Electronically Filed - SUPREME COURT OF MISSOURI - September 23, 2015 - 11:06 AM

IN THE SUPREME COURT OF MISSOURI

No. SC94969

SONYA M. LONG,

Respondent,

vs.

NEENA HARDIN,

Appellant.

Appeal from the Circuit Court of St. Louis County
Honorable Coleen Dolan, Circuit Judge
Cause No. 11SL-CC02717

SUBSTITUTE BRIEF OF APPELLANT NEENA HARDIN

THOMAS R. CARNES, #41570
3827 Gustine Avenue
St. Louis, Missouri 63116
(314) 664-1001 Telephone
(314) 664-1002 Facsimile
e-mail: tcarnes@sprynet.com

ATTORNEY FOR APPELLANT

Electronically Filed - SUPREME COURT OF MISSOURI - September 23, 2015 - 11:06 AM

Table of Contents

Electronically Filed - SUPREME COURT OF MISSOURI - September 23, 2015 - 11:06 AM

Table of Authorities

Pages

Cases

Statutes

Constitutional Provisions

Electronically Filed - SUPREME COURT OF MISSOURI - September 23, 2015 - 11:06 AM

Rules

Jurisdictional Statement

Appellant Neena Hardin appeals from a post-judgment denial of her motion to set aside a sheriff's sale of her residential property that was ordered sold in a partition action. This appeal is authorized by MO. REV. STAT. §512.020 (2000), because it involves a special order after final judgment in this action.

After the Eastern District of the Missouri Court of Appeals entered an Opinion on March 10, 2015, affirming the Trial Court's Order denying Ms. Hardin's motion to set aside the sheriff's sale, this Court sustained Ms. Hardin's Application for Transfer on August 18, 2015.

This Court has jurisdiction to hear appeals on transfer from the Missouri Court of Appeals pursuant to Article V, Section 10 of the Missouri Constitution. MO. CONST. OF 1945, art. V, § 10 (amended 1982).

Electronically Filed - SUPREME COURT OF MISSOURI - September 23, 2015 - 11:06 AM

Statement of Facts

This appeal arises from the trial court's denial to set aside a post-judgment sheriff's sale of residential real estate that was conducted following a judgment in a partition action. [L.F. 7, 35] Appellant Neena Hardin, a 58-year old woman, has lived at 2034 Sun Valley Drive, St. Louis, Missouri, 63136, ("the property") with her 88-year old mother, Glorious Hardin, since August, 1973 – over 42 years. [L.F. 12-13] The property was jointly owned by Ms. Hardin and her older sister, Sonja Moore, the respondent in this appeal. [L.F. 12] Ms. Moore has not lived at the property for 23 years - since 1992. [L.F. 13]

On March 13, 2013, the trial court entered a judgment ordering a partition of the property. [L.F. 12-15] After the judgment was issued, Ms. Hardin filed an appeal that was later dismissed by the Missouri Court of Appeals on October 30, 2013, in Appeal No. ED99923. Ms. Hardin was unaware of any subsequent trial court action in this case until Ms. Moore told Ms. Hardin, in April, 2014, that Ms. Moore had purchased the property in a sheriff's sale for $10 on March 3, 2014. [L.F. 29-30]

Ms. Hardin's attorney immediately checked the docket sheet in the circuit clerk's office and found an entry dated January 9, 2014, stating "Order of Partition Sale presented, approved and entered by the Court." [L.F. 29] However, neither Ms. Hardin nor her attorney were ever notified that anyone was going to appear in court to present a proposed order of sale to the trial judge. [L.F. 29] Because of this, Ms. Hardin and her attorney had no chance to appear in court when the proposed order was presented to the trial judge, they had no chance to review the proposed order before the judge signed it,

and they had no chance to offer any argument or request any modification or conditions to the proposed order. [L.F. 29]

The court file maintained by the circuit clerk doesn't even contain the original order of partition sale that was signed by the trial judge. [L.F. 30] The court file only contains a copy of the order that was filed later by the St. Louis County Sheriff after the partition sale was conducted. [L.F. 20-28, 30, 33-34] And while the copy of the order of sale filed by the sheriff indicates the trial judge wrote "cc: attorneys of record" on the second page, [L.F. 25], no copy of the order was ever sent to Ms. Hardin or her attorney. [L.F. 30]

The court file indicates that Ms. Moore purchased the property at the sheriff's sale for $10. [L.F. 20-21] Previously, however, the trial judge had held that the value of the property was $65,000. [L.F. 13, ¶ 19] Also, during the first appeal in this action, Ms. Moore's counsel noted that the trial court had found the value of the property to be $65,000, and requested that an appeal bond be set at $100,000. [L.F. 17] The trial judge, after considering that the judgment had ordered a two-thirds/one-third split of the partition sale proceeds between Ms. Hardin and Ms. Moore, authorized a supersedeas bond of $50,000. [L.F. 19]

Because Ms. Hardin was not informed that anyone was going to approach the trial court to present a proposed Order of Partition Sale, Ms. Hardin had no notice that an order of sale would be entered and no opportunity to be heard before it was entered. [L.F. 30] Further, even though the trial judge ordered a copy of the Order of Partition Sale to be sent to Ms. Hardin's attorney, no copy was ever sent. [L.F. 30] For these

Electronically Filed - SUPREME COURT OF MISSOURI - September 23, 2015 - 11:06 AM

reasons, and after learning that her sister had purchased her home at a sheriff's sale for only $10, the home she and her mother have lived in for over 40 years, Ms. Hardin filed a motion with the trial court to set aside the sheriff's sale and order a new sale. [L.F. 29-31]

Ms. Hardin's motion informed the trial court that Ms. Moore's counsel had wrongfully presented a proposed order of sale to the trial court without providing notice to Ms. Hardin or her attorney when Ms. Moore's counsel had a duty to do so. [L.F. 29-30]

The trial court, without any findings of fact or conclusions of law, denied Ms. Hardin's motion, [L.F. 35] and she appealed the case to the Missouri Court of Appeals.

On March 10, 2015, the Eastern District of the Missouri Court of Appeals issued an opinion affirming the trial court's order in Cause No. ED101612. Ms. Hardin subsequently filed an Application for Transfer with this Court, and on August 18, 2015, this Court sustained Ms. Hardin's Application for Transfer.

Electronically Filed - SUPREME COURT OF MISSOURI - September 23, 2015 - 11:06 AM

Electronically Filed - SUPREME COURT OF MISSOURI - September 23, 2015 - 11:06 AM

Points Relied On

I.

The trial court erred when it did not set aside the sheriff's sale of Ms. Hardin's home and order a new sale, because proposed orders parties wish a court to consider in a case must be presented by motion to the court with notice served on all parties, in that neither Ms. Hardin nor her attorney were ever served with any motion requesting an order of sale from the trial court, they were never notified that Ms. Moore's counsel was going to present a proposed order of sale to the trial court, and a copy of the order of sale was never sent to Ms. Hardin or her attorney.

MO. R. CIV. P. 43.01

MO. R. CIV. P. 55.26

Hoppe v. St. Louis Public Service Co., 235 S.W.2d 347, 350 (Mo. Banc 1950)

Plant v. Plant, 825 S.W.2d 674 (Mo.App. 1992)

II.

The trial court erred when it did not set aside the sheriff's sale of Ms. Hardin's home and order a new sale, because the sale price for the property was so grossly inadequate that it shocks the conscience and amounted to a sacrifice, in that Ms. Moore purchased the property for only $10 when Ms. Moore had previously argued, and the trial court had previously determined, the value of the property to be $65,000.

Borchers v. Borchers, 352 Mo. 601, 179 S.W.2d 8 (1944)

DiLeo v. Hunter, 505 S.W.2d 112 (Mo.App. 1974)

Frontenac Bank v. T.R. Hughes, Inc., 404 S.W.3d 272 (Mo.App. E.D. 2013)

White v. Director of Revenue, 321 S.W.3d 298 (Mo. *banc* 2010),

Electronically Filed - SUPREME COURT OF MISSOURI - September 23, 2015 - 11:06 AM

Electronically Filed - SUPREME COURT OF MISSOURI - September 23, 2015 - 11:06 AM

Argument

I.

The trial court erred when it did not set aside the sheriff's sale of Ms. Hardin's home and order a new sale, because proposed orders parties wish a court to consider in a case must be presented by motion to the court with notice served on all parties, in that neither Ms. Hardin nor her attorney were ever served with any motion requesting an order of sale from the trial court, they were never notified that Ms. Moore's counsel was going to present a proposed order of sale to the trial court, and a copy of the order of sale was never sent to Ms. Hardin or her attorney.

A. Standard of Review.

In appeals from a court-tried civil case, the trial court's judgment will be affirmed unless there is no substantial evidence to support it, it is against the weight of the evidence, or it erroneously declares or applies the law. *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. *banc* 1976). To set aside a judgment as "against the weight of the evidence," an appellate court must have a firm belief that the judgment is wrong. *Id.*

B. Argument

After the first appeal of this action was dismissed in Appeal No. ED99923, Ms. Hardin was unaware that the trial court had taken any further action in this case until she was told by her sister, Ms. Moore, in April, 2014, that her sister had purchased at a sheriff's sale, for $10, the home Ms. Hardin and her mother have lived in for over 40 years. Ms. Hardin was shocked to learn of this, because Ms. Moore had never sent Ms.

Electronically Filed - SUPREME COURT OF MISSOURI - September 23, 2015 - 11:06 AM

Hardin or her attorney any pleadings, notices, or proposed orders indicating that Ms. Moore was going to go to court to present a proposed order of sale to the trial court. By doing so, Ms. Moore violated the Missouri Rules of Civil Procedure, which require applications to courts for orders to be made by motion, in writing. Specifically, Rule 55.26 provides that "[a]n application to the court for an order *shall be by motion* which, unless made during a hearing or trial, *shall be made in writing*, shall state with particularity the grounds therefor, and shall set forth the relief or order sought. MO. R. CIV. P. 55.26(a)(emphasis supplied). Additionally, had Ms. Moore filed a motion requesting the trial court to enter a proposed order of sale, Rule 43.01 would have required her to serve a copy of the motion upon Ms. Hardin's attorney. MO. R. CIV. P. 43.01(a)(2). Further, even though the trial court wrote on the second page of the order "cc: attorneys of record," no copy of the order was ever sent to appellant's attorney.[1] This was also in violation of the Rules of Civil Procedure, specifically Rule 43.01(a)(3), which requires every written order to be served. MO. R. CIV. P. 43.01(a)(3). Because Ms. Hardin never received any of the foregoing notices, proposed orders, and court-issued orders that were required to be sent to her or her attorney by court rule – and these facts are uncontested – she didn't even know she needed to keep a look out for publication of a sheriff's sale, and she was not able to attend the sale to make a bid for her home. Reasonable notice to parties whose interests are at stake in a contemplated

[1] The original order signed by the trial judge is not even in the court file.

order is a prerequisite to the lawful exercise of a court's order. *Hoppe v. St. Louis Public Service Co*., 235 S.W.2d 347, 350 (Mo. Banc 1950).

The facts in this case are distinguishable from the facts of *Plant v. Plant*, 825 S.W.2d 674 (Mo.App. 1992), in which the appellant argued that the trial court's order was void on its face, and that he was entitled to actual notice of the sale from the sheriff instead of constructive notice by publication. In this case Ms. Hardin does not argue that the notice published by the sheriff was faulty (it accurately stated the time and place of the sale), and Ms. Hardin does not argue that the sheriff was required to personally serve notice of the sale upon her. Instead, Ms. Hardin argues that she didn't know a proposed order of sale had been be presented to the trial court at all, and had Ms. Moore followed the Missouri Rules of Civil Procedure, Ms. Hardin would have received notice and been able to respond accordingly.

This lack of notice prejudiced Ms. Hardin because since she had no idea that Ms. Moore was presenting and obtaining an order of sale from the trial court without notifying her, she was unable to know she should have been on the lookout for a notice of the sale to be published by the sheriff, and she missed out on the sale in which her sister bought her $65,000 home for only $10.

In light of the foregoing events – the lack of required notice from Ms. Moore that she was going to present a proposed order to the trial court, the failure to Ms. Moore to send a copy of the proposed order to Ms. Hardin, the failure of anyone to send a copy of the order to Ms. Hardin or her attorney after the trial judge signed it – the trial court

Electronically Filed - SUPREME COURT OF MISSOURI - September 23, 2015 - 11:06 AM

manifestly abused its discretion when it refused to set aside the sheriff's sale and order a new sale to take place.

II.

The trial court erred when it did not set aside the sheriff's sale of Ms. Hardin's home and order a new sale, because the sale price for the property was so grossly inadequate that it shocks the conscience and amounted to a sacrifice, in that Ms. Moore purchased the property for only $10 when Ms. Moore had previously argued, and the trial court had previously determined, the value of the property to be $65,000.

A. Standard of Review.

In appeals from a court-tried civil case, the trial court's judgment will be affirmed unless there is no substantial evidence to support it, it is against the weight of the evidence, or it erroneously declares or applies the law. *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. *banc* 1976). To set aside a judgment as "against the weight of the evidence," an appellate court must have a firm belief that the judgment is wrong. *Id*.

B. Argument

After a public sale in a partition action is conducted, the confirmation or rejection of the sale is normally within the sound discretion of the trial court. *Borchers v. Borchers*, 352 Mo. 601, 179 S.W.2d 8, 12 (1944). This decision is not disturbed on appeal unless there is a manifest abuse of discretion. *DiLeo v. Hunter*, 505 S.W.2d 112, 114 (Mo.App.1974). Inadequacy of price alone is not a sufficient ground for refusing to confirm a public sale, unless the inadequacy is "so gross as to raise the presumption of

Electronically Filed - SUPREME COURT OF MISSOURI - September 23, 2015 - 11:06 AM

fraud." *Borchers*, 179 S.W.2d at 12. A sale can also be set aside if the price amounts to a "sacrifice." *Koester v. Koester*, 543 S.W.2d 51, 55 (Mo.App.1976). *Sangamon Assoc. v. Carpenter 1985 Family*, 165 S.W.3d 141, 144-145 (Mo. 2005).

Throughout the trial and appeal of this action the parties agreed that the value of the property is $65,000. The trial court's findings of fact and judgment also found and held the value of the property to be $65,000. Further, Ms. Moore argued in her motion to set an appeal bond in this action – and therefore admitted this fact through her pleadings - that the value of the property is $65,000. The $65,000 value of the property is therefore uncontested.

At the sheriff's sale in this case, Ms. Moore purchased the home that Ms. Hardin and her mother have lived in for over 40 years for $10, even though it was uncontested that the value of the property is $65,000. Worse - the $10 Ms. Moore paid at the sheriff's sale did not even cover the cost of publication of the sale, so Ms. Hardin actually received *nothing* from the sale of the only residence she and her mother have known for over 40 years.

The facts in this case differ markedly from those in *Swift v. Fed. Home Loan Mortgage Corp*., 417 S.W.3d 342 (Mo.App. 2013). In *Swift*, unlike the present case, all parties were notified that the trial court had ordered a sale of the real property at issue, and all parties were represented at the sale. *Swift*, 417 S.W.3d at 344. Further, the value of the property in *Swift* was uncertain because it had many encumbrances, and no evidence of the value of the property was presented to the trial court except for an unpaid mortgage balance. *Id* at 345. In this case there was no mortgage or other encumbrance

Electronically Filed - SUPREME COURT OF MISSOURI - September 23, 2015 - 11:06 AM

Electronically Filed - SUPREME COURT OF MISSOURI - September 23, 2015 - 11:06 AM

on the property, the trial court had determined the value of the property to be $65,000, and Ms. Moore had herself established the value of the property as $65,000 when she requested that an appeal bond be set at $100,000. Importantly, in arguing that the value of the property was $65,000 when she requested that an appeal bond be set, Ms. Moore was not arguing that the *market price* of the property was $65,000, but that $65,000 was the price she expected the property to bring following the conclusion of the appeal, when a *sheriff's sale* of the property would be held.

The $65,000 value of the property was uncontested. Evidence is uncontested when a party "has admitted in its pleadings, by counsel, or through the [party's] individual testimony the basic facts of [other party's] case." In such cases, the issue is legal, and there is no finding of fact to which to defer. *Frontenac Bank v. T.R. Hughes, Inc.*, 404 S.W.3d 272, 283 (Mo.App. 2013). Since, as a matter of law, the value of the property following the conclusion of the appeal when a sheriff's sale was to be conducted was established by Ms. Moore as $65,000, a purchase price of only $10 for the property was certainly so grossly inadequate that it raises the presumption of fraud and amounted to a sacrifice.

In *White v. Director of Revenue*, 321 S.W.3d 298 (Mo. *banc* 2010), this Court outlined the role of an appellate court as follows: "It is only when the evidence is uncontested that no deference is given to the trial court's findings. Evidence is uncontested in a court-tried case when the issue before the trial court involves only stipulated facts and does not involve resolution by the trial court of contested testimony; in that circumstance, the only question before the appellate court is whether the trial court

drew the proper legal conclusions from the facts stipulated." *White*, 321 S.W. 3d at 307-308.

Considering foregoing circumstances, when all parties and the trial court had unanimously agreed that the value of the property is $65,000, the $10 sale price paid at the partition sale was so grossly inadequate as to raise the presumption of fraud, and it amounted to a sacrifice of Ms. Hardin's interest in the property. The trial court did not draw the proper legal conclusion that a $10 sale price for a property worth $65,000 was grossly inadequate and a sacrifice, and therefore it was a manifest abuse of discretion for the trial court not to set aside the sale and order that a new sale be conducted.

Conclusion

For the foregoing reasons, and because the trial court's decision to deny Ms. Hardin's motion to set aside the sheriff's sale was a manifest abuse of discretion, there was no substantial evidence to support it, it was against the weight of the evidence, and it erroneously applied the law, this Court should reverse the trial court's decision, order that the previous sheriff's sale be set aside and voided, order that a new sale be held, and grant Ms. Hardin such other and further relief as the court deems just and proper.

Electronically Filed - SUPREME COURT OF MISSOURI - September 23, 2015 - 11:06 AM

Electronically Filed - SUPREME COURT OF MISSOURI - September 23, 2015 - 11:06 AM

/s/ Thomas R. Carnes

THOMAS R. CARNES, #41570
3827 Gustine Avenue
St. Louis, Missouri 63116
(314) 664-1001 Telephone
(314) 664-1002 Facsimile
e-mail: tcarnes@sprynet.com

ATTORNEY FOR APPELLANT

Certificate of Compliance

The undersigned hereby certifies under Rule 84.06 of the Missouri Rules of Civil Procedure that:

1. Appellant's Substitute Brief includes the information required by Rule 55.03.

2. Appellant's Substitute Brief complies with the limitations contained in Rule 84.06.

3. Appellant's Substitute Brief, excluding cover page, signature blocks, certificate of compliance, and certificate of service, contains 2,941 words, as determined by the word-count tool contained in the Microsoft Word 2010 software with which this Appellant's Substitute Brief was prepared.

/s/ Thomas R. Carnes

Certificate of Service

The undersigned hereby certifies that the Brief and Appendix thereto were sent through the Court's electronic filing system to the following attorneys of record this 23rd day of September, 2015:

Cynthia S. Holmes
Attorney at Law
520 North Skinker Boulevard
St. Louis, Missouri 63130

_/s/__Thomas R. Carnes_____

Electronically Filed - SUPREME COURT OF MISSOURI - September 23, 2015 - 11:06 AM