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Commonwealth Of Kentucky

Court Of Appeals

NO. 2004-CA-000153-MR

PAUL D. SANDERS AND NANCY F. SANDERS;
RONNIE BROWNING; TAMI BROWNING; SCOTT
SHACKLEFORD; LOGAN COUNTY, KENTUCKY;
FIRST UNION NATIONAL BANK;
MID STATE TRUST X APPELLANTS

APPEAL FROM LOGAN CIRCUIT COURT
v. HONORABLE TYLER L. GILL, JUDGE
ACTION NO. 03-CI-00092

CITIZENS NATIONAL BANK;
MID STATE TRUST X APPELLEE

OPINION
AFFIRMING
** ** ** ** **

BEFORE: DYCHE, KNOPF, AND MINTON, JUDGES.

KNOPF, JUDGE: Paul and Nancy Sanders[1] appeal from a judgment of the Logan Circuit Court, entered November 13, 2003, subordinating their mortgage on a forty-acre tract of land to a

[1] The other appellants, though nominally parties, have not actively participated in this appeal.

mortgage of Citizens National Bank. The Sanderses contend that a subsequent refinancing extinguished the bank's mortgage. We agree with the trial court that it did not.

On November 20, 1998, Ronnie and Tami Browning borrowed from Citizens National $38,500.00 to purchase an unimproved forty-two acre tract in Logan County. In exchange the Brownings gave the bank a promissory note in that amount and a mortgage on the property. The mortgage, which was duly recorded, included the following future-advance clause:

> This mortgage shall secure the payment of (1) all renewals, modifications, and extensions of the mortgage note evidenced thereby; and (2) any additional indebtedness thereto, whether direct, indirect, existing, future, contingent, or otherwise, of mortgagors to mortgagee, and said additional indebtedness in no event to exceed the principal sum of One Hundred Thousand Dollars ($100,000.00) in addition to the principal balance of the mortgage note. This mortgage will not secure any other debt if the mortgagee fails to give any required notice of the right of rescission.

The Brownings obtained two additional loans from Citizens National. On November 28, 1998, they borrowed $18,822.60 to purchase a pickup truck, and on June 23, 2000, they borrowed $12,834.16. The Sanderses do not dispute that these later loans were secured by the real estate under the future-advance clause. At some point, Citizens released about an acre-and-a-half of the real estate from its mortgage so that

the Brownings could build a house. Then in November 2001, Tami's parents, the Sanderses, loaned the couple $30,000.00 and obtained a note and a second mortgage on the land.

On March 29, 2002, with all three of their notes to Citizens National in default, and with a total outstanding balance of about $60,800 the Brownings gave the bank a fourth note in that amount plus refinancing charges. Apparently the bank cancelled the other three notes and returned them to the Brownings. This fourth note applied one interest rate to the entire debt and provided for a single periodic payment. It also provides that it is secured by the original 1998 mortgage as modified by the exclusion of the acre-and-a-half and by a new mortgage on the entire forty-two acre tract.

In March 2003, after the Brownings had again defaulted and gone through bankruptcy, the bank brought the present action seeking a sale of the realty and satisfaction of its 1998 lien. The Sanderses opposed the bank's claim on the ground that the March 2002 refinancing, by superceding the prior notes, had extinguished the 1998 mortgage incident to those notes. The bank was thus left, according to the Sanderses, with its 2002 mortgage, which is junior to their mortgage of 2001. The Sanderses have appealed from the trial court's rejection of this argument.

The Sanderses rely on the following passage from Nolin Production Credit Association v. The Citizens National Bank of Bowling Green,[2]

> Our law is well settled that a renewal note will not extinguish an obligation. However, a renewal note that is a novation which operates to extinguish an original debt is to be distinguished. Whether a second note is a renewal of an original obligation or a novation thereof, depends upon the intentions of the parties.

The Sanderses maintain that the return to the Brownings of the superseded notes, the adjustment of the interest rate, and the bank's recharacterization of the debt as consumer as opposed to agricultural indicate that the parties intended the fourth note to be a novation rather than a renewal of the prior agreements. We disagree.

Novations are typically undertaken to effect an alteration of the parties to a contract, as was the case in Nolin, or to effect a material change in the parties' bargain.[3] The transaction at issue here did neither. It was on its face simply a continuation and refinancing of overdue notes, including, as the trial court observed, an express provision

[2] Ky. App., 709 S.W.2d 466, 467 (1986). We have disregarded the Sanderses' citation to an unpublished opinion of this Court as we are obliged to do under CR 76.28(4)(c). We caution counsel against this practice.

[3] *Cf. Restatement (Second) of Contracts* §§ 279, 280 (1981) (addressing discharge by means of substituted contracts and substituted parties).

that the original security was to be retained. Merely changing the form of an obligation does not strip the obligation of its security.[4] The fourth note does nothing more than change the form of the Brownings' obligation. The trial court did not err by ruling that the parties intended it to be a renewal, not a novation.

The return of the superseded notes to the Brownings makes no difference. As this Court observed in Georgi v. First National Bank of Louisville,[5]

> [w]here a note is given merely in renewal for another note and not in payment, the renewal does not extinguish the original debt or in any way change the debt except for postponing the time of payment, even though the first note was surrendered.

The other factors the Sanderses cite are no more significant. The interest rates on the first three notes were 10.5% (variable), 12.61%, and 13.5% respectively. The interest rate on the consolidated note was 7.75% (variable). Neither this change, favorable to the Brownings, nor the alleged recharacterization of the debt as consumer suggests that the transaction was anything other than a consolidated renewal of the Brownings' obligations.

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[4] Amlung v. First National Lincoln Bank of Louisville, Ky., 411 S.W.2d 465 (1967).

[5] Ky. App., 557 S.W.2d 442, 443 (1977) (citation and internal quotation marks omitted).

Because the parties' intent to renew is abundantly clear on the face of the 2002 note, parol evidence of a different intention was inadmissible.[6] The trial court did not err, therefore, by denying the Sanderses' request for additional fact finding.

Finally, the Sanderses contend that the 1998 mortgage should be invalidated because in obtaining it the bank violated the federal Truth in Lending Act. The Sanderses' reference in a single sentence of their trial-court memorandum to procedural requirements under that Act, without citation to authority, was not enough to raise this issue before the trial court. Their post-judgment attempt to raise the issue under CR 59 was too late.[7] Because the issue was not properly raised in, and so never addressed by, the trial court, we must likewise decline to address it.

In sum, the return to the Brownings of their superseded notes did not convert their fourth note to a novation, where the new note was continuous with the superseded notes and on its face merely renewed the Brownings' obligation and simplified its representation. The trial court did not err

[6] Kentucky-West Virginia Gas Company v. Browning, Ky., 521 S.W.2d 516 (1975).

[7] Bingham v. Davis, Ky., 444 S.W.2d 123 (1969).

by so ruling. Accordingly, we affirm the November 13, 2003, judgment of the Logan Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANTS:

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