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SEE COURT OF APPEALS RULES 11 AND 12

Court of Appeals of Tennessee, Middle Section at
Nashville.

GRAYSTONE PROPERTIES, James E. Ward and
Thomas Bumpous, Plaintiffs and Counter-Defendants,

v.

Ross **FULLER**, Defendant and Counter-Plaintiff,

v.

JAMES E. WARD & ASSOCIATES, INC., a Tennessee
Corporation, Third-Party Defendant.

Dec. 13, 1989.

Opinion on Petition for Rehearing Feb. 16, 1990.

Permission to Appeal Denied by Supreme Court May 14,
1990.

C.A. No. 89-215-III, Appeal from the Circuit Court for
Davidson County, at Nashville, Hamilton Gayden, Jr.,
Judge.

James D. Kay, Jr., Manier, Herod, Hollabaugh & Smith,
Nashville.

Joseph K. Dughman, Bruce, Weathers, Dughman & Lyle,
Nashville.

OPINION

FRANKS, Judge.

*1 Graystone Properties, a partnership between James Ward and Tom Bumpous, brought this action for rent payments against Ross Fuller, who had entered a lease purchase agreement for a house with plaintiffs. Fuller counter-claimed, alleging Graystone's failure to make necessary repairs to the realty and later joined the contractor, Ward & Associates, as well as Ward and Bumpous individually.

Following a trial before a jury, a judgment was entered stating Ross Fuller was entitled to "a judgment against Graystone Properties and James E. Ward & Associates, Inc., in the amount of \$25,000.00 for structural defects in the home and for all repairs needed which shall be a decrease in the purchase price of the home." The court also ruled that Graystone Properties was entitled to a judgment against Fuller for past due rent in the amount of \$18,600.00 and "[t]he court further determined that as a result of the jury verdict,

the purchase price for the house will be \$324,000.00 rather than \$349,000.00 and Graystone Properties and/or James E. Ward & Associates, Inc. will not be responsible for any defects or additional repairs on the house."

This appeal concerns the trial court's orders following the trial in circuit court. While Fuller's motion for a new trial was pending he continued to withhold rental payments and when Graystone was informed the mortgagor was preparing to foreclose on the property, Graystone asked the court for Fuller's removal from the house. Before the trial judge acted on the motion, Fuller moved. Later Graystone and the bank entered a new financing agreement and the foreclosure did not commence. The trial court denied Fuller's motion for a new trial and Fuller appealed to this court.

On May 4, 1988, the trial court entered an order enforcing the judgment against Ward and Bumpous as individuals. As to the appeal by Fuller, this court entered an order on May 16, 1988, dismissing Fuller's appeal on the grounds that:

On November 13, 1987, the Trial Court entered judgment as to the issues between Graystone Properties, James E. Ward & Associates, Inc., and Ross Fuller, but neither James E. Ward nor Tom Bumpous nor issues relating to them were disposed of in said judgment, nor were said parties or issues disposed of elsewhere in the record.

On June 23, 1988, Fuller filed a motion seeking a "final order disposing of all claims of the parties." On September 9, 1988, the trial court entered a "final order" essentially restating provisions of the prior judgment of the court. On October 7, 1988, Fuller filed a "motion for a new trial or to alter or amend the judgment", which asserted Fuller's inability to purchase the house unfairly negated his judgment. On November 7, 1988, the trial court entered an order denying a new trial but held Graystone could not collect rent arrearages, in effect declaring a set-off. On November 18, 1988, Graystone filed a motion to alter or amend the order of November 7, and on January 26, 1989 the trial judge, responding to the motion and predicating his decision "pursuant to Rules 59 and 60 of the Tennessee Rules of Civil Procedure", said "the judgment of Graystone Properties, James E. Ward and Thomas Bumpous against Ross Fuller on the original claim in the amount of Eighteen Thou-

Not Reported in S.W.2d

Not Reported in S.W.2d, 1989 WL 150673 (Tenn.Ct.App.)

(Cite as: **Not Reported in S.W.2d**)

sand Six Hundred (\$18,600.00) Dollars shall be set aside and vacated” and “the judgment of Ross Fuller against Graystone Properties, James E. Ward & Associates, Inc., James E. Ward and Thomas Bumpous on the counterclaim and third party complaint in the amount of Twenty-Five Thousand (\$25,000.00) Dollars, which was a credit toward the purchase price shall be set aside and vacated”. He then taxed the costs one-half to Ward and Bumpous and one-half to Ross Fuller.

*2 The issues on appeal are considered as an appeal from the judgment pursuant to T.R.Civ.P., Rule 60. A judgment is final when it decides and disposes of all of the issues in the case and leaves nothing for further judgment. [Knox County v. Burroughs, 212 Tenn. 322, 369 S.W.2d 734 \(1963\)](#). In this case, the judgment of October 19, 1987 was properly revised twice: on November 13, 1987 and on May 4, 1988. ^{FN1} The judgment became final as to all parties on May 4, 1988 and no motion to alter or amend was filed within 30 days. Accordingly, the trial court's subsequent revisions, if viable, must fall within the scope of T.R.Civ.P., Rule 60, which provides for relief from final judgments.

The setting aside of a final judgment lies within the sound discretion of the trial court, [Brumlow v. Brumlow, 729 S.W.2d 103 \(Tenn.App.1986\)](#), and the burden is on the moveant to establish by proof the basis for the relief sought.

The revisions attempted by the trial court that first set-off the judgments and then vacated the judgments are without support under the provisions of Rule 60. Fuller alleged the threatened foreclosure was an act of bad faith by Graystone, calculated to keep Fuller from realizing the \$25,000.00 reduction in the purchase price of the realty. This allegation is not supported by the record. Fuller's affidavit does not state with particularity any facts showing fraud or misconduct by Graystone and does not dispute the mortgagor held a security interest in the realty leased by Graystone to Fuller. Foreclosure was a real threat due to Fuller's refusal to pay further rents. We find the equities of the case do not lie with Fuller. Moreover, the judgment provided Fuller's award was, in fact, conditional, *i.e.*, when he purchased the realty the purchase price would be reduced by \$25,000.00.

For the foregoing reasons, the judgment of the trial court

setting aside and vacating its prior judgment is reversed and the cause remanded to the trial court, with cost of the appeal assessed to defendant.

TODD, P.J., and CANTRELL, J., concur.

OPINION ON PETITION FOR REHEARING

FRANKS, Judge.

Appellant Ross Fuller has filed a petition to rehear, pointing to an order entered by this court on May 24, 1988, which modified the order of dismissal of the prior appeal by stating, “No rights of any party is prejudiced by the dismissal of the appeal, which will enable the parties and the Trial Court to review and clarify the record.” Accordingly, we now conclude appellant is entitled to have the issues raised on appeal further considered.

The trial court, responding to Ross Fuller's motion for a new trial, said: “The Court finds that Ross Fuller is not entitled to a new trial pursuant to his Rule 59 motion.” The court then proceeded to “alter“ the judgment upon considering the affidavits in the context of a Rule 60 motion.

The trial court in his discretion could have granted a new trial. He did not, and we find no basis on this record to grant Fuller a new trial, especially since Fuller did not appeal the trial court's judgment. Accordingly, we reaffirm our analysis and holding in the original opinion. The petition for rehearing is denied.

TODD, P.J., and CANTRELL, J., concur.

^{FN1} This court held the attempted appeal would not lie since the appeal was from a judgment not final as to Ward and Bumpous.

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Graystone Properties v. Fuller

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