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NOT TO BE PUBLISHED

Commonwealth Of Kentucky
Court Of Appeals

NO. 2005-CA-001292-MR

GARY R. DURBIN
AND LYNNE M. DURBIN

APPELLANTS

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE JAMES D. ISHMAEL, JR.
ACTION NO. 04-CI-01398

BANK OF THE BLUEGRASS & TRUST COMPANY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: BARBER, KNOPF, AND MINTON, JUDGES.

KNOPF, JUDGE: Gary R. Durbin and Lynne Durbin (the Durbins) appeal from a summary judgment entered by the Fayette Circuit Court dismissing their counterclaims against Bank of the Bluegrass and Trust Company (the Bank). The Durbins argue that their counterclaims stated proper causes of actions and they are entitled to proceed on those claims notwithstanding their settlement of the Bank's primary claim. Although we disagree

with some of the trial court's reasoning, we conclude that summary judgment was appropriate on all of the Durbins' counterclaims. Hence, we affirm.

On May 6, 2000, the Durbins and Edward Madon executed a promissory note with the Bank in the amount of \$50,000.00. The stated purpose of the note was to establish a line of credit for Madon's car business. As security for the note, the Durbins gave the Bank a second mortgage on their residence.

At some point after the promissory note and mortgage were executed, Madon died. Madon's estate was insolvent, and included several large debts to the Bank. The Durbins ceased making payments on the note in December 2003. Thereafter, the Bank declared the note in default and brought this action to collect the balance and to foreclose on the property. In their answer, the Durbins asserted various defenses and counterclaims, including: fraud in the inducement; breach of fiduciary duty; breach of covenant of good faith and fair dealing; unjust enrichment; and violation of the Truth-in-Lending Act (TILA) as amended by the Home Owner Equity Protection Act (HOEPA),¹ the Real Estate Settlement Procedures Act (RESPA),² and the Kentucky Consumer Protection Act.³

¹ 15 U.S.C. §§ 1601 *et seq.*

² 12 U.S.C. § 2601.

³ KRS 367.110 *et seq.*

The Bank filed a motion for summary judgment on its claims relating to the note, asserting that there was no genuine issue of material fact concerning the Durbins' liability on the note or that the note was in default. The Durbins and the Bank reached an agreement regarding the Durbins' liability on the note, and the trial court granted summary judgment for the Bank on August 26, 2004. Thereafter, the Bank filed a motion for summary judgment, seeking to dismiss the Durbins' counterclaims. In an opinion and order entered on May 23, 2005, the court granted the Bank's summary judgment motion and dismissed the Durbins' counterclaims. This appeal followed.

The standard of review governing an appeal of a summary judgment is well-settled. We must determine whether the trial court erred in concluding that there was no genuine issue as to any material fact and that the moving party was entitled to a judgment as a matter of law.⁴ Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."⁵ In Paintsville Hospital Co. v. Rose,⁶ the

⁴ Scifres v. Kraft, 916 S.W.2d 779, 781 (Ky.App. 1996).

⁵ CR 56.03.

Supreme Court of Kentucky held that for summary judgment to be proper, the movant must show that the adverse party cannot prevail under any circumstances. The Court has also stated that "the proper function of summary judgment is to terminate litigation when, as a matter of law, it appears that it would be impossible for the respondent to produce evidence at the trial warranting a judgment in his favor."⁷ Because factual findings are not at issue,⁸ there is no requirement that the appellate court defer to the trial court. "The record must be viewed in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor."⁹

The Bank argues that the Durbins' agreement to summary judgment on the note constituted a waiver of their counterclaims. The Bank asserts that the Durbins should not be permitted to benefit from their settlement of the note with the Bank while continuing to pursue their counterclaims. However, we agree with the trial court that the parties' settlement of the Bank's claim on the note did not expressly waive the counterclaims. Furthermore, the judgment on the primary claim does not

⁶ 683 S.W.2d 255, 256 (Ky. 1985).

⁷ Steelvest, Inc. v. Scansteel Service Center, Inc., 807 S.W.2d 476, 480 (Ky. 1991).

⁸ Goldsmith v. Allied Building Components, Inc., 833 S.W.2d 378, 381 (Ky. 1992).

⁹ Steelvest, 807 S.W.2d at 480.

necessarily affect the viability of the Durbins' counterclaims.¹⁰ However, the Durbins' concession of liability on the note does implicate the counterclaims, at least to a certain extent. Therefore, the trial court properly looked to the merits of the Durbins' separate claims.

The Durbins first allege that the Bank fraudulently induced them to co-sign on the note by representing to them that Madon was financially sound and there would be little risk to them as co-signors. The trial court found, as a matter of law, that a party may not rely on oral representations that conflict with the written language of the contract.¹¹

We agree with the Bank that a party may not rely on oral representations that conflict with written disclaimers to the contrary which the complaining party earlier specifically acknowledged in writing.¹² Clearly, any oral representations by the Bank stating that the Durbins would not be liable on the note would have directly conflicted with the express written language of the note. However, the gravamen of the Durbins' fraud claim

¹⁰ As a general rule, the pendency of a counterclaim or similar opposing claim does not bar entry of summary judgment on the primary claim in action. However, execution of the summary judgment may be inappropriate due to the pending counterclaim. See "Proceeding for summary judgment as affected by presentation of counterclaim." 8 A.L.R.3d 1361 (1966 & 2006 Supp).

¹¹ Citing Mario's Pizzeria, Inc. v. Federal Sign & Signal Corp., 379 S.W.2d 736, 740 (1964).

¹² Rivermont Inn, Inc. v. Bass Hotels & Resorts, Inc., 113 S.W.3d 636, 640 (Ky.App. 2003).

is that the Bank made affirmative misrepresentations regarding Madon's financial condition, thus fraudulently inducing them into executing the note. The note does not expressly disclaim such representations. Consequently, the allegedly fraudulent representations were not merged into the contract and parol evidence would be admissible to show that the making of the contract was procured by fraud.¹³

Where an individual is induced to enter into the contract in reliance upon false representations, the person may maintain an action for a rescission of the contract, or may affirm the contract and maintain an action for damages suffered on account of the fraud and deceit.¹⁴ In this case, the Durbins have pursued the latter remedy. However, a party alleging fraud must show, among other things, that the misrepresentations caused the harm.¹⁵ The Durbins conceded their liability to the Bank - the party which allegedly made the false representations - and they have not pleaded or sought any damages other than their liability on the note. In the absence of a showing of any other damages, the Durbins' settlement of their liability on the note

¹³ Hanson v. American National Bank & Trust Co., 865 S.W.2d 302, (Ky. 1993)

¹⁴ Adams v. Fada Realty Co., 305 Ky. 195, 202 S.W.2d 439, 440 (Ky. 1947). See also Bryant v. Troutman, 287 S.W.2d 918, 920 (Ky. 1956), and Faulkner Drilling Co., Inc. v. Gross, 943 S.W.2d 634, 638-39 (Ky.App. 1997).

¹⁵ See United Parcel Service Co. v. Rickert, 996 S.W.2d 464, 468 (Ky. 1999).

precludes them from recovering damages on their fraud claim. Hence, the trial court properly dismissed this count.

We also disagree with the trial court's reasoning dismissing the Durbins' claim of breach of fiduciary duty. But as with the fraud claim, we likewise conclude that the settlement on the note precluded the Durbins from any recovery on that claim as well. In dismissing the Durbins' claim for breach of fiduciary duty, the trial court relied upon Layne v. Bank One, Ky., N.A.,¹⁶ in which the Sixth Circuit, interpreting Kentucky law, held that banks generally do not have a fiduciary relationship with their borrowers.¹⁷

But in Steelvest, Inc. v. Scansteel Service Center, Inc.,¹⁸ the Kentucky Supreme Court held that a bank's services to borrowers "may support a finding that a bank, in taking a borrower's note and collateral, falls under a fiduciary duty to disclose material facts affecting the loan transaction. In view of changes in the nature of commercial transactions bankers may sometimes be placed in a position of trust with respect to their customer."¹⁹ More recently, in Morton v. Bank of the Bluegrass,²⁰

¹⁶ 395 F.3d 271 (6th Cir. 2005).

¹⁷ Id. at 281, citing Sallee v. Fort Knox National Bank, N.A., 286 F.3d 878, 893 (6th Cir. 2002).

¹⁸ *Supra.*

¹⁹ Id. at 485; citing Henkin, Inc. v. Berea Bank and Trust Co., 566 S.W.2d 420 (Ky.App. 1978).

this Court recognized that a bank may have a fiduciary duty to disclose material facts affecting the loan transaction such as the borrower's eligibility for credit life insurance.²¹ And subsequently, in Presnell Construction Managers, Inc. v. EH Const., LLC,²² the Kentucky Supreme Court recognized the tort of negligent misrepresentation as set forth in the Restatement (Second) of Torts § 552.²³ Based on this authority, the Durbins have presented at least colorable claims against the Bank for breach of fiduciary duty and negligent misrepresentation.

Nevertheless, the Durbins' only measure of damages on a claim for breach of fiduciary duty or negligent misrepresentation would be their liability on the note.²⁴ Since they have settled with the Bank, they could not prove damages even if they establish that the Bank owed and breached a duty to them. Consequently, the trial court properly dismissed this claim as well.

We agree with the trial court's reasoning dismissing the Durbins' remaining common-law claims. In Ranier v. Mount

²⁰ 18 S.W.3d 353 (Ky.App 1999).

²¹ Id. at 359.

²² 134 S.W.3d 575 (Ky. 2004).

²³ Id. at 580-82.

²⁴ Morton v. Bank of the Bluegrass and Trust Co., *supra* at 358.

Sterling National Bank,²⁵ the Court observed that "[i]n every contract, there is an implied covenant of good faith and fair dealing." The covenant imposes a duty on the parties to do everything necessary to carry out the purposes and provisions of the contract.²⁶ However, the covenant of good faith and fair dealing does not prevent a party from exercising its contractual rights.²⁷ Furthermore, the alleged conduct by the Bank involved the formation of the contract, not the performance of the contract. Hence, the covenant of good faith and fair dealing is not implicated.

Similarly, the Durbins' claim for unjust enrichment must also fail. "Unjust enrichment" is based upon an implied contract, creating an obligation from the recipient of the benefits received to the one bestowing them, to compensate him for whatever outlay he has made in bestowing them.²⁸ This doctrine applies as a basis of restitution to prevent one person from keeping money or benefits belonging to another.²⁹ In this case, the Durbins do not allege that they advanced any money for

²⁵ 812 S.W.2d 154, 156 (Ky. 1991).

²⁶ Id., citing Beech Creek Coal Co. v. Jones, 262 S.W.2d 174 (Ky. 1953).

²⁷ Farmers Bank and Trust Co. of Georgetown, Kentucky v. Willmott Hardwoods, Inc., 171 S.W.3d 4, 11 (Ky. 2005).

²⁸ Sullivan's Adm'r v. Sullivan, 248 Ky. 744, 59 S.W.2d 999, 1001 (1933).

²⁹ Haeberle v. St. Paul Fire and Marine Ins. Co., 769 S.W.2d 64, 67 (Ky.App. 1989).

the Bank's benefit. Rather, their actions were solely for Madon's benefit. Consequently, they have failed to state a claim against the Bank for unjust enrichment.

Finally, the trial court properly dismissed the statutory claims. As the trial court noted, the statutory provisions apply only to consumer claims. The TILA and the HOEPA specifically exclude credit transactions involving extensions of credit primarily for business or commercial purposes.³⁰ Similarly, the RESPA does not apply to business loans.³¹ And the Kentucky Consumer Protection Act allows only a person who purchases goods or services primarily for personal, family or household services to bring a private action under the Act.³²

The Durbins assert that their purpose in co-signing on the loan was personal - they were co-signing the note for their friend Madon and they had no involvement with his business. They cite a number of cases holding that a transaction need not be entirely personal to fall within the protection of the federal acts. Rather, courts must examine the transaction as a whole and the purpose for which the credit was extended in order to determine whether this transaction was primarily consumer or commercial in nature. Consequently, the Durbins assert that

³⁰ 15 U.S.C. §1603.

³¹ 12 U.S.C. § 2606.

³² KRS 367.220.

there is a genuine issue of material fact concerning the nature of the loan.

But in those cases, the contracts or notes did not specify that the loans were for personal or business purposes and the uses of the loan proceeds were not clearly or primarily for business purposes. As a result, the nature of those loans constituted issues of fact.³³ In this case, the note clearly states that the loan was to establish a business line of credit. The fact that the credit transaction was secured by a mortgage on the Durbins' personal residence does not transform the business or commercial loan into a personal or consumer loan.³⁴ Moreover, the Durbins do not suggest that any of the loan proceeds were not used for business purposes.³⁵ In the absence of any affirmative evidence that the loan proceeds were primarily used for other than business purposes, we agree with the trial court that summary judgment was appropriate on these claims.

³³ See Thorns v. Sundance Properties, 726 F.2d 1417 (9th Cir. 1984) (Purchase of a limited partnership interest for investment purposes can be for personal since certain securities transactions can fall within the scope of the TILA.); Tower v. Moss, 625 F.2d 1161 (5th Cir. 1980) (Borrower used loan proceeds to repair residence, then rented out residence while she lived and worked in another city); Gallegos v. Stokes, 593 F.2d 372 (10th Cir. 1979) (Purchase of pick-up truck which buyer had intended to use for business purposes, but lender never knew of that intent); Cantrell v. First National Bank of Euless, 560 S.W.2d 721 (Tex.Civ.App. 1977) (Although borrowers used motor home as living quarters while they traveled on business, the purpose of the loan to purchase the motor home remained primarily personal).

³⁴ Sherrill v. Verde Capital Corp. 719 F.2d 364, 367 (11th Cir. 1983).

³⁵ See Bokros v. Associates Finance, Inc., 607 F.Supp. 869 (N.D.Ill. 1984), and Sims v. First National Bank, Harrison, 267 Ark. 253, 590 S.W.2d 270 (1979).

In conclusion, we disagree with the trial court's reasoning dismissing the Durbins' fraud and breach-of-fiduciary duty claims. Had they not conceded liability on the note, they would have been entitled to pursue those claims. Nonetheless, the Durbins' settlement with the Bank precludes them from seeking any damages based on their liability on the note, and they have not alleged any other damages arising from the Bank's conduct. We agree with the trial court that the Durbins' remaining common-law and statutory claims fail to state viable causes of action. Consequently, the trial court properly entered summary judgment for the Bank.

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

ALL CONCUR.

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