

**Commonwealth of Kentucky**

**Court of Appeals**

NO. 2009-CA-002055-MR

WOMBLES CHARTERS, INC.;  
and BOBBY G. WOMBLES, JR.

APPELLANTS

v. APPEAL FROM JESSAMINE CIRCUIT COURT  
HONORABLE C. HUNTER DAUGHERTY, JUDGE  
ACTION NO. 08-CI-00369

COMMUNITY TRUST BANK, INC.;  
and FIFTH THIRD BANK, KENTUCKY, INC.

APPELLEES

OPINION  
AFFIRMING

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BEFORE: VANMETER AND WINE, JUDGES; SHAKE,<sup>1</sup> SENIOR JUDGE.

WINE, JUDGE: Wombles Charters, Inc. and Bobby G. Wombles, Jr. (collectively “the appellants”) appeal from a summary judgment entered by the Jessamine Circuit Court in favor of Community Trust Bank, Inc. (“Community Trust”) and Fifth Third Bank, Kentucky, Inc. (“Fifth Third”) (collectively “the appellees”).

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<sup>1</sup> Senior Judge Ann O’Malley Shake sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

The appellants argue that summary judgment was premature because of their pending claims alleging fraud and breach of fiduciary duty. However, the appellants did not timely file their answer and counterclaim asserting these claims. Furthermore, the appellants did not include an affidavit setting out the facts supporting their fraud claims and the trial court did not abuse its discretion by denying their post-judgment motion to file an affidavit. We also agree with the trial court that Wombles had notice of the summary judgment hearing and failed to appear or present any evidence showing any genuine issues of material fact. Therefore, the trial court properly granted judgment for the appellees. Hence, we affirm.

The relevant facts of this action are not in dispute. On July 23, 1999, Wombles Charters, Inc. executed a promissory note to Community Trust in the amount of \$492,000.00. The note was secured by personal property owned by Wombles Charters and real property owned by Bobby Wombles, Jr., the principal of Wombles Charters. At the same time, Bobby Wombles executed an agreement personally guaranteeing payment of the note.

Thereafter, Wombles Charters defaulted on the note. On April 7, 2008, Community Trust brought this action to foreclose on the personal and real property and to obtain a judgment for any deficiency against Bobby Wombles. Community Trust also named Fifth Third, which held a mortgage on the real

property. Fifth Third filed an answer and cross-claim also seeking foreclosure and a judgment against Bobby Wombles.

The appellants were served with the complaints, appeared at several hearings seeking extensions of time, and responded to some (but not all) discovery requests. However, they did not immediately file an answer. On April 30, 2009, Community Trust filed a motion for summary judgment. Fifth Third joined in the motion. The motion was originally scheduled for hearing on May 21, 2009. Prior to that time, the appellants moved for an extension of time to file a response. The motion was granted by agreed order and the hearing was passed to June 25, 2009.

The parties also agreed to extend the time for the appellants to file a response to the motion until June 11, 2009. However, the appellants did not file their response until June 23, 2009. In the response to Community Trust's motion for summary judgment, they alleged that Community Trust secured the promissory note, mortgage and guaranty through fraud and breach of fiduciary duty. At the same time, they also filed an answer and counterclaim which also asserted these claims. The appellants did not file a motion for leave to file the answer and counterclaim, and they did not attach a counter-affidavit to their pleadings.

The hearing on the motion for summary judgment was held on June 25, 2009. However, counsel for the appellants did not appear at the hearing. On June 29, 2009, the trial court entered a calendar order granting the motion for summary judgment. The trial court directed that the appellees tender a judgment and order of sale, which was entered on July 21, 2009.

On July 14, 2009, counsel for the appellants wrote to the trial court and objected to entry of the judgment. In the letter, counsel informed the court that he had been out of the state at the time of the hearing and he believed he had an agreement with Community Trust's counsel to postpone the hearing. The letter was not immediately accompanied by a motion to set aside the summary judgment. On July 28, 2009, the appellants filed a "motion for a new trial and/or motion to alter or amend judgment and motion for relief from judgment. On August 7, 2009, the appellants filed a motion to supplement their response with an affidavit.

Community Trust's counsel responded that the agreement had been to postpone the hearing from May 21 until June 25 and he had not agreed to a further continuance. Counsel also noted that the appellants had not filed a response to the motion for summary judgment by June 11, 2009, as previously ordered. Finally, Community Trust noted that appellants' answer was not timely, and the response was not verified and did not include an affidavit setting out the factual basis for the fraud claims.

Following a hearing, the trial court denied the appellants' motions. The court found that there were no genuine issues of material fact regarding the appellees' claims, and that the appellants had failed to offer any timely proof to counter those claims despite having sufficient time and opportunity to do so. This appeal followed.

The appellants first argue that the trial court should have set aside the summary judgment based on the absence of their counsel at the hearing. However,

the June 25, 2009, summary judgment hearing had been scheduled since May 26, 2009. The appellants' counsel did not notify opposing counsel that he would be unavailable until June 21, 2009. Counsel did not provide this notice to the trial court or request a continuance.<sup>2</sup> Furthermore, there was no evidence that the appellees' counsel had agreed to any additional continuance. Although a continuance may have been appropriate had a timely request been made, the trial court was not obligated to set aside the summary judgment based on counsel's failure to attend the hearing.

The appellants further argue that the answer and counterclaim raised issues of fact by alleging fraud and breach of fiduciary duty in the execution of the note. But as the appellees correctly note, the appellants' answer and counterclaim were not timely. Kentucky Rule of Civil Procedure ("CR") 12.01 requires that an answer to a complaint be filed within twenty (20) days after service. Under CR 6.02, a trial court may grant leave to file a belated answer "where the failure to act was the result of excusable neglect." The decision to allow an untimely answer is within the reasonable discretion of the court. *See, Bianchi v. City of Harlan*, 274 S.W.3d 368, 371 (Ky. 2008). In this case, the appellants did not move for leave to file the pleadings and did not provide any grounds for their failure to file a timely

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<sup>2</sup> At the June 25, 2009, hearing, both the appellees' counsel advised the court about the letter sent from the appellants' counsel on June 21, 2009. Community Trust's counsel pointed out that the letter had been written on a Sunday and was not received until June 23, 2009. By that time, the appellants' counsel had already left the state and could not be contacted. Given the prior delays in the case, the appellees objected to any further continuance and requested that the court enter judgment in their favor. The appellees also noted that the appellants' answer was untimely, and their response was not verified and was not accompanied by an affidavit setting out their fraud claims with particularity.

answer and counterclaim. Under the circumstances, the trial court did not abuse its discretion by refusing to accept the untimely pleading.

Even if the answer and counterclaim had been properly filed, the appellants failed to present sufficient evidence to defeat Community Trust's right to judgment. The appellants admitted execution of the note, guaranty, security agreement and mortgage, that the note was in default, that a demand for payment had been made, and that the real property was indivisible. Although the appellants generally denied the amount owed on the note, they presented no evidence to counter Community Trust's or Fifth Third's affidavits setting out the balance due.

In their answer, the appellants alleged fraud and breach of fiduciary duty as a defense. But they failed to plead those defenses with specificity as required by CR 9.02. The appellants concede that the affidavit setting out the basis for those claims was "inadvertently" omitted from their response to the appellees' motion for summary judgment. However, they argue that the trial court should have allowed them to supplement the record with the affidavit when the omission was discovered.

We disagree. The trial court was not required to allow the filing of supplemental affidavits after the hearing. CR 56.05. We find that the trial court did not abuse its discretion by denying the appellants' motion to supplement the record with the affidavit.

Finally, the appellants argue that the trial court should not have designated its judgment as final and appealable because there were pending issues

raised in the counterclaim and concerning the priority of the liens between Community Trust and Fifth Third. But in the absence of any valid defense or counterclaim, there were no genuine issues of material fact which precluded summary judgment for the appellees. CR 56.03. Likewise, since the counterclaim was never properly filed, the trial court properly declined to address the fraud and breach of fiduciary duty claims. Furthermore, the judgment specifically set out that Fifth Third's lien shall have priority over Community Trust's.<sup>3</sup> Since the judgment resolved all pending issues, the trial court properly designated the judgment as final and appealable. CR 54.01.

Accordingly, the judgment of the Jessamine Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Bobby G. Wombles  
Lexington, Kentucky

BRIEF FOR APPELLEE:

James B. Ratliff  
Pikeville, Kentucky

Emily H. Cowles  
Lexington, Kentucky

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<sup>3</sup> This issue was apparently settled by agreement between Community Trust and Fifth Third.