

Commonwealth of Kentucky
Court of Appeals

NO. 2009-CA-001024-MR

FIRST GUARANTY NATIONAL BANK
D/B/A US BANK

APPELLANT

v. APPEAL FROM FLOYD CIRCUIT COURT
HONORABLE JOHN DAVID CAUDILL, JUDGE
ACTION NO. 07-CI-01266

RAY COOK

APPELLEE

OPINION
AFFIRMING IN PART, REVERSING IN PART, AND REMANDING

** ** * * * * *

BEFORE: NICKELL AND STUMBO, JUDGES; WHITE,¹ SENIOR JUDGE.

NICKELL, JUDGE: First Guaranty Bank, d/b/a, US Bank appeals from a summary judgment requiring it to honor a certificate of deposit (CD) held by Ray Cook. US Bank argues: (1) there is a material issue of fact as to whether the CD

¹ Senior Judge Edwin M. White sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

has previously been paid; and (2) Cook is only entitled to the rate of interest on the CD pursuant to KRS 360.040 rather than standard judgment interest.

Prior to her death in January 2006, Elizabeth Caudill purchased a \$7,500.00 CD from First Guaranty National Bank. Ray Cook was identified on the CD as the pay on death (POD) beneficiary. First Guaranty was acquired by Transfinancial Bank, which was acquired by Star Bank, which was later acquired by US Bank. After Caudill's death, Cook tendered the CD to US Bank and demanded payment. US Bank did not find any listing of the CD in its computer records and denied payment.

Cook filed suit in Floyd Circuit Court seeking enforcement of the CD. The trial court granted summary judgment in favor of Cook, holding the CD was valid on its face and was payable pursuant to its terms. The court held Cook was entitled to the contractual rate of interest from the date of purchase to the date of the amended judgment and Cook was entitled to the legal rate of interest thereafter. This appeal followed.

US Bank's first argument is that there was a material issue of fact as to whether the CD had previously been paid, and therefore, the award of summary judgment was erroneous. Summary judgment is appropriate only 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.” CR² 56.03. The trial court must view the record “in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor.” *Steelvest, Inc. v. Scansteel Serv. Ctr., Inc.*, 807 S.W.2d 476, 480 (Ky. 1991). Further, “a party opposing a properly supported summary judgment motion cannot defeat it without presenting at least some affirmative evidence showing that there is a genuine issue of material fact for trial.” *Id.* at 482. On review, the appellate court must determine “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).

US Bank claims there is a material issue of fact as to whether the CD has already been paid because it has no record of the CD. We find no merit to this contention. There has been no allegation the CD is not valid on its face. As stated above, the party opposing summary judgment must produce at least some affirmative evidence. *Steelvest*. The absence of records does not constitute affirmative evidence. US Bank has not presented any evidence the CD was previously paid. Therefore, we hold the trial court properly entered summary judgment.

² Kentucky Rules of Civil Procedure.

US Bank next argues KRS 360.040 limits Cook to the interest rate provided for in the CD rather than the judgment interest rate of twelve percent.

We agree.

KRS 360.040 provides in part:

A judgment shall bear twelve percent (12%) interest compounded annually from its date. A judgment may be for the principal and accrued interest; but if rendered for accruing interest on a written obligation, it shall bear interest in accordance with the instrument reporting such accruals, whether higher or lower than twelve percent (12%).

In *Union Trust, Inc. v. Brown*, 757 S.W.2d 218, 219 (Ky. App. 1988), this Court held the trial court erred when it reduced post-judgment interest on promissory notes to twelve percent rather than the higher interest rates provided by the notes.

A CD is an instrument containing a written obligation. *See* KRS 355.3-104(10). The language of KRS 360.040 is mandatory. Therefore, we reverse and remand that portion of the judgment providing for twelve percent judgment interest with directions to enter judgment interest in accordance with the instrument.

Accordingly, the judgment of the Floyd Circuit Court is affirmed in part, reversed in part, and remanded with directions.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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