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Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-001454-MR
AND
NO. 2007-CA-001487-MR

VILLAGE CAMPGROUND, INC. APPELLANT/CROSS-APPELLEE

v.

APPEAL AND CROSS-APPEAL FROM SPENCER CIRCUIT COURT
HONORABLE CHARLES R. HICKMAN, JUDGE
ACTION NO. 01-CI-00060

LIBERTY BANK APPELLEE/CROSS-APPELLANT

OPINION
AFFIRMING

** ** ** ** **

BEFORE: MOORE AND THOMPSON, JUDGES; HENRY,[1] SENIOR JUDGE.

HENRY, SENIOR JUDGE: This is an appeal from a judgment of the Spencer Circuit Court following a jury trial which found Liberty Bank liable for fraud against Village Campground, Inc., in connection with the failure to release a

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

mortgage on the campground. Although it was successful in its fraud claim, Village argues that the trial court erred in granting summary judgment on its claim for damages pursuant to Kentucky Revised Statutes (KRS) 382.365, which governs the timely release of liens on real property following the payment of the underlying obligation; and in refusing to permit a supplemental notice of punitive damages. Liberty Bank has cross-appealed, arguing that the trial court should have granted summary judgment to Liberty on Village's fraud claim.

FACTUAL AND PROCEDURAL BACKGROUND

Liberty Bank, located in Connecticut, had an extensive and longstanding loan arrangement with Thousand Adventures, Inc., (TAI), a national campground company. On August 18, 1992, TAI executed and delivered to Liberty a promissory note in the face amount of $4.5 million, an increase of $1 million over the amount available to TAI under an earlier note dated August 30, 1990. Liberty Bank's loan to TAI was secured by consumer notes (in the form of campground memberships which operated as retail installment contracts (RIC)), second and third mortgages on the TAI campgrounds, and a mortgage on the Nebraska residence of TAI's president, James Vopnford.

This appeal concerns one of the campgrounds which served as security for the note. The campground, which is located beside Taylorsville Lake in Spencer County, Kentucky, was purchased on September 3, 1993, by TAI Kentucky, a subsidiary of TAI. At the time of the sale, the campground was already encumbered with a first mortgage held by McDill Columbus Corporation.

In December 1993, TAI Kentucky granted a second mortgage on the property to Liberty as security for the $4.5 million note. Thus, by the end of 1993, the campground had been pledged as security to both McDill and Liberty.

TAI Kentucky subsequently defaulted on its obligations to McDill, which moved to foreclose on its mortgage. In December 1996, the Spencer Circuit Court entered a judgment in favor of McDill and ordered the sale of the campground. McDill retained attorney Sue Sutherland to represent its interests in the foreclosure action. Sutherland conducted a title search to determine what parties, if any, had a legal interest in the campground in order to notify them of the pending foreclosure. Unfortunately, Sutherland overlooked the Liberty mortgage. The campground was sold to McDill at a foreclosure sale in January 1997 for $150,000. In March 1997, McDill sold its interest in the property to Village Campground, Inc., a related entity, for $205,000. Village intended to make repairs and improvements to the campground in order to resell it.

In August 1998, Liberty sold the $4.5 million note and the accompanying RIC proceeds and mortgages to Mortgage Express, Inc. (MEI) for $252,744.88. The circumstances of this sale formed the basis of Village's fraud claims against Liberty. At the time of the sale, TAI was in serious financial difficulties. It had filed for bankruptcy, and was failing to meet its obligations under the Liberty note. Liberty planned to foreclose on the Vopnford residence in Nebraska. MEI's principal, Jeffrey Rothlisberger, learned of the foreclosure and expressed an interest in purchasing the house. Liberty instead proposed to transfer

the note and all related collateral to MEI. According to Village, Liberty's motive for selling the note was to avoid potential liability in a major class-action suit that had been launched against TAI by dissatisfied holders of campground memberships. Liberty assigned the note, or "hot potato" as Village was later to describe it, to MEI, without informing MEI and its principal, Jeffrey Rothlisberger, of the TAI bankruptcy or of the potential holder-in-due-course liability stemming from the terms of the retail installment contracts. Liberty proceeded with the foreclosure sale on the Vopnford residence, bid $195,000 and then sold the note and all related collateral to MEI. Village contended that at the time the note was assigned to MEI, Liberty knew that it had been fully satisfied by the sale of the Vopnford residence.

In March 1999, Sutherland discovered the Liberty mortgage still encumbering the Village campground. She informed Village, and then set about trying to get the mortgage released. In 2000, Sutherland's counsel contacted Liberty's outside counsel to inquire about the amount remaining on the mortgage, and how it might be released. A paralegal for Liberty's outside counsel responded with a letter which stated "[p]lease be advised that the Liberty Bank notes were assigned to Mortgage Express, Inc., of Omaha, Nebraska. . . . Please contact Attorney Teichman [MEI's attorney] directly to obtain the information you require."

Village and MEI then engaged in a lengthy dispute as to the amount of the balance remaining on the note. Consequently, Village filed an action to

quiet title against MEI in Spencer Circuit Court in May 2001. The Spencer Circuit Court ruled in July 2002 that MEI had a valid and enforceable first mortgage on the campground property. Village later added Sutherland as a defendant, as well as Rothlisberger. Village was finally able to sell the campground for $572,000 in September 2004, although the mortgage was not released until January 5, 2006. Liberty remained the lienholder of record until November 2004.

In December 2004, Village moved to join Liberty to the action, claiming fraud, violations of KRS 382.365 and slander of title. Village contended that Liberty had known that the note had been paid in full prior to the assignment to MEI, and that Liberty should have released the Kentucky campground mortgage. Village claimed that the failure to release the mortgage had resulted in delay in selling the campground, unexpected holding costs, lost sales, and related damages. Liberty argued that it had assigned the mortgage to MEI and that only MEI could provide a release.

The defendants moved for summary judgment and on June 2, 2006, the trial court issued an opinion and order addressing several claims, of which the following are pertinent to this appeal: first, it ruled that an issue of fact remained as to the calculation of the balance remaining on the note; second, it granted Liberty and MEI's motion for summary judgment on Village's claim for statutory damages pursuant to KRS 382.365; third, it denied Liberty and MEI's motion for summary judgment on the issue of fraud; and fourth, it granted Liberty and MEI's

motion for summary judgment on Village's claims for slander of title and abuse of process.

Village's remaining claims against MEI, Rothlisberger, Sutherland and Liberty went to trial in March 2007. During the course of the trial, Village reached a settlement with Sutherland. After the close of proof, Liberty moved for a directed verdict on all claims, including Village's claim for punitive damages. Village had failed to specify the amount of its punitive damages and moved at that time to supplement its prior discovery responses to specify an amount. The trial court denied Village's motion to supplement its discovery responses and granted Liberty a directed verdict on punitive damages. While the trial court was revising the proposed jury instructions, Village reached a settlement with the MEI defendants. As a result, the only claim remaining to be considered by the jury was the fraud claim against Liberty. The jury returned a verdict in Village's favor, but apportioned 75 percent of the fault to the MEI defendants. The verdict resulted in a judgment of $41,561.33 against Liberty. Village thereafter filed a motion to reconsider, in which it argued that the verdict showed that the trial court had erred in granting summary judgment in June 2006 to Liberty on Village's claim for statutory damages pursuant to KRS 382.365. The motion was denied and this appeal followed.

On direct appeal, Village raises two arguments: first, that the trial court erred in denying its post-trial motion to reconsider its earlier grant of summary judgment to the defendants on the issue of statutory damages pursuant to

KRS 382.365; and second, that it erred in refusing to allow an instruction on punitive damages. On cross-appeal, Liberty argues that the trial court erred in denying its motion for summary judgment on the fraud claim.

STATUTORY DAMAGES UNDER KRS 382.365

In its opinion and order of June 2, 2006, the trial court granted summary judgment to Liberty and MEI on Village's claim for statutory damages pursuant to KRS 382.365, "which imposes penalties upon a mortgage holder who fails to timely release the mortgage after the underlying note is satisfied." *Union Planters Bank, N.A. v. Hutson*, 210 S.W.3d 163, 164 (Ky. App. 2006). The statute, which has since been revised, provided during the pertinent period that "[a] holder of a lien on real property . . . shall release the lien in the county clerk's office where the lien is recorded within thirty (30) days from the date of satisfaction." KRS 382.365(1). If the lien holder fails to release the lien within thirty days, "[a] proceeding may be filed by any owner of real property or any party acquiring an interest in real property in District Court or Circuit Court[.]" KRS 382.365(2). "If the court finds that the lienholder received written notice of its failure to release and lacked good cause for not releasing the lien, the lienholder shall be liable to the owner of the real property in the amount of one hundred dollars ($100) per day for each day, beginning on the fifteenth day after receipt of the written notice, of the violation for which good cause did not exist." KRS 382.365(3). Should the lienholder continue to fail to release the lien without good cause within forty-five days from the date of written notice, the fine increases to $400 per day, for a total

of $500 per day, plus actual expenses including reasonable attorney's fees. *See* KRS 382.365(4).

Village argued that the note had been satisfied before it was assigned to MEI, that Liberty was aware of this, and that Liberty was therefore statutorily liable for failing to release the mortgage when it was requested. The trial court ruled that although Liberty was the lien holder of record until November 2004, it had assigned the mortgage to MEI and could not release a mortgage that it no longer held. The trial court therefore granted summary judgment to Liberty on this claim.

In its motion to reconsider, filed after the trial and entry of judgment, Village asked the trial court to grant the statutory damages in light of the fact that the jury had found Liberty liable for fraud. The trial court denied that portion of the motion, explaining that

> The court's Opinion and Order of June 2, 2006 . . . sets out the grounds for sustaining Liberty's Motion for Summary Judgment regarding the claims pursuant to KRS 382.365 and the Court incorporates the Opinion by reference herein. This issue was resolved approximately ten months before the trial of the current action and the trial proceeded based on the Court's prior rulings. Post-trial the Court is left with few options and Village has cited no authority or precedent to support the relief requested in their post-trial motion.

On appeal, Village argues that, as the lienholder of record, Liberty was the party statutorily responsible for releasing the lien on August 18, 2000, (the date that Liberty was contacted by Sutherland's counsel), and that Village is

therefore entitled to receive the statutory penalties from that date until January 5, 2006, when the lien was finally released. (Liberty was the record lienholder of the Kentucky mortgage until November 22, 2004, when it finally recorded the assignment to MEI in Spencer County.) Village further argues that the good cause defense provided in the statute was unavailable to Liberty because the jury had found fraud on Liberty's part in assigning a note which had already been paid off.

We agree with the basis of the trial court's grant of summary judgment that Liberty "could not release a mortgage that it no longer held." KRS 382.365(1) provides that a lien on real property shall be released by the "holder of the lien." KRS 382.365(1). Although the assignment was unrecorded, MEI was nonetheless the holder of the lien by virtue of the assignment from Liberty. "The holder of an unrecorded assignment of a debt in trust, or in mortgage, acquires an equity as valid as if such assignment had been recorded." *Haydon v. Eldred,* 231 Ky. 298, 21 S.W.2d 457, 458 (1929) (citation omitted). Whatever the value of the note, or any fraud that Liberty may have committed when its outside counsel informed Village that the note had been assigned to MEI, the jury instructions specifically stated that "[i]t has been determined as a matter of law that Liberty executed a valid assignment of the note and mortgage, and the issue of the validity of the assignment is not before the jury."

We are further convinced that the grant of summary judgment was appropriate when we look at the revisions that have been recently made to KRS 382.365. Although this new provision is not binding in this case, the burden is

now expressly placed upon the assignee of the lien to record the assignment, and the statute provides that a failure to so record does not affect the validity of the lien.

> An assignee of a lien on real property shall record the assignment in the county clerk's office as required by KRS 382.360. Failure of an assignee to record a mortgage assignment shall not affect the validity or perfection, or invalidity or lack of perfection, of a mortgage lien under applicable law.

KRS 382.365(2).

Furthermore, we find nothing in the appellant's argument to contradict the following principles, although we acknowledge that they also are not binding authority in Kentucky:

> Generally, in the absence of statute, a release of a mortgage may be made only by the owner of the secured obligation or by some one authorized by him.
>
> In the absence of circumstances constituting ratification or raising an estoppel or of contrary provisions of a statute . . . or of intervening rights of third persons, an effectual release of a mortgage may be made by, and only by, the owner of the debt or obligation secured . . . [.]

59 C.J.S. *Mortgages* § 467 (footnotes omitted).

We affirm the trial court's grant of summary judgment because under the *Steelvest* standard, Liberty was entitled to judgment as a matter of law on this issue. *See Steelvest v. Scansteel Serv. Ctr., Inc.,* 807 S.W.2d 476, 480-82 (Ky. 1991).

PUNITIVE DAMAGES

Village next argues that the trial court erred in denying its motion to supplement its interrogatory responses to include a specific amount for its punitive damages claims against the defendants. The issue was first raised on the last day of the trial. The trial court conducted a brief hearing on the matter, at which Village requested $3 million in punitive damages from each defendant.[2] Village argued that it was well within the trial court's discretion under Kentucky Rules of Civil Procedure (CR) 8.01(2) to allow it to supplement its responses. The trial court denied the motion, in part because Village had not complied with its pretrial order of March 13, 2006, which had directed that "[e]ach party claiming damages of any nature shall submit an itemization of such damages to opposing counsel on or before forty-five (45) days before trial." (Emphasis in original.)

[2] In their reply brief and response to Liberty's cross-appeal, Village states:

> nowhere in the record of this case has Village ever requested $9 million dollars in punitive damages. Village cannot imagine or identify any foundation on which Liberty could make such an assertion. This is simply a false statement intentionally made to shock this Court into a belief that Village is somehow attempting to receive more from this action than it is rightfully and legally entitled.
>
> The only statements Village has ever made regarding the amount of punitive damages sought from Liberty or MEI was in its supplemental interrogatory response in which it made a request for punitive damages not to exceed $3 million dollars. As such, Liberty must retract its blatantly false and misleading allegations regarding the amount of punitive damages requested.

Our review of the record indicates that on the morning of the last day of the trial, March 16, 2007, at the hearing on the motion to supplement the interrogatory responses, Village's counsel stated:

> We are asking for an instruction for punitive damages in the amount not to exceed $3 million, and we do intend that to be for each defendant, not aggregate.

On appeal, Village argues that CR 8.01(2) was not applicable to this situation after all, because punitive damages are not unliquidated damages.[3] Village further contends Kentucky law does not permit or condone any plaintiff-imposed limit on punitive damages and that in any event, allowing supplementation of the interrogatories to include a specified upper limit would not have caused prejudice to Liberty, which was well aware that Village intended to request a punitive damages instruction.

CR 8.01(2) provides that:

> In any action for unliquidated damages the prayer for damages in any pleading shall not recite any sum as alleged damages other than an allegation that damages are in excess of any minimum dollar amount necessary to establish the jurisdiction of the court; provided, however, that all parties shall have the right to advise the trier of fact as to what amounts are fair and reasonable as shown by the evidence. When a claim is made against a party for unliquidated damages, that party may obtain information as to the amount claimed by interrogatories. If this is done, the amount claimed shall not exceed the last amount stated in answer to interrogatories; provided, however, that the trial court has discretion to allow a supplement to the answer to interrogatories at any time where there has been no prejudice to the defendant.

In *Pickett v. Shields*, 2005 WL 3246838 (Ky. App. 2005) (2003-CA-000744-MR), an unpublished opinion of this Court, it was held that "punitive damages are by their very nature unliquidated and thus, constitute unliquidated damages within the meaning of CR 8.01(2)." Village has argued that *Pickett* is not

[3] While we found no published Kentucky case defining "unliquidated damages," we note that they are defined in *Black's Law Dictionary* as "[d]amages that cannot be determined by a fixed formula and must be established by a judge or jury." *Black's Law Dictionary* (8th Ed. 2004). Punitive damages would seem to fit squarely within that definition.

binding authority. Even if we disregard *Pickett*, however, it is well-established that the trial court possesses "discretion to deny a requested instruction, and its decision will not be reversed absent an abuse of that discretion." *Olfice, Inc. v. Wilkey*, 173 S.W.3d 226, 229 (Ky. 2005) (citation omitted). "The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Goodyear Tire and Rubber Co. v. Thompson*, 11 S.W.3d 575, 581 (Ky. 2000) (citation omitted.) In this case, Village waited until shortly before the conclusion of the trial to propose an upper limit to the punitive damages instruction, even though it had been made fully aware a year earlier, by order of the trial court, that the court required disclosure of specific amounts. Village had virtually a full year from the date of that order until the date of the trial to raise the arguments it now raises regarding the instructions, yet it provided the trial court with no explanation for the delay. The trial court's denial of the motion to supplement the interrogatory responses and disallow a punitive damages instruction was neither arbitrary, unreasonable nor unfair when viewed in this context.

CROSS-APPEAL

On cross-appeal, Liberty argues that the trial court erred in denying Liberty's motion for summary judgment on Village's fraud claim. The denial of a motion for summary judgment "is not reviewable on appeal from a final judgment

where the question is whether there exists a genuine issue of material fact." *Transportation Cabinet, Bureau of Highways, Commonwealth of Ky. v. Leneave*, 751 S.W.2d 36, 37 (Ky. App. 1988). However, there is an exception to this rule where: (1) the facts are not in dispute, (2) the only basis of the ruling is a matter of law, (3) there is a denial of the motion, and (4) there is an entry of a final judgment with an appeal therefrom. Then, and only then, is the motion for summary judgment properly reviewable on appeal. *Id*. In this case, the trial court's ruling on Village's fraud claim stated that "Village has alleged facts regarding inducement, reliance, and injury to submit the issue of fraud to a jury." It further found that "Village has pled facts sufficient to submit to the jury their allegations of fraud against Liberty and MEI." The trial court's ruling was based entirely on the purported existence of disputed issues of fact, not on a question of law. It does not therefore meet the exception to the rule that we may not review a denial of a motion for summary judgment.

The judgment of the Spencer Circuit Court is therefore affirmed. The cross-appeal by Liberty Bank is denied.

MOORE, JUDGE, CONCURS.

THOMPSON, JUDGE, CONCURS IN RESULT ONLY.

BRIEFS FOR APPELLANT/ CROSS-APPELLEE:

Dennis D. Murrell
Michael F. Tigue
Rebecca Grady Jennings
Louisville, Kentucky

ORAL ARGUMENT FOR APPELLANT/CROSS-APPELLEE:

Dennis D. Murrell
Louisville, Kentucky

BRIEFS FOR APPELLEE/CROSS-APPELLANT:

Byron E. Leet
C. Tyson Gorman
Louisville, Kentucky

ORAL ARGUMENT FOR APPELLEE/CROSS-APPELLANT:

Byron E. Leet
Louisville, Kentucky