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Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-000343-MR

DONALD LEE NEWMAN — APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE SHEILA ISAAC, JUDGE
ACTION NO. 96-CI-02073

TERRILL WAYNE NEWMAN, BENEFICIARY
UNDER THE LAST WILL AND TESTAMENT
OF JOE R. RIDDELL;
FAMILY, INC, OWNED IN PART
BY THE LATE JOE R. RIDDELL;
DONALD B. HARRIS, CO-EXECUTOR
OF THE ESTATE OF JOE R. RIDDELL; AND
DONALD VAZMINA, CO-EXECUTOR OF THE
ESTATE OF JOE R. RIDDELL — APPELLEES

AND: NO. 1998-CA-001216-MR

DONALD LEE NEWMAN; AND
ROBERT E. WIER — APPELLANTS

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE SHEILA ISAAC, JUDGE
ACTION NO. 96-CI-02073

TERRILL WAYNE NEWMAN AND
FAMILY INC., OWNED IN PART BY THE
LATE JOE R. RIDDELL — APPELLEES

OPINION
AFFIRMING IN PART - REVERSING AND REMANDING IN PART
** ** ** ** **

BEFORE: EMBERTON, GUIDUGLI AND SCHRODER, JUDGES.

GUIDUGLI, JUDGE: In 98-CA-343-MR, Donald Newman (Donald) appeals from orders of the Fayette Circuit Court which granted summary judgment in favor of Terrill Newman (Terrill), Family, Inc. (the Corporation), and Donald B. Harris (Harris) and Donald Vazmina (Vazmina) (collectively the Co-Executors). In 98-CA-1216-MR, Donald and his attorney, Robert E. Wier (Wier) appeal from an order entered April 27, 1998, directing Wier to pay $14,000 in sanctions to Terrill and the Corporation pursuant to CR 11 and CR 37. We affirm in part and reverse and remand in part.

Although these two separate appeals have been consolidated by order of this Court, we will treat them separately for purposes of this opinion.

1998-CA-00343-MR

Donald and Terrill Newman are the sons of Durelle Riddell (Durelle) and the step-sons of Joe Riddell (Joe). Family, Inc. is a corporation organized under the laws of Kentucky which was owned in part by Durelle and Joe.

Durelle died testate in August 1992. Pursuant to the terms of her will, all of her property passed to Joe, who was also named executor of her estate. Unfortunately for all involved, Joe died testate in June 1995, before achieving final settlement of Durelle's estate. Under the terms of his will, his stock in the Corporation passed directly to Terrill, and Donald and Terrill were to equally divide the remainder of his estate. Harris and Vazmina were named co-executors of Joe's estate in his

will. On August 23, 1995, Harris and Vazmina were appointed successor co-executors of Durelle's estate.

It appears that Donald became increasingly unhappy with the Co-Executors' handling of the two estates. This unhappiness culminated on or about November 3, 1995 when Donald filed a motion with the Fayette District Court (the district court) seeking to remove Harris and Vazmina as the co-executors of Joe's estate due to their alleged failure to file an inventory within 60 days and alleged depletion and mismanagement of estate assets. This was followed by a motion filed on or about March 13, 1996 seeking to remove Harris and Vazmina as co-executors of Durelle's estate.

On April 3, 1996 following a hearing, the district court entered a joint order in Joe and Durelle's separate estates requiring the Co-Executors to file a final settlement of Durelle's estate with the court prior to March 22, 1996.[1] In compliance with the district court's order, the Co-Executors filed a final settlement of Durelle's estate on or about March 21, 1996 stating that Joe had received his share of her estate as set forth in the will and that no claims or lawsuits had been filed against her estate. Donald responded by filing a notice of exceptions to the proposed settlement on or about April 2, 1996.

On June 20, 1996, before the district court had an opportunity to rule on Donald's motion to remove the Co-Executors and his exceptions to the final settlement of Durelle's estate,

[1]Apparently the district court ordered the parties to do the above-mentioned things at the hearing on March 18, 1996 and did not file the actual order until April 3, 1996.

Donald filed suit in the Fayette Circuit Court against Terrill as beneficiary of Joe's estate, the Co-Executors in their capacity as such in regard to Joe's estate, and the Corporation as an entity owned in part by Joe. In the complaint, Donald alleged that (1) the Co-Executors had failed to settle the estates of Joe and Durelle; (2) the Co-Executors had failed to pursue or protect assets of Joe's estate, namely loans from Joe and/or Durelle to Terrill and/or the Corporation, and rental from Terrill for use of estate property; (3) the Co-Executors mismanaged Joe's estate; and (4) the Co-Executors had improperly favored Terrill in the administration of Joe's estate. Donald asked that Joe's estate be settled, that the assets of Joe's estate be properly distributed, and that the Co-Executors be ordered to pay damages for their alleged breach of fiduciary duties.

On August 21, 1996, the Co-Executors filed a motion with the trial court asking for approval of the final settlement in Durelle's estate previously filed in the district court. The Co-Executors renewed their motion on August 28, 1996, this time alleging that Donald had no standing to object or file exceptions to the final settlement. Despite the Co-Executor's claims, the trial court entered an order on August 28, 1996, giving Donald fourteen days to serve interrogatories on the Co-Executors "which shall contain only requests for discovery or information concerning specific property or properties that [Donald] believes to have been in the possession of the former Executor Joe R. Riddell, or which [Donald] believes to have come into the possession of the Co-Executors of the Estate of Durelle P.

Riddell." [emphasis deleted] The trial court ultimately approved the settlement of Durelle's estate by order entered September 19, 1996.

It appears that during a document inspection held in October 1996, Donald discovered what he believed to be evidence of loans from Joe and Durelle to the Corporation. Apparently Donald asked the Co-Executors to pursue collection of the alleged loans because on October 21, 1996, they filed a motion asking to be excused from the obligation of "determining the amount of, payment of, and effect of checks payable to [the Corporation or Terrill], marked "Loan" and made by Joe Riddell, and the financial relationship between the parties." Although Donald initially opposed the Co-Executor's motion, on November 18, 1996 he filed his own motion seeking leave of the trial court to proceed directly against Terrill and the Corporation to collect $60,000 in loans allegedly made by Joe and Durelle. Donald also asked that Durelle's estate be reopened to pursue collection of any loans made by her. In an order entered December 9, 1996, the trial court granted Donald's motion to proceed directly against Terrill and the Corporation but denied permission to reopen Durelle's estate. Donald filed his amended complaint, which included an action under Count IV for recovery of the alleged loans against Terrill and the Corporation, on January 13, 1997.

Immediately following the filing of the amended complaint, Terrill and the Corporation filed a motion seeking partial summary judgment as to Count IV. One of the arguments made in favor of summary judgement was that the checks relied

upon by Donald did not constitute written contracts and as such would fall under the five year statute of limitations for oral contracts established by KRS 413.120(1). Following a hearing, the trial court entered an order on February 19, 1997 in which it held "that checks written by [Joe and Durelle] do not constitute written contracts as required by KRS 413.090 and are merely evidence of potential oral contracts." In another order entered February 24, 1997, the trial court held that Donald lacked standing to assert claims against Terrill and the Corporation for loans allegedly made by Durelle or debts allegedly owed to her or her estate.

On May 13, 1997 the Co-Executors filed two motions seeking summary judgment in their favor on Donald's claims. In regard to Durelle's estate, the Co-Executors argued the lack of any genuine issue of material fact. In regard to Joe's estate, the Co-Executors argued that Donald could only pursue the collection of any loan made by Joe prior to five years before his death and that Donald had failed to show reaffirmation of any alleged corporate debt by the Corporation.

The case continued on in a similar manner for several more months with all parties involved filing yet more motions for summary judgment and responses thereto. Finally, on October 13, 1997 the trial court entered an opinion and order ruling in pertinent part:

> 1. On Plaintiff's claim for sums owed to the Riddell estate by Terrill Newman and Family, Inc., judgment for the Defendants;

> 2. On Plaintiff's claim against the co-executors for failing to pursue the above sums, judgment for the Defendants[.]

In regard to Donald's claims against Terrill and the Corporation for the alleged loans made by Joe, the trial court first summarized Donald's evidence as follows:

> Discovery has produced the following evidence of potential oral contracts arising from these "loans":
>
> 1. checks made to Family, Inc. by Joe or Durelle containing "loan," "deposit," or other notations on the "for" line;
>
> 2. notations regarding "notes payable" on Family, Inc.'s annual balance sheets, only some of which name "Joe Riddell" or "JRR" as creditor;
>
> 3. Joe and Durelle's checkbook registers, which contained "loan" notations under various checks written to Family, Inc.;
>
> 4. Joe and Durelle's check stubs containing "loan" notations;
>
> 5. savings account pas [sic] books showing withdrawals by Joe and Durelle;
>
> 6. Family, Inc.'s statements of interest income;
>
> 7. Donald's affidavit in which he states that his parents intended Family, Inc. to repay them;
>
> 8. Terrill's affidavit that Joe and Durelle made gifts to Family, Inc., without intending repayment; and
>
> 9. a few miscellaneous pages from Family, Inc. books.

In regard to Donald's evidence, the trial court first found that none of the above items rose to the level of a written contract. In so holding, the trial court stated:

> Due to the lack of terms of repayment, interest rates, etc., these remain, at best, evidence of oral contracts.
>
> To prove an enforceable oral contract to lend money there must be definiteness in the essential terms of the agreement. In particular there must be proof of the amount of money to be loaned, the time within which the loan will be made, and the term of such loan, i.e., whether the note will be payable upon demand or upon a date certain.
>
> In re Louden, 106 B.R. 109, 112 (Bankr. E.D.Ky. 1989), citing Klein v. Citizens Union Nat. Bank, Ky., 136 S.W.2d 770 (1940). Of all the evidence of loans submitted by Donald, only *one* loan (made in March 1973, in the amount of $7,200) could possibly be sufficiently definite in its terms. No other evidence indicates whether the money was to be repaid at all, much less the times for repayment or the other terms of the loans.

The trial court further held that aside from his failure to show that the above documents constituted enforceable contracts, Donald's claims were also barred by the statute of limitations, stating:

> Under KRS 413.120, oral contracts have a five-year statute of limitations, while written contracts are subject to a fifteen-year statute of limitations pursuant to KRS 413.090. As previously discussed, the Court finds that none of the evidence of contracts rises to the level of written contracts. However, even if the loans were held to be enforceable contracts, the vast majority would be barred by the five-year statute of limitations. Note that the January 1, 1975 Statement of Interest Income, the only document the Court finds could possibly be contorted into a written contract, would still be barred by the fifteen year statute of limitations.

In regard to Donald's claim that the Corporation had reaffirmed some of the alleged loans which were otherwise barred by the statute of limitations, the trial court stated:

> It must be remembered that before reaching the issue of reaffirmation, the original transactions must be proven, which as previously discussed Donald cannot do because of the lack of terms of repayment. Assuming, though, that those original contracts could be established, Kentucky law requires that to escape the statute of limitations, a reaffirmation or acknowledgment "must be a distinct, unqualified, unconditional recognition of an obligation for which the person making the admission is liable." Vinson's Ex'xs v. Maynard, Ky., 178 S.W.2d 603, 605 (1944). The acknowledgment must be so clear and express that the acknowledgment itself can be sued upon. Plaintiff argues that the mere recording of "notes payable" on Family, Inc.'s balance sheet every year is a reaffirmation of debt owed to Joe by Family, Inc. There are no express statements in which a representative or agent of Family, Inc. says he intends to repay the debt, or that the debt is correct and owed, and there are no corporate resolutions regarding debts owed to Joe.

In regard to Donald's claims against the Co-Executors, the trial court held:

> In light of the Court's ruling on Terrill and Family, Inc.'s summary judgment motion, the co-executors cannot be held liable for their failure to pursue and collect these loans. Thus, to the extent that Donald's claims against the co-executors emanate from their failure to collect the alleged loans to Family, Inc. and Terrill on behalf of Joe's estate, the co-executors' motion for partial summary judgment is hereby sustained. [emphasis deleted]

Summary judgment in favor of the Co-Executors on the balance of Donald's claims was entered on December 10, 1997. The trial court's entry of summary judgment was made final by order entered January 8, 1998. This appeal followed. Further facts will be developed where necessary.

I. DID THE TRIAL COURT ERR IN GRANTING SUMMARY JUDGEMENT IN FAVOR OF TERRILL AND THE CORPORATION?

Donald claims that the alleged loans from Joe to Terrill and the Corporation fell into three categories: (1) a long term loan made in 1973; (2) a capital loan for the purchase of real estate in 1988; and (3) an operating line of credit consisting of checks written by Joe from 1989 until his death in 1995. We note at the outset that "[t]he standard of review on appeal of a summary judgment is 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, Ky. App., 916 S.W.2d 779, 781 (1996). Donald maintains that genuine issues of material fact exist concerning not only the existence of the loans themselves, but also the application of the applicable statutes of limitations.

A. The 1973 Loan

Evidence contained in the record shows that on February 23, 1973, Joe wrote a check to the Corporation from a joint account with Durelle in the amount of $7,200. The "memo" line on the check says "mortgage loan 218 E. Seventh St. Lexington Ky." In 1974 Terrill, in his capacity as vice president of the Corporation, sent Joe a "Statement of Interest Income" referencing a March 1973 loan in the amount of $7,200 at a yearly interest rate of 7%. According to the statement, as of March 1974 $720 had been paid on the principal and $504 had been paid on interest, leaving a balance of $6,480.

In further support of his allegation that the 1973 check constituted a loan, Donald submitted two ledger sheets from the Corporation titled "Note Payable, Joe R. Riddell, Maple Street. Those pages reflects the information contained in the above-referenced interest statement, and also show interest payments for 1975-1980. What is interesting to note, however, besides the difference in addresses between the check and the ledger sheets, is that the interest payments for 1975-1980 were calculated at an interest rate of 8.5.% as opposed to 7%.

Donald also alleges that a Balance Sheet for the Corporation as of April 21, 1986, shows that the Corporation "began rolling interest into the debt and carried the debt unchanged from 1981 through 1986." This Balance Sheet has a line stating "Notes Payable to Mr. Joe Riddell" indicating a balance of $10,376.37. Donald attached other sheets indicating the accumulation of interest for 1987 and showing a balance of $11,242.09, and alleged that this note was "subsumed" within the alleged 1988 capital loan.

As noted above, the trial court indicated that this was the only alleged loan which was sufficiently definite in its terms (apparently based on the check and the interest statement for 1974) to rise to the level of an oral contract, and that it could "possibly be conforted into a written contract."

We need not address Donald's argument that genuine issues of material fact exist concerning the existence of the loan because, even if Donald was able to prevail on this point, the trial court did not err in finding that the statute of

limitations has long since expired. Pursuant to KRS 413.120, actions upon an oral contract are to be brought within five years from the accrual of the cause of action. Under KRS 413.090, actions based on a written contract are to be brought within 15 years. The question then becomes when did the cause of action on the 1973 loan accrue?

It is a long-standing rule in Kentucky that a note which is silent as to when payment is due is to be treated as a demand note. See Kendal v. Talbot, 8 Ky. 237 (1818); Payne v. Mattox, 4 Ky. 164 (1808). "A note payable on demand is treated as a due note, and it is settled rule that the statute of limitations, [sic] begins to run at the date of the note." Gould v. Bank of Independence, Ky., 94 S.W.2d 991, 992 (1936). All of the documents which Donald purports to constitute the 1973 loan are silent as to when payment is due. As such, any cause of action based on the 1973 loan accrued on February 23, 1973, that being the date of the check. Based on that date, the fifteen year statute of limitations would have expired on February 23, 1988, and the five year statute of limitations would have expired on February 23, 1978. As Donald did not file suit until June 20, 1996 his claim is clearly time barred. Because the cause of action accrued as a matter of law on the date of the alleged note, any discretion on the part of Joe in delaying or somehow controlling collection of the note makes no difference.

B. The 1988 Capital Loan

Donald alleges that in 1988 Terrill purchased a piece of property at 507 N. Broadway for $165,000. Donald further

alleges that $130,000 of the purchase price came directly from Joe through respective deposits of $80,000 and $50,000. In support of his allegations, Donald once again relies on a compilation of several documents which he alleges constitutes evidence of a loan. These documents consist of (a) an unidentified checkbook register showing check 759 dated May 25 payable to First Security in the amount of $50,000 with the notation "loan on 507 N. B'way" written on the "for" line; (b) a ledger sheet from the Corporation showing receipt of $80,000 with the notation "Cash - Loan to Corp Cash (JRR)"; (c) passbooks for accounts maintained by Joe and Durelle at Lexington Federal Savings Bank showing respective withdrawals of $40,000 each on May 20, 1988 along with a cashier's check from Lexington Federal Savings Bank dated May 20, 1988 payable to Joe or Durelle; (d) a checkstub and check from the Corporation dated June 2, 1988 in the amount of $52,276.12 payable to Joe with "payment of temporary loan on 507 N. Bdway" written on the checkstub and "repay of temporary loan" written on the check; (e) a ledger sheet from the Corporation showing payment of $35,000 to Joe with the notation "Loan expense - repayment to JRR on 507"; and (f) a comparative balance sheet for the years 1987-1988 showing a column entitled "Notes Payable" with $11,242.09 listed for 1987 and $92,028.97 listed for 1988.[2]

[2]Donald alleges that the $80,786.88 remaining for 1988 after subtracting $11,242.09 constitues a principal of $80,000 with $786.88 in accrued interest. There is no notation on this sheet as to whom this note(s) was payable to or for what is was payable.

As the trial court noted in its opinion, the evidence produced by Donald in regard to the existence of a 1988 loan rises only to the level of evidence of a potential oral contract. While there may, in fact, be a genuine issue of material fact as to whether an oral contract exists, we note that his claim is barred by the five year statute of limitations of KRS 413.120. The statue of limitations for the check of May 25, 1988 would have run on May 23, 1993. Likewise, any cause of action in regard to the $80,000 check of May 20, 1988 would have run on May 20, 1993. Once again, Donald filed his action too late.

C. Operating Line of Credit

Finally, Donald alleges that Joe continued to bankroll the Corporation by extending an operating line of credit from 1989-1995. As an example of his allegations, Donald introduced numerous canceled checks written in 1991 to the Corporation with "Loan" written on the memo line. Out of all the checks submitted, one was written by Joe, the rest by Durelle. Donald also submitted a checkbook register showing checks written to the Corporation with "loan" inscribed underneath the entry. Through the pleadings submitted in this case, it appears that these alleged loans total $74,263.51. Donald freely admitted in his pleadings filed with the trial court that "no express written note has yet surfaced applicable to these operating loans."

Based on Donald's admission, we once again agree with the trial court that the evidence submitted in support of his allegations rises only to the level of evidence of potential oral contracts, thus subjecting his cause of action to the five year

statue of limitations of KRS 413.120. However, we disagree with the trial court's finding that the statute of limitations precludes Donald's cause of action as to all the checks.

Donald filed his amended complaint on January 13, 1997. Based on that date, the statute of limitations would not bar Donald's action as to any check written after January 13, 1992. Thus, Donald is entitled to reinstatement of his cause of action for any alleged loan made by Joe in the form of a check written after January 13, 1992.

D. The Doctrine of Reaffirmation

Donald argues that by acknowledging the amount of debt owed to Joe on its balance sheets from the early 1980s through 1992, the Corporation reaffirmed the debt and thus tolled the statutes of limitation. Donald summarized his evidence of the Corporation's reaffirmation as follows in his brief on appeal:

> From 1979 through 1992, FI essentially had one creditor, Joe Riddell. Beginning in 1980, FI annually reported as a "note payable" on its balance sheet a figure directly correlating to the amount it owed Joe Riddell. [citation to record omitted] Thus, from 1982 through the end of 1985, FI annually recognized the identical figure of $10,376.37 in the "notes payable" category. In 1986, FI expressly labeled that category as "Notes payable to Mr. Joe Riddell." [citation to record omitted] For each year ending after 1986, the notes payable category on the FI financial statement directly rose and fell with the amount of money Joe Riddell lent to or was repaid by FI. Thus, the change from 1987 to 1988, a total of $80,786.88, identically mirrors Joe Riddell's loan to FI of $80,000 for the purchase of 507 N. Broadway and $786.88 in interest payable from the preceding year. [citation to record omitted] Likewise, the debt change in 1991 is exactly $21,863.51, the precise amount of loans from Joe Riddell to FI for that year,

> and the precise amount of the checks deposited as loans into FI for that year. [citation to record omitted]

We agree with the trial court that the evidence offered by Donald does not rise to the level of an affirmation.

Donald is correct that:

> one under a moral, as well as a legal, obligation to pay a note becomes liable upon a new promise to pay made after the bar of limitations has become complete, the new promise creating a new obligation.

Vinson's Ex'xs v. Maynard, Ky., 178 S.W.2d 603, 605 (1944). However, what is equally clear is that a party claiming express acknowledgment of a debt now barred by an applicable statute of limitations must prove that acknowledgment by clear and convincing evidence. Hutsell v. Current's Adm'r., Ky., 215 S.W.2d 978, 980 (1948).

> [A]cknowledgement of a debt to lift the bar of limitation must be a distinct, unqualified, unconditional recognition of an obligation for which the person making the admission is liable. [citation omitted]. As said in the early case of Harrison v. Handley, 1 Bibb 443, and uniformly adhered to, 'The acknowledgment from which the law is to raise a promise, contrary to the provisions of the statute, must be clear and express, where the mind is brought directly to the point — debt or no debt at the present time, not whether the debt was once an existing demand.'

Maynard, 178 S.W.2d at 605.

Based on the foregoing, Donald has failed to show reaffirmation of a debt now barred by the applicable statute of limitations. While he may have succeeded in showing that the Corporation recorded "notes payable" on its books and balance sheets, there is no evidence that Terrill, the Corporation or

anyone else ever made a promise to repay any of the alleged loans. Merely acknowledging the existence of a debt on corporate accounting books does not rise to the level of reaffirmation of a debt now barred by the statute of limitations in the absence of evidence of some type of promise to pay.

II. DID THE TRIAL COURT ERR IN GRANTING SUMMARY JUDGMENT IN FAVOR OF THE CO-EXECUTORS?

Donald challenges the granting of summary judgment in favor of the Co-Executors on several grounds, which we will address separately.

A. The Failure to Pursue the Alleged Loans

Donald argues that if loans existed but were rendered uncollectible due to some action of the Co-Executors, an issue of fact exists as to whether the Co-Executors breached their fiduciary duty.

As to the alleged 1973 loan and the alleged 1988 capital loan, this argument is without merit. As we have noted, the statutes of limitation on both of these alleged loans ran well before Joe's death, therefore there was nothing for the Co-Executors to collect. The issue of the operating line of credit, however, is a different matter.

In regard to all of the checks written by Joe prior to January 13, 1992, we believe that summary judgment in favor of the Co-Executors was proper. As the trial court stated, "[i]n light of the Court's ruling on Terrill and Family, Inc.'s summary judgment motion, the co-executors cannot be held liable for their failure to pursue and collect these loans." However, in light of

the fact that we have ruled that Donald is entitled to reinstatement of his cause of action for any checks written by Joe after January 13, 1992, he is also entitled to the reinstatement of any claim he may have against the Co-Executors arising from these checks.

B. Sale of the Residence

On July 31, 1996, the Co-Executors filed a motion seeking leave to sell Joe and Durelle's residence. According to the contract attached to the motion, the property was to be sold for $78,500. Although Donald objected to the sale of the property in a response filed August 7, 1996, the trial court entered an order approving the sale of the property on August 15, 1996.

On appeal, Donald alleges that the Co-Executors breached their fiduciary duty in regard to the sale of the property because (1) they failed to pursue sale of the property in June 1995 when a neighbor expressed an interest in buying the property; and (2) the Co-Executors knew the sale was invalid because Joe's estate was solvent. Donald further alleges that had the property sold in July 1995, the purchase price would have been in the mid to high $80,000s. Donald alleges that before they could pursue the sale, Terrilll decided to retain the property. The Co-Executors deny knowledge of the neighbor's interest in the property. Based on these facts, Donald argues that the Co-Executors improperly favored Terrill to his detriment. We disagree.

In regard to the alleged potential sale in July 1995, Donald has brought forth nothing which shows that the Co-Executors acted improperly. All he has shown is that some neighbors expressed an interest in the property but it appears that no offer was ever made. Although Donald claims that he informed the Co-Executors of his objection to letting Terrill live on the property and urged them to pursue sale of the property, he never undertook any formal proceedings to force sale of the property. Because Donald failed to attempt to protect his interest in the property prior to the sale he now complains of, he cannot now be heard to complain of the actions of the Co-Executors.

In regard to his objections in regard to the actual sale of the property, we note that Donald has not directly challenged the trial court's order granting the Co-Executors leave to sell the property. As the Co-Executors point out in their brief on appeal, Donald cannot claim that the Co-Executors acted improperly when he has not yet shown that the sale was somehow improper.

C. Terrill's Use of the Real Property

Donald argues that it was improper of the Co-Executors to allow Terrill to live rent free in the residence for over a year. Donald also challenges the Co-Executors' use of estate funds to pay for Terrill's utility expenses during the time he lived in the property. In support of his allegations, Donald attached a register report from the estate checking account showing payments to various utility companies from July 1, 1995

to October 26, 1996. In support of their actions, the Co-Executors argue that they would have been unable to maintain insurance on the house had it been allowed to remain vacant and that the house was needed as storage space for the estate's personal property.

We agree with Donald that there are genuine issues of material fact as to whether the Co-Executors breached their fiduciary duty in allowing Terrill to live rent free on the property while paying his bills. Thus, it was improper for the trial court to grant summary judgment on this issue.

III. WERE THE FEES AWARDED TO THE CO-EXECUTORS AND/OR THEIR ATTORNEYS PROPER?

On October 21, 1996 the Co-Executors filed a motion seeking leave of the trial court to pay themselves and their attorney, Lawrence Sherman, $3,500 each. It appears that Sherman was the attorney retained by the Co-Executors to handle the estates at issue herein. Donald objected, arguing that the Co-Executors had already taken $7,000 from the estate as "executor's fees," and that payment of an additional $7,000 to the Co-Executors would result in a fee exceeding the maximum amount permitted by KRS 395.150. Donald further alleged that the Co-Executors had produced no documentation as to the reasonableness or necessity of any fee paid to Sherman. The Co-Executors' motion was granted by order of the trial court entered December 9, 1996.

On November 3, 1997 the Co-Executors filed a motion seeking an order of the trial court "permitting them to pay the attorney fees of Julius Rather and A. Lawrence Sherman, [and] to

pay the Co-Executor fees[.]" Rather was the attorney who represented the Co-Executors during the current action. This was followed by a second motion on November 11, 1997, in which the Co-Executors sought $5,000 each as executor's fees, $7,312.50 for Rather, and $7,040.63 for Sherman. Donald once again objected. In regard to the Co-Executors' fees, Donald alleged that although the maximum fee for their services should be $12,524, they had already received $14,000. As to the attorneys' fees, Donald again argued that the reasonableness of the fees sought had not yet been established. On November 21, 1997, the Co-Executors filed a joint affidavit in which they argued that they had spent an "inordinate" amount of time exercising their duty as Co-Executors, thus justifying payment of the fee sought. The trial court entered an order granting the Co-Executor's motion on November 25, 1997.

Aside from the motions filed by the Co-Executors, Donald alleges that the estate check register shows various payments to the Co-Executors, Rather and Sherman which he contends were unauthorized by the trial court.

Pursuant to KRS 395.150, the amount paid to an executor for his services as such is not to exceed 5% of the value of the decedent's personal property plus 5% of the value of the income collected by the executor. KRS 395.150(1). However, if the executor is able to show that he:

> has performed additional services in the administration of the decedent's estate, the court may allow to the executor . . . such additional compensation as would be fair and reasonable for the additional services rendered, if the additional services were:

> (a) Unusual or extraordinary and not normally incident to the administration of a decedent's estate[.]

KRS 395.150(2)(a). Based on the record compiled herein, it cannot be seriously argued that the Co-Executors did not render services of an unusual or extraordinary nature. The Co-Executors were forced to defend against Donald's claims in what has been a hard fought battle from the beginning over the Riddell estates. Hence, they are clearly entitled to a fee in excess of the 5% minimum. The record also supports the payment of fees to attorneys Rather and Sherman. We see no error on the part of the Co-Executors in retaining Sherman to handle the two estates at issue in this dispute and in also retaining Rather to defend against Donald's claims. Based on the foregoing, the trial court did not err in its award of fees.

IV. DID THE TRIAL COURT ERR IN REFUSING TO REOPEN DURELLE'S ESTATE?

Finally, Donald argues that the trial court erred in refusing to reopen Durelle's estate once he came forward with evidence of alleged loans from Durelle to Terrill and/or the Corporation. We disagree.

First, Donald's claim in regard to any loans allegedly made by Durelle suffer from the same deficiency as his claims in regard to loans allegedly made by Joe - they are barred by the applicable statutes of limitation. Secondly, we agree with the trial court's holding that Donald lacks standing to assert a claim against Durelle's estate as he was not an heir thereto. Hence, the trial court did not err in refusing to reopen Durelle's estate.

In this appeal, Donald and his attorney, Robert E. Weir challenge the trial court's assessment of sanctions in the amount of $14,000 pursuant to CR 11 and CR 37.

On May 5, 1997 Terrill and the Corporation filed a motion to compel pursuant to CR 37 seeking an order requiring Donald to respond to outstanding interrogatories and requests for production of documents. In its motion, Terrill alleged that he propounded discovery to Donald on January 29, 1997 for the purpose of ascertaining the nature of Donald's claims. Specifically, Terrill asked Donald to identify each loan which he claimed needed to be repaid. Terrill alleges that when Donald requested that the discovery requests be drafted more specifically, Terrill complied and forwarded the redrafted discovery requests to Donald. In further support of his allegations, Terrill alleged that Donald was evasive to questions regarding the identity of any alleged loans.

On May 1, 1997 Donald responded to the motion to compel by arguing that the redrafted requests constituted a second set of interrogatories. It appears that Donald provided responses to Interrogatories 1-7, but refused to answer interrogatories no. 8-17 on the ground that they were in excess of the number of interrogatories allowed by the Rules of Civil Procedure and that he had already responded to discovery requests. Donald maintained that he timely and adequately responded to Terrill's first discovery requests, and later voluntarily supplemented his responses to avoid a discovery dispute. Donald argued that when

he received the second set of discovery requests he refused to respond to any surplus questions.

On May 20, 1997 the trial court entered an order granting the motion to compel and ordering Donald to specifically identify each alleged loan and for each to state why it would not be barred by the applicable statute of limitations. The order further provided that Terrill's request for sanctions would be taken under advisement for resolution at a future date.

In a second order entered April 27, 1998 the trial court ordered Weir to reimburse Terrill and the Corporation a total of $14,000; $2,000 attributable to CR 37 and $12,000 attributable to CR 11.[3] In regard to the sanctions pursuant to CR 37, the trial court found that Donald's "opposition to the motion to compel was not substantially justified, and that there are no other circumstances which make an expense award unjust." As to the Rule 11 sanctions, the trial court noted that Terrill had filed an invoice showing accrued attorneys' fees in the amount of $24,700.80. In awarding Terrill $12,000 in attorneys' fees, the trial court stated:

> Although not inclined to grant the entire cost of the defendse [sic], the Court does find that Plaintiff's claims against Defendants were not well grounded in fact and were not warranted by existing law. Plaintiff's evidence of checks, checkbook registers, corporate ledgers and the like do not constitute written contracts, and even if they did, Plaintiff had insurmountable statute of limitations problems which were obvious from the beginning of the suit.

[3]It appears that Terrill later moved for Rule 11 sanctions some time after his motion to compel.

Pursuant to CR 37.01, a party who files a motion to compel and ultimately succeeds is entitled to an award of "reasonable attorney's fees, unless the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust." CR 37.01(d)(i). Based on our examination of the record herein, we believe there was a genuine and reasonable dispute as to whether Donald was required to respond to the discovery requests in question and that his opposition to Terrill's motion was justifiable. Therefore, the trial court erred in awarding costs pursuant to CR 37.

Pursuant to CR 11:

> The signature of an attorney or party constitutes a certification by him that he has read the pleading, motion or other paper; that to the best of his knowledge, information and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. . . . If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

Once again, based on our review of the record we do not believe that sanctions are warranted in this case. Donald had evidence of what he believed to be loans from Durelle and Joe to

Terrilll and the Corporation. While he ultimately did not prevail on his claim, we believe that his claim was grounded in fact and warranted by law, particularly in light of the questions raised regarding the statutes of limitation. While there is obviously quite a bit of bad blood between Donald and Terrill, we have found no evidence that Donald's claim was filed for an improper purpose.

Having considered the parties' arguments on appeal, the orders of the Fayette Circuit Court entered October 13, 1997 granting summary judgment in favor of Terrill, the Corporation and the Co-Executors is affirmed except to the extent that it grants summary judgment on Donald's claim regarding checks written by Joe after January 13, 1992. That portion of the order is reversed and the matter remanded for reinstatement of that portion of Donald's claim.

The order of the Jefferson Circuit Court entered December 10, 1997 granting summary judgment in favor of the Co-Executors is affirmed except to the extent that it grants summary judgment on Donald's claim regarding Terrill's rent-free use of the residence and the Co-Executor's payment of Terrill's utility expenses from estate funds. That portion of the order is reversed and the matter remanded for reinstatement of Donald's claim regarding that matter.

ALL CONCUR.

BRIEF AND ORAL ARGUMENT FOR APPELLANT, DONALD NEWMAN:

Robert E. Wier
Lexington, KY

BRIEF AND ORAL ARGUMENT FOR APPELLEE, TERRILL NEWMAN:

Thomas D. Bullock
Lexington, KY

BRIEF AND ORAL ARGUMENT FOR
APPELLEE, HARRIS & VAZMINA:

Julius Rather
Lexington, KY