

Commonwealth Of Kentucky

Court Of Appeals

NO. 1997-CA-002344-MR

BILL G. RHOADS AND
SALLY E. RHOADS

APPELLANTS

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE REBECCA M. OVERSTREET, JUDGE
ACTION NO. 96-CI-0282

PEOPLES BANK & TRUST
COMPANY OF MADISON COUNTY

APPELLEE

OPINION
AFFIRMING
** ** * * * * *

BEFORE: GARDNER, HUDDLESTON AND JOHNSON, JUDGES.

GARDNER, JUDGE: Bill and Sally Rhoads (the Rhoadses) appeal from an order of the Fayette Circuit Court granting summary judgment for Peoples Bank & Trust Company of Madison County (Peoples Bank). On appeal, they contend that the trial court erroneously granted summary judgment, because several material factual disputes existed regarding whether Peoples Bank was negligent as a lender or breached any fiduciary duties. After reviewing the record below, this Court has found no error and affirms.

William and Doris Moore (the Moores) along with the Rhoadses formed Chevy Chase Terrace Incorporated in the mid-1980s. The corporation purchased a seventy-two unit apartment complex in Lexington known as the Chevy Chase Terrace Apartments. The parties intended to convert the apartments into an assisted living complex for elderly residents. The Moores and the Rhoadses each owned fifty percent of the stock in the corporation.

In 1988, the Moores and the Rhoadses contacted Peoples Bank about refinancing a previous loan taken out for the project. Peoples Bank loaned \$1,300,000 in September 1988. The note was signed by the corporation and by the Moores individually and the Rhoadses individually. The note was secured by a first mortgage on the real property and the pledge of a \$200,000 certificate of deposit (CD) by the Rhoadses and a \$200,000 CD by the Moores. In November 1990, Peoples Bank loaned an additional \$150,000 at the request of Mr. Moore. This note was executed by the corporation and the individuals. The proceeds of the \$150,000 loan were disbursed in the following manner: \$34,941.79 for back taxes, \$972.50 for attorney fees and title insurance, \$23.50 for recording fees, \$1,500 for loan commitment fees and \$112,562.21 to the corporation. The proceeds check to the corporation was deposited into the corporation's bank account at First Security National Bank (First Security). On the same day the deposit was made, Mr. Moore wrote himself a check for \$110,000 on the First Security account allegedly for reimbursement for repairs to the apartments that he had previously paid for.

In 1995, the borrowers began to experience severe cash flow problems. Peoples Bank let the borrowers know that a foreclosure action was going to be brought against the real estate which secured the promissory note. Attempts were made to sell the property, and Peoples Bank lent an additional \$15,000 for a loan application and market study. In late 1995, the note came up for renewal. The Rhoadses, the Moores and Peoples Bank discussed the matter at various meetings. Peoples Bank conditioned renewal upon the deposit of \$50,000 into an escrow account to cover future shortfalls. Loan documents were prepared, and the Rhoadses even signed the documents; however, the Moores did not.

Peoples Bank proceeded with the foreclosure action, and filed a complaint in circuit court in January 1996. The action was filed against the corporation, the Moores and the Rhoadses. In March 1996, Peoples Bank moved the circuit court for a summary judgment against the corporation and the Moores and for a default or summary judgment against the Rhoadses as they had not filed a response. In July 1996, the Rhoadses filed an answer as well as a cross-claim against the Moores, and a counterclaim against Peoples Bank. On July 24, 1996, the circuit court granted a summary judgment for Peoples Bank against the Rhoadses, the Moores and the corporation. The Rhoadses filed a motion to alter, amend or vacate the judgment. The court on August 13, 1996, granted the Rhoadses motion and vacated its earlier judgment.

In June 1997, Peoples Bank again moved for summary judgment against the Rhoadses and the other parties. On July 21, 1997, the circuit court granted summary judgment for Peoples Bank against the Rhoadses. The court awarded Peoples Bank \$354,662.73 on the August 1994 note plus interest, and \$18,547.41 on the June 1995 note plus interest. The Rhoadses subsequently moved the court to alter, amend or vacate its July 21, 1997 judgment. The court on August 20, 1997, pursuant to another order denied the Rhoadses' motion to alter, amend or vacate the earlier summary judgment for Peoples Bank. The Rhoadses subsequently moved the circuit court to stay enforcement of the judgment, but this motion was denied by the court. The Rhoadses have brought this appeal.

The Rhoadses argue to this Court that the record below clearly reveals the existence of several material factual disputes concerning whether Peoples Bank as the lender, was negligent or breached any fiduciary duties. They also maintain that the existence of their claim in tandem with the general preclusive nature of summary judgment would require the trial court to consider both claims when deciding whether there was an issue of material fact. They maintain that Peoples Bank as the lender owed a fiduciary duty to them as they had established a special relationship with it and relied on it to monitor and keep them apprised of the loan's viability and the underlying real estate. They state in their brief that it is yet to be determined whether a fiduciary relationship existed between them and Peoples Bank and whether the bank breached a fiduciary duty.

They further assert that Peoples Bank by not taking some action in monitoring the disbursement of the November 1990 loan may have become a party to the acts of Mr. Moore. This Court has concluded that even under the alleged facts set out by the Rhoadses, they have failed to establish a valid legal claim against Peoples Bank and therefore, the circuit court correctly granted summary judgment for the bank.¹

Summary judgment should only be used 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 or her favor against the movant. Steelvest, Inc. v. Scansteel Service Center, Inc., Ky., 807 S.W.2d 476 (1991), quoting Paintsville Hospital Co. v. Rose, Ky., 683 S.W.2d 255 (1985); Farmer v. Heard, Ky. App., 844 S.W.2d 425 (1992). Summary judgment is properly granted only when there is no genuine issue as to any material fact, and the movant is entitled to prevail as a matter of law. Mullins v. Commonwealth Life Ins. Co., Ky., 839 S.W.2d 245, 247 (1992); CR 56.03.

This Court has uncovered no legal authority to support the Rhoadses contention that Peoples Bank breached any fiduciary duty in the instant case. In Bale v. Mammoth Cave Production Credit Association, Ky., 652 S.W.2d 851 (1983), this Court and later the Kentucky Supreme Court, was faced with a similar yet

¹Peoples Bank maintains that this Court should reject the Rhoadses' brief, because they have failed to show where their issues were preserved pursuant to Kentucky Rule of Civil Procedure (CR) 76.12(4)(c)(iv) and that they have cited to depositions which have not been certified and included in the record on appeal. We have decided to review the merits of the case and have concluded that the Rhoadses' arguments lack merit.

not identical factual scenario. The lender in Bale according to the borrowers, had misrepresented the financial affairs of another party. This party had borrowed money from the lender and had also entered into business transactions with the complaining borrowers, and the lender knew of these transactions. The borrowers also contended that the lender engaged in a course of conduct after the loan was made to convince the borrowers that their interests were being protected when in fact the lender was not protecting their interests, but rather was inducing them to refrain from taking independent action against the other party in order to delay the date of the other party's bankruptcy until the lender's second mortgage was no longer in jeopardy of being set aside as a preferential transfer. The Supreme Court in adopting this Court's opinion held that the conduct of the lender, if true, did not afford the complaining borrowers an affirmative defense to the lender's action to enforce the notes that the borrowers had entered into. Id., at 855. The Court noted that such fraudulent conduct by the bank might provide the borrowers with a counterclaim but not with an affirmative defense. Id. See also American Fidelity Bank & Trust Co. v. Hinkle, Ky. App., 747 S.W.2d 620 (1988), (holding that the signor on a note whether a co-signor or accommodation party, who could not prove a legally cognizable defense, was liable for the amount due on the original note even though the lender accepted eleven renewals by the other signor alone and that the trial court should have directed a verdict for the lender); cf. H.C. Witmer Co. v. Richardson, 271 Ky. 112, 111 S.W.2d 577 (1937).

In the instant case, the Rhoadses have asserted no genuine issues of material fact arising from their answer or counterclaim which would show a breach of fiduciary duty owed them by Peoples Bank and entitle them to prevail at trial. The Rhoadses and the Moores both signed the note with Peoples Bank as they were both active investors in the corporation. While apparent conflicts developed between the Rhoadses and the Moores, and the corporation began experiencing serious cash flow problems, the Rhoadses have shown no actions by Peoples Bank which were fraudulent or which breached any fiduciary duty owed them. The bank was not obligated to keep them apprised of every financial detail involving the Moores. The record reflects in fact that Peoples Bank tried to work with the Rhoadses and the Moores in 1995 to avoid a foreclosure action by lending an additional amount of money to allow them to look at options for the property and by agreeing to refinance the note if both borrowers would agree to each place \$50,000 in an escrow account to ensure future payments. The Rhoadses apparently agreed to this, but the Moores did not. Further, regarding the 1990 \$150,000 loan that Peoples Bank loaned the corporation at Mr. Moore's request, the Rhoadses again have shown no concrete evidence of fraud, negligence or improprieties on the part of the bank. The \$110,000 check that Moore wrote to himself out of this loan to reimburse himself for earlier repair expenditures came from a separate banking account at another institution. The Rhoadses have cited nothing to show that Peoples bank acted improperly or could have controlled Mr. Moore's subsequent

actions after he received the loan check from the bank. Many of the Rhoadses' allegations appear to be against Mr. Moore who is not a party to this appeal. They have made other general allegations but have not shown any concrete evidence to support them.

The cases cited by the Rhoadses such as Henkin, Inc. v. Berea Bank & Trust Co., Ky. App., 566 S.W.2d 420 (1978), are fundamentally distinguishable. See Bale v. Mammoth Cave Prod. Credit Ass'n., 652 S.W.2d at 854. In Henkin and the other cases they have cited, a bank or similar parties clearly acted in ways which harmed other parties to which they owed fiduciary duties such as by acting on confidential information which benefitted the actors and harmed the parties to which duties were owed. The Rhoadses simply have not shown such conduct or harm in the instant case. Even under the strict summary judgment standard set out in Steelvest, Inc. v. Scansteel Service Center, Inc., supra, and taking the facts in the light most favorable to the Rhoadses, they have simply not shown a viable claim on which they could prevail at trial.

For the foregoing reasons, this Court affirms the judgment of the Fayette Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANTS:

Gary R. Matthews
Lexington, Kentucky

BRIEF FOR APPELLEE:

James T. Gilbert
Richmond, Kentucky