

Commonwealth Of Kentucky

Court Of Appeals

NO. 2000-CA-002145-MR

LASALLE NATIONAL BANK

APPELLANT

v. APPEAL FROM WHITLEY CIRCUIT COURT
HONORABLE PAUL E. BRADEN, JUDGE
ACTION NO. 99-CI-00147

MANCE PAUL, MARY SUE PAUL,
and
W.D. BRYANT & SON, INC.

APPELLEES

OPINION
AFFIRMING
** ** * * * * *

BEFORE: BUCKINGHAM, GUIDUGLI, AND HUDDLESTON, JUDGES.

BUCKINGHAM, JUDGE: LaSalle National Bank filed a foreclosure action against Mance and Mary Sue Paul as a result of their failure to pay on a promissory note. During the jury trial of the case, the court granted a directed verdict in favor of the Pauls and dismissed LaSalle's complaint. LaSalle appeals from the portion of the court's order directing a verdict against it. We affirm.

In 1994, Mance and Mary Sue Paul entered into a land contract with Nadine Croley to purchase property located in Whitley County. The contract provided for owner financing of

\$50,000 at seven percent interest per annum. Monthly payments were to be \$350.

In 1998, the Pauls made a decision to pay off the debt. They met with Joe Allen, a representative of Progressive Mortgage Group, Inc., at the home of Mary Sue's parents.¹ The Pauls' uncontradicted testimony at trial was that Allen told them that he could get them a loan in excess of what they owed Croley and at a better rate. They further testified that Allen assured them the monthly payments would not exceed \$350.

The Pauls testified that Allen brought the loan documents to their home for closing late in the evening on June 30, 1998. When they informed Allen that they did not think they should go through with the agreement, he told them that if they backed out they would have to pay a penalty equal to twenty percent of the principal. Allen again assured the Pauls that their payments would not be more than \$350 per month. Although they did not read the documents, they signed them.

The documents signed by the Pauls indicated that they had entered into a variable rate loan with Tandem National Mortgage, Inc., with an initial interest rate of 13.375%. The documents further provided that the rate could rise as high as 19.375%. Furthermore, despite Allen's assurances that their payments would not exceed \$350, the Pauls were required to pay \$513.28 per month. Of the \$45,200 the Pauls borrowed, \$28,913 went to Croley, \$6,952.20 went to loan costs, and \$9,334.80

¹ Allen had been attempting to get Mary Sue's parents to enter into a loan.

remained as a payout to the Pauls. According to the Pauls, they paid Allen an additional \$1,660, which amount included Allen's \$1,500 fee for assisting them in obtaining the loan as well as \$160 in interest he allegedly paid to Croley.

According to the Pauls, when they received notice that their first payment was due and that the amount was \$513.28, they suspected Allen of fraud. Although they made the first payment, they then sought the advice of an attorney and thereafter made no additional payments on the loan. As a result, on December 4, 1998, the Pauls received a notice of default from Superior Bank, FSB.

On March 23, 1999, LaSalle filed a complaint in the Whitley Circuit Court seeking foreclosure due to the Pauls' default in paying the note. LaSalle filed the complaint as "Trustee under the Pooling and Servicing Agreement dated September 1, 1998, series 1998-3, c/o Superior Bank." It claimed that, as holder and owner of the note, it was entitled to principal in the amount of \$45,180.97, as well as interest at the rate of 13.375%, late charges, and escrow advances. The Pauls responded with an answer and counterclaim, alleging that Allen induced them to enter into the loan through fraud and misrepresentation and that his actions violated the Truth in Lending Act.

A jury trial was held in June 2000. At trial, LaSalle attempted to prove its case through the introduction of documents and through the testimony of Matt Cahill, an attorney from New York who was assistant counsel in Superior Bank's loan servicing

division. According to Cahill, Allen made the loan on behalf of Progressive Insurance Co. and Tandem National Mortgage. He testified that the note was subsequently purchased from Tandem by Alliance Funding, a division of Superior Bank. The loan then became a part of a servicing and pooling agreement where Superior Bank serviced the loan and LaSalle held the note and mortgage as trustee and was the proper party to bring the foreclosure action. Cahill also testified that the principal owed by the Pauls was \$41,150 "or somewhere right in that neighborhood." Further, he stated that the Pauls owed "approximately between twelve and thirteen and a half thousand dollars worth of interest[.]"

Of greatest significance, Cahill testified that neither Superior Bank nor LaSalle had any interest in the note. Based on that testimony and the failure of LaSalle or Cahill to produce the necessary documentation to support LaSalle's claim that it was the real party in interest entitled to bring the foreclosure action, the trial court granted the Pauls' directed verdict motion and dismissed LaSalle's complaint. In doing so, the court stated:

It is the finding of the Court that the Plaintiff either through the testimony of its witnesses or through the documentary evidence has failed to show that it has any interest in this matter and is not a real party in interest in this action. Furthermore, it has not shown either by testimony or documentary evidence that it has the right to bring this action on behalf of whomever may be the real party in interest.

The court also dismissed the Pauls' counterclaim without prejudice. This appeal by LaSalle followed.

LaSalle argues that the trial court erred in denying its motions for summary judgment and for a directed verdict and in entering a directed verdict against it on its complaint. LaSalle filed a motion for summary judgment before the trial, but there is no indication in the record that the court ever ruled on it. In Transportation Cabinet, Bureau of Highways, Commonwealth of Kentucky v. Leneave, Ky. App., 751 S.W.2d 36, 38 (1988), we held that "once the trial-in-chief commences, an unruled-upon motion for summary judgment is rendered moot by application of waiver." Thus, we will not review whether LaSalle's summary judgment had merit.

As we review the trial court's denial of LaSalle's directed verdict motion and the trial court's granting of the Pauls' motion, we "must ascribe to the evidence all reasonable inferences and deductions which support the claim of the prevailing party." Bierman v. Klapheke, Ky., 967 S.W.2d 16, 18 (1998). "Once the issue is squarely presented to the trial judge, who heard and considered the evidence, a reviewing court cannot substitute its judgment for that of the trial judge unless the trial judge is clearly erroneous." Id. We conclude that the rulings of the trial court in denying LaSalle's motion and in granting the Pauls' motion were not clearly erroneous.

First, Cahill testified that LaSalle had no interest in the note and mortgage. Further, there were gaps in the title documents such that the last valid holder of both the note and mortgage appeared to be Tandem. There were no documents indicating an assignment of the note, an assignment of the

mortgage from Tandem to Alliance/Superior, nor an assignment of the servicing rights. The failure of LaSalle to introduce the pooling and servicing agreement also left unanswered questions both as to the circumstances under which LaSalle held the document as trustee and as to the relationship between LaSalle, Superior Bank, and Alliance.² Faced with this evidence, or lack thereof, the trial court had no choice but to direct a verdict dismissing LaSalle's complaint for lack of proof that it was a real party in interest or had the right to bring the action on behalf of whomever may have been the real party in interest.

The order of the Whitley Circuit Court is affirmed.

ALL CONCUR.

BRIEF AND ORAL ARGUMENT FOR
APPELLANT:

Cheryl U. Lewis
Hyden, Kentucky

BRIEF FOR APPELLEES, MANCE and
MARY PAUL:

Marcus L. Vanover
Howard O. Mann
Sandra J. Reeves
Corbin, Kentucky

ORAL ARGUMENT FOR APPELLEES:

Howard O. Mann
Corbin, Kentucky

² This relationship takes on particular significance in light of the fact that many of the documents provided by Allen at closing contained an Alliance/Superior Bank loan number. Further, several of the documents were on Superior Bank letterhead.