

Commonwealth Of Kentucky

Court Of Appeals

No. 1997-CA-000595-MR

JOGINDER S. BRAR and
PRITAM K. BRAR

APPELLANTS

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE WILLIAM E. McANULTY, JR., JUDGE
ACTION NO. 95-CI-04479

TEJPAUL BRAR (a.k.a. PAUL
BRAR) and
RIVER CITY BANK OF LOUISVILLE

APPELLEES

OPINION
AFFIRMING

* * * * *

BEFORE: BUCKINGHAM, GUIDUGLI and HUDDLESTON, Judges.

GUIDUGLI, JUDGE. Appellants appeal from an in rem judgment ordering judicial sale of real property to satisfy mortgage liens enforced at trial before the Deputy Master Commissioner of Jefferson County. For the reasons set forth herein, we affirm.

In the Spring of 1993, appellants, Joginder Brar (Joginder) and Pritam Brar (Pritam), allege they decided to

retire to the Louisville area.¹ They wanted to purchase Lot 30 in Glen Oaks subdivision upon which their son, Tejpaul Brar (Paul) was going to build them a house. Prior to the actual purchase of Lot 30, son approached father with a plan to also purchase Lot 164 in Springhurst subdivision.² Joginder alleges the plan was for him to pay cash for both lots, houses would be constructed on both, with the sale of one financing the construction of the other. Paul was to construct a house on each lot. Joginder and Pritam purchased the two lots. Because Paul had no collateral, the appellee, River City Bank of Louisville (the Bank) required Joginder and Pritam to execute a mortgage in its favor. On June 3, 1993, the parties executed a mortgage to secure a \$31,200 note given by Paul to the Bank. This mortgage contained an advance clause which authorized \$80,000 in additional construction advances to Paul. Joginder claims not to have understood the loan documents.

At the time of the closing of the first mortgage, Joginder and Paul executed a signature card establishing a joint construction loan account at the Bank. Allegedly without Joginder's knowledge or approval, Paul executed additional

¹ Appellants are natives of India. The record reflects they had a Louisville address at all times relevant to this action. Joginder alleges he was a manual laborer with a high school education in India and that English is his second language, and his comprehension is minimal. There is no dispute that his wife, Pritam, does not speak or read English.

² Paul testified the financing for Lot 164 was provided by another bank.

promissory notes to the Bank. All the promissory notes executed by Paul were 90-day balloon notes:

DATE	AMOUNT	SECURITY	PURPOSE
6/25/93	\$25,550	Lot 30	Construction
8/31/93	\$20,450	Lot 30	Construction
9/12/93	\$20,450	Lot 30	Not Stated
10/27/93	\$ 8,175	Lot 30	Construction

The house constructed on Lot 30 was ready on December 6, 1993, and Joginder moved into the home on that date. On December 17, 1993, Joginder and Pritam executed a second mortgage on Lot 30 in the same amount as a promissory note given by Paul to the Bank that same day, \$10,236. Thus, there were two mortgages on Lot 30 (\$31,200 - 6/3/93 and \$10,236 - 12/17/93) totaling \$41,436.

Joginder alleges that he did not learn of the advances to Paul until some time in 1994, when he requested tax information from the Bank. In September, 1994, Lot 164 and the house thereon were sold and Joginder received over \$110,000 in net proceeds from the sale. Joginder testified that he took the proceeds of that sale to the Bank to payoff the mortgages but that the Bank refused tender. Joginder alleges the Bank told him the notes belonged to Paul and Paul needed to pay them.³

³ The proceeds check from Lot 164 was never entered into evidence. Thus, the Master Commissioner had no way of knowing if the check was payable to Joginder only (which could have been negotiated to the Bank simply by Joginder's endorsement), or whether the proceeds check was also payable to Pritam. Thus, Joginder did not meet his burden of proof that he "tendered" payment to the Bank. Joginder's testimony on this issue, while
(continued...)

Joginder alleges he then issued a personal check to Paul in the amount of \$85,000 to pay off the notes. Paul did not pay off the notes to the Bank.

On August 10, 1995, the Bank filed a complaint against Joginder and Pritam seeking to foreclose on the two mortgages and seeking a personal deficiency judgment against Paul. The complaint did not seek a personal judgment against Joginder and Pritam. The Bank never sought anything other than an in rem judgment against Joginder and Pritam. Joginder and Pritam answered the complaint without asserting any type of counterclaim against the Bank or crossclaim against Paul. Paul eventually answered, also without asserting any counterclaim against the Bank. Paul also cross-claimed against his parents for the reasonable rental value of the home built on Lot 30 and for indemnification by his parents against any judgment which the Bank might be awarded against him. Joginder and Pritam answered Paul's cross-claim and cross-claimed against Paul for indemnification.

The Bank eventually moved to set the case for a bench trial. Joginder and Pritam requested a jury trial as they had demanded in their verified answer to the foreclosure complaint.

³(...continued)
not contradicted by the Bank (which is somewhat disturbing), was not corroborated by any other evidence. Further, this issue was not preserved for appellate review by filing a specific exception to the Master Commissioner's Report or a request for a specific finding under CR 52.04. This Court may not set aside the findings of the Master Commissioner, adopted by the circuit court, unless clearly erroneous. CR 52.01.

The trial court referred the case to the Master Commissioner. A hearing was held before a Deputy Master Commissioner and a report was entered August 14, 1996, which stated that it was decided by the Commissioner and counsel that issues between Joginder, Pritam, and Paul would be addressed after the Bank's claims were tried. The report further ordered that the trial in chief on Bank's claims would be held before the Commissioner. No exceptions were filed to this report.

Trial was held on the Bank's claims before the Deputy Master Commissioner on October 9, 1996. The Master Commissioner's report was filed October 16, 1996, and included extensive findings of fact and conclusions of law. Joginder and Pritam filed the following exceptions to said report: 1) the loans to Paul were not secured by the mortgages; 2) the mortgages to the Bank were not valid and enforceable; 3) Pritam's passport should have been admitted as evidence or she should have been allowed to authenticate her passport; 4) evidence of the Bank's alleged failure to comply with the notice provisions of the Federal Truth in Lending Act should have been admitted; and 5) the Commissioner's fee should not be assessed against Joginder and Pritam. On February 4, 1997, the trial court entered the final judgment and order of sale. Joginder and Pritam filed this appeal on February 25, 1997.

The Commissioner's sale was held March 25, 1997, and the property was sold to KATY, Inc., for \$170,000. The report of sale was filed March 28, 1997. Joginder and Pritam did not file

exceptions to the report of sale or post a supersedeas bond which would have stayed proceedings on the judgment. The Bank's judgment with accrued interest, court costs, and attorneys fees at the time of the judicial sale was \$140,634.98. A balance of \$27,098,84 remained after satisfaction of the judgment and payment of the Master Commissioned's fee. The balance was disbursed to Joginder and Pritam.

Joginder and Pritam's first assignment of error is that the trial court erred in denying them a jury trial. The pleadings in the case; the complaint; the answer; the cross-claims filed by Paul against Joginder and Pritam; and vice versa, raised both legal and equitable issues. The Deputy Master Commissioner's report entered August 14, 1996, stated that it was decided between and among the Commissioner and counsel that issues between Joginder and Pritam, and Paul would be addressed after the Bank's claims were tried. The report further ordered that trial in chief on the Bank's claims would be held before the Commissioner. No exceptions were filed to this report.

The right to trial by jury, like any other constitutional right, may be waived intentionally as well as unintentionally. CR 38.04. It appears that is exactly what happened in this instance. If counsel for Joginder and Pritam did not, in fact, "agree" to the procedure ordered by the Deputy Master Commissioner, an exception should have been filed to preserve the issue for review. However, even if the issue was not waived and was properly preserved, Joginder and Pritam cannot

meet their burden of proving the ruling was clearly erroneous as they are required to do in this Court by CR 52.01. In Steelvest, Inc. v. Scansteel Service Center, Inc., Ky., 908 S.W.2d 104, 108 (1995), the Kentucky Supreme Court held:

Stated differently, causes of action historically legal are triable by jury and causes of action historically equitable are triable by the court - notwithstanding the rule. [CR 39.01(c)] Thus, if both legal and equitable issues are joined in a single cause of action, the appropriate mode of trial must be followed as to each, and in that sequence which will promote efficient administration without curtailing the substantive rights of the respective parties.

We cannot say the Deputy Master Commissioner's decision to bifurcate the Bank's equitable foreclosure suit, from the claims between and among the Brar family, was clearly erroneous, and thus, we affirm on this issue.

Appellants' second assignment of error is that the Master Commissioner impermissibly "constructed" a contract between Joginder and Pritam and the Bank as to the notes given by Paul to the Bank as security for the construction advances. This assignment is based upon contradictory evidence given by Joginder and Paul at trial regarding their agreement and the contract language of the mortgage. Paul testified Joginder understood the documents he signed and the arrangement with the Bank regarding construction advances and Joginder says he did not.

Regardless of the level of Joginder's understanding of the financing, he and Pritam have never alleged that the parties intended anything other than for their son, Paul, to construct a

house on Lot 30 with financing provided by the Bank. With that much in agreement, it is not reasonable for Joginder to assert that he thought the home built on Lot 30 (which sold at the courthouse steps for \$170,000) could be constructed using only the amounts stated on the face of the two mortgages, \$41,436 (\$31,200 on 6/3/93 and \$10,236 on 12/17/93). Materials alone would have cost at least that much. Therefore, the Master Commissioner's findings of fact and conclusions of law on this issue cannot be shown to be inequitable, much less clearly erroneous, and we, therefore, affirm.

Appellants' third assignment of error is that Joginder and Pritam were released from the obligation to pay the mortgage. First, by the Bank's alleged failure to accept tender of payment (citing KRS 355.3-604); and second, by giving Paul an extension of time within which to pay the notes without reservation of rights [citing KRS 355.3-606(1) (a) and (b)]. Joginder did not meet his burden of proving "tender" of payment to the Bank at trial (see infra, footnote 3) and therefore, could not meet his burden in this Court of proving the Master Commissioner's findings or conclusions on this issue were clearly erroneous. CR 52.01. Moreover, Article 3 of the Uniform Commercial Code, as adopted in Kentucky, pertains to commercial paper, which is not at issue in this case.

Appellants' final assignment of error is that the Master Commissioner erred in failing to allow Pritam to testify because there was not an interpreter present and erred in failing

to allow her to authenticate her passport. The Commissioner's report states that there was an agreement between counsel for the Bank and the former counsel for Joginder and Pritam that an interpreter would be provide by the party who wished to call her as a witness.

At trial, when then-counsel for Joginder and Pritam attempted to call Pritam as a witness she was excluded because of her inability to speak English. Not only was this ruling in keeping with a previous agreement between the parties, it was consistent with Kentucky Rule of Evidence (KRE) 601(b)(3), which disqualifies as a witness any person who "lacks the capacity to express himself so as to be understood, either directly or through an interpreter." Appellants counter that Joginder and Paul agreed to interpret for Pritam and that because they were adverse parties, their interpretation of her testimony should have been allowed. However, KRE 604 requires interpreters to be "subject to the provisions of these rules relating to qualifications of an expert." KRE 703, relating to expert opinions, requires experts to be available for cross-examination. We believe the Bank's cross-examination of Pritam, through Joginder and Paul, would have been "limited" in violation of KRE 703(c) because Joginder and Paul's respective interests were not adverse in the trial before the Master Commissioner. The Bank would have been prejudiced had Joginder and Paul been allowed to interpret for Pritam.

Finally, we hold that it was not error to exclude Pritam's passport from evidence. The India passport is not a self-authenticating document under KRE 902(3) as a "Foreign Public Document" because the arguably relevant entries in November, 1993, and March, 1994, are not "attested in an official capacity by a person authorized by the laws of a foreign country to make the attestation" nor "accompanied by a final certification as to the genuineness of the signature of official position." Id. Moreover, even if Pritam's passport were deemed a "self-authenticating document" under KRE 902, the passport does not prove the factual proposition argued by appellants. As the Master Commissioner correctly pointed out, Pritam's passport was stamped in India in November, 1993, and March, 1994, which would "not conclusively prove" she was not in the United States on December 17, 1993. The passport alone is insufficient to prove Pritam's whereabouts on December 17, 1993, and its exclusion, even if erroneous, would not have changed the outcome in this case. If the exclusion was error, it was harmless. CR 61.01.

For the reasons set forth in this opinion, the judgment of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANTS:

Michelle M. Chalmers
Louisville, KY

BRIEF FOR APPELLEE, RIVER CITY
BANK:

Joseph A. Moloney
Louisville, KY

NO BRIEF FOR APPELLEE, BRAR
TEJPAUL

