

RENDERED: MAY 1, 2020; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2019-CA-000067-MR

CITIZENS BANK OF KENTUCKY,
F/K/A CITIZENS NATIONAL BANK

APPELLANT

v.

APPEAL FROM FLOYD CIRCUIT COURT
HONORABLE JOHNNY RAY HARRIS, JUDGE
ACTION NO. 16-CI-00688

STACEY BENTLEY

APPELLEE

OPINION
REVERSING AND REMANDING

** ** * ** * **

BEFORE: CLAYTON, CHIEF JUDGE; DIXON AND MAZE, JUDGES.

CLAYTON, CHIEF JUDGE: Citizens Bank of Kentucky (“Citizens”) appeals from the Floyd Circuit Court’s order granting Stacey Bentley’s motion to dismiss Citizens’ post-judgment action to recover costs and attorneys’ fees allegedly owed

to Citizens by Stacey under a mortgage note. Upon review of the record and applicable law, we reverse and remand to the trial court for further proceedings.

BACKGROUND

Eva Vance obtained title to certain property located in Floyd County, Kentucky, in December of 1999. Eva conveyed a portion of her property to her daughter, Teresa Bentley, in April of 2004. In turn, Teresa deeded to her daughter, Stacey, a portion of Teresa's property in July of 2008 (the "Subject Property").

Thereafter, Stacey granted a mortgage on the Subject Property to Citizens in October of 2009 (the "Mortgage"). The Mortgage contained the following language:

Attorneys' Fees; Expenses. If Lender institutes any suit or action to enforce any of the terms of this Mortgage, Lender shall be entitled to recover such sum as the court may adjudge reasonable as attorneys' fees at trial and upon any appeal. Whether or not any court action is involved, and to the extent not prohibited by law, all reasonable expenses Lender incurs that in Lender's opinion are necessary at any time for the protection of its interest or the enforcement of its rights shall become a part of the indebtedness payable on demand and shall bear interest at the Note rate from the date of the expenditure until repaid. Expenses covered by this paragraph include, without limitation, however subject to any limits under applicable law, Lender's reasonable attorneys' fees and expenses for bankruptcy proceedings (including efforts to modify or vacate any automatic stay or injunction), appeals, and any anticipated post-judgment collection services, the cost of searching records, obtaining title reports (including foreclosure reports), surveyors' reports, and appraisal fees and title

insurance, to the extent permitted by applicable law. Grantor will also pay any court costs, in addition to all other sums provided by law.

Stacey subsequently defaulted on the Mortgage and, after obtaining a judgment in a foreclosure action, Citizens acquired title to the Subject Property via a Commissioner's Deed recorded on May 18, 2015.

Thereafter, a dispute arose as to whether Citizens was authorized to use Teresa's property to access the Subject Property for maintenance and repairs to the Subject Property. As a result, Citizens filed an action against Teresa in October of 2016 to obtain an access easement across Teresa's property and to enjoin Teresa from interfering with Citizens' access to the Subject Property.

In her response to Citizens' complaint, Teresa Bentley argued that, when she deeded the Subject Property to her daughter, she had intended that the Subject Property be landlocked and that, because Citizens had knowingly and willingly chosen to grant a mortgage on the landlocked Subject Property, Teresa was not required to grant Citizens any type of easement across her property. Teresa also asserted a counterclaim against Citizens requesting compensation for its alleged trespass on her property. Additionally, Teresa's response contained an affidavit from Stacey stating that Stacey knew that the Subject Property did not have access and that there was "no intent to have an easement."

In June of 2017, the trial court granted Citizens leave to file an amended complaint to add Eva – Stacey’s grandmother – as a party. Citizens had discovered that the existing access road to the Subject Property traversed Eva’s property as well. Additionally, the trial court granted Citizens leave to file a second amended complaint adding Stacey as a party defendant and a claim that, under the Mortgage, Citizens was entitled to recover attorneys’ fees and expenses from Stacey that Citizens had incurred in litigating the post-judgment access issue. Ultimately, in November of 2018, Citizens and Eva entered into an agreement providing for an easement against Eva’s property, thereby settling the central issue in the case.

In September of 2018, Stacey filed a motion to dismiss Citizens’ complaint as to any liability Stacey might have under the Mortgage for attorneys’ fees or costs for failure to state a claim. The trial court entered an order in December of 2018 granting Stacey’s motion to dismiss the complaint and finding that Citizens was not entitled to attorneys’ fees from Stacey. Specifically, the trial court stated:

Costs and attorney’s fees are not available to the Plaintiff against the Defendant, Stacey Bentley, as they are not being sought in this action as part of an action to enforce their rights under the mortgage note as expressly contemplated by the language of the note, or an action based on any other contract requiring the non-prevailing party to pay the same.

Citizens filed a timely appeal from the foregoing order.

ANALYSIS

As an initial matter, we note that Stacey failed to file a brief in this case, as required by Kentucky Rule of Civil Procedure (CR) 76.12(1). Under CR 76.12(8)(c), we may accept Citizens' statement of the facts and issues as correct, reverse the judgment if we believe Citizens' brief supports such a result, or treat Stacey's failure to file a brief as a confession of error and reverse the judgment without reaching the merits of the case. The rule does not mandate a specific penalty, but "merely provides penalty options which an appellate court may, in its discretion, impose for failure to file a brief." *Kupper v. Kentucky Bd. of Pharmacy*, 666 S.W.2d 729, 730 (Ky. 1983). In this instance, we choose to review the merits of the case, but will accept Citizens' statement of the facts and issues as correct.

a. Standard of Review

Under Kentucky law:

A motion to dismiss for failure to state a claim upon which relief may be granted admits as true the material facts of the complaint. So a court should not grant such a motion unless it appears the pleading party would not be entitled to relief under any set of facts which could be proved. Accordingly, the pleadings should be liberally construed in the light most favorable to the plaintiff, all allegations being taken as true. This exacting standard of review eliminates any need by the trial court to make findings of fact; rather, the question is purely a matter of law. Stated another way, the court must ask if the facts alleged in the complaint can be proved, would the

plaintiff be entitled to relief? Since a motion to dismiss for failure to state a claim upon which relief may be granted is a pure question of law, a reviewing court owes no deference to a trial court's determination; instead, an appellate court reviews the issue de novo.

Fox v. Grayson, 317 S.W.3d 1, 7 (Ky. 2010), *reh'g denied* (Aug. 26, 2010)

(internal quotation marks and footnotes omitted).

b. Discussion

Citizens argues that the trial court erred in its conclusion that the attorneys' fees were not being sought as part of an action to enforce Citizens' rights under the Mortgage as expressly contemplated by the language of the Mortgage. Rather, Citizens argues that the fees it seeks to recover from Stacey were incurred for precisely that reason – namely, Citizens' interest in and right to being able to access the Subject Property – and such attorneys' fees were contemplated in the express language of the Mortgage.

Kentucky courts follow the “American Rule” with regard to attorneys' fees, which states “that in the absence of a statute or contract expressly providing therefor, attorney fees are not allowable as costs, nor recoverable as an item of damages.” *Cummings v. Covey*, 229 S.W.3d 59, 61 (Ky. App. 2007) (citations omitted). Here, Citizens argues that the contractual language in the Mortgage signed by Stacey was sufficient to impose a contractual obligation on Stacey to pay post-judgment attorneys' fees and costs.

In its second amended complaint, Citizens alleged that the language in the loan documents executed by Stacey was broad enough to entitle Citizens to collect attorneys' fees and expenses incurred in protecting Citizens' rights in the Subject Property. Due to the procedural posture of this case as having been dismissed pursuant to CR 12.02(f), we must accept Citizens' allegations in its complaint as true. As a result, we find that Citizens has pled facts which could evidence an intent to preserve the effectiveness of the Mortgage provision concerning attorneys' fees following the entry of a foreclosure judgment, and such facts are sufficient to state a claim upon which relief can be granted. "A motion to dismiss for failure to state a claim does not test the merits of the action but is confined solely to the sufficiency of the pleading." *White v. Brock*, 487 S.W.2d 908, 909 (Ky. 1972).

CONCLUSION

For the foregoing reasons, we reverse the judgment of the Floyd Circuit Court and remand for further proceedings consistent with this opinion.

ALL CONCUR.

BRIEF FOR APPELLANT:

Jill Hall Rose
Kim Garrison
Lexington, Kentucky

BRIEF FOR APPELLEE:

No Brief Filed