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Commonwealth of Kentucky

Court of Appeals

NO. 2017-CA-001749-MR

DAVID RADOS APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE DARRYL S. LAVERY, JUDGE
ACTION NO. 16-CI-002895

ROBERT BEAVERS APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, KRAMER, AND L. THOMPSON, JUDGES.

KRAMER, JUDGE: David Rados appeals an order of the Jefferson Circuit Court that dismissed, based upon *res judicata*, various claims of fraud and unjust enrichment he asserted against appellee Robert Beavers. Upon review, we affirm.

Because the circuit court's decision under review in this appeal was founded on *res judicata*, we must first set forth the proceedings and decisions in an

underlying foreclosure action and CR[1] 60.02 motion in that case before we can address the matter that is currently under review. We note, therefore, that this appeal stems indirectly from a January 13, 2014 postjudgment order entered by the Jefferson Circuit Court in *Residential Funding Company, LLC v. David Rados, Jr.*, 12-CI-403498, a foreclosure proceeding that involved residential property situated in Louisville, Kentucky, that was formerly owned by David Rados. Briefly summarized, the January 13, 2014 postjudgment order resolved an uncontested claim of Robert Beavers to the net remaining proceeds yielded from the judicial sale of the subject property. In total, the circuit court awarded Beavers a distribution of $42,018.70; and in doing so, it resolved the final aspect of that litigation.

There is no dispute that the January 13, 2014 order was final and appealable. There is no dispute that it was never appealed. This leads to *part* of why the present appeal only indirectly relates to that order: On April 24, 2014, Rados attempted to collaterally attack it through CR 60.02 proceedings.

Citing CR 60.02, Rados asked the circuit court to vacate Beavers's award of $42,018.70 based upon fraud. Specifically, he alleged that Beavers, who had been the assignee of the successful bidder at the judicial sale, had defrauded him by: (1) convincing him, on the date of the judicial sale (*i.e.*, May 21, 2013),

[1] Kentucky Rule of Civil Procedure.

that there would be little or no proceeds remaining from the judicial sale after the interests of his creditors were satisfied; (2) inducing him on that date, based upon the strength of that representation, to execute a deed to the subject property that quitclaimed his interest in any remaining proceeds to Beavers; and by (3) using that deed to later claim the $42,018.70 in judicial sale proceeds that actually remained after the interests of his creditors were satisfied.

Over the course of a two-day evidentiary hearing before the circuit court's master commissioner, Rados was then granted an opportunity to flesh out the substance of his contentions. Beavers was permitted to adduce proof to the contrary. Afterward, the master commissioner entered a recommended order. The master commissioner began by framing the issues:

> The issue raised by defendant David Rados is whether the purchaser or the purchaser's assignee committed fraud. In particular Mr. Beavers asserts that Mr. Rados was fully aware of what was going on or had the opportunity to make himself aware and nevertheless signed the deed.

The master commissioner then summarized the parties' evidence regarding the events that had culminated in Beavers, rather than Rados, receiving the $42,018.70 in judicial sales proceeds:

> Mr. Rados, being duly sworn, testified that he had become depressed, had not been opening his mail, and did not know what was going on with his house. He testified that when he purchased his house, he had made an $80,000 deposit on his house toward the $120,000

purchase price. His house payments had been $450 per month and he did not know the balance remaining on the mortgage when he stopped paying on the mortgage. Mr. Rados acknowledges that he did not make his mortgage payments.

The Court entered a judgment, in an amount to be raised, at the sale, of $10,172.53. The amount was contained in the handbill posted on the property, and made available both on the website and at the Master Commissioner's Office. The amount is a specifically identified amount. In particular, the "Amount to be Raised," is contained in a statement submitted by the Plaintiff's counsel, and includes all amounts in the judgment creditor's judgment, including interest current through the sale date, but not including costs and reserved amounts. JRP[2] 502D. In contrast to the amount to be raised, the Court appraisal was for $80,000 and Mr. Rados himself had originally purchased the property for $120,000.

The Master Commissioner announced the Court appraised value of $80,000 immediately in advance of auctioning the property. The Master Commissioner sold the property at judicial sale, according to the terms of the judgment. Subsequently, it sold for $53,500 to We Buy Real Estate, LLC. No party filed objections to the sale.

Immediately after the sale, We Buy Real Estate, LLC's representative, J.P. Pirtle, met with Mr. Rados. Mr. Pirtle, being duly sworn, testified that Mr. Rados and he made arrangements to go through the house together that evening, for the purpose of entering a lease.

That evening, Mr. Rados met with Mr. Pirtle, who also had brought the person who became the assignee, Mr. Beavers, and another individual, Frank Miller. Mr. Beavers and Mr. Miller were looking at the property for

[2] Jefferson Rule of Practice.

purposes of investing in it. Mr. Rados understood the parties were there to discuss a lease.

Mr. Rados's visitors discussed the investment possibilities of the property. Mr. Pirtle, Mr. Beavers, and Mr. Miller are bidders and investors in Commissioner's sales properties. Mr. Pirtle was considering assigning his interest to Mr. Beavers. Mr. Pirtle concluded he did not want the property because he was more interested in purchasing and selling, and not leasing it. The parties had some discussion about any amounts that may remain after the sale. Mr. Miller, being duly sworn, had stated that proceeds may remain from the sale.

However, the parties also discussed a complication. The United States' 120 day Right of Redemption was attached to the property, and was an additional term announced at the sale. The right allows the United States 120 days to purchase the property for the sale price plus interest, according to Title 28 U.S.C. § 2410. Although discussed at the time, the term did not ultimately apply. Approximately three weeks after the sale, the United States moved to be dismissed, and tendered an order that the Right of Redemption did not apply. The Court entered the order, thereby extinguishing the term.

Mr. Beavers was interested in renting the house from the new owner. The parties discussed the terms of the lease. At the meeting, Mr. Beavers told Mr. Rados that a deed would be required before a lease could be entered.

The following day Mr. Beavers arrived with a deed for Mr. Rados to sign. He also had a lease, with an option to purchase, which neither party kept. Mr. Rados started to sign the deed and Mr. Beavers said it had to be notarized. Mr. Rados recalled that there was a notary at the UPS store, and because it was after hours of ordinary business, Mr. Rados suggested that they go to the UPS [sic].

> Mr. Rados and Mr. Beavers went to the UPS store, with Mr. Beavers' deed. A blank remained on the form for the consideration. Mr. Rados testified that the UPS clerk returned the form to him without initially notarizing it. Mr. Rados said he did not know what consideration meant, and asked Mr. Beavers. They agreed upon $1.00. Mr. Rados testified that he reached into his pocket, pulled out his wallet, and paid Mr. Beavers the $1.00. The person at the UPS store then notarized [the] deed. Mr. Rados attested to the fact that he not only signed the deed but he also paid the one dollar consideration for the property.
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> Mr. Beavers testified that he paid Mr. Pirtle $10,600 for the assignment of the rights to the bid, and paid another amount into court with a total rough amount of paying $64,000 on the property. He testified that additional terms of consideration were that he would exchange the right to possession of the property to Mr. Rados in exchange for Mr. Rados's paying $450 per month for four months the length of the time for the right of redemption to expire. The terms related to possession were not contained in the deed, and were not noted in the consideration certificate. Neither party has a copy of the lease, which both agreed they entered. Then, [Beavers] received $42,018 in proceeds.

Next, the master commissioner proceeded to discuss the significance of this evidence for purposes of Rados's CR 60.02 motion, explaining in relevant[3] part:

> Mr. Rados did not object to the distribution [to Beavers.] All matters were resolved and the case became final after

[3] The master commissioner's recommended order included three additional pages of analysis regarding the law of contracts, fraud, and innocent misrepresentations. We have omitted it because, considering the master commissioner's disposition of Rados's motion, it was *dicta*.

> the January 13, 201[4[4]] order of distribution. The pending matter is here on a motion to vacate pursuant to CR 60.02. In order for the Court to reopen a matter under CR 60.02, there must be matters which "do not appear on the face of the record, were not available by appeal or otherwise, and were discovered after the rendition of the judgment without the fault of the party seeking relief." Board of Trustees of Policeman's and Fireman's Retirement Fund of City of Lexington v. Nuckolls, 507 S.W.2d 183, 186 [(Ky. 1974)]. In the present case, all matters were before Mr. Rados at the time the events unfolded: the amount to be raised, the appraisal amount, the release of proceeds contained in the deed, which he signed. While a deed whose sole purpose is to facilitate the removal of proceeds from a party may play a role in another case, it is not one for this case.

In other words, the master commissioner determined from the evidence that in the approximately seven months between May 21, 2013 (*i.e.*, the date of the judicial sale and also the date Rados executed the quitclaim deed) and January 13, 2014 (the date of the circuit court's order of distribution), Rados had known or should have known that the quitclaim deed he had signed included a provision that conveyed to Beavers any remaining proceeds from the judicial sale. He should have known – considering the difference between what he had purchased the property for ($120,000) or the appraised value of the property ($80,000), versus the advertised amount that was being sought through the foreclosure proceedings ($10,172.53) – that there *would* be remaining sales

[4] Due to an apparent typographical error, the master commissioner stated the circuit court's prior order of distribution was dated "January 13, 2013."

proceeds. During that period, Rados also could have easily verified whether there *were* proceeds remaining. He could have objected to the circuit court's order of distribution. Moreover, he also could have appealed that order. But, he did neither.

Accordingly, the master commissioner recommended the circuit court deny Rados's CR 60.02 motion, concluding that Rados was attempting to improperly utilize CR 60.02 as a basis for raising issues that he could have and should have asserted in the prior litigation. *See Nuckolls*, 507 S.W.2d at 186; *McQueen v. Commonwealth*, 948 S.W.2d 415, 416 (Ky. 1997) (explaining CR 60.02 "is available only to raise issues which cannot be raised in other proceedings"). Thereafter, in a January 11, 2016 order, the circuit court adopted the master commissioner's reasoning and recommendation.

With that said, Rados did not appeal the circuit court's January 11, 2016 order either.[5]

Instead, on June 30, 2016, Rados filed a complaint in Jefferson Circuit Court and initiated the litigation forming the basis of the instant appeal. His complaint took the allegations of fraud previously set forth in his CR 60.02 motion

[5] A circuit court's ruling on a CR 60.02 motion qualifies as a final judgment from which an appeal may be taken. *See Mingey v. Cline Leasing Service, Inc.*, 707 S.W.2d 794, 796 (Ky. App. 1986). Assuming an appeal is taken, the circuit court's findings of fact are reviewed under the clear error standard. *McMurry v. McMurry*, 957 S.W.2d 731, 733 (Ky. App. 1997).

and effectively repackaged them into the following civil "claims"[6] against Beavers: (1) fraud; (2) fraudulent omission; (3) failure of consideration; (4) equitable estoppel; and (5) unconscionability. He also sought the same relief: rescission of the quitclaim deed and recovery of the $42,018.70.

Thereafter, Beavers moved to dismiss on the basis of *res judicata*, and the circuit court ultimately granted his motion.

In light of that background information, we now turn to the instant appeal. Before us, Rados argues that *res judicata* cannot apply because the merits of his fraud and associated claims have never been adjudicated.[7] In making this argument, however, Rados misses the point. The dispositive question is *when* he should have raised the issues underlying his claims.

The doctrine of *res judicata* provides that a final judgment on the merits of an action precludes the parties or their privies from re-litigating issues that were or could have been raised in a prior action. *See Buis v. Elliott*, 142 S.W.3d 137, 139-40 (Ky. 2004); *see also City of Louisville v. Louisville Prof'l. Firefighters Ass'n*, 813 S.W.2d 804, 806 (Ky. 1991) (explaining *res judicata*

[6] "Failure of consideration," "equitable estoppel," and "unconscionability" are *defenses*. Nevertheless, it is apparent from the face of his complaint that in asserting them as "claims," Rados was asserting bases for rescinding the quitclaim deed and recovering the $42,018.70 in judicial sale proceeds that had been distributed to Beavers.

[7] In his appellee brief, Beavers insinuates Rados's various claims were adjudicated by virtue of the circuit court's January 11, 2016 order. As explained, however, they were not. In that order, the circuit court adjudicated when those claims should have been asserted.

applies when three requirements are met: "First, there must be identity of the parties. Second, there must be identity of the two *causes of action*. Third, the action must be decided on its merits." (Quoting *Newman v. Newman*, 451 S.W.2d 417, 419 (Ky. 1970) (emphasis added)). So long as its elements are met, the rule applies "even though the plaintiff is prepared in the second action (1) To present evidence or grounds or theories of the case not presented in the first action, or (2) To seek remedies or forms of relief not demanded in the first action." *Dennis v. Fiscal Court of Bullitt County*, 784 S.W.2d 608, 610 (Ky. App. 1990) (quoting RESTATEMENT (SECOND) OF JUDGMENTS § 25); *see also Cherry v. Augustus*, 245 S.W.3d 766, 775 (Ky. App. 2006) ("[C]laim preclusion does not require a resolution on the merits. Rather, the relevant question is whether these claims should have been raised in an earlier proceeding.").

With that in mind, an issue that was litigated in *Residential Funding Company, LLC v. David Rados, Jr.*, 12-CI-403498, was Beavers's claim to the judicial sale proceeds that remained after the interests of Rados's creditors were satisfied. Rados was a party to that matter. Rados was or should have been aware of Beavers's claim and the basis of Beavers's claim. Rados made no claim for any of the proceeds; he did not contest Beavers's claim; and, a final judgment of January 13, 2014, adjudicated that matter in Beavers's favor. Moreover, it has already been determined that the issues Rados seeks to raise *here* should have been

raised prior to, or in a direct appeal of, that January 13, 2014 order. Indeed, that was exactly what the circuit court explained when it rejected Rados's *first* attempt to collaterally attack the distribution order of January 13, 2014, when he raised the same issues through his CR 60.02 motion in the original foreclosure action.

Accordingly, there was no error in the circuit court's decision to reject what amounted to Rados's *second* attempt to collaterally attack that order. *Res judicata* precluded Rados's claims, and the Jefferson Circuit Court is therefore AFFIRMED.

ALL CONCUR.

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