

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-001450-MR

PAUL BAKER

APPELLANT

v. APPEAL FROM LAUREL CIRCUIT COURT
HONORABLE RODERICK MESSER, JUDGE
ACTION NO. 06-CI-00004

MORTGAGE ELECTRONIC REGISTRATION SYSTEMS,
INC., AS NOMINEE FOR LENDER AND FLAGSTAR BANK,
FSB

APPELLEES

OPINION AFFIRMING

** ** * ** * ** *

BEFORE: HOWARD AND MOORE, JUDGES; GUIDUGLI,¹ SENIOR JUDGE.

MOORE, JUDGE: Paul Baker appeals the Laurel Circuit Court's order overruling his CR 60.02 motion for relief from the court's judgment ordering the Master Commissioner to sell Baker's property at public auction after finding that Baker owed Mortgage Electronic Registration Systems, Inc. and Flagstar Bank, FSB (Appellees): \$158,692.89 plus costs; future accruing interest; and amounts spent for insurance, taxes, and preserving the

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 KRS 21.580.

property until sold. After a careful review of the record, we affirm the Laurel Circuit Court's order.

I. FACTUAL AND PROCEDURAL BACKGROUND

In December 2002, Baker executed a promissory note stating that he would repay a loan for \$135,000 in principal, at the interest rate of 6.375% per year, for the property located at 154 Flat Lick Road, London, Kentucky 40741. Baker also executed a mortgage the same day he signed the promissory note. Unfortunately, the mortgage referenced the wrong deed. Rather than referencing the deed that Baker received from his predecessors in title, the Reynoldses, the mortgage referenced the deed by which the Reynoldses acquired the property. Specifically, the mortgage document described the property being mortgaged, located in Laurel County, as follows:

Being all the same property conveyed to Melissa C. Reynolds and Eugene Reynolds, wife and husband, by Jeannie Williams England (formerly Jeanne Williams) and Steven R. England, wife and husband, by deed dated May 1, 1997, recorded May 2, 1997, in deed book 469, page 212, records of the Laurel County Court Clerk's Office.

(Capitalization changed). Furthermore, beneath this property description was the following: "Tax Parcel ID Number [blank space] which currently has the address of 154 Flat Lick Road[,] London, Kentucky 40741 ('Property Address')." After the page containing Baker's signature, a page labeled "Exhibit A" was attached. That page contained a legal description of the property at issue, as well as the Laurel County Court Clerk's statement that the mortgage was recorded in January 2003, in book 583, page 144. This statement was then signed by the court clerk.

According to the complaint filed in the circuit court by Appellees, Baker defaulted on his loan. Thus, Appellees sought a judgment of \$141,393.81 in principal, plus accrued interest from September 1, 2004 and thereafter at the rate of 6.375%, "plus late charges, escrow advances, advances for taxes and insurance and . . . costs herein expended, including a reasonable attorney fee." Appellees also sought to foreclose on the mortgage, and they requested that the property be sold and Appellees be paid from the proceeds of the sale.

Pursuant to CR 4.05 and CR 4.06, Appellees sought the appointment of a warning order attorney for purposes of service of process because Baker's place of residence was unknown to them. A warning order attorney, the Honorable James Hodge, was appointed, and he sent a certified letter to Baker informing him that a lawsuit had been filed against Baker in the Laurel Circuit Court. The letter continued, stating "[e]nclosed herein, please find a copy of the Complaint filed in this court action, along with a copy of an Appointment of Warning Order Attorney document, appointing me as the Warning Order Attorney in this case. For the particulars of the lawsuit, please see the attached complaint." In the letter, Mr. Hodge also informed Baker as follows:

[Y]ou must file an Answer or Response to the Complaint within fifty (50) days of January 6, 2006. If you should fail to file an Answer or Response before that date, you may forfeit your right to challenge the Plaintiff's claims listed in the Complaint, and the Court may enter a judgment against you in this matter.

Finally, Mr. Hodge informed Baker that he did not represent Baker and that his "sole function [was] to attempt to notify [him] of [the] lawsuit and report [his] findings to the Court."

Mr. Hodge filed his report with the court, notifying the court that he sent the certified letter, return-receipt requested with postage pre-paid to Baker. Mr. Hodge reported that he received the return receipt, signed by Ashley Wagers, from the post office. He then found a telephone number for Ashley Wagers, called her, and she informed Mr. Hodge that she had indeed signed the return receipt and "given the certified letter[] to Paul Baker." Mr. Hodge informed the court that Ms. Wagers told him she would have Baker call him. Over the next several weeks, Mr. Hodge spoke with Ms. Wagers and left messages for her, asking that she have Baker call him. Baker never returned Mr. Hodge's call. Mr. Hodge concluded his report to the court by stating that, "[a]s a result of [his] efforts, it appears that from the information provided by Ashley Wagers, that Paul Baker received his notice as to the pending Civil Action."

Appellees then moved for an in rem judgment and order of sale of the property because Baker failed to answer the complaint, even after apparently being notified by the warning order attorney. The circuit court granted Appellees' motion, finding, *inter alia*, that Baker owed \$158,692.89 to Flagstar Bank, FSB. Additionally, the court determined that

Mortgage Electronic Registration Systems, Inc., as nominee for Lender, shall recover an in rem judgment against the interests of Paul Baker, together with interest at the rate of \$23.49 per diem (or 6.375% per annum) . . . until paid plus

costs herein and any sums expended by the [Appellees] for insurance, ad valorem taxes or for preservation of the real estate until date of sale.

Finally, the court ordered the Master Commissioner to sell the 154 Flat Lick Road property at auction.

Baker then filed his CR 60.02 motion for relief from the circuit court's judgment. In his motion, Baker contended that the court "lack[ed] personal jurisdiction because he was improperly served with process, even by substituted service." Specifically, Baker alleged that the warning order attorney should have informed him in the letter what the lawsuit against Baker was about, rather than stating that Baker should read the attached complaint for details about the lawsuit. Additionally, Baker asserted that the mortgage failed to describe the property that the court ordered the Master Commissioner to sell and, thus, the mortgage lien was invalid. Baker requested that the court set aside its in rem judgment and cancel the Master Commissioner's Sale that was scheduled for June 9, 2006.

Appellees opposed Baker's motion for relief from judgment, and the circuit court entered an order "overruling" Baker's CR 60.02 motion. The court reasoned that although "the Warning Order Attorney did not state the nature of the case in his letter to [Baker], he did attach a copy of the complaint which satisfies the requirement of CR 4.07(1) that the Warning Order Attorney 'make diligent efforts to inform the defendant, by mail, concerning the pendency and nature of the action against him.'" The court also

found "that the mortgage involved in this action adequately describes the real property especially in light of the fact that the defendant signed the mortgage."

Baker now appeals, raising the following claims: (1) service of process was fatally defective because the letter from the warning order attorney failed to state the nature of the case; and (2) the mortgage was invalid because it did not contain an adequate description of the property.

II. ANALYSIS

On appeal, we review the denial of a CR 60.02 motion for an abuse of discretion. *See White v. Commonwealth*, 32 S.W.3d 83, 86 (Ky. App. 2000).

A. CLAIM THAT SERVICE OF PROCESS WAS DEFECTIVE

Baker first alleges that service of process was fatally defective because the letter from the warning order attorney failed to state the nature of the case, as required by CR 4.07, which provides, in relevant part:

The clerk at the time of making a warning order shall appoint, as attorney for the defendant, a practicing attorney of the court. . . . Such attorney must make diligent efforts to inform the defendant, by mail, concerning the pendency *and nature of the action* against him, and must report the result of his efforts to the court within 50 days after his appointment.

CR 4.07(1) (emphasis added).

Baker cites *Potter v. Breaks Interstate Park Comm'n*, 701 S.W.2d 403 (Ky. 1985), in support of his claim. Baker alleges that in *Potter*, the Court "held that the Warning Order letter did not comply with CR 4.07 and jurisdiction had never been obtained as to those parties sought to have been constructively served" because the letter

failed to provide the nature of the action. In both the present case and in *Potter*, the warning order attorney's letter failed to inform the defendant of the nature of the action. *See Potter*, 701 S.W.2d at 405. However, the present case is distinguishable from *Potter* because in Baker's case, the letter incorporated the complaint by reference, and the complaint was attached to the letter.

Baker also cites *Nolph v. Scott*, 725 S.W.2d 860 (Ky. 1987), in support of this argument. In *Nolph*, the Court noted that the Civil Rules pertaining to warning order attorneys, i.e., CR 4.05, 4.06, and 4.07, require strict compliance. *Nolph*, 725 S.W.2d at 861. The Court then went on to hold that when a defendant is not notified of a lawsuit within the limitations period, an amended pleading naming that party does not "relate back to the time of the original complaint." *Nolph*, 725 S.W.2d at 862.

Additionally, Baker cites *Noble v. Noble*, 302 Ky. 679, 195 S.W.2d 319 (Ky. 1946), in support of this claim. The Court in *Noble* held that "the statute providing for constructive process should be strictly construed." *Noble*, 302 Ky. at 682, 195 S.W.2d at 320.

Although CR 4.07, which Baker alleges was violated in the present case, must be strictly complied with, there is nothing in CR 4.07 providing that the nature of the action can only be explained to the defendant in the letter from the warning order attorney. That is, CR 4.07 requires only that the warning order attorney "make diligent efforts to inform the defendant, by mail, concerning the pendency and nature of the action against him. . . ." CR 4.07(1). This is exactly what the warning order attorney did in this

case, i.e., Mr. Hodge attempted to notify Baker by mail of the fact that this action was pending against Baker, and he attached the complaint to the letter and incorporated the complaint by reference in the letter, thus informing Baker of the nature of the action. Baker's arguments to the contrary are unavailing.

Finally, Baker cites *Priddy v. Swimme*, 555 S.W.2d 279 (Ky. App. 1977), claiming that in *Priddy*, the Court held "that any judgment entered in an action where service of process is deficient is void." Specifically, in *Priddy*, the Court noted that when the Secretary of State, who is supposed to serve process on a defendant, is provided an incorrect address for that defendant, any judgment entered in that action is void. *Priddy*, 555 S.W.2d at 280. However, in the present case, service of process was not deficient, and in fact, Baker does not contend that he did not receive the warning order attorney's letter with the complaint attached; rather, he merely alleges that the nature of the action should have been explained in the letter itself, rather than in an attachment to the letter, a claim which we repudiated, *supra*. Thus, because service of process was not deficient in this case, *Priddy* is inapplicable. Consequently, the circuit court did not abuse its discretion in denying Baker's CR 60.02 motion based on this claim.

B. CLAIM THAT THE MORTGAGE WAS INVALID

Baker next contends that the mortgage was invalid because it did not contain an adequate description of the property. As previously explained, the mortgage referenced the wrong deed in that rather than referencing the deed that Baker received from his predecessors in title, the Reynoldses, the mortgage referenced the deed by which

the Reynoldses acquired the property. Specifically, the mortgage document described the property being mortgaged, located in Laurel County, as follows:

Being all the same property conveyed to Melissa C. Reynolds and Eugene Reynolds, wife and husband, by Jeannie Williams England (formerly Jeanne Williams) and Steven R. England, wife and husband, by deed dated May 1, 1997, recorded May 2, 1997, in deed book 469, page 212, records of the Laurel County Court Clerk's Office.

(Capitalization changed). Furthermore, beneath this property description was the following: "Tax Parcel ID Number [blank space] which currently has the address of 154 Flat Lick Road[,] London, Kentucky 40741 ("Property Address")."

In the Commonwealth,

before a mortgage will create a lien upon property which will be valid as against purchasers, or those subsequently acquiring a lien upon it, such a description must be given in the mortgage of the property intended to be mortgaged as will give notice to any one who deals with the mortgagor of the condition of the property dealt with.

United States Cast Iron Pipe & Foundry Co. v. Henry Vogt Mach. Co., 182 Ky. 473, 206 S.W. 806, 810 (Ky. 1918). "To make the notice effective, . . . the description of the property undertaken to be mortgaged must be such as to enable one who reads it to know to what property it attaches." *Id.*

Baker alleges that "Exhibit A," which described his property and was attached to the end of the mortgage document and after Baker's signature, could not be used to determine to which property the mortgage pertains because Exhibit A was not incorporated by reference in the mortgage above Baker's signature. "When the law

requires any writing to be signed by a party thereto, it shall not be deemed to be signed unless the signature is subscribed at the end or close of the writing." KRS 446.060(1). Although this statute does not "abolish the doctrine of incorporation by reference," *Childers & Venters, Inc. v. Sowards*, 460 S.W.2d 343, 345 (Ky. 1970), the signatures must, nonetheless, "appear below the incorporating language, which must be conspicuous by being in larger or other contrasting type or color," *Hertz Commercial Leasing Corp. v. Joseph*, 641 S.W.2d 753, 756 (Ky. App. 1982). In the present case, because Exhibit A was not incorporated by reference in the body of the mortgage before Baker's signature, then Exhibit A is not considered to be part of the mortgage.

Thus, we need to examine the remainder of the mortgage to determine whether the property was adequately described therein, so as to give others notice of the property subject to the mortgage. *See United States Cast Iron Pipe & Foundry Co.*, 182 Ky. 473, 206 S.W. at 810. In *M & I Bank, FSB v. Wilkey*, 347 B.R. 222 (W.D. Ky. 2005), the mortgage at issue contained an incorrect legal description of the property sought to be mortgaged. The Court noted that "Kentucky allows incorrect legal descriptions of property to confer constructive notice unless, 'the description is so insufficient as that the land cannot be identified.'" *M & I Bank, FSB*, 347 B.R. at 226.

Consequently, if the mortgage furnishes on its face marks by which the land intended to be embraced in it can be identified, or marks sufficient to put an intended purchaser on notice, it is enough to put one on constructive notice. . . . A document should be enforced if the description provides enough information to gather the parties' intention by any reasonable rules of construction.

Id. (internal quotation marks and citation omitted).

In the present case, the mortgage signed by Baker identified the property by its mailing address, which was listed as the "Property Address." Additionally, the mortgage identified the property by stating that the property was the same that had previously been conveyed to Melissa C. Reynolds and Eugene Reynolds by Jeannie Williams England and Steven R. England, by a deed that was recorded in the Laurel County Court Clerk's Office in Book 469 at Page 212. Based on these property descriptions in the mortgage, we find that "the mortgage furnishes on its face marks by which the land intended to be embraced in it can be identified." *M & I Bank, FSB*, 347 B.R. at 226 (internal quotation marks omitted). Furthermore, in *In re Rothacre*, 326 B.R. 398 (E.D. Ky. 2005), the Court found "that a property address is sufficient to put third parties on at least inquiry notice of a mortgagee's interest in property." *In re Rothacre*, 326 B.R. at 400. Therefore, the property address listed in the mortgage signed by Baker was sufficient to put others on notice and, thus, the mortgage was valid. Consequently, the circuit court did not abuse its discretion when it denied Baker's CR 60.02 motion based on this claim.

Accordingly, the order of the Laurel Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

Anne M. Smith
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