

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-002371-MR

DARRELL HARTWICH

APPELLANT

v. APPEAL FROM OHIO CIRCUIT COURT
HONORABLE RONNIE C. DORTCH, JUDGE
ACTION NO. 03-CI-00331

ALICE K. TODD AND
RUSS WILKEY, TRUSTEE
IN BANKRUPTCY

APPELLEES

OPINION
VACATING AND REMANDING

** ** * * *

BEFORE: HENRY AND VANMETER, JUDGES; MILLER, SENIOR JUDGE.¹

HENRY, JUDGE: Darrell Hartwich appeals from an order of the Ohio Circuit Court overruling his motion for summary judgment requesting reformation of a deed, and instead granting a money judgment in his favor in the amount of \$3,100.00. Because we

¹ Senior Judge John D. Miller sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110.(5)(b) of the Kentucky Constitution and KRS 21.580.

believe that summary judgment was improperly granted, we vacate and remand for further proceedings.

Plaintiff Darrell Hartwich and Defendant Alice Todd met while both were employed as over-the-road truckers, and became engaged. In 1999 Darrell received a deed to a house and lot in Centertown, Kentucky, which stated a consideration of \$18,000.00². Approximately a year later he conveyed the property to Alice for \$9,000.00. The consideration statement recited that the property was conveyed to Alice "for and in consideration of the forgiveness of the indebtedness owed by the GRANTOR to the GRANTEE...." Soon thereafter Darrell filed a bankruptcy proceeding in the United States Bankruptcy Court for the Western District of Kentucky. Two months after the date of the deed to Alice, the parties executed and recorded a Deed of Correction stating that they had intended to convey only an undivided one-half interest in the property to Alice, with Darrell retaining the other undivided one-half interest³. Darrell listed his one-half interest in the Centertown property among his assets on his bankruptcy schedules. At that point an

²Both in her Response to Motion for Summary Judgment at the trial court and in her brief in this Court, Alice contended that she was the sole purchaser of the subject property on a land contract before she met Darrell. She claims that she allowed the deed to be made in Darrell's single name because she thought they were to be married. The contract is not included in the record.

³Alice claims that the Deed of Correction was made on the advice of Darrell's bankruptcy attorney.

undivided one-half interest in the Centertown property became part of the bankruptcy estate. 11 U.S.C.A. §541.

In September, 2000, the Bankruptcy Court approved the sale of Darrell's one-half interest in the Centertown property back to him for the sum of \$3,100.00. However, when Darrell had not paid the agreed amount a year later, the Trustee, Russ Wilkey, filed an Adversary Proceeding in the Bankruptcy Court. The Cause of Action in that proceeding was summarized as a "Complaint under Sec. 363 Title 11 USC to sell real estate, including co-owner's share." Both Darrell and Alice were served by first-class mail on November 2, 2001. Alice filed an answer to the Adversary Proceeding, but Darrell did not.

On December 10, 2001, Darrell finally tendered a check in payment for the property, and received a receipt signed by the Trustee. Nine days later, on December 19, 2001, the Bankruptcy Court entered an order vacating the September 8, 2000, Order of Sale which had permitted Darrell to re-purchase the property⁴. The December 19, 2001 order authorized Alice Todd to purchase Darrell's one-half interest in the Centertown property "free and clear of liens, encumbrances and other interests including the interest of the co-owner Darrell Hartwich", for the sum of \$3,100.00. Alice did not tender her

⁴In its Order the Ohio Circuit Court incorrectly stated that Darrell tendered his check after the Bankruptcy Court had entered the December 19, 2001 order revoking his permission to purchase the property.

check to the Trustee for payment for the property until December 2002. Alice claims that when she finally tendered the check, she was advised that payment had already been received on her behalf. Her check was later voided. The Trustee executed and delivered a deed to Alice in May, 2003.

On October 20, 2003, Darrell filed suit in the Ohio Circuit Court, alleging that the May 16, 2003 deed from the Trustee to Alice "was made on mutual mistake of fact" and asking the court to "enter an Order reforming the deed dated May 16, 2003, to reflect the conveyance was made by the Trustee in bankruptcy to the plaintiff...." Alice and Russ Wilkey, the Trustee, were named Defendants. Wilkey filed an answer on October 23, 2003, admitting the allegations in the complaint and asking the Court to grant the relief Darrell requested. Alice filed a timely answer in which she affirmatively pleaded that Darrell defaulted on his obligation to repurchase the subject property in the bankruptcy proceeding, and that the Bankruptcy Court subsequently entered an order revoking his permission to purchase the property. Her answer controverted some of the allegations in the complaint, and affirmatively pleaded waiver, estoppel, laches and fraud. The next entry in the record is Darrell's motion for summary judgment and supporting affidavit, filed March 31, 2004. In her response, Alice did not file a cross-motion for summary judgment, but she stated that she had

"offered to reimburse the Plaintiff or the Trustee's office the sum of \$3,100.00 to bring ultimate finality to this matter." She went on to state that "[t]he Plaintiff's Motion for Summary Judgment should be overruled and an order entered either awarding the Defendant the property in fee or allowing her to reimburse the Plaintiff or the Trustee the sum of \$3,100.00." That is what the court ultimately did, refusing to reform the deed and entering judgment for Darrell against Alice for \$3,100.00.

On appeal, Darrell argues that he is entitled to reformation of the deed from the Trustee or that in the alternative, if Darrell is compensated by a money judgment, the correct amount needed to make him whole is \$9,000.00, not \$3,100.00. The reasoning supporting this alternative position is that in his bankruptcy case Darrell took advantage of the exemptions permitted by KRS⁵ 427.060 and .160, by which he exempted a total of \$5,900.00 of the value attributable to his share of the property. Darrell insists that awarding him a money judgment of \$3,100.00 fails to fully compensate him for the value of the property and results in a windfall of \$5,900.00 to Alice.

This case is in an unusual posture on appeal. The trial court unequivocally overruled Darrell's motion for summary

⁵ Kentucky Revised Statutes.

judgment. If the matter had been left there, no appeal would have been possible, because orders overruling motions for summary judgment are interlocutory and are not appealable. Bell v. Harmon, 284 S.W.2d 812, 814 (Ky. 1955). The court went on, however, to grant the Plaintiff something he did not ask for - a judgment for \$3,100.00. Although technically judgment was rendered "in favor of" Darrell, and the general rule is that a party may not appeal from a judgment in his favor⁶, it has been held that "parties to litigation who have rights that may have been erroneously injured or rights which may be enforced by law in whole or in part by obtaining a reversal of a judgment are entitled to maintain an appeal." Civil Service Commission v. Tankersley, 330 S.W.2d 392, 393 (Ky. 1959)(citations omitted)(emphasis added). Although Darrell obtained relief, it was very different from the relief he asked for, and he disputes the correctness of the amount awarded. Neither appellee challenged Darrell's standing to appeal, and we take it as adequately established.

Although Alice did not file a motion or cross-motion for summary judgment, she clearly received the relief she wanted, and no cross-appeal was filed. While it has been held that in a proper case a trial judge may consider granting summary judgment in favor of a party who has not requested it,

⁶ See Miller v. Miller, 335 S.W.2d 884, 886 (Ky. 1960).

we are not persuaded that this is such a case. See Green v. Bourbon County Joint Planning Commission, 637 S.W.2d 626, 629-630 (Ky. 1982).

We will review the case as an appeal from a summary judgment⁷. Thus, our standard of review is "whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law." Scifres v. Kraft, 916 S.W.2d 779, 781 (Ky.App. 1996). Summary judgment "is only proper where the movant shows that the adverse party could not prevail under any circumstances." Steelvest, Inc. v. Scansteel Service Center, Inc., 807 S.W.2d 476, 480 (Ky. 1991). And, "[b]ecause summary judgments involve no fact finding, this Court reviews them de novo, in the sense that we owe no deference to the conclusions of the trial court." Blevins v. Moran, 12 S.W.3d 698, 700 (Ky.App. 2000).

Darrell argues that "[t]he fact that the Trial Court did enter a monetary judgment in favor of the Appellant means that it must have concluded that there was no dispute of fact and that the Appellant was entitled to a judgment of some form." Appellant's brief, p. 3. He then posits that "[t]he question, then, becomes one of remedies." Id. It is an interesting

⁷We mention in passing that the judgment has some of the characteristics of a judgment pro confesso. The parties did not advance this theory and we did not consider it.

argument, but we cannot accept with any confidence the premise that the judgment in this case means that the trial court "concluded that there was no dispute of fact and that the Appellant was entitled to judgment in some form". Even if we accept that the trial court indeed concluded that Darrell was entitled to an unsolicited money judgment, Darrell himself raises a factual dispute regarding the proper amount of damages. Our review leaves us unconvinced either that there are no questions of material fact⁸ or that the movant is entitled to judgment as a matter of law⁹. CR¹⁰ 56.03. Determinations remain to be made that must be made in the trial court rather than in this Court, either through further discovery and motion practice or at trial.

⁸For example, besides the potential issue of damages mentioned above, our review of the record discloses that Darrell's affidavit in support of his Motion for Summary Judgment contains a statement that the deed conveying the property to Alice was delivered to her "[f]or unknown reasons", when the record strongly suggests that the delivery resulted from the Bankruptcy Court's order pursuant to the Adversary Proceeding. Darrell makes no mention of that proceeding or of the Order revoking his permission to purchase the property in his pleadings. And, while the Trustee admitted the allegations of Darrell's complaint, the facts surrounding the Trustee's acceptance and negotiation of Darrell's check, the later refusal of Alice's check, and the delivery of the deed to Alice could be material both to the plaintiff's case and to the affirmative defenses raised in Alice's answer.

⁹As the trial court noted, there is at least a serious question whether Darrell may legally purchase the property, in view of the Bankruptcy Court's order of December 19, 2001. Although Alice failed to plead it as an affirmative defense, the issue may have been res judicata.

¹⁰Kentucky Rules of Civil Procedure.

Accordingly, the order and judgment of the Ohio Circuit Court is vacated, and the case is remanded for further proceedings consistent with this opinion.

ALL CONCUR.

BRIEF FOR APPELLANT:

Harry L. Mathison
Henderson, Kentucky

BRIEF FOR APPELLEE:

Amanda Perkins
Hartford, Kentucky