

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 2001-CA-000662-MR (DIRECT)

INTREPID INVESTMENTS, INC.

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT  
HONORABLE LAURANCE B. VANMETER, JUDGE  
ACTION NOS. 97-CI-04103 & 98-CI-01019

PNC BANK OF KENTUCKY; EQUINE MANAGEMENT  
CONSULTANTS, INC.; AND TIMOTHY  
SNODDY

APPELLEES

AND NO. 2001-CA-000732-MR (CROSS)

PNC BANK, N.A.,  
f/k/a PNC BANK, KENTUCKY, INC.

CROSS-APPELLANT

v. CROSS-APPEAL FROM FAYETTE CIRCUIT COURT  
HONORABLE LAURANCE B. VANMETER, JUDGE  
ACTION NOS. 97-CI-04103 & 98-CI-01019

INTREPID INVESTMENTS, INC.; EQUINE  
MANAGEMENT CONSULTANTS, INC.; AND  
TIMOTHY SNODDY

CROSS-APPELLEES

OPINION  
AFFIRMING ON APPEAL  
AND REVERSING AND REMANDING ON CROSS-APPEAL  
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BEFORE: BARBER, McANULTY, SCHRODER, JUDGES.

SCHRODER, JUDGE: This is an appeal and cross-appeal from an order of the Fayette Circuit Court. Intrepid Investments, Inc. (Intrepid) appeals the granting of summary judgment to PNC Bank, N.A. (PNC) in a dispute concerning the assignment by PNC of a loan agreement, note, and mortgage to Central Bank & Trust Company, as Trustee f/b/o the P. Keith Nally KEOGH (Central Bank), and the subsequent foreclosure of the mortgaged property, which was owned by Intrepid. The issue in the direct appeal is whether the previous foreclosure lawsuit between Central Bank and Intrepid concerning the loan agreement, note, and mortgage acts as res judicata in Intrepid's present lawsuit against PNC. PNC cross-appeals the circuit court's denial of attorney fees associated with its efforts to collect defaulted notes from Equine Management Consultants, Inc. (Equine Management) and Timothy Snoddy. We affirm in the direct appeal and reverse and remand in the cross-appeal.

In March 1994, FY Investments, Inc. (FYI), as Trustee for its Profit Sharing Plan, became the owner of 35% of the stock in Intrepid Investments, Inc. FYI was wholly owned by Norman D. Owens. The other 65% of Intrepid's stock was owned by Timothy K. Snoddy. At or about the same time, Norman Owens and his wife conveyed to Intrepid approximately 26 acres of land located on Newtown Pike in Fayette County, Kentucky, known as Providence

Place. At the time of these transactions, Norman Owens owed, and was in default, on a promissory note held by PNC Bank, which, as of April 1, 1994, had an unpaid balance of approximately \$266,000.00.

On April 8, 1994, Intrepid entered into a loan agreement with PNC Bank under which Intrepid granted a mortgage on Providence Place to PNC Bank. Under the agreement, among other things, PNC agreed to a forbearance in attempting to collect on the \$266,000.00 Owens note. The loan agreement also designated certain horses owned by Norman Owens as collateral on the note, and provided that PNC would apply the proceeds from the scheduled sale of the horses owned by Owens against the note. It is stipulated by the parties that the application of the proceeds from the sale of the collateral to the note did not occur.

In December 1996, PNC Bank transferred the note, mortgage, and loan agreement to Central Bank for \$75,000.00. According to Intrepid, as a result of the loan agreement and the surrounding circumstances, PNC became a joint venturer with Intrepid in the Providence Place property, and thereby became a fiduciary with respect to Intrepid. Intrepid alleges that in conjunction with the transfer of the note and mortgage, PNC breached various fiduciary duties PNC owed to Intrepid.

In February 1997, Central Bank filed a lawsuit in Fayette Circuit Court (Seventh Division), Case 97-CI-0638, seeking to foreclose against the Providence Place property. In the foreclosure lawsuit, Central Bank was the plaintiff, and Intrepid Investments was one of several defendants; other

mortgage holders on the Providence Place property were also named as defendants. On March 24, 1997, Intrepid filed an answer contesting the enforceability of the mortgage and asserting various counterclaims against Central Bank.

On June 2, 1997, Central Bank filed a motion for summary judgment in the foreclosure case. On June 25, 1997, the circuit court entered an order granting the motion. The order also granted Central Bank summary judgment on Intrepid's counterclaims and dismissed the counterclaims with prejudice. Intrepid filed a motion to alter, amend or vacate, which was denied by order entered July 15, 1997. Intrepid did not appeal the foreclosure ruling or the dismissal of its counterclaims.

On November 24, 1997, Intrepid filed the present lawsuit against PNC in Fayette Circuit Court (Division One), Case No. 97-CI-4103. Intrepid's complaint alleged that PNC breached the April 1, 1994, loan agreement; that PNC misrepresented that it would collect the proceeds from the sale of collateral and apply the proceeds to the \$266,000.00 Owens note; that PNC made misrepresentations in breach of its fiduciary duty owed to Intrepid; that PNC breached its fiduciary duty to Intrepid by selling the note to Central Bank without notice to Intrepid; and that PNC breached its fiduciary duty to Intrepid by selling the note with knowledge that Central Bank would foreclose even though PNC was aware that the mortgage was invalid.

On March 20, 1998, PNC filed a separate lawsuit, Case 98-CI-1019, against Equine Management Consultants, Inc. and Timothy Snoddy to collect two promissory notes. Case 97-CI-4103

and 98-CI-1019 were subsequently ordered consolidated. Case 98-CI-1019 and PNC's entitlement to attorneys' fees is the subject of the cross-appeal and is irrelevant to the direct appeal.

In October 1999, PNC filed a motion for summary judgment on the grounds that the decision in the foreclosure case was res judicata as to the claims against PNC made by Intrepid in the present case.<sup>1</sup>

On November 15, 2000, the circuit court entered an Opinion and Order granting PNC summary judgment on the basis that Intrepid's claims against PNC were res judicata based upon the decision in the foreclosure case. A Final Judgment incorporating the November 15 Opinion and Order was entered on December 18, 2000. Intrepid subsequently filed a motion to alter, amend or vacate, and PNC filed a motion to collect attorneys' fees related to its collection of the Snoddy and Equine Management notes. On February 21, 2001, the circuit court entered an order denying the motions. This appeal and cross-appeal followed.

In the direct appeal, Intrepid contends that the trial court erred in its determination that its claims against PNC in

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<sup>1</sup>Prior to any ruling being made, the two Division One cases, Case 97-CI-4103 and 98-CI-1019, were transferred to Division Seven and consolidated with Case 97-CI-0638. On February 29, 2000, Division Seven granted PNC's motion for summary judgment. Intrepid appealed to this Court; in addition to the February 29, 2000, order, Intrepid attempted to appeal various other orders which had been entered in Case 97-CI-0638. On August 16, 2000, we entered an order dismissing Intrepid's appeal on the basis that appeal of the orders in Case 97-CI-0638 were time-barred, and on the basis that the February 29, 2000, summary judgment order was interlocutory because it did not include finality language pursuant to CR 54.02 (see Case No. 2000-CA-000748-MR). Upon remand, Cases 97-CI-4103 and 98-CI-1019 were returned to the First Division. On remand, PNC again moved for summary judgment.

the present case are res judicata by operation of the final adjudication in the Central Bank case. Intrepid contends that the elements for res judicata are not met under either of the two subgroups of res judicata, claim preclusion or issue preclusion (collateral estoppel). We are persuaded that Intrepid's present lawsuit is barred by claim preclusion.

The rule of res judicata is an affirmative defense which operates to bar repetitious lawsuits involving the same cause of action. Godbey v. University Hosp., Ky. App., 975 S.W.2d 104, 105 (1998); Yeoman v. Commonwealth Health Policy Bd., Ky., 983 S.W.2d 459, 464 (1998). Res judicata encompasses two separate but related aspects: (1) claim preclusion, and (2) issue preclusion (sometimes referred to as collateral estoppel). Yeoman at 465. Because we decided the case under claim preclusion, we need not discuss the merits of the case under issue preclusion; however, we note that the same result is reached under issue preclusion.

Claim preclusion bars a party from relitigating a previously adjudicated cause of action and entirely bars a new lawsuit on the same cause of action. The requirements for claim preclusion are as follows: (1) identity or privity of the parties; (2) identity of the claims or causes of action; and (3) resolution of the action on the merits. Yeoman, 983 S.W.2d at 465; Napier v. Jones By and Through Reynolds, Ky. App., 925 S.W.2d 193, 195 (1996); Newman v. Newman, Ky., 451 S.W.2d 417, 419 (1970). Claim preclusion bars entire claims or causes of action that were or should have been brought in a prior action.

City of Covington v. Board of Trustees of the Policemen's and Firefighters' Retirement Fund, Ky., 903 S.W.2d 517, 521 (1995); Yeoman, 983 S.W.2d at 465.

The first element which must be met under claim preclusion is identity of parties. In this respect, Intrepid was a party to both the Central Bank case and the case at bar, so the only concern is whether there is an identity of parties between Central Bank and PNC. The identity of parties requirement may be satisfied through a finding of privity between the two parties. BTC Leasing, Inc. v. Martin, Ky. App., 685 S.W.2d 191, 197-198 (1984). While the concept of privity defies a precise, inflexible definition, a key consideration for its existence is the sharing of the same legal right by the parties allegedly in privity. Id. at 198. This is to ensure that the interests of the party against whom res judicata has been asserted have been adequately represented by his purported privity at the initial trial of the cause of action. Id. (citing, 46 Am. Jur. 2d Judgments § 532 (1969)). The absolute identity of legal interest is fundamental to a finding of privity, and the mere fact that two parties are interested in proving or disproving the same facts will not create privity. Id. (citing, Newark Insurance Company v. Bennett, Ky., 355 S.W.2d 303, 304 (1962)).

The December 1996 transfer of the note, mortgage, and loan agreement from PNC to Central Bank transferred and assigned PNC's rights in the note, mortgage, and loan agreement to Central

Bank and, as a result, Central Bank succeeded to the same rights and interests in the note, mortgage, and loan agreement as PNC. One is in privity with a party to litigation when he has succeeded to some estate or interest involved in the controversy. Pineville Steam Laundry v. Phillips, 254 Ky. 391, 71 S.W.2d 980, 982 (1934). The derivative right of succession of interest creates a privity of estate and binds as well as inures to the benefit of one who acquires it. Id. Between an assignor and assignee, there is a privity in estate and in contract as well. Id. Further, since Intrepid was a participant in the Central Bank case, its interests were adequately represented in the initial case. Pursuant to Pineville Steam Laundry and BTC Leasing, we are persuaded that the identity of interest element of claim preclusion is met.

Next, for claim preclusion to apply, the subject matter of the subsequent suit must be identical. Yeoman, 983 S.W.2d at 465. The key inquiry in deciding whether the two lawsuits concern the same controversy is whether they both arise from the same transactional nucleus of facts. If the two suits concern the same controversy, then the previous suit is deemed to have adjudicated every matter which was or could have been brought in support of the cause of action. Id.

A comparison of the Central Bank case litigation and the present litigation discloses that both cases arise from the same transactional nucleus of facts. Underlying Intrepid's defenses and counterclaims in the Central Bank case and its claims in the present case are the fundamental allegations (1)



that PNC breached its contractual agreement with Intrepid by failing to comply with the terms and provisions of the loan agreement by failing to apply the sales proceeds from the sale of collateral against the \$266,000.00 Owens note; (2) that PNC breached its fiduciary duty and obligation of good faith and fair dealing owed to Intrepid by its failure to comply with the terms and provisions of the loan agreement by misrepresenting that it would collect the horse sales proceeds and apply the proceeds against the note, and by making other false representations to Intrepid to induce it into entering into the loan agreement; (3) that PNC breached the fiduciary duties to act in good faith and fair dealing by selling the PNC note to Central Bank without notice to Intrepid, with knowledge that Central Bank would file a foreclosure action, and with the knowledge that the mortgage was invalid because PNC had breached the loan agreement; (4) that PNC was a fiduciary with respect to Intrepid and violated the trust and confidence of Intrepid by dealing in its own interests and otherwise failing to act in good faith and with due regard to the interest of Intrepid; (5) that PNC violated its fiduciary duties owed to Intrepid by acting and/or failing to act consistent with the fiduciary duties owed to Intrepid; (6) that PNC fraudulently, illegally or improperly colluded with Central Bank and others for the purpose of attempting to secure payment of the mortgage by Intrepid or for the purpose of obtaining the mortgaged property at a premium in foreclosure; and (7) that PNC aided Central Bank in purchasing the Robert and Peggy Owens note at substantially

less than fair market value, thereby depriving Intrepid of a lucrative sale of the property.

Intrepid's counterclaims and defenses in the Central Bank case, together, coincide with the claims in the case sub judice. The same transactional nucleus of facts apply to both cases and, accordingly we are persuaded that this element of claim preclusion is met.

Finally, claim preclusion requires that the prior action must have been resolved on the merits. A judgment on the merits precluding the relitigation of the same cause of action is one based on the legal rights and liabilities of the parties, as distinguished from one based on technical or dilatory objections or contentions, or on mere matters of form or of practice or procedure. 46 Am. Jur. 2d, Judgments § 606 (1994). It is a judgment determining which party is right as to the cause of action in dispute. Id. We are persuaded that the Central Bank case was decided on the merits.

Our conclusion that the Central Bank case was decided on the merits is determined, in large part, from our conclusion that the failure of PNC's defenses in the Central Bank case was not decided on the basis that Central Bank was, with respect to the note and mortgage, a holder in due course. In turn, this conclusion is compelled, first, by the circuit court's identification of Central Bank as merely a "holder" of the note, even though the holder in due course issue had been placed squarely before it, and was a rational and legitimate grounds upon which to reject Intrepid's defenses if Central Bank were, in

fact, a holder in due course. We conclude that Intrepid prevailed in its argument that Central Bank was not a holder in due course, which is understandable considering, along with the note and mortgage, Central Bank also accepted assignment of a contractual loan agreement, which imposed various obligations on PNC<sup>2</sup> and, further, Central Bank knew, or should have known, that payment on the note was overdue. See Hartford Insurance Group v. Citizens Fidelity Bank and Trust Company, Ky. App., 579 S.W.2d 628, 631 (1979) (Holder in due course must take note without notice that it was overdue); KRS 355.3-302.

Further, the breach of fiduciary allegations concerning PNC in the Central Bank case were premised upon the theory that the loan agreement established PNC and Intrepid as joint venturers in the Providence Place property. However, in paragraph seven of the summary judgment order, the trial court stated that Intrepid's obligation to PNC was "in the nature of debts" and that PNC was not an equity participant or joint venturer in the Providence Place property. It appears that the circuit court felt that it was necessary to reach the determination that the relationship between PNC and Intrepid was a debtor-creditor relationship, and not a relationship which would give rise to the fiduciary duties Intrepid alleges were breached by PNC, though this issue would have been irrelevant to the Central Bank litigation if Central Bank were a holder in due course.

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<sup>2</sup>Such as the obligation to apply the loan proceeds from the sale of collateral against the note, which Central Bank knew or should have known had not been complied with.

Lacking holder in due course status, Central Bank was subject to all of the defenses Intrepid would be entitled to assert against PNC. See Federal Deposit Ins. Corp. v. Gamaliel Farm Supply, Inc., Ky. App., 726 S.W.2d 709, 711 (1987); KRS 355.3-306. These defenses include all of the theories Intrepid asserts as claims in the present case - breach of contract, misrepresentation, and breach of fiduciary duty. Indeed, all of the various theories underlying the present claims appear to have been raised by Intrepid in its pleadings and arguments in the Central Bank claim, both as defenses and as counterclaims against Central Bank.<sup>3</sup> To the extent there is not absolute identical overlap, claim preclusion also bars issues which could have been brought in the prior action. City of Covington, 903 S.W.2d at 521; Yeoman, 983 S.W.2d at 465.

In granting Central Bank summary judgment, the circuit court necessarily determined that Intrepid did not have valid defenses against Central Bank; it follows that, since Central Bank was not a holder in due course and was subject to Intrepid's defenses against PNC, the trial court also determined that Intrepid did not have valid defenses against PNC, as any defenses Intrepid had against PNC were valid against Central Bank. By concluding that the defenses raised by Intrepid concerning PNC were not good against Central Bank, the trial court necessarily

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<sup>3</sup>As noted by Intrepid in its July 7, 1997, motion to alter, amend or vacate, "Intrepid has properly asserted many of the theories on which it has based its counterclaims (e.g., breach of fiduciary duty, bad faith, fraud, etc.) as defenses to Plaintiff's claims. The same facts establish those defenses as establish the counterclaims."

determined that the defenses were not good as against PNC. Since the claims in the present case are the reciprocals of the defenses in the Central Bank case, it follows that the failure of the defenses in the Central Bank case is ascribable to the claims in the present case.

Further, though the Central Bank case was decided by summary judgment; nevertheless, the case was decided "on the merits." In granting summary judgment, the circuit court necessarily determined that there were no genuine issues of material fact, and that Central Bank was entitled to judgment as a matter of law. Steelvest, Inc. v. Scansteel Service Center, Ky., 807 S.W.2d 476 (1991); CR 56. Hence all defenses and counterclaims raised by Intrepid in the Central Bank case were decided on the merits, not on technical grounds or on matters concerning form or procedure. We note that the standard for summary judgment in Kentucky is rigorous, see Steelvest, 807 S.W.2d 476, and were we to be reviewing the Central Bank judgment in this appeal, we may have concluded that Central Bank was not entitled to summary judgment in the Central Bank case. However, that issue is not before us and, in any event, the res judicata doctrine is applicable even though the former judgment was erroneous. Wallace v. Ashland Oil & Transp. Co., Ky., 305 S.W.2d 541, 544 (1957).

\_\_\_\_\_ In conclusion, all the necessary elements of claim preclusion are met in this case, and the litigation in the Central Bank case acts as res judicata to the claims raised by Intrepid in the present lawsuit. There are no genuine issues of

material fact, and PNC is entitled to summary judgment as a matter of law. Steelvest, 807 S.W.2d 476.

\_\_\_\_\_ In the cross-appeal, PNC contends that the trial court erred in denying its motion to collect attorneys' fees associated with the cost of collecting on the Equine Management and Timothy Snoddy notes. KRS 411.195 is entitled, "Enforceability of written agreement to pay attorney fees in event of default." The statute provides:

Any provisions in a writing which create a debt, or create a lien on real property, requiring the debtor, obligor, lienor or mortgagor to pay reasonable attorney fees incurred by the creditor, obligee or lienholder in the event of default, shall be enforceable, provided, however, such fees shall only be allowed to the extent actually paid or agreed to be paid, and shall not be allowed to a salaried employee of such creditor, obligor or lienholder.

The Snoddy note dated November 1, 1995, contained a provision which provided that "In the event of any default under this Note . . . the Borrower promises to pay the Bank's reasonable attorneys' fees and court costs incurred in collecting or attempting to secure this Note or enforcing the Bank's rights under any security instruments."

Similarly, the Equine Management note dated March 31, 1996, contained a provision which provided that "If there is any default under this Note . . . the undersigned Maker promises to pay to the holder hereof its reasonable attorneys' fees, court costs and other expenses incurred in collecting . . . this Note[.]"

\_\_\_\_\_As both notes expressly provide for the payment of attorney fees in the event of default, pursuant to 411.195, PNC is entitled to collect attorney fees to the extent actually paid or agreed to be paid. We accordingly reverse and remand for an award of attorney fees consistent with the provisions of the note and KRS 411.195.

For the foregoing reasons, the judgment of the Fayette Circuit Court is affirmed as to the direct appeal, and reversed and remanded as to the cross-appeal.

ALL CONCUR.

BRIEF FOR APPELLANT/CROSS-  
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BRIEF FOR APPELLEE/CROSS-  
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