

RENDERED: DECEMBER 19, 2008; 2:00 P.M.
 NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2006-CA-002307-MR

JIMMY ARNOLD CARTWRIGHT

APPELLANT

v. APPEAL FROM HENDERSON CIRCUIT COURT

HONORABLE STEPHEN A. HAYDEN, JUDGE

ACTION NO. 06-CI-00531

MANUFACTURERS AND TRADERS
TRUST CO.; COUNTY OF HENDERSON;
CITY OF CORYDON

APPELLEES

OPINION
AFFIRMING IN PART, REVERSING IN PART
AND REMANDING

*** * * * *

BEFORE: CLAYTON, LAMBERT, AND WINE, JUDGES.

WINE, JUDGE: Jimmy Arnold Cartwright (Cartwright) appeals from a judgment by the Henderson Circuit Court granting a judgment of foreclosure to Manufacturers and Traders Trust Company, as trustee for Securitization Series 1997-4 Agreement 9/1/97 (Manufacturers). Cartwright argues that he did not

receive notice of Manufacturers' motion for summary judgment, and that Manufacturers failed to establish that it was entitled to reformation of the property description in the mortgage. We conclude that the notice issue is not properly presented in this appeal. However, we agree with Cartwright that Manufacturers' evidence, while uncontested, was insufficient to establish its right to reformation of the mortgage by clear and convincing evidence. Hence, we affirm in part, reverse in part, and remand for further proceedings on the reformation issue.

On May 2, 1997, Cartwright executed a promissory note for \$60,760.00 to Mercantile Mortgage Company. The note was secured by a mortgage against Cartwright's real property located at 826 Pritchett Street, Corydon, Kentucky. Eventually, Manufacturers acquired the note and mortgage. On July 6, 2006, Manufacturers filed a complaint against Cartwright alleging that the note was in default and seeking to foreclose on the real property. Manufacturers also requested reformation of the mortgage to correct an error in the legal description which omitted a portion of the property. In addition, Manufacturers asserted claims against the "unknown spouse (if any) of Jimmy Arnold Cartwright," and against the City of Corydon and Henderson County. The latter two entities held tax liens against the property.

The City of Corydon did not file an answer in this action. Henderson County filed its answer on July 27, 2006. Finally, Cartwright filed a *pro se* answer on July 31, 2006. Cartwright admitted the existence of the mortgage and the tax

liens, but generally denied any default. He also asserted that the mortgage should be limited to the described property.

On September 25, 2006, Manufacturers filed a motion for default judgment against the City of Corydon and Cartwright's spouse. It also filed a motion for summary judgment against Cartwright and Henderson County. Cartwright did not respond to the motion. Consequently, on October 9, 2006, the trial court entered a judgment against Cartwright and an order of sale for the property.

Thereafter, on November 2, 2007, Cartwright filed a Kentucky Rules of Civil Procedure (CR) 60.02 motion to set aside the judgment and order of sale. Cartwright asserted in the motion and by affidavit that he did not receive notice of Manufacturers' motion for summary judgment. At the same time, Cartwright filed a notice of appeal from the October 9, 2006, judgment and a petition for bankruptcy with the United States Bankruptcy Court for the Western District of Kentucky. Upon receiving notice of the bankruptcy filing, the trial court cancelled the sale of the property and placed the case in abeyance.

In June of 2007, Cartwright filed notices with the trial court and this Court that the bankruptcy petition had been withdrawn. He also filed a motion with the trial court to renew his prior CR 60.02 motion to vacate the judgment. Initially, the trial court granted the motion. But upon being advised of Cartwright's prior notice of appeal, the court set aside its order, finding that it

lacked jurisdiction to address the merits of the motion. Cartwright now pursues this appeal.

As previously noted, Cartwright filed his CR 60.02 motion on the same day he filed his notice of appeal. Since the trial court never had the opportunity to rule on the merits of the motion, the notice issue is not before this Court. Furthermore, Cartwright does not appeal the judgment granting the foreclosure based on his default on the note. Rather, the only matter properly presented on appeal concerns the sufficiency of Manufacturers' evidence for reformation of the mortgage.

Cartwright argues that Manufacturers failed to present sufficient evidence showing that it was entitled to reformation of the mortgage. In reviewing a motion for summary judgment, a trial court must consider all stipulations and admissions on file. CR 56.03. Summary judgment is only proper where the movant shows that the adverse party could not prevail under any circumstances. *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 480 (Ky. 1991), citing *Paintsville Hosp. Co. v. Rose*, 683 S.W.2d 255 (Ky. 1985). The standard of review on appeal of a summary judgment is whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law. *Scifres v. Kraft*, 916 S.W.2d 779 (Ky. App. 1996). There is no requirement that the appellate court defer to the trial court since factual findings are not at issue. *Goldsmith v. Allied Bldg. Components, Inc.*, 833 S.W.2d 378, 381 (Ky. 1992).

However, a party opposing a motion for summary judgment cannot rely merely on the unsupported allegations of his pleadings, but is required to present “some affirmative evidence showing that there is a genuine issue of material fact for trial.” *Hallahan v. The Courier Journal*, 138 S.W.3d 699, 705 (Ky. App. 2004), quoting *Steelvest*, 807 S.W.2d at 482. Cartwright presents no evidence challenging Manufacturers’ evidence for reformation of the deed. Therefore, the only question on appeal is whether Manufacturers was entitled to reformation of the mortgage as a matter of law.

As a basis for reformation, Manufacturers contends that the parties made a mutual mistake concerning the property description contained in the mortgage. In support of its request for reformation of the mortgage, Manufacturers attached a copy of a quitclaim deed from Mary Jane Blanford conveying her interest in a 0.425 acre tract to Cartwright. That tract was adjacent to a 0.774 tract which Cartwright already owned. Manufacturers also attached a copy of a recorded June 25, 1984, plat which consolidated the smaller tract with Cartwright’s 0.774 acre tract.

The legal description in the 1997 mortgage only described the 0.774 acre tract. Likewise, the 1997 appraisal which accompanied the mortgage also described only the 0.774 acre tract.¹ Nevertheless, Manufacturers argues that the two tracts became a single, indivisible tract by virtue of the 1984 consolidation plat, and therefore the mortgage should be reformed to cover the entire property.

¹ Manufacturers attached the appraisal as an exhibit to its motion for summary judgment.

But while Manufacturers' evidence was uncontested, we must conclude that it failed to establish a right to reformation of the mortgage by clear and convincing evidence.

It is well-established that courts have authority to reform written contracts when, because of fraud or mutual mistake, the writing does not reflect the intentions and understanding of the party seeking relief. *Bradshaw v. Kinnaird*, 319 S.W.2d 475, 477 (Ky. 1958); *Mayo Arcade Corp. v. Bonded Floors Co.*, 240 Ky. 212, 41 S.W.2d 1104, 1108 (1931). Reformation of a deed may be granted only if the mistake is mutual, the evidence is clear, convincing and beyond reasonable controversy, and it is shown that the parties had actually agreed upon terms different from those appearing in the written instrument. *Price v. Godby*, 263 S.W.3d 598, 602 (Ky. App. 2008), citing *Pressley v. Morton*, 325 S.W.2d 81, 83 (Ky. 1959). *See also Deskins v. Leslie*, 387 S.W.2d 596 (Ky. 1965). The courts goal is to respond meaningfully to genuine instances of fraud or mistake without thereby undermining the ordinary expectation that contracts will be enforced according to their plain terms. *Mayo Arcade Corp.*, 41 S.W.2d at 1109.

In striking this balance, Kentucky's courts have insisted that the parties to a contract exercise "at least the degree of diligence which may be fairly expected from a reasonable person." *Id.* Consequently, contract reformation is not available where the complaining party negligently failed to detect the fraud or mistake. *Id.* Although Manufacturers' evidence would establish a unilateral mistake in the property description by its predecessor, we must conclude that it has

not presented clear and convincing evidence of a mutual mistake, or that the parties clearly intended to mortgage both tracts.

The clear face of the mortgage and the accompanying documents demonstrate only that the parties intended the mortgage to cover the 0.774 acre tract. Manufacturers presents no evidence that the tracts are physically indivisible. Manufacturers correctly points out that the lots would need to be subdivided prior to a conveyance, Kentucky Revised Statutes (KRS) 100.277(2). But it presents no authority that the 1984 consolidation plat would have precluded Cartwright from encumbering only one portion of the property.

We recognize that the trial court granted the reformation based on Manufacturers' uncontested motion for summary judgment. Furthermore, Manufacturers may ultimately be entitled to reformation. But at this point in the proceedings, we must conclude that Manufacturers failed to establish that it was entitled to reformation of the mortgage as a matter of law. Therefore, summary judgment was not appropriate on this issue.

Accordingly, the judgment of the Henderson Circuit Court is affirmed in part, reversed in part, and remanded for further proceedings on Manufacturers' request for reformation of the mortgage.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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BRIEF FOR APPELLEE
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NO BRIEF FILED FOR APPELLEES
COUNTY OF HENDERSON OR
CITY OF CORYDON