

Commonwealth of Kentucky

Court of Appeals

NO. 2014-CA-001477-MR

ABBIE GAIL ALEXANDER,
A/K/A ABBIE GAIL, INDIVIDUALLY AND
ABBIE GAIL ALEXANDER, A/K/A ABBIE GAIL,
AS EXECUTRIX OF THE ESTATE OF
MARIE THOMASSON

APPELLANT

v. APPEAL FROM MCLEAN CIRCUIT COURT
HONORABLE BRIAN WIGGINS, JUDGE
ACTION NO. 10-CI-00115

WELLS FARGO BANK, N.A. SUCCESSOR
BY MERGER TO WACHOVIA BANK, N.A.;
UNKNOWN SPOUSE, IF ANY, OF
ABBIE GAIL ALEXANDER, A/K/A ABBIE GAIL;
UNKNOWN SPOUSE, IF ANY, OF KERRY MILLER;
UNKNOWN DEFENDANTS, WHO ARE THE HEIRS,
AND/OR DEVISEES, AND/OR LEGATEES OF
MARIE L. THOMASSON; FORD MOTOR CREDIT
COMPANY; CITY OF LIVERMORE; AND
COUNTY OF MCCLEAN

APPELLEES

OPINION
DISMISSING APPEAL

** ** * ** * ** *

BEFORE: JONES, D. LAMBERT AND THOMPSON, JUDGES.

THOMPSON, JUDGE: Abbie Gail Alexander a/k/a Abbie Gail, individually and as executrix of the estate of Marie Thomasson, appeals from an order granting summary judgment to Wells Fargo Bank, N.A., successor by merger to Wachovia Bank, N.A. (Wells Fargo).¹

In 1999, Kerry Miller and Marie Thomasson executed a note with First Union Bank for \$45,000 secured by a mortgage on their property in Livermore, Kentucky. Miller and Thomasson held the property jointly with right of survivorship. A Heartland manufactured home was present on the property at the time of execution. First Union Bank failed to record a security interest on the title of the manufactured home.

In 2008, Miller died and Thomasson became the sole owner of the property. On the manufactured home's certificate of title issued on July 7, 2009, Thomasson and Alexander are listed as the owners. Thomasson died in 2010 and left her estate to Alexander.

Before Thomasson's death, she defaulted on her mortgage. On August 19, 2010, Wells Fargo filed a foreclosure action asserting it held the note and mortgage on Thomasson's property. Wells Fargo sought to enforce the note for the balance due of \$31,922.20, plus interest, late fees, prepayment penalty, escrow advances,

¹ Other appellees are unknown spouse if any, of Abbie Gale Alexander, a/k/a Abbie Gail; unknown spouse, if any, of Kerry Miller; unknown defendants, who are the heirs, and/or devisees, and/or legatees of Marie L. Thomasson; Ford Motor Credit Company; City of Livermore; and County of McClean. The other appellees will only be discussed in this appeal when relevant.

court costs and expenses and to establish a valid first lien on the property pursuant to the mortgage. Wells Fargo asserted an equitable lien upon the manufactured home, requested the property and manufactured home be sold together to satisfy the debt, with the master commissioner authorized to apply for a vehicle identification number, certificate of title and then complete an affidavit of conversion. Wells Fargo asserted that its lien had a higher priority than any claims the defendants had to the property. Defendants in this action who appeared and answered were Alexander, the City of Livermore and the County of McLean.

In Alexander's answer, she asserted she is the owner of the manufactured home and Wells Fargo does not have an equitable lien. The City of Livermore and the County of McLean each argued in their answers that their tax liens had first priority and were superior to Wells Fargo's lien.

On May 5, 2014, Wells Fargo filed a motion for summary judgment seeking to establish that its mortgage extended to the manufactured home. Wells Fargo argued because the mortgage language stated that it included all improvements, Wells Fargo had a valid, existing security interest in the manufactured home and was entitled to have title to the manufactured home issued to it for the purpose of executing an affidavit of conversion and selling the manufactured home and real property at a Master Commissioner's sale. The appraisal² listed the site as being valued at \$6,000 and the manufactured home as being valued at \$54,740, thus supporting Wells Fargo's claim that the mortgage for \$45,000 would not have been

² The appraisal report was purported to be attached as an exhibit to the motion, but is missing from the record in that location. However, the report was attached to Wells Fargo's reply.

made merely upon the property without the manufactured home. Wells Fargo noted the appraisal included photographs of the manufactured home. While Wells Fargo acknowledged that its security interest in the manufactured home may not be perfected, it asserted it still held a valid lien against the collateral and no other lienholders or bona fide purchasers have asserted a superior or prior claim to the manufactured home.

Alexander opposed Wells Fargo's motion for summary judgment arguing the manufactured home is titled in her name and its lien was not noted on the original certificate of title. She attached an affidavit in which she stated that for valuable consideration, Thomasson transferred her ownership of the manufactured home to Alexander in July of 2009 and she had been in possession of the manufactured home since 2008. The record contains a transfer certificate of title dated July 20, 2009, listing Thomasson and Alexander as the owners of the manufactured home and a transfer certificate of title dated May 25, 2012, listing Alexander as the owner.

In Wells Fargo's reply, it argued its unperfected security interest was superior to Alexander's because she only succeeded to the manufactured home due to the death of Thomasson. Wells Fargo argued Alexander was not a *bona fide* purchaser and took the manufactured home subject to its previous security interest because she did not have a purchase agreement or any other evidence of consideration paid for her interest in the manufactured home.

On July 8, 2014, the trial court granted summary judgment to Wells Fargo. The trial court noted Alexander stated in her affidavit that she paid Thomasson “valuable consideration” in exchange for ownership of the manufactured home, but her counsel acknowledged in a hearing that Alexander had no purchase agreement or other evidence of the type or amount of consideration given in exchange for her interest in the manufactured home. The trial court found “[Alexander] is not a bona fide purchaser for value. Given the entire record, there exists no *genuine* factual controversy on this issue.”

The trial court concluded Wells Fargo was entitled to judgment as a matter of law because it had an unperfected security interest that was superior to Alexander’s interest as Thomasson’s heir. The parties’ contractual intent was that the manufactured home be considered part of the property as an improvement at the time the mortgage was executed, even though Wells Fargo’s interest was neither listed on its title, nor was it converted into an improvement by being permanently affixed to the real estate through an affidavit of conversion. The trial court concluded as follows:

[T]his Court believes it appropriate to take the following actions: (a) the court shall order [Alexander] to surrender title to the manufactured home so proper notation can be made . . . ; (b) the Court shall deem the mobile home converted to the real estate described in the mortgage and therefore compliant with KRS 187A.297; and (c) the court shall direct the county clerk to accept for recording (i) an affidavit of conversion from the purchaser of the property at the master commissioner sale, and (ii) this court’s forthcoming judgment converting the mobile home to real estate.

The trial court granted the motion for summary judgment and directed counsel for Wells Fargo “prepare and tender to the court for entry of a judgment in accordance herewith.” The order lacked any recitation of finality and a determination that “there is no just reason for delay.” Kentucky Rules of Civil Procedure (CR) 54.02(1).

Alexander filed a motion to alter, amend or vacate which was summarily denied. Alexander filed a notice of appeal which appears to acknowledge that she may not be appealing from a final judgment, noting:

[Alexander] intends to supplement or amend this notice if any amendment of the attached orders is made by the Court and appeal from any such judgments or orders following entry of same, including any judgment and order of sale entered by the Court consistent with the attached orders. Specifically, [Alexander] intends this Notice to relate forward to any subsequent judgment and order of sale entered in the action[.]

The trial court was divested of jurisdiction by the notice of appeal. Therefore, no further action could be taken by the trial court. *Wright v. Ecolab, Inc.*, 461 S.W.3d 753, 758 (Ky. 2015).

On appeal, Alexander argues the trial court erred in granting summary judgment because it made factual findings in determining that she did not pay valuable consideration for the manufactured home and Wells Fargo did not have standing to enforce the mortgage.

While neither party has raised the issue of whether the order granting summary judgment is a final and appealable order, we must address this issue.

Huff v. Wood-Mosaic Corp., 454 S.W.2d 705, 706 (Ky. 1970); *Cent. Adjustment Bureau, Inc. v. Ingram Associates, Inc.*, 622 S.W.2d 681, 683 (Ky.App. 1981). CR

54.01 provides as follows:

A judgment is a written order of a court adjudicating a claim or claims in an action or proceeding. A final or appealable judgment is a final order adjudicating all the rights of all the parties in an action or proceeding, or a judgment made final under Rule 54.02. Where the context requires, the term “judgment” as used in these rules shall be construed “final judgment” or “final order”.

CR 54.02(1) provides:

When more than one claim for relief is presented in an action . . . , or when multiple parties are involved, the court may grant a final judgment upon one or more but less than all of the claims or parties only upon a determination that there is no just reason for delay. The judgment shall recite such determination and shall recite that the judgment is final. In the absence of such recital, any order or other form of decision, however designated, which adjudicates less than all the claims or the rights and liabilities of less than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is interlocutory and subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

A summary judgment disposing of less than all the claims against all the parties can only be deemed to be final and appealable if it contains the requisite language specified in CR 54.02, otherwise it will be deemed interlocutory and not appealable. *Wright*, 461 S.W.3d at 757; *Huff*, 454 S.W.2d at 706.

In a foreclosure action, a final and appealable judgment orders the property to be sold in satisfaction of a judgment and lists and determines the lien priorities.

Sec. Fed. Sav. & Loan Ass'n of Mayfield v. Nesler, 697 S.W.2d 136, 139 (Ky. 1985). The order granting summary judgment only resolved the issue of whether the manufactured home was subject to the mortgage. The order did not resolve Wells Fargo's claim that it was entitled to enforce its lien and, while it contemplated the eventual sale of the property, the order did not determine the priorities between Wells Fargo, the city, the county and Alexander. The order was no more than an intermediate step toward a final determination of Wells Fargo's claims. *See State Auto. Mut. Ins. Co. v. Outlaw*, 575 S.W.2d 489, 491 (Ky.App. 1978). Therefore, Alexander's appeal was premature.

Accordingly, we dismiss Alexander's appeal of the McLean Circuit Court's order granting summary judgment as an appeal from an interlocutory order.

ALL CONCUR.

BRIEFS FOR APPELLANT:

L. Christopher Hunt
Hartford, Kentucky

BRIEF FOR APPELLEE:

Robert E. Ison
Hopkinsville, Kentucky