

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-002066-MR

CRYSTAL L. SMITH;
BANKERS TRUST OF CA

APPELLANTS

v.

APPEAL FROM MENIFEE CIRCUIT COURT
HONORABLE WILLIAM B. MAINS, JUDGE
CIVIL ACTION NO. 04-CI-90103

WASHINGTON MUTUAL BANK, ITS SUCCESSORS
AND ASSIGNS; OPTION ONE MORTGAGE CORPORATION

APPELLEES

OPINION AFFIRMING

** ** * * * * * * * * * *

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

ROSENBLUM, SENIOR JUDGE: Crystal L. Smith and Bankers Trust of CA appeal

from an order entered by the Menifee Circuit Court dismissing her complaint against the

Appellees. Finding no error, we affirm.

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.

On March 26, 2002, Washington Mutual Bank filed a foreclosure action against Smith in the Menifee Circuit Court.² Smith answered the complaint and denied that she had defaulted under the terms of the note and mortgage. On March 13, 2004, Smith allegedly filed an Amended and Supplemental Counterclaim, although the record does not disclose a copy stamped with the date it was entered. After several unsuccessful attempts at negotiation, the parties ultimately agreed to a settlement at a status conference conducted by the court on June 10, 2004. The terms of the agreement were reflected in an order entered July 9, 2004. The court's order indicates that the parties contemplated a dismissal of the pending action in exchange for other mutual agreements between them, which included the bank's consent to contact credit reporting agencies on Smith's behalf and Smith's payment of \$48,600.00 to the bank “within 90 days from the date Smith's credit report no longer reflects the delinquency and foreclosure action.” On August 6, 2004, Smith appealed the order entered July 9, 2004, but this Court dismissed the appeal³ because the order was not final.

On February 15, 2006, the court entered a final order in case 02-CI-90037 that denied Smith's Amended and Supplemental Counterclaim, ordered Smith to pay Option One Mortgage Corporation \$48,600.00 in full satisfaction of the subject mortgage, and dismissed the case. On October 18, 2004, Smith filed a complaint in the Menifee Circuit Court against Washington Mutual alleging “[t]hat such foreclosure proceedings

² Civil Action No. 02-CI-90037.

³ See *Smith v. Washington Mut. Bank*, 2005 WL 2105597 (Ky.App. Sept. 2, 2005)(unpublished).

were begun without proper notice to [Smith], [t]hat [Appellees] made false and defamatory statements regarding [Smith's] credit which appeared on her credit report, and [t]hat as a direct and proximate result of the negligence and carelessness of [Appellees], [Smith] has suffered pain and mental anguish.”⁴ In response, Washington Mutual filed a Motion to Dismiss that was granted by order entered February 15, 2006 (the same day the court entered the order in Case No. 02-CI-90037). That order stated:

This matter having come before the Court on Motion to Dismiss filed by Washington Mutual Bank/Option One, and [Smith's] Response;
The Court having reviewed the record in this case, the record in Menifee Civil Action 02-CI-90037; all parties having been given an opportunity to be heard; and the Court being sufficiently advised;
The Court finds that [Smith's] Complaint is barred by *res judicata*; the Court further finds that [Smith's] complaint is barred by the statute of limitations.
It is therefore ORDERED that is case is DISMISSED WITH PREJUDICE.
This is a final order, there being no just reason for delay.

Smith appealed the Order entered in 02-CI-90037 to this court; however, Smith's appeal was dismissed as moot because she had remitted the \$48,600.00 payoff amount to the Appellees.⁵ Smith now appeals the Order entered in 04-CI-90103.

Smith argues that the trial court erred in dismissing her complaint against the Appellees. We disagree.

⁴ Civil Action No. 04-CI-90103.

⁵ See *Smith v. Washington Mut. Bank*, 2006-CA-000544-MR (March 12, 2007)(unpublished).

At the June 10, 2004, hearing, Smith accepted the settlement terms, formally entered by court order on July 9, 2004, in 02-CI-90037, providing, in pertinent part, that:

[t]he parties **release each other from all claims** that were or could have been raised in this action, other than claims to enforce this agreement. Smith retains the right to pursue a claim against [Appellees] if she contends [Appellees] did not request the revision to her credit report as agreed.

(Emphasis added).

The July 9, 2004, Order itself bars the present action. Whether Smith thought she settled these claims or not, an appeal does not stay proceedings on the judgment or order appealed from unless a supersedeas bond is posted. *See* CR⁶ 73.04. Because no bond was posted, the July 9, 2004, Order was not stayed and remained in full force and effect. Moreover, Smith did not contest the dismissal of her appeal of the July 9, 2004, Order. Furthermore, Smith failed to respond to the Appellees' motion to dismiss as well as the evidence presented showing that the mortgage had been paid in full and that her credit history had been corrected. The July 9, 2004, Order operated as a settlement and thus, constituted a valid consent judgment and was entitled to *res judicata* effect. *See, e.g., Blevins v. Johnson*, 344 S.W.2d 375 (Ky. 1961); *3D Enterprises Contracting Corp. v. Louisville & Jefferson Metro. Sewer Dist.*, 174 S.W.3d 440 (Ky. 2005).

⁶ Kentucky Rules of Civil Procedure.

Accordingly, the trial court did not err in dismissing Smith's complaint with prejudice because the matter was already decided and barred by *res judicata*.

Absent the July 9, 2004, Order, *res judicata* would nevertheless operate as a partial bar to Smith's complaint. The doctrine of *res judicata* is applicable not only to the issues disposed of in the first action, **but to every point which properly belonged to the subject of the litigation in the first action and which in the exercise of reasonable diligence might have been brought forward at the time.** See *Hays v. Sturgill*, 302 Ky. 31, 193 S.W.2d 648 (1946)(Emphasis added). Thus, Smith was required pursuant to CR 13.01⁷ to bring her compulsory counterclaim against the Appellees once the foreclosure action was brought against her upon her claim “that [the] foreclosure proceedings were begun without proper notice to [Smith].” Her failure to do so bars her claim against the Appellees by virtue of *res judicata*. We are aware that Smith allegedly moved to enter a counterclaim, but it was overruled by the trial court. While Smith did appeal that order to this Court⁸, the Appellees moved to dismiss the appeal as it was rendered moot upon Smith's satisfaction of the mortgage debt and the Appellees' correction of Smith's credit report to accurately reflect the payoff. Following Smith's failure to respond to the motion to dismiss, it was granted.

⁷ CR 13.01 states in relevant part that “[a] pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim....”

⁸ See *Smith v. Washington Mut. Bank*, 2006-CA-000544-MR (unpublished).

Accordingly, the trial court properly dismissed Smith's complaint as barred by *res judicata*.

The judgment of the Menifee Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANTS:

Crystal L. Smith
Henderson, Nevada

BRIEF FOR APPELLEES:

David A. Stringer
Cincinnati, Ohio