

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 2000-CA-000375-MR

WILLIAM FOLEY AND PAULINE  
FOLEY, HIS WIFE; AND PAUL  
FOLEY AND JENNIFER FOLEY,  
HIS WIFE

APPELLANTS

v. APPEAL FROM FLOYD CIRCUIT COURT  
HONORABLE JOHN DAVID CAUDILL, JUDGE  
ACTION NO. 95-CI-00956

FIRST COMMONWEALTH BANK OF  
PRESTONSBURG, KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: GUDGEL, CHIEF JUDGE; DYCHE AND MILLER, JUDGES.

DYCHE, JUDGE: William Foley and his wife Pauline Foley, and Paul Foley and his wife, Jennifer Foley, appeal from a judgment of the Floyd Circuit Court granting summary judgment to First Commonwealth Bank [hereinafter FCB] on their claims involving alleged misapplication of the remaining proceeds from the sale of a residence obtained by FCB following default on a mortgage loan. After reviewing the record and the arguments of counsel, we affirm.

Paul Foley, Jennifer Foley, and William Foley, Paul's father, were the officers, directors, and shareholders of Foley Lumber Company. On February 25, 1994, FCB loaned Foley Lumber Company \$103,570.67, with Paul, as President of the company, executing a promissory note to FCB. Paul and Jennifer also signed the note as personal guarantors and executed two mortgages to four tracts of realty, which included the couple's personal residence, in favor of FCB as security for the note. William and his wife, Pauline, joined in execution of one of the mortgages because they retained a life estate in two of the tracts. On March 3, 1994, FCB loaned Foley Lumber Company \$35,010.50 with Paul signing a second promissory note on behalf of the company and as personal guarantor. This note was secured by certain heavy equipment.

In addition to the above business loans, Paul and Jennifer obtained a personal loan from FCB in May 1994 for \$23,075 that was secured by a second mortgage on their personal residence. At some point, the Foleys failed to make the required payments on all three loans and they fell into default. Rather than proceed with foreclosure on the realty, Paul and Jennifer sold their residential property in August 1995 and a check for the sale amount of \$61,336.87 was made out to Paul, Jennifer, and FCB. The Foleys then endorsed the check to FCB, which took possession of the entire proceeds. However, FCB refused the Foleys' demand to return to them approximately \$41,000, which represented the excess amount left after payment of the remaining balance due on the personal mortgage loan. At that time, both

the February and March 1994 notes were in default, so FCB applied the \$41,000 to reduce the balance owing on the February 1994 note, which exceeded \$100,000 and was secured in part by the realty that generated the proceeds. FCB also obtained possession of the heavy equipment securing the March 1994 note and applied the proceeds from a sale of the equipment to reduce the \$35,000 balance due on that note.

In December 1995, Paul, Jennifer, and William Foley filed a complaint alleging that FCB had acted illegally in its handling of the \$41,000 and asserting claims of fraud, conversion, intentional infliction of emotional distress, breach of duty to act in good faith, breach of fiduciary duty, and negligent supervision of employees. In January 1996, FCB filed an answer and counterclaim. In the answer, FCB denied acting improperly in applying the proceeds of the sale of the residence or dealing unfairly with the Foleys. The counterclaim alleged that the two promissory notes were in default and sought sale of the remaining realty covered by the mortgages securing the notes and a judgment against Paul and Jennifer Foley on their personal guaranties.<sup>1</sup> In March 1996, the Foleys filed an answer to the counterclaim asserting the allegations in their complaint and a violation of federal lending laws as defenses to the counterclaim.

In June 1996, FCB filed a motion for summary judgment on its counterclaim stating that there was no genuine issue in

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<sup>1</sup>Pauline Foley was later added as a party through an amended counterclaim filed by FCB.

dispute that the February and March 1994 notes of Foley Lumber Company were in default, and that Paul and Jennifer Foley were liable for the debts on their personal guaranties. In their response to the summary judgment motion, the Foleys argued that FCB had breached its fiduciary duty to act in good faith in handling the \$41,000 proceeds from the property sale and again raised the issues in their complaint as a defense.

In September 1996, the trial court granted the motion and entered an interlocutory summary judgment for FCB on its counterclaim pending updated calculation of the amounts owed on the two promissory notes. In November 1996, the court entered a final summary judgment finding Paul and Jennifer Foley liable on the remaining balance of the two notes plus attorney fees, recognizing that FCB had a superior mortgage lien on the three remaining tracts of realty securing the notes, and ordering public sale of the property.<sup>2</sup>

In December 1996, the Foleys filed a CR 59.05 motion to alter, amend or vacate the summary judgment arguing that material issues of fact remained concerning FCB's actions involving the loans on the February 1994 and March 1994 notes, and the handling of the \$41,000 proceeds from the sale of their residence. They maintained that the facts surrounding the actions of FCB were inextricably linked to both their complaint and FCB's counterclaim. They asserted that application of the proceeds to both of the business loans would have satisfied the existing past

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<sup>2</sup>The trial court also subsequently granted a separate summary judgment against Pauline Foley on the same grounds as that granted against the other Foleys.

due amounts and averted the defaults. They stated that summary judgment on the counterclaim "effectively renders impossible a full and fair investigation and trial upon the Complaint, which covers the same loans and behavior as the Counterclaim." After a hearing, the trial court denied the CR 59.05 motion.

In March 1997, the Foleys filed an appeal of the summary judgment granted on FCB's counterclaim. On July 2, 1999, this Court rendered an opinion affirming the trial court's grant of summary judgment to FCB on its counterclaim. Foley v. First Commonwealth Bank of Prestonsburg, Kentucky, 1997-CA-000806-MR.

On January 5, 2000, FCB filed a motion for summary judgment on the Foleys' original complaint contending that this Court's opinion on the counterclaim had effectively decided the issues raised in the complaint. In a response, the Foleys argued that the appellate decision only involved FCB's counterclaim and that disputed issues of material fact remained on the claims in their complaint. On January 20, 2000, the trial court granted FCB's motion for summary judgment based on the previous appellate decision. This appeal followed.

The Foleys contend that the trial court erred in granting summary judgment on its complaint. First, they claim the court incorrectly found that this Court's prior opinion determined the issues raised in the complaint. The Foleys maintain that the Court of Appeals lacked jurisdiction to decide the issues in the complaint because the appeal concerned only FCB's counterclaim and the trial court had not rendered a decision on the issues in the complaint. They argue that the

prior appellate decision would not preclude further litigation of the complaint under the principles of res judicata or issue preclusion. Second, the Foleys argue that summary judgment was premature on substantive grounds. They contend that FCB violated a fiduciary duty of good faith in handling the personal funds of Paul and Jennifer Foley consisting of the \$41,000 proceeds from the sale of their residence. They assert that genuine issues of material fact exist concerning FCB's actions and its dealings with the Foleys as debtors.

After reviewing the record in both the current appeal and the prior appeal, we agree with the trial court that this Court's opinion in the prior appeal effectively decided the issues raised in the complaint. Under the principles of the law of the case, the Foleys are precluded from relitigating those issues.

Under the law of the case doctrine, a decision of the appellate court, unless properly set aside, is controlling at all subsequent stages of the litigation and is binding on the parties, the trial court and the Court of Appeals. See Inman v. Inman, Ky., 648 S.W.2d 847, 849 (1982); Ellis v. Jasmin, Ky., 968 S.W.2d 669 (1998). A final decision of an appellate court is conclusive of questions resolved therein and may not be reconsidered or reopened again by prosecuting appeals from further proceedings in that case or other related cases. Newman v. Newman, Ky., 451 S.W.2d 417, 420 (1970); McHargue v. Sizemore, Ky., 438 S.W.2d 338 (1969). The law of the case doctrine, however, generally applies to the determination of questions of

law and not questions of fact. See Hardaway Management Co. v. Southerland, Ky., 977 S.W.2d 910, 915 (1998).

When an appellate court decides a question concerning evidence or instructions, the question of law settled by the opinion is final upon a retrial in which the evidence is substantially the same and precludes the reconsideration of the claimed error on a second appeal.

H.R. v. Revlett, Ky. App., 998 S.W.2d 778, 780 (1999) (quoting Siler v. Williford, Ky., 375 S.W.2d 262, 263 (1964)).

In the present case, the Foleys presented the issues raised in their complaint as defenses to FCB's summary judgment on its counterclaim in both the trial court and the Court of Appeals. In the prior appeal, they argued that summary judgment on the counterclaim was premature because it would effectively prevent a full and fair investigation and trial on the complaint. They consistently asserted that FCB's actions with respect to the \$41,000 proceeds, which represented the basis for the claims in the complaint, was inextricably linked to FCB's rights on the two promissory notes and the associated mortgages, which in turn also formed the basis of FCB's counterclaim. In their appellate brief in the prior appeal, the Foleys stated:

Contrary to Appellee's repeated assertions, the complaint and the counterclaim deal with exactly the same issue, that being whether the Bank acted lawfully in dealing with the business loans, and the proceeds of a sale of personally owned realty. This issue was presented to the trial court for review in the memorandum of law filed in support of the motion to alter, amend or vacate entry of summary judgment.

Brief for Appellant at 6, 1997-CA-000806-MR. They maintained that summary judgment on the counterclaim was improper because of

evidence showing that FCB seized and converted proceeds of a consumer credit loan and applied the proceeds contrary to the Foleys' stated directions. See Reply Brief for Appellant at 2, 1997-CA-000806-MR.

In affirming the trial court's grant of summary judgment on the counterclaim, this Court addressed the Foleys' contention that FCB acted improperly in dealing with the \$41,000 proceeds.

We are not persuaded by appellants' contention that genuine issues of material fact exist as to whether the bank violated federal banking regulations or otherwise acted wrongfully in its application of the sale proceeds to outstanding debts. In the first place, the regulations cited by appellants apply to consumer loans rather than to the business loans at issue here. Moreover, as noted above, the parties specifically agreed in writing that the mortgages and promissory notes would secure all of appellants' obligations to the bank. Thus, contrary to appellants' contention, KRS 431.065 does not bar the bank's counterclaim. Further, the promissory notes specified that if the bank in good faith either deemed itself insecure as to repayment or believed that prospects of repayment were impaired, it could make any and all of appellants' obligations to the bank immediately "due and payable without demand or notice." If such events occurred, the bank was entitled to an immediate public or private sale of the property securing the note.

The record contains no probative evidence, and no indication that such evidence could be adduced with or without additional time for discovery, to counter the bank's showing that the mortgages and promissory notes were in default. Moreover, regardless of whether evidence could be adduced at a trial to support appellants' contention that they never received copies of the numerous past due notices which the bank allegedly sent to the lumber company and to them, such evidence would not warrant a



different outcome herein since the mortgages and notes specifically provided that the property in question was subject to sale without demand or notice. Further, there is no merit to appellants' argument that the bank somehow exceeded its authority by refusing to comply with appellants' demands regarding the disposal of the proceeds from the sale of the property which secured the personal loan, since the mortgages and promissory notes specifically secured all of appellants' debts to the bank and the bank was entitled thereunder to apply the sale proceeds against other obligations as it deemed proper.

Slip op. at 5-6 (emphasis added).

Given the Foleys' interjection of the issues raised in the complaint in opposition to FCB's counterclaim and this Court's resolution of those issues in the prior appellate opinion, we believe that under the law of the case doctrine, the Foleys were precluded from attempting to relitigate these issues. The Foleys essentially presented the same arguments in this appeal that they presented in the first appeal. Consequently, we hold that the trial court did not err in granting FCB's summary judgment on the Foleys' complaint.

We affirm the judgment of the Floyd Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANTS:

E. Martin McGuire  
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BRIEF FOR APPELLEE:

Richard E. Fitzpatrick  
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