

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-001782-MR

VIOLA LANE

APPELLANT

v. APPEAL FROM POWELL CIRCUIT COURT
HONORABLE HON. FRANK ALLEN FLETCHER, JUDGE
ACTION NO. 04-CI-00230

LARRY LANE

APPELLEE

OPINION
VACATING AND REMANDING

** ** * * * * *

BEFORE: KELLER AND TAYLOR, JUDGES; GUIDUGLI,¹ SENIOR JUDGE.

KELLER, JUDGE: This appeal involves the sale of certain real property by the

Powell County Master Commissioner (the Master Commissioner). On appeal,

Viola Lynn Lane (Viola) argues that she filed objections to the Master

Commissioner's Report of Sale and that the Powell Circuit Court violated her right

¹ Senior Judge Daniel T. Guidugli sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky constitution and KRS 21.580.

to due process by overruling her objections without providing her notice of a hearing. For the reasons set forth below, we vacate and remand.

FACTS

The marriage of Viola and Larry Lane (Larry) was dissolved in 1987. After the dissolution, the parties reconciled but did not re-marry. They made joint purchases of real and personal property, the only one that is pertinent to this appeal is a residence located at 1775 Campton Road, Powell County, Kentucky (the residence). The parties separated in either 2003 or 2004 and, on September 21, 2004, Viola filed a complaint asking the Powell Circuit Court to order the sale of the parties' property. Following what appears to have been a contentious and lengthy litigation, the Powell Circuit Court ultimately ordered the residence to be sold by the Master Commissioner.

The Master Commissioner entered a Notice of Sale on July 2, 2007, setting the sale date for July 21, 2007. On July 20, 2007, Larry, *pro se*, filed an objection to the sale, noting that: (1) the address on the notice of sale in the newspaper listed the property as being in Clay City rather than Stanton; (2) he had been unable to obtain legal counsel; and (3) the sale would adversely affect him physically and mentally. The Master Commissioner went forward with the sale, and Larry purchased the property for \$40,000. On July 23, 2007, the Master Commissioner entered her Report of Sale. In her Report of Sale, the Master Commissioner moved the court "for approval and confirmation hereof"; however, the Master Commissioner's motion did not set forth a date or time for a hearing.

On July 30, 2007, the circuit court entered an Order for Commissioner's Sale to Lie Over for Exceptions. The order stated, in pertinent part, that "[s]hould no exceptions be filed within ten (10) days of the date of this Order, said Sale shall be confirmed upon Motion of the Master Commissioner." The order did not state what would occur if exceptions were filed or set a date or time for a hearing on any such exceptions.

On August 2, 2007, Viola filed an objection to the Master Commissioner's report arguing that Larry threatened potential buyers, which tainted the sale, and that the notice of sale had the incorrect address. In support of her argument that Larry had tainted the sale, Viola offered the Affidavits of Mike Arnett (Arnett), Anna Wise (Wise), and her attorney. Arnett stated that Larry approached him at the sale and, in a loud and angry voice, said, "You son-of-a-bitch, I didn't bid against you when you were going through your divorce and had your sale and I don't appreciate you bidding against me. You son-of-a-bitch, I will take care of you." Wise stated that Larry approached her at the sale and said, "You have no business here, you just go on and leave." According to Wise, Larry was angry and he frightened her, so she left the auction. Viola's attorney stated that he witnessed Larry "jump in the face of a gentleman who had made an opposing bid on his property" and that he heard Larry threaten that man if he continued to bid on the property. Viola did not move for a hearing on her objection, nor did she set forth when a hearing should be scheduled on the court's motion docket.

Larry filed a response to Viola's objection on August 7, 2007. In his response, Larry admitted that he "conveyed to Mr. Arnett that he was displeased with Mr. Arnett bidding on property." However, he denied using the exact words contained in Arnett's affidavit. Larry also admitted that he had words with Wise, who is Viola's mother. However, Larry stated that Wise was not present for the sale and that their confrontation occurred after the sale had been completed. We note, as did Larry, that the Master Commissioner did not note any irregularities with the sale, and that Arnett did not state that Larry's actions had any impact on what he bid.

In her brief, Viola states that Larry requested an evidentiary hearing in his response. However, Viola is over-reading Larry's request, which states that, "[i]n the event the Court is interested in hearing testimony," Larry would request an evidentiary hearing.

The circuit court's docket sheet for August 8, 2007, indicates that Viola's objection was an "add on" and that "no motion" had been filed. As noted by Viola in her brief, it is unclear who was present; however, there is a check mark next to Larry's name, indicating that he or his counsel may have been present. We note that, in his brief, Larry states that he, his counsel, and the Master Commissioner were all present. There is no record of what, if any, proceedings took place on August 8, 2007; however, the docket sheet contains a notation that the "motion to set aside sale is denied. Sale is final[.]" The docket sheet was signed by the circuit court judge and entered on August 8, 2007. In her brief, Viola

states that neither she nor her attorney received a copy of the court's order as reflected on the docket sheet.

On August 28, 2007, Viola filed her Notice of Appeal to this Court. It is from the order contained on the docket sheet that Viola appeals. In her appeal, Viola argues that she did not receive notice of the hearing on her objection and that her due process rights were thereby violated. Larry argues to the contrary. For the reasons set forth below, we agree with Viola and vacate and remand.

STANDARD OF REVIEW

The issue raised by Viola is one of law; therefore, our review is *de novo*. *Carroll v. Meredith*, 59 S.W.3d 484, 489 (Ky. App. 2001); *see also A & A Mechanical, Inc. v. Thermal Equipment Sales, Inc.*, 998 S.W.2d 505, 509 (Ky. App. 1999); *Aubrey v. Office of Attorney General*, 994 S.W.2d 516, 518-19 (Ky. App. 1998); and *Cinelli v. Ward*, 997 S.W.2d 474, 476 (Ky. App. 1998).

ANALYSIS

Viola's primary argument is that CR 6.04 requires that notice of a hearing on a motion be provided to the parties. However, we begin our analysis with the court's July 30, 2007, order. As noted above, that order states that the Master Commissioner's report will not be acted upon for ten days. Ten days from July 30, 2007, would have been August 9, 2007, not August 8, 2007. Therefore,

the addition of this matter to the court's August 8, 2007, motion docket, absent notice to all of the parties, was inappropriate.

Next we look to CR 53.06(2), which provides that:

[w]ithin 10 days after being served with notice of the filing of the [commissioner's] report any party may serve written objections thereto upon the other parties. Application to the court for action upon the report and upon objections thereto shall be by motion and upon notice as prescribed in CR 6.04. The court after hearing may adopt the report, or may modify it, or may reject it in whole or in part, or may receive further evidence, or may recommit it with instructions.

Based on CR 53.06(2), a motion is required to prompt the court to take action on a commissioner's report or objections thereto. Neither Viola nor Larry filed a motion asking the court to take action on her objections or to adopt the Master Commissioner's report. And neither Viola, Larry, nor the Master Commissioner filed anything requesting that a hearing be scheduled at a date and time certain.

Although the Master Commissioner did move for approval of her report, any action on that motion was stayed for ten days by the court's July 30, 2007, order.

Therefore, addition of this matter on the court's August 8, 2007, motion docket, absent notice to all parties, was inappropriate.

Finally, we look to CR 6.04(1), which provides that

[a] written motion, other than one which may be heard ex parte, and notice of the hearing thereof shall be served a reasonable time before the time specified for the hearing, unless a specific period is fixed by these rules or by order of the court. Such an order may for cause shown be made on ex parte application.

Based on CR 6.04, notice of a hearing is required to be given a reasonable time before the time specified for the hearing. According to the Rules of Practice and Procedure for the 39th Judicial Circuit (the local rules), “**Powell County** Civil and Criminal Motion days shall be held on the first and third **Wednesday**, after the first Monday, of each month . . . The Clerk shall keep a motion docket in which there shall be docketed, in order, all motions filed with the Clerk no later than one week prior to the Court’s Motion day.” (Emphasis in original). The local rules do not state that a party filing a motion must designate the date and time for the motion to be heard. Assuming for the sake of argument that Viola’s objections to the Master Commissioner’s report constituted a motion, they were filed on August 2, 2007, which is less than one week from August 8, 2007. Under the local rules, the objections should not have been scheduled for a hearing until August 15, 2007, the next available motion docket. Therefore, addition of this matter on the court’s August 8, 2007, motion docket, absent notice to all parties, was inappropriate.

We note Larry’s argument that, under *Carnahan v. Yocom*, 526 S.W.2d 301 (Ky. 1975), a party making a motion is required to include notice of the hearing date and time in the motion or within a reasonable time thereafter. If no such date and time are designated, the motion may be deemed to be “no motion at all.” *Id.* at 304. If Viola’s objections do not constitute a motion, and we agree that they do not, then the court, by its own order, was foreclosed from considering either the Master Commissioner’s report or the objections to that report until August 9, 2007. If, as noted above, Viola’s objections are deemed to be a motion,

the earliest such a motion could have been automatically added to a motion docket would have been August 15, 2007. In either case, addition of this matter on the court's August 8, 2007, motion docket, absent notice to all parties, was inappropriate.

Finally, Larry is correct that the Supreme Court of Kentucky held in *Kelley v. Fedde*, 64 S.W.3d 812 (Ky. 2002), that a party objecting to a master commissioner's report is not necessarily entitled to an evidentiary hearing. However, "the parties must be afforded an opportunity for oral argument." *Kelley v. Fedde*, 64 S.W.3d 812, 814 (Ky. 2002). By scheduling the hearing for August 8, 2007, without giving notice to Viola, the circuit court deprived her of the opportunity for an oral argument.

For the above reasons, the circuit court's order of August 8, 2007, is vacated and this case is remanded. On remand, the circuit court is instructed to provide the parties with, at a minimum, the opportunity to make oral arguments. The circuit court may, as it deems appropriate, conduct an evidentiary hearing. We are not holding that the court is required to ultimately find for Viola, only that she is entitled to be heard. After providing her with that opportunity, the court may reach whatever conclusions it finds are supported by the arguments or the evidence.

ALL CONCUR.

BRIEF FOR APPELLANT:

Brian P. Gilfedder
Lexington, Kentucky

BRIEF FOR APPELLEE:

B. Scott Graham
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