

Commonwealth of Kentucky
Court of Appeals

NO. 2013-CA-002077-MR

THOMAS K. STONE

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE DONNA DELAHANTY, JUDGE
ACTION NO. 13-CI-501434

PENNIE DUBARRY
AND JOHN DUBARRY

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: CAPERTON,¹ COMBS, AND VANMETER, JUDGES.

COMBS, JUDGE: Thomas K. Stone appeals the order of the Jefferson Family Court concluding that his attorney's lien was invalid and ordering that it be set aside. After our review, we affirm.

¹ Judge Caperton concurred in this opinion prior to Judge Debra Lambert being sworn in on January 5, 2015, as Judge of Division 1, Third Appellate District. Release of this opinion was delayed by administrative handling.

On May 3, 2013, Pennie DuBarry retained Thomas Stone to represent her in a divorce action against her husband, John DuBarry. On August 7, 2013, the DuBarrys entered into a written settlement agreement that divided their property and debt. The agreement provided that John would retain the marital residence. John was to refinance the property and pay \$20,000 to Pennie as her interest in the real property. Pennie was to vacate the residence within 30 days of receiving that payment and quitclaim her interest in the property. The parties agreed to pay their own attorneys' fees except for \$1,500, which John agreed to contribute toward Pennie's fees. The settlement agreement was filed with the court and was incorporated into the final decree dissolving the marriage entered on August 21, 2013.

On August 28, 2013, attorney Thomas Stone filed a motion to withdraw from his representation of Pennie. On the same date, he also filed an attorney's lien against the DuBarry residence in Jefferson County in the amount of \$7,142.82 – the amount of Pennie's outstanding balance. Pennie was provided with notice of the lien. John became aware of the lien only when he attempted to comply with the terms of the parties' agreement by refinancing the property. John asked Stone to release the lien, but he refused to do so.

On October 9, 2013, John filed a motion with the family court seeking to have the lien released. He included a copy of correspondence from a mortgage

processor at Fifth Third Bank indicating that the attorney's lien had prevented a closing of the contemplated transaction. John indicated that the existence of the lien had prevented him from having the property refinanced to raise the money that he agreed to pay to Pennie and from releasing her from her portion of the obligation to repay the loan.

The court's order granting John's motion was entered on October 23, 2013. The family court denied Stone's motion to alter, amend, or vacate the order. This appeal followed.

Stone contends that he was authorized to attach a lien to the property in order to secure the payment of his legal fees pursuant to the provisions of Kentucky Revised Statute[s] 376.460. He notes that the statute expressly permits an attorney to have a lien "upon all claims . . . upon which suit has been instituted, for the amount of any fee agreed upon by the parties. . . ." The statute also provides that where an action "is prosecuted to a recovery of money or property, the attorney shall have a lien upon the judgment recovered, legal costs excepted, for his fee." But where the parties "in good faith and before judgment compromise or settle their controversy without the payment of money or other thing of value, the attorney for the plaintiff shall have no claim against the defendant for any part of his fee." *Rice v. Kelly*, 226 Ky. 347, 10 S.W.2d 1112, 1115 (1928).

The parties in this case reached an agreement concerning the disposition of their property. Attorney Stone did not recover a judgment in the sense of creating an asset that could be attached as contemplated by the statute

authorizing him to attach a lien to such assets. We conclude that under these circumstances, the provisions of KRS 376.460 have no application and that Stone was not entitled to file an attorney's lien against the real estate.

We affirm the opinion and order of the Jefferson Family Court.

CAPERTON, JUDGE, CONCURS.

VANMETER, JUDGE, DISSENTS BY SEPARATE OPINION.

VANMETER, JUDGE, DISSENTING: I respectfully dissent. In my view the plain language of KRS 376.460 permits the filing and enforcement of an attorney's lien in this circumstance. In *Exchange Bank of Kentucky v. Wells*, 860 S.W.2d 785, 787 (Ky. App. 1993), this court held that “[t]he enforceability of the attorney's lien is founded upon the theory that the judgment is the product of the services and skill of the attorney. . . . An attorney's lien on the fund that he or she created should be granted priority over set-off judgments[.]” (citations omitted). *Rice v. Kelly*, 226 Ky. 347, 10 S.W.2d 1112 (1928), cited in the majority opinion, is not dispositive as it has been construed as to authorize the filing of a lien only in the cases involving the recovery of attachable assets. See *Ruby v. Scherzer*, 2012-CA-001724, 2013 WL 5423067 (Ky. App., Sep. 27, 2013), disc rev. denied, ordered not to be published, 2013-SC-000725 (Ky., Sep. 10, 2014).²

The property settlement between John and Pennie involved the payment of money in favor of Stone's client, Pennie DuBarry, and was attachable.

² I will note that *Ruby*, in which I concurred, unequivocally held that KRS 376.460 does not apply in a dissolution action. But, as noted, the Kentucky Supreme Court denied discretionary review and ordered *Ruby* not to be published.

The attempted refinancing could have been very simply accomplished by the securing of a loan commitment, and then having a closing at which a quitclaim deed and a lien release were tendered, and in return Stone would receive his fee and Pennie would receive the net proceeds to which she was entitled under the decree/property settlement. The fact that the case involved a dissolution action does not change the result. To hold that KRS 376.460 does not apply in dissolution actions inserts a condition into the statute that the legislature did not place there.

I would reverse the decision of the Jefferson Circuit Court.

BRIEF FOR APPELLANT:

Steven A. Snow
Louisville, Kentucky

BRIEF FOR APPELLEE:

Diana L. Skaggs
Michelle E. Mapes
Louisville, Kentucky