

RENDERED: SEPTEMBER 9, 2005; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-002666-MR

STEVEN WAGGONER

APPELLANT

v. APPEAL FROM JESSAMINE CIRCUIT COURT
HONORABLE C. HUNTER DAUGHERTY, JUDGE
ACTION NO. 03-CI-00235

MORTGAGE ELECTRONIC REGISTRATION
SYSTEMS, INC.; DENISE WAGGONER;
and DISCOVER BANK, ISSUER OF THE
DISCOVER CARD

APPELLEES

OPINION
AFFIRMING

** ** * * * **

BEFORE: HENRY, TACKETT, AND VANMETER, JUDGES.

VANMETER, JUDGE: This is an appeal from an order entered by the Jessamine Circuit Court granting summary judgment for appellee, Mortgage Electronic Registration Systems, Inc. (MERS), and ordering a master commissioner's sale of certain real estate owned in part by appellant, Steven Waggoner. For the reasons stated hereafter, we affirm.

Steven and Denise Waggoner signed a promissory note for \$101,510.¹ To secure the debt, they executed a mortgage on their home at 224 Millhouse Drive, Nicholasville, Kentucky.² When Steven and Denise defaulted on the note MERS, as the owner and holder of the note, instituted a foreclosure action in the Jessamine Circuit Court on April 1, 2003. MERS mailed notice of its motion for summary judgment and an order of sale on November 4. The circuit court orally granted MERS' motion at a November 13 hearing because there was no opposition to the motion, and it then entered a summary judgment and an order of sale in MERS' favor on November 14. This appeal followed.

On appeal, Steven maintains that the circuit court erred in entering summary judgment against him on November 14 because he had until November 17 to file a response to MERS' summary judgment motion. In support thereof, Steven argues that he was entitled to a ten-day notice pursuant to CR 56.03 plus an additional three days pursuant to CR 6.05 because MERS served its summary judgment motion on him through the mail on November 4. Steven thus concludes that the trial court erred in granting the motion before the expiration of thirteen days from the mailing of MERS' summary judgment motion. We disagree.

¹ The promissory note was proven below by an affidavit concerning a lost or destroyed promissory note.

² The mortgage was executed by Denise Waggoner and Steven Waggoner, by and through Denise Waggoner, his attorney-in-fact.

Steven did not contest the circuit court's entry of summary judgment in the matter below. In fact, it appears that Steven did not make any appearance in the matter below.³ The court in *Equitable Coal Sales, Inc. v. Duncan Machinery Movers, Inc.*⁴ held that a party waived CR 56.03's ten-day notice requirement when he "did not object to the hearing date, did not ask for a continuance, did not argue against the motion on the day of the hearing, and has not shown any prejudice by having fewer than ten days notice of the hearing." Similarly, in the matter now before us Steven waived his right to ten days' notice under CR 56.03 by failing to object to the hearing date, attend the hearing, or otherwise make his objections known.

In any event, "[t]he function of the Court of Appeals is to review possible errors made by the trial court, but if the trial court had no opportunity to rule on the question, there is no alleged error for this court to review."⁵ As Steven did not object to the circuit court's entry of summary judgment, the propriety of the court's ruling was not preserved for appeal and is not properly before us. We need not reach Steven's argument

³ MERS stated in its summary judgment motion that Steven filed a pro se answer; however, MERS did not reiterate this fact in its appellate brief and we have been unable to locate any such document in the circuit court record.

⁴ 649 S.W.2d 415, 416 (Ky.App. 1983).

⁵ *Kaplon v. Chase*, 690 S.W.2d 761, 763 (Ky.App. 1985).

that he was entitled to three extra days notice pursuant to CR
6.05.

The judgment of the Jessamine Circuit Court is
affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Steven Waggoner, *pro se*
Nicholasville, Kentucky

BRIEF FOR APPELLEE MORTGAGE
ELECTRONICS REGISTRATION
SYSTEMS, INC.:

Brian E. Chapman
Cincinnati, Ohio