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Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-000990-MR

FIRST FIDELITY MORTGAGE, INC.,
DONNIE EMERSON AND MARY YVONNE
EMERSON APPELLANTS

APPEAL FROM RUSSELL CIRCUIT COURT
v. HONORABLE VERNON MINIARD, JR., JUDGE
ACTION NO. 07-CI-00436

PHILLIP G. ROBERTSON APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: DIXON, STUMBO AND VANMETER, JUDGES.

DIXON, JUDGE: Appellants, Donnie and Yvonne Emerson, individually and First Fidelity Mortgage, Inc. (collectively "the Emersons"), appeal from an order of the Russell Circuit Court granting summary judgment in favor of Appellee, Phillip Robertson. Finding no error, we affirm.

In August 2001, Robertson and wife Debbie[1] were facing foreclosure of their residence when they were approached by the Emersons with a proposal to avoid losing their home. It was agreed that Yvonne Emerson would purchase the home for $46,900.00[2] and would then sell the home back to Robertson on a land sale contract. The Emersons secured financing for $46,900.00 and paid off all of Robertson's creditors attached to the property. In so doing, the Emersons charged Robertson $2,000 for obtaining the mortgage. At the time of the sale, Robertson owed $27,500.00 on the home and had accrued $31,000.00 in equity as reflected by a HUD statement. During the August 30, 2001, closing, the Emersons tendered a check to Robertson in the amount of $22,581.00, representing Robertson's equity that remained in the property. Robertson claimed that he endorsed the check and returned it to the Emersons with the understanding that it would be credited toward Robertson's repurchase of the home.

Throughout the next year, Robertson made installment payments to Emerson in accordance with the land sale contract. On November 7, 2002, Robertson repurchased the home with a mortgage brokered by the Emersons. Again, the Emersons charged Robertson an additional $3,000 in fees, resulting in a mortgage of $58,600.00. Almost five years later, in October 2007, Robertson was attempting to refinance the home when he discovered that the $22,581.81 equity check he had endorsed back to the Emersons had never been credited toward his repurchase of

[1] Debbie died during the pendency of the transactions in November 2001.

[2] Although the parties agreed to a purchase price of $46,900, the stated consideration on the deed was $67,000.

the home. Robertson thereafter retained counsel and filed a complaint in the Russell Circuit Court on October 27, 2007, against the Emersons, as well as their company, Fidelity Mortgage, Inc., alleging fraud.

On May 22, 2009, the Emersons filed a motion to dismiss the action, arguing that Robertson's claim was barred by KRS 413.120(12), which requires an action for relief or damages on the ground of fraud or mistake to be commenced within five years after the cause of action accrued. Following a hearing, the trial court denied the motion, ruling that the statute did not begin to run until the fraud was discovered and thus Robertson's cause of action was tolled until October 2007.

Following discovery, both parties filed motions for summary judgment claiming no genuine issues of material fact existed. A hearing was held on February 9, 2010, after which the trial court entered an order granting summary judgment in favor of Robertson and awarding him $33,581.00 in damages. Following the denial of the motion to vacate, the Emersons appealed to this Court as a matter of right.

A motion for summary judgment shall be granted "if the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." CR 56.03. The record "must be viewed in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor." *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 480 (Ky.

1991). Further, summary judgment is only proper "where the movant shows that the adverse party could not prevail under any circumstances." *Id. (citing Paintsville Hospital Co. v. Rose*, 683 S.W.2d 255 (Ky. 1985)). The standard of review on appeal of a summary judgment is whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law. CR 56.03; *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky. App. 1996). There is no requirement that the appellate court defer to the trial court since factual findings are not at issue. *Goldsmith v. Allied Building Components, Inc.*, 833 S.W.2d 378, 381 (Ky. 1992).

As they did in the trial court, the Emersons first argue that Robertson's complaint was filed outside of the applicable statute of limitations. They contend that the statute began to run on the date they purchased the property from Robertson, August 30, 2001, and thus Robertson was required to file any action before August 30, 2006. Furthermore, they claim that the trial court erroneously found that the statute was tolled because Robertson failed to offer any proof of his diligence to uncover the fraud or facts to excuse the delay.

KRS 413.120(12) provides, "The following actions shall be commenced within five (5) years after the cause of action accrued: . . . (12) an action for relief or damages on the ground of fraud or mistake." The general rule is that an action "accrues" on the date of injury, and the limitations period begins to toll from that date. *Caudill v. Arnett*, 481 S.W.2d 668, 696 (Ky. App. 1972). Nevertheless, where it would not have been reasonable for the plaintiff to have discovered the

injury on the actual date the fraud was perpetrated, the limitations period does not begin to toll until the date that the fraud was discovered or, through the exercise of reasonable diligence, should have been discovered. KRS 413.130(3); *Hernandez v. Daniel*, 471 S.W.2d 25, 26 (Ky. 1971). KRS 413.130(3) is only available where the plaintiff is able to demonstrate why the fraudulent act could not, through reasonable diligence, have been discovered sooner. *McCoy v. Arena*, 295 Ky. 403, 174 S.W.2d 726, 729 (1943).

While the statute requires a plaintiff to meet a "reasonable diligence" test, Kentucky Courts have interpreted this demonstration rather expansively in certain circumstances. In *Shelton v. Clifton*, 746 S.W.2d 414, 415 (Ky. App. 1988), a panel of this Court noted:

> The courts have been willing to interpret this rule expansively when the "discovery" of fraud involved a fraud between persons in a confidential relationship. "When a confidential relationship exists between the parties . . . the statute does not begin to run until actual discovery of the fraud or mistake. Constructive notice such as the recordation of the instrument containing the mistake [or fraud] is not sufficient to commence the operation of the statute." *Hernandez v. Daniel*, 471 S.W.2d 25, 26 (Ky. 1971). The explanation for the actual notice is that, "[p]ersons in a confidential relationship do not have the reasons or occasions to check upon (sic) each other that would exist if they were dealing at arms length." *McMurray v. McMurray*, 410 S.W.2d 139, 142 (Ky. 1966).

In this case, it was the Emersons who first approached Robertson about helping him and his wife to avoid foreclosure. Further, during the course of the transactions between the parties, Mr. Emerson, who was an evangelical preacher,

provided grief counseling sessions to Robertson after the loss of his wife. As such, we are of the opinion that sufficient evidence was presented that a confidential relationship existed between the parties, and therefore, actual notice rather than constructive notice of the fraud was necessary. Consequently, the trial court properly found that the statute of limitations was tolled until Robertson's actual discovery of the fraud in 2007.

Notwithstanding the trial court's finding that the statute of limitations was tolled, we agree with Robertson that his complaint was actually filed within the five-year statute of limitations. While the Emersons claim that the statute began to run on the date they purchased the property from Robertson, we conclude that the triggering event or date of "injury" that gave rise to the action for fraud occurred on November 7, 2002, when the Emersons sold the property back to Robertson. It was at that point that Robertson entered into the new inflated mortgage and the dealings between the parties concluded. Since Robertson's action was filed on October 29, 2007, it fell within the limitations period contained in KRS 413.120(12).

Next, the Emersons argue that summary judgment was improper as there remained too many disputed issues of material fact. The Emersons contend that there were significant questions of fact as to the amount they actually paid for the property in 2001, as well as the existence and/or application of the $22,581.81 equity check. However, in addressing this same issue in the Emerson's motion to vacate the summary judgment, the trial court noted:

> Both parties have stipulated, through mutual Motions for Summary Judgment, that after the depositions of the parties and witnesses, there remain no genuine issues of material fact to be decided in this case and that this case is ripe for Final Judgment. . . .
>
> It is inconsistent for the Defendant to now allege, in his motion to vacate, that genuine issues of material fact exist, when the Defendant was the first to move for summary judgment after proof was gathered and stipulated under Kentucky Rules of Civil Procedure 56.01 that no genuine issues of material fact exist. It is important to note that no additional discovery has been conducted since the Defense filed their motion for summary judgment on October 26, 2009.

Obviously, following the completion of discovery the Emersons argued there were no disputed issues of material fact as they moved for summary judgment. Accordingly, the trial court is correct that it is disingenuous to now claim that the numbers and amounts were too convoluted for the trial court to arrive at a conclusion based upon the stipulated testimony of all involved.

We also agree with Roberton that the Emersons offered no additional proof to dispute his motion for summary judgment. "[A] party opposing a properly supported summary judgment motion cannot defeat it without presenting at least some affirmative evidence showing that there is a genuine issue of material fact for trial." *Steelvest*, 807 S.W.2d at 482. We simply cannot conclude that based upon the pleadings, the trial court erred in granting summary judgment in favor of Robertson.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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