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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-002723-MR

COUNTRYSIDE BUILDERS, INC AND
GALET DEVELOPMENT CO., INC. APPELLANTS

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE F. KENNETH CONLIFFE, JUDGE
ACTION NO. 96-CI-007208

NATIONAL CITY BANK OF KENTUCKY APPELLEE

OPINION
AFFIRMING
** ** ** ** **

BEFORE: GUDGEL, CHIEF JUDGE, GUIDUGLI AND TACKETT JUDGES.

GUIDUGLI, JUDGE: Countryside Builders, Inc. and Galet Development Company, Inc. (collectively Countryside) appeal from a memorandum and order of the Jefferson Circuit Court entered August 26, 1998 granting summary judgment in favor of National City Bank of Kentucky (NCB) as to its claim against Countryside and Countryside's counterclaim. We affirm.

FACTS[1]

[1]We have taken the majority of our facts from the deposition of Thomas Johns (Thomas), Countryside's president.

Countryside was a corporation engaged in the development of subdivisions and the construction of new homes. In late 1994-1995, Countryside began developing cash flow problems due to a combination of various factors, none of which are attributable to any conduct or action on behalf of NCB.[2] Countryside's problems continued despite an additional $600,000 credit line extended by NCB in March 1995. Some of Countryside's trade creditors apparently knew about its cash flow problems as early as the summer of 1995 when Countryside began slowing down its repayment schedule. In an effort to remedy its problems Countryside (a) went to its creditors and negotiated debt restructuring agreements; (b) began negotiating with PNC Bank (PNC) to obtain additional credit lines; and (c) ultimately entered into a forbearance agreement with NCB.

DEBT RESTRUCTURING

In October 1995, Countryside began negotiations with its trade creditors in regard to debt restructuring. Under the terms of each individual agreement, Countryside's trade creditors were asked to agree to a 25% debt discount. The creditors were told that restructuring would result in a substantial cash flow increase which would allow Countryside to survive. All but two of Countryside's trade creditors agreed to the restructuring.

Kentucky-Indiana Lumber Company (K&I) was one of Countryside's largest creditors. In late October 1995 a meeting

[2]Although Countryside's tax returns show losses from 1989-1993, Countryside attributes its ability to show these losses to its ability to utilize tax loopholes and claims that it was, in fact, turning a profit until 1994-1995.

took place in the office of Don Cox (Cox), K&I's attorney. According to Thomas, during this meeting Ron Mason (a K&I employee) stated that Dick Hawkes (a loan officer with NCB) called Walt Freeman (K&I's president), advised him that Countryside was having cash flow problems, and recommended that K&I file liens to protect itself. Thomas admitted that K&I never filed liens as a result of the alleged phone calls and that K&I agreed to restructure its debt with Countryside. However, Thomas alleged that doing business with K&I became more difficult after the alleged phone calls and that the difficulties did not start until after the phone calls occurred.

PNC NEGOTIATIONS

Countryside began negotiating for an increase in its credit line with PNC in the summer of 1995. Thomas testified that PNC was advised of Countryside's cash flow problems and that PNC chose to conduct an "extensive audit." Following completion of the audit, PNC advised Countryside that it was in better shape than it thought and agreed to increase its credit line. PNC's commitment letter was dated August 8, 1995.

Thomas testified that Larry Goins (Goins), a PNC employee, told him that Hawkes began calling PNC in July-August 1995 in regard to Countryside's financial condition. Thomas stated that although PNC had originally told Countryside that the loan would close in 7-10 days, once the phone calls started the closing was delayed for 2-2½ months. The loan did not close until November or December 1995. Thomas testified that the

closing of the loan came too late to be of any benefit to Countryside.

Thomas stated that Goins told him that Hawkes' phone calls were partially responsible for the delay in the closing. Thomas further stated that had Hawkes not made the calls the loan would have closed earlier and it would not have been necessary to pursue the debt restructuring agreements. Thomas admitted that he did not know whether Hawkes' alleged conduct was the cause of the delay in closing, but stated that he assumed it was.

THE FORBEARANCE AGREEMENT

It appears from an affidavit of Jerrol Miles (Miles), a senior vice president of NCB, that Countryside defaulted on a number of promissory notes and mortgages with NCB ranging in date from September 28, 1990 to May 26, 1995. Negotiations between NCB and Countryside resulted in the execution of a forbearance agreement (the agreement) on December 26, 1995 wherein NCB agreed to refrain from foreclosing for six months to allow Countryside time to remedy its default. Thomas admitted that Countryside was in default on its obligations to NCB at the time the agreement was executed.

Central to this appeal is Paragraph 9 of the agreement, which provided:

> Release of Bank. In consideration of the agreement of Bank to forbear hereunder, Borrower and Guarantors, jointly and severally, on behalf of themselves and all of their respective heirs, successors and assigns, do hereby knowingly and voluntarily and unconditionally remise, release, acquit, satisfy and forever discharge Bank, and its respective past, present and future officers, directors, employees, agents, attorneys,

> representatives, participants, heirs, successors and assigns, from any and all manner of debts, accountings, bonds, warranties, representations, covenants, promises, contracts, controversies, agreements, liabilities, obligations, expenses, damages, judgments, executions, claims, demands and causes of action of any nature whatsoever, whether in law or in equity, whether known or unknown, either now accrued or hereafter maturing, which Borrower and Guarantors hereafter can, shall or may have arising out of the lending relationship and various loan transactions currently or previously existing among Borrower, Guarantors and Bank. Borrower and Guarantors agree that Bank has acted at all times in a fair, reasonable and good faith manner in connection with its administration and enforcement of the Existing Loan Documents, its dealings with Borrower and Guarantors with respect to the Loans and the Existing Loan Documents, and its negotiation and consummation of this Agreement and other transactions related to this Agreement. The consummation of this Agreement by Borrower and Guarantors, and their offering of the items and documents required of them pursuant to the terms of this Agreement, was and is their free and voluntary deed, without any misapprehension as to the effect thereof, and without any coercion, duress, overreaching or any other misconduct by Bank. Each of Borrower and Guarantors has had the benefit of legal counsel in connection with the negotiation and consummation of this Agreement, and Borrower and Guarantors agree that Bank has in no way exercised any management decisions, performed any business functions relating to the operations of Borrower, or otherwise acted in a fiduciary capacity with respect to Borrower.

Thomas freely admitted that Countryside had knowledge of Hawkes's alleged conduct at the time it signed the agreement, and further admitted that the agreement contained the release set forth in Paragraph 9. It is also clear that Countryside had the advice of counsel in negotiating and executing the agreement. However, Thomas stated that when NCB was advised by Countryside's

attorney that it would not sign the agreement with the release in it, NCB refused to remove the release. When counsel for Countryside told NCB it would sign the agreement under duress, Miles allegedly advised them that NCB could not "legally take away [Countryside's] right to any lawsuit had [NCB] done something wrong and that we had to sign it anyways." Thomas testified that at that point Countryside had no other choice but to sign the agreement.

THE CURRENT ACTION

Countryside subsequently was unable to meet its obligations under the terms of the agreement and filed for Chapter 11 bankruptcy protection in July 1996. It appears that Countryside decided to withdraw its bankruptcy petition in order to file suit against NCB for Hawkes's alleged conduct, and the bankruptcy stay was lifted on November 7, 1996. NCB filed its foreclosure action with the trial court on December 13, 1996, and Countryside filed its answer and counterclaim against NCB on January 28, 1997. Thomas admitted that all of the causes of action set forth in Countryside's counterclaim were directly attributable to the phone calls allegedly made by Hawkes.

NCB filed its motion for summary judgment in April 1998. Attached to NCB's motion were the affidavits of Mason, Freeman, Cox and Goins. Mason denied telling Thomas about the phone calls allegedly made by Hawkes to Freeman. Cox denied that Mason told Thomas or anyone else that NCB had contacted Freeman. Freeman denied that anyone from NCB suggested that K&I take action against Countryside to protects its interests. Goins

denied telling Thomas that he received phone calls from Hawkes or anyone else about Countryside.

Countryside responded to NCB's summary judgment motion in August 1998. In support of its allegations regarding Hawkes' conduct, Countryside specifically relied on Thomas's deposition testimony concerning what Mason and Goins told him. Countryside further relied on affidavits of Thomas and William Tally (a CPA who performed work for Countryside) concerning Mason's comments regarding the alleged telephone calls.

On August 26, 1998 the trial court entered summary judgment in favor of NCB on both its action for foreclosure and Countryside's counterclaim. The trial court found that summary judgment was proper as to NCB's foreclosure action because:

> the notes and mortgages which National City seeks to enforce have been in default for non-payment since before December, 1995. It is not disputed that the notes and mortgages were properly executed. On December 26, 1995, when Countryside executed the Forbearance Agreement, the said notes and mortgages were in default. The record shows that National City fully performed its obligations under the Forbearance Agreement, and that Countryside remains in default for non-payment of the said notes and mortgages which National City seeks to enforce. Accordingly, National City is entitled to judgment on the foreclosure action as a matter of law.

In regard to Countryside's counterclaim, the trial court found that the deposition of Thomas and the affidavits of Thomas and William Tally concerning phone calls allegedly made by Hawkes constituted inadmissible hearsay. The trial court further found that even if Hawkes had made the phone calls, there was no cause of action for "tortious interference, bad faith, or any of

the other allegations brought by Countryside in its counterclaim . . . . [because] the entire building community was aware that Countryside was having substantial problems at the time of the alleged damaging communications." In regard to the forbearance agreement, the trial court found:

> Countryside's proposition that it entered into the Forbearance Agreement with National City under duress is without merit. National City had every right to foreclose on the notes and mortgages issued to Countryside for having been in default for nonpayment prior to entering into the Forbearance Agreement. The fact that National City could have foreclosed and/or might have informed Countryside that they had this option does not arise to duress. The Forbearance Agreement provided Countryside a chance to get their financial affairs in order, which was not done.

This appeal followed.

Countryside contends that the trial court improperly decided contested factual questions in granting summary judgment in favor of NCB. In particular, Countryside argues that the trial court erred in making the following findings:

> Before the end of 1994, Countryside's financial condition was deteriorating from causes which were unrelated to National City. Countryside suffered losses in 1989, 1990, 1991, 1992, 1993, 1994 and 1995. Countryside's financial condition continued to decline in 1995[.]
>
> . . . .
>
> By late Summer (sic) 1995, Countryside's financial problems were common knowledge among its trade creditors.
>
> . . . .
>
> The record shows that the entire building community was aware that Countryside was

> having substantial problems at the time of the alleged damaging communications.

Having reviewed the record on appeal, most particularly the deposition of Thomas Johns, we find this argument to be meritless. All of the disputed factual findings made by the trial court came directly from Thomas's own testimony. He clearly testified in regard to the losses claimed on Countryside's tax returns and to the various causes for its financial crisis in 1994 and 1995. Thomas further testified that some of Countryside's trade creditors were aware of its problems by the summer of 1995 when it was unable to make timely payments. While there may be a dispute as to whether all of Countryside's trade creditors knew about its financial condition or as to whether "the entire building community" knew the extent of Countryside's problems at the time of the alleged phone calls, that does not rise to the level of a genuine issue of material fact.

> [S]ummary judgment does not require that there be no issue of fact but that there be no genuine issue of material fact. If the defenses have no substance, if controlling facts are not in dispute, or factual disputes are insignificant, summary judgment is appropriate.

Blue Cross & Blue Shield of Kentucky, Inc. v. Baxter, Ky.App., 713 S.W.2d 478, 479 (1986).

Countryside next argues that the trial court erred in finding that NCB was entitled to summary judgment in regard to Countryside's counterclaim as a matter of law based on the language of release contained in Paragraph 9 of the agreement.

Based on our review of the record and the language contained in the agreement, we disagree.

The language contained in the release is clear and unambiguous. Under the terms of Paragraph 9, NCB is released "from any and all manner of . . . causes of action of any nature whatsoever . . . arising out of the lending relationship and various loan transactions currently or previously existing[.]" "The scope of a release is determined by ascertaining the intention of the parties. The "intent" is determined by reviewing the language of the entire instrument and all of the surrounding facts and circumstances under which the parties acted." Overberg v. Lusby, 727 F.Supp. 1091, 1093 (E.D. Ky. 1990). If parties to a release wish to except certain items from the scope of the release, their intent to do so must be manifest from the terms of the agreement. Overberg, 727 F.Supp. at 1093. It cannot be seriously argued that the alleged actions of Hawkes did not arise from the loan transactions between Countryside and NCB. Because the actions Countryside complains of clearly arose from the loan transactions, and because there is no language in the agreement excepting Countryside's causes of action based on the alleged conduct of Hawkes, summary judgment was proper.

Countryside's argument that a release of claims arising from the terms of a contract does not act to release claims sounded in tort is equally unavailing.

> It is clear to us that the . . . agreement that they executed was intended to tie up all loose ends and resolve all of the claims or disputes that might arise from the [contractual] relationship. We also note

> that [Countryside was] represented by and consulted with counsel.
>
> . . . .
>
> We must conclude that the issue of [Hawkes's alleged conduct] was a matter within the contemplation of the parties at the time the . . . agreement was executed.

Overberg v. Lusby, 921 F.2d 90, 91 (6th Cir. 1990).

Countryside's argument that a release cannot be interpreted to bar claims which were not known at the time of execution or those occurring or asserted a some point in time in the future is without merit. The record is abundantly clear that Countryside was aware of Hawkes's alleged conduct at the time it signed the agreement. In fact, Thomas testified:

> We found out about the conversations between Mr. Hawkes and Walt Freeman on or about October 27 [1995]. That was after we had already entered into negotiations with our vendors and our subcontractors. Yes, it was before we signed the Forbearance Agreement. And it was that reason that we had our attorney discuss paragraph No. 9 with Mr. Miles.

Countryside signed the release despite the fact that it had concerns in regard to the scope of the release. Having done so, it cannot be heard to complain now. See Mario's Pizzeria, Inc. v. Federal Sign & Signal Corporation, Ky., 379 S.W.2d 736 (1964)(holding that summary judgment is proper where claimant read and familiarized himself with written agreement, protested its terms, but signed anyway).

We also disagree with Countryside's contention that the doctrine of esjudem generis applies to this case. The language of the release was clear and unambiguous, otherwise Countryside

would not have been hesitant to sign it. "[I]t is not the function of the judiciary to change the obligation of a contract which the parties have seen fit to make." O.P. Link Co. v, Wright, Ky., 429 S.W.2d 842, 847 (1968).

As a final argument, Countryside contends that NCB is estopped from foreclosing its notes by the equitable doctrine of "unclean hands." Countryside argues that NCB owed it a duty to safeguard information concerning its financial condition, that NCB breached its duty by disclosing information concerning Countryside's financial problems to third parties, and that as a result of this disclosure Countryside's creditors refused to extend further credit which resulted in Countryside's default on its obligations to NCB. Despite Countryside's arguments to the contrary, this question was resolved in Bale v. Mammoth Cave Production Credit Association, Ky., 652 S.W.2d 851 (1983), where the Kentucky Supreme Court held that "alleged fraudulent conduct of a bank or lender . . . does not as a matter of law preclude a lender from enforcing promissory notes executed prior to the time such conduct occurs." Bale, 652 S.W.2d at 855.

Because we find that NCB was entitled to summary judgment on Countryside's counterclaim as a matter of law based on the release contained in Paragraph 9 of the agreement, we need not address Countryside's argument concerning the admissibility of the affidavits of Thomas and William Tally.

Having considered the parties' arguments on appeal, the order of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

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