JUDGE: In early 2003, the Commissioner for the Department of Financial Institutions ("Department") entered an order of default against Consolidated Mortgage, Inc. ("CMI") revoking both of CMI's broker's licenses in the Department's administrative action designated 2003-AH-001. CMI filed a motion to set aside the default order. The Deputy Commissioner, to whom the case had been assigned, did modify the default order but denied CMI's motion to set aside the default order. In

response, CMI filed a petition for review, pursuant to KRS 294.210 and KRS 13B.140, with the Franklin Circuit Court challenging the denial. Shortly thereafter, it moved for summary judgment. On September 10, 2003, the circuit court entered an order in which it denied CMI's motion; granted summary judgment in the Department's favor; and affirmed the default order. CMI appeals from the circuit court's judgment.

On appeal, CMI argues that the default order was void because the Department had filed a civil complaint against it with the Franklin Circuit Court. According to CMI, this granted the circuit court exclusive jurisdiction to revoke its mortgage broker's licenses. CMI also argues that the Deputy Commissioner abused his discretion when he failed to set aside the default order because CMI's attorney was ill at the time the administrative complaint in 2003-AH-001 was filed and because a corporation is not responsible for crimes committed by employees acting outside the scope of their employment. Finding no abuse of discretion, this Court affirms.

CMI was a mortgage loan broker company licensed by the Department, which previously possessed two broker's licenses. Donald A. Clark ("Donald"), CMI's president, owned fifty percent of CMI. His wife, Barber G. Clark ("Barber"), CMI's vice-president, owned the other fifty percent. Brenda Gentry ("Brenda") worked as CMI's secretary/treasurer.

In 2002, the Department discovered that from February 2001 to March 2002, when CMI's closing agent, James Clay ("Clay"), would close a new residential mortgage loan, he would turn the proceeds over to CMI instead of using them to pay off the prior mortgage creditor. CMI would then deposit the proceeds into an escrow account that Barber and Brenda had opened for CMI in 1993 at Central Bank in Lexington, Kentucky. CMI would then pay off the prior creditor two to four weeks late with funds from the escrow account. Due to these activities, the Department filed, pursuant to KRS 294.090, an administrative action, designated as 2002-AH-017, against CMI and sought to revoke both of CMI's licenses. In November of 2002, the Department held an administrative hearing at which it introduced an analysis of approximately seventy of CMI's loans. It found that CMI had paid numerous prior creditors late. Not only had CMI paid the creditors late, but it had also altered over one hundred checks to make it appear as if the prior creditors had been paid simultaneously with the deposit of the new mortgage loan proceeds. CMI also altered numerous bank statements apparently in an effort to hide its activities, and it failed to disclose the existence of the escrow account to the Department.

While 2002-AH-017 was still pending, the Department discovered that Barber and Brenda had opened another escrow account for CMI at Bank One in Lexington. CMI also switched

closing agents from Clay to the law firm of Elam & Miller. In the closing months of 2002, Elam & Miller turned over to CMI the loan proceeds from five different mortgage loans. CMI deposited these funds, totaling approximately \$494,000.00, into its new escrow account but never paid the prior creditors. After the Department learned of this, it filed, on January 10, 2003, a civil complaint, pursuant to KRS 294.190(2)(b), with the Franklin Circuit Court seeking injunctive relief against CMI and against Donald, Barber, and Brenda, as individuals. The Department sought to enjoin the respondents from engaging in the mortgage loan broker business. The circuit court issued the injunction that same day.

Later, on January 20, 2003, the Department filed administrative complaint, 2003-AH-001, against the respondents. Pursuant to KRS 294.090, the Department sought to revoke both of CMI's broker's licenses. On January 22, 2003, the Department successfully served the complaint on CMI by serving Donald, CMI's process agent. On the same day, the Department also successfully served the complaint on both Barber and Donald, as individuals. Finally, on February 3rd, the Department served the complaint on Brenda.

In the complaint, the Department alleged that CMI had committed at least five counts of theft by failure to make required disposition of property, KRS 514.070, because it failed

to pay off five residential mortgage loans. Pursuant to 808 KAR 12:030, the respondents had twenty days to file an answer and to request a hearing. Despite the fact the complaint clearly stated this, the respondents failed to file an answer or to request a hearing. On February 28, 2003, the Commissioner entered an order of default against CMI and against Donald, Barber, and Brenda, as individuals. The Commissioner revoked both of CMI's licenses and prohibited Donald, Barber, and Brenda from engaging in the mortgage loan broker business.

On March 10, 2003, the respondents filed a motion to set aside the default order; to consolidate 2003-AH-001 with 2002-AH-017; to dismiss Donald and Barber as individuals, and to strike all allegations against them. To support this motion, CMI's attorney, Robert Ristaneo, argued that he had been hospitalized from January 5th to January 13th and under medical supervision from January 14th to February 25th. Thus, he was unable to engage in the practice of law. Not only did Ristaneo argue his illness prevented the respondents from answering the complaint, but Ristaneo also argued that the Department's attorney failed to serve the complaint on him as required by the "Canons of Ethics." The Deputy Commissioner, who considered the motion, modified the default order by dismissing the complaint against Donald, Barber, and Brenda, as individuals, and by striking the portion that prohibited them from engaging in the

mortgage loan broker business. But the Deputy Commissioner declined to set aside the default order, and he affirmed the revocation of CMI's licenses.

Not satisfied with the Deputy Commissioner's ruling, CMI filed a petition for review with the Franklin Circuit Court. In its petition, CMI argued once again that Ristaneo's illness prevented it from answering the administrative complaint. CMI also argued again that the Department's attorney violated the "Canons of Ethics" by failing to serve the complaint on Ristaneo. Finally, CMI argued that it was not responsible for Barber's and Brenda's criminal conduct since they had acted outside the scope of their employment. CMI moved for summary judgment. The Franklin Circuit Court found that the Department had complied with KRS 13B.050, the statute regarding procedures for administrative hearings, and had properly served the complaint on CMI. The circuit court noted that CMI had failed to respond to the complaint and failed to request a hearing. The circuit court also noted that KRS 13B.050 only required service of process on the parties named in the complaint. Unconvinced by CMI's arguments, the circuit court denied its motion and granted summary judgment in the Department's favor.

On appeal, CMI argues that when the Department filed for injunctive relief with the Franklin Circuit Court, this civil action invested the circuit court with exclusive

jurisdiction to revoke CMI's licenses. CMI insists that the Department lacked jurisdiction to maintain the administrative action, 2003-AH-001, against it. Thus, CMI concludes that the default order against it was void. To support its argument, CMI cites Smothers v. Lewis, Ky., 672 S.W.2d 62 (1984), and Revenue Cabinet v. Cherry, Ky., 803 S.W.2d 570 (1990). However, CMI fails to explain how these cases support its argument.

Contrary to CMI's argument, the General Assembly, in KRS 294.090, granted the Commissioner of the Department of Financial Institutions exclusive authority to revoke mortgage loan broker's licenses. Not only did the General Assembly grant the Commissioner this power but, in KRS 294.190(2)(b), it also granted the Commissioner the authority to seek injunctive relief from Franklin Circuit Court. CMI cites neither case law nor statute that would prohibit the Department from seeking to administratively revoke a broker's license while simultaneously seeking to enjoin that same broker from violating the provisions of KRS Chapter 294.

Furthermore, neither of the cases cited by CMI supports its argument that the circuit court had exclusive jurisdiction to revoke its broker's licenses. In Revenue Cabinet v. Cherry, Ky., 803 S.W.2d 570 (1990), the Supreme Court held that KRS 131.130 did not grant the Revenue Cabinet the authority to issue administrative subpoenas in order to obtain a

taxpayer's records. In Smothers v. Lewis, Ky., 672 S.W.2d 62 (1984), the Supreme Court held that the General Assembly could not restrict a court's inherent power to issue injunctions.

CMI also argues that the Department abused its discretion by not setting aside the default order. According to CMI, the Deputy Commissioner abused his discretion because he failed to take into consideration the fact that Ristaneo had been ill. Also, the Deputy Commissioner abused his discretion because he failed to recognize that CMI was not responsible for Barber's and Brenda's criminal conduct since they were acting outside the scope of their employment. To support this argument, CMI cites Caretenders, Inc. v. Commonwealth, Ky., 821 S.W.2d 83 (1991).

In Lexington-Fayette Urban County Human Rights Commission v. Wal-Mart Stores, Inc., Ky. App., 111 S.W.3d 886 (2003), the Lexington-Fayette Urban County Human Rights Commission entered a default judgment against Wal-Mart and denied Wal-Mart's subsequent motion to set aside the default judgment. Id. at 889. Wal-Mart filed a petition for the Fayette Circuit Court to review the Commission's denial. The Fayette Circuit Court reversed the Commission. Id. On appeal, this Court pointed out that when reviewing an agency's decision, the ultimate concern is whether the agency acted arbitrarily. This Court stated that the Commission's denial of Wal-Mart's

motion to set aside the default judgment was entitled to the same deference from a reviewing court as this Court must give to a trial court when reviewing one of its discretionary rulings. Id. at 890. In Green Seed Company, Inc. v. Harrison Tobacco Storage Warehouse, Inc., Ky. App., 663 S.W.2d 755, 757 (1984), this Court noted that trial courts have wide discretion in deciding whether or not to set aside a default order but a trial court will not set aside a default order unless the movant has shown both good cause and a meritorious defense.

The record shows that the Department properly and successfully served process on CMI. Yet, despite being properly served and being aware of the complaint, CMI chose to ignore it. Once the default order had been entered against it, CMI argued that it could not answer the complaint because its attorney, Ristaneo, was ill. But CMI never explains to this Court, nor did it explain to the Deputy Commissioner or the circuit court, why or how Ristaneo's illness prevented it from responding. Therefore, the Deputy Commissioner did not abuse his discretion when he concluded CMI failed to show good cause.

Not only did CMI fail to show good cause but it also failed to show it had a meritorious defense. KRS 502.050, the statute regarding corporate liability, states in pertinent part:

(1) A corporation is guilty of an offense when:

. . . .

(b)The conduct constituting the offense is engaged in, authorized, commanded or wantonly tolerated by the board of directors or by a high managerial agent acting within the scope of his employment in behalf of the corporation; or

. . . .

(2) As used in this section:

. . . .

(b)"High managerial agent" means an officer of a corporation or any other agent of a corporation who has duties of such responsibility that his conduct reasonably may be assumed to represent the policy of the corporation.

The Department revoked both of CMI's licenses because Barber and Brenda had opened the escrow account; had deposited loan proceeds in it; and subsequently failed to pay those proceeds to the prior creditors. Since Brenda was CMI's treasurer, she obviously acted within the scope of her employment when she engaged in these activities. Barber was a fifty-percent owner of CMI and its vice-president, which made her an officer of the corporation. As one of CMI's officers, Barber not only authorized the illicit activities but she also actively participated in them. Pursuant to KRS 502.050, Barber's and Brenda's actions were sufficient to impute liability to CMI. Given the facts, CMI's argument that it was not responsible for Barber's and Brenda's criminal conduct is simply without merit.

Since CMI failed to show either good cause or a meritorious defense, the Deputy Commissioner did not abuse his discretion. Therefore, this Court affirms the Franklin Circuit Court's order.

ALL CONCUR.

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