

RENDERED: FEBRUARY 4, 2011; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2008-CA-001344-MR

PNC BANK, NATIONAL ASSOCIATION

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE MARTIN F. MCDONALD, JUDGE
ACTION NO. 02-CI-001415

FIFTH THIRD BANK,
AS SUCCESSOR IN INTEREST TO
FIFTH THIRD MORTGAGE
COMPANY AND FIFTH THIRD
BANK, KENTUCKY, INC.

APPELLEE

OPINION
REVERSING AND REMANDING

** ** * ** * ** *

BEFORE: TAYLOR, CHIEF JUDGE; COMBS, JUDGE; HENRY,¹ SENIOR
JUDGE.

¹ Senior Judge Michael L. Henry 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. Senior Judge Henry voted in this case prior to the expiration of his term of service as senior judge. Entry of the Opinion was delayed by administrative handling.

TAYLOR, CHIEF JUDGE: PNC Bank, National Association, appeals from a judgment and order of sale entered by the Jefferson Circuit Court on June 12, 2008, which gave prior and superior status to a mortgage lien held by Fifth Third Bank over PNC's lien claims in a foreclosure proceeding. PNC and Fifth Third each hold liens on the same tract of real property in Louisville. It is undisputed that Fifth Third's liens were recorded first. The issue is whether a summary judgment and order of sale concerning the same property, which was entered December 20, 2002, and never appealed, constituted a final adjudication of the priority of the liens in PNC's favor and, thus, precluded Fifth Third from asserting the priority of its liens thereafter. For the reasons stated, we reverse and remand.

In 2000, PNC extended a loan of \$509,000 to Covers Unlimited.² The loan was secured in part by a mortgage on the Louisville home of Covers' principals, Kevin and Catherine Orr. PNC's lien was recorded on October 30, 2000. Previously, on March 27 and August 11, 2000, Fifth Third had recorded two mortgage liens against the property.

On January 14, 2002, PNC declared its loan in default with an outstanding balance of \$474,941.92, plus interest and late charges. On February 22, 2002, PNC brought suit against Covers and the Orrs. PNC's complaint identified Fifth Third Mortgage Company and Fifth Third Bank, Kentucky, Inc. as other interest holders by virtue of the mortgages recorded in their favor. The

² The complaint states that the loan was in the amount of \$509,800.

complaint called upon them “to assert whatever interest [they] may have in the subject real property or be forever barred.”

Fifth Third Bank, as a successor of Fifth Third Mortgage Company and Fifth Third Bank, Kentucky, Inc., filed an Answer, Cross-Claim and Counterclaim. PNC contends that Fifth Third’s Counterclaim failed to assert an interest that would take priority over PNC’s mortgage. PNC does acknowledge, however, that Fifth Third in its prayer asked that its mortgages be found and adjudged valid first liens upon the real estate.

On May 15, 2002, PNC obtained a default judgment against Covers Unlimited. On August 30, 2002, PNC obtained a default judgment against the Revenue Cabinet, which failed to file any responsive pleading.

Then, on December 20, 2002, PNC obtained a summary judgment and order of sale against numerous defendants, including Fifth Third. Fifth Third did not oppose PNC’s motion for summary judgment. The crux of this appeal is whether this 2002 summary judgment order determined the priority of the PNC and Fifth Third liens. The pertinent passages of the judgment state as follows:

5. That Plaintiff, PNC, be, and it is, granted summary judgment against the Defendants, Fifth Third Bank as Successor in interest to Fifth Third Mortgage Company and Fifth Third Bank Kentucky, Inc.; Commonwealth of Kentucky, Jefferson County Kentucky; and City of Louisville, as these Defendants have failed to plead any defenses herein.

6. That Plaintiff, PNC, be, and it is, awarded the sums in paragraphs number one and number two above and its court costs herein expended, for all of which Plaintiff is

adjudged liens against the following described real estate, together with all improvements, appurtenances, and fixtures, any personal property described in the subject mortgage, and the rents, issues, and profits therefrom and thereon, prior and superior to any and all liens and encumbrances of the parties except the following:

A. Any city, state, county, and school taxes due and payable, and all taxes due thereafter.

B. Easements, restrictions, covenants of record, and applicable zoning ordinances.

C. Assessments for public improvements levied against the property.

D. Any facts which an inspection and accurate survey of the property may disclose.

E. Any liens, mortgages or judgments of record superior to Plaintiff's interests.

After this judgment was entered, but before the property could be sold, the Orrs filed for bankruptcy, thereby staying the action.

After the bankruptcy action was resolved in 2005, Fifth Third moved for a default judgment against the Orrs and an order of sale of the property in its favor. PNC objected, filing a motion requesting the court to adopt and enforce the 2002 summary judgment and order of sale. The trial court granted PNC's motion on November 1, 2005.

Six months later, Fifth Third filed an objection to PNC's motion, arguing that it had the first and prior lien on the property. The trial court held a hearing on the matter and entered an order on June 13, 2006, which granted PNC's motion to adopt and enforce the 2002 summary judgment and order of sale. Fifth

Third filed an appeal of the June 13, 2006, order which was dismissed by the court in Appeal No. 2006-CA-001474-MR. The appeal was dismissed for the failure of Firth Third to timely file its appeal pursuant to Kentucky Rules of Civil Procedure (CR) 73.01(1)(a).

PNC then moved the trial court to refer the matter to the Master Commissioner for sale. The trial court granted the motion. Fifth Third meanwhile attempted its third “bite at the apple” by filing a motion in the circuit court pursuant to CR 60.02(e) and (f), seeking to vacate the prior orders of sale, including the 2002 order. The trial court referred the motion to the Master Commissioner who issued a Report which contained the following interpretation of the summary judgment and order of sale entered on December 20, 2002:

Both PNC and Fifth Third appear to treat the Summary Judgment and Order of Sale entered in favor of PNC on December 20, 2002, as a final determination of the priority of their respective mortgages. In fact, Paragraph 6(E) thereof provides that PNC’s liens are adjudged prior and superior to “any and all liens and encumbrances of the parties except the following: (E) any liens, mortgages or judgments of record superior to (PNC’s) interests.” In other words, priority awaits future adjudication.

The efforts of Fifth Third to vacate this judgment and its attempted appeal from the Court’s June 13, 2006, denial of that relief were unnecessary, as is the current motion. The property should be sold without further delay. Mr. and Mrs. Orr must find another place to live. The door remains open to Fifth Third to take its claims to judgment and to be paid from the proceeds of the sale in the priority to which it appears to be entitled.

PNC filed objections to the report. Fifth Third tendered a proposed judgment and order of sale, but failed to prove service upon all interested parties; consequently the Master Commissioner recommended denying the tendered judgment. The Master Commissioner filed a supplemental report which reiterated that the 2002 judgment did not adjudicate the issue of priority.

[A] “judgment against” is not the same as a “priority judgment against” another party. A difference arises because numerous parties are involved. A judgment against other parties must be secured in order to sell real estate and extinguish the other interests in the property. See KRS 426.006. In this case, the priority issue was reserved, in provision 6. In provision 6, the priority provision, the judgment does not allocate priority to PNC Bank. Instead, it allocates priority to PNC Bank after first-in-time mortgages. In particular, the provision states that PNC Bank concedes priority to “Any liens, mortgages or judgment of record superior to Plaintiff’s interests.”

Further, a second judgment provision also concedes priority. In provision 10, the priority allocation in the proceeds, PNC Bank does not assert priority in the proceeds after costs. Instead, PNC Bank asserts priority in the proceeds after costs and prior liens. It states, “The proceeds of the sale, or a sufficiency thereof, shall, after payment of all courts costs [sic], costs of sale and prior liens adjudicated herein, be applied to the balance owed the Plaintiff as adjudged herein”

Fifth Third eventually served the affected parties, and by report dated May 28, 2008, the Master Commissioner approved Fifth Third’s tendered judgment with amendments. On June 12, 2008, the trial court granted Fifth Third a final Judgment and Order of Sale. This appeal followed.

PNC argues that the trial court erred in entering the judgment and order of sale in Fifth Third's favor because the 2002 judgment, which remained in full force and effect, had already established priority in PNC's favor. PNC acknowledges that the 2002 judgment contemplates the existence of additional lienholders or taxing authorities who might have priority over PNC but contends that the judgment fully adjudicated the rights of the parties then before the court – namely Fifth Third and PNC. PNC further argues that the trial court erred in granting relief to Fifth Third under CR 60.02 and that the Master Commissioner's recommendations regarding the 2002 judgment were based on a misinterpretation of KRS 426.006.

Upon reviewing the record and the pertinent caselaw, we believe that the circuit court clearly erred in entertaining Fifth Third's Rule 60 motion and referring this matter back to the Master Commissioner for additional consideration. The Summary Judgment and Order of Sale, entered by the Jefferson Circuit Court on December 20, 2002, resolved all issues and claims regarding the priority of PNC and Fifth Third's competing lien claims against the subject real property. This was a final and appealable judgment which was not appealed. The final judgment plainly states in paragraph 6:

That Plaintiff, PNC, . . . is adjudged liens against the following described real estate, . . . prior and superior to any and all liens and encumbrances of the parties

The exceptions listed to this provision do not pertain to Fifth Third as it was a named party to the action and, in fact, filed an answer in the litigation.

Specifically, the exceptions referred to in Paragraph 6E of the judgment (erroneously relied upon by the Master Commissioner) pertains only to lienholders who were not properly made parties as required by KRS 426.006 or to lien claimants who filed liens against the property after the commencement of the action but prior to the filing of a *lis pendens*. See KRS 382.440. Any other interpretation of these exceptions effectively negates the application of applicable statutes and law regarding foreclosures and the enforcement of judgments in Kentucky. To the extent the circuit court may have erred in granting the judgment in 2002, Fifth Third's only recourse was to appeal – which it failed to do.

On June 3, 2006, the circuit court entered a second order to adopt and enforce the Summary Judgment and Order of Sale entered on December 20, 2002. Fifth Third's second "bite at the apple" failed when its appeal to this Court was dismissed for being untimely filed in Appeal No. 2006-CA-001474-MR.

Notwithstanding having struck out twice, Fifth Third immediately made a third attempt to collaterally attack the judgment and order of sale by filing a motion for relief under CR 60.02. As the saying goes, "third time is a charm." For some reason, which we cannot discern from the record, the circuit court referred this matter to the Master Commissioner for review and consideration. This was clearly erroneous because there was no legal basis for the court to entertain a CR 60.02 motion at that time. CR 60.02 is not permissible to raise or challenge an error or mistake of law by the circuit court, which was the only basis to challenge the final judgment entered in December 2002. *James v. Hillerich &*

Bradslly Co., Inc., 299 S.W.2d 92 (Ky. 1957); *City of Covington v. Sanitation Dist. No. 1 of Campbell and Kenton Counties*, 459 S.W.2d 85 (Ky. 1970). Accordingly, relief from the original judgment in 2002 could only be accomplished by direct appeal, which did not occur. The order referring the case back to the Master Commissioner in 2006 and the judgment entered in 2008 now on appeal in this case were nullities and otherwise of no effect.

Upon entry of the original judgment in 2002, the jurisdiction of the trial court to alter or amend the judgment was limited by the plain and unambiguous language of CR 59.05. This rule provides that a motion to alter, amend, or vacate a judgment must be served not later than ten days after entry of the final judgment. Additionally, the trial court retains jurisdiction to consider a motion for new trial for ten days under CR 52.02. Fifth Third took neither of these steps upon entry of the original judgment on December 20, 2002. Accordingly, their only recourse was to file an appeal within thirty days after entry of the judgment pursuant to CR 73.02(1). Compliance with the time requirements of CR 73.02 is both mandatory and jurisdictional. *United Tobacco Warehouse, Inc. v. Southern States Frankfort Coop., Inc.*, 737 S.W.2d 708 (Ky. App. 1987). Since ten days had passed from entry of the original judgment and no appeal was then subsequently taken within thirty days of entry of the judgment, the trial court lost jurisdiction to alter, amend, or modify its original judgment entered in 2002. In Kentucky, any judgment or order issued by a court that does not have proper jurisdiction is “void *ab initio*.” *S.J.L.S. v. T.L.S.*, 265 S.W.3d 804 (Ky. App. 2008).

The judgment and order of sale entered on June 12, 2008, is void. For the reasons stated in this opinion, we reverse and remand this case for enforcement of the judgment rendered on December 20, 2002.

COMBS, JUDGE, CONCURS.

HENRY, SENIOR JUDGE, CONCURS IN RESULT ONLY.

BRIEFS FOR APPELLANT:

Christopher A. Bates
Paul J. Hershberg
Louisville, Kentucky

BRIEF FOR APPELLEE:

Thomas A. Wietholter
Cincinnati, Ohio