

RENDERED: January 24, 2003; 10:00 a.m.

NOT TO BE PUBLISHED

Commonwealth Of Kentucky
Court Of Appeals

NO. 2001-CA-001185-MR

RANDALL COPE

APPELLANT

APPEAL FROM MARSHALL CIRCUIT COURT
v. HONORABLE DENNIS FOUST, JUDGE
ACTION NOS. 99-CI-00445, 99-CI-00171, & 99-CI-00466

FIRSTAR BANK

APPELLEE

OPINION & ORDER
DISMISSING APPEAL
** **

BEFORE: GUIDUGLI, JOHNSON, AND KNOPF, JUDGES.

KNOPF, JUDGE: In 1996, Randall Cope purchased a sixty-nine-acre tract of Marshall County land plus a house trailer, a horse barn, and other items of personalty from Bob Melton. Cope paid about \$37,000.00 down and borrowed the remaining \$100,000.00 of the purchase price from the Bank of Marshall County. He gave the bank a note for the indebtedness and a mortgage on the land and the house trailer. In December 1999, the bank's successor, Mercantile Bank of Kentucky, brought suit against Cope and alleged that he had defaulted on his note, which had an outstanding balance of about \$94,000.00 plus interest. Mercantile sought a judicial sale of the land and the trailer to satisfy the debt. The complaint named the full sixty-nine acres

as described in Cope's deed and included as attachments Cope's duly executed and filed mortgages on the realty and the trailer.

At the time, Cope was incarcerated, so, when he did not acquire counsel, the Marshall Circuit Court appointed a guardian ad litem for him pursuant to CR 17.04.

In June 2000, Firststar Bank, Mercantile's successor and the appellee herein, filed an amended complaint essentially adopting the complaint of its predecessor. On November 20, 2000, the circuit court granted Firststar's motion for summary judgment and ordered a commissioner's sale of the land and trailer. Cope neither objected to nor appealed from that judgment. The sale took place February 23, 2001, and the commissioner filed his report the same day. The tract and trailer sold together for about \$125,000.00.

On March 1, 2001, Cope filed a pro se motion objecting to the sale. He alleged, for the first time, that he had not given the bank a mortgage on the trailer and that the \$100,000.00 note and mortgage applied to the land alone. On March 7, 2001, Cope filed a second pro se motion objecting to the sale, this time alleging that the mortgage had been intended to apply only to about sixty-five acres of the realty, but did not apply to about four acres where the personalty was located and where Cope had intended some day to build a home. He alleged that this agreement was reflected in various documents in the bank's possession and moved that the bank be compelled to disclose them. The court denied these motions and confirmed the sale by order entered April 20, 2001. The clerk noted service of the order the same day. Cope filed pro se his notice of appeal May 21, 2001,

and also moved to retain the services of the guardian ad litem. The later motion was denied. Cope contends on appeal that the trial court erred by confirming the sale of property to which the bank's lien did not extend and that he was entitled to a guardian ad litem on appeal.

With respect to the latter claim, the trial court did not err when it denied Cope's motion for an attorney. There is no constitutional or common-law right to appointed counsel in civil cases.¹ And the right of a prisoner to an appointed guardian ad litem under CR 17.04 extends only through the rendition of judgment. It is not for this Court to expand that rule to cover appeals.

With respect to Cope's contention concerning the scope of the bank's lien, both his motion raising the issue and his appeal are untimely. He was on notice that the bank claimed liens on all the land and the house trailer when the bank filed its complaint in November 1999, and he knew that the court had upheld those liens in its November 20, 2000, judgment. If he wished to deny the asserted liens he was obliged to do so, at the very latest, within ten days following the judgment as allowed under CR 59.05. The judgment underlying a judicial sale becomes final like any other judgment and must be attacked or appealed from within the ordinary time limits. It is not subject to attack for mere error following the commissioner's sale.²

¹May v. Coleman, Ky., 945 S.W.2d 426 (1997); Parsley v. Knuckles, Ky., 346 S.W.2d 1 (1961).

²Kelley's Heirs v. Burnam, 305 Ky. 544, 204 S.W.2d 965 (1947); Moore v. Waltman's Administratrix, 288 Ky. 258, 156 S.W.2d 100 (1941).

Nor would the result be any different were we to deem Cope's objection to the sale an attack on the November 2000 judgment pursuant to CR 60.02. That rule provides for relief from a final judgment in rare instances to prevent the patent miscarriage of justice. A movant under that rule must show that he has diligently asserted his rights.³ Cope, however, waited more than a year to challenge the bank's mortgages. He can not be deemed entitled to relief under CR 60.02.

Finally, the circuit clerk noted service of the court's order confirming the commissioner's sale on April 20, 2001, the same day the order was entered. Under CR 73.02, therefore, Cope had thirty days, or until May 20, 2001, to file his notice of appeal.⁴ His notice was not filed, however, until May 21, 2001.

³Board of Trustees v. Nuckolls, Ky., 507 S.W.2d 183 (1974).

⁴Fox v. House, Ky. App., 912 S.W.2d 450 (1995).

His appeal was thus untimely and must therefore be dismissed.⁵

It is so ordered.

ALL CONCUR.

ENTERED: January 24, 2003

/s/ William L. Knopf

JUDGE, COURT OF APPEALS

BRIEF FOR APPELLANT:

Randall Cope, pro se
Terre Haute, Indiana

BRIEF FOR APPELLEE:

Kerry D. Smith
McMurry & Livingston, PLLC
Paducah, Kentucky

⁵Excel Energy, Inc. v. Commonwealth Institutional Securities, Inc., Ky., 37 S.W.3d 713 (2000).