

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-002316-MR

PETRO ENERGY, INC. AND
ANTHONY WILSON

APPELLANTS

v.

APPEAL FROM CLINTON CIRCUIT COURT
HONORABLE EDDIE C. LOVELACE, JUDGE
ACTION NO. 05-CI-00128

TIM WITHAM AND HIS
WIFE, KAREN WITHAM

APPELLEES

OPINION
REVERSING AND REMANDING

** ** * ** * ** *

BEFORE: DIXON, STUMBO AND VANMETER, JUDGES.

DIXON, JUDGE: Appellants, Petro Energy, Inc. and Anthony Wilson, appeal from an order of the Clinton Circuit Court denying their motion for summary judgment and dismissing Petro Energy's counter-claim against Appellees, Karen Witham, individually and acting as executrix of the estate of Tim Witham

(“Withams”), in this declaratory judgment action. Because we conclude that dismissal of the counter-claim was erroneous, we reverse and remand for further proceedings.

By deed dated May 2003, the Withams purchased real estate in Clinton County from Ewert and Linda Wilson. At the time of the transaction, the property was subject to numerous liens and other encumbrances. Relevant to this case was a 1987 promissory note executed by Ewert Wilson and Earl Craig in the amount of \$15,000 to Citizens Bank of Albany. A real estate mortgage on the subject property secured the note. The note and mortgage were subsequently assigned to Petro Energy on June 6, 1994.

In 2005, the Withams filed a declaratory judgment action in the Clinton Circuit Court against all interested parties to determine what liens were valid and enforceable. The only original defendant at issue herein is Petro Energy. On March 27, 2006, Petro Energy filed an answer and counter-claim asserting that it was the successor in interest of a valid and enforceable note and mortgage on the subject property. Accordingly, it requested an *in rem* judgment and order directing the sale of the property to satisfy payment of the note. During this same time frame, Anthony Wilson, Ewert Wilson’s son, was permitted to file an intervening complaint, wherein he sought to set aside the deed of conveyance to the Withams on the grounds that he purchased all nonexempt assets of Ewert and Linda Wilson

in their 2003 bankruptcy action, including their interest in the subject property.¹

Anthony Wilson is also the owner and registered agent of Petro Energy.

On October 1, 2009, Anthony Wilson and Petro Energy filed a motion for summary judgment claiming that there was no disputed issue that Petro Energy was the assignee of the 1987 note and mortgage, and that no payments had been made since the assignment in 1994. Further, the motion alleged that Wilson, as the sole shareholder of Petro Energy, was entitled to act on the corporation's behalf.

Following a hearing, the trial court entered an order denying the motion for summary judgment and dismissing Petro Energy's counter-claim with prejudice. Citing *Hodges Adm'r v. Asher*, 224 Ky. 431, 6 S.W.2d 451 (1928), the trial court found that because the promissory note was due and payable on demand, the statute of limitations began to run on the date of the note, September 25, 1987. As such, Petro Energy's claim was time-barred since it was filed outside the 15-year statute of limitations set forth in Kentucky Revised Statutes (KRS) 413.090(2). Further, the court noted that Petro Energy did not file suit against the Wilsons, the Craigs, their heirs or assigns,² and that the Withams could not be personally liable to Petro Energy since they were not the makers of the note. Finally, the trial court ruled that the relationship between Anthony Wilson and Petro Energy was "recondite," and that Wilson had failed to sufficiently establish in his intervening complaint that he was the sole shareholder of Petro Energy or

¹ The validity of the Witham's deed is not relevant to this appeal but is noted solely to explain how Anthony Wilson became a party herein.

²

The trial court took judicial notice that both Ewert Wilson and Earl Craig were deceased.

that he was authorized to institute proceedings on its behalf. Following the denial of a motion to alter, amend or vacate the judgment, Wilson and Petro Energy appealed to this Court as a matter right.

Petro Energy first argues that the trial court erred in relying upon the decision in *Hodges Adm'r v. Asher*, in ruling that its counter-claim was barred by the statute of limitations. We must agree. KRS 413.090(2) requires that an action upon a written contract be commenced within fifteen (15) years after the cause of action accrued. However, Kentucky law is clear that payment on a promissory note is sufficient to stop the running of the statute up to that time, and that “the period of limitation will then be computed from the date of the payment.”

Richardson's Adm'r v. Morgan, 233 Ky. 540, 26 S.W.2d 32, 33 (1930); *see also Radford's Adm'rs v. Harris*, 144 Ky. 809, 139 S.W. 963 (1911). There appears to be no dispute among the parties that the last payment was made on the note on August 11, 1993. Thus, it is irrelevant that no payment had been made since the note was assigned to Petro Energy. Because the statute of limitations was “re-set” on the date of the payment, Petro Energy’s March 27, 2006, counter-claim was filed well within the statute of limitations.

We also conclude that the trial court erred in finding that dismissal of the counter-claim was warranted because it failed to name any defendants who could be liable on the note. Petro Energy acknowledges that the Withams are not personally liable, and that it would not be entitled to an *in personam* judgment

against them. As such, Petro Energy sought an *in rem* judgment against the property itself.

Proceedings are divided into three classes: (1) *in personam*, (2) *in rem*, and (3) *quasi in rem*. In *Gayle v. Gayle*, 301 Ky. 613, 192 S.W.2d 821, 822 (1946), the Court explained:

A judgment in a proceeding *in rem* is an adjudication upon the status of some particular thing by a tribunal having jurisdiction of the subject matter; it differs from a judgment in a proceeding *in personam*, in that the latter is an adjudication of the rights of the parties to the action, and does not directly affect the status of a thing or res. A personal judgment is a pronouncement binding only on the parties to the action and their privies; a judgment *in rem*, by a court of competent jurisdiction, is a pronouncement upon the status of the subject matter, and is binding upon the world. Judgments *in rem* and *quasi in rem* may be pronounced in an action in which the defendant has been notified by constructive process; whereas, a personal judgment may be pronounced only by personal service upon the defendant within the territorial jurisdiction of the court, or by his voluntary appearance to the action. (Internal citations omitted).

Contrary to the Withams' assertion, the law does not require Petro Energy to first seek a judgment against the makers, their heirs or assigns. A party may obtain an *in rem* judgment to enforce a lien without first obtaining a personal judgment against the debtors. *See Julian v. Pilcher*, 63 Ky. (2 Duv.) 254 (1865). The Withams purchased property subject to a mortgage held by Petro Energy. Given that the amount due on the note was ascertainable, Petro Energy was entitled to seek an *in rem* judgment against the property.

Finally, we must conclude that trial court erred in dismissing the counter-claim due to Anthony Wilson's alleged failure to establish his relationship to Petro Energy. In his September 2009 affidavit, Wilson testified that he is the owner and incorporator of Petro Energy. In interrogatories, Wilson claimed that he and his wife, Teresa, are the only individuals who have ever been shareholders of Petro Energy. Indeed, the articles of incorporation list no other individuals.

Notwithstanding Wilson's relationship to Petro Energy, as a Kentucky corporation it was entitled to bring a cause of action. In fact, it was Petro Energy, not Wilson, who asserted the counter-claim against the Withams. In their brief, the Withams cite to 19 Am. Jur. 2d *Corporations* § 2896 (1986), in arguing that Petro Energy could not bring a counter-claim due to its administrative dissolution. We disagree.

KRS 271B.14.050 provides in relevant part:

- (1) A dissolved corporation shall continue its corporate existence but may not carry on any business except that appropriate to wind up and liquidate its business and affairs, including:
 - (a) Collecting its assets;
.....
 - (e) Doing every other act necessary to wind up and liquidate its business and affairs.
- (2) Dissolution of a corporation shall not:
 - (a) Transfer title to the corporation's property;
.....

(e) Prevent commencement of a proceeding by or against the corporation in its corporate name;

. . . .

(g) Terminate the authority of the registered agent of the corporation;

We are of the opinion that Petro Energy had statutory authority to file the counter-claim in the name of the corporation. As such, even if we were to agree with the trial court that Wilson failed to establish his relationship to Petro Energy, that finding has no affect upon Petro Energy's entitlement to pursue the counter-claim.

For the foregoing reasons, we conclude that the Clinton Circuit Court erred in dismissing Petro Energy's counter-claim, as well as denying the motion for summary judgment. As such, we reverse and remand this matter to the lower court for entry of an order granting Petro Energy and Anthony Wilson's motion for summary judgment. Petro Energy is the holder in due course of a valid and enforceable note and mortgage and, as such, is entitled to an *in rem* judgment against the subject property.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Sara Beth Gregory
Thomas E. Carroll
Monticello, Kentucky

BRIEF FOR APPELLEE:

M. Gail Wilson
Jamestown, Kentucky