

RENDERED: November 14, 1997; 2:00 p.m.
NOT TO BE PUBLISHED

NO. 96-CA-1839-MR

CHARLES H. MOORE, L. F.
MOORE and LEOTA PROPERTIES, INC.

APPELLANTS

V. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE JOHN R. ADAMS, JUDGE
ACTION NO. 92-CI-3609

BANK ONE LEXINGTON, NA;
BANK ONE COLUMBUS, NA;
WILLIAM R. GUTHRIE and
VINCE NOONEY

APPELLEES

OPINION
AFFIRMING

* * * * *

BEFORE: GARDNER, JOHNSON and WILHOIT, Judges.

GARDNER, JUDGE: Charles H. Moore, L. F. Moore, and Leota Properties, Inc. (collectively referred to as Moore) appeal from two opinions and orders of the Fayette Circuit Court which rendered a summary judgment against Moore on his claim, and a summary judgment in favor of Bank One Lexington, NA and Bank One Columbus, NA (hereinafter referred to as Bank One) on its counterclaim. We affirm the opinions and orders now on appeal.

The instant action was previously addressed on appeal by opinion of this Court rendered April 21, 1995. We summarized the

undisputed factual background which preceded this action as follows:

Moore started his real estate development business in 1953. At that time, he began to do his banking for the business with Citizens Union Bank of Lexington, Kentucky, which was the predecessor to appellee, Bank One, Lexington N.A. Moore established a lasting business relationship with Citizens, which spanned several decades. Over the course of his dealings with Citizens, Moore borrowed and repaid substantial amounts of money. In 1986, Bank One acquired and merged with Citizens.

Moore had formed and was the president of Leota. In 1985, Leota arranged to purchase a multi-million dollar building in Atlanta, Georgia known as The Exchange. At the time, the note on The Exchange was held by Citizens. In 1990, Leota began to encounter difficulty in keeping up the payments. Moore argued that Bank One officials demanded that he fully collateralize his \$1 million open line of credit, previously unsecured with Citizens, to avoid foreclosure on the building. Moore claimed that Bank One officials represented that his failure to do so would result in the potential dishonor of some of their prior obligations. Moore provided the collateral on the loans and participated in the execution of the appropriate restructured loan documents. Moore maintained that he did so without the benefit of advice of counsel in reliance on statements to him by Bank One officials.

Part of the loan documents which were restructured included promissory notes executed by Moore, as President of Leota, with both Bank One and Citizens. In October, 1985, Leota executed a promissory note with Citizens in the amount of \$1,400,000, with interest and principal payments set out in the

agreement. The original maturity date of the note was April 17, 1993.

The next note was executed between Leota and Bank One on October 17, 1989, in the amount of \$400,000 with a maturity date of October 17, 1990. This note, originally dated October 17, 1985, was an extension of a promissory note in the amount of \$500,000.

Around July 17, 1991, after Moore and Leota had defaulted on these notes, Bank One entered into a Loan Extension and Modification Agreement. That agreement made various changes in the original notes and also provided for the drafting of a new demand note in the amount of \$197,185.38, which represented the amount of interest due on the prior notes. All of these documents were drafted pursuant to the Loan Extension and Modification Agreement.

Moore filed a lender liability suit on October 20, 1992. After oral arguments on Bank One and William R. Guthrie's¹ motion to dismiss, the trial court granted the motion and entered an order permitting Moore to file an amended complaint reflecting the two remaining counts sounding in fraud and misrepresentation. Moore and Leota's amended complaint sought damages as well as a determination that the "restructured" loan documents be declared unenforceable. Bank One filed its answer and also asserted a counterclaim on three notes owed by Moore and Leota, one of which represented the unpaid interest on the prior notes.

Bank One filed a motion for partial summary judgment on the note reflecting the unpaid interest which, at that time, had a balance of \$133,963.15. Bank One maintained it was entitled to summary judgment because this note was severable from the remainder of the lawsuit. After

¹Mr. Guthrie is not a party to this appeal.

oral arguments, the trial court sustained the partial summary judgment motion and entered an interlocutory order. The trial judge did permit Bank One to seek a certification of finality. Bank One did so and the trial court entered its order of finality on November 5, 1993.

Moore appealed the partial summary judgment to this Court. We rendered an opinion on April 21, 1995, wherein we vacated and remanded the judgment. As a basis for the opinion, this Court concluded that the subject matter of Bank One's counterclaim was so intricately entwined with Moore's claim that summary judgment on Bank One's counterclaim was precluded. The summary judgment was reversed and the matter was remanded to the Fayette Circuit Court.

The matter proceeded in the lower court through late 1995 on both Moore's claim of lender liability and Bank One's counterclaim on the promissory notes. Bank One then filed motions seeking summary judgment on both the claim and counterclaim. At the hearing conducted on January 5, 1996, the parties and the lower court agreed to pass the ruling on the promissory notes until the court had ruled on Moore's claim of lender liability.

On the issue of lender liability, the court concluded, that, "[n]one of the facts alleged in the argument of counsel for the Plaintiff, nor the briefs that were filed contesting the issue of Summary Judgment, are [sic] sufficient to support the requirement of a fraud claim necessary to get beyond the Defendant's motion for Summary Judgment." It went on to conclude as a matter of law that Moore could not prevail on his claim of

fraud, and accordingly it granted Bank One's motion for summary judgment on Moore's claim. The opinion on this issue was rendered on February 7, 1996.

On March 25, 1996, the court addressed the motion for summary judgment on Bank One's counterclaim. Since Moore's claim was no longer pending, the issues relating to Bank One's counterclaim were no longer intricately entwined with Moore's claim. Accordingly, the lower court again concluded that there were no genuine issues of material fact on the counterclaim, and entered a summary judgment in favor of Bank One on its counterclaim.² This appeal followed.

Moore now argues that the lower court committed reversible error in granting Bank One's motions for summary judgment on both Moore's claim and Bank One's counterclaim. Specifically, Moore alleges that this Court's prior opinion became the law of the case and prohibited relitigation of the issues addressed in that appeal, and that there remain genuine issues of material fact supporting his claim. Having studied the record and the law, as well as the written and oral arguments of counsel, we cannot conclude that the lower court erred on the issues which Moore now raises.

We will first address the opinion and order entered February 7, 1996, which granted summary judgment in favor of Bank One on Moore's claim of lender liability/fraud. The lower court

²The 1993 order granted summary judgment on only one of the three promissory notes. The 1996 order granted summary judgment as to all three promissory notes.

concluded in relevant part that Moore's claim, even if true as alleged, could not be construed to constitute fraud. Moore alleged in part that he was defrauded because of the insertion of a "cross-collateralization provision" in the July 1991 note. The court concluded that this allegation could not be construed as fraud because it was undisputed that the same provision had been signed by Moore, included in other notes, and merged into the July 1991 note. Moore also claimed that he did not read the document and did not ask for or receive a copy of the document. Furthermore, the court found that all of the testimony on this issue supported Bank One's assertion that the document had not been altered.

Kentucky Rule of Civil Procedure (CR) 56.03 authorizes summary judgment "if the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the affidavits, if any, show that there is no genuine issues as to any material fact and that the moving party is entitled to a judgment as a matter of law." 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 trial warranting a judgment in his favor. Steelvest, Inc. v. Scansteel Service Center, Inc., Ky., 807 S.W.2d 476 (1991), citing Paintsville Hospital Co. v. Rose, Ky., 683 S.W.2d 255 (1985). While this rule should be cautiously applied, Steelvest, 807 S.W.2d at 480, its purpose is to promote the expeditious disposition of cases and to avoid unnecessary trials. Preston v. Elm Hill Meats, Inc., Ky., 420 S.W.2d 396 (1967).

While we are acutely aware that Steelvest sets forth an extremely strict standard for the application of summary judgment, we are sufficiently convinced that Moore could not prevail if the action proceeded to trial. Under these circumstances, summary judgment clearly is appropriate. Moore maintains that genuine issues of material fact exist which support his claim. He does not, however, state what these issues are, and merely alleges that the lower court conducted only a " cursory review " of his claims. The primary focus of his argument in favor of reversal is his contention that this Court's 1995 opinion became the law of the case and should serve to bar summary judgment on both his claim and Bank One's counterclaim. This argument is not persuasive.

This Court's 1995 opinion reversed the lower court's summary judgment in favor of Bank One on its counterclaim because the issues presented in the counterclaim (i.e., the promissory notes) were intricately entwined with Moore's claim of fraud. Contrary to Moore's assertion, that opinion did not address the question of whether summary judgment was appropriate as to Moore's claim of fraud. No summary judgment had been entered as to Moore's claim, and accordingly the holding expressed in this Court's 1995 opinion could not be regarded as the law of the case as to Moore's claim. Stated differently, the 1995 opinion held only that summary judgment on Bank One's counterclaim was premature as long as Moore's claim remained pending. It in no way addressed the propriety of summary judgment against Moore on his claim because that issue had not yet risen. Thus, Moore's argument that this

Court's 1995 opinion should be construed to bar summary judgment against Moore on his claim of fraud is without merit.

Moore's remaining argument is that the lower court erred in granting summary judgment in favor of Bank One on its counterclaim. Moore again argues that this Court's 1995 opinion became the law of the case and should serve to bar summary judgment on the counterclaim. We find no error.

Once again, this Court's 1995 opinion merely held that summary judgment on the counterclaim was barred so long as Moore's claim of fraud remained pending. When summary judgment was rendered in favor of Bank One on its counterclaim on March 25, 1996, Moore's claim had previously been disposed of via summary judgment. Thus, when the lower court addressed the motion for summary judgment on Bank One's claim, the motion could be addressed anew and without reference to this Court's 1995 opinion. In examining the motion, the lower court again found that no genuine issue of material fact existed and that Moore could not prevail on the issue of the matter proceeded to trial. The lower court's analysis comports with Steelvest, supra, and as such, we find no error.

For the foregoing reasons, the orders of summary judgment of the Fayette Circuit Court are affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

John H. Dwyer, Jr.
Louisville, Kentucky

BRIEF FOR APPELLEE:

Charles E. Shivel, Jr.
Lexington, Kentucky