

COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY
NO. 2010-SC000227-D
92009-CA-000978-MR)

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THE DREAMERS, LLC,
WILLIE M. NEAL, JR. And
GLENDA HOFFMAN

APPELLANTS

VS.

BRIEF FOR APPELLANTS

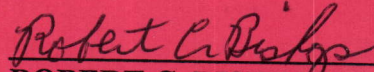
DON'S LUMBER & HARDWARE, INC.

APPELLEE

CERTIFICATE OF SERVICE

I certify that a true copy of the Brief for Appellants was mailed by regular United States Mail to Jerry M. Coleman, Esq., Quick & Coleman, PLLC, at 128 West Dixie Avenue, Elizabethtown, KY 42701, attorney for the Appellee Don's Lumber & Hardware, Inc.; and also to Hon. Charles C. Simms III, Special Judge, Nelson County Justice Center, 200 Nelson County Plaza, Bardstown, KY 40004-2100, all on this the 13th day of December, 2010. The undersigned further certifies that the record was not withdrawn for the preparation of this Brief for Appellants.

So certified this 13th day of December, 2010.



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CERTIFICATE OF SERVICE

I certify that a true copy of the Brief for Appellants was mailed by regular United States Mail to Jerry M. Coleman, Esq., Quick & Coleman, PLLC, at 128 West Dixie Avenue, Elizabethtown, KY 42701, attorney for the Appellee Don's Lumber & Hardware, Inc.; and also to Hon. Charles C. Simms III, Special Judge, Nelson County Justice Center, 200 Nelson County Plaza, Bardstown, KY 40004-2100, all on this the 13th day of December, 2010. The undersigned further certifies that the record was not withdrawn for the preparation of this Brief for Appellants.

INTRODUCTION

This is an appeal of an order of the Court of Appeals of Kentucky that dismissed an appeal of a summary judgment for money and an order for the sale of real estate to satisfy an alleged mechanics lien, entered by the Hardin Circuit Court against the Appellants and in favor of the Appellee. The Court of Appeals dismissed the appeal as being moot solely on the basis that the judgment entered had been satisfied by the Appellants, without any proof that the Appellants had intended to waive or abandon their right to appeal the judgment.

STATEMENT OF POINTS AND AUTHORITIES

A) THE COURT OF APPEALS ERRED IN DISMISSING THE APPEAL IN 2009-CA-00978-MR. IN SO DOING, THE COURT OF APPEALS IGNORED ITS OWN PRECEDENT THAT SATISFACTION OR PAYMENT OF A JUDGMENT DOES NOT IMPAIR AN APPEAL OR RENDER AN APPEAL MOOT-----2

Kentucky Milk Marketing Antimonopoly Commission v. Kroger Company, Ky.,
691 S.W.2d 893 (1985)-----3

Greater Louisville First Federal Savings and Loan Association v. Etzler, Ky. App.,
659 S.W.2d 209 (1983)-----3.

Madden v. Madden, 169 Ky. 367, 183 S.W. 931 (Ky. 1916)-----3,4

Stairs v. Riley, 306 Ky. 645, 208 S.W.2d 961 (Ky. 1948)-----3

Moss v. Smith, 361 S.W.2d 511-----3,4

Oatts v. City of Hopkinsville, 406 S.W.2d 842 (Ky. 1966)-----4

Mercer v. Federal Land Bank of Louisville, 300 Ky. 311, 188 S.W.2d 489 (Ky. 1945)-----4

Stairs v. Riley, 306 Ky. 645, 208 S.W.2d 961 (Ky. 1948)-----4

Paine v. Woolley, 80 Ky. 568 (Ky. 1182)-----4,5

B) THE COURT OF APPEALS ERRED IN DISMISSING THE APPEAL IN 2009-CA-00978-MR. IN SO DOING, THE COURT OF APPEALS VIOLATED THE APPELLANTS' CONSTITUTIONAL RIGHT OF AT LEAST ONE APPEAL AS A MATTER OF RIGHT, WHICH RIGHT WAS NOT WAIVED BY THE APPELLANTS.-----5

§ 115, Constitution of Kentucky-----5,7

Stairs v. Riley, 306 Ky. 645, 208 S.W.2d 961 (Ky. 1948)-----5,6,7

Mercer v. Federal Land Bank of Louisville, 300 Ky. 311, 188 S.W.2d 489 (Ky.

1945)-----6,7

Oatts v. City of Hopkinsville, 406 S.W.2d 842 (Ky. 1966)-----6

STATEMENT OF THE CASE

On May 22, 2009 the Appellants timely filed a Notice of Appeal from a judgment of the Hardin Circuit Court in civil action number 08-CI-01851. [Court of Appeals Record]. An Amended Notice of Appeal correcting the dates of entry of orders was filed on 5-27-09. [Court of Appeals Record]. The Appellants perfected their appeal in 2009-CA-00978-MR by filing a Brief for Appellants on 10-19-09. [Court of Appeals Record]. The Appellee filed its brief on 11-09-09. [Court of Appeals Record]. The Appellants filed their Reply Brief on 11-17-09. [Court of Appeals Record]. On 11-19-09 the Appellants satisfied the Hardin Circuit Court judgment granted to the Appellee so as to stop a Master Commissioner sale on that date. The amount paid was the amount of the judgment awarded the Appellee, plus interest and attorney fees as calculated by counsel for the Appellee. The amount of costs remains an issue in litigation. Counsel for the Appellee signed a statement that recited: "I, Jerry Coleman, hereby acknowledge receipt on behalf of Don's Lumber for \$48,309.95 from Willie M. Neal in case number 2009-CA-2136-OA which is being made to stop a pending sale on property located at 200 Mary Lee Street, Elizabethtown, Kentucky, 42701." [Court of Appeals Record, Response to Appellee's Motion to Dismiss Appeal]. The action referenced was an Original Action in the Court of Appeals, a Petition that requested a Writ of Prohibition to stop the sale set for 11-19-09. The Court of Appeals received the record from the Hardin Circuit Court on 12-15-09. On 12-09-09 the Appellee filed a motion to dismiss the appeal on the sole ground that the appeal had been rendered moot by the payment of the judgment by the Appellants and the resulting cancellation of the sale of the real estate. [Court of Appeals Record]. The Appellants filed their response on 12-21-09. [Court

of Appeals Record]. The tenor of the response filed by the Appellants was to contradict the opinion of the Appellee that payment of a judgment renders an appeal moot. Thus, the Appellants spoke in terms of cancelling the sale. This was to eliminate any argument that payment was intended to include a waiver of the right to appeal, or as a final conclusion of all matters in the case. Although counsel for the Appellee desired that the appeal in 2009-CA-00978-MR be dismissed, there was no agreement by any of the Appellants or by the counsel for the Appellants that said appeal would be dismissed. Payment of the sum that was dictated by counsel for the Appellee did not include any agreement to dismiss the appeal. On 3-03-10 the Court of Appeals entered an Order dismissing the appeal on the sole ground that same had been rendered moot by the satisfaction or payment of the Hardin Circuit Court judgment by the Appellants. **[Court of Appeals Record]**.

The Appellants filed their Motion for Discretionary Review On 4-02-10. Discretionary Review was granted by the Supreme Court on 10-13-10.

ARGUMENT

A) THE COURT OF APPEALS ERRED IN DISMISSING THE APPEAL IN 2009-CA-00978-MR. IN SO DOING, THE COURT OF APPEALS IGNORED ITS OWN PRECEDENT THAT SATISFACTION OR PAYMENT OF A JUDGMENT DOES NOT IMPAIR AN APPEAL OR RENDER AN APPEAL MOOT.

This issue was preserved by the filing by the Appellants of a Motion for Discretionary Review by the Supreme Court of the Order of the Court of Appeals dismissing the appeal in 2009-CA-00978-MR.

Whether payment of the amount of a judgment is characterized as a satisfaction of a judgment or as an act done simply for the purpose of stopping a sale of real property, by foreclosure or in satisfaction of an execution of a lien or of a money judgment, is actually immaterial. The fact is that, in this case, the amount of the judgment, plus interest and attorney fees, was paid by the Appellants. If it "...walks like a duck, acts like a duck and quacks like a duck, it's a duck!..." **Kentucky Milk Marketing Antimonopoly Commission v. Kroger Company, Ky., 691 S.W.2d 893 (1985)** and **Greater Louisville First Federal Savings and Loan Association v. Etzler, Ky. App., 659 S.W.2d 209 (1983)**.

The Court of Appeals in **Madden v. Madden, 169 Ky. 367, 183 S.W. 931 (Ky. 1916)**, while dismissing an appeal of one who had defended another suit by setting forth the judgment appealed from in the case that was dismissed, stated that the prevailing law is that:

"...a party against whom a judgment has been rendered for money may pay it and still prosecute an appeal..." and that "...the payment of the judgment has been construed to be in lieu of his right to supersede the judgment...as his act in paying the judgment is not one seeking any benefits therefrom nor one possessing any of the elements of an estoppel..."

This established and accepted principle of law was recognized by the Court of Appeals in **Stairs v. Riley, 306 Ky. 645, 208 S.W.2d 961 (Ky. 1948)**. The Court of Appeals therein stated: "...the mere payment of the amount of a money judgment does not adversely affect the losing party's right of appeal..."

In accord with these cited reported precedents is **Moss v. Smith, 361 S.W.2d 511**

(Ky. 1962), in which the Court of Appeals stated: "...a party against whom a judgment has been rendered for money may pay it and still prosecute an appeal... and the payment of the judgment has been construed to be in lieu of his right to supersede the judgment..".

The Court of Appeals thus restated the rule announced in Madden, supra. Also see Oatts v. City of Hopkinsville, 406 S.W.2d 842 (Ky. 1966), in which the Court of Appeals, in determining that a party had not waived his right to appeal, stated, citing Moss, supra, stated that: "...in civil cases we have held that the satisfaction of an adverse judgment does not impair such right..".

Also in accord with Madden, supra, is Mercer v. Federal Land Bank of Louisville, 300 Ky. 311, 188 S.W.2d 489 (Ky. 1945).

The Appellants recognize the rule announced in Stairs v. Riley, 306 Ky. 645, 208 S.W.2d 961 (Ky. 1948) that the compromise and settlement of a money judgment does moot an appeal. In Stairs, the appellant paid \$2,500.00 of a judgment for \$3,400.00, which amount was accepted by the appellee as full satisfaction of the amount awarded, who then cancelled the sale of real estate. This, of course, is not the situation here, as the Appellants did not compromise and settle the judgment with the Appellee, but they rather paid the full amount of the judgment that had been granted to the Appellee on its claim, plus interest and attorney fees. As previously stated, the issue of costs remains in litigation. There was no compromise settlement effected in this case. Thus, the rule set forth in Stairs v. Riley, supra, does not apply.

Another principle which the Appellants acknowledge, but which also is inapplicable to this case, announced by the Court of Appeals in Paine v. Woolley, 80 Ky. 568 (Ky.

1882), is the reverse scenario to that involved in the case on discretionary review. In Paine, the Court of Appeals decided that a creditor who accepts payment of a judgment cannot appeal that judgment.

B) THE COURT OF APPEALS ERRED IN DISMISSING THE APPEAL IN 2009-CA-00978-MR. IN SO DOING, THE COURT OF APPEALS VIOLATED THE APPELLANTS' CONSTITUTIONAL RIGHT OF AT LEAST ONE APPEAL AS A MATTER OF RIGHT, WHICH RIGHT WAS NOT WAIVED BY THE APPELLANTS.

This issue was preserved by the filing by the Appellants of a Motion for Discretionary Review by the Supreme Court of the Order of the Court of Appeals dismissing the appeal in 2009-CA-00978-MR.

§ 115 of the Constitution of Kentucky provides: "In all cases, civil and criminal, there shall be allowed as a matter of right at least one appeal to another court...". The appeal filed in 2009-CA-00978-MR is the Appellants' constitutionally mandated and protected appeal as of right. This constitutional right of appeal was not and is not waived by the Appellants by the payment of the Hardin Circuit Court judgment. In its response to the Motion for Discretionary Review the Appellee argues that the Appellants did not reserve the right to continue with the appeal, and that the payment of the money was not conditional on the outcome of the appeal. The Appellee has matters backwards. There was no need for the Appellants to reserve their right to appeal. Furthermore, there is no writing signed by the Appellants or their counsel in which they agree to waive the appeal. Nor is there a motion or agreed order to dismiss the appeal. Indeed, in Stairs v. Riley, 306 Ky. 645, 208 S.W.2d 961 (Ky. 1948) the Court of Appeals of Kentucky stated: "the

right to appeal is not waived except upon a clear and decisive ground...” The Court of Appeals in Stairs, supra, cited Mercer v. Federal Land Bank of Louisville, 300 Ky. 311, 188 S.W.2d 489 (Ky. 1945), in which the Court of Appeals stated: “...the right of appeal is favored by the law, and it certainly should not, and will not, be held to have been waived, except upon clear and decisive grounds...” In deciding whether there had been an estoppel by an appellant, the Court of Appeals stated: “...He must have parted with some available right and suffered some injury or have been induced to alter his position for the worse in some material respect...” The Court of Appeals went on to state that: “...There must be a clearly expressed intention of the appellant to abandon his appeal. The waiver of the right must be intentional. It cannot be waived by one who, as a result of a mistake or ignorance, attempts to pursue the wrong remedy...”

In Oatts v. City of Hopkinsville, 406 S.W.2d 842 (Ky. 1966), a case in which the Court of Appeals concluded that the payment of a police court fine did not impair a right to appeal the judgment and fine, the Court of Appeals concluded: “...Waiver, of course, involves an intentional relinquishment of a right, and we cannot infer such intent when the defendant has exhibited the opposite inclination by taking and perfecting an appeal...” The Court of Appeals went on to state: “...Obviously, the fine was paid by defendant to preserve his liberty, and it is unrealistic to interpret such act as an intentional relinquishment of the right of appeal...” It must be noted that in this case the Appellants filed their Notice of Appeal on 5-22-09 and Amended Notice of Appeal on 5-27-09. [Court of Appeals Record]. Furthermore the Appellants perfected their appeal by filing a Brief on 10-19-09. [Court of Appeals Record]. Additionally, the payment

of the amount of the Hardin Circuit Court judgment, plus interest and attorney fees as calculated and directed by counsel for the Appellee, was done to preserve a property right of the Appellants. Furthermore, payment was tendered and was accepted on 11-19-09, after all briefing had been completed.

In determining whether a party had waived his right to an appeal, the Court of Appeals in Mercer v. Federal Land Bank of Louisville, 300 Ky. 311, 188 S.W.2d 489 (Ky. 1945) and Stairs v. Riley, 306 Ky. 645, 208 S.W.2d 961 (Ky. 1948) used a “clear and convincing ground” standard of proof.

The Appellants submit that the Kentucky Supreme Court, in determining whether a party has waived his or its right to appeal as guaranteed by § 115 of the Constitution of Kentucky, should apply a “clear and convincing” standard of proof.

CONCLUSION

For all of the foregoing reasons, the Appellants respectfully requests that the Supreme Court reverse the Order of the Court of Appeals that dismissed their appeal in 2009-CA-00978-MR, and remand this case to the Court of Appeals for a decision on the merits of the appeal as filed and perfected.

Respectfully submitted,



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