RENDERED: OCTOBER 29, 2010; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-002130-MR

EUGENE WALTERS; JEFF WALTERS;
AND KATHY WALTERS — APPELLANTS

v.

APPEAL FROM WHITLEY CIRCUIT COURT
HONORABLE PAUL E. BRADEN, JUDGE
ACTION NO. 98-CI-00610

EDITH LANHAM; MICHAEL SANTOS;
AND DEBORAH SANTOS — APPELLEES

OPINION AND ORDER
AFFIRMING
AND DENYING MOTION TO DISMISS

** ** ** ** **

BEFORE: CLAYTON AND KELLER, JUDGES; BUCKINGHAM,[1] SENIOR JUDGE.

BUCKINGHAM, SENIOR JUDGE: Eugene, Jeff, and Kathy Walters appeal from an Agreed Judgment of the Whitley Circuit Court entered as the settlement of their

[1] Senior Judge David C. Buckingham 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.

dispute with Edith Lanham and Michael and Deborah Santos over the ownership to real property. The Walters assert several errors, including judicial bias. We affirm.

Edith Lanham and her husband, Edward, purchased approximately 22 acres of property for $30,000 in 1986. Edward died in October 1991 leaving Edith as sole owner. Edith worked outside the home but then began receiving disability payments in November 1996. One of Edith's sons, Eddie, is disabled and lives with her.

Edith was unable to stay current on the mortgage payments to PNC and asked her children to buy the property. Jeff and Kathy Walters, Edith's son-in-law and daughter, agreed to make the mortgage payments, set aside three acres for Eddie, and provide certain improvements in exchange for Edith leaving the property to them in her will. They made those payments for seven years and lived with Edith on the property for two of those years.

In 1996, Jeff took Edith to an attorney to execute a deed. He wanted to put the property in the name of Eugene Walters, his father, who would hold the property in trust. According to Eugene Walters, he held the property in trust for his son who was in the coal business and was a potential target for dishonest persons. The purpose of the trust was to protect this asset from unscrupulous persons who might sue him. This deed was executed in September 1997.

Edith testified she thought she was merely granting three acres to her son Eddie and was surprised when she later discovered the conveyance was to

Walters. Unfortunately, a rift developed, and, on December 31, 1997, Edith deeded the property to Michael and Deborah Santos, another daughter and son-in-law. In September 1998, Edith filed an action against Eugene Walters seeking to set aside the deed to him.

After depositions and other discovery had commenced, Edith filed an amended complaint adding Jeff and Kathy Walters as defendants since Eugene Walters had deeded the property to them. The amended complaint also added Michael and Deborah Santos as plaintiffs since Lanham had executed a deed of the property to them. Eugene Walters filed an answer and counterclaim, but Jeff and Kathy did not. In 1999 Jeff and Kathy borrowed $61,691.00 using the property as collateral. Of that sum, $26,664.26 was used to pay off the original mortgage held in Edith's name.

Both sides retained new counsel for various reasons, and the matter was set for a jury trial to start on February 5, 2008. That date was then moved to July 17, 2008, and again to August 18, 2008, after the matter was transferred from Division I of the circuit court to Division II. A motion *in limine* filed by Edith and the Santos was successful and limited the trial to the issues raised in the complaint.

During the trial, it became clear to the judge that neither Jeff nor Kathy Walters had filed an answer or counterclaim. The judge opined that a default judgment against those two could be in order. Eugene Walters had already testified he did not want anything from Lanham and held no claim against her because he was just temporarily holding the property in his name to keep the asset

free from any claims arising against his son Jeff. The parties reached an agreement at the judge's encouragement during a recess during the trial. Eugene, Jeff, and Kathy Walters were to be paid $38,500.00 in return for a special warranty deed to the Santos along with a release of any mortgage against the property.

When presented with the agreement, the judge asked counsel for both sides if it was the agreement of the parties. Both answered yes. Eugene, Jeff, and Kathy Walters, along with Edith Lanham and Michael and Deborah Santos, were then sworn and asked if this was the agreement they intended. Each answered that it was. The jury was then dismissed, and the Agreed Judgment was entered on September 3, 2008, specifying the terms previously sworn to and recited into the record.

On September 8, 2008, the Walters filed a motion to set aside the settlement on the grounds they were not allowed ample time to make a decision. That was followed by a motion to alter, amend, or vacate the judgment on September 16, 2008. The court heard arguments and denied the motions by order entered on October 13, 2008. This *pro se* appeal by the Walters followed.

The Walters now argue five errors including judicial bias where they allege the trial judge became an advocate for the plaintiffs, refused to allow the introduction of admissible evidence, refused to acknowledge a valid counterclaim, and exhibited prejudice before and during the trial. They additionally claim they proved their case at trial and that they were misled into adopting the agreed judgment.

Many of the Walters' arguments focus on what they perceive as judicial bias. Lanham and the Santos contend that the Walters did not preserve this argument for appellate review by raising the issue before the trial court by moving the judge to disqualify himself.

We generally do not examine issues that are raised here for the first time. *West v. Commonwealth,* 780 S.W.2d 600, 602 (Ky. 1989). It is true that the Walters never alleged or raised an issue or complained of judicial bias at the trial court level. Now, they allege that the judge's rulings and his stated inclination on possible rulings demonstrate bias. Simply because a judge rules or expresses an inclination to rule against a party is insufficient to prove bias. Our review of the record does not yield a single instance where the trial judge made statements or took actions that were improper or indicated he personally favored one side or the other. While it is true that the judge did indicate his inclination to rule on some issues, there is no indication that the rulings would have been incorrect. Rather, it appears that the judge correctly observed the risks that the parties would encounter if the trial continued rather than settled. There is insufficient evidence for us to find any judicial bias, and the Agreed Judgment will not be set aside for that reason.

The Walters next argue that the court's ruling excluding evidence they had made payments for Edith was error. Our review of the record discloses no such ruling. The trial court discussed the issue with counsel and indicated that since Kathy and Jeff Walters did not file a counterclaim, they could make no

claims for the payments they made in the event the jury found the deed to Eugene was invalid. Based on that information, a settlement was reached and the issue of the admissibility of the payments as evidence was rendered moot. There was no error.

The Walters next argue that although Jeff and Kathy did not file an answer or a counterclaim, the answer and counterclaim filed on behalf of Eugene should inure to them. They provide no legal support for their assertion. It is correct that an answer and exception filed by one party inures to the benefit of all parties but only because the defenses or claims raised would completely preclude recovery by the plaintiff. *Rhodes v. Laswell's Adm'r,* 283 Ky. 655, 143 S.W.2d 175 (1940). That is not the case here. If the jury had found the deed to Eugene was valid, the Santos deed would have become invalid. It is true that would have inured to Jeff's and Kathy's benefit. However, the counterclaim filed by only Eugene sought $1.00 in damages along with punitive damages. His own testimony waived those issues. But, if the jury had found damages, any recovery would have been personal to Eugene and would not have inured to Jeff and Kathy. *See Haddad v. Louisville Gas & Electric Co.,* 449 S.W.2d 916, 919-20 (Ky. 1969).

Jeff and Kathy next argue that they were not at risk for a default judgment as neither had ever received proper summons. Our review of the record discloses otherwise. Regardless, they appeared ready for trial and had filed numerous motions on repeated occasions. Those actions waived the summons

requirement. *Brock v. Saylor,* 300 Ky. 471, 189 S.W.2d 688, 690 (1945). Because they failed to file an answer, they were indeed in jeopardy of a default judgment.

The Walters next argue that they proved their case at trial. The trial was suspended in the middle of testimony, and the parties reached an agreement dismissing the action. Foregoing the completion of the trial renders their argument moot. It is impossible to say how a jury would have ruled until such time as it announces its verdict. The Walters did not prove their case at trial because the case was settled before its completion.

Finally, the Walters suggest that they were forced into the agreement and did not have time to properly decide whether to proceed with the trial or enter into the Agreed Judgment. There is no evidence they were forced in any manner to settle the case. Both sides were represented by counsel. The risks of an adverse jury verdict would have been significant for either side. The trial judge first asked counsel and then asked each plaintiff and each defendant if they agreed to dispose of the case with the settlement. They each acknowledged that they did. There was no indication of fraud or coercion. Had the Walters wanted more time to consider the settlement, they should have asked for it. They did not. There is no basis to set aside the Agreed Judgment.

We are also required to consider the motion filed by Edith Lanham and the Santos to dismiss this appeal. They seek to dismiss the Walters' appeal as it was founded on a consent or agreed judgment. Such judgments are not generally reviewed on appeal absent fraud or mistake. *Browning v. Cornn,* 240 S.W.3d 671,

674 (Ky. App. 2007); *Friedman v. Friedman,* 307 Ky. 439, 211 S.W.2d 403, 403-04 (1948); *Boone v. Ohio Valley Fire & Marine Ins. Co's Receiver,* 246 Ky. 489, 55 S.W.2d 374, 375 (1932). Regardless, we have decided this appeal on its merits, rendering the motion to dismiss moot.

The judgment of the Whitley Circuit Court is affirmed, and the motion to dismiss the appeal is ordered denied as moot.

ALL CONCUR.

ENTERED: October 29, 2010

/s/ David C. Buckingham
SENIOR JUDGE, COURT OF APPEALS

BRIEFS FOR APPELLANTS:

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