

# Commonwealth Of Kentucky

## Court of Appeals

NO. 2001-CA-001927-MR

ROBERT N. MITCHEM JR.

APPELLANT

APPEAL FROM JEFFERSON CIRCUIT COURT  
v. HONORABLE BARRY WILLETT, JUDGE  
ACTION NO. 97-CI-001108

FIRST BANK NATIONAL ASSOCIATION

APPELLEE

### OPINION

### REVERSING AND REMANDING

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BEFORE: BUCKINGHAM, GUIDUGLI, and McANULTY, JUDGES.

BUCKINGHAM, JUDGE. Robert N. Mitchem Jr. appeals from an order of the Jefferson Circuit Court granting summary judgment to First Bank National Association in its mortgage foreclosure action brought against Queen Esther Rucker to enforce a lien on property. We reverse and remand.

The undisputed facts are as follows: Sammie Mitchem died in Louisville, Kentucky, on December 8, 1984. By a provision in her will, she bequeathed her entire estate to her

three grandchildren: Queen Esther Rucker (Ms. Rucker), Donald Mitchem, and Robert Mitchem (appellant). Part of the estate included real property located at 1524 Prentice Street, Louisville, Kentucky. Ms. Rucker, Donald Mitchem, and appellant thus became one-third owners of the Prentice Street property.

On November 6, 1995, Ms. Rucker executed and delivered a promissory note for \$30,000 to EquiCredit Corporation of Kentucky. As security for the note, Ms. Rucker pledged a mortgage on the Prentice Street property, which indicated that Ms. Rucker was the sole owner. The mortgage was recorded in the office of the Jefferson County Clerk on November 15, 1995.

Two deeds, purporting to show that Donald Mitchem and his former wife, Glenda Mitchem, and appellant had conveyed their interests in the property to Ms. Rucker, had previously been filed with the Jefferson County Clerk. Both deeds are dated May 23, 1985. Donald Mitchem, Glenda Mitchem, and appellant all contended that the deeds did not contain their signatures and thus were forgeries.

First Bank National Association filed its cause of action against Ms. Rucker on February 27, 1997, alleging that she had defaulted on the note.<sup>1</sup> First Bank sought to have its lien enforced and the Prentice Street property sold to satisfy

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<sup>1</sup> The Rucker note had been assigned by EquiCredit Corporation of Kentucky to EquiCredit Corporation of America and then reassigned to First Bank National Association.

Ms. Rucker's debt. A judgment was obtained against Ms. Rucker, and the Jefferson Circuit Court entered an order of sale.

After the entry of judgment against Ms. Rucker, Donald Mitchem and appellant became aware of the ordered sale. A motion was filed on their behalf to stay the foreclosure sale and permit the filing of a counterclaim and cross-claim against First Bank. An affidavit signed by appellant, alleging that he did not sign the deed to Ms. Rucker and, therefore, that she could not mortgage his one-third interest was attached to the motion to intervene. By order of the Jefferson Circuit Court, the matter was referred to the Jefferson Circuit Court Master Commissioner and set for trial on September 23, 1999. By agreement of the parties, the trial was continued to October 1, 2000.

On July 18, 2000, First Bank filed a motion for summary judgment arguing 1) that no genuine issue of material fact existed as to the claims asserted by Donald Mitchem and appellant, 2) that the applicable statute of limitations set out in KRS<sup>2</sup> 413.120(12) and KRS 413.130(3) barred appellant's claims, and 3) that the doctrine of laches and estoppel precluded setting aside the deeds.

The trial before the circuit court master commissioner was held on October 19, 2000. On October 25, 2000, the

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<sup>2</sup> Kentucky Revised Statutes.

commissioner issued Findings of Facts and Conclusions of Law recommending that Donald Mitchem's and appellant's claims be dismissed as time-barred under the statute of limitations pursuant to KRS 413.120(12) and KRS 413.130(3). On the same day, appellant filed a motion to have his attorney's name removed from the record as his advocate, asserting that his interests were not being adequately represented.

On November 3, 2000, appellant filed exceptions to the master commissioner's report, claiming that he was not in attendance at the hearing because he was incarcerated and that his attorney of record did not adequately represent him. Appellant also disputed the entry of certain documents into evidence. First Bank received notice on November 16, 2000, from appellant's counsel that she would no longer be representing appellant and that all future pleadings and correspondence should be forwarded directly to appellant.

On August 3, 2001, the circuit court affirmed the Findings of Fact and Conclusions of Law in the master commissioner's report and entered summary judgment in favor of First Bank. The court specifically held that "First National is entitled to summary judgment as a matter of law. The Mitchems filed their pleadings outside the five and ten year statute of limitations as noted in the report so they cannot prevail in this action." It is from that order that appellant appeals.

Appellant argues on appeal that 1) the circuit court committed reversible error in failing to construe the facts and inferences in a light most favorable to him as the non-moving party; 2) the court abused its discretion by admitting evidence that was more prejudicial than probative; 3) material factual disputes precluded summary judgment; 4) summary judgment was improper because the running of the statute of limitations should have been tolled. We note that the court granted summary judgment for the sole reason that the statute of limitations barred appellant's claims.

Appellant's first three arguments go to factual issues as to whether the deeds were fraudulently obtained by Ms. Rucker. The trial court did not find that the deeds were or were not fraudulent based on the evidence, but it found only that appellant's claims were time-barred. As such, the only issue to be determined on appeal is whether the circuit court properly granted summary judgment based on the statute of limitations.<sup>3</sup>

Pursuant to CR<sup>4</sup> 56.03, summary judgment is proper "if the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the

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<sup>3</sup> It is unusual that the court held an evidentiary hearing and then entered summary judgment without addressing the factual issue of whether the deeds were forged.

<sup>4</sup> Kentucky Rules of Civil Procedure.

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." Scifres v. Kraft, Ky. App., 916 S.W.2d 779, 780 (1996). We are to view the record in the light most favorable to the party opposing the motion and resolve all doubts in its favor. Steelvest, Inc. v. Scansteel Service Center, Inc., Ky., 807 S.W.2d 476, 480 (1991).

KRS 413.120(12) states, in pertinent part:

The following actions shall be commenced within five (5) years after the cause of action accrued:

(12) An action for relief or damages on the ground of fraud or mistake.

KRS 413.120 is subject to the provisions of KRS 413.130(3), which reads in pertinent part:

In an action for relief or damages for fraud or mistake, referred to in subsection (12) of KRS 413.120, the cause of action shall not be deemed to have accrued until the discovery of the fraud or mistake. However, the action shall be commenced within ten (10) years after the time of making the contract or the perpetration of the fraud.

We conclude that the trial court erred in determining that KRS 413.120(2) and KRS 413.130(3) barred appellant from

asserting his claim. Under the ruling of the trial court, Mitchem had no more than ten years to assert a claim that his interest in property had been transferred by a forged deed or else he would lose his interest in the property. We disagree.

"A forged deed is void." Lincoln Building & Loan Ass'n v. Cohen, 292 Ky. 234, 238, 165 S.W.2d 957, 960 (1942). "[A] forged deed is absolutely void and is ineffectual for any purpose." Lowther Oil & Gas Co. v. McGuire, 189 Ky. 681, 684, 225 S.W. 718, 719 (1920). "[A] claim of title under a void deed, although recorded, [will not] ripen into a fee by lapse of time, nor will limitations run against the owner of record in favor of a claimant not in possession." Kypadel Coal & Lumber Co. v. Millard, 165 Ky. 432, 443, 177 S.W. 270, 275 (1915). Further, "[a] mere claim of title, even of record, unaccompanied by an adverse holding, will not start the statute." Id.

If appellant proves to the satisfaction of the court that the deed conveying his interest to Ms. Rucker was forged, then the deed was void. If the deed was void, appellant would not have had to assert his interest in the property within any time period. We do not believe that a forged deed may become valid simply by the passing of a period of time.

First Bank relies on the case of Skaggs v. Vaughn, Ky. App., 550 S.W.2d 574 (1977). Citing Hollified v. Blackburn, 294 Ky. 74, 170 S.W.2d 910 (1943), the court in Skaggs held that

"[a]s a general rule, the recording of a deed obtained by fraud is notice to the grantor, and the grantor must bring an action to set aside the deed within five years after the recording of the deed, or within ten years of the execution of the deed, whichever is earlier." Skaggs, 550 S.W.2d at 577. However, the facts in Skaggs are distinguishable from the facts in this case.

In Skaggs, the party claiming to be defrauded initially asserted that he did not sign the deed. However, the appellate court concluded that his assertions were not sufficient to raise the issue of forgery. Id. at 576. The court then held that the remaining issue was "whether the statute of limitations bars that portion of the complaint which alleges that the execution of the deed was obtained by fraud, mistaken and undue influence." Id. The court concluded that the action was barred. The significant difference in the Skaggs case and in this case is that in this case there was a fact issue concerning whether appellant signed the deed. In Skaggs, the court concluded that the deed had not been forged.

Finally, we note that Mitchem did not raise the argument in his brief or before the trial court that the deed was void due to his alleged forged signature. Rather, he acknowledged in his brief that the statute of limitations relied upon by the circuit court was applicable. In reviewing Mitchem's *pro se* arguments, we note that they are somewhat vague

and often unconvincing. However, Mitchem did raise the issue that the deed was forged and that summary judgment was not appropriate.

When considering a summary judgment on appeal, this court gives no deference to the trial court since fact findings are not at issue. Stewart v. University of Louisville, Ky. App., 65 S.W.3d 537, 540 (2001). Rather, we must determine whether First Bank was entitled to judgment as a matter of law. See Scifres v. Kraft, Ky. App., 916 S.W.2d 779, 781 (1996). Although for reasons different from those asserted by Mitchem, we agree with him that First Bank was not entitled to summary judgment.

We vacate the summary judgment of the circuit court and remand the case for a decision on the merits.<sup>5</sup>

ALL CONCUR.

BRIEF FOR APPELLANT:

Robert N. Mitchem Jr., *pro se*  
Beaver, West Virginia

BRIEF FOR APPELLEE:

Kevin B. Sciantarelli  
Louisville, Kentucky

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<sup>5</sup> Since a trial was held before the commissioner, it does not appear that a new trial will be necessary.