

RENDERED: May 5, 2006; 2:00 P.M.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky
Court of Appeals

NO. 2005-CA-000172-MR

RICHARD B. THORNTON

APPELLANT

v. APPEAL FROM BRECKINRIDGE CIRCUIT COURT
HONORABLE ROBERT A. MILLER, JUDGE
CIVIL ACTION NO. 04-CI-00067

THE FARMERS BANK

APPELLEE

OPINION
REVERSING AND REMANDING

** ** * * *

BEFORE: BARBER AND MINTON, JUDGES; HUDDLESTON, SENIOR JUDGE.¹

MINTON, JUDGE: Richard Thornton appeals from the grant of summary judgment to The Farmers Bank in a mortgage foreclosure action. Because we believe that the record discloses genuine issues of material fact regarding Thornton's mental competency at the time he signed the promissory note, we must reverse.

¹ Senior Judge Joseph R. Huddleston sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

According to the Bank's complaint, Thornton signed a promissory note for \$20,894.80 secured by a real estate mortgage. The Bank alleged that Thornton defaulted on the note and mortgage. So it sued to foreclose the mortgage, requesting a judicial sale of the real property described in the mortgage. Thornton filed a *pro se* answer stating his belief that he was incompetent at the time he signed the note. Attached to Thornton's answer was an affidavit from his mother, Colleen Thornton, in which she "recall[ed] the transaction with [T]he Farmers Bank concerning said loan on the home and property of [her] son . . . in dispute; and [did] testify that Richard B. Thornton was stoned out of his mind, and [T]he Farmers Bank was told of his condition at that time."

Several months into the foreclosure suit, the Bank propounded requests for admission and production of documents to Thornton. The relevant request for admission asked Thornton to admit "[t]hat you never informed The Farmers Bank of your mental incapacity until you filed an Answer in this action. After you executed the notes mentioned in 'Exhibit 1[,'] 'Exhibit 3[,]' and 'Exhibit 5' and signed the mortgage mentioned in 'Exhibit 6[,]' you made payments to The Farmers Bank under the terms and conditions of these documents." Thornton did not respond to any of these requests for admission within the thirty days allotted in Kentucky Rules of Civil Procedure (CR) 36.01(2)

for doing so. Thus, under CR 36.01(2), the matters contained in the requests for admission were deemed admitted.

When the Bank moved for summary judgment, the circuit court granted it and ordered Thornton's mortgaged real estate sold, wholly relying upon Thornton's failure to respond to the requests for admission. Thornton filed a motion to alter, amend, or vacate the summary judgment and order of sale, which the trial court denied. Thornton filed a timely notice of appeal from the summary judgment, but he never made a supersedeas bond. So after the notice of appeal, the real property was auctioned by the master commissioner, as directed in the order of sale. The sale to a third party was confirmed, a deed passed, and the proceeds of sale distributed.

Before we may examine the trial court's grant of summary judgment on its merits, we must identify the proper scope of our review. In assessing the propriety of the trial court's grant of summary judgment to the Bank, we are mindful of the fact that summary judgment was appropriate only if the Bank showed that Thornton "could not prevail under any circumstances."² In ruling on a motion for summary judgment, we must view the evidence in the light most favorable to the non-

² Steelvest, Inc. v. Scansteel Service Center, Inc., 807 S.W.2d 476, 480 (Ky. 1991) (citing Paintsville Hosp. Co. v. Rose, 683 S.W.2d 255 (Ky. 1985)).

movant, Thornton.³ When we review a trial court's decision to grant summary judgment, we must determine whether the trial court correctly found that there were no genuine issues of material fact.⁴ As findings of fact are not at issue, the trial court's decision is entitled to no deference.⁵

It is generally held that the validity of every contract, whether in the form of negotiable paper or otherwise, is dependent upon the capacity of the parties to contract.⁶ And under the law in Kentucky "it is elementary law that capacity—legal and mental—of the parties is a necessary and constituent element of a simple contract[.]"⁷ In order to have the requisite mental capacity to enter into a contract, a person must have "the ability to understand and appreciate the consequences of the particular transaction. There must be a meeting of the minds to effect assent, and there can be no meeting of the minds where either party to the agreement is mentally incapable of understanding the consequence of his acts."⁸

³ *Id.*

⁴ Scifres v. Kraft, 916 S.W.2d 779, 781 (Ky.App. 1996).

⁵ *Id.*

⁶ 12 AM.JUR.2D *BILLS AND NOTES* § 565 (2005).

⁷ Stege v. Stege's Trustee, 237 Ky. 197, 35 S.W.2d 324, 325 (1930).

⁸ Conners v. Eble, 269 S.W.2d 716, 718 (Ky. 1954).

Relying upon his answer and Colleen's affidavit, Thornton asserts that the record is at least conflicting regarding whether he had the requisite mental competency at the time he signed the promissory note and mortgage. Conversely, the Bank contends that there is no genuine issue of material fact involving Thornton's alleged mental incapacity by virtue of his failure to respond to the discovery requests. Certainly, CR 36.02 does provide that "[a]ny matter admitted under Rule 36 is conclusively established" So it is conclusively established by the record that Thornton did not inform the Bank at the time he signed the promissory note and mortgage that he was suffering from any mental incapacity.

But all that has been proven is that Thornton did not inform the Bank of his allegedly diminished mental condition. It has not been proven that he did not have an incapacitating mental disability. Those two concepts are not mutually exclusive. And the record fails to establish that it would be impossible for Thornton to produce evidence at trial that the Bank employee(s) who arranged his transaction, which included the execution of the note, knew of (or should have known of) his diminished mental state, regardless of whether he informed them of it. In fact, Thornton has presented some evidence in the form of Colleen's affidavit, which specifically says that Thornton was "heavily on prescription drugs and out of his right

mind" while he dealt with the Bank in this transaction. And Colleen asserts under oath that "[T]he Farmers Bank was aware of his condition."

It is reasonable to believe that a person suffering from a medication-induced diminished mental capacity might not inform others of his condition. And construing all of the evidence in a light most favorable to Thornton and drawing all reasonable inferences in his favor, it appears that a genuine issue of material fact exists regarding his mental capacity at the time he signed the promissory note and the Bank's knowledge of his condition. So, though Thornton may not ultimately prevail at trial, we believe that the record falls short of the could-not-prevail-under-any-circumstances standard required for summary judgment. Accordingly, we must reverse the trial court's decision to grant summary judgment to the Bank and remand this matter for further proceedings.

Finally, we are aware of the fact that the real estate described in the mortgage has been sold because of Thornton's failure to post a supersedeas bond. We must reject the Bank's argument that the sale of the real property renders this appeal moot. Actually, "[t]he law is that failure to supersede does not prevent the losing party from taking an appeal."⁹ So if the

⁹ Barron v. Phelps, 238 S.W.2d 1016, 1019 (Ky. 1951).

original judgment is "reversed after execution has been done on it," as is the case at hand, then "the successful party on appeal must look to the execution creditor to make him whole."¹⁰ In other words, while Thornton was legally entitled to file this appeal, our ruling here does not disturb the master commissioner's sale of the real estate, nor would any potential judgment in Thornton's favor on remand of the case before us affect the finality of that sale.¹¹ Were Thornton to be successful on remand, the Bank must respond in damages sufficient to make him whole.

For the foregoing reasons, the Breckinridge Circuit Court's order granting summary judgment to the Bank is reversed; and this matter is remanded for further proceedings consistent with this opinion.

ALL CONCUR.

BRIEF FOR APPELLANT:

Kyle A. Burden
Louisville, Kentucky

BRIEF FOR APPELLEE:

Thomas C. Brite
Hardinsburg, Kentucky

¹⁰ *Id.*

¹¹ *See, e.g., Rose v. Cox*, 297 Ky. 458, 179 S.W.2d 871 (1944).