RENDERED: SEPTEMBER 13, 2013; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-000248-MR

J. MICHAEL BUTLER AND
THE 5312 GEORGIA LANE LAND TRUST — APPELLANTS

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE IRV MAZE, JUDGE
ACTION NO. 10-CI-400101

CHASE HOME FINANCE, LLC AND
THE LOUISVILLE/JEFFERSON COUNTY
METRO GOVERNMENT — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: MOORE, STUMBO AND THOMPSON, JUDGES.

STUMBO, JUDGE: J. Michael Butler, et al., appeal from an Opinion and Order of the Jefferson Circuit Court overruling his motion for CR 60.02(c) and (d) relief from Judgment. Butler contends that the circuit court erred in failing to conclude

that Chase Home Finance, LLC falsified evidence and employed deceptive practices to procure the Judgment. He also maintains that the court erroneously failed to conclude that Chase's actions prevented him from appearing and fully prosecuting his defense. We find no error, and accordingly affirm the Opinion and Order on appeal.

On January 7, 2010, Chase filed a foreclosure action in Jefferson Circuit Court against the Appellants, who jointly owned a parcel of real property in Louisville, Kentucky. Chase alleged that the Appellants had defaulted on the mortgage held by Chase. The Appellants did not file an Answer to the action.

The matter went before the Master Commissioner, who on August 11, 2010, recommended that a Judgment and Order of Sale be rendered. Thereafter, the court accepted the recommendation and rendered a Judgment and Order of Sale on August 27, 2010.

About 11 months later on July 20, 2011, Butler filed an Answer along with a CR 60.02 motion to set aside the Judgment and Order of Sale. As a basis for the motion, Butler claimed that he was deceived during negotiations with Chase into believing that no foreclosure was forthcoming. After Chase responded, the Master Commissioner recommended that the motion to vacate be overruled. After exceptions were filed, the matter went before the Jefferson Circuit Court for oral arguments where, according to the record, a "highly spirited debate" ensued.

Butler asserted two primary arguments before the court as to why the Judgment and Order of Sale should be vacated under CR 60.02. First, he alleged

that Chase falsified evidence to procure a favorable Judgment; and second, he claimed that he was lulled by Chase into believing that Chase would not seek a final Judgment and Order of Sale. The alleged falsified evidence to which Butler pointed was an "Assignment of Mortgage" and "Note with the Allonge" which were appended to Chase's July 15, 2010 motion for a Default Judgment.

After considering the arguments, the Jefferson Circuit Court determined that if Butler, through counsel, had defended the action with the filing of an Answer and the conducting of discovery, the purported falsified evidence would have been discovered long before the entry of the Judgment and Order of Sale. It found that CR 60.02, upon which Butler relied, does not avail the movant of relief based on fraud which could have or should have been discovered with the exercise of due diligence during the proceedings. Additionally, the court rejected Butler's contention that Chase lulled Butler into believing that Chase was not pursuing a Judgment. It noted that Chase filed a foreclosure action, moved for a default judgment and moved to liquidate the parcel, each action reasonably informing Butler of Chase's intent. The court went on to note that Chase's filing of a motion seeking a default judgment, taken alone, should have made it quite apparent to Butler that presenting a defense was required. An Opinion and Order overruling Butler's motion for CR 60.02 relief was rendered on January 15, 2012, and this appeal followed.

Butler first argues that the trial court erred in failing to conclude that Chase falsified evidence and employed deceptive practices to procure a Judgment in its

favor. Specifically, Butler maintains that under counts one and two of its complaint, Chase asserted that it was the holder of the note and mortgage at issue and that copies of same were attached to the complaint. Butler contends that a review of the attachments revealed that the original lender was First Union Mortgage Company and that a second entity, Mortgage Electronic Registration Systems ("MERS") was the sole nominee for the lender and lender's successors and assigns. The import of these attachments, according to Butler, is that they failed to properly demonstrate that Chase was vested with the authority to prosecute the foreclosure. Additionally, Butler raises the question of whether a signator to the Assignment of Mortgage, Whitney K. Cook, was employed by Chase or MERS, and also contends that the allonge styled "Endorsement and Assignment of Note" was falsified by Chase's legal counsel. Finally, Butler argues that through the entirety of this case, Chase assured the Butlers that refinancing negotiations were in progress and that the pending foreclosure litigation was of no concern. Butler maintains that based on these assurances, he did not respond to the legal action pending against him. The focus of Butler's argument on these issues is that Chase fabricated documents and mislead the Butlers throughout the foreclosure, thus justifying the relief they now seek.

CR 60.02 allows a moving party to seek post-judgment relief under a very limited set of circumstances. It states in relevant part, that

> [o]n motion a court may, upon such terms as are just, relieve a party or his legal representative from its final judgment, order, or proceeding upon the following

> grounds: . . . (c) perjury or falsified evidence; (d) fraud affecting the proceedings, other than perjury or falsified evidence . . . . The motion shall be made within a reasonable time, and on grounds (a), (b), and (c) not more than one year after the judgment, order, or proceeding was entered or taken.

The Jefferson Circuit Court found that Butler's motion was timely filed. In resolving the underlying claim of entitlement to CR 60.02 relief, the court determined that it was reasonable to conclude that the alleged falsification of evidence would have been discovered had Butler, through counsel, answered the complaint and engaged in discovery. Additionally, the court found that the arguments Butler now raises could have been addressed during the corpus of the foreclosure proceeding, had Butler chosen to participate. We find no error in this conclusion. The matter is before us on the Jefferson Circuit Court's denial of Butler's CR 60.02 motion for relief. Kentucky case law holds that a CR 60.02 movant's pre-judgment due diligence greatly affects the availability of relief under CR 60.02.

> In those instances where grounds . . . for relief under a 60.02 motion are such that they were known or could have been ascertained by the exercise of due diligence prior to the entry of the questioned judgment, then relief cannot be granted from the judgment under a 60.02 proceeding. Relief afforded by a 60.02 proceeding is extraordinary in nature and should be related to those instances *where the matters do not appear on the face of the record, were not available by appeal or otherwise, and were discovered after rendition of the judgment without fault of the party seeking relief.* (Emphasis original).

Kentucky Retirement Systems v. Foster, 338 S.W.3d 788, 797 (Ky. App. 2010), *citing Board of Trustees of Policeman's and Firemen's Retirement Fund of City of Lexington v. Nuckolls*, 507 S.W.2d 183, 186 (Ky. 1974). Butler now points to the face of the record in support of his claim for relief from Judgment, yet it is the very record which existed throughout the entirety of the proceeding below. As such, we cannot conclude that the Jefferson Circuit Court erred in concluding that Butler is not entitled to CR 60.02 relief on this issue.

Butler goes on to argue that Chase's deceptive conduct prevented him from filing a timely answer. He contends that Chase misled him throughout the entirety of the foreclosure proceeding by representing that no foreclosure would ever take place and that the matter would ultimately be resolved. We find persuasive the circuit court's reasoning on this issue, in that Chase's filing of the complaint, motion for default judgment and motion to liquidate the parcel evinced the reality that Chase was foreclosing on the parcel. *Arguendo*, even if Butler was lulled into inaction by his ongoing interaction with Chase, the Judgment and Order of Sale would have disabused Butler of any notion that there was no actual foreclosure or that the property was not being liquidated to satisfy the note. Butler was at that time availed of the opportunity to tender a motion to vacate the judgment, or alternatively to prosecute an appeal in accordance with the civil rules. He did neither. Rather, it was after the span of almost one year that Butler pointed back, via CR 60.02, to the same circuit court record that existed at the time of judgment. Additionally persuasive, and though by no means dispositive, was the circuit

court's finding that Butler is a sophisticated individual who owned numerous properties during the proceeding below. It cannot reasonably be argued that Butler was unaware of the consequences of the Judgment and Order of Sale, nor that he was prevented from appearing or fully presenting his side of the case below. As such, we find no abuse of discretion as argued by Butler, and accordingly find no error.

For the foregoing reasons, we affirm the Opinion and Order of the Jefferson Circuit Court.

MOORE, JUDGE, CONCURS.

THOMPSON, JUDGE, DISSENTS AND FILES SEPARATE OPINION.

THOMPSON, JUDGE, DISSENTING: Respectfully, I dissent. I believe that J. Michael Butler should have been granted relief under CR 60.02(c) and (d) because he produced ample evidence to support his assertions that Chase Home Finance, LLC, falsified evidence and employed deceptive practices to procure the judgment. Butler made a sufficient showing to excuse his failure to answer the complaint based upon Chase's conduct which led him to believe that the foreclosure would not take place because he was participating in a loan modification process before and throughout the proceedings.

While Butler was pursuing loan modification with Chase, Chase initiated foreclosure proceedings on his loan as secured by his mortgaged property. Butler did not answer Chase's complaint or otherwise appear. Consequently, he did not receive any notice from Chase that it was seeking a default judgment. The master

commissioner's report recommending granting the motion was not served upon Butler, so he had no notice of it and could not make timely objections to it. Butler was served with the circuit court's order granting the default judgment. However, without having made objections to the master commissioner's report, Butler could not challenge the ground for the default on direct appeal. *See Eiland v. Ferrell*, 937 S.W.2d 713, 716 (Ky. 1997); *Statewide Environmental Services Inc. v. Fifth Third Bank*, 352 S.W.3d 927, 930 (Ky. App. 2011).

Because a master commissioner's report and the failure to challenge it prevent a party's ability to appeal, I believe a master commissioner, as an officer of the court, has a duty to serve his report on all parties, whether they appear or not. Requiring such a duty of the master commissioner would avoid protracted after-the-fact challenges under CR 60.02 on matters that could have properly been addressed in challenges to the master commissioner's report. Accordingly, I would reverse based upon the master commissioner's failure to serve Butler.

Additionally, I believe Butler made a valid argument for reversal under CR 60.02 based on the course of conduct Chase exhibited toward him. The affidavit of Beth Butler, who was an employee of Butler and is now his wife, details every interaction she had with Chase employees on Butler's behalf. In summary, after the initial mailed paperwork she faxed paperwork to Chase no less than sixteen times. These submissions included four separate authorizations by Butler giving Chase permission to speak with Beth, three complete loan modification applications and numerous other supplementary submissions based

on Chase's requests. Beth spoke with no fewer than thirty-four Chase employees. Sporadically, Chase employees could no longer find the authorization paperwork, or other paperwork she submitted and she would have to refile it.

Beth was repeatedly told that the matter was assigned to a particular person, who could not be reached despite numerous attempts. However, following many additional calls, Beth would learn that the matter was now reassigned to another person. Butler's loan modification application was reassigned four separate times.

Beth was repeatedly reassured that the modification process was moving forward even as she was required to submit new documentation: On September 14, 2009, Beth was told that Butler was eligible for forbearance for three months and, depending upon how Butler performed, he might be eligible for loan modification. The loan was considered current during this period. On February 3, 2010, Beth confirmed that Butler wanted to pursue loan modification. On March 1, Beth was told that a request for "foreclosure deferment" had been submitted and to wait a few weeks for the file to be reviewed. On April 28, Beth was told there was no scheduled sale date for the property and to make a loan modification payment of $440.61 by May 28, 2010, which Beth did. On July 17, Beth was told that "according to [the Chase employee's] code, this loan should not be in foreclosure." On July 19, Beth was told the foreclosure action had been postponed and to call back on Monday. On August 3, Beth was told that Chase was reviewing the loan modification. On February 24, 2011, Beth was told there was no foreclosure sale date. On March 23, Beth was told that a broker price opinion

(BPO) was ordered for the home for the loan modification to move forward. On April 4, Beth was told that no foreclosure was scheduled and the BPO had been ordered. On May 26, Beth was told the review for modification was sent to quality assurance.

On May 31, Beth was told the modification documents had expired and she would once again have to resubmit extensive documentation. Finally, Butler contacted an attorney who immediately filed an answer asserting numerous affirmative defenses and moved for an order to set aside the default judgment pursuant to CR 60.02(c) and (d). Notable affirmative defenses included were that Chase was not the holder of the note, owner of the mortgage and lacked standing to bring the action, the assignment of the mortgage was fraudulent because the party executing the assignment from Mortgage Electronic Registration System (MERS) was actually an employee of Chase and the allonge was a fraud.

The motion to set aside the default judgment explained Butler's claim that the judgment was procured by falsified evidence based upon the supporting exhibits attached to the motion for default judgment, the assignment of mortgage and the allonge. Butler claimed that the mortgage assigned from MERS as a nominee for First Union Mortgage Corporation (FUMC) was defectively assigned to Chase because Whitney Cook, a Chase employee, fraudulently stated she was a Vice President of MERS. Additionally, FUMC no longer had legal existence at the time of the purported assignment.

Butler explained that the allonge was likely fraudulent. The power of attorney claimed in the allonge, which endorsed and assigned the note to Chase, was problematic because the endorsement by Dana Heisel as attorney in fact for Wachovia Mortgage Corporation is invalid because Heisel is employed by Chase and did not have the power to act on Wachovia's behalf. Additionally, the allonge was claimed to be prepared when Wachovia lacked legal existence. Finally, the timing of the filing of the allonge was suspicious. The allonge was not filed with the complaint and appeared to be prepared specifically for this litigation because it bore Chase's counsel's internal case number for this case.

Butler also detailed the conduct by Chase towards him through Beth as detailed in her affidavit, assuring Butler that a modification would be considered and no adverse action would be taken prior to the conclusion of the modification process.

Default judgments are disfavored and trial courts are vested with broad discretion to set them aside when the moving party shows good cause for failing to defend and a meritorious defense. *Asset Acceptance, LLC v. Moberly*, 241 S.W.3d 329, 332 (Ky. 2007).

> According to CR 55.02, if a defaulting party demonstrates good cause, a trial court may set aside a default judgment providing said good cause meets the requirements set forth in CR 60.02. To show good cause, and thereby justify vacating a default judgment, the defaulting party must: (1) provide the trial court with a valid excuse for the default; (2) demonstrate a meritorious defense; and (3) show the absence of prejudice to the non-defaulting party.

First Horizon Home Loan Corp. v. Barbanel, 290 S.W.3d 686, 688-689 (Ky. App. 2009) (footnote omitted).

CR 60.02 allows a court to relieve a party from its final judgment upon the grounds of "(c) perjury or falsified evidence; (d) fraud affecting the proceedings, other than perjury or falsified evidence" by a motion made within a reasonable time not more than a year after the judgment for ground (c). A party can be relieved from a judgment that relies upon falsified evidence under both CR 60.02(c) and (d).

In *Mullins v. Picklesimer*, 317 S.W.3d 569, 577 (Ky. 2010), the Kentucky Supreme Court ruled that an agreed judgment that Mullins, a partner in a lesbian relationship acting in a parental role for a child who was not biologically hers, was the child's *de facto* custodian, could be set aside based on the falsified evidence that Mullins was the child's primary caregiver and primary financial supporter where both partners knew the evidence was untrue. The Supreme Court stated: "We agree with the Court of Appeals that the assertion in the agreed judgment that Mullins was the child's primary caregiver and primary financial provider constituted both falsified evidence and fraud affecting the proceedings warranting relief from the judgment." *Id.*

Accordingly, based upon the authority of *Mullins* and Butler's answer and motion, I believe that he qualified for relief from the judgment under CR 60.02(c) and (d). There is no requirement under *Mullins* that the falsified evidence

not be previously discoverable under due diligence to allow relief. In fact, both parties were aware of the falsified evidence at the time of the judgment and consented to this fraud in an effort to establish joint custody. For this reason, I believe that cases involving fraudulent evidence are excluded from the general due diligence requirement for CR 60.02 relief set out in *Kentucky Retirement Systems v. Foster*, 338 S.W.3d 788, 797 (Ky. App. 2010), relied upon by the majority in denying relief.

While the procedural posture in *Mullins* was different because the Court was reviewing the granting of CR 60.02 relief, rather than its denial, I believe the trial court abused its discretion in denying relief in the absence of a due diligence requirement. If relief was available in *Mullins,* even where the moving party actively participated in the fraud, Butler has an even stronger basis for relief because he did not know about the fraud when the default judgment was granted. Although Butler could have potentially learned about the fraud had he appeared and answered, the fraud was not obvious without research by a diligent and knowledgeable counsel.

The continuous conduct by Chase in assuring Butler that the modification process was proceeding, before the foreclosure action was filed, after the foreclosure action was filed and after the default judgment was granted, excuses Butler's failure to answer or otherwise defend. Butler detrimentally relied and reasonably believed based on Chase's conduct and representations, that his property would not be foreclosed or sold while he complied with Chase's requests.

He reasonably believed that his application would be considered in good faith rather than used as a delaying tactic to prevent his challenge to the foreclosure process. *See Dixon v. Wells Fargo Bank, N.A*., 798 F.Supp.2d 336, 344-345 (D. Mass. 2011). Such conduct by lenders can be actionable. Federal cases with similar facts concerning the conduct of lenders assuring borrowers that they would be considered for loan modifications, only to foreclose on the properties without considering modification, have been determined to sufficiently plead causes of action for promissory estoppel, breach of contract, misrepresentation, bad faith and similar statutory grounds for relief. *See id.* at 340-349; *Akar v. Federal Nat. Mortg. Ass'n*, 845 F.Supp.2d 381, 397-402 (D. Mass. 2012); *Currie v. Wells Fargo Bank*, N.A., __ F.Supp.2d __, 2013 WL 2295695, 15 (D. Md. 2013); *Moore v. Mortgage Electronic Registration Systems, Inc*., 848 F.Supp.2d 107, 130-131 (D. N.H. 2012); *Neff v. Flagstar Bank, FSB*, 2013 WL 3872115, 4-6 (S.D. Ohio 2013) (slip copy).

The potentially falsified evidence and course of conduct by Chase demonstrate a meritorious defense. Chase's conduct with regard to the allonge is particularly troubling and our Court has previously determined in an unpublished decision that a similar later filed allonge was insufficient to establish as a matter of law that the lender had standing to foreclose on a mortgage in default. *See Morgan v. HSBC Bank USA, NA*, 2009-CA-000597-MR, 2011 WL 3207776 (Ky. App. 2011) (unpublished). While standing may be waived if not timely pled as an

affirmative defense, *Harrison v. Leach*, 323 S.W.3d 702, 708 (Ky. 2010), I believe that the same grounds which excuse the default would also preclude waiver.

In addition, common sense indicates something was not correct during this litigation. On January 7, 2010, the complaint was filed. Butler was served in his individual capacity the next day and as trustee on February 16, 2010.
No answer was filed. Most attorneys would have immediately requested a default judgment once the twenty-day deadline to answer under CR 12.01 passed. However, the motion for default judgment was not filed until July 15, 2010. This delay indicates communication to their attorney by Chase regarding the communications with Beth. Unfortunately, trial counsel that filed the complaint and motion for default judgment did not appear at oral argument and, therefore, could not explain the delay, why the assignment of mortgage and allonge were not filed with the complaint, or why the allonge bore Chase's case number for the litigation. The attorney that did appear at oral argument had no knowledge on any of these issues.

I would reverse the circuit court's denial of Butler's CR 60.02 motion as being an abuse of discretion, set aside the default judgment under CR 55.02, allow Butler's answer to be considered and allow the matter to proceed to trial.

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