

RENDERED: OCTOBER 19, 2012; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-002007-MR

JAMES F. CLAY, JR.,
AND JUDY TANNER CLAY

APPELLANTS

v. APPEAL FROM BOYLE CIRCUIT COURT
HONORABLE DARREN W. PECKLER, JUDGE
ACTION NO. 01-CI-00389

NATIONAL CITY BANK
OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: KELLER, TAYLOR, AND THOMPSON, JUDGES.

TAYLOR, JUDGE: This appeal arises from a residential foreclosure action filed by National City Bank of Kentucky against James F. Clay, Jr., and Judy Tanner Clay. The issues presented involve the Clays' supplemental counterclaim against National City for damages allegedly incurred as the result of trespass and theft while the subject property was vacant. After a bench trial, the Boyle Circuit Court

granted judgment in favor of National City as to the supplemental counterclaim and subsequently denied the Clays' motion to vacate the judgment. The Clays now appeal. After careful review, we affirm.

Facts and Procedural History

On August 13, 1998, the Clays executed a note payable to National City in the amount of \$111,650 in exchange for a loan in that amount. As security for the note, the Clays granted a mortgage to National City encumbering the property located at 480 Goggin Lane in Danville, Boyle County, Kentucky.

Although the Clays deny this, it appears that they vacated the property in August 2001 and stopped making mortgage payments. On October 1, 2001, National City filed a foreclosure action against the Clays alleging that they had defaulted under the terms of the note and mortgage. The Clays responded by filing an answer denying the allegations of National City's complaint, as well as a counterclaim alleging that National City had damaged their vehicle in the course of repossession. Both of these claims were resolved below and are not subjects of this appeal.

At some point following the filing of the foreclosure action, National City began using a company named Safeguard Properties, Inc., to inspect the Goggin Lane property, report its status, perform work orders, and the like in an effort to secure the property and to protect its value. "Uniform Covenant" number 7 of the parties' mortgage agreement plainly allowed for such:

7. Protection of Lender's Rights in the Property. If Borrower fails to perform the covenants and agreements contained in this Security Instrument, or

there is a legal proceeding that may significantly affect Lender's rights in the Property (such as a proceeding in bankruptcy, probate, for condemnation or forfeiture or to enforce laws or regulations), then Lender may do and pay for whatever is necessary to protect the value of the Property and Lender's rights in the Property. Lender's actions may include paying any sums secured by a lien which has priority over this Security Instrument, appearing in court, paying reasonable attorneys' fees and entering on the Property to make repairs. . . .

During the course of those visits, Safeguard left stickers on the residence's door indicating that the property was found to be vacant/abandoned and that the mortgagee – National City – had the right to have the property secured and/or winterized. Those stickers also advised the reader to contact Safeguard if the property was found to be no longer secure.

Although Safeguard made multiple visits to the property during litigation – particularly during 2004 – the Clays were never given notice before any of those visits. Moreover, as the years went on, it appears that the property fell into disrepair and was subject to extensive vandalism, trespassing, and theft of its contents – even after the residence had been boarded up by friends of the Clays. For example, locked doors and windows were pried open or broken, personal items were stolen or thrown into a nearby creek, and walls were covered with graffiti. On one occasion, a sleeping bag was found in the home, and there was evidence that animals were living in the home or had died inside. In June 2004, James contacted National City and Safeguard to complain about their incursions onto the property, but those conversations failed to resolve any of his complaints.

Subsequently, on August 4, 2004, the Clays filed a supplemental counterclaim against National City for trespass and theft. The Clays alleged that National City or its agents had violated the parties' mortgage agreement by entering the Goggin Lane property and residence without notice or permission. They further alleged that National City or its agents had stolen certain personal property from the residence and had caused (or allowed to be caused) extensive vandalism to the property. Although their brief provides little clarification on this point, their trespass claim appears to rely on "Uniform Covenant" number 9 of the mortgage agreement, which states as follows:

9. Inspection. Lender or its agent may make reasonable entries upon and inspections of the Property. Lender shall give Borrower notice at the time of or prior to an inspection specifying reasonable cause for the inspection.

Following a bench trial, the trial court entered a judgment on July 13, 2010, rejecting the Clays' supplemental counterclaim against National City. In response to the Clays' complaint that National City or its agents had trespassed by entering the subject property without notice or permission, the court noted that the parties' mortgage agreement explicitly required the Clays to "not destroy, damage or impair the Property, allow the Property to deteriorate, or commit waste on the Property."¹ Citing to the *Restatement (Third) of Property*, the court then noted that in a situation in which a property appears to have been abandoned, a mortgagee

¹ This particular passage is contained in the mortgage agreement's "Uniform Covenant" number 6, which is entitled, "Occupancy, Preservation, Maintenance and Protection of the Property; Borrower's Loan Application; Leaseholds."

such as National City had the right to “expend funds reasonably necessary for the protection of the security” so as to “protect the value of the mortgaged real property and improvements on it.” Accordingly, the trial court concluded that National City was “legally permitted to take whatever measures necessary to protect its interest in the property,” including using Safeguard for the purposes of securing the residence.

The trial court then indicated that although James testified that he had not abandoned the property and intended to return at some future time, it was uncontested at trial that the dwelling was continuously unoccupied after August 2001. The court additionally found that the Clays had presented no proof that National City had directly or indirectly caused damage to the home or the loss of any of its contents. Instead, James’s own testimony reflected that witnesses had seen a number of individuals – including youths and ATV owners – trespassing on the property since the house had been unoccupied. The court also determined that the “remote and isolated” location of the property “would reasonably invite the attention of thieves and vandals.” Again citing to the *Restatement (Third) of Property*, the court properly concluded that as the owners of the property, the Clays had a duty to protect it and “held the primary responsibility for the security of the premises.” In light of this, the court decided that it would be inappropriate to assign blame to National City for any damage done to the property.

On July 26, 2010, the Clays filed a motion pursuant to Kentucky Rules of Civil Procedure (CR) 59.07 asking the trial court to take additional proof,

enter new findings of fact, and/or enter a new judgment granting the relief they had requested. On October 4, 2010, the trial court entered an order denying the motion. This appeal followed.

Analysis

On appeal, the Clays contend that the trial court improperly failed to enforce the terms of the parties' mortgage and that reversal is merited because substantial evidence supported their claims that National City or its agents broke into the premises without notice or permission, removed its contents, and caused (or allowed to be caused) extensive vandalism to the property. Because this case was tried by the trial court sitting without a jury, our review is focused on the court's findings of fact and conclusions of law. Our standard of review in such cases was concisely summarized in *Gosney v. Glenn*, 163 S.W.3d 894 (Ky. App. 2005):

[A]ppellate review of the trial court's findings of fact is governed by the rule that such findings shall not be set aside unless clearly erroneous. A factual finding is not clearly erroneous if it is supported by substantial evidence. Substantial evidence is evidence, when taken alone or in light of all the evidence, has sufficient probative value to induce conviction in the mind of a reasonable person. The trial court's conclusions of law, however, are subject to independent de novo appellate determination.

Id. at 898 (citations omitted). Thus, while the Clays argue that reversal is merited because substantial evidence supported their claims at trial, our actual concern as a

reviewing court is whether the court's findings to the contrary were "clearly erroneous." *See* CR 52.01.

After reviewing the record, we cannot say that the trial court's findings of fact were "clearly erroneous" as to the question of whether National City or its agents had vandalized/damaged the Goggin Lane residence and stolen any of its contents. The Clays' "proof" in this regard essentially amounted to argumentative speculation since they presented no evidence that National City had directly or indirectly caused damage to the home or the loss of any of its contents. Instead, as noted by the trial court, James's own testimony reflected that witnesses had seen a number of other individuals – including youths and ATV owners – trespassing on the property in the years the house had been unoccupied. The court also found that the property was remote and isolated, which "would reasonably invite the attention of thieves and vandals." The court essentially concluded that it was just as likely that the acts complained of by the Clays were performed by third parties unaffiliated with National City. We see no reason to disagree with this conclusion given the lack of evidence presented at trial.

The Clays also argue that because National City failed on multiple occasions to give them written notice before allowing its agents to enter the Goggin Lane property, damages for trespass were merited. As noted above, although their brief is unhelpful on this point, this argument appears to be based on a mortgage provision requiring National City to give the Clays "notice at the time of or prior to an inspection specifying reasonable cause for the inspection."

It is apparent that National City did authorize Safeguard to enter the subject property on several occasions without notice to the Clays for purposes of securing its collateral, which arguably violated the terms of the parties' mortgage agreement. We note, though, that National City was also authorized by the mortgage agreement to enter upon the property to make repairs when necessary. Nonetheless, the trial court perhaps could have found that, absent notice to the Clays, entry upon the property by National City or Safeguard was unlawful and constituted a trespass that would merit at least nominal damages.

However, as the finder of fact, the trial court was certainly not obligated to reach such a conclusion or to award such damages. As discussed above, the court found that the Clays had failed to prove that National City was responsible for any damage to the property or residence. Moreover, the court essentially concluded that the Clays should not be allowed to take advantage of a technical violation of the parties' mortgage agreement to benefit from their own failure to maintain the property or to prevent it from deteriorating in value – which *they* were required to do under the terms of the mortgage. The record in this case could easily support the conclusion that the Clays breached their duties and contractual obligations under the mortgage agreement. In light of these considerations, we do not believe that the trial court erred in failing to award damages for trespass.

The Clays also present a vague challenge to the trial court's denial of their CR 59.07 motion to take additional proof, make new findings of fact, and/or to enter a new judgment in their favor. CR 59.07 provides:

On motion for a new trial in an action tried without a jury, the court may grant a new trial or it may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and enter a new judgment.

“CR 59.07 is a broad and sweeping grant of power to the trial court to grant a new trial or, alternately, to enter new findings, conclusions and judgment where the dictates of justice require, if, as occurred here, the action was tried without a jury.” *Carpenter v. Evans*, 363 S.W.2d 108, 109-110 (Ky. 1962). Whether a litigant is entitled to relief under CR 59.07 is a consideration left to the discretion of the trial court, and its decision will not be disturbed absent an abuse of that discretion. *Walsh v. Kennedy*, 463 S.W.2d 318 (Ky. 1971).

The trial court denied the Clays' CR 59.07 motion after finding that they had produced “no new revelations” that would allow a reasonable person to conclude that National City or its agents had broken into their home and caused the claimed damage. The court also reiterated the grounds for its original judgment, noting that the Clays' assertions that National City was responsible for the damage were unsupported by the evidence and would require the court to engage in “guesswork and speculation,” which it declined to do. The court further noted that the Clays were aware that the vacant property was the subject of repeated trespass

and vandalism and had failed to protect it from such. Because of this, they could not pass the blame for any damage onto National City.

The record reflects that the Clays had a considerable amount of time – nearly ten years – to gather all relevant evidence and to produce it at trial. Moreover, nowhere in the record do they explain or detail what “additional testimony” would have proven that would merit a new judgment. In light of this, we do not believe that the trial court abused its discretion in denying the Clays’ CR 59.07 motion. *See Pittsburgh Consolidation Coal Co. v. Johnson*, 305 S.W.2d 317 (Ky. 1957).

Conclusion

For the foregoing reasons, the judgment of the Boyle Circuit Court is affirmed.

ALL CONCUR.

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