

# Commonwealth of Kentucky

## Court of Appeals

NO. 2005-CA-002344-MR

BILL PATRICK AND SANDRA PATRICK

APPELLANTS

v. APPEAL FROM POWELL CIRCUIT COURT  
HONORABLE SAMUEL C. LONG, SPECIAL JUDGE  
ACTION NO. 92-CI-00085

CITIZENS BANK AND TRUST CO.  
OF JACKSON

APPELLEE

OPINION  
AFFIRMING

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BEFORE: LAMBERT AND STUMBO, JUDGES; BUCKINGHAM,<sup>1</sup> SENIOR JUDGE.

STUMBO, JUDGE: This appeal provides a graphic example of the dangers inherent in prolonged litigation. Originally filed in 1992, this foreclosure action has been in litigation for fifteen years, been heard by eight different judges and seen the death of at least two counsel of record. At issue is the finality of an order entered in October of 1997, which granted a motion to dismiss a counterclaim filed by Appellants. The facts are complex and somewhat confusing, but appear to be as set forth below.

<sup>1</sup> Senior Judge David C. Buckingham sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

## THE FACTS

The Citizens Bank and Trust Co. of Jackson, (hereinafter “Citizens”) loaned money to Bill and Sandra Patrick, (hereinafter the “Patricks”), to purchase a home in Powell County. Sometime later the Patricks moved to Lexington, Kentucky, and rented the house to a Mr. and Mrs. Jones. They also executed a contract giving the Joneses the right to purchase the home if they could get financing. At some point, the Patricks got a verbal agreement from a bank officer to accept “interest only” payments for either six months, according to Citizens, or until they could sell the house to the Joneses or someone else, according to the Patricks. Once the six months passed, Citizens rejected the interest only payments and eventually filed a foreclosure action.

In response to the action, the Patricks filed a counterclaim alleging fraud in the matter of the interest rate being charged on the loan and in the manner in which Citizens handled the interest only issue. Additionally, the Patricks claimed that the filing of the lawsuit ruined their opportunity to invest in a company that acquired a very profitable state contract with the lottery. They alleged substantial damages as a result of the lost business opportunity. The Joneses intervened seeking enforcement of their purchase agreement.

At some point, Bill Patrick declared bankruptcy. The bankruptcy trustee abandoned any claim to the real estate in question as being valueless. No mention was made of the counterclaim as an asset of the bankruptcy.

Against the backdrop of the foreclosure action, which staggered along slowly, the counterclaim was litigated. Because the sitting Powell Circuit Judge was ill, several special judges handled the case over the years. At one point, a trial was held on the counterclaim resulting in a mistrial declared by the then-presiding special judge. The newly elected Powell Circuit Judge took over the case and entered the order in question. Citizens filed a bare bones motion to dismiss the counterclaim which was heard in July of 1997. At the hearing, the court expressed concern about the status of the bankruptcy proceeding and whether the counterclaim was a declared asset of the bankruptcy. The Patricks' counsel denied any knowledge of the particulars of the bankruptcy. The court entered an order directing the parties to brief the issue of whether the Patricks had a viable counterclaim. According to the docket sheet, the motion was to be revisited at the August motion hour. The Patricks' counsel filed a memorandum on the issue but Citizens did not. The Patricks' counsel did not appear in court in August and the court entered the following order on October 20, 1997:

This cause being before the Court on plaintiff's Motion to Dismiss the Counterclaim of Billy Patrick, a hearing was held on August 6, 1997. Plaintiff and defendants Jones were represented by counsel. The attorney for the defendants Patrick was not present but had filed a Memorandum Brief which the Court considered.

Based upon the record and statements of counsel the Court finds that said defendants do not have legal standing to prosecute their Counterclaim due to bankruptcy proceedings, as more particularly detailed in the record.

1. Based on the foregoing findings of fact the Court concludes as a matter of law that said Counterclaim

should be and is hereby dismissed with prejudice and at the cost of the defendant.

2. Due to the fact that counsel for the defendants Patrick was not present at the hearing and the Court being unable to ascertain the reason therefor, it is further Ordered that this instrument should be considered interlocutory for a period of 20 days for defendants' counsel to answer the following questions:

(A) Was said Counterclaim listed as an asset in defendants' bankruptcy proceedings?

(B) If (A) be answered in the affirmative, that copies of all documents so indicating, continuing to the present, should be provided.

(C) And if same be answered in the negative, all legal authority to proceed in this Court be also provided. The Court is anticipating the actual holdings of any case cited rather than dictum.

(D) Any and all documents that counsel desires for the Court to consider.

3. Finally, it is ordered that if counsel is unable to answer these questions satisfactorily or provide any more positive proof than that contained in the record, this order shall become final 20 days from and after the entry of this order.

The Patricks then filed a motion to recuse the trial judge some 21 days later, outside the twenty-day window specified in the order. The motion was granted and yet another series of special judges considered this case. Of note is the fact that while counsel's motion did address a claimed lack of notice of the August hearing, counsel did not in fact provide any proof of any kind in response to the order, nor did he request that

said order be set aside. On December 11, 1997, Special Judge William Mains entered an order finding that since no response had been made to the October 20 order within the prescribed time, it had become final and directed that the real estate be sold by the master commissioner. The Patricks filed a Motion to Alter, Amend or Vacate that order on December 22, 1997, which was a Monday. Thus, the motion was timely filed under CR 59.05, if the December 11, 1997, order was indeed a judgment. In that motion, the Patricks sought alternative relief: that the order be vacated or amended, or; that more specific findings of fact be made, or; that the order be made final and appealable “there being no just cause for delay.” In January of 1998, the trial court directed that both parties file written arguments on whether the order should be set aside. Nothing more occurred in regard to this motion for some time. The time line becomes murky in that a hearing on a motion filed by the Joneses resulted in an order granting the third party Plaintiffs (the Joneses) certain rights. It neither vacated nor amended the order in regard to the Patrick counterclaim; nor did it transform the order into one that could be appealed. That order was entered on January 23, 1998.

The next action in the case was related to the attempts of the long absent Bankruptcy trustee’s efforts to intervene on behalf of the bankruptcy estate of Bill Patrick to pursue the claim on behalf of Bill Patrick. Additionally, and interestingly, the Patricks then filed a memorandum setting forth legal grounds and arguments in favor of permitting the counterclaim to proceed, seemingly in response to the January order. This memorandum was filed on February 9, 1998.

After this, various motions were filed and orders entered, but none having any real consequence to the issue at hand. The next motion that pertains to this issue is one filed on May 22, 1998. It was a motion for summary judgment from Defendants, Ken and Maude Jones. In this motion, the Joneses ask to be paid the \$5600 they were owed from Patrick, to declare the land contract null and void, and to be given the money they have been putting into the Clerk's escrow account.

A partial summary judgment was entered on September 1, 1998, ordering the land contract be deemed null and void, that the money in the escrow account be given to the Joneses, and that Patrick is to pay them the \$5600. Defendant Patrick filed a motion to alter, amend or vacate on September 11, 1998, concerning this partial summary judgment.

An order was entered on October 21, 1998, in which Patrick's motion to alter, amend or vacate the judgment against him and in favor of the Joneses for \$5600 was "held in abeyance pending further Orders of the Court." This order also dictated that the land in question was to be sold, the proceeds be put into an escrow account, and the money already held in an escrow account for the Joneses be paid over to them.

Finally, on November 2, 1998, the trial court permitted the bankruptcy trustee to intervene in the action. The order granting leave contained the following language:

The Motion is herein sustained and the trustee is herein allowed to intervene to pursue the claim on behalf of the Bankrupts (sic) estate. The trustee shall become a party and stand on behalf of the estate and its interest. The claim field

(sic) herein on behalf of William W. Patrick shall stand as the claim of the trustee the same as if separately filed.

Then, on April 17, 1999, a motion was filed requesting judgment in favor of the Patricks. The motion was based on the failure of the Bank to file any response to the order requiring memorandum in support of a motion to alter, amend or vacate to be filed back in January of 1998. The Patricks filed a supporting memorandum, but Citizens never filed a response. No order was ever entered pertaining to this motion.

The action meandered along, the property was eventually sold and the proceeds applied to the debt due Citizens. At one point, a trial was set for the counterclaim but was continued due to the illness of counsel. The October 20, 1997, Order was not raised in response to the motions that resulted in the trial being set and continued. Following the sale of the house and distribution of the proceeds, the Joneses moved to dismiss their complaint. The motion was granted on December 15, 1999. Later that month, an order was entered completing distribution of the proceeds of the sale to the Bank. The order concluded by setting "a trial on all remaining issues" for August of 2000. As might have been anticipated, no trial took place in August. The case had little activity until a CR 77.02(2) notice went out in mid-2001. The matter was dismissed, then reinstated. Spurred to action, the Patricks moved for a new trial date. For the first time, the Bank raised the October 27, 1997, order as a bar to the continued viability of the counterclaim. The trial court eventually held that the October 20, 1997, order had become final "by its own terms twenty days after October 20, 1997, and no appeal or motion tolling the appeal having been timely filed," dismissed the action from the court's

active docket. The court did make this order final and appealable as required by CR 54.02(1).

### ARGUMENTS

The Patricks contend that the failure of any of the judges who considered this case after the October 27, 1997, order to rule upon their CR 59 motion to alter, amend or vacate, filed December 22, 1997, means that the issues raised therein remained to be determined by the trial court. Alternatively, they argue that the eventual entry of the Bankruptcy Trustee into the case cured the defect in the litigation raised in the October order. They contend that only Mr. Patrick sought bankruptcy protection and that Mrs. Patrick's counterclaim was unaffected by the bankruptcy proceeding. Finally, the Patricks contend that by continuing to litigate the case and failing to object, over a period of years, to the setting of various trial dates, the Bank has conceded that the order had no effect on the viability of the litigation.

The Bank responds that this appeal is untimely because upon entry of the final order dismissing the claims filed by the Joneses on December 15, 1999, all prior orders of the court, including the October 27, 1997, order became final. The Bank cites CR 54.02(2) in support of its contention. The rule provides as follows:

When the remaining claim or claims in a multiple claim action are disposed of by judgment, that judgment shall be deemed to readjudicate finally as of that date and in the same terms all prior interlocutory orders and judgments determining claims which are not specifically disposed of in such final judgment.

As to the entry of the bankruptcy trustee and Citizens own failure to raise the finality issue earlier, Citizens points to the confusion arising from the sheer number of presiding judges who have handled the case as well as the loss through death of two of its own counsel of record. Citizens argues that the responsibility to make sure that the motions were ruled upon lies upon the Patricks.

### DISCUSSION

What is the effect of a failure to bring a motion to the attention of the trial court so that it may be ruled upon? In the case at bar, there are at least three significant motions filed by the Patricks that remained dormant for years. The first is the motion to alter, amend or vacate the October 1997 order filed in December 1997; the motion to alter, amend or vacate the judgment entered in favor of the Joneses filed in September 1998; and the April 1999 motion for a judgment. Other than noticing the motions, the Patricks took no other action to have the court resolve the issues raised by the motions.

We have searched for any Kentucky law specifically addressing this issue but found none of recent vintage. There is venerable case law that stands for the proposition that the first motion filed by the Patricks could render the attacked order or judgment interlocutory. Specifically, *Larue v. Larue*, 12 Ky. 258 (Ky. 1822), wherein a motion to have a judgment set aside was unresolved, rendering a judgment unappealable. Also cited is *Garrett's Adm'r v. Ashcraft*, 30 S.W. 21 (Ky. 1895), in which an appeal was attempted from an order which denied a motion to amend a petition and granted the defendant's costs in the action. The court held that an appeal could not

lie where no answer or other proceedings had occurred. However, it is Citizens' contention that the Patricks' motion was of no effect because it was untimely filed by the terms of the October 1997 order and completely failed to address the issues that the court wanted to be addressed. Citizens describes the October 1997 order as *final* but not appealable, just as described by CR 54.02(2).

It would appear from this authority that the October order was indeed interlocutory. The question then arises whether any other action by the trial court rendered this order final? Citizens directs this Court's attention to the fact that this matter began as a foreclosure action, which has its own peculiar rules in regard to finality. "A judgment holding that the purchase of land was subject to a lien and decreeing a sale of the land to satisfy that debt is a final order from which an appeal lies." *Security Federal Savings & Loan Assoc. of Mayfield v. Nesler, et al.*, 697 S.W.2d 136 (Ky. 1985). Such an order was entered in this case on October 21, 1998, but by its own terms, it reserved an issue in regard to certain payments previously ordered made to the Joneses. That issue was resolved when the Joneses were dismissed from the action as both defendants and cross-claimants upon their own motion in December of 1999. Citizens contends that this order acted as a final judgment because the October 1997 order was not properly challenged. Thus, Citizens argues this appeal was not timely filed and this Court has no jurisdiction. As to the other proceedings described in this opinion, Citizens argues that each was a nullity, having no effect on the finality of the orders.

We do not believe that the foreclosure law cited by Citizens is truly applicable to the case at bar given that the cross-claim was not related to either the sale of the property or the determination of priority of lien holders as in the cases cited. Nor do we believe that the Patricks' various motions remain a viable bar to affirmation of the trial court's judgment. It is a rule of long standing that "a motion which is never called to the attention of the court is presumed to have been waived or abandoned by the moving party, and, where no ruling appears to have been made on a motion, the presumption is, unless it otherwise appears, that the motion was waived or abandoned." *60 C.J.S. Motions & Orders § 42 at 63 (1969)*. It is the responsibility of the party filing the motion to bring the motion to the court's attention and obtain a ruling. *Hiway 20 Terminal, Inc v. Tri-County Agri-Supply, Inc.*, 454 N.W.2d 671 (Neb. 1990). As previously discussed, the Patricks waited months to respond to the order to provide the requested information to the trial court and made no effort to bring the initial motion to set aside to the attention of the subsequent presiding judges. When the trial court considered the final arguments of counsel, it reaffirmed and adopted as its judgment the October 20, 1997 order. Each and every argument raised by the Patricks was contained in the pleadings that led up to the judgment appealed from and was rejected by the trial court in so ruling.

The sole issue before us is whether the trial court erred in reaffirming and adopting the October 20, 1997 order. We believe that it was completely within the discretion of the trial court to reject as untimely the arguments raised by the Patricks in

opposition to the October 1997 order. Though not expressed directly in those terms, the final judgment of the court states that “the Order Dismissing became final by its own terms,” impliedly holding that the Patricks’ response was insufficient. As noted by Citizens, it is well within the exercise of a court’s discretion to dismiss a case for failure to respond to a court order. CR 41.02(1); *See, e.g., Polk v. Wimsatt*, 689 S.W. 2d 363, (Ky. App. 1985). When confronted with a court order directing production of certain information within a defined time limitation, the response was not to come forth, but to move that the judge be replaced. Even then, it was some four months before a direct response to the order was filed by the Patricks. It is clear from the transcripts that the trial court felt that it had given the Patricks every opportunity to provide the information and had been lenient in granting additional time to do so, but the memos filed “didn’t contain the information” it had sought “for some months.” The record supports the conclusion that the order should stand. Accordingly, we find no error.

For the reasons set forth herein, the judgment is AFFIRMED.

ALL CONCUR.

BRIEFS AND ORAL ARGUMENT  
FOR APPELLANT:

Earl M. McGuire  
Prestonsburg, Kentucky

BRIEF FOR APPELLEE:

W. Thomas Bunch  
W. Thomas Bunch II  
Lexington, Kentucky

ORAL ARGUMENT FOR APPELLEE:

W. Thomas Bunch  
Lexington, Kentucky