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Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-001555-MR

DAWN OSBORNE — APPELLANT

v.

APPEAL FROM JESSAMINE CIRCUIT COURT
HONORABLE C. HUNTER DAUGHERTY, JUDGE
ACTION NO. 07-CI-00211

TOWN SQUARE BANK; DAVID ALLEN OSBORNE, EXECUTOR OF THE ESTATE OF SHELLY M. OSBORNE; DAVID ALLEN OSBORNE, INDIVIDUALLY; JACQUELINE OSBORNE; CHERI O. WRIGHT (NOW HARLOW); MICHAEL EARNEST HARLOW; AND COMMONWEALTH OF KENTUCKY, DEPARTMENT OF REVENUE — APPELLEES

AND

NO. 2007-CA-001909-MR

DAVID A. OSBORNE, EXECUTOR OF THE ESTATE OF SHELLY OSBORNE, DECEASED — APPELLANT

APPEAL FROM JESSAMINE CIRCUIT COURT
v. HONORABLE C. HUNTER DAUGHERTY, JUDGE
ACTION NO. 07-CI-00211

TOWN SQUARE BANK, INC.; DAWN OSBORNE; DAVID ALLEN OSBORNE, INDIVIDUALLY; JACQUELINE OSBORNE; MICHAEL EARNEST HARLOW; COMMONWEALTH OF KENTUCKY, REVENUE CABINET; AND DENNIS KING APPELLEES

AND

NO. 2007-CA-001926-MR

CHERI O. WRIGHT (NOW CHERI HARLOW); MICHAEL EARNEST HARLOW; DAVID ALLEN OSBORNE, INDIVIDUALLY; AND JACQULINE OSBORNE APPELLANTS

APPEAL FROM JESSAMINE CIRCUIT COURT
v. HONORABLE C. HUNTER DAUGHERTY, JUDGE
ACTION NO. 07-CI-00211

TOWN SQUARE BANK, INC; DAWN OSBORNE; DAVID ALLEN OSBORNE, AS EXECUTOR OF THE ESTATE OF SHELLY OSBORNE; COMMONWEALTH OF KENTUCKY, REVENUE CABINET; AND DENNIS KING APPELLEES

OPINION

AFFIRMING AND REMANDING

** ** ** ** **

BEFORE: WINE AND VANMETER, JUDGES; LAMBERT,[1] SENIOR JUDGE.

LAMBERT, SENIOR JUDGE: These consolidated appeals present issues arising from a mortgage foreclosure action brought subsequent to the death of one of the obligors. The primary issues presented are whether the decedent's surviving spouse effectively renounced his will pursuant to KRS 392.080, and whether three subdivided lots created from the encumbered tract after the mortgage lien came into existence were sold in the proper sequence. The surviving spouse, Dawn Osborne, claims error in the trial court's determination that her renunciation of the decedent's will was invalid. The decedent's children, David A. Osborne and Cheri O. Wright (Harlow), appeal in their individual capacities, and David A. Osborne also appeals as executor of the decedent's estate, from the trial court's order directing the sequence of the sale of the three lots. Other issues relating to the judicial sale are also presented.

Appellant Dawn Osborne is the surviving spouse of Shelly M. Osborne who died testate on August 30, 2006. About three years prior to Mr. Osborne's death, he and Dawn purchased a 45-acre parcel of land with a home located thereon in Wilmore, Kentucky. The purchase price was $940,000 and title was taken in the Osbornes' names jointly, with remainder in fee simple to the survivor. Of the purchase price, $60,000 was paid in cash and the balance of

[1] Senior Judge Joseph E. Lambert sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

$880,000 was financed by means of a promissory note to Town Square Bank secured by a mortgage lien on the entirety of the real property.

Following the real estate purchase, the Osbornes subdivided the property into three separate parcels known as lot 1F (20 acres), lot 1G (10 acres) and lot 1H (15.72 acres). A plat depicting the subdivision was recorded in the county court clerk's office. While the mortgage instrument executed by Shelly M. Osborne and Dawn Osborne described the original 45.72-acre tract, the mortgage enforcement complaint filed herein by Town Square Bank acknowledged the subdivision of the property. There is no issue as to whether the mortgage covers the three subdivided lots. Lot 1F and lot 1H consist of unimproved acreage. Lot 1G is a 10-acre tract improved with a home and adjacent outbuildings.

On July 29, 2006, about one month before Shelly Osborne's death, Dawn Osborne conveyed her interest in lots 1F and 1H to her husband. A few days later, at a time when he was seriously ill, Shelly M. Osborne executed a last will and testament whereby he devised lots 1F and 1H to his daughter and son, issue of an earlier marriage. Lot 1G, upon which was located the family residence, was given to Dawn Osborne, but the will directed that the outstanding mortgage debt be allocated only to lot 1G and that lots 1F and 1H go to the testator's daughter and son without encumbrance. A few weeks after Shelly Osborne's death, his will was probated, and pursuant to directions contained in the will, David A. Osborne was appointed executor.

After the executor was appointed, Dawn Osborne sought allowance of her spousal exemption. Over the executor's objection, the court ordered the payment to be made. Dawn used these proceeds, in part, to pay the decedent's funeral expenses despite a provision to the contrary in his will whereby payment was directed to be made by the estate. Thereafter, over the next few months, the relationship between Dawn Osborne and the executor deteriorated to the extent that in January 2007, Dawn sought his removal. She requested entry of an order directing the executor to file an inventory and to immediately pay current the mortgage debt owed to Town Square Bank. She also sought payment of a certain specific bequest in the decedent's will. She contends that this request was to secure funds with which to pay toward the delinquent mortgage debt owed to Town Square Bank.

Whether due to Dawn Osborne's request or of his own accord, the executor paid her the sum of $45,000 on January 25, 2007. A letter of transmittal from the executor's counsel to Dawn's counsel makes it unmistakable that the payment was "a partial distribution from the Estate pursuant to Article III C and D of the Will of Shelly Osborne." In addition, the check contained a memo in the lower left-hand corner reflecting that it was pursuant to Article III C of the will. In her deposition, Appellant acknowledged that she was aware of the motion filed on her behalf seeking payment pursuant to the decedent's will, that the check indicated payment pursuant to the will; and that $32,000 of the $45,000 payment had been used to pay the mortgage indebtedness with the rest being placed in a

certificate of deposit in her name. She also acknowledged that her attorney had advised her not to take the check.

I.

On February 6, 2007, Dawn Osborne filed a purported renunciation of the last will and testament of Shelly M. Osborne pursuant to KRS[2] 392.080. Whether she had a right to renounce the will at that time is a central issue before the Court. The executor, David A. Osborne, contends that by her acceptance of the $45,000 payment pursuant to the decedent's will, she forfeited her right to renounce the will.

Dawn Osborne claims exemption from the general rule that one who accepts benefits from a decedent's will may not thereafter renounce that will. Her argument is that in an effort to stave off foreclosure upon her home, she accepted a relatively modest sum provided for her in the decedent's will and used it to pay the mortgage because the executor refused to make the required mortgage payment.

The right of a surviving spouse to renounce a decedent's will exists by virtue of KRS 392.080. The statute contains language permitting the surviving spouse to "release what is given to him or her by will, if any, and receive his or her share under KRS 392.020 as if no will had been made." From the language "release what is given . . . by will," courts have held that acceptance of benefits under the will precludes subsequent renunciation.

[2] Kentucky Revised Statutes.

A lengthy survey of the law in this area is unnecessary for the decision of the Supreme Court in *Hannah v. Hannah*, 824 S.W.2d 866 (Ky. 1992), appears to be dispositive. In that case, a surviving spouse brought an action to recover a $50,000 *inter vivos* gift her husband had made to his brother. She claimed that the transfer was with the intent to deprive her of her dower interest in the money. With respect to the decedent's will, she was the sole beneficiary. She did not renounce the will and fully accepted its benefits, but in addition she claimed a dower interest in the $50,000 gift from her husband to his brother.

The question identified by the *Hannah* Court was whether one who accepted what was given by will could also claim a right of dower. For its short answer to the question presented, the Court said:

> Within this scheme, the General Assembly has provided the surviving spouse with a "dower" interest in the decedent's estate which she can assert, if there is a will, *only* by renouncing the will and releasing what is given to her under the will.

Id. at 867. The Court explained that testators are broadly entitled to dispose of their estates as they see fit even to the point of disinheriting close relatives. It noted that only a surviving spouse is protected from total disinheritance, and the means is the renunciation statute. Discussing the purpose of the dower statute as secured by the renunciation statute, the Court said:

> The purpose of the dower statute is to insure that a surviving spouse will not be left disinherited and destitute. The statute is to apply in only those limited situations. It was not meant to utterly destroy the testator's ability to give and devise his property as he

> desires so long as the spouse was provided for. If the widow is not satisfied with the will provisions, she can elect to seek her statutory remedy. But the plain language of the statute makes clear that she cannot have both.

Id. at 868. The Court held that as Mrs. Hannah did not renounce the will, she lost her right to claim a dower interest, and had no standing to assert her claim that a fraudulent transfer was made to defeat that interest.

The Court summarized its view as follows:

> In conclusion, if a surviving spouse brings a claim that a fraudulent transfer was made with the intent to deprive her of her dower interest, she must, within the allotted time, renounce the will that makes provisions for her and thereby invoke her statutory right to her dower interest. Failing to do this, the widow takes as a devisee the bequests made by the will and her right to dower ceases. In this case, the widow has taken under the will and thus is precluded by statute to take her dower interest in addition thereto.

Id.

From the evidence of record, there appears to be no doubt that Dawn Osborne was cognizant that the $45,000 she received was pursuant to the decedent's will. Despite her apparent fear of foreclosure and desire to prevent it, she could not accept benefits under the will and thereafter effectively renounce the will. *Sanders v. Pierce*, 979 S.W.2d 457 (Ky.App. 1998). *Morguelan v. Morguelan's Executor,* 307 Ky. 94, 209 S.W.2d 824 (1948).

For the foregoing reasons, we affirm the trial court's summary judgment of July 20, 2007, holding the purported renunciation of Shelly M. Osborne's will by his spouse, Dawn Osborne, to be invalid.

II.

Upon our determination that the will of Shelly M. Osborne is controlling, we must review the claim of David A. Osborne, individually, and as executor of the decedent's estate, and Cheri O. Wright (Harlow) that the trial court's judgment of August 1, 2007, relating to the order in which the lots were to be sold was erroneous and the sale should be set aside.

Notwithstanding the July 20, 2007, trial court judgment effectively upholding the will of Shelly M. Osborne, the trial court nevertheless ordered the lots to be sold in an order that is claimed to be inconsistent with the provisions of the will. The trial court directed that the unimproved lots 1F and 1H be sold first. It then directed that in the event the proceeds of the sale were insufficient to satisfy the judgment, interest and costs, the Master Commissioner should sell lot 1G and then offer all properties as a whole to determine whether a greater sum could be obtained when the lots were grouped. The executor and his sister claim that this order of sale is contrary to the terms of Shelly M. Osborne's will because the will allocated the indebtedness on the property to lot 1G. The reasoning goes that lot 1G should have been sold first and that lots 1F and 1H should have been sold only if lot 1G did not produce sufficient proceeds to pay the indebtedness.

The trial court appears to have ruled as it did with respect to the order of sale on the view that the unimproved lots should be sold first. Inasmuch as Town Square Bank had a mortgage lien on the entirety of the real property and the subdivision into three lots was without its participation, the trial court's

determination does not constitute an abuse of discretion. Moreover, even if the order of sale was inconsistent, it is difficult to discover any prejudice to the executor and his sister in this regard. When the property was sold by the Master Commissioner, the two unimproved lots brought an insufficient sum to pay the indebtedness, and lot 1G alone likewise brought an insufficient sum. Thus, at a minimum, it would have been necessary to sell lot 1G and at least one of the other lots to pay the indebtedness. The executor and his sister have not contended that one or the other of the unimproved lots should have been spared from judicial sale. As such, we conclude that even if the trial court erred in its determination of the order of sale of the lots, the error was entirely nonprejudicial to the interests of the executor and his sister.

Finally in this regard, we must also consider the interest of the purchaser, an appellee in this proceeding. At the judicial sale, Dennis K. King, for himself and others, purchased all three lots paying $200,000 for lot 1F, $150,000 for lot 1H, and $445,000 for lot 1G. The judgment requiring the sale was unsuperceded.

King contends that *Sedley v. Louisville Trust Company*, 419 S.W.2d 531 (Ky. 1967), and *Rose v. Cox*, 297 Ky. 458, 179 S.W.2d 871 (1944), preclude an attack upon the sale because the error, if any, was in the summary judgment (judgment and order of sale) dated August 1, 2007. Indeed, those cases hold that where a judicial sale is pursuant to an unsuperceded judgment, the subsequent

reversal of the judgment does not invalidate the sale. The prevailing rule as stated in *Sedley v. Louisville Trust* is that:

> [T]he purchaser of real estate at a sale made pursuant to an unsuperseded judgment acquired title to the property, irrespective of the fact that subsequent to the sale and confirmation that judgment was appealed and reversed.

Id. at 532.

The executor and his sister argue that *E'Town Shopping Center , Inc. v. Lexington Finance Company*, 436 S.W.2d 267 (Ky. 1969), distinguishes both *Sedley* and *Rose* and describes a situation in which a judicial sale can be set aside. However, *E'Town Shoppping Center* plainly says that the rule in *Sedley v. Louisville Trust Company* applies when the error is in the judgment of sale as distinguished from the proceedings held pursuant to it. The error in this case, if there is one, was in the judgment and order of sale, not in the proceedings pursuant to it. Thus, we conclude that *Sedley* and *Rose* are controlling and that relief is unavailable.

Finally, we have considered the argument presented by the executor and his sister criticizing the trial court's amendment of the August 1, 2007, summary judgment reducing the notice time that was required to be given by the Master Commissioner. Though conceding that the circuit court could have amended the judgment to require less notice, they contend that the court acted beyond its jurisdiction by retroactively allowing less notice than was earlier required. In our view, the trial court acted well within its discretion, and

particularly as no prejudice has been identified. All parties were fully apprised of the fact of the judicial sale. *See Kentucky Trust Co. v. Kessel*, 464 S.W.2d 275 (Ky. 1971). This case is a far cry from *Miller v. Cisco*, 279 Ky. 440, 130 S.W.2d 783 (1939), where there was an absence of posting of handbills at the courthouse door or on the property as required by the judgment.

III.

As reflected in this opinion, this Court affirms the orders and judgment of the trial court in their entirety. Despite that fact, further trial court action will be required for the proper distribution of sale proceeds, the determination of claims for reimbursement, orders confirming the sale, determination of inferior liens, attorneys' fees and other matters within the jurisdiction of the trial court. Accordingly, we remand for such further orders and judgments as may be required.

ALL CONCUR.

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BRIEF FOR APPELLEES, DAVID A. OSBORNE, EXECUTOR; DAVID OSBORNE, INDIVIDUALLY; JACQUELINE OSBORNE, CHERI O. WRIGHT (NOW CHERI HARLOW); AND MICHAEL EARNEST HARLOW:

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