

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-001757-MR

CONSECO FINANCE SERVICING
CORPORATION F/K/A GREEN TREE
FINANCIAL SERVICING CORPORATION

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE LISABETH HUGHES ABRAMSON, JUDGE
ACTION NO. 02-CI-001193

HURSTBOURNE HEALTHCARE, LLC

APPELLEE

OPINION AND ORDER
(1) REVERSING
(2) DENYING MOTION TO STRIKE REPLY BRIEF

** ** *

BEFORE: BARBER, KNOPF, AND TACKETT, JUDGES.

BARBER, JUDGE: This action began when George A. Conn, Ronald L. Westfall, Advanced Acquisition Group International, Inc., and Advanced Acquisition Group filed a complaint in foreclosure against David A. Mikels, Sr., Gary J. Adams and the parties to this appeal. THS Partners I, Inc., THS Partners II, Inc., and Hurstbourne Care Centre at Stoney Brook (collectively referred

to as HCC) filed a cross claim against Conseco Finance Servicing Corporation f/k/a Green Tree Financial Servicing Corporation (Conseco). The court granted a default judgment to HCC for Conseco's failure to appear in the action and Conseco moved to set aside the judgment. The court denied Conseco's motion and this appeal followed. We reverse.

Conseco held a first mortgage on the property sought to be foreclosed on by the plaintiffs below. Gary J. Adams and HCC also had interests in the property by virtue of judgment liens that had been filed of record. KRS 426.006 requires the plaintiff to make these entities parties defendant. KRS 426.006 also requires those made defendants to assert their right to share in any proceeds of the foreclosure by filing an answer and cross claim.

The foreclosure action was served on Conseco February 19, 2002. Also on that date HCC filed its answer and cross claim. HCC did not have its cross claim served on Conseco. On March 19, 2002, HCC filed for default judgment against Conseco and on March 29, 2002, the court granted the motion. At this point Conseco had not entered an appearance in the action in any manner.

On June 11, 2002, Conseco asked the court to be allowed to file an answer to the plaintiffs' complaint out of time. The motion was denied, but Conseco did not appeal from

this order because the judgment entered in favor of the plaintiffs' provided that the property be sold subject to Conseco's first mortgage. On June 27, 2002, Conseco filed for relief from the default judgment entered in favor of HCC. On August 15, 2002, the court order denying Conseco's motion for relief from the default judgment in favor of HCC was entered. The default judgment in favor of HCC did not provide for the property to be sold subject to Conseco's first mortgage.

Conseco's sole argument on appeal is that the court should have granted its motion to set aside the default judgment in favor of HCC because the cross-claim filed by HCC against it was never served as required by the Kentucky Rules of Civil Procedure. Thus, the judgment is void. HCC makes several arguments in response, and we shall deal with each.

Preliminarily HCC maintains that the appeal should be dismissed as moot. It contends that Conseco's failure to file an appeal from the denial of its motion to file an answer out of time now forecloses Conseco's ability to argue that the order denying its motion to set aside the default judgment in favor of HCC was in error. This is because even if the relief Conseco requests, setting aside the default judgment, is granted, Conseco is still classified as a non-answering defendant in the case. KRS 426.006 provides that a defendant is not entitled to "withdraw or receive any of the proceeds" of a sale unless it

has shown its "right thereto by answer and cross claim."

Therefore, HCC asserts that Conseco would not be able to receive any proceeds in any event.

Conseco responds to this argument by stating that it was never intended that it share in the proceeds because the judgment granted to the plaintiffs in the action, unlike the judgment granted to HCC, provided that the property was to be sold subject to Conseco's first mortgage.

An appeal should be dismissed if it is moot. That is, if the question presented is abstract or otherwise makes it so that the relief granted would have no practical effect. Courts are to decide questions that injuriously affect the "rights of some party to the litigation." White v. Hamlin, 265 Ky. 631, 97 S.W.2d 543, 544 (1936). See also Brown v. Baumer, 301 Ky. 315, 321, 191 S.W.2d 235, 238 (1945).

Judged by this standard, it is clear that this appeal is not moot. The judgment granted to the plaintiffs below preserved Conseco's interest in the property providing that it would be sold subject to its first mortgage. However, the judgment obtained by HCC does not preserve Conseco's first mortgage, but instead gives HCC priority. Consequently, Conseco's rights are injuriously affected by the entry of the default judgment in favor of HCC.

In addition, although Consecoco may not share in any of the proceeds of any sale of the property (which Consecoco maintains it was never intended to do since the sale was to transfer the property subject to its mortgage), the lien it has on the property by virtue of its first mortgage is still valid. Safety Motor Coach Co. v. Maddin's Adm'x, 266 Ky. 459, 99 S.W.2d 183, 187 (1936). If HCC's default judgment is allowed to stand, then its lien may be adjudged superior to Consecoco's first mortgage which is the very position it has argued in papers it has filed with the trial court.

HCC next responds to Consecoco's argument by asserting that the court did not abuse its discretion in refusing to set aside the default judgment. Ordinarily on a motion to set aside a default judgment the court should consider whether there exists a valid excuse for default; whether the party has a meritorious defense; and whether prejudice will result to the opposing party. Perry v. Central Bank & Trust Co., Ky. App., 812 S.W.2d 166, 170 (1991).

The true standard though allows a court to set aside a default judgment "for good cause shown" in accordance with CR 60.02. CR 55.02; Roadrunner Mining, Engineering & Development Co., Inc. v. Bank Josephine, Ky., 558 S.W.2d 597, 598 (1977). Of the grounds enumerated in CR 60.02, Consecoco is arguing that the judgment is void the same as argued in Bank Josephine. Id.

When the question is whether the judgment is void, the factors discussed in Perry, supra do not provide appropriate guidance and are not necessarily relevant because if a judgment is void, a court has no choice but to set it aside. A void judgment is not entitled to any deference or respect and a court has no discretion about whether or not to set it aside. As a matter of law it must hold that the judgment is a nullity. Foremost Insur. Co. v. Whitaker, Ky. App., 892 S.W.2d 607, 610 (1995). Faulty service of process can make a judgment void. Id.; Hertz' You Drive It Yourself System, Inc. v. Castle, Ky., 317 S.W.2d 177, 177-178 (1958).

Therefore, if Consecos argument has merit, it is not a question of whether the trial court abused its discretion in its decision to let the default judgment stand. As a matter of law the court would be required to set the judgment aside if there has been insufficient service of process, a question that we shall now address.

Thus we come to the heart of this appeal: Whether HCC's failure to serve its cross-claim on Consecos makes the default judgment rendered in its favor void. We hold that it does.

KRS 426.006 requires a defendant named, such as HCC, in a foreclosure action to assert any cross-claim it may have in accordance with "the Rules of Civil Procedure." KRS 426.006.

The Rules of Civil Procedure mandate that a party have summons issued and serve any complaint "or other initiating document." CR 4.01(1). Therefore, the question is whether a cross-claim is an initiating document. Consecro argues it is and HCC that it is not.

The main argument that HCC makes that a cross claim is not an "initiating document" is based upon the history behind KRS 426.006. Prior to the adoption of KRS 426.006, foreclosure actions were governed by Carroll's Civil Code of Practice § 692. KRS 426.006 tracks Section 692 of the Code with the exception that Section 692 provided that "unless a personal judgment be prayed for in such cross-petition, there need not be any summons thereon; and it shall be treated with reference to the time of answering thereto, as a set-off or counter-claim." Numerous cases interpreting that Section reaffirm the principle. See Noel v. Noel, 307 Ky. 128, 131, 210 S.W.2d 140, 142 (1947); Ideal Savings, Loan & Building Ass'n of Newport, Ky. v. Town of Park Hills, 281 Ky. 571, 136 S.W.2d 748, 750 (1940); Louisville Title Co. v. White Const. Co., 250 Ky. 212, 62 S.W.2d 795, 796 (1933); Lorton v. Ashbrook, 220 Ky. 830, 295 S.W. 1027, 1028 (1927); Griffith v. Blue Grass Building & Loan Ass'n, 22 Ky. L. Rptr. 391, 108 Ky. 713, 57 S.W. 486, 487 (1900).

However, when KRS 426.006 was adopted the language relieving a party from serving a cross petition that did not

seek a personal judgment was deleted and in its place parties are now required to comply with the Rules of Civil Procedure. A cross claim initiates an action between two defendants in an action. An initiating document must be served according to the Rules. CR 4.01. The claims set up in a cross-petition may or may not involve the plaintiff or plaintiffs. There is no logic for excepting foreclosures from this rule.

Moreover, even at the time Section 692 of Carroll's Code of Civil Practice was in effect a cross claim was considered the commencement of an action so that it must be served. Hays v. Lundy, 293 Ky. 711, 170 S.W.2d 49, 50 (1943); Carter v. Capshaw, 249 Ky. 483, 60 S.W.2d 959, 961 (1933); Allen v. Sweeney, 185 Ky. 94, 213 S.W. 217, 218 (1919); Howard v. Jones, 147 Ky. 303, 143 S.W. 1058, 1059 (1912); Brackett's Adm'r v. Boreing, 28 Ky. L. Rptr. 386, 89 S.W. 496, 499 (1905). And parties proceeding under Section 692 were excused from serving a cross petition only because of the express language of the Section.

Therefore, when KRS 426.006 was adopted it is logical that the Legislature intended foreclosure actions to conform to the generally accepted rule that cross petitions were the commencement of an action and should be served as provided for in the Rules of Civil Procedure.

We hold that a cross-petition is an initiating document under CR 4.01 and therefore, must be served according to the Rules of Civil Procedure. Because HCC did not comply with the requirements of the Rules on service of process, the default judgment it obtained against Conseco is void and the court should have set it aside. Hertz' You Drive It Yourself System, supra; Foremost Insur. Co., supra.

HCC also argues that Conseco is not a "party in default" under the Rules of Civil Procedure and, thus, it is not required to serve its cross claim except by regular mail under CR 5.01 & 5.02. HCC further maintains that fairness and equity do not favor setting aside the judgment because it is Conseco's failure to answer or otherwise appear that resulted in the default judgment being entered. Given our holding that the default judgment against Conseco is void, these arguments need not be addressed.

HCC has made a motion to strike Conseco's reply brief. Its motion is based on two sentences in Conseco's reply brief that state, "Appellee/HCC's's (sic) answer and cross-claim were mailed via regular mail to 4965 U.S. Hwy 42, Suite 1500 in Louisville, KY [R.50]. The record is silent as to why HCC believed this to be a valid address to serve Appellant." The remainder of Conseco's reply brief does not mention this fact nor attempt to use it in anyway to argue for reversal. In fact,

the remainder of its reply brief replies to the arguments made by HCC in its response brief. Out of these two sentences HCC contends that Consecos reply brief should be stricken because "it improperly asserts arguments neither raised below, in its Prehearing Statement or its Appellant's Brief, or in response to arguments asserted in HCC's Brief."

We do not believe the motion to strike is well taken. Our disposition of the case does not rely on where the cross-claim was sent, but on whether the cross-claim had to be served according to the Rules of Civil Procedure. HCC admittedly did not serve the cross-claim and Consecos sole argument is that this is fatal to the default judgment entered against it. Therefore, the motion to strike is DENIED.

The judgment of the circuit court is vacated and the case is remanded for proceedings consistent with this Opinion.

ALL CONCUR.

ENTERED: December 3, 2004

/s/ David A. Barber
JUDGE, COURT OF APPEALS

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