

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-002146-MR

SHERMAN MOBILE HOME PARK, LLC; AND
GAILEN W. BRIDGES, JR.

APPELLANTS

v. APPEAL FROM GRANT CIRCUIT COURT
HONORABLE STEPHEN L. BATES, JUDGE
ACTION NO. 01-CI-00276

GREENPOINT CREDIT, LLC;
AMANDA J. WHALEN; AND
SEAN N. DEARING

APPELLEES

OPINION
AFFIRMING

** ** *

BEFORE: BUCKINGHAM, MINTON, AND TAYLOR, JUDGES.

TAYLOR, JUDGE: Sherman Mobile Home Park, LLC (Sherman Park) and Gailen W. Bridges, Jr. (Bridges) appeal from a Judgment and Order of Sale entered August 16, 2002, as amended on September 20, 2002, by order of the Grant Circuit Court.¹ We affirm.

GreenPoint Credit, LLC (GreenPoint) financed the purchase of a mobile home sold to Amanda J. Whalen (Whalen) and Sean N. Dearing (Dearing). GreenPoint retained a purchase money

¹Gailen W. Bridges, Jr. is an attorney and is proceeding *pro se*. Bridges is also representing Sherman Mobile Home Park, LLC.

security interest against the mobile home and perfected the lien by notation on the title certificate as required by Kentucky Revised Statutes 186A.190(1). Whalen and Dearing subsequently defaulted on the loan to GreenPoint. The mobile home was located on a lot in Sherman Park and Bridges is the sole shareholder of Sherman Park. Whalen and Dearing had also fallen behind on the lot rental payments to Sherman Park. Bridges informed GreenPoint that he would not allow the mobile home to be moved from Sherman Park until the unpaid rent was satisfied.

On August 28, 2001, GreenPoint filed a complaint against Whalen, Dearing, and Bridges in the Grant Circuit Court. The complaint sought a personal judgment against Whalen and Dearing, and to enforce GreenPoint's lien including the repossession of the mobile home. As against Bridges, the complaint requested "access to his property for the limited purpose of removing the collateral." After Bridges was served with the complaint, he informed GreenPoint that he did not personally own Sherman Park; rather, it was a limited liability company. GreenPoint then attempted to dismiss its complaint as to Bridges; Bridges, however, objected and thus remained a party.

On August 31, 2001, GreenPoint filed an amended complaint, naming Sherman Park as an additional defendant. The amended complaint was served upon Bridges as Sherman Park's

agent for service of process. However, as Bridges had previously filed an answer, GreenPoint was required to seek leave to amend its complaint. Ky. R. Civ. P. (CR) 15.01. On October 24, 2001, the circuit court granted GreenPoint's motion for leave and the amended complaint was deemed filed on that date.

Bridges, as Sherman Park's agent, was not formally served with the amended complaint until May 2, 2002. The amended complaint sought the same relief against Whalen and Dearing. As to Sherman Park, it requested access to the premises "for the limited purpose of removing the collateral." Bridges was not named as a party in the amended complaint, nor was any relief requested against him.

On May 17, 2002, GreenPoint moved for summary judgment. CR 56. On August 16, 2002, a judgment and order of sale was entered in favor of GreenPoint. Bridges and Sherman Park subsequently filed a motion to alter, amend or vacate. CR 59.05. An amended judgment and order of sale was entered September 20, 2002. The amended judgment directed that after satisfaction of GreenPoint's judgment, any remaining proceeds would go to satisfy Sherman Park's claim for back rents owed. This appeal follows.

Bridges and Sherman Park (hereinafter referred to collectively as "appellants") contend GreenPoint's motion for

summary judgment was prematurely filed. Specifically, appellants contend the motion for summary judgment was barred pursuant to CR 56.01, which provides that such motion may not be filed until "after the expiration of 20 days from the commencement of the action." Appellants argue the action did not commence until Sherman Park was served with the amended complaint on May 2, 2002. As such, appellants assert the motion for summary judgment filed on May 17, 2002, was premature as the twenty day period had not yet passed.

We reject this argument for two reasons. First, if a motion for summary judgment is made before the expiration of the twenty day period and the adverse party fails to object, any objection to its prematurity is waived. 7 Kurt A. Philipps, Jr., Kentucky Practice, CR 56.01, cmt. 3, p. 315 (5th ed. 1995). Appellants did not object to the alleged prematurity of the motion before the circuit court; thus, we are of the opinion appellants waived any such objection. Second, Bridges was both the agent for service of process and counsel for Sherman Park who was served with the original complaint filed August 28, 2001. Bridges does not dispute that he received a copy of the amended complaint at the time of filing on August 31, 2001. CR 56.01 does not require that a defendant be served with summons before a plaintiff can file a motion for summary judgment. Id. The purpose of the rule is to allow a party ample time to

conduct discovery, which clearly occurred in this case. Under these circumstances, for the appellants to argue the prematurity of the motion for summary judgment filed nine months after the amended complaint was filed is disingenuous at best.

Appellants next contend summary judgment was improperly granted as issues of material fact existed. Specifically, appellants contend that issues of fact existed “regarding what effect the lease ha[d] on the rights of the parties.” Appellants argue summary judgment was improper because Sherman Park raised issues of material fact regarding whether the mobile home could be removed before the lot rent was paid.

We are of the opinion that no genuine issues of material fact remained. The action was initiated by GreenPoint to enforce a lien after Whalen and Dearing defaulted on the loan. The issue before the circuit court was whether GreenPoint’s lien could be enforced and what priority the lien had. The circuit court determined the priority and fully adjudicated the rights of appellants.

Appellants also contend the “judgment is fatally defective because it does not dispose of the interest” of Dearing. Specifically, appellants contend that although GreenPoint named Dearing as a defendant and his name appeared on the title, the judgment did not dispose of Dearing’s interest.

Appellants argue any purported sale of the mobile home would be defective and a purchaser would not receive clear title.

Appellants also argue the “[j]udgment does not protect Sherman’s lien rights against Dearing.”

Appellants cited no authority to this Court in support of its contention that the judgment is defective. Furthermore, appellants failed to specify how the alleged defect would affect Sherman’s lien claim. As such, we must summarily reject these allegations of error.

Appellants next contend the “order improperly gave 20 days free rent to any stranger with no justification or basis.” Appellants specifically contend the circuit court directed GreenPoint to prepare the judgment and order of sale, but did not direct GreenPoint to include language “giving any prospective purchaser 20 days free lot rent.” The amended judgment and order of sale entered on September 20, 2002, states that “[w]hen the purchase price is paid in full, the purchaser will have twenty (20) days to remove the mobile home from Sherman Mobile Home Park.” We are of the opinion the circuit court did not abuse its discretion when it gave the purchaser twenty days to remove the mobile home. The order clearly and properly adjudicates the lien rights of the parties to the collateral at issue before the court. The fact that a purchaser of the collateral was given twenty days to remove the mobile

home from Sherman Park after the sale does not appear in any way to be unreasonable to this Court.

Appellants' final argument is that "GreenPoint drafted the order to cast Bridges in a bad light in anticipation of a malicious prosecution action." Specifically, appellants assert that when GreenPoint drafted the order, it was "clearly intending to build defenses against the malicious prosecution claim" by including language to imply Bridges had previously asserted an interest in the mobile home. We are of the opinion this argument is also totally without merit. Whether Bridges pursues a malicious prosecution claim against GreenPoint is not properly before this Court. Furthermore, we have closely reviewed the amended judgment and order of sale and do not believe it casts Bridges in a "bad light." If there was any confusion regarding Bridges' status in the case, it appears that he created it. Similarly, we are puzzled why Bridges objected to his dismissal early on in the case and now argues he was somehow placed in a "bad light" via a court order signed by the circuit judge.

Lastly, GreenPoint asserts that this appeal is frivolous and that appellants should be assessed costs and attorney's fees incurred by GreenPoint in this appeal under CR 73.02(4). CR 73.02(4) allows this Court to award single or double costs for a frivolous appeal. Additionally, attorney's

fees may be awarded as damages upon a finding that an appeal is frivolous. Lake Village Water Assoc. Inc. v. Sorrell, 815 S.W.2d 418 (Ky.App. 1991). An appeal is frivolous if it is so totally lacking in merit that no reasonable attorney would assert such an argument and thus, bad faith can be inferred. Leasor v. Redmon, 734 S.W.2d 462 (Ky. 1987). While we concede that some of appellants' arguments approach the "dark side," we cannot find upon a thorough review of the record as a whole sufficient facts to deem the appeal as frivolous. The subjective belief of an attorney is not the determining factor in whether an appeal is frivolous. A court must examine the entire record objectively to determine whether an appeal is totally lacking in merit. On the record as a whole, we cannot infer bad faith in this appeal and thus, decline to award GreenPoint sanctions under CR 73.02(4).

For the foregoing reasons, we affirm the decision of the Grant Circuit Court.

ALL CONCUR.

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