

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-000011-MR

MARILYN W. CRAWFORD

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE JAMES M. SHAKE, JUDGE
ACTION NO. 02-CI-000414

NATIONAL CITY BANK OF KENTUCKY

APPELLEE

OPINION AND ORDER

DISMISSING

** ** *

BEFORE: DYCHE, GUIDUGLI, AND McANULTY, JUDGES.

DYCHE, JUDGE. The present matter is a foreclosure action in which the home of Appellant, Marilyn W. Crawford, was sold to satisfy a mortgage on the property. We dismiss for failure to file a timely appeal.

Appellee, National City Bank, filed a foreclosure action in Jefferson Circuit Court against Crawford. Initially, Crawford answered National City Bank's complaint pro se. She later hired Julius Price as counsel to defend this action, and

he filed a second answer. However, before receiving the second answer, National City Bank filed a motion for summary judgment, but failed to include Price on the certificate of notice. Although Price admitted in an affidavit to having received a copy of the motion for summary judgment via fax, he did not file a response thereto on Crawford's behalf. The Master Commissioner filed a report recommending the entry of National City Bank's motion.

Price thereafter filed objections to the report, and a hearing was held on the matter. On April 20, 2002, the trial court granted Crawford twenty additional days to respond to National City Bank's motion for summary judgment. Despite this, no response was filed, and the trial court granted the motion and entered a Final Judgment and Order of Sale on June 20, 2002.

Crawford maintains that Price never informed her of this order. Nonetheless, in a letter she wrote on July 8, 2002, to Judge James Shake she stated that she learned of the order on June 21, 2002. She subsequently fired Price and proceeded in this case pro se.

On August 28, 2002, Crawford filed a motion asking the court to allow her to present proof that she had made her mortgage payments. However, in this motion she failed to include the procedural grounds under which she was entitled to relief from the June 21, 2002, order. The trial court denied

the motion on September 5, 2002, finding that if it was made pursuant to CR. 59.05, it was untimely, or alternatively, if it was made pursuant to CR 60.02, Crawford failed to show the appropriate grounds for relief to which she was entitled.

Proceedings continued in this matter resulting in the sale of Crawford's home on September 10, 2002. On December 3, 2002, the trial court entered an Order Confirming Sale.

On December 26, 2002, Crawford filed a Notice of Appeal from the December 3, 2002, Order Confirming Sale. However, in her pre-hearing statement, she referenced only the summary judgment for the disposition from which she appealed. Nonetheless, she attached both the December 3, 2002 Order Confirming Sale and the June 20, 2002, Judgment to her pre-hearing statement. In her brief, however, she attacks only the Judgment of June 20, 2002. Crawford does not present any arguments whatsoever regarding the December 3, 2002, Order Confirming Sale.

In Kentucky an order of sale is a final appealable order. See Security Federal Savings & Loan Ass'n of Mayfield v. Nesler, Ky., 697 S.W.2d 136, 139 (1985). In fact, although no magic words were required to make it so, see id., the order itself stated that it was final and appealable. While the December 3, 2002, order was also a final appealable order, Crawford cannot rely on it to challenge the judgment of sale.

See, e.g., Shuput v. Lauer, 325 N.W.2d 321 (Wis. 1982). This is so because the validity of a sale is distinct from the validity of the judgment of sale. Ramey v. Francis, Day and Co., 169 Ky. 469, 184 S.W. 380, 382 (1916). The order of confirmation is only an adjudication that the sale was properly conducted. See, e.g., Heilman v. Suburban Coastal Corp., 506 So.2d 1088, 1090 (Fla. App. 4 Dist. 1987). It does not go to the underlying validity of the sale.

While it may not be fatal to fail to specify in the notice of appeal the proper judgment or order appealed from under substantial compliance rules, see Ready v. Jamison, Ky., 705 S.W.2d 479 (1986), failing to timely file a notice of appeal is. Excel Energy, Inc. v. Com. Institutional Securities, Inc., Ky., 37 S.W.3d 713, 716-17 (2000); CR 73.02. Despite the fact that Crawford specifically included the December 3, 2002, order in her notice of appeal, the merits of her appeal are directed only at the June 20, 2002, order.

Kentucky Rules of Civil Procedure require that “[t]he notice of appeal shall be filed within 30 days after the date of notation of service of the judgment or order under Rule 77.04(2).” CR 73.02(1)(a). Although we may sympathize with Crawford’s troubles, including those with counsel, strict compliance with CR 73.02 (1)(a) is mandatory. Thus, she was required to appeal the judgment within thirty days. Such a

technicality in the law is a pitfall for those unfamiliar with the practice of law. Nonetheless, a "notice of appeal is a procedural device prescribed by the rules of the court by which a litigant may invoke the exercise of the inherent jurisdiction of the court as constitutionally delegated." Excel, 37 S.W.3d at 716 (quoting Johnson v. Smith, Ky., 885 S.W.2d 944, 949-50 (1994)). Accordingly, we are compelled to dismiss this appeal as our jurisdiction to review the merits of it has not been properly invoked.

ALL CONCUR.

ENTERED: November 21, 2003

/s/ R. W. DYCHE
JUDGE, COURT OF APPEALS

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