RENDERED: JULY 30, 2010; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-000005-MR

BRUSH RUN, LLC;
AND THOMAS BORNTRAEGER — APPELLANTS

v.

APPEAL FROM OLDHAM CIRCUIT COURT
HONORABLE KAREN A. CONRAD, JUDGE
ACTION NO. 08-CI-00429

GUS GOLDSMITH — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: TAYLOR, CHIEF JUDGE; CLAYTON AND THOMPSON, JUDGES.

CLAYTON, JUDGE: Brush Run, LLC and Thomas Borntraeger appeal from the Oldham Circuit Court's entry of summary judgment in favor of Gus Goldsmith, who had filed a lawsuit for default of a promissory note secured by real estate and to foreclose under the mortgage. We affirm.

This action stems from the execution of a promissory note, on or about July 23, 2005, between the Appellants, Brush Run, LLC (hereinafter "Brush Run") and Thomas Borntraeger, and the Appellee, Goldsmith. Brush Run and Borntraeger agreed to pay the principal sum of $150,000 with interest at the rate of eleven percent per annum from the date of the note until paid. The Appellants secured the note by a mortgage with Goldsmith on real estate located at 3100 Fendley Mill Road in Oldham County. On May 3, 2008, Goldsmith filed an action to foreclose on this property. At that time, Brush Run and Borntraeger had not made a payment since July 11, 2007, which was applied to the June 25, 2007 payment. The balance of the note was $148,309.81 with interest accruing at the rate of eleven percent per annum from June 25, 2007.

Then, Brush Run and Borntraeger filed an answer and counterclaim wherein they asserted that the parties had entered into verbal agreements to defer loan payments. The Appellants explained further that Goldsmith had agreed not to pursue a foreclosure action so that the Appellants could subdivide the real estate into more valuable lots. Brush Run and Borntraeger allege that Goldsmith made the agreement to refinance the property and future improvements in order to receive a higher rate of return or a faster payoff. Based on the agreement with Goldsmith, they asserted that they had moved forward with the necessary actions to subdivide the property.

Subsequently, Goldsmith filed a reply to the counterclaim in which he raised additional arguments to support the summary judgment motion. He stated in

the reply that the agreement is unenforceable under the statute of frauds; the agreement lacks consideration; Brush Run and Borntraeger cannot establish the fraud claim; no agreement existed or if it did, it was an agreement to agree; and finally the property's divisibility is a non-issue. Then, Goldsmith moved for summary judgment and asked the court therein to order foreclosure and the sale of the property.

On November 19, 2008, the trial court, without having a hearing, entered an order granting summary judgment and allowing the foreclosure and sale of the property. The court found that there were no genuine issues of material fact as to Appellants' counterclaim and that Goldsmith was entitled to summary judgment as a matter of law. The court, however, made no comments with regard to Appellant's counterclaim and cited no legal precedent or authority in the judgment. This appeal followed.

The standard of review on appeal when a trial court grants a motion for summary judgment is "whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law." *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky. App. 1996); Kentucky Rules of Civil Procedure (CR) 56.03. In addition, "[t]he trial court must view the evidence in the light most favorable to the nonmoving party, and summary judgment should be granted only if it appears impossible that the nonmoving party will be able to produce evidence at trial warranting a judgment in his favor." *Lewis v. B & R Corporation*, 56 S.W.3d 432, 436 (Ky. App. 2001),

citing *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 480-82 (Ky. 1991). "The moving party bears the initial burden of showing that no genuine issue of material fact exists, and then the burden shifts to the party opposing summary judgment to present 'at least some affirmative evidence showing that there is a genuine issue of material fact for trial.'" *Lewis*, 56 S.W.3d at 436, citing *Steelvest*, 807 S.W.2d at 482. The trial court "must examine the evidence, not to decide any issue of fact, but to discover if a real issue exists." *Steelvest*, 807 S.W.2d at 480. "Because summary judgment involves only legal questions and the existence of any disputed material issues of fact, an appellate court need not defer to the trial court's decision and will review the issue *de novo*." *Lewis,* 56 S.W.3d at 436, citing *Scifres*, 916 S.W.2d at 781.

Appellants maintain the court erred in granting summary judgment because there are valid issues of material fact concerning the issues raised in the counterclaim. The foundation of the counterclaim is that Appellants entered into a verbal agreement with Goldsmith to modify the terms of the original mortgage and note. Under the purported agreement, the Appellants would subdivide the property, which would allow them to retire the debt and/or arrange alternative financing to repay Goldsmith. Brush Run and Borntraeger maintain that they acted to improve the property based on fraudulent misrepresentations made by Goldsmith. And Appellants claim that Goldsmith then filed the foreclosure action to interfere with a sale to their buyer in order to procure it for his preferred customer.

Goldsmith counters that the trial court correctly determined that he was entitled to summary judgment because Brush Run and Borntraeger did not establish the existence of any genuine issues of material fact and, therefore, he is entitled to judgment as a matter of law. First, Goldsmith provided evidence that clearly shows a default by the Appellants on the loan and that the default was never remedied. In fact, the Appellants admitted throughout the action that they were in default. Then, Goldsmith presents several aforementioned counterarguments to the Appellants' counterclaim, including the absence of a writing to establish a binding agreement to refrain from action to pursue foreclosure. He asserts that the failure to produce a written document about the agreement renders the agreement null, if it existed at all. Additionally, Goldsmith says that allowing the property to be subdivided did not benefit him – he was entitled to payment regardless. Moreover, if the note and mortgage were paid off early, then he would receive less interest than if the Appellants paid him under the mortgage's timeline.

We note initially that it is clear from the record that the Appellants were in default on the note and the mortgage. So, no issue of material fact exists relative to the default. They proffer, however, that they entered into a verbal agreement with Goldsmith wherein he would allow them to defer loan payments and not foreclose so that they could subdivide the property into more valuable building lots. Yet, Goldsmith maintains that if such an agreement existed, it must be in writing.

"[T]he whole purpose of the writing required by a Statute of Frauds is to provide evidence of a contract." *Shpilberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 535 S.W.2d 227, 229 (Ky.1976). To begin our analysis of whether it is necessary to provide a written document for the alleged agreement between the parties, we examine the applicable statute. Kentucky Revised Statutes (KRS) 371.010 provides legal enlightenment about contracts, which must be written to be enforceable. Subsection nine (9) of Kentucky's statute of frauds, KRS 371.010, specifically concerns promises to lend money. It reads:

> No action shall be brought to charge any person:
>
> . . . .
>
> (9) Upon any promise, contract, agreement, undertaking, or commitment to loan money, to grant, extend, or renew credit, or make any financial accommodation to establish or assist a business enterprise or an existing business enterprise including, but not limited to the purchase of realty or real property, but this subsection shall not apply to agreements pursuant to which credit is extended by means of a credit card or similar device, or to consumer credit transactions;
>
> unless the promise, contract, agreement, representation, assurance, or ratification, or some memorandum or note thereof, be in writing and signed by the party to be charged therewith, or by his authorized agent. It shall not be necessary to express the consideration in the writing, but it may be proved when necessary or disproved by parol or other evidence.

KRS 371.010(9). Brush Run and Borntraeger state that the statute of frauds does not apply in this case because it only applies when the debtor is seeking to borrow money. But our reading of the statute does not comport with this interpretation.

Initially, we observe that the original contract to loan money to Brush Run and Borntraeger certainly falls within the coverage of subsection nine of the statute of frauds. Furthermore, based on the language of the statute, we also believe that Goldsmith's alleged acquiescence, oral or otherwise, to defer loan payments and/or not foreclose on the loan must comply with the statute of frauds because the purported changes materially affected the terms of the written agreement. *Murray v. Boyd*, 165 Ky. 625, 177 S.W. 468, 471-72 (Ky. App. 1915) ("If the contract is required to be in writing, evidence will not be admitted to prove a subsequent parol agreement which materially modifies the writing; that is, if the subsequent agreement is itself within the statute of frauds, and of a nature required by law to be in writing.").

We believe that any agreement between the parties to modify the initial loan contract must be in writing based on two factors. First, the statutory language, which states "[u]pon any promise, contract, agreement, undertaking, or commitment to loan money, to grant, extend, or renew credit, or make any financial accommodation to establish or assist a business enterprise or an existing business enterprise[,]" supports the proposition that it must be written. This language is further explicated in *Farmers Bank and Trust Co. of Georgetown, Kentucky v. Willmott Hardwoods, Inc.*, 171 S.W.3d 4 (Ky. 2005), which holds that

a modification of a loan must be in writing if it materially affects the original loan. We deem that an agreement to defer loan payments and not seek foreclosure materially affects the loan. Thus, we hold that the mere verbal agreement to defer loan payments and refrain from foreclosure action is not enforceable. And we concur with the trial court's assessment, given the lack of any written modification of the loan, that no material fact exists as to the Appellants' counterclaim on this issue. Moreover, this holding herein renders the issue of consideration moot since we find no enforceable agreement to modify the contract and, therefore, we will not address it.

Next, Brush Run and Borntraeger maintain that the statute of frauds does not preclude them from an action against Goldsmith for fraudulent misrepresentations, thereby rendering the summary judgment inappropriate. In a somewhat convoluted manner, they then assert *again* that this claim is significant enough to continue this action because the statute of frauds only applies to the borrowing of money and not to a modification of the agreement. As stated above, we have already found this argument to be incorrect.

But even if the Appellants could establish fraudulent conduct on Goldsmith's part, they must establish any claim for fraud by substantiating with clear and convincing evidence all the elements of fraud. *Farmers,* 171 S.W.3d. at 11. One element is detrimental reliance wherein the Appellants must prove that they acted or failed to act based on an alleged fraudulent misrepresentation by Goldsmith. *United Parcel Service Co. v. Rickert*, 996 S.W.2d 464 (Ky. 1999).

The record, however, contains nothing demonstrating any reliance on the "verbal agreement" by the Appellants that was detrimental to them. In addition, the Appellants must plead circumstances of the fraud with particularity. CR 9.02. Here, they do not. Hence, the support for this issue is not sufficient to overcome Goldsmith's summary judgment motion.

The only evidence provided by the Appellants in this case is the verified answer, counterclaim, and an affidavit of Thomas Borntraeger. Unfortunately, none of these documents provide competent or affirmative evidence. The documents include language which is excessively vague, or hearsay, or unsupported conclusions and personal opinion. As such, these documents do not measure up to the standards for evidence required under Kentucky law. *See Nelson v. Martin*, 552 S.W.2d 668 (Ky. App. 1977). For instance, the Appellants spend considerable time suggesting that Goldsmith interfered with a deal they had arranged with a prospective buyer. But no evidence, including the alleged buyer's name or the later culmination of a deal with the so-called preferred customer who is only identified as "Chapman," is provided. Nor do they show how this action might have harmed them. Simply put, we have a case where the borrowers did not make payments on the mortgage, and after ten months, Goldsmith filed a foreclosure action, which was well within his legal and contractual rights.

In conclusion, the trial court did not err in its determination that there were no genuine issues of material fact as to Appellants' counterclaim and that

Goldsmith was entitled to summary judgment as a matter of law. The judgment of the Oldham Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Galen L. Clark
Louisville, Kentucky

BRIEF FOR APPELLEE:

Michael R. Gosnell
Russell H. Saunders
Louisville, Kentucky