

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-000347-MR

DENNIS L. BELL

APPELLANT

v. APPEAL FROM MCCRACKEN CIRCUIT COURT
HONORABLE DENNIS R. FOUST, JUDGE
ACTION NOS. 06-CI-00305, 06-CI-00813, & 06-CI-0891

COUNTRYWIDE HOME LOANS, INC.

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: MOORE AND STUMBO, JUDGES; LAMBERT,¹ SENIOR JUDGE.

LAMBERT, SENIOR JUDGE: Dennis L. Bell appeals from a judgment and order of sale by the McCracken Circuit Court in favor of Countrywide Home Loans, Inc., (Countrywide) on its actions to foreclose on Bell's real properties. Bell argues that Countrywide lacked standing to bring the foreclosure claims and that he did not waive this defense. We agree with the trial court, however, that

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.

Countrywide established its standing to bring this action. We also agree with the trial court that Bell waived any objection to Countrywide's standing by his prior admissions and through his misconduct in this action. Finally, we conclude that the issues related to the dismissal of Bell's counterclaims are not properly presented in this appeal. Hence, we affirm.

In 2004, Bell executed three separate notes and mortgages on three separate tracts of real property. All three tracts were located in McCracken County, Kentucky. The first note, dated February 2, 2004, was in the amount of \$37,000 and was secured by a mortgage on real property located at 2914 Benton Road, Paducah, Kentucky. The second note, dated February 25, 2004, was in the amount of \$35,000 and was secured by a mortgage on real property located at 2115 Park Avenue, Paducah, Kentucky. And the third note, dated May 11, 2004, was in the amount of \$28,000 and was secured by real property located at 840 Burkhart Lane, Paducah, Kentucky. The notes identified the payee as "America's Wholesale Lender," and the mortgages identified Mortgage Electronic Registration Systems, Inc. (MERS) as the holder of the mortgage.

On March 24, 2006, Countrywide, doing business as America's Wholesale Lender, commenced foreclosure actions, alleging that Bell had breached by failing to make the required escrow payments. Bell answered and asserted a

number of counterclaims, but did not object to Countrywide's standing at that time. All three complaints were consolidated into the current action.

Between 2006 and 2009, discovery proceeded in the consolidated action. Bell also brought a number of actions in various federal courts, including bankruptcy proceedings. In July of 2008, Countrywide filed motions for summary judgment and motions to dismiss Bell's counterclaims. In his response to this motion, Bell raised numerous defenses to the default, mainly based on alleged breach of contract. He also asserted, for the first time, that Countrywide lacked standing to pursue the foreclosure because its name did not appear on the notes or mortgage.

The matter was held in abeyance while Bell attempted to assert related claims against Countrywide in federal court. In 2009, the federal action was dismissed and his state-court claims were removed from abeyance. Bell moved to file an amended complaint in this action, claiming that Countrywide lacked standing to foreclose on the notes. On September 1, 2009, the trial court entered an order granting Countrywide's motion for summary judgment, denying Bell's motion to file an amended complaint, granting foreclosure on the properties, and dismissing Bell's counterclaims. On November 13, 2009, the trial court entered a monetary judgment in favor of Countrywide and an order directing the properties to be sold at judicial sale to satisfy Countrywide's judgment.

Bell now appeals from the summary judgment order and the order of sale. He primarily argues that Countrywide failed to prove its standing to

prosecute the foreclosure action. He points out that the notes identified “America’s Wholesale Lender” as the lender and MERS as the holder of the mortgage. In support of its motion for summary judgment, Countrywide submitted documentation that since 1991 it has operated in Kentucky under the registered assumed name “America’s Wholesale Lender.” Furthermore, the mortgage documents specifically stated that MERS was mortgagee only in a nominee capacity for America’s Wholesale Lender. Countrywide also submitted documentation showing assignments of the mortgages from MERS. While Bell questions the authenticity of these documents, he points to no evidence challenging Countrywide’s standing to pursue this action.²

Furthermore, we agree with Countrywide that an objection to standing can be waived unless timely raised. *Harrison v. Leach*, 323 S.W.3d 702, 708 (Ky. 2010). As previously noted, Bell did not raise the objection to Countrywide’s standing until he attempted to file the amended complaint. Therefore, the controlling question is whether the trial court abused its discretion by denying

² On December 16, 2008, Bell filed papers with the New York Secretary of State to incorporate an entity under the name “America’s Wholesale Lender, Inc.” After creating this corporation, Cheri English, Bell’s girlfriend, filed pleadings in one of the federal actions claiming that it was this company which entered into the mortgage loans with Bell in 2004. English also filed pleadings “confessing” judgment to Bell on his claims in the federal actions. The federal court struck those pleadings as fraudulent. Nevertheless, Bell filed these same documents in this action in support of his motion to dismiss. He also submitted an affidavit from “Maurits van Eck,” purportedly on behalf of the New York Corporation, stating that it was the holder of the mortgages from Bell. In denying Bell’s motion to dismiss, the trial court took notice of the federal court’s action, but did not rule on Countrywide’s motion for sanctions. We note, however, that Bell does not rely on these documents or claims in this appeal.

Bell's motion to file the amended complaint which asserted the defense. *Graves v. Winer*, 351 S.W.2d 193, 197 (Ky. 1961).

After a responsive pleading is served, Kentucky Rules of Civil Procedure (CR) 15.01 allows a trial court to permit a party to amend a "pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires." But while amendments should be freely allowed, the trial court has wide discretion to grant or deny such an amendment, and we will not disturb its ruling unless it has abused its discretion. *Lambert v. Franklin Real Estate Co.*, 37 S.W.3d 770, 779 (Ky. App. 2000), citing *Graves v. Winer*, 351 S.W.2d 193, 197 (Ky. 1961). In determining whether to permit a party to amend his complaint, a court may consider, among other factors, whether an amendment would prejudice or work an injustice upon the opposing party. *Shah v. American Synthetic Rubber Corp.*, 655 S.W.2d 489, 493 (Ky. 1983). The trial court may also consider whether the amendment would fail to cure deficiencies in the pleadings or the futility of the amendment itself. *First National Bank of Cincinnati v. Hartman*, 747 S.W.2d 614, 616 (Ky. App. 1988), citing CR 15.01; Bertelsman and Philipps, 6 *Ky. Practice* at 310 (1984).

As previously noted, Bell failed to challenge Countrywide's standing when the complaint was filed in 2006. To the contrary, in 2007, Bell filed admissions stating that he had entered into the loan transactions with Countrywide. He also gave deposition testimony which admitted that Countrywide was entitled to bring this action on the notes and the mortgages. The trial court also noted that

Bell has repeatedly attempted to delay this action by filing parallel actions in federal court. All of those actions have since been dismissed and Bell was sanctioned for misconduct in several of those actions. The trial court also noted that it had sanctioned Bell for misconduct in this action.³ Considering the delay in this action, we agree with the trial court that Countrywide would be prejudiced by Bell's untimely challenge to its standing.

Finally, Bell maintains that there were genuine issues of material fact which precluded summary judgment on his counterclaims. But as Countrywide notes in its response, Bell did not identify this as an issue in his prehearing statement, as required by CR 76.03(4)(h). Consequently, the issue is not properly presented in this appeal. CR 76.03(8).

Furthermore, the trial court also dismissed Bell's counterclaim based on his failures to comply with its prior sanction orders and for engaging in acts of fraud, as evidenced by the record. Bell does not appeal from this portion of the trial court's order, nor does he challenge the trial court's findings regarding these issues. Under the circumstances, Bell has not presented any basis to disturb the trial court's dismissal of his counterclaims.

³ On March 24, 2008, the trial court sanctioned Bell for engaging in the unauthorized practice of law by purporting to represent his company, McCracken Builders, Property and Management, while providing answers to discovery. And on May 5, 2008, the trial court sanctioned Bell for providing deliberately false answers to interrogatories. Bell notes that these orders were entered by the original trial judge, who was subsequently recused due to a conflict of interest. However, those orders and findings have never been set aside and Bell does not challenge them in this appeal.

Accordingly, the judgment and order of sale by the McCracken
Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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