

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-001463-MR

MICHAEL MORROW and
MICHELLE MORROW

APPELLANTS

v. APPEAL FROM HARDIN CIRCUIT COURT
HONORABLE T. STEVEN BLAND, JUDGE
ACTION NO. 94-CI-01658

T. MICHAEL CARNES; LAURA C.
CARNES and REPUBLIC BANK
AND TRUST COMPANY

APPELLEES

OPINION

AFFIRMING

** ** * * *

BEFORE: EMBERTON, CHIEF JUDGE; BARBER AND DYCHE, JUDGES.

EMBERTON, CHIEF JUDGE. In March 1992, Michael and Michelle Morrow contracted to sell T. Michael Carnes, Sr., and Laura C. Carnes certain real property referred to as the Red Hill property. The Carneses paid \$2,500 down and agreed to pay the balance of \$72,500 in 359 monthly installments payable directly to Republic Bank and Trust. This action arose after the Morrrows filed bankruptcy in April 1992, and failed to identify the

Carneses in the bankruptcy schedules. In the summer of 1993, Republic contacted the Carneses informing them that there existed a \$17,815.66 debt on the property owed by the Morrows and unless the Carneses paid that amount, Republic would foreclose. In order to preserve their interest in the property, the Carneses executed a note and mortgage to the bank agreeing to pay \$17,815.66 over the balance owed on the contract for deed. The Carneses then filed this action seeking to recover the amount paid Republic, plus interest and costs. Subsequently, the Morrows filed a third-party complaint against the bank alleging Republic agreed to release the Morrows of all debts owed. The Morrows also alleged that all money owed the bank was paid.

The trial court heard the evidence and its findings must not be disturbed unless clearly erroneous.¹ It is within the discretion of the trial court to decide issues of fact including the resolution of conflicting evidence.² Although the Morrows presented an expert, Danny Hutcherson, who testified that the assets turned over to the bank and liquidated exceeded or equaled the amount owed, Republic's records directly contradicted Hutcherson's figures. Explaining the discrepancy, Hutcherson testified that he did not realize that the interest

¹ Kentucky Rules of Civil Procedure 52.01; Mason v. Randolph, Ky., 304 S.W.2d 913 (1957).

² Id. at 915.

on the note increased monthly, that he had no knowledge of the payment history on the Morrows' loan, and that he did not consider Republic's right to recover attorney's fees and late fees. Moreover, he testified that Republic is in the best position to determine the balance on the various notes.

The Morrows' bankruptcy attorney, James Career, testified that Republic agreed to release the Morrows from further debt in exchange for the conveyance of various personal and real property. However, the correspondence between Republic and Career listed the outstanding balances on specific notes and stated Republic's intentions to apply certain proceeds to those outstanding notes. Specifically, a letter dated June 25, 1993, from Republic to Career states that Republic intended to begin foreclosure proceedings on the Red Hill property. Neither the Morrows nor Career objected to, or responded to, Republic's intent to foreclose on the property.

We agree with the trial court that the Carneses are entitled to judgment against the Morrows in the amount of \$17,815.66, plus pre-judgment and post-judgment interest. The Carneses and the Morrows entered into an enforceable contract for the sale of the property that the Morrows breached when they filed bankruptcy making it impossible to deliver a warranty deed free of all liens and encumbrances. In order to prevent foreclosure on the property on which the Carneses had made

substantial improvements, they paid off the loan secured by the property. The trial court applied the correct measure of damages.

Finally, the Morrows' third-party complaint against Republic for fraud and misrepresentation was barred by the statute of limitations. The alleged fraud occurred in 1993, and was, or should have been, discovered in 1994 when the Carneses filed their complaint. The third-party complaint was not filed until 2000 and is time-barred.

The judgment is affirmed.

ALL CONCUR.

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