

RENDERED: May 1, 1998; 2:00 p.m.
NOT TO BE PUBLISHED

NO. 96-CA-3305-MR

KEITH A. DUKE, Individually and
as Co-Executor of the Estate of
HELEN L. DUKE; and GARY L. DUKE,
Individually and as Co-Executor
of the Estate of HELEN L. DUKE

APPELLANTS

v. APPEAL FROM SIMPSON CIRCUIT COURT
HONORABLE WILLIAM R. HARRIS, JUDGE
ACTION NO. 93-CI-135

FIRST AMERICAN NATIONAL BANK OF
KENTUCKY, f/k/a FIRST FEDERAL
SAVINGS & LOAN ASSOCIATION OF
BOWLING GREEN, KENTUCKY;

APPELLEE

AND

NO. 96-CA-003361-MR

AMERICAN GENERAL FINANCE, INC.

APPELLANT

v. APPEAL FROM SIMPSON CIRCUIT COURT
HONORABLE WILLIAM R. HARRIS, JUDGE
ACTION NO. 93-CI-135

FIRST AMERICAN NATIONAL BANK OF
KENTUCKY

APPELLEE

OPINION
AFFIRMING

* * * * *

BEFORE: DYCHE, EMBERTON, and JOHNSON, Judges.

JOHNSON, JUDGE: Keith Duke and Gary Duke, individually and as co-executors of the estate of Helen Duke (the Dukes), and American General Finance, Inc. (American General) have appealed from the judgment of the Simpson Circuit Court entered on September 26, 1996, and the amended judgment entered on November 12, 1996, which award an attorney's fee in the total amount of \$18,707.24, to First American National Bank of Kentucky (First American or the bank). Finding no error, we affirm.

The facts necessary for a resolution of the issues presented in this appeal are relatively simple. In December 1977, the Dukes' parents, Otis and Helen Duke, executed a promissory note in favor of First American. The note was secured by a mortgage on real property located in Franklin, Kentucky. Ten years later, Otis and Helen Duke executed a promissory note in favor of American General which was also secured by a mortgage on the same property. Otis Duke died in 1992. Helen Duke died four months later. The Dukes made no payments on these notes after the death of their mother.

On July 9, 1993, First American commenced a foreclosure action in the Simpson Circuit Court. At that time, the realty securing the note was worth approximately \$40,000. First American was owed about \$13,000. American General joined in the foreclosure to recover its outstanding balance of \$13,905, plus attorney's fees and court costs. The Dukes resisted the lenders'

attempts to foreclose and made several arguments that foreclosure was an inappropriate remedy against a decedent's estate and that the lenders should have filed their respective claims pursuant to provisions of Kentucky Revised Statutes (KRS) Chapter 396 et seq.

On February 23, 1994, the trial court entered a final partial summary judgment and order of sale in which it determined that there were no genuine issues of material fact regarding the amounts owed to First American and American General, or that the estate of Helen Duke was in default on the notes. It also determined that First American was entitled to recover a reasonable attorney's fee to be determined at the conclusion of the proceedings and that such fees were secured by First American's mortgage on the real property. The property was ordered to be sold by the Master Commissioner with the proceeds to be applied in the following order: (1) the costs of sale; (2) First American's costs; (3) First American's priority mortgage lien, "including interest, late charges, expenses and costs of collection, and attorney's fees;" (4) American General's second priority mortgage lien, also including interest, costs of collection and attorney's fees.

The Dukes appealed from this judgment but did not post a supersedeas bond. Thus, on June 24, 1994, the realty was sold and the proceeds of \$43,527.40 were disbursed as follows: \$14,306.80 to First American for principal and interest owed on the note, \$7,750.50 for its attorney's fee and \$361.61 for its costs and expenses. American General received \$13,905 due on its

note and \$2,045.75 in costs and attorney's fees. The remaining balance of \$5,157.74 was ordered to be placed in an interest bearing account held by the Simpson Circuit Court Clerk.

The Dukes proceeded with their appeal. On June 23, 1995, this Court affirmed the trial court's summary judgment and rejected all arguments raised by the Dukes including their major contention that they were under no obligation to pay claims against the estate until six months after their appointment as co-executors.¹ This Court, however, declined to address the award of attorney's fees as the partial summary judgment was not final in that regard as it did not determine the specific amount of those awards.

On July 17, 1995, First American moved for an additional award of attorney's fees and expenses in the amount of \$8,060.96. The motion was held in abeyance by the trial court until disposition of the Dukes' motion for discretionary review in the Supreme Court.² On April 29, 1996, the fee dispute still unresolved, First American sought another \$2,372.50 in fees it incurred for work performed by its attorney since July 1995, including its response to the motion filed by the Dukes in the Supreme Court. The Dukes argued below that First American's fees should not be allowed as it was their belief that it was unnecessary and unreasonable for First American to seek

¹94-CA-0587-MR, opinion designated "not to be published."

²Discretionary review was denied by the Supreme Court of Kentucky on March 13, 1996.

foreclosure in the first instance and that the bank would have received all amounts it was due under the note and mortgage had it cooperated with the Dukes' plans to repair and privately sell their parents' property. Both the Dukes and American General argued that even if First American were entitled to legal fees, such fees were not secured by the mortgage.

On September 26, 1996, the trial court entered a final order resolving the attorney's fee dispute. It determined that First American was entitled to recover an additional attorney's fee and expenses of \$10,724.13, and that American General was entitled to an additional attorney's fee of \$1,935.50. The sums held by the Simpson Circuit Court Clerk were ordered to be paid to First American. The trial court made several findings and conclusions including (1) that the Dukes had failed to establish that the estate of Helen Duke was insolvent; (2) that a constitutional challenge to KRS 411.195 would not be entertained as no notice was given to the Attorney General; (3) that the attorney's fee recovery clause of the mortgage was enforceable despite the fact that the mortgage was executed prior to the passage of KRS 411.195; (4) that the language of the attorney's fee recovery clause of the mortgage was sufficiently clear to create a lien secured by the property; (5) that, although the attorney's fee and expenses exceeded the underlying debt when the suit was filed, "the course of this litigation and the services required of First American's counsel . . . render[ed] the claimed amount proper and reasonable."

In ruling on First American's motion to alter or amend the judgment pursuant to Kentucky Rules of Civil Procedure 59.05, the trial court directed American General to return the sum of \$5,649.78 which it had previously received from the proceeds of the Master Commissioner's sale to satisfy First American's priority lien.

In their respective appeals, the Dukes and American General argue that First American's attorney's fees are not secured by the mortgage instrument executed by Otis and Helen Duke in 1977. The clause of the mortgage at issue reads as follows:

Mortgagor agrees that in the event the Association is required in its judgment to incur any expenses by reason of legal fees, court costs or expenses incidental thereto, by reason of the filing of any divorce action, suit for sale of indivisible property or any other litigation involved with said premises, including the enforcement of this mortgage, then the mortgagor will pay said expenses and cost upon submission of an itemized statement for same by the Association at the conclusion of the litigation.

The appellants insist that the failure of this paragraph to specifically recite that the real estate secures the payment of attorney's fees described therein compels a determination that the parties did not intend that the property would secure these additional fees. The Dukes also assert that the language of the last sentence of the clause, specifically that the fees are to be paid "at the conclusion of the litigation," requires the conclusion that the fees would of necessity have to be determined

after the proceeds of a foreclosure were disbursed.

First American argues that the scope of the mortgage, when read as a whole, creates a lien on any indebtedness incurred under its various performance covenants. Indeed, the next-to-last paragraph of the mortgage states that a release of the mortgage will occur only when the "Mortgagor well and truly pay[s] said debt and interest, and perform[s] all of the covenants and agreements herein set out." We agree with the trial court's reasoning that the "clear and unambiguous meaning" of the language employed in the instrument is that attorney's fees are a secured debt. See O'Bryan v. Massey-Ferguson, Inc., Ky., 413 S.W.2d 891 (1966).

Next, the Dukes insist that an award of attorney's fees is improper against an insolvent estate. They rely on KRS 453.210 which provides in pertinent part: "No attorney's fee shall be allowed any claimant in any case against an insolvent estate." We find no merit in this argument for two reasons. First, we are not satisfied that the trial court's findings in this regard are clearly erroneous. The court found that the Dukes had not shown that the estate of Helen Duke was actually insolvent. At best, the record demonstrates that the estate may be insolvent if the award of attorney's fees is affirmed. If these fees are not allowed, there is nothing in the record to suggest that the estate will be insolvent. Additionally, the Dukes have not provided us with any authority that this statute is implicated in the instant case. It is our opinion that KRS

453.210 simply does not contemplate attorney's fees that are secured by a mortgage or other lien.

Next, the Dukes argue that the attorney's fee recovery clause of the mortgage should be declared unenforceable "as unconscionable and violative of the implied covenant of good faith and fair dealing." The Dukes insist that First American, which they describe as a "sophisticated commercial lender," violated its duty to deal with Otis and Helen Duke in good faith by including the attorney's fee recovery clause in the mortgage at a time when such clauses were known to offend public policy and were routinely determined to be unenforceable.

The passage of KRS 453.250 (now KRS 411.195), which became effective on July 15, 1980, reflects a change in public policy and gives effect to such clauses. This statute reads:

Any provisions in a writing which create a debt, or create a lien on real property, requiring the debtor, obligor, lienor or mortgagor to pay reasonable attorney fees incurred by the creditor, obligee or lienholder in the event of default, shall be enforceable, provided, however, such fees shall only be allowed to the extent actually paid or agreed to be paid, and shall not be allowed to a salaried employee of such creditor, obligor or lienholder.

There are two cases which specifically hold that this statute is remedial in nature and that such clauses are enforceable for fees incurred after its effective date even though the document creating the debt or lien was executed prior to the statute's passage. See Freas v. First Federal Savings and Loan Association, Ky. App., 636 S.W.2d 660 (1982), and Central

Kentucky Production Credit Association v. Smith, Ky., 633 S.W.2d 64 (1982). Surely, if inserting such a provision constituted a "flagrant example of overreaching" on a lender's part as the Dukes suggest, our highest court would not have given KRS 453.250 retroactive application.

Finally, the Dukes argue, as they did below, that First American acted unreasonably in foreclosing on property worth \$40,000 to recover the sum of \$13,000 owed to it. This Court's opinion in their previous appeal has required the Dukes to recognize that First American had a legal right to seek foreclosure upon default. However, they now argue that while First American's actions were not unlawful, the bank should not have exercised its rights and that all of First American's fees should be disallowed. In the alternative, they argue that First American's counsel practiced the case at a "leisurely pace" which should result in a "drastic reduction in fees."

We believe the trial court wisely declined to become embroiled in the dispute over which party caused this routine foreclosure action to evolve into such contentious and protracted litigation. However, the fact remains that the Dukes were in default and First American was pursuing its legal remedies. Under these circumstances, First American was entitled to a reasonable attorney's fee. Having reviewed the five volumes of record compiled in this matter, we find no error in the amount of the fee allowed. The question of the amount of an attorney's fee is one left to the sound discretion of the trial court. See

Dingus v. Fada Service Co., Inc., Ky. App., 856 S.W.2d 45 (1993).

The trial court made extensive findings about the quality and quantity of work performed by First American's counsel. These findings are amply supported by this record.

Accordingly, the judgment of the Simpson Circuit Court is affirmed.

ALL CONCUR.

BRIEF AND ORAL ARGUMENT FOR
APPELLANTS, Keith Duke and
Gary Duke:

Hon. Mike Kelly
Louisville, KY

BRIEF AND ORAL ARGUMENT FOR
APPELLANT, American General:

Hon. David T. Wilson, II
Radcliff, KY

BRIEF AND ORAL ARGUMENT FOR
APPELLEE:

Hon. David Cummins
Franklin, KY