

Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-000590-MR

STEPHANIE ANN TIMBERLAKE

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE F. KENNETH CONLIFFE, JUDGE
ACTION NO. 03-CI-010005

FIFTH THIRD BANK OF KENTUCKY, INC.;
SUSAN DENISE McCARTY; THE UNKNOWN
SPOUSE OF SUSAN DENISE McCARTY;
METROPOLITAN FINANCIAL, INC.; AND
UNION PLANTERS BANK, NATIONAL ASSOCIATION

APPELLEES

OPINION
AFFIRMING

** ** * * *

BEFORE: BUCKINGHAM, JOHNSON, AND TAYLOR, JUDGES.

TAYLOR, JUDGE: Stephanie Ann Timberlake brings this appeal from a February 22, 2005, order of the Jefferson Circuit Court confirming the sale of real property in a foreclosure action. We affirm.

Fifth Third Bank of Kentucky, Inc., (Fifth Third) filed a complaint to foreclose upon real estate located at 5513 Antle Drive, Louisville, Kentucky. The named defendants were,

inter alios, Susan Denise McCarty, who was the mortgagee, and the Unknown Spouse of Susan Denise McCarty.

Thereafter, Fifth Third filed an affidavit and request for appointment of warning order attorney to notify McCarty's unknown spouse of the pendency of the action. The warning order attorney was appointed by the Jefferson Circuit Court Clerk. Because personal service was unsuccessful upon McCarty, Fifth Third apparently filed another affidavit and request for appointment of warning order attorney to notify McCarty of the pendency of the action. The circuit court appointed an attorney to serve as warning order attorney for McCarty. The warning order attorney for McCarty and her unknown spouse subsequently filed answers and reports outlining the unsuccessful efforts to serve McCarty and her unknown spouse. As neither McCarty nor her unknown spouse appeared, a default judgment and order of sale was entered.

Timberlake was the highest bidder at the judicial sale of the real estate with a bid in the amount of \$83,000.00. Timberlake made a deposit at the time of sale of \$3,500.00. The master commissioner subsequently entered a report of sale and Timberlake filed exceptions to that report. Timberlake argued the sale should not be confirmed because the court lacked personal jurisdiction over McCarty and her unknown spouse. Timberlake specifically alleged that the appointments of the

warning order attorney to notify these defendants of the action were fatally flawed. The circuit court ultimately denied Timberlake's exceptions and confirmed the sale by order entered February 22, 2005. This appeal follows.

Timberlake contends the circuit court's appointment of a warning order attorney for McCarty violated the express language of Ky. R. Civ. P. (CR) 4.05, CR 4.06, and CR 4.07. Based upon these rules, Timberlake states that the circuit court clerk had the sole authority to initially appoint a warning order attorney and that the circuit court had no authority to do so. Specifically, Timberlake points to the language of CR 4.07, which reads in part:

The clerk at the time of making a warning order shall appoint, as attorney for the defendant, a practicing attorney of the court. The court may appoint another attorney as a substitute for the attorney appointed by the clerk.

Under this rule's plain language, Timberlake maintains that initial appointment of a warning order attorney must be made by the clerk and the court may only make a substitute appointment. Because the circuit court made the initial appointment of the warning order attorney for McCarty, Timberlake concludes this appointment clearly violates CR 4.05, CR 4.06 and CR 4.07. As strict compliance with these rules are required to effectuate a proper appointment of a warning order

attorney, Timberlake maintains the appointment was fatally flawed; thus, the court did not obtain personal jurisdiction over McCarty. See Nolph v. Scott, 725 S.W.2d 860 (Ky. 1987).

While we agree with Timberlake that the civil rules suggest that only a clerk may initially appoint a warning order attorney, we are, nevertheless, persuaded that a court may, pursuant to its inherent powers, appoint a warning order attorney. It is well-established that a court "is also vested with certain 'inherent' powers to do that which is reasonably necessary for the administration of justice" Smothers v. Lewis, 672 S.W.2d 62, 64 (Ky. 1984). In the case at hand, we believe it was within the inherent power of the court to appoint a warning order attorney to notify McCarty of the action. As such, we reject Timberlake's claim that the circuit court improperly appointed the warning order attorney for McCarty.

Timberlake also contends that the appointment of the warning order attorney to notify McCarty's unknown spouse was defective because it failed to comply with CR 4.06.

Specifically, Timberlake asserts that Fifth Third:

[D]id not comply with the specific requirements for the affidavit as set out in the second sentence of CR 4.06(1) which requires that the last known address of the party to be constructively served be given, or that the affiant state his ignorance of that fact.

Timberlake's Brief at 6.

CR 4.06 states, in relevant part, as follows:

The affiant shall state the last known address of the defendant, or, if the defendant is one designated in Rule 4.05(b) and its address is unknown, the last known address of one upon whom service may be had in its behalf, or shall state his ignorance of such of those facts as he does not know.

The affidavit at issue reads, in part, as follows:

2. Affiant states that the present name and residence for the Defendant, The Unknown Spouse of Susan Denise McCarty, is unknown.

In the affidavit, the affiant stated the name and address for McCarty's unknown spouse was "unknown." We believe this statement constitutes adequate compliance with the requirement that the affiant state his ignorance of the defendant's address. As such, we are of the opinion the warning order affidavit for the unknown spouse complied with the requirements of CR 4.06.

We view Timberlake's remaining contentions to be moot.

For the foregoing reasons, the order of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

NO BRIEF FOR APPELLEES

Michael R. Gosnell
Louisville, Kentucky