RENDERED: JUNE 15, 2012; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-002406-MR

THERESA GERSTLE — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE JAMES M. SHAKE, JUDGE
ACTION NO. 08-CI-001970

REPUBLIC BANK & TRUST COMPANY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE AND STUMBO, JUDGES; LAMBERT,[1] SENIOR JUDGE.

LAMBERT, SENIOR JUDGE: Theresa Gerstle appeals the trial court's grant of summary judgment ordering the sale of certain real property to satisfy defaulted

[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 Kentucky Revised Statutes (KRS) 21.580.

loans made against that property. Upon review, we affirm the judgment of the Jefferson Circuit Court.

Gerstle secured loans and executed first mortgages in favor of Republic Bank & Trust for two tracts of property in Louisville: the first on November 11, 2003, when she executed a promissory note in the amount of $54,400 secured by a mortgage lien on property at Goldsmith Lane, and the second on March 14, 2005, when she executed a promissory note in the amount of $149,000 secured by a mortgage lien on property at Cooper Chapel Road.

Republic filed a complaint on February 19, 2008, to enforce the notes and mortgages. The November 2003 note was overdue for an October 2007 payment and had been accelerated pursuant to the terms of the loan when the complaint was filed. Likewise, the March 2005 note was overdue for a November 2007 payment and had been accelerated pursuant to the terms of the loan when the complaint was filed. After Gerstle filed her answer to the complaint on June 11, 2008, the bank filed a motion for summary judgment on October 17, 2008.

Gerstle filed a counterclaim on November 4, 2008, with six allegations. She claimed the bank was negligent in its appraisal of the Cooper Chapel property and negligent in "closing the deal" before all inspections were complete. She further alleged the bank was negligent in failing to disclose "known or unknown" defects in that property and by requiring an additional down payment "at the last minute" before closing on the loan. She further claimed negligence in failing to disclose until "the last minute" that all loan payments must be linked to

other accounts at the bank and for failing to negotiate a settlement. She then stated all negligence claims "may give rise to fraud, as discovery is made." She did not file any affidavits or other proof regarding the pending motion for summary judgment except for a blanket denial.

On November 12, 2008, the master commissioner filed a report recommending entry of a judgment and order of sale. That order was entered by the court on November 26, 2008. From that order, Gerstle then filed this appeal on December 23, 2008.

"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, 781 (Ky.App. 1996). Gerstle first suggests that Republic lacked a persuasive basis for the summary judgment. Summary judgment is "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). The record is clear that the bank was entitled to a foreclosure on the loan and an order of sale. Gerstle was months behind on meeting her monthly payment obligations. Pursuant to the terms of the loans, the bank accelerated the loans making the entire balance due. Summary judgment is a correct decision "when it appears impossible for the nonmoving party to produce evidence at trial warranting a judgment in his favor." *Huddleston v. Hughes,* 843 S.W.2d 901, 903 (Ky.App. 1992). It was Gerstle who failed to meet her

obligations under the loan contracts. She was unable to bring any evidence to the trial court to persuade it that the bank was not entitled to judgment.

Next Gerstle suggests that because the summary judgment does not address each of her counterclaim points, the judgment is "invalid." She further speculates that because the counterclaims were filed late, the trial court may have believed it could ignore them. There is nothing in the record to indicate the trial court ignored the counterclaims for any reason. We will not speculate as Gerstle suggests we do but instead we examine her counterclaim. She provided no evidence in any form to counter Republic's requested summary judgment. The counterclaim consisted of a number of allegations yet none were supported by any factual evidence.

> [T]he appellants have stated potentially valid causes of action, but at each point they have failed to produce any evidence, in the record, to support such legal theories. The bank met its *prima facie* burden of demonstrating the absence of any genuine issue of material fact. The appellants failed to produce any affirmative evidence, by deposition testimony, affidavits, documents or otherwise, to counter the bank's evidence, offered in support of its motion for summary judgment. Unsupported allegations are insufficient to create a genuine issue of material fact.

de Jong v. Leitchfield Deposit Bank, 254 S.W.3d 817, 825 (Ky.App. 2007). We have previously found that when ruling on a motion for summary judgment, the trial court need not address counterclaims unsupported by actual evidence. *Smith v. Food Concepts, Inc.,* 758 S.W.2d 437, 438 (Ky.App. 1988). Absent anything beyond the counterclaim's allegations, the trial court order remains valid.

Gerstle's next two arguments rest on her previous argument that the trial court's order was "invalid." Having explained why the order is in fact valid, we need not further determine her now moot arguments regarding an invalid order.

Finally, Gerstle presents the issue that the bank engaged in predatory lending that would be a defense to the bank's cause of action. She defines a predatory lender as one who improperly provides a "high-cost home loan" as defined by Kentucky Revised Statutes (KRS) 360.100. Although she argues the counterclaim presented the issue of predatory lending as a defense, we have examined each instance of that counterclaim and can find no such reference. The allegations of negligence, even if elevated to allegations of fraud as the counterclaim states may be possible do not rise to the level of particularized violations of KRS 360.100. We will not consider an issue on appeal that has not been raised in the trial court. *Combs v. Knott County Fiscal Court,* 141 S.W.2d 859 (Ky. 1940).

Discovering no error, we affirm the judgment of the Jefferson Circuit Court.

STUMBO, JUDGE, CONCURS.

ACREE, JUDGE, CONCURS AND FILES SEPARATE OPINION.

ACREE, JUDGE, CONCURRING: I concur with the majority's well-written opinion. However, I write separately because I do not want this opinion to be construed as an improper exercise of appellate jurisdiction.

As the majority notes, Gerstle attempted to present a counterclaim that was never addressed. Our jurisprudence is clear that this Court lacks jurisdiction to hear appeals from orders and judgments that fail to dispose of a counterclaim for they lack finality under Kentucky Rules of Civil Procedure (CR) 54.02. *Trumbo v. Parsley*, 461 S.W.2d 67, 68 (Ky. 1970). However, I consider, and I believe the circuit court agrees, that Gerstle's counterclaim was untimely, merely tendered and not filed, and of no consequence to the proceedings.

The sequence of relevant events is this: (1) Republic Bank filed its complaint; (2) Gerstle filed an answer *reserving the right to file a counterclaim*; (3) Republic Bank filed a motion for summary judgment; (4) five months after filing her answer, Gerstle tendered a counterclaim; (5) the circuit court granted Republic Bank's summary judgment motion without addressing Gerstle's counterclaim.

CR 13.01 plainly requires 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[.]" (Emphasis added); CR 7.01 (defining a "pleading" as a "complaint and an answer"). Likewise, CR 8.01(1) describes a counterclaim as "[a] pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third-party claim, [that] shall contain (1) a short and plain statement of the claim showing that the pleader is entitled to relief and (2) a demand for judgment for the relief to which he deems himself entitled."

Gerstle did not set forth, in her answer, the factual allegations of her counterclaim entitling her to relief; instead she attempted to "reserve" the right to

assert a counterclaim at a later time. Unmistakably, this falls far short of proscribing "a short and plain statement" of her counterclaim as required by CR 8.01. *See Carson Park Riding Club v. Friendly Home for Children*, 421 S.W.2d 832, 835 (Ky. 1967).

Because Gerstle failed to adequately assert a counterclaim in her answer, her only recourse was to file a motion requesting an enlargement of time pursuant to CR 6.02, or seeking leave to amend her answer pursuant to CR 15. This requires the circuit court's participation and exercise of discretion. *Montfort v. Archer*, 477 S.W.3d 143, 144 (Ky. 1970) ("Enlargement under [CR 6.02] is to be granted by the circuit court for cause shown, in the exercise of a judicial discretion."); *Bradford v. Billington*, 299 S.W.2d 601, 603 (Ky. 1957) (leave to amend a complaint pursuant to CR 15.01 "is addressed to the sound discretion of the trial judge."). No such motion was filed or granted.

We have previously said "a party cannot unilaterally enlarge the time within which the Civil Rules require action." *Stipp v. St. Charles*, 291 S.W.3d 720, 724 (Ky. App. 2009). If we accepted Gerstle's alternative, unilateral means of enlarging the time limits and methods of Rule 13 through "reservation," we would be sanctioning an abrogation of our Civil Rules. *See Montfort v. Archer* at 144 ("[CR 6.02] prescribes procedures for obtaining such enlargements").

Accordingly,

it is my opinion that Gerstle's counterclaim was not timely filed and need not have been (and properly was not) addressed by the circuit court. Because no claim

remained outstanding, the circuit court properly designated its November 26, 2008 order final and appealable.

BRIEF FOR APPELLANT:

Frank Yates, Jr.
Louisville, Kentucky

BRIEF FOR APPELLEE:

Helene Gordon Williams
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