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Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-001001-MR
AND
NO. 2009-CA-001091-MR

GARY HALL AND
SHARON HALL

APPELLANTS/CROSS-APPELLEES

APPEAL AND CROSS-APPEAL FROM LAUREL CIRCUIT COURT
v. HONORABLE RODERICK MESSER, JUDGE
ACTION NO. 06-CI-00127

MORTGAGE ELECTRONIC
REGISTRATION SYSTEM, INC. AND
HOUSEHOLD FINANCE
CORPORATION II

APPELLEES/CROSS-APPELLANTS

OPINION
AFFIRMING IN PART;
REVERSING IN PART;
AND REMANDING

** ** * * * * *

BEFORE: CLAYTON AND KELLER, JUDGES; BUCKINGHAM,¹ SENIOR JUDGE.

CLAYTON, JUDGE: Gary Hall and Sharon Hall appeal the Laurel Circuit Court's order denying statutory penalties under KRS 382.365 but awarding them attorney fees and costs. The statute addresses the timely release of liens on real property. Mortgage Electronic Registration Systems, Inc. ("MERS") and Household Finance Corporation, II ("Household Finance")(collectively referred to as "Household Finance") cross-appeal the court's award of attorney fees and costs. After a careful review, we affirm in part, reverse in part, and remand.

BACKGROUND

The Halls are the owners of a tract of real estate located in Laurel County at 1965 East Highway 578, East Bernstadt, Kentucky. On April 2, 2004, the Halls executed a mortgage with MERS to secure a loan for the purchase of this property. This mortgage was satisfied in full on May 18, 2005. Household Finance was the owner of the mortgage note at the time the debt was satisfied. (MERS was a registration and trading facility that also had the power to release the mortgage.)

Household Finance provided testimony at trial that, following the May 2005 satisfaction of the mortgage, it both prepared the release deed for recording and also mailed a letter to the Halls thanking them for paying the mortgage.

¹ 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 Kentucky Revised Statutes (KRS) 21.580.

Household Finance performed these actions on the same day, May 24, 2005.

Subsequently, the release deed was recorded on June 3, 2005, and contained the correct mortgagor, mortgagee, and property address. But the release deed incorrectly listed deed book number 571 and page number 300 instead of deed book number 666 and page number 138.

On July 25, 2005, the Halls procured a second mortgage on the property with L&N Federal Credit Union (“L&N Credit”). After the closing for this mortgage, the attorney for L&N Credit, who is now the Halls’ attorney, sent a letter dated August 2, 2005, to the Halls stating that, while conducting the title examination, he had discovered the mortgage. He requested the Halls’ permission to contact MERS, on their behalf, to get the mortgage released and clarify L&N Credit’s mortgage priority. At trial, Mr. Hall admitted that when he received this letter, he was aware that Household Finance had recorded a release for the prior mortgage with the Laurel County Clerk but had been told that there was a problem with the release. In addition, he testified that the Halls had suffered no damages as a result of the error in the release deed.

Then, the Halls’ attorney sent a letter to Household Finance inquiring about the release of the original mortgage. The portion of the letter regarding the mortgage stated:

It is my understanding that the entire indebtedness of Mr. and Mrs. Hall to MERS and/or Equifirst secured by the mortgage referenced above has been paid and satisfied in full yet the mortgage has not been released of record.

Household Finance received the letter on or about August 22, 2005. Relying on the language in the letter, personnel of Household Finance said at trial that in response to the letter, they searched for the release deed and found that it had been executed and recorded on May 24, 2005. After its search confirmed that a release deed had been recorded, Household Finance took no further action.

After a lapse of roughly five months, the Halls filed this action on February 1, 2006. The Halls, pursuant to KRS 382.365, brought this action based on Household Finance's alleged failure to make a timely release of the mortgage. Under KRS 382.365 a satisfied lien must be released within thirty days. After the complaint was filed and Household Finance became aware of the recording error, it prepared a corrected release on March 9, 2006. This release deed was recorded on March 22, 2006.

Both the Halls and Household Finance made motions for summary judgment. These motions were denied by the court on October 10, 2007. In the order the court stated that "[i]t appears that there remains a question of material fact as to the effectiveness of the Release filed by the Defendant." The action was tried, without a jury, on February 26, 2009.

Following the bench trial, the court entered findings of fact, conclusions of law, and a separate final judgment and order on April 8, 2009. Based on its findings, the trial court concluded that the Halls were not entitled to recover statutory penalties under KRS 382.365 but awarded the Halls attorney fees and costs associated with the action.

Thereafter, the Halls filed a motion to alter, amend, or vacate the judgment. Household Finance also filed a motion asking the court, pursuant to Kentucky Rules of Civil Procedure (CR) 52.02, to make additional conclusions of law and amend the judgment entered on April 8, 2009, consistent with Household Finance's contention that the Halls were only entitled to recover attorney fees and costs, which they had incurred, prior to March 22, 2006, the date the second release of the mortgage was filed. On May 19, 2009, the trial court entered an order denying both parties' motions. This appeal and cross-appeal followed. The Halls also appeal the judge's denial of their summary judgment motion.

ISSUE

Two issues are presented for the Court's review. First, the Halls maintain that Household Finance's errors in its release of the Halls' satisfied mortgage rendered the release fatally defective, and therefore, they are entitled to the statutory penalties described in KRS 382.365 for the alleged failure to make a timely release.

The second issue is based on the cross-appeal of Household Finance. It argues that the court erred when it refused to amend its conclusions of law to clarify that the Halls may only recover attorney fees and costs incurred prior to March 22, 2006, the date that Household Finance had a corrected release filed with the Laurel County Clerk's Office. Household Finance states that, because KRS 382.365 was amended in 2006, the statutory language applicable to this case, pre-

2006, limits the attorney fee award to the time period prior to the entry of the corrected deed.

STANDARD OF REVIEW

In this case, which involved a bench trial, the standard of review is twofold. We review the trial court's findings of fact pursuant to CR 52.01. Consequently, this Court will not disturb the trial court's findings of fact unless clearly erroneous. "Findings of fact are not clearly erroneous if supported by substantial evidence." *Janakakis-Kostun v. Janakakis*, 6 S.W.3d 843, 852 (Ky. App. 1999). Substantial evidence is that evidence, "when taken alone, or in the light of all the evidence, it has sufficient probative value to induce conviction in the minds of reasonable [people]." *Id.* (citing *Kentucky State Racing Commission v. Fuller*, 481 S.W.2d 298, 308 (Ky. 1972)). Further, due regard must also be given to the trial judge's opportunity to consider the credibility of the witnesses. CR 52.01. *Cherry v. Cherry*, 634 S.W.2d 423 (Ky. 1982).

Finally, the trial court's construction of statutes is entitled to no deference on appeal because statutory construction is a matter of law subject to a *de novo* standard of review. *Bob Hook Chevrolet Isuzu, Inc. v. Commonwealth Transp. Cabinet*, 983 S.W.2d 488, 490 (Ky. 1998). Accordingly, we shall review the issues in light of these standards.

ANALYSIS

1. Statutory damages under KRS 382.365

The 2005 version of KRS 382.365, which was effective at the time of

this action, states in pertinent part:

(1) A holder of a lien on real property . . . shall release the lien in the county clerk's office where the lien is recorded within thirty (30) days from the date of satisfaction.

(2) A proceeding may be filed by any owner of real property or any party acquiring an interest in the real property in District Court or Circuit Court against a lienholder that violates subsection (1) of this section. A proceeding filed under this section shall be given precedence over other matters pending before the court.

(3) Upon proof to the court of the lien being satisfied, the court shall enter a judgment releasing the lien. The judgment shall be with costs including a reasonable attorney's fee. If the court finds that the lienholder received written notice of its failure to release and lacked good cause for not releasing the lien, the lienholder shall be liable to the owner of the real property in the amount of one hundred dollars (\$100) per day for each day, beginning on the fifteenth day after receipt of the written notice, of the violation for which good cause did not exist.

(4) A lienholder that continues to fail to release a satisfied real estate lien, without good cause, within forty-five (45) days from the date of written notice shall be liable to the owner of the real property for an additional four hundred dollars (\$400) per day for each day for which good cause did not exist after the forty-fifth day from the date of written notice, for a total of five hundred dollars (\$500) per day for each day for which good cause did not exist after the forty-fifth day from the date of written notice. The lienholder shall also be liable for any actual expense including a reasonable attorney's fee incurred by the owner in securing the release of real property by such violation.

On appeal, the Halls contend that the trial court erred in concluding that they were not entitled to damages pursuant to the provisions of KRS 382.365. We disagree. Although the trial court found that the initial release of deed was fatally flawed, it also decided that good cause existed for Household Finance to not file another release of deed.

In essence, the statute requires three things for statutory penalties to be assessed: (1) that the debt is satisfied; (2) that the lienholder is provided with written notice of its failure to release the mortgage; and (3) that the lienholder lacks good cause for failing to release the mortgage once notice is given. KRS 382.365. With regard to the first requirement, no dispute exists as to whether the Halls satisfied the mortgage. They did. Whether the next requirement, written notice from the Halls to Household Finance, was met is not so easily discerned.

Clearly, KRS 382.365 does not authorize the imposition of penalties until and unless written demand for release has been made to the lienholder and the lienholder thereafter fails to release the mortgage within fifteen days. *See Union Planters Bank, N.A. v. Hutson*, 210 S.W.3d 163, 166 (Ky. App. 2006). Here, whether written notice was given to Household Finance by the Halls is ambiguous. The ambiguity is demonstrated by the facts of the case. When Household Finance originally released the deed in May 2005, it released the deed but with a scrivener's error. Then, the Halls sent a letter to them, which stated that the mortgage had not been released. The Halls' testimony, however, indicated that they knew that a release deed had been prepared but had problems. Yet their letter

does not so indicate. Rather, the letter states that no release deed was effectuated. Obviously, confusion exists because the deed was released albeit with errors.

Examination of the testimony during the trial shows that the Halls' own expert, Bruce Orwin, a real estate attorney, said that under the same circumstances he would notify the appropriate party that the release was "improperly" filed or "not filed properly" and have it fixed by a deed of correction. Thus, under this factual scenario, we concur with the court in its conclusion of law that the Halls did not strictly comply with KRS 382.365(3) and (4) failed to provide adequate written notice. This lack of sufficient notice, as the trial court noted in its conclusions of law, is good cause not to file a new release of a mortgage.

Lastly, moving past whether the Halls gave appropriate written notice, we address the third requirement – did Household Finance lack additional good cause for failing to release the mortgage upon receipt of notice? The trial court concluded that Household Finance did have good cause for failing to release the deed. Relying on the unpublished case, *Wolter v. U.S. Bancorp*, 2004 WL 2984882 (Ky. App. December 23, 2004)(2003-CA-002788-MR), wherein our Court found that human error by a lender could constitute good cause under the statute, the trial judge here noted that this case is also a factual situation wherein human error occurred.

We begin our analysis by noting that KRS 382.365 says that penalties shall be assessed "for each day for which good cause did not exist." KRS

382.365(4). Acknowledging that the legislative purpose of the statute is to enforce the prompt release of liens by banks, we review Household Finance's actions. Originally, Household Finance prepared the release deed, albeit with errors, only six days after the note was satisfied in full, which is well within the statutory thirty-day time period. Next, when notified by the Halls' attorney that **no release deed** been prepared, the finance company searched its records and found that it had prepared a release deed. Having not been explicitly told that the release deed was in error, they had no reason, i.e., notice to do anything else. Notwithstanding a mechanism in KRS 382.365(3) allowing for an expedited judgment to release a satisfied mortgage, the Halls did not file the complaint against Household Finance until approximately six months later. When the Halls filed the complaint and Household Finance actually learned about the errors, it reacted quickly. And it prepared a corrected release, and recorded it.

Interestingly, notwithstanding that the release deed was incorrect, the Halls had no difficulty getting a subsequent mortgage with L&N Credit.

Here, the trial court, in denying the Halls' motion for summary judgment, rightly observed that a legitimate controversy existed regarding the efficacy of the release deed. Therefore, although reviewing the statute *de novo*, we concur with the trial judge that good cause, as contemplated by the statute, supported the bank's explanation regarding the original release of the lien – the deed was released although with errors.

The Halls maintain that the failure to release the deed without errors renders it fatally defective and the trial court agreed with them. They, however, provide no additional support for this proposition. As noted above, in reference to the Halls' expert witness, unfortunately deeds are sometimes prepared with errors. These errors do not render them defective. Instead, deeds of corrections are entered.

Whether the release deed prepared by Household Finance was fatally defective appears unimportant in this context as a remedy existed to correct its errors. Further, as the trial judge explains so clearly in his exhaustive and thorough findings and conclusions:

25. A title searcher looking for a mortgage release would search the index for plaintiffs' names and turn to Mortgage Book 703, Page 44, wherein same would find the Release Deed covering the subject real estate. A review would reveal the wrong book and page reference. At most, this should have generated a letter requesting a corrected release, not a letter stating that no release had been recorded.

Further, while the Halls' expert, Orwin, opined that an incorrect release deed was fatally defective, he testified that a scrivener's error in a deed merely requires a deed of correction – not a claim that no deed has been recorded.

Furthermore, the *per diem* penalty provision in KRS 382.365 is penal in nature. Statutes that are penal in nature are to be strictly construed. *Caudill v. Judicial Ethics Committee*, 986 S.W.2d 435, 438 (Ky. 1999). The statute in question says nothing about errors in release deeds. The statute only speaks about

a lienholder's failure to release a deed. Extending the meaning of this statute beyond its plain wording violates the longstanding legal maxim to construe penal statutes strictly.

The Halls rely on an unpublished case of our Court, *Bank of America v. Boone Nat'l Bank*, 2006 WL 504999 (Ky. App. March 3, 2006)(2004-CA-002422-MR), to support the proposition that Household Finance's failure to release the deed properly makes it liable for the statutory penalty under KRS 382.365. Their reliance is misplaced. In *Boone Nat'l Bank*, Bank of America was the mortgagee of the satisfied (but unreleased) mortgage, and the plaintiff, Boone National Bank, was the refinancing lender that sued Bank of America under KRS 382.365 for liquidated damages. In that case, our Court rejected the "mistake" argument as "good cause" under KRS 382.365. Yet in *Boone Nat'l Bank*, the bank took no action to attempt to release the mortgage and merely claimed that due to the enormous volume, the need for the release fell through the cracks.

Here, the factual scenario is quite different since Household Finance did send a release deed to the clerk's office, and its attached check for the filing was executed. To summarize, we agree with the reasoning espoused by the trial court. The Halls did not provide adequate written notice to Household Finance to correct the release deed, and Household Finance's errors in preparing the release deed meet the "good cause" requisite for not allowing the imposition of fines in the statute. Hence, the court properly held that the Halls were not entitled to damages pursuant to the provisions of KRS 382.365.

The intention of this statute is penal and desirous of enforcing the immediate release of deeds so that the property records are correct. Here, as the trial court found, Household Finance inadvertently made an error in its recording of the initial release of deed. This error had no impact on the Halls' ability to procure another loan. Notwithstanding that the Halls knew that the release deed had been filed, albeit with problems, they sent a letter saying no release deed was filed. After waiting approximately six months, even though the statute has an expedited time line, they filed a claim. Household Finance corrected the deed upon learning of the scrivener's error. We find that the trial judge's findings were not clearly erroneous because there is substantial evidence to support them. Penalties are to punish or enforce actions. They were not needed here – human error caused these problems. And legal negligence was not established by the Halls.

The Halls also appeal the court's denial of their motion for summary judgment. Under Kentucky law, "[t]he 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." *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky. App. 1996); CR 56.03. An appellate court need not defer to the trial court's decision on summary judgment and will review the issue *de novo* since it "involves only legal questions and the existence of any disputed material issues of fact[.]" *Lewis v. B & R Corporation*, 56 S.W.3d 432, 436 (Ky. App. 2001). It has long been held that a

trial judge must view the evidence in the light most favorable to the nonmoving party, and summary judgment should be granted only if it appears impossible that the nonmoving party will be able to produce evidence at trial warranting a judgment in his favor. *Steelvest Inc. v. Scansteel Serv. Ctr., Inc.* 807 S.W.2d 476, 482-83 (Ky. 1991). Considering the history of this action and our above reasoning, we agree with the court's order for denial of the summary judgment wherein it said that "[i]t appears that there remains a question of material fact as to the effectiveness of the Release filed by the Defendant."

2. Attorney Fees

On cross-appeal, Household Finance argues that, to the extent that the Halls were entitled to receive attorney fees and costs, the attorney fees and costs should be limited to the costs and fees incurred prior to the Halls' mortgage being released. The version of KRS 382.365, which was in effect at the time of the action, limited fees and costs in this manner.

With regard to the attorney fees and costs, the version of KRS 382.365 in effect during the time of this incident provided:

Upon proof to the court of the lien being satisfied, the court shall enter a judgment releasing the lien. The judgment shall be with costs including a reasonable attorney's fee.

KRS 382.365(3)(2005).

In the case at hand, no judgment was entered. Both subparagraph 3 and 4 of the statute describe the penalty provisions for failure to timely release. But

then, as noted above, after the imposition of penalties, the following language dictates:

The lienholder shall also be liable for any actual expense including a reasonable attorney's fee incurred by the owner in securing the release of real property by such violation.

KRS 382.365(4)(2005).

Consequently, this version, as designated in the above subparagraph, limits the plaintiff's recovery of attorney fees and costs to those incurred in securing the actual release of the real property by such violation. The last date that the Halls could claim for securing the release is March 22, 2006 – the date that Household Finance entered its corrected second release.

Our interpretation of the statute is consistent with both its purpose, to obtain proper releases for property records, and to strictly construe this statute, which is penal in nature. Furthermore, a review of the current version of the statute shows that it has been changed from its original version. In KRS 382.365(5), the statute expressly allows for an award of damages and delineates the method for calculating the damages:

Damages under this subsection for failure to record an assignment pursuant to KRS 382.360(3) shall not exceed three (3) times the actual damages, plus attorney's fees and court costs, but in no event less than five hundred dollars (\$500).

Thus, the statute's formulation for attorney fees and costs was changed in 2006.

Furthermore, as instructed by KRS 446.080(3), we observe that no statute is construed to be retroactive unless so stated. Although *Riley v. Flagstar Bank, FSB*, ___ S.W.3d ___, 2009 WL 792716 (Ky. App. March 27, 2009), is not final, our Court so stated particularly therein that this statute is not to be applied retroactively. Even though the Halls argue that the statute is remedial and therefore retroactive, merely saying it is so, does not make it so. They have provided nothing to establish that the legislature intended this statute to be applied retroactively as remedial. Therefore, the trial court should have limited the award of attorney fees and costs to those incurred prior to the mortgage being released. We remand the case for a clarification of the order for attorney fees and costs so that the trial court amends its findings and conclusions to make clear that the Halls may only recover attorney fees and costs incurred prior to March 22, 2006. This is the date that Household Finance corrected the release deed with the Laurel County Clerk.

CONCLUSION

Accordingly, the decision of the Laurel Circuit Court is affirmed in part, reversed in part, and remanded with instructions to limit the award of attorney fees and costs to the 2005 statutory language of KRS 382.365.

ALL CONCUR.

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