

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-001525-MR

STEVEN PINSON;
AND SHERRY PINSON

APPELLANTS

v. APPEAL FROM PIKE CIRCUIT COURT
HONORABLE EDDY COLEMAN, JUDGE
ACTION NO. 07-CI-00930

BOBBY THACKER; AND
THACKER AUTO PARTS, INC.

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: NICKELL AND WINE, JUDGES; HARRIS, SENIOR JUDGE.

WINE, JUDGE: Steve and Sherry Pinson (“the Pinsons”) appeal from a summary judgment by the Pike Circuit Court dismissing their claim against Thacker Auto Parts, Inc. (“Thacker Auto”) to obtain the release of a mortgage lien and damages pursuant to Kentucky Revised Statute (“KRS”) 382.365(4). Although it is not

clear that the mortgage lien secures post-judgment attorney fees, we agree with the trial court that Thacker Auto had good cause to deny the Pinsons' request to release the lien after satisfaction of the judgment. We disagree with the trial court that the lien clearly includes post-judgment attorney fees. However, we conclude that this issue was not ripe for adjudication at the time the Pinsons brought this action and is now moot. Hence, we affirm the entry of summary judgment.

The underlying facts of this action were set out in detail in the prior appeal as follows:

In March 1993, the Pinsons purchased an auto parts business from Thacker Auto for \$300,000, secured by a promissory note and mortgage. Pinson leased the business premises from Thacker and continued to operate the business as Nationwide Auto Parts. Eleven years later, in July 2004, the Pike District Court found Pinson guilty of forcible detainer and directed him to vacate the business premises. In August 2004 Thacker Auto filed a mortgage foreclosure action against Pinson. Meanwhile, Pinson and his wife filed several bankruptcy proceedings.

In November 2004, before Pinson finished moving inventory from the premises, which he had been ordered to vacate, the leased building and its contents were destroyed by fire. Thacker then intervened in the foreclosure action, asserting that Pinson had defaulted in his rent payments, and that he had "negligently or otherwise" caused the fire. Further, Thacker Auto amended its complaint to name Pinson's casualty insurance provider, Kentucky Farm Bureau (Farm Bureau), as a defendant in the action. That claim was eventually resolved by Farm Bureau's tender to the Pike Circuit Court Clerk of a total of \$50,000 for structural loss and \$160,000 for inventory loss. In April 2006 the court entered a partial summary judgment awarding Thacker the \$50,000 tendered by Farm Bureau for the structural loss.

The civil action went to trial in November 2006, and the jury found that Pinson intentionally started the fire. In accordance with the jury's verdict, the court entered a judgment finding the Pinsons jointly and severally liable to pay (1) Thacker a total of \$109,600 plus prejudgment and post[-]judgment interest relating to unpaid rent and structural damage, (2) Thacker Auto \$45,900 plus prejudgment and post[-]judgment interest relating to the unpaid promissory note, (3) Thacker Auto \$19,000 in attorney's fees, and (4) costs to both Thacker and Thacker Auto. The court subsequently amended its judgment to prioritize the various liens, and to reflect that Steve Pinson individually, but not Sherry Pinson, was liable for payment. The court also found that \$50,000 of the judgment in favor of Thacker for the destruction of the premises already had been satisfied by the April 2006 partial summary judgment in his favor.

On January 5, 2007, the day after entry of the judgment, the Pinsons paid \$77,787.91 to Thacker Auto in satisfaction of the judgment. However, Pinson also appealed the amount of the award of attorney fees.¹ On March 14, 2007, the Pinsons sent a written notice to Thacker Auto requesting that Thacker Auto release the mortgage lien on the property. Thacker Auto declined to release the lien because the Pinsons' appeal was still pending.

The Pinsons filed this action seeking release of the lien and damages pursuant to KRS 382.365. On July 18, 2008, the trial court granted Thacker Auto's motion for summary judgment. The trial court found that the mortgage lien secures attorney fees incurred in collecting any unpaid amount of the purchase price, including attorney fees which would be incurred. Since attorney fees would

¹ On appeal, this Court affirmed the judgment, including the entire award of attorney fees. *Pinson v. Thacker*, Nos. 2007-CA-000262-MR & 2007-CA-000282-MR, 2008 WL 4998428 (Ky. App. 2008).

presumably still accrue while the matter was on appeal, the trial court found that the total amount of the mortgage could not be determined until the appeal was finally resolved. As a result, the court concluded that Thacker Auto was not obligated to release the lien at that time. The Pinsons now appeal.

KRS 382.365(1) requires 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(4) further provides that “[i]f 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 or to a party with an interest in 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.” The parties in this case agreed that Pinson has satisfied the judgment in favor of Thacker Auto. Thacker Auto maintains that the mortgage lien also secured post-judgment attorney fees and costs incurred while the matter was on direct appeal.

There is no Kentucky caselaw which directly addresses this point. Other jurisdictions have determined that once a contract has been merged into the judgment, post-merger attempts to collect attorney's fees authorized only by the merged contract cannot be sustained. *See Monarc Construction, Inc. v. Aris Corp.*, 188 Md.App. 377, 981 A.2d 822 (2009); *Hatch v. T & L Associates*, 319 N.J. Super. 644, 726 A.2d 308 (N.J. Super. A.D. 1999); *Florida Pottery Stores of*

Panama City, Inc. v. American Nat. Bank, 578 So.2d 801, 806, (Fla. App. 1991); *Production Credit Ass'n. of Madison v. Laufenberg*, 143 Wis.2d 200, 420 N.W.2d 778, 779 (1988), *Chelios v. Kaye*, 219 Cal.App.3d 75, 80, 268 Cal.Rptr. 38, 40 (Cal. App 4 Distr. 1990), and *Caine & Weiner v. Barker*, 42 Wash.App. 835, 713 P.2d 1133, 1134 (1986). Taking a contrary view, the Kentucky Supreme Court recently held that *res judicata* does not preclude a claim for post-judgment and appellate attorney fees because the claim for additional attorney fees is distinct and separate from the contract claim. *Moorhead v. Dodd*, 265 S.W.3d 201, 204 (Ky. 2008).

But while Thacker Auto may have a separate claim for post-judgment attorney fees, it is not clear that this claim is secured by the existing mortgage lien. Given this ambiguity in the law, we agree with the trial court that Thacker Auto had a good cause for declining to release the lien while the appeal was pending.

Furthermore, Thacker Auto's cause of action for additional attorney fees did not accrue until the appeal was resolved. Consequently, the application of the mortgage lien to that prospective claim was not ripe for adjudication at the time Pinson brought this action. And finally, the parties agree that Thacker Auto executed and recorded a release of the mortgage on April 1, 2009. Therefore, the Pinsons' request to release the lien is now moot. Consequently, we need not reach the substantive question of whether the mortgage lien applied to post-judgment attorney fees.

Accordingly, the summary judgment by the Pike Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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BRIEF FOR APPELLEE:

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