

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-001438-MR

PAUL GLENN WATKINS

APPELLANT

v.

APPEAL FROM ESTILL CIRCUIT COURT
HONORABLE WILLIAM TRUDE, JR., JUDGE
ACTION NO. 02-CI-00316

BETTY MARIE WATKINS

APPELLEE

OPINION
AFFIRMING

** ** * ** * **

BEFORE: COMBS, CHIEF JUDGE; TAYLOR, JUDGE, GUIDUGLI,¹ SENIOR JUDGE.

GUIDUGLI, SENIOR JUDGE: Paul Watkins (hereinafter “Paul”) appeals two orders of the Estill Circuit Court, entered June 13, 2006. The first of those judgments ordered Paul and his wife to vacate a piece of real estate that had been the matter of a legal action between Paul and his ex-wife Betty Watkins (hereinafter “Betty”). The second judgment

¹ Senior Judge Daniel T. Guidugli sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes 21.580.

dismissed Paul's claim for the property, ordered Paul to pay Betty's attorney's fees in the amount of \$1,464.00, granted Betty the right to apply for additional attorney's fees as conditions warrant and confirmed a judgment entered February 13, 2003, in which it was held that Paul owed Betty \$26,577.31 with interest thereon at the rate of 12% annum from August 21, 2001, until paid. We affirm.

In 1997, Betty filed a petition to dissolve the marriage between the parties. The marriage was dissolved and a settlement agreement was filed in the record on January 16, 1998. As part of that agreement, the parties were to divide the marital real estate, consisting of 2.4 acres and a mobile home, and Paul was to pay various sums of money to Betty and release the mortgage on the portion of the real estate awarded to Betty. After Betty sought to have Paul's obligations under the settlement agreement reduced to a monetary amount, an order was entered² against Paul in the amount of \$26,577.31 with interest thereon at 12% annum until paid. A Judgment Lien was subsequently filed by Betty in the Estill Circuit Clerk's office.

On December 2, 2002, Betty, instituting a new action,³ filed a complaint with the Estill Circuit Court seeking to enforce her judgment lien through a court ordered sale of that portion of the property awarded to her in the divorce. Betty joined Paul; his new wife, Lori Watkins; the mortgagee, CMH Homes, Inc.; and Estill County, Kentucky as co-defendants. Paul and CMH Homes, Inc. filed answers. Betty then sought and

² This order is not part of the record on appeal but was referenced by orders of the circuit court in the record. Furthermore, a copy of the judgment lien, reflecting the order, was filed in the record.

³ This new action, not the divorce proceeding, is the basis of this appeal.

received a summary judgment on February 13, 2003, ordering the property to be sold by the Master Commissioner. That judgment was never appealed.

A sale of the property was scheduled. However, Paul filed for bankruptcy, and the sale was canceled. Unfortunately, the Master Commissioner had already incurred costs related to the planned sale, and Betty was ordered to pay those costs. Paul's bankruptcy was subsequently dismissed and Betty moved to re-docket the sale. Her motion was sustained on October 14, 2003. On November 11, 2003, Paul again filed for bankruptcy. A new sale had not yet been scheduled, but a new order requiring Betty to pay the previously incurred sale costs was entered. In the interim, Betty's attorney, Michael Moreland, passed away and her current counsel, Philip Owens, assumed representation of Betty.

On June 9, 2004, Paul filed a motion claiming that Betty's share of the property had been fraudulently transferred to Betty's brother. Paul argued that the property could not be transferred because it was subject to a mortgage and cited KRS⁴ 454.160 in support of his argument. Paul filed several other motions over the next few months, including one in which he sought a deed for his portion of the property and another in which he moved for a change in venue. In support of his venue change argument, Paul argued that Mr. Owens's positions as Assistant Estill County Attorney, Assistant Commonwealth's Attorney and Betty's attorney were a violation of KRS 61.080. All of Paul's motions were denied.

⁴ Kentucky Revised Statutes.

On December 15, 2004, Paul's second bankruptcy action was dismissed. Betty then filed a motion to re-docket the sale of the property and also sought attorney's fees. Paul argued that he was the owner of the property and that the bankruptcy action was still pending. Paul also sent several eviction notices to the portion of the property claimed by Betty, claiming that he had been awarded the property.

On February 14, 2005, Paul filed a third bankruptcy petition. A letter, dated August 10, 2005, purported to dismiss the action. CMH Homes, Inc. moved to re-schedule the Master Commissioner's sale. In response, Paul moved to cancel the sale, claiming that the property was under the control of the bankruptcy court and had been deemed his sole property. Paul filed a second similar motion which he failed to notice, and a motion for tenant eviction, which he styled with the heading of the bankruptcy court. On September 8, 2005, the court ordered the sale to proceed. The sale was scheduled for November 7, 2005.

The property was appraised at \$25,000 by two court-appointed appraisers, and their report was filed in the record. The sale was conducted and the property sold for \$21,000. Pursuant to motions by the Master Commissioner to approve the sale, approve a deed and for an order of distribution, the Estill Circuit Court ordered the distribution of the funds and the delivery of the deed in an order marked final and appealable and entered November 29, 2005. That judgment was not appealed.

From January 3, 2006, through May 24, 2006, Paul filed various motions, alleging a "mistake"; alleging failure to reflect "off-conveyances"; alleging failure of the

property to sell for 2/3 of its value, pursuant to KRS 324.020(6); alleging failure to receive a copy of the deed to the property; requesting a jury trial; asking for a judgment against Betty's attorney for \$100,000; and seeking "damages" against the Master Commissioner. During this period, Betty filed two motions, asking for: sanctions; possession of the property; dismissal of Paul's claims; attorney's fees; eviction; and a deficiency judgment. On June 13, 2006, Betty's motions were sustained and Paul was ordered to vacate the property. Betty was also granted a deficiency judgment in the amount of \$26,577.31 with interest thereon at 12% per annum from August 21, 2001 and attorney's fees in the amount of \$1,464.00. On June 23, 2006, Paul filed a motion "renouncing" his claim against Betty's attorney, claiming that he had not received notice of the judgment lien underlying Betty's complaint and requesting additional time to retain counsel. This motion was denied. On July 12, 2006, Paul filed a "Request for Appeal."

On appeal, Paul alleges the following: 1) the property was not divided properly in the divorce action; 2) the property did not sell for 2/3 of its appraised value; 3) the appraisal by the Master Commissioner was erroneous; 4) Betty's attorney held numerous incompatible office pursuant to KRS 61.080; 5) he (Paul) was improperly denied a change of venue; 6) he was never served a copy of the judgment lien was the basis for Betty's complaint; and 7) the sale of the property took place prior to the dismissal of his third, and final, bankruptcy.

The property was divided per a divorce decree in Estill Circuit Court, action 97-CI-00035. Any appeal of the issue regarding property division required an appeal of

the decree, not of orders issued in the foreclosure proceedings. Therefore, the issue of property division is not properly before this court and will not be addressed.

The appraisal of the property, which Paul claims was done erroneously by the Master Commissioner, was in fact performed by two court appointed appraisers, in accordance with applicable law, KRS 406.520. Paul also argues that the property was not sold for 2/3 of its value pursuant to KRS 324.020. KRS 324.020 pertains to the licensing of real estate agents and is not applicable to the sale of the property. Furthermore, the “2/3 value” issue involves the right of redemption as set forth in KRS 426.530. The property was appraised at \$25,000 and sold for \$21,500, well above 2/3 of its value, making Paul's argument moot. There is no evidence which leads us to believe the appraisal or sale were improper. The appraisal was filed in the record on October 20, 2005, and Paul has failed to raise the issue of the accuracy of the property appraisal until now. Therefore, he has waived such argument.

Next we will address Paul's arguments that Mr. Owens held incompatible offices and that he was entitled to a change of venue. KRS 61.080 outlines the criteria of incompatible offices. Mr. Owens' positions of assistant county attorney, assistant commonwealth's attorney and Betty's attorney do not meet this criteria. The grounds for change of venue are stated in KRS 452.010(2) as follows:

A party to any civil action triable by a jury in a Circuit Court may have a change of venue when it appears that, because of the undue influence of his adversary or the odium that attends the party applying or his cause of action or defense, or

because of the circumstances or nature of the case he cannot have a fair and impartial trial in the county.

Paul claims that the various positions held by Betty's attorney warrant a change of venue. Granting a change of venue is within the discretion of the court. KRS 452.030. Paul has failed to prove impartiality based on the offices held by Betty's attorney. We do not believe that the circuit court abused its discretion in denying Paul a change of venue.

Paul next argues that he was never served a copy of the judgment lien that was the basis for Betty's foreclosure action. We believe this argument to not only have been improperly preserved but also disingenuous. A copy of the judgment lien was filed in the circuit court record on December 20, 2004. We are not convinced that Paul who, after spending almost 5 years defending himself and filing motions and pleadings in this action, was never served the document which serves as its cornerstone. Furthermore, the appropriate test for notice, under KRS 426.720 is delivery to the last known address or personal delivery, not service. Even if service were required, the claim was not presented to the the court until June 23, 2006, four and a half years after Betty's complaint was filed. As such, we consider the issue waived.

Paul's final argument is that the sale of the property took place prior to the dismissal of his third bankruptcy. A review of the record affirms that this is true. The August 10, 2005, letter indicating the bankruptcy's dismissal, was succeeded by another letter clarifying that the bankruptcy had not been dismissed, but had been stayed.

However, because the bankruptcy eventually was dismissed, any error the circuit court committed, by selling the property prior to the bankruptcy's official dismissal, is harmless.

For the foregoing reasons, the June 13, 2006, orders of the Estill Circuit Court are affirmed.

COMBS, CHIEF JUDGE, CONCURS.

TAYLOR, JUDGE, CONCURS IN RESULT ONLY.

BRIEF FOR APPELLANT:

Paul G. Watkins, Pro Se
Irvine, Kentucky

BRIEF FOR APPELLEE:

Philip M. Owens
Irvine, Kentucky