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Commonwealth of Kentucky

Court of Appeals

NO. 2017-CA-000481-MR

RICHARD CLAY AND ELEANOR M. CLAY — APPELLANTS

APPEAL FROM BOYLE CIRCUIT COURT
v. HONORABLE HUNTER DAUGHTERY, SPECIAL JUDGE
ACTION NO. 16-CI-00039

WESBANCO BANK, INC. f/k/a
UNITED BANK & CAPITAL TRUST
COMPANY f/k/a FARMERS BANK
AND CAPITAL TRUST CO.;
DAVID P. NUTGRASS, ITS
ATTORNEY; AND BOYLE HEATING
AND AIR CONDITIONING, INC. — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, COMBS AND MAZE, JUDGES.

ACREE, JUDGE: Appellants Richard and Eleanor Clay (Clay) appeal the February 7, 2017, judgment and order of sale of property by a special judge in the

Boyle Circuit Court in favor of United Bank & Capital Trust, formerly known as Farmers Bank & Capital Trust Company and now known as WesBanco Bank, Inc. (UBCT).[1] Clay raises issues regarding acceleration of the mortgage, discovery practice, lien superiority, failure to recuse, and the supersedeas bond amount set by the court. After careful review, we affirm.

FACTS AND PROCEDURE

This appeal emanates from a mortgage executed by Clay in favor of UBCT on property located in Mercer and Boyle Counties. On February 27, 2006, UBCT's predecessor recorded the mortgage on Clay's property located at 319 West Main Street, Danville, Kentucky, in the Boyle County Clerk's office to secure payment of a promissory note in the original principal amount of $172,000, with interest. Boyle Heating and Air Conditioning, Inc. became a party to this action to assert its claim secured by a mechanic's lien on the subject property.

On February 15, 2016, UBCT filed an action to collect the note and to foreclose on Clay's Boyle County property securing it. Clay's motion to dismiss delayed his answer. Additionally, the original trial judge's recusal necessitated the appointment of the Honorable Hunter Daugherty as Special Judge. When Clay

[1] During the pendency of this appeal, the Court granted a motion substituting WesBanco Bank, Inc. for United Bank & Capital Trust as appellee.

filed an answer in September 2016, it was accompanied by a counterclaim alleging abuse of process and malicious prosecution against UBCT.

Soon after filing his answer and counterclaim, Clay filed an affidavit for the recusal of the special judge. The judge declined to recuse. Clay then pursued his right pursuant to KRS[2] 26A.020 and requested the Chief Justice of the Kentucky Supreme Court to order recusal. The Chief Justice entered an order stating that Clay "failed to demonstrate any disqualifying circumstance" that would require recusal; however, the order was entered without prejudice of any party to seek appellate review after entry of the final judgment.

Shortly thereafter, UBCT filed a motion for summary judgment on its foreclosure claim. The record shows, and the trial court found after trial, that Clay made his most recent mortgage payment on July 27, 2015, and that since February 17, 2016, Clay was delinquent in paying taxes assessed by Boyle County and the Danville School District relative to the subject property. On December 16, 2016, the trial court found these material facts were still the subject of genuine dispute and denied UBCT's summary judgment motion.

In the same order, the trial court bifurcated UBCT's equity-based foreclosure claim and Clay's law-based counterclaims and set the matter for trial on the former in late January 2017. Clay's motions to continue were denied. The

[2] Kentucky Revised Statutes.

court conducted a bench trial on January 25, 2017, and found, based on facts already noted regarding mortgage payments and tax delinquency, that Clay was in default on the note and the remedy provisions of the mortgage were applicable, including foreclosure.

The trial court issued an order of sale for the property on February 7, 2017. Clay filed a motion to alter, amend, or vacate on February 17, 2017, which the trial court denied on March 6, 2017. A notice of appeal was filed on March 17, 2017, in conjunction with the supersedeas bond. UBCT objected to the bond form and surety and a hearing was conducted on this matter on June 17, 2017, when the court increased the amount of the supersedeas bond.

STANDARD OF REVIEW

We will not set aside a judgment following a bench trial unless it is "clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." CR[3] 52.01. A factual finding is not clearly erroneous if it is supported by substantial evidence, which is defined as evidence of sufficient probative value to induce conviction in the mind of a reasonable person. *Gosney v. Glenn*, 163 S.W.3d 894, 898-99 (Ky. App. 2005). The trial court's conclusions of law, however, are reviewed *de novo. Id.*

[3] Kentucky Rules of Civil Procedure.

ANALYSIS

Clay raises several issues on appeal. We address each separately.

Default payments

Clay argues that UBCT did not properly accelerate the loan secured by the mortgage because it did not make a demand that the note be paid. Clay further asserts that it was error for UBCT to refuse mortgage payments that would have brought the debt current and ahead. UBCT responded by asserting that any such refusal was permitted because Clay had already defaulted on the mortgage and, under the terms of the mortgage, that permitted UBCT to accelerate the debt and refuse any subsequent payments. UBCT also points out that Clay did not raise this specific argument as to the demand for payment at trial.

Clay relies upon KRS 355.1-309 as the basis for his argument that UBCT be required to make a demand. The statute states:

> A term providing that one (1) party or that party's successor in interest may accelerate payment or performance or require collateral or additional collateral "at will" or when the party "deems itself insecure," or words of similar import, means that the party has power to do so only if that party in good faith believes that the prospect of payment or performance is impaired. The burden of establishing lack of good faith is on the party against which the power has been exercised.

KRS 355.1-309. In response, UBCT argues the statute applies only to an acceleration that permits acceleration "at will" – *i.e.*, at the unilateral option of the

creditor – or when the creditor can accelerate by unilaterally deeming itself insecure. The statute is inapplicable, UBCT continues, when express terms of the mortgage set out specific borrower requirements that prevent triggering acceleration. We agree.

> The note concerning the property in question states:
>
> > Should the Mortgagor fail: a) to pay any installment on the said note or interest thereon when the same becomes due, or b) to pay such taxes or assessments when they become due . . . the Mortgagee may declare the indebtedness secured hereby to be at once due and payable and may forthwith proceed to collect the same and to enforce this mortgage by suit or otherwise. . . .

(R. at 9.) The clear language of the note specifies that, should default occur, UBCT had authority to foreclose on the property. The note's terms clearly state that the failure to pay taxes constitutes a breach of the covenants set forth in the note. When such language unambiguously grants a party the right to do something, we will enforce the terms of the agreement. *McMullin v. McMullin*, 338 S.W.3d 315, 320 (Ky. App. 2011).

During the bench trial, UBCT testified that Clay missed three monthly payments and was delinquent on taxes associated with the property. Clay presented no evidence to refute either of these facts. Regardless whether any satisfactory payment by Clay was declined by the bank, we agree that a finding of default was proper because Clay missed three monthly payments and did not pay

taxes assessed on the property for 2016. Furthermore, Clay presented no evidence to question the validity of the mortgage, the foundation upon which the trial court made its finding of default. Based on the language of the instrument and unrefuted evidence of default presented by UBCT, we cannot agree with Clay that the trial court was clearly erroneous in its findings.

Reasonable notice under CR 40

At a hearing on November 21, 2016, the parties addressed several pending matters. The trial court suggested that, this being an equitable action in foreclosure, a trial date be set. Clay's counsel's only concern was that some discovery had been sent to UBCT a few weeks earlier for which a response was not yet due. Not knowing what those discovery responses would reveal, his counsel wanted to be sure that, if necessary, a follow-up deposition could be taken before trial. UBCT said the discovery responses were due and would be completed and served the first week of December. The trial court suggested a January trial date. That would allow Clay the month of December to pursue follow-up discovery.

Clay's counsel had conflicts on the first three January dates the court suggested. However, when the judge suggested January 25, 2017 as the trial date, Clay's counsel stated: "Judge, I can do it then, Mr. Clay can do it then, if we could have discovery finished. That sounds good, judge." (Video Transcript, 11/21/16;

9:19:45 – 9:19:53.) The order setting trial for January 25, 2017, was entered on December 16, 2016, and distributed to counsel.

Clay now argues that the order violated CR 40 because it failed to provide him with reasonable notice of the trial. Clay characterizes the trial court's actions as a "sprint to trial" and a "rocket docket" with a "*sua sponte* trial date." We disagree.

The procedural rule governing the court's notice of trials, CR 40, says only: "No case shall be assigned for trial without giving reasonable notice to all parties not in default of the day on which a trial date will be fixed." We believe reasonable notice of the trial was given.

Violation of this rule has been found when no notice at all was given because its "underlying purpose was that parties should be given notice." *Burns v. Brewster*, 338 S.W.2d 908, 910 (Ky. 1960). The rule is violated when a trial is conducted even though "it was made known to the court that the attorneys for the defendants had had no previous notice of the date of trial . . . ." *Id.* The rule "is not intended to impose an unnecessary burden upon the court or those who seek to have their cases assigned for trial." *Combs v. Griffith*, 429 S.W.2d 849, 851 (Ky. 1968) (internal quotation marks omitted).

Our highest court has repeated that the purpose of the rule is to limit a trial court's discretion "only . . . to assign[ing] a trial date after proper notice,

giving to both sides an opportunity to be heard and state their reasons for or against." *Id.*; *Ledford v. Osborne*, 350 S.W.2d 641, 643 (Ky. 1961) (purpose of CR 40 is "to make sure that a party who might possibly object to a trial date be advised of the time when that case will be assigned." (quoting 1960 Supplement to Clay on Kentucky Practice)); *Wharton v. Cole*, 374 S.W.2d 498, 499 (Ky. 1964) (same). In fact, our highest court said, "[I]n some circumstances a few minutes' notice of hearing on such a motion would be sufficient." *Walker v. Bencini*, 374 S.W.2d 368, 369 (Ky. 1963) (citing Clay, Kentucky Practice, Rules of Civil Procedure Annotated, CR 40, Comment 3).

Considering Clay's counsel's agreement to a trial date two months in advance, and further considering the foregoing jurisprudence regarding CR 40, Clay's argument is without merit.

Opportunity for discovery

Clay also argues that the trial date was set without allowing him to complete discovery. We reiterate that this foreclosure action began in February 2016. Clay's answer to the foreclosure complaint narrowed the disputed issues.

He admitted executing the mortgage and the property description. He admitted the identity of the other potential lienholders, including Appellee Boyle Heating and Air and three taxing authorities. Essentially all that was left in dispute was whether Clay had defaulted.

The complaint alleges default occurred when Clay failed to make timely payments and again when Clay fell delinquent on taxes owed regarding the property. If Clay was no longer in possession of proof (such as cancelled checks) to the contrary, he had many months to target discovery to obtain it. We have said, in the context of summary judgment motions, that "[i]t is not necessary that litigants be allowed to complete discovery but only that they be granted sufficient time to complete discovery . . . ." *Martin v. Pack's Inc.*, 358 S.W.3d 481, 485 (Ky. App. 2011). This principle applies equally to trials.

The discovery requests that were outstanding as of the November 21, 2016 hearing were timely answered in early December. However, UBCT did object to some of the questions. One of the interrogatories to which UBCT objected was a fishing expedition, seeking the names of "all borrowers filing oral or written complaints against [UBCT], its predecessors or assignees, including the officers, directors, employees, or agents of any of them, since June 1, 2013, whether filed with plaintiff, its attorneys, or regulators . . . ." Another sought proof of every bank charge Clay ever paid. Still another sought every UBCT record ever mentioning Clay.[4]

[4] Neither the interrogatories nor the responses were made a part of the record. The interrogatories to which UBCT objected are listed in Clay's brief. The text of this opinion describes Interrogatories 13, 4, and 5, in that order. Interrogatories 6 and 7 are referenced in Clay's brief but they are not described.

This Court is not saying UBCT's objections to this discovery were sustainable. That question is irrelevant. We are saying only that seven months elapsed from service of the complaint on April 3, 2016,[5] until November 1, 2016; and nearly another three months elapsed from then until trial. Given the nature of this action, we conclude that Clay was "granted sufficient time to complete discovery . . . ." *Id.*

Failure to determine amount and priority of liens before ordering sale

Next, Clay asserts that the judgment should be vacated because the priority of the claims against the subject property had not been fully determined. As authority, Clay relies on *Alexander v. Springfield Prod. Credit Ass'n,* 673 S.W.2d 741 (Ky. App. 1984). *Alexander* cannot carry the day here.

Alexander is distinguishable because the record in that case reflected "a substantial issue as to . . . *validity* of the Alexander's [sic] mortgage lien upon the property." *Id.* at 743 (emphasis added). In contrast, Clay does not claim that UBCT's note or mortgage is invalid. Moreover, *Alexander* does not necessarily support Clay's position because that case specifically declined to "hold that a sale before final judgment upon the validity and priority of claims is always

[5] UBCT questions the delay of service of summons, noting Mr. Clay's office is next to the Boyle County Courthouse. However, the address on both Mr. Clay's and Mrs. Clay's summonses was their residence. Although there was an unexplained delay between filing the complaint on February 15, 2016, and service on April 3, 2016, this did not substantially deprive Clay of the opportunity for discovery.

impermissible[.]" *Id.; see also Murty Bros. Sales, Inc. v. Preston,* 716 S.W.2d 239, 241 (Ky. 1986). We agree with *Alexander's* notation that "it seems only reasonable that the validity of the indebtedness should be adjudicated before sale of the security." *Alexander*, 673 S.W.2d at 743. Again, however, the validity of UBCT's note and mortgage is not disputed in this case. As discussed above, Clay admitted these elements of UBCT's claim. We find no error here.

Trial judge's decision not to recuse

Clay moved for the recusal of the special judge assigned to replace the original trial judge who had recused. He argued that the special judge exhibited bias toward him and that he should have recused. In support of this contention, Clay offers his own affidavit that, starting in 2008, he "began declining further employment in the circuit court in these counties [in which the special judge was seated] due to my belief from local experience that I could not fairly represent my clients' interest before [the special judge]." (R. at 193.)[6] This, of course, reflects Clay's subjective view. The special judge denied the motion because it had been "six to seven years since Clay practiced before [him]" and he expressed from the bench his own subjective belief that he could try the case without bias.

[6] The affidavit to which Clay refers discusses alleged issues concerning statements made by the special judge in court as well as the appearance of impropriety based on an alleged *ex parte* communication that occurred on August 19, 2016.

An objective view that applies the proper standard is found in the record. It is the Order Denying Motion For Disqualification entered by Chief Justice of the Kentucky Supreme Court on December 15, 2016. (R. at 199.) The order says Clay "failed to demonstrate any disqualifying circumstance that would require the appointment of a special judge" to replace the special judge. However, the order also says the denial of Clay motion was "without prejudice of any party to seek appellate review after entry of a final judgment." (*Id.*)

Appellate review of this issue starts with the applicable statute, KRS 26A.015. The relevant portion of that statute says: "Any . . . judge . . . shall disqualify himself in any proceeding . . . [w]here he has a personal bias or prejudice concerning a party . . . ." KRS 26A.015(2)(a). The statute also requires recusal if the judge "has knowledge of any other circumstances in which his impartiality might reasonably be questioned." KRS 26A.015(2)(e).

On the other hand, judges have a "duty to sit" absent valid reasons for recusal. *Commonwealth of Kentucky, Revenue Cabinet v. Smith*, 875 S.W.2d 873, 879 (Ky. 1994). A judge contemplating his own disqualification must consider these competing obligations in context. On review of that decision the appellate court applies an abuse of discretion standard. *Minks v. Commonwealth*, 427 S.W.3d 802, 806 (Ky. 2014). The reviewing court must consider whether the facts alleged would place a reasonably prudent person in fear of not receiving a fair

and impartial trial. *Dean v. Bondurant*, 193 S.W.3d 744 (Ky. 2006); *see also Taylor v. Carter*, 333 S.W.3d 437, 445 (Ky. App. 2010). Reversal of a judge's decision not to disqualify himself requires a finding that refusal to do so was "arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999).

We find nothing in the record sufficient to compel reversal of the special judge's decision to preside over the case. There is no objective evidence of bias in this case. The trial court, therefore, did not abuse its discretion.

Increasing the supersedeas bond

Lastly, Clay argues that the trial court erred by increasing the supersedeas bond in violation of CR 73.04. We disagree.

CR 73.04 states as follows:

> (1) Whenever an appellant entitled thereto desires a stay on appeal, as provided in Rule 62.03, he may present to the clerk or the court for approval an executed supersedeas bond with good and sufficient surety. The address of the surety shall be shown on the bond. The bond shall be in a fixed amount and conditioned for the satisfaction of the judgment in full together with costs, interest and damages for delay, if the appeal is dismissed or if the judgment is affirmed, and to satisfy in full such modification of the judgment and such costs, including costs on the appeal and interest as the appellate court may adjudge.
>
> (2) When the judgment is for the recovery of money not otherwise secured, the amount of the bond shall be fixed at such sum as will cover the whole amount of the

> judgment remaining unsatisfied, costs on the appeal, interest, and damages for delay, unless the trial court after notice and hearing and for good cause shown fixes a different amount or orders security other than the bond.
>
> (3) When the judgment determines the disposition of the property in controversy as in real actions or replevin, or when such property is in the custody of the sheriff, or when the proceeds of such property or a bond for its value is in the custody or control of the court, the amount of the supersedeas bond shall be fixed at such sum only as will secure the amount recovered for the use and detention of the property, the costs of the action, costs on appeal, interest, and damages for delay. A supersedeas bond may be given to stay proceedings on a part of a judgment, and in such case the bond need only secure the part superseded.

CR 73.04.

The supersedeas bond scheme also provides the method for challenging a supersedeas bond:

> (1) The sufficiency of the bond or the surety may be determined by the trial court upon motion and hearing.
>
> (2) During an appeal, the trial court shall retain original jurisdiction to determine all matters relating to the right to file a supersedeas bond, the amount and sufficiency thereof and the surety thereon.

CR 73.06.

We begin by noting that "little has been written on the topic of supersedeas bonds. As an appellate court, we lack authority to approve them, and are limited to granting leave to file a bond in the circumstances described in CR

73.06 or 'to review the sufficiency of supersedeas bonds already filed in a pending appeal.'" *Strunk v. Lawson*, 447 S.W.3d 641, 652 (Ky. App. 2013) (quoting *Henry Vogt Machine Company v. Scruggs*, 769 S.W.2d 766, 767 (Ky. App. 1989)).

Notwithstanding these cautionary notes, "[w]e review a challenge to a supersedeas bond for an abuse of discretion." *Strunk*, 447 S.W.3d at 651. Applying that standard to the facts of this case, we find no abuse of discretion. When Clay filed the notice of appeal, he executed a supersedeas bond in the amount of principal and interest the trial court had determined remained unpaid under the note as of the date of judgment – $122,237.31. However, the judgment also awarded interest at the rate set out in the note plus costs of the action. Consequently, UBCT moved to increase the bond to cover those additional amounts. The trial court granted the motion and ordered the bond amount increased to $150,000.

Clay contested UBCT's motion to increase the bond before the trial court on the facts. Before this Court, however, the challenge focuses on the bond form. Clay argues the principal amount of the judgment is all that is required of the form created by the Administrative Office of the Courts pursuant to CR 74.03 (Form AOC-155). We disagree.

First, the form does include all the elements of CR 73.04.[7] But even if it did not, the rule and not the form would control. The rule does not limit the amount of the bond to the judgment itself but says the bond should be sufficient to cover "costs, interest and damages for delay, . . . costs on the appeal and interest as the appellate court may adjudge." CR 73.04(1). The trial court increased the bond in an amount reasonably calculated to include these other amounts. Clay directs us to nothing that would indicate the trial court abused its discretion in increasing the bond. We find that the trial court acted in accordance with the rule and did not abuse its discretion in doing so.

CONCLUSION

Based on the foregoing analysis, we affirm the February 7, 2017, judgment and order of sale of the Boyle Circuit Court.

ALL CONCUR.

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[7] Form AOC-155 says:

> The Appellant having appealed from a judgment of this Court rendered on _____, 2____, for $_____ and costs, we, _____, as principal, and _____, as surety, bind ourselves and our estates to Appellee in the amount of $_____ to satisfy the judgment *together with interest, costs and damages for delay if for any reason the appeal is dismissed or the judgment is affirmed, and to satisfy in full such modification of the judgment and such interest and costs, including costs of the appeal, as the appellate court may adjudge*.

(Emphasis added.)

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