

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-002311-MR

NADINE SAYLOR;
LEE HELTON

APPELLANTS

v. APPEAL FROM HARLAN CIRCUIT COURT
HONORABLE RON JOHNSON, JUDGE
ACTION NO. 04-CI-00860

DEUTSCHE BANK NATIONAL TRUST
COMPANY, AS TRUSTEE FOR LONG
BEACH MORTGAGE LOAN TRUST
2004-1

APPELLEE

OPINION AFFIRMING AND REMANDING

** ** * ** * **

BEFORE: ACREE AND LAMBERT, JUDGES; ROSENBLUM, SENIOR JUDGE.¹

ROSENBLUM, SENIOR JUDGE: Nadine Saylor and Lee Helton appeal from a Judgment and Order of Sale of the Harlan Circuit Court² directing the sale of property owned by the appellants in connection with a foreclosure action filed by the appellee,

¹ Senior Judge Paul W. Rosenblum, sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

² We note that the appellant's brief fails to comply with the requirement of CR 76.12(4)(c)(vii) that the order being appealed from be included as an appendix to the brief.

Deutsche Bank National Trust Company, as Trustee for Long Beach Mortgage Loan Trust 2004-1. We affirm the Judgment and Order of Sale, but remand for a correction of the order pursuant to CR³ 60.01 to rectify a clerical error in the order which stated that Saylor and Helton are married.

FACTUAL AND PROCEDURAL BACKGROUND

In November 2003, in connection with the purchase of property located in Harlan County, Saylor and Helton executed a note and mortgage in favor of Long Beach Mortgage Company. The note and mortgage were eventually assigned to the appellee.

On December 3, 2004, the appellee filed a Complaint in Harlan Circuit Court alleging that Saylor and Helton had defaulted on the note, and seeking to foreclose on the mortgage. The complaint named as defendants other parties, not at issue here, thought to have an interest in the property.

On December 22, 2004, Saylor and Helton filed an answer generally denying the allegations contained in the complaint, including their default.

On June 17, 2005, the appellee first moved for summary judgment upon its complaint. The motion was supported by an affidavit describing the appellants' default and documentation verifying the assignment of the loan and mortgage to the appellee. The motion was noticed for hearing on July 15, 2005. On July 14, 2005, the appellants filed a notice to the effect that they had filed a bankruptcy proceeding, thereby triggering the stay proceedings of the Bankruptcy Code.

³ Kentucky Rules of Civil Procedure.

On August 14, 2006, the appellee filed a renewed motion for summary judgment. The motion included an assertion that Saylor and Helton were married to one another. Attached to the motion were the bankruptcy court docket sheets demonstrating that the bankruptcy proceedings had been closed.

On August 31, 2006, the appellants filed a response to the motion. The response was limited to objecting to the motion's (and the appellee's proposed order's) description of the appellants as being married. The response was supported by the affidavits of Saylor and Helton that they were not married. No other grounds in opposition to summary judgment were stated.

On September 20, 2006, the appellee filed a second renewed motion for summary judgment. The motion was substantially the same as the filing of August 14, 2006, except this renewed motion stated that Saylor and Helton were not married.

On October 9, 2006, the circuit court entered a Judgment and Order of Sale granting the appellee's motion for summary judgment, and directing the Master Commissioner to sell the subject property in satisfaction of the note in default.⁴ The order erroneously stated that Saylor and Helton were married.

This appeal followed.

ERRONEOUS FINDING OF MARRIAGE

As previously noted, the circuit court's October 9, 2006, Judgment and Order of Sale erroneously found that Saylor and Helton were married. The appellee

⁴ The record on appeal discloses that the property was sold by the Master Commissioner on November 6, 2006, and that the appellee was the successful bidder.

agrees that this finding is erroneous and, indeed the record on appeal reflects that on January 10, 2007, the appellee filed a motion for entry of a nunc pro tunc order correcting the error. The record further discloses that Saylor and Helton filed a response opposing the motion on the basis that “[a]t this point in time the case is being litigated in the Court of Appeals. The Harlan Circuit Court has no Jurisdiction of the Case at this time.”

It is apparent that the finding contained in the circuit court's order of October 9, 2006, to the effect that Saylor and Helton are married is clearly erroneous. CR 52.01. The erroneous finding is, however, clearly a clerical error correctable under CR 60.01. We accordingly are constrained to remand the cause for the entry of an order correcting the error pursuant to CR 60.01.

As the order will merely correct a clerical error, the substantive rights of the parties are, of course, otherwise unaffected.

DEFECTIVE MORTGAGE

Citing KRS 423.130 - a statute repealed in 1992 - the appellants also argue that the mortgage was somehow defective. It appears that the argument alleges that the obligation upon the note was discharged in the bankruptcy proceedings, and because the mortgage is defective, Saylor and Helton are now entitled to continue ownership of the property free and clear of both the note and the mortgage.

The appellants do not cite us to their preservation of this argument as required by CR 76.12(4)(c)(iv), and our review of the record fails to disclose that the argument was made before the circuit court. It is elementary that a reviewing court will

not consider for the first time an issue not raised in the trial court. *Caslin v. General Elec. Co.*, 608 S.W.2d 69, 70 (Ky.App., 1980). We accordingly will not address this issue upon the merits.

CONCLUSION

For the foregoing reasons the judgment of the Harlan Circuit Court is affirmed, and the cause is remanded for further proceedings consistent with this opinion.

ALL CONCUR.

BRIEF FOR APPELLANT:

John Crocket Carter
Harlan, Kentucky

BRIEF FOR APPELLEE:

Kerri N. Bruckner
Cincinnati, Ohio