

COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY
NO. 2010-SC000227-D
2009-CA-000978-MR

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SUPREME COURT

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

APPELLANTS

VS. **REPLY BRIEF FOR APPELLANTS**

DON'S LUMBER & HARDWARE, INC.

APPELLEE

CERTIFICATE OF SERVICE

I certify that a true copy of the Reply 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 2nd day of February, 2011. The undersigned further certifies that the record was not withdrawn for the preparation of this Reply Brief for Appellants.

So certified this 2nd day of February, 2011.

Robert C. Bishop

ROBERT C. BISHOP
P.O. Box 788
Elizabethtown, KY 42702-0788
(270) 769-3865
Attorney for Appellants

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INTRODUCTION

The purpose of this Reply Brief for Appellants is to correct misstatements of fact made by the Appellee in its brief and also the resulting application of the law.

ARGUMENT

On pages 1 and 2 of its brief, the Appellee argues that the Appellee cancelled the sale of the property in question upon the payment of the judgment plus interest and attorney fees "...with the understanding that the judgment had now been satisfied and the case was over...". The Appellants wonder with whom the Appellee formed that understanding? There was no agreement, written or otherwise, that the appeal pending in the Court of Appeals would be or was to be dismissed. The Appellants state that any "understanding" regarding dismissal of the appeal would need to be in writing, to satisfy the Statute of Frauds and also the Appellants' constitutional right to at least one appeal. The Appellants agree that no reservation of right to continue the appeal was discussed, because such a reservation of right was not necessary, and, in any event, the Appellee never made such an issue a part of the written agreement. Under no circumstances or agreement was this case "settled" under terms that the appeal was to be dismissed.

The Appellee misconstrues and improperly applies the decision in Stairs v. Riley, 306 Ky. 645, 208 S.W.2d 961 (Ky. 1948). In that case, the defendant paid, and the plaintiff accepted as full satisfaction of the judgment, an amount that was less than the judgment obtained, and the plaintiff cancelled the sale based upon this compromise, or accord and satisfaction, of the judgment obtained. Thus, under those specific facts, upon a reversal the settlement by accord and satisfaction would bar further prosecution of the

action. Those are not the facts herein. In this case, the full amount of the judgment, plus interest and attorney fees, was paid. Stairs, supra, stated that "...the mere payment of the amount of a money judgment does not adversely affect the losing party's right of appeal...".

The Appellee argues on page 3 that it has suffered a detriment by the cancellation of the sale because it was not able to obtain money from the sale and that the Mechanic's Lien has been released. The creation of the Mechanic's Lien is the threshold issue in the appeal before the Court of Appeals. If that was not validly done, then the case fails. The inference that the Appellant Willie M. Neal, Jr. Now owns the property in question, made but not proven in the Appellee's footnote, is irrelevant. The Appellants state that the Appellee could obtain only a single recovery of the judgment, and not double or more through a sale of the property in addition to accepting full payment prior to the sale. This is ludicrous. Furthermore, **KRS 382.365(1)** requires that a lien shall be released within 30 days from the date of satisfaction.¹

The Appellee further argues in its Brief on page 3 that "...Appellee is entitled to keep the moneys paid to it regardless of the outcome of this litigation..." The Appellants attach hereto an Agreed Order of Dismissal in 10-CI-01387, the action referenced in footnote 1, entered on 9-27-2010, wherein counsel for the Appellee herein agrees that, should the final adjudication in Hardin Circuit Court Action 08-CI-1851, the case on appeal to the Court of Appeals, and to which this discretionary review is directed, be that

¹ To accomplish the release of the mechanic's lien in this case, the Appellant Willie M. Neal, Jr. Was forced to file a pro-se complaint in the Hardin Circuit Court, action No. 10-CI-01387.

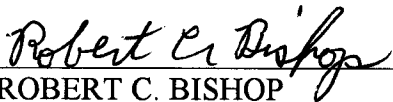
no debt is owed by The Dreamers, LLC, then the money paid to satisfy the judgment shall be released to The Dreamers, LLC.

The Appellee argues on page 5 of its Brief that paying a judgment in full without reserving the right to appeal should be a waiver of the right to appeal. The Appellants responds by stating there was no need to “reserve” the right, and asks whether a prisoner who served his entire criminal sentence while his case was on appeal could be said to have thereby waived his right to continue with his appeal? To answer in the affirmative raises serious Constitutional problems. The Appellee argues the case of **Jackson v. Commonwealth**, 113 S.W.3d 128 (Ky. 2003) for the proposition that a criminal defendant may waive his constitutional right to a trial by jury. What the Appellee does not tell this Court is that the cited case notes that RCR 9.26(1) requires a written waiver of the right to a trial by jury. The court also stated that the waiver could be accomplished with a colloquy with the defendant to ascertain whether the waiver was made knowingly, intelligently and voluntarily. The court in **Jackson**, supra, definitively stated: “Thus, a trial court may not presume a waiver of the right to a jury trial from a silent record and a court should not presume acquiescence in the loss of a constitutional right.”. The court also noted that any such waiver must be agreed to by the Commonwealth. In the instant case, the record is silent, as there was no agreement to waive the right of appeal.

CONCLUSION

For all of the foregoing reasons, the Appellants respectfully request 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.


ROBERT C. BISHOP
P.O. Box 788
Elizabethtown, KY 42702-0788
Attorney for Appellants