

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2010-CA-001888-MR

SONNY HART AND  
WANDA HART

APPELLANTS

v.

APPEAL FROM WHITLEY CIRCUIT COURT  
HONORABLE PAUL E. BRADEN, JUDGE  
ACTION NO. 10-CI-00450

FIRST NATIONAL BANK  
AND TRUST

APPELLEE

OPINION  
REVERSING AND REMANDING

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BEFORE: CLAYTON, KELLER, AND MOORE, JUDGES.

MOORE, JUDGE: Sonny and Wanda Hart (the Harts) appeal the Whitley Circuit Court's order granting summary judgment in favor of First National Bank and Trust (FNB) and subsequent denial of their motion to alter, amend, or vacate the judgment. After a careful review of the record, we reverse and remand.

## I. FACTUAL AND PROCEDURAL BACKGROUND

This appeal arises from a foreclosure action in which FNB sought to enforce a promissory note executed by the Harts' son, Jerry Wayne Hart.<sup>1</sup> On April 14, 2004, Jerry executed a promissory note in favor of FNB in the amount of \$52,719.55 and bearing a maturity date of April 20, 2024. The promissory note stated that “[Jerry] acknowledge[s] this Note is secured by 1996 OAKWOOD MOBILE HOME and 3.5 +/- ACRES OF LAND LOCATED AT 359 23<sup>RD</sup> ST CORBIN KY 40701 DB 393/PG 505 WHITLEY CO.”

That same day, the Harts executed a mortgage for \$52,719.55 in favor of FNB. Although the mortgage bears the same maturity date as the note and generally references and incorporates “a note” bearing the same maturity date, nothing in the mortgage specifically refers to the note executed by Jerry Wayne Hart or indicates that it was intended to secure Jerry's indebtedness. Rather, the mortgage describes the note as having been “executed and delivered by Mortgagor [the Harts] to the order of Mortgagee [FNB].”

On September 2, 2004, FNB filed a financing statement in the Whitley County Clerk's Office purporting a security interest in Wanda Hart's mobile home. FNB also filed a title lien statement dated May 5, 2004, and signed by Wanda Hart.

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<sup>1</sup> Jerry Wayne Hart is not a party to this appeal.

On June 4, 2010, FNB filed a complaint stating that Jerry Wayne Hart was in default on the note and sought to foreclose upon the Harts' real property and mobile home. FNB alleged that the Harts had executed the mortgage and security agreement by virtue of the financing statement filed on September 2, 2004, as security for Jerry's promissory note.<sup>2</sup> The Harts argued that no indebtedness existed. FNB subsequently filed a motion for summary judgment, on the basis that Jerry Wayne Hart had defaulted on the promissory note and that Sonny and Wanda had executed a mortgage and financing statement in order to secure his indebtedness. The Harts objected to FNB's motion for summary judgment, arguing that that FNB had not presented any evidence that the Harts had executed the mortgage and title lien statement in order to secure Jerry's loan, and that, absent a promissory note, security agreement, or guaranty executed by the Harts to that effect, FNB had failed to show that the Harts were indebted to FNB.

The trial court granted summary judgment, finding that the Harts had executed both the mortgage and financing statement in order to secure the promissory note executed by Jerry Wayne Hart, and that the Harts "failed to establish any issue of material fact as to the loans made by [FNB], the execution of the security instruments, or the amount of the indebtedness owed." The Harts again argued in their motion to alter, amend, or vacate that FNB had failed to

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<sup>2</sup> We decline to consider the security agreement which was submitted as an addendum to the appellees brief, as the appellees failed to submit a copy of the security agreement at the trial level. This is an inappropriate attempt to supplement the record. *White v. White*, 883 S.W.2d 502, 505 (Ky. App. 1994).

produce evidence that any debt existed. The trial court denied the Harts' motion.

This appeal followed.

## II. STANDARD OF REVIEW

Summary judgment is appropriate “if the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law.” CR<sup>3</sup> 56.03. It is appropriate where it “appears that it would be impossible for the respondent to produce evidence at the trial warranting a judgment in his favor.” *Steelvest, Inc. v. Scansteel Serv. Ctr. Inc.*, 807 S.W.2d 476, 480 (Ky. 1991). When deciding a motion for summary judgment, the record must be viewed in the light most favorable to the party opposing the motion. *Id.* “The party moving for a summary judgment has the burden of establishing that no genuine issue as to any material fact exists and also that he is entitled to judgment as a matter of law.” *Continental Casualty Co., Inc. v. Belknap*, 281 S.W.2d 914, 916 (Ky. 1955). Therefore, the moving party “must make a prima facie showing that would entitle him to a summary judgment.” *Id.*

## III. ANALYSIS

The following is a list of the evidence contained in the record:

1. A promissory note in the amount of \$52,719.55 executed on April 14, 2004 by Jerry Wayne Hart in which Jerry pledged a 96 Oakwood mobile home and approximately 3.5 acres of land located at 359 23<sup>rd</sup> Street, Corbin,

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<sup>3</sup> Kentucky Rule of Civil Procedure.

Kentucky and of record in Deed Book 393, Page 505, Office of the Whitley County Clerk;

2. A mortgage in the amount of \$52,719.55 executed on April 14, 2004 by Sonny and Wanda Hart encumbering a parcel of real property owned by Sonny and Wanda Hart, of record in Deed Book 393, Page 505, Office of the Whitley County Clerk;
3. A financing statement filed of record in the Whitley County Clerk's Office on September 2, 2004 purporting to encumber a 96 Oakwood mobile home owned by Wanda Sue Hart;
4. A title lien statement signed by Wanda Hart and filed of record on September 2, 2004 noting a lien on the same mobile home; and
5. The affidavit of Glenn Calebs, Executive Vice-President of First National Bank and Trust, dated July 26, 2010, stating that Jerry Wayne Hart executed a promissory note on April 14, 2004 in the amount of \$52,719.55 and failed to make any payment on said note after June 3, 2010.

Based upon these documents, the trial court concluded that no genuine issue of material fact existed as to the "loans made by [FNB], the execution of the security instruments, or the amount of the indebtedness owed."

However, we conclude that these documents do not adequately demonstrate that the Harts provided the mobile home and real property as collateral for Jerry's note. Despite the contentions of FNB, nothing in the record supports the trial court's finding that the Harts executed the mortgage and title lien statement for the purpose of providing collateral or acted as guarantors for Jerry's promissory note.

Jerry was not the title holder of the mobile home or the record owner of the real property that he pledged as collateral. The note did not indicate that the

Harts were owners of the property or that they had given Jerry the authority to pledge their property as collateral for the note. Therefore, it appears that Jerry had no authority to pledge the property as collateral. Likewise, the mortgage did not indicate that the Harts were pledging their property as collateral for Jerry's note. Instead, the mortgage referred to a note described as having been executed by the Mortgagors, which in this instance would have been the Harts. No such note exists in the record.

Furthermore, FNB failed to produce any security agreement or other documentation permitting it to file a financing statement with respect to the mobile home. This financing statement was filed over four months after the mortgage was filed. The title lien statement was executed on May 5, 2004, approximately two weeks after the note and mortgage, and was filed approximately four months after the mortgage.<sup>4</sup> The affidavit executed in connection with FNB's motion for summary judgment refers only to the promissory note executed by Jerry, and makes no representation regarding the mortgage or other documentation alleged to provide security for the note. Because these inconsistencies are evident upon the face of the record, we conclude that there is a genuine issue of material fact and that summary judgment was therefore inappropriate.<sup>5</sup> We therefore reverse and remand to the trial court for further proceedings consistent with this opinion.

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<sup>4</sup> We also note that FNB did not provide the title lien statement as a basis for the allegations set forth in the complaint, but submitted it along with its motion for summary judgment.

<sup>5</sup> We are mindful of the possibility that the trial court may have been privy to evidence not before us on appeal.

ALL CONCUR.

BRIEF FOR APPELLANTS:

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BRIEF FOR APPELLEE:

Thomas L. Jensen  
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