

# Commonwealth Of Kentucky

## Court of Appeals

NO. 2001-CA-001615-MR

GERALD BAILEY AND  
MADONNA BAILEY

APPELLANTS

v. APPEAL FROM MENIFEE CIRCUIT COURT  
HONORABLE WILLIAM B. MAINS, JUDGE  
ACTION NO. 00-CI-90103

TRADITIONAL BANK, INC.

APPELLEE

OPINION  
REVERSING AND REMANDING

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BEFORE: GUIDUGLI AND JOHNSON, JUDGES; AND HUDDLESTON, SENIOR  
JUDGE.<sup>1</sup>

JOHNSON, JUDGE: Gerald Bailey and Madonna Bailey have appealed from a summary judgment and order of sale entered by the Meniffee Circuit Court on June 27, 2001, in favor of Traditional Bank, Inc. The circuit court ruled as a matter of law that the property should be sold as a whole to satisfy the debt on a promissory note secured by a real estate mortgage on the

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<sup>1</sup> Senior Judge Joseph R. Huddleston sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

property. Having concluded that there is a genuine issue as to a material fact concerning the indivisibility of the property, we reverse the summary judgment and remand for further proceedings.

In July 1999 Gerald and Madonna Bailey executed and delivered a negotiable promissory note to Traditional Bank that was secured by a real estate mortgage in the amount of \$165,000.00 with interest at the rate of 8.5%, due and payable on July 26, 2000. On November 22, 2000, Traditional Bank filed an action in Menifee Circuit Court claiming that the Baileys had failed to pay the note when due and demanding (1) judgment against the Baileys in the amount of \$166,759.37 with legal interest thereon from judgment until paid; (2) attorney's fees and costs as provided in the promissory note; and (3) an order directing the Special Commissioner to sell the real estate and to apply the net proceeds to the judgment. Traditional Bank alleged that the property could not be divided for sale without impairing its vendible value. In their answer, the Baileys denied the amount claimed as owed and they further denied that the real estate was indivisible.

On May 23, 2001, Traditional Bank served a motion for summary judgment on the Baileys. Attached to the motion was an affidavit of the bank's branch manager and vice-president stating that the Baileys were indebted to Traditional Bank for

the sum of \$173,167.79, and after demand being made, refused to pay the balance owed. No mention was made in the motion as to the indivisibility of the property and the affidavit did not include any averment that the property was indivisible. The Baileys did not respond to the motion.<sup>2</sup>

On June 27, 2001, the circuit court entered "Findings, Conclusions and Judgment." The trial court found that the Baileys owed the amount set forth in the affidavit and that the property "could not be divided without impairing plaintiff's interest, and should be sold as a whole." The trial court concluded that "Plaintiff's claim is valid and a Summary Judgment should be awarded for a Commissioner's Sale of the property as a whole, there being no justiciable controversy." On July 5, 2001, an order of sale was entered, and on July 13, 2001, the trial court approved the notice of sale.

On July 27, 2001, the Baileys filed a notice of appeal; and on August 2, 2001, they filed a motion to approve a supercedeas bond and a motion pursuant to CR<sup>3</sup> 60.02 to vacate and set aside the summary judgment and order of sale. The Baileys claimed that there were genuine issues as to material facts,

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<sup>2</sup> We note that the Baileys' attorney filed a motion to withdraw as counsel on June 13, 2001, without having responded to the motion for summary judgment. With the motion to withdraw still pending, on June 27, 2001, the circuit court entered the summary judgment and on July 5, 2001, entered the order of sale. The motion to withdraw was granted on July 13, 2001.

<sup>3</sup> Kentucky Rules of Civil Procedure.

including in particular, the need to sell the mortgaged property as a whole to satisfy the judgment debt. The trial court denied both motions on August 3, 2001, and on August 4, 2001, the property was sold by Commissioners Sale, as a whole, to Traditional Bank for the sum of \$116,000.00.

The Baileys argue on appeal that the circuit court erred by granting the motion for summary judgment, as there existed a genuine issue of material fact, particularly as to the indivisibility of the property. Pursuant to CR 56.03, summary judgment is proper "if the pleadings, depositions, answers to interrogatories, stipulations, and admissions of file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." The standard of review of a trial court's granting of summary judgment is "whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law."<sup>4</sup> We are to view the record in the light most favorable to the party opposing the motion and resolve all doubts in its favor.<sup>5</sup>

In their answer to the complaint filed by Traditional Bank, the Baileys denied that the property was indivisible. The

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<sup>4</sup> Scifres v. Kraft, Ky.App., 916 S.W.2d 779, 780 (1996).

<sup>5</sup> Steelvest, Inc. v. Scansteel Service Center, Inc., Ky., 807 S.W.2d 476, 480 (1991).

property subject to the mortgage was described in four different exhibits, with exhibit "D" consisting of 37 separate lots. The affidavit attached to Traditional Bank's motion for summary judgment did not address the issue of indivisibility and no other proof was offered to support the circuit court's finding that the property was indivisible.

KRS<sup>6</sup> 426.685(1) provides as follows:

Before ordering a sale of real property for the payment of debt, the court must be satisfied by the pleadings, by an agreement of the parties, by affidavits filed, or by a report of a commissioner or commissioners, whether or not the property can be divided without materially impairing its value, and may cause it to be divided, with suitable avenues, streets, lanes or alleys, or without any of them.

The pleadings in the case sub judice joined the issue of the indivisibility of the property. There was clearly no agreement of the parties concerning this issue, the single affidavit in support of summary judgment made no averment of indivisibility, and there was no Commissioner's report. Viewing the record in the light most favorable to the Baileys, we conclude that the trial court erred by granting summary judgment and ordering that the property be sold as a whole.

Accordingly, the judgment and order of sale are reversed with directions to set aside the Commissioner's sale

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<sup>6</sup> Kentucky Revised Statutes.

and this matter is remanded for further proceedings consistent with this Opinion.

ALL CONCUR.

BRIEF FOR APPELLANT:

Jace Nathanson  
Morehead, Kentucky

BRIEF FOR APPELLEE:

No brief filed.