RENDERED: DECEMBER 22, 2000; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1999-CA-000654-MR

MANNING FAMILY TRUST; RONALD C. MANNING, AS TRUSTEE AND INDIVIDUALLY; AND DAVID JOHN WESTWICK, JOHN GEORGE RUSSELL, AND SHONA PATRICIA MANNING, TRUSTEES OF THE MANNING FAMILY TRUST

APPELLANTS

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE LEWIS G. PAISLEY, JUDGE
ACTION NO. 93-CI-01774

BANK ONE LEXINGTON, NA; UNITED STATES OF AMERICA; AND SIMON MANNING

APPELLEES

OPINION
REVERSING AND REMANDING
** ** ** ** **

BEFORE: BUCKINGHAM, JOHNSON, AND MILLER, JUDGES.

BUCKINGHAM, JUDGE: The Manning Family Trust, its trustees, and Ronald Manning (Manning) appeal from orders of the Fayette Circuit Court granting summary judgment to Bank One, Lexington, N.A., (the bank), and denying its motion to alter, amend, or vacate. Because we have concluded the trial court erred in granting summary judgment to the bank, we reverse and remand.

In May 1990, Manning allegedly entered into an oral agreement with Dr. John W. Backer to purchase Female Star, a thoroughbred mare in foal to Alydar, and her Alydar colt (hereinafter referred to as the Female Star package) for $1,000,000. Under the terms of the agreement, Manning was to pay $50,000 as a down payment, $600,000 at the closing, and the balance of $350,000 plus interest over the next two years. Manning tendered the $50,000 down payment, but Backer failed or refused to close the deal. Manning then filed suit against him in the Fayette Circuit Court.

After a bench trial in early 1992, the court entered an opinion and order in Manning's favor. While Backer denied an agreement existed, the court found "there is clear and convincing evidence that a contract was formed between Dr. Backer and Ron Manning."[1] Thereafter, on February 27, 1996, the court entered a judgment in favor of Manning and against Backer in the amount of $1,483,294. On March 22, 1996, the parties entered into a forbearance agreement "given Backer's present financial condition and the prospect of obtaining any further recovery against Backer on the Judgment held by Manning."[2]

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[1] Based on this finding in the Manning/Backer litigation, the trial court herein assumed, for the purpose of the summary judgment motions, that there was such a contract.

[2] The forbearance agreement contained various provisions including the division of the proceeds from the sale of a filly foal, the right of Manning to proceed against the $550,000 supersedeas bond posted in the case, the right of Manning to receive funds held on deposit with the master commissioner, Backer's agreement not to appeal, Manning's agreement to forbear further collection efforts, and Backer's waiver of any claim, privilege, or confidentiality raised by other parties with

(continued...)

Manning and Backer were both customers of the bank at the time of their oral agreement for the sale of the Female Star package, and Backer owed the bank $680,000 which was unsecured and due. Also, the bank had given Manning a written loan commitment of $450,000 to use in the purchase of the Female Star package.[3] Manning contends that after its oral agreement with Backer but before the deal was closed, the bank, by and through its president, Ben Elkin, told Backer it would not allow him to sell the Female Star package and finance part of the purchase price himself as had been contracted. Elkin contends that he merely advised Manning not to enter into the deal and be Backer's "banker" and that he was unaware of any contract. Manning maintains, however, that the bank required Backer to give it a lien on the Female Star package and told him that it would not release its lien unless the $680,000 delinquent debt was paid in full. Manning contends that Backer refused to close the deal based on the refusal of the bank to let him close and based on the advice of his attorney, William T. Bishop III. Manning claims these events occurred without its knowledge.

In an unrelated matter, on July 5, 1990, the bank issued a $600,000 loan commitment to Manning. The loan was to be secured by Sally's Ride, a mare which Manning hoped to buy. Manning was unable to purchase the Sally's Ride package, which

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[2](...continued)
respect to Manning's examination of documents or procuring testimony in connection with its litigation against the bank or other parties.

[3] The loan commitment was actually given by First Security National Bank & Trust Co., Bank One's predecessor in interest.

included the mare along with her foal and certain breeding rights, but on December 11, 1990, Manning executed a promissory draw note pursuant to the July loan commitment and proposed to draw on it to purchase other horses. The bank, however, declined to fund these purchases.

In May 1993, Manning filed suit against the bank in the Fayette Circuit Court. Manning, which had prevailed in its litigation against Backer, claimed the bank had improperly interfered with its contract to purchase the Female Star package from Backer. Manning also claimed the bank acted improperly in not funding its purchase of other horses. The trial court, however, found no merit in those claims or the other claims of Manning. Thus, the court granted the bank's summary judgment motion and denied Manning's.

Concerning Manning's claim that the bank improperly interfered with Manning's contract with Backer, the court held as a matter of law that the bank had no liability because it was "clearly acting in good faith to protect its own legitimate interest" and "[t]here is simply no evidence to show that the [b]ank acted wrongfully." Concerning the refusal of the bank to fund Manning's purchase of additional horses in December 1990, the court held that the December 11, 1990 note was tied to the July 1990 loan commitment which related solely to the purchase of the Sally's Ride package.

In short, the trial court held as a matter of law that the bank had not committed the tort of improper interference with contractual relations in connection with the Manning/Backer

agreement and also held as a matter of law that the bank was within its rights when it refused to finance Manning's purchase of other horses pursuant to the December 1990 note. The trial court also dismissed Manning's conspiracy claim because it was based on the same facts which supported its other claims. Finally, it dismissed Manning's claim that the bank had breached an implied covenant of good faith and fair dealing on the ground that such claim was based on alleged unenforceable verbal promises. This appeal followed.

Manning contends the trial court erred in granting the bank's motion for summary judgment by failing to apply the proper standard. CR[4] 56.03 provides in part that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." "The record must be viewed in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor." Steelvest, Inc. v. Scansteel Service Center, Inc., Ky., 807 S.W.2d 476, 480 (1991). Manning asserts the trial court did not view the evidence in a light most favorable to it and ignored, overlooked, or misinterpreted evidence of record.

Manning's first assignment of error is its argument that the trial court erred in granting summary judgment to the bank on its (Manning's) claim of improper interference with

[4] Kentucky Rules of Civil Procedure.

contractual relations in connection with the contract with Backer to purchase the Female Star package. Citing National Collegiate Athletic Assoc. v. Hornung, Ky., 754 S.W.2d 855 (1988), the trial court stated that the bank had done nothing wrong in demanding payment in full from Backer and requiring a lien which had to be paid in full before it would be released. In Hornung, our supreme court held that "the party whose interference is alleged to have been improper may escape liability by showing that he acted in good faith to assert a legally protected interest of his own." Id. at 858. The trial court determined as a matter of law that the bank "was clearly acting in good faith to protect its own legitimate interest." The court further held that "[t]here is simply no evidence to show that the [b]ank acted wrongfully."

In order to properly analyze this issue, we must recite additional facts. William T. Bishop III, an attorney who represented Backer in his veterinary medicine practice and who also represented the bank, advised Backer that his agreement with Manning was unenforceable because it was not in writing and that he should not close the deal. When Backer refused to close the deal, Manning employed Harvie B. Wilkinson, an attorney in the same firm as Bishop,[5] to send Backer a letter demanding that the sale be closed pursuant to the contract. When the conflict in representation came to light, Wilkinson withdrew from his representation of Manning.

[5] Both Wilkinson and Bishop were attorneys with the Stoll, Keenon and Park law firm in Lexington, Kentucky.

Wilkinson had been introduced to Manning by the bank's loan officer, Scott Flowers, to assist in the closing on a loan in connection with Manning's purchase of a farm in Woodford County. Following Wilkinson's demand letter to Backer, the bank required Backer to give it a lien on the Female Star package and related to him that its lien would not be released until the $680,000 debt was paid in full. Nevertheless, the bank had given Manning a loan commitment to purchase the Female Star package and, according to Manning, was aware of the Manning/Backer agreement.

After Wilkinson withdrew from his representation of Manning, Manning procured new counsel and filed the original suit in the Fayette Circuit Court against Backer and the bank. Manning's claim against Backer was for specific performance and/or damages for breach of the oral agreement and against the bank due to the lien that had been placed on the Female Star package. Wilkinson, who had previously sent the demand letter on behalf of Manning and who was a law partner of Bishop, represented the bank in defending against Manning's lawsuit. Early in the litigation, the bank arranged for Backer to borrow the $680,000 which he owed to the bank from Central Kentucky Agricultural Credit Association (Ag Credit) so that the bank could be paid. Backer borrowed the money from Ag Credit, and the bank was paid and the lien released. Thereafter, Wilkinson advised Manning's counsel that the lien had been released and tendered an agreed order dismissing the bank from the case. Neither Manning nor the court were informed that Ag Credit now

held a lien on the Female Star package, and Ag Credit was not joined as a defendant in Manning's suit against Backer until after Manning had obtained a judgment against Backer nearly two years later.

We agree with the trial court's reliance on Hornung to support the proposition that the bank may escape liability by showing that it acted in good faith to assert a legally protected interest of its own. Hornung, 754 S.W.2d at 858. We disagree, however, with the trial court's finding as a matter of law that the bank was "clearly acting in good faith to protect its own legitimate interest." (Emphasis added.) The facts we have set forth above lead to a different conclusion when viewed in a light most favorable to Manning rather than in a light most favorable to the bank. For purposes of considering the bank's motion for summary judgment, the trial court was required to view the facts in a light most favorable to Manning. Steelvest, 807 S.W.2d at 480. Viewing the facts in that manner, we believe there was a genuine issue of material fact concerning whether the bank acted in good faith in taking the actions that, according to Manning, caused Backer to fail or refuse to close the deal for the Female Star package.[6]

In connection with Manning's claim for wrongful interference with contractual relations, the trial court also held that the "advice" given by bank president Elkin to Backer that he not close the deal with Manning "cannot form the basis of

[6] Manning's expert witness on banking testified that the bank's conduct in relation to the Manning/Backer contract violated the standard of conduct required of banks.

wrongful interference with the contractual rights of another." The trial court relied on the *Restatement (Second) of Torts* § 772. We again disagree with the trial court. If Elkin's statement to Backer amounted to advice upon which Backer relied, we might be inclined to agree with the trial court. However, Backer himself has characterized Elkin's statement to him as a directive not to close the transaction and not as merely advice. Again, we believe there is a fact issue in this regard.

The trial court also held that even if the bank had wrongfully interfered with the Manning/Backer contract, Manning would nevertheless be barred from recovery due to the forbearance agreement it entered into with Backer in the previous lawsuit. Citing Klepper v. First American Bank, 916 F.2d 337 (6th Cir. 1990), the trial court held that Manning's losses "have been satisfied" and that he "cannot sue the [b]ank for the same damages." The Klepper case, however, is distinguishable on its facts from this case. In that case, Klepper had recovered the full amount which was owed to him from another party in an arbitration proceeding. The court in Klepper recognized the general rule set forth in Pierce v. Frito-Lay, Inc., Ky., 426 S.W.2d 439 (1968), that only the satisfaction of a judgment or something equivalent thereto, will bar an action against other tortfeasors. Klepper, 916 F.2d at 342. Because the forbearance agreement between Manning and Backer did not satisfy Manning's judgment against Backer,[7] Manning could pursue a cause of action

[7] In Backer's bankruptcy action, the United States Bankruptcy Court for the Eastern District held that the (continued...)

against any joint tortfeasor for the same damages. We thus disagree with the trial court's assertion that the forbearance agreement provided full satisfaction of Manning's damages.

The bank also argues that the trial court's summary judgment was appropriate because its dismissal from the earlier Manning/Backer litigation was res judicata. The trial court did not address this argument. As we have noted, the bank was made a party defendant to the Manning/Backer litigation for the sole reason that it held a lien on the Female Star package. It was dismissed from that litigation by an agreed order once the lien was released.

The doctrine of res judicata is "applicable not only to the issues disposed of in the first action, but to every point which properly belonged to the subject of the litigation in the first action and which in the exercise of reasonable diligence might have been brought forward at the time." Egbert v. Curtis, Ky. App., 695 S.W.2d 123, 124 (1985) (emphasis added). Although the trial court did not address the issue, it appears to us that there is at least a fact issue concerning whether Manning knew of the facts upon which it brought this action when it brought the original action against Backer and the bank. We conclude that summary judgment on the basis of res judicata would not have been appropriate for this reason.

Manning's second assignment of error is that the trial court erred in granting summary judgment to the bank on its

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[7](...continued)
forbearance agreement was "a forbearance agreement and it is not a settlement agreement."

(Manning's) claim that the bank breached its contract under the July 1990 loan commitment by not funding the December 1990 note Manning executed for the purpose of borrowing money to purchase horses other than the Sally's Ride package. As we have stated previously, the bank issued a $600,000 loan commitment to Manning in July 1990 so that Manning could purchase the Sally's Ride package. Manning was unable, however, to make the purchase. Approximately six months later, Manning executed a promissory draw note in an attempt to borrow money to purchase horses other than the Sally's Ride package. The bank declined to fund the purchase and maintained that the July 1990 loan commitment related only to the purchase of the Sally's Ride package.

We agree with the trial court that the July 1990 loan commitment was expressly for the sole purpose of the Sally's Ride package as evidenced by a letter sent by the bank to Manning. Manning asserts, however, that the bank told him after he failed to purchase the Sally's Ride package that the July 1990 loan commitment would be good for later purchases of horses. He may not rely on these alleged verbal representations due to the provisions of KRS[8] 371.010(9) which provides:

> No action shall be brought to charge any person:
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> . . . .
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> (9) Upon any promise, contract, agreement, undertaking, or commitment to loan money, to grant, extend, or renew credit, or make any financial accommodation to establish or assist a business enterprise . . . .

[8] Kentucky Revised Statutes.

> unless the promise, contract, agreement, representation, assurance, or ratification, . . . be in writing and signed by the party to be charged therewith . . . .

The trial court properly granted the bank summary judgment on this issue.

Manning also assigns as error the adverse rulings of the trial court on its claim for concert of action. This cause of action related to allegations that the bank and the Stoll, Keenon and Park law firm conspired to breach the bank's fiduciary duties owed to Manning. The trial court rejected the claim "because the acts complained of are the same which support the Plaintiff's [Manning's] other claims addressed in this opinion." Because we have found there are fact issues regarding Manning's claim for improper interference with contractual relations which precludes summary judgment for the bank, we likewise hold those same fact issues preclude summary judgment on the concert of action claim.

Additionally, Manning assigns as error the trial court's award of summary judgment for the bank on Manning's claim for breach of an implied covenant of good faith and fair dealing. The trial court held that "to the extent any such promises were made they are not legally enforceable." We agree with Manning that its claim in this regard was more than a claim based on oral promises to extend credit and that the trial court erred in granting summary judgment on this claim. As we have noted previously in this opinion, there are genuine issues of material fact concerning whether the bank acted in good faith in connection with the Manning/Backer agreement.

Finally, Manning contends the trial judge erred in refusing to recuse from this case. Again, it is necessary to recite further facts. At one point in the litigation, the trial court entered an order that dispositive motions be filed no later than April 15, 1997, and that the case be tried by a jury on June 16, 1997. On the last day for dispositive motions to be filed, the bank's attorney moved to withdraw from the case citing a conflict of interest. On April 17, 1997, the trial court entered an order permitting counsel for the bank to withdraw and continuing the trial date. Unbeknownst to Manning, however, the trial judge had signed an $85,000 mortgage to the bank only six days before the order was entered.

A new trial date had been assigned for December 1, 1997, but on November 20, 1997, the trial court informed the parties that it had denied Manning's summary judgment motion but granted the bank's. The court apparently informed the parties that an opinion and order would be issued reflecting the rulings. Several months passed when, in June 1998, Manning apparently discovered the trial judge's mortgage. A recusal motion was filed,[9] but when the trial court entered its written opinion and order on February 9, 1999, some fifteen months after advising the parties of its ruling, the trial court denied the recusal motion. In denying the motion, the trial judge acknowledged that he had been a customer of the bank for years prior to the institution of

[9] At the hearing concerning the recusal motion, the trial judge stated that he had no knowledge of the mortgage and the bank counsel agreed that they had no record of the mortgage. However, the mortgage had been signed and was recorded on April 15, 1997.

the lawsuit and that an "equity line" type of account had been set up years before. The trial judge related that he had received nothing from the bank other than the continuing of a credit line and that the transaction "constitutes no basis for recusal." The trial judge also noted that a complaint had been filed with the Judicial Retirement and Removal Commission and that the Commission had found no impropriety.

In support of its argument that the trial court erred in not granting the motion to recuse, Manning cites SCR[10] 4.300. That rule provides in part that "[a] judge should refrain from financial and business dealings that tend to reflect adversely on his impartiality[.]" SCR 4.300, Canon 5, C.(1). The bank responds by citing KRS 26A.015 which sets forth circumstances under which a judge should disqualify himself from a proceeding.

We agree with the bank that the statute does not specifically state circumstances which would require recusal in this situation. KRS 26A.015(2)(e) states, however, that a judge should disqualify himself "[w]here he has knowledge of any other circumstances in which his impartiality might reasonably be questioned." From reviewing the taped hearing of the recusal motion, we understand that the judge no longer has a relationship with the bank. Thus, we see no need for the trial judge to recuse on remand if he has no relationship with the bank.

The opinion and order of the Fayette Circuit Court is reversed and remanded.

ALL CONCUR.

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[10] Rules of the Supreme Court.

BRIEFS AND ORAL ARGUMENT FOR APPELLANTS:

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BRIEF FOR APPELLEE BANK ONE:

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