

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 1997-CA-001537-MR

ROBERT ROY  
AMY LAMB

APPELLANTS

v.

APPEAL FROM LIVINGSTON CIRCUIT COURT  
HONORABLE BILL CUNNINGHAM, JUDGE  
ACTION NO. 94-CI-000009

LOIS MADDEN NORTON

APPELLEE

OPINION  
AFFIRMING

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BEFORE: HUDDLESTON, McANULTY AND SCHRODER, JUDGES.

McANULTY, JUDGE: This is an appeal from an order denying Appellants' Motion to Vacate Pursuant to CR 60.02.

The background and procedural history of this case is extensive. The original parties to this action were Lois Madden Norton, plaintiff, and Garry Madden, defendant. At one time these parties were married but divorced in 1983. On December 21, 1984 the Bank of Marshall County obtained a judgment against Garry Madden in the amount of \$27,079.97. Lois Norton entered into an agreement with the bank in which the bank assigned the judgment to her.

On January 26, 1990 Norton filed a judgment lien in Livingston County against the property of Garry Madden. Then in January of 1994, she filed the present civil action, a petition to foreclose the judgment lien. Garry Madden was served and filed an Answer on February 7, 1994.

During the pendency of the action, Garry Madden died intestate. At that time it was learned that he had executed a living trust on October 5, 1994 and filed this document with the Livingston County Clerk's Office. The trust purported to transfer the property at issue to a revocable living trust and named Barbara Nell Legereit as the successor beneficiary. The trust further provided that if Legereit married another, the property was to be sold with one half the proceeds to be distributed to Legereit, one fourth to Madden's son (Appellant Robert Roy) and one fourth to Madden's daughter (Appellant Amy Lamb).

After several unsuccessful attempts to locate Legereit, the trial court joined her as an indispensable party and appointed a warning order attorney. Again, the warning order attorney failed to locate and serve her. As a result, Legereit has never entered an appearance. The trial court entered a judgment on August 19, 1996 ordering that the Master Commissioner initiate proceedings to foreclose on the property at issue.

Thereafter on April 30, 1997 Appellants Roy and Lamb filed a Motion to Vacate Pursuant to CR 60.02. In the motion, Appellants stated that they have an interest in the property under the Living Trust and that they had no knowledge of the law

suit regarding the property. The trial court denied the motion in an order dated May 20, 1997, stating that the motion "fails to provide sufficient grounds under CR 60.02." This appeal followed.

The sole issue is whether the trial court erred in denying Appellant's motion to vacate. CR 60.02 addresses itself to the sound discretion of the court. Fortney v. Mahan, Ky., 302 S.W.2d 842 (1957). Accordingly, we will not disturb the trial court's ruling except for an abuse of discretion. Schott v. Citizens Fidelity Bank and Trust Co., Ky., 692 S.W.2d 810, 814 (1985).

As a preliminary matter, Appellee contends that the trial court properly denied the motion to vacate because Appellants lack standing to contest the judgment. Appellee states that as the successor trustee under the living trust, Legereit was the real party in interest concerning the property. Although Appellants may have an interest in the property, the trustee or successor trustee has the power "to prosecute or defend actions, claims or proceedings for the protection of the trust assets." KRS 386.810(3)(y). This statute, on which Appellee relies, lists the powers of a trustee but does not provide that these powers are within the exclusive province of the trustee. However, we need not decide whether Appellee's argument is correct because we affirm the trial court's decision on other grounds.

Appellants assert that because they have an interest in the property and were never joined as parties to the action, the

judgment is void. For this proposition they cite Foremost Insurance Company v. Whitaker, Ky. App., 892 S.W.2d 607 (1995). In Foremost, this Court reversed the trial court's denial of a motion to set aside a default judgment because the trial court lacked personal jurisdiction over the defendant due to insufficient service of process. We held that because the trial court lacked personal jurisdiction, the judgment was void. Foremost certainly does not hold, as Appellants contend, that a judgment is void "due to the fact that they were never properly joined in a suit in which they had an interest therein [sic]." As such, Foremost is most definitely distinguishable from the present case and not dispositive of this issue.

Appellants also argue that subsections (a) and (f) of CR 60.02 and the facts of this case comprise sufficient grounds to vacate the judgment. Appellants submit that in light of the fact that they were not aware of the suit and never joined or served, there is surprise or excusable neglect on their part. In addition, they assert that the fact that they will never have their day in court to defend their interest in the property constitutes a reason of extraordinary nature justifying relief.

In considering the facts and circumstances of this case, we conclude that the trial court did not err in finding that Appellants have not provided sufficient grounds to justify vacating the judgment. Appellants have not offered any possible defense to the attachment of the judgment lien to the property in question nor have they alleged that the judgment lien was invalid. As the trial court indicated in its judgment, the

notice of judgment lien was filed and was followed by a *lis pendens* notice before the living trust was created. Therefore, any interest the Appellants may have in the property is necessarily subject to the encumbrance. Because Appellants merely rely on their exclusion from the original suit and do not provide any indication that their participation would have changed the outcome, we find that they have not stated sufficient grounds under CR 60.02.

Accordingly, the trial court did not abuse its discretion in denying the requested relief. The decision of the Livingston Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANTS:

William F. McGee, Jr.  
Smithland, Ky

BRIEF FOR APPELLEE:

Bard K. Brian  
Paducah, Ky