RENDERED: May 27, 2005; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-001308-MR

GREENPOINT CREDIT, L.L.C. APPELLANT

v.

APPEAL FROM ROWAN CIRCUIT COURT
HONORABLE BETH LEWIS MAZE, JUDGE
ACTION NO. 01-CI-90332

PENNY MURPHY (NOW BRINKER) APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: DYCHE, SCHRODER, AND VANMETER, JUDGES.

SCHRODER, JUDGE: A secured creditor of a used mobile home filed a collection suit against the debtor who quit making payments. The debtor was represented by an attorney who filed an answer and counterclaim for a breach of warranties. The attorney was also successful in having the prejudgment writ of possession quashed. Nevertheless, the creditor used self help to repossess the mobile home and sold it to a third party after sending the debtor a notice to the vacant lot. We agree with the trial

court that the notice was commercially unreasonable under the circumstances and affirm the court's summary judgment.

Penny Murphy Brinker purchased a used mobile home from Lou's American Home Center on April 12, 2001. Brinker financed her purchase through Greenpoint Credit, L.L.C. Greenpoint perfected its security interest in the home. Brinker alleged that Lou's damaged the home during its delivery and that the home contained numerous defects which breached both expressed and implied warranties. Brinker complained to both Lou's and Greenpoint about the problems and quit making payments. Greenpoint filed suit on December 26, 2001, for the balance owed, and for a prejudgment writ of possession as a secured creditor. The writ was granted subject to the posting of a bond in the amount of $55,815.30. An answer and counterclaim was filed on January 28, 2002. On January 30, 2002, Greenpoint notified the court that a Replevin Bond had been filed, and on February 11, 2002, the prejudgment writ of possession was re-filed. Brinker argued that she was not in default and that the home was needed as evidence for her counterclaim. Brinker filed a Motion to Quash Prejudgment Writ of Possession on February 27, 2002, and the Order was granted on March 5, 2002. Subsequently, Greenpoint exercised self help and repossessed the home after learning that Brinker had moved out.

Greenpoint sent Brinker a "Notice of Our Plan to Sell Property", postmarked May 24, 2002, to the vacant address where the home had once stood. The notice provided the sale would take place after June 2, 2002. The private sale did take place on June 27, 2002. Brinker did not receive notice of the proposed sale nor notice of the actual sale. Upon learning that the home had been removed, Brinker's attorney contacted Greenpoint's attorney to discover the location of the home. Greenpoint filed another request for a prejudgment writ of possession on July 3, 2002. The trial court denied the motion on August 2, 2002, and ordered Greenpoint to either return the home or make it available for inspection and provide proof of ownership. Almost a year later, Brinker filed an amended counterclaim on July 8, 2003, alleging violations of the Kentucky Uniform Commercial Code.

On June 9, 2004, the trial court issued an Order Granting Summary Judgment to Brinker, finding that Greenpoint violated KRS 355.610 [sic] by failing to give "reasonable" notice of the sale of the home and by failing to act commercially reasonable in the repossession and sale of the mobile home. The court further found Greenpoint disobeyed the court's order by repossessing the mobile home after the court's order quashing the prejudgment writ of possession. The court also found the sale of the home was conducted without giving

"reasonable notice" to Brinker or her attorney. The court then denied Greenpoint a deficiency judgment and awarded statutory damages to Brinker under KRS 355.9-625, on her counterclaim, for $16,955.36 plus $2,851.40 for a time differential, for a total of $19,806.76 plus interest.

On appeal to this Court, Greenpoint argues that the trial court erred in granting summary judgment because there were issues of fact and the court improperly concluded that Greenpoint violated KRS 355.9-610. Specifically, Greenpoint argues that Greenpoint's notice of sale to Brinker was commercially reasonable. KRS 355.9-609 allows a secured creditor (after default) to use self help if it can do so without a breach of the peace. KRS 355.9-610 allows the secured party (after a default) to sell the collateral in a commercially reasonable manner, after notice to the debtor pursuant to KRS 355.9-611. KRS 355.9-612 provides the timeliness of the notification is a question of fact. If there is a question of fact, summary judgment is premature. Steelvest, Inc. v. Scansteel Service Center, Inc., 807 S.W.2d 476 (Ky. 1991). We agree with the trial court that the notice was not reasonable. On March 5, 2002, the court quashed the prejudgment writ of possession after an answer and counterclaim were filed. Brinker was represented by counsel who argued that she was not in default, but was withholding payment because of a breach of

warranties, and that the home was needed as evidence. Subsequently, the home was repossessed and on May 24, 2002, Greenpoint sent Brinker a notice of sale at the address where the home once stood, but not to her attorney, knowing full well that Brinker was represented by an attorney and that the court quashed the writ of possession. Under those circumstances, the notice was clearly unreasonable.

Greenpoint contends disposition of the mobile home was carried out in a reasonable manner. We disagree for the reasons stated above. To make matters worse, on August 2, 2002, Greenpoint was ordered to either return the home or make it available for inspection and provide proof of ownership. Greenpoint never complied with that order.

Greenpoint's final argument is that if Brinker rejected the home or revoked acceptance, she was not entitled to the measure of damages that were granted in the order granting summary judgment. Below, Greenpoint argued that Brinker was not entitled to damages, not the measure of damages (under KRS 355.2-711 versus KRS 355.9-625). This issue is not properly before the Court because the trial court was not given an opportunity to rule on that issue. The law is well-settled that the trial court must be given the opportunity to rule on issues before they are presented for appellate review and that issues

first raised on appeal should not be considered. Regional Jail Authority v. Tackett, 770 S.W.2d 225 (Ky. 1989).

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

ALL CONCUR.

BRIEF FOR APPELLANT:	BRIEF FOR APPELLEE:
Glenn Edward Algie Cincinnati, Ohio	Kelly E. Collinsworth Morehead, Kentucky