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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1999-CA-001592-MR

DEAN MARDIS — APPELLANT

v.

APPEAL FROM RUSSELL CIRCUIT COURT
HONORABLE EDDIE C. LOVELACE, JUDGE
ACTION NO. 98-CI-00080

ALLIANCE BANK — APPELLEE

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

BEFORE: EMBERTON, McANULTY, AND SCHRODER, JUDGES.

SCHRODER, JUDGE: Appellant, Dean Mardis, appeals from a summary judgment finding him in default on a promissory note secured by a mortgage. Having determined that no genuine issue of material fact exists and that appellee, Alliance Bank, is entitled to judgment as a matter of law, we affirm the judgment of the Russell Circuit Court.

On October 3, 1994, Dean Mardis (Mardis) executed a promissory note with Alliance Bank, FSB (Alliance Bank), in the amount of $22,000.00. The note was secured by a mortgage on a property located in Russell County, Kentucky. It is undisputed

that appellant was frequently late in making his monthly payments. Mardis failed to pay the monthly payments for January and February, 1998, and on March 7, 1998, Alliance Bank filed a complaint in Russell Circuit Court, alleging that Mardis had become delinquent in his payments and was in default from and after January 23, 1998. Alliance Bank stated that it was exercising its option under the promissory note and mortgage to declare the unpaid indebtedness, in the amount of $17,280.49 plus interest from and after January 23, 1998, due and payable in its entirety.

On March 10, 1998, Mardis paid $975.12 to Alliance Bank, which represented payments due for January, February, and March 1998. Mardis states that at this time he had no knowledge of the action filed against him by Alliance Bank. Alliance Bank accepted the payments, and as such, Mardis believed the note was in good standing. On April 14, 1998, Mardis made a payment on the note of $316.00. Mardis states that he still had no knowledge of the legal action filed against him at the time, and assumed the note was still in good standing based on the acceptance of this payment and the past course of dealing by the bank.

It is undisputed that Mardis did not make payments on the note for May, June, and July, 1998. On June 26, 1998, Alliance Bank filed an amended complaint stating that Mardis was in default from and after June 9, 1998 and that the unpaid balance of $17,068.20 plus interest was due in its entirety. On August 20, 1998, still unaware of the legal action and believing

the note was in good standing, Mardis brought $1,650.00 in cash to Alliance Bank, as payment for the amounts due on the note for May, June, July, and August, 1998, and as an "advance payment" for September, 1998. Approximately 10 days later Mardis received a check from Alliance Bank for the amount of $1,650.00 along with a letter dated August 25, 1998 informing him of the foreclosure suit, and stating that the bank would not accept anything less than full payoff of the loan. Mardis continued to attempt to make monthly payments, but these were returned by Alliance Bank.

On September 8, 1998, Alliance Bank filed a motion for summary judgment. On September 21, 1998 Mardis filed a response to the motion, contending that he was never properly served with the January 23, 1998 complaint or the June 26, 1998 amended complaint. Mardis further stated that Alliance Bank had accepted his payment of $1,650.00, and therefore his account was paid through September. On September 21, 1998, Mardis also filed a motion to dismiss on the grounds that the service of summons was improper, as it was just left in his mailbox. On October 14, 1998, Alliance Bank filed a renewed motion for summary judgment, and on October 19, 1998, Mardis filed a renewed response. On October 19, 1998, the court granted Alliance Bank's motion for summary judgment. On October 22, 1998, Mardis filed a motion to set aside the October 19, 1998 summary judgment and a renewed motion to dismiss/quash summons. In support of the motion, Mardis included an affidavit from Charles Mann, Russell County Deputy Sheriff, stating that he did not personally serve Mardis

with summons, but left it in his mailbox. In an order and judgment entered on October 27, 1998, the court found Alliance Bank to have a first lien upon Mardis's property in the amount of $17,068.20 plus interest from and after June 9, 1998, and ordered the property be sold at public auction. On October 28, 1998, Mardis filed a renewed motion to set aside the order and judgment entered on October 27, 1998 and a renewed motion to dismiss/quash service. On November 5, 1998, the Master Commissioner of the Court filed a Notice of Sale that Mardis's property would be sold at public auction on November 21, 1998. On November 16, 1998, based on Deputy Sheriff Mann's affidavit that he did not personally serve appellant with summons, the court granted Mardis's renewed motion to quash service and set aside the judgment and order of sale.

On January 27, 1999, Alliance Bank filed a renewed motion for summary judgment, which was denied to allow Alliance Bank the opportunity to answer interrogatories. Alliance Bank filed a second renewed motion for summary judgment on April 28, 1999, to which Mardis filed a response on May 11, 1999. On May 25, 1999, the court entered an order granting Alliance Bank's motion for summary judgment. The order allowed Mardis to present further evidence that Alliance Bank should be estopped from pursuing the action and that Mardis was current on his account. On May 26, 1999, Mardis filed a motion to alter, amend or vacate the summary judgment entered on May 25, 1999. On June 22, 1999, the court entered an order denying the motion, finding that Mardis owed Alliance Bank the sum of $17,068.20 on the promissory

note plus interest from and after June 9, 1998 and ordering the property be sold. This appeal followed.

On appeal, Mardis argues that Alliance Bank accepted the payment of $1,650.00 which he tendered on August 20, 1998, which included payments for the past due months of May, June, July, and August, and an advance payment for September. Mardis contends that, because Alliance Bank took possession of the payment and did not return it to him for approximately 10 days, the payment was accepted, making Mardis current on the note and thus, not in default.

A review of the record indicates that Mardis was clearly in default on the note and that the bank did not accept Mardis's $1,650.00 payment, thus summary judgment was proper. The promissory note states, in pertinent part:

> 7. BORROWER'S FAILURE TO PAY AS REQUIRED
>
> ....
>
> (B) Default
> If I do not pay the full amount of each monthly payment on the date it is due, I will be in default.
>
> (C) Notice of Default
> If I am in default, the Note Holder may send me a written notice telling me that if I do not pay the overdue amount by a certain date, the Note Holder may require me to pay immediately the full amount of principal which has not been paid and all the interest that I owe on that amount. That date must be at least 30 days after the date on which the notice is delivered or mailed to me.
>
> (D) No Waiver By Note Holder
> Even if, at a time when I am in default, the Note Holder does not require me to pay immediately in full

> as described above, the Note Holder will still have the right to do so if I am in default at a later time.

It is undisputed, and the record clearly shows, that Mardis did not make payments on the note for the months of May, June, July, nor a timely payment for August. Thus, by the terms of section 7(B) of the note, Mardis was in default.

We further disagree with appellant that the bank accepted Mardis's payment of $1,650.00, thus curing the default. The record indicates that Mardis brought $1,650.00 in cash to Alliance Bank on August 20, 1998, and that Alliance Bank issued a check for that amount to Mardis dated August 21, 1998. The check was sent to Mardis accompanied by a letter dated August 25, 1998, informing him of the foreclosure proceedings. The bank clearly did not "retain and use" the payment, but returned it promptly to Mardis, and as such, there was no acceptance so as to cure Mardis's default. See, Equitable Life Assurance Society of the United States v. Brewer, 225 Ky. 472, 9 S.W.2d 206, 207 (1928). (When payment of insurance premium was tendered after grace period had expired, the company was not required to accept it; but if company chooses to accept the premium, it must make insured aware of conditions under which it is accepting. Insurance company could not receive, retain and use payment and deny liability under the policy). See also, White-Branch-McConkin-Shelton Hat Co. v. Carson & Co., 77 S.W. 366, 25 Ky. La Rep. 1230 (1903). (Goods arrived late. Buyer found not to have accepted the goods as he did not exercise any acts of ownership over them and promptly returned them to seller. Court stated

what constitutes an acceptance is a mixed question of law and fact, and is usually for the jury to determine in view of the particular circumstances of the case.)

Mardis further argues that Alliance Bank breached the terms of the Mortgage securing the promissory note by failing to notify him that a default had occurred and giving him an opportunity to cure the default. The Mortgage states, in pertinent part:

> 2. Acceleration; Remedies. Lender shall give notice to Borrower prior to acceleration following Borrower's breach of any covenant or agreement in this Security Instrument . . . The notice shall specify: (a) the default; (b) the action required to cure the default; (c) a date, not less than 30 days from the date the notice is given to Borrower, by which the default must be cured; and (d) that failure to cure the default on or before the date specified in the notice may result in acceleration of the sums secured by this Security Instrument, foreclosure by judicial proceeding and sale of the Property. The notice shall further inform Borrower of the right to reinstate after acceleration and the right to assert in the foreclosure proceeding the non-existence of a default or any other defense of Borrower to acceleration and foreclosure.

However, as appellant did not raise this issue before the trial court, it was not preserved for our review. "The Court of Appeals is without authority to review issues not raised in or decided by the trial court." Regional Jail Auth. v. Tackett, Ky., 770 S.W.2d 225, 228 (1989).

Appellant's final argument is that the "non-waiver clause" in the promissory note is not enforceable, based on the prior course of dealing and past conduct of Alliance Bank

throughout the history of appellant's promissory note. Appellant argues that he made irregular payments throughout the history of the note, which were accepted by the bank, and that it was unfair for the bank to suddenly act in strict compliance with the note without giving him warning. The "non-waiver clause" of the promissory note states "Even if, at a time when I am in default, the Note Holder does not require me to pay immediately in full as described above, the Note Holder will still have the right to do so if I am in default at a later time." In Price v. First Federal Savings Bank, Ky. App., 822 S.W.2d 422 (1992), the appellant argued that the bank had established a pattern of accepting late payments over the course of a loan secured by a mortgage, which constituted a waiver or estoppel of its right to exercise the acceleration provision of the mortgage. This Court held that where a mortgage contains a non-waiver clause, the mortgagee's acceptance of late payments does not constitute a waiver of its right to accelerate and foreclose in the event of a subsequent default. Id. at 424. Similarly, in the instant case, the bank's acceptance of late payments over the course of the note did not waive its right to enforce the terms of the note for subsequent defaults by appellant.

The standard of review of a trial court's granting of 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, 780 (1996). We are to view the record in the light most favorable to the party

opposing the motion and resolve all doubts in its favor. Steelvest, Inc. v. Scansteel Service Center, Inc., Ky., 807 S.W.2d 476, 480 (1991). Having determined that no genuine issue of material fact exists, Alliance Bank was properly entitled to summary judgment as a matter of law.

For the aforementioned reasons, the judgment of the Russell Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

William G. Bertram
Jamestown, Kentucky

BRIEF FOR APPELLEE:

Jeffrey H. Hoover
Jamestown, Kentucky