

RENDERED: December 30, 2004; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky
Court of Appeals

NO. 2003-CA-002711-MR

DENNIS A. BRADLEY, IN HIS CAPACITY
AS PUBLIC ADMINISTRATOR FOR THE ESTATE
OF MARSHALL H. THOMAS

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE LAURANCE VANMETER, JUDGE
ACTION NO. 03-CI-00164

NATIONAL CITY BANK OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: JOHNSON, KNOPF, AND SCHRODER, JUDGES.

JOHNSON, JUDGE: Dennis A. Bradley, in his capacity as public administrator for the estate of Marshall H. Thomas, has appealed from an order of the Fayette Circuit Court entered on December 4, 2003, granting summary judgment in favor of National City Bank of Kentucky on the estate's claim for conversion of two checks. Having concluded that the trial court correctly ruled

that the three-year statute of limitations of KRS¹ 355.3-118 barred the claim, we affirm.

On April 9, 1997, Marshall H. Thomas died testate in Fayette County, Kentucky. On April 30, 1997, his will was filed for probate and an executor was appointed. After the initial executor resigned, Karen L. Snider, the decedent's daughter, was appointed the successor executrix pursuant to the will. She served in this capacity from January 9, 1998, until August 16, 2001.

In August 1998 Snider received two tax refund checks from the Internal Revenue Service made payable to "Karen Snider, as Executrix of the Estate of Marshall H. Thomas." On or about October 20, 1998, Snider deposited both checks, without endorsement, into her personal account at National City Bank. The Bank collected the full amount of the checks, totaling \$58,716.00, from the United States Treasury.

By order of the Fayette District Court, Probate Division, entered on August 16, 2001, Snider was removed from her duties as executrix and Bradley, the Public Administrator for Fayette County, was appointed as administrator of the estate. On January 14, 2003, Bradley, on behalf of the Thomas estate, filed a petition for declaration of rights against the Bank in the Fayette Circuit Court alleging conversion of the two

¹ Kentucky Revised Statutes.

negotiable instruments and demanding that the Bank reimburse the estate the full amount of the two checks. After the Bank filed its response to the petition, it moved the trial court for a summary judgment on the ground that the claim was barred by the three-year statute of limitations at KRS 355.3-118(7)(a). In his response to the motion for summary judgment, Bradley limited his argument to claiming that the discovery rule should apply to his claim, causing it to fall within the three-year period. The trial court granted the Bank's motion for summary judgment and this appeal followed.

The standard of review governing an appeal of a summary judgment is well-settled. We must determine whether the trial court erred in concluding that there was no genuine issue as to any material fact and that the moving party was entitled to a judgment as a matter of law.² Summary judgment is appropriate "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."³ In Paintsville Hospital Co. v. Rose,⁴ the Supreme Court of Kentucky held that for summary

² Scifres v. Kraft, Ky.App., 916 S.W.2d 779, 781 (1996).

³ Kentucky Rules of Civil Procedure (CR) 56.03.

⁴ Ky., 683 S.W.2d 255, 256 (1985).

judgment to be proper the movant must show that the adverse party cannot prevail under any circumstance. The Court has also stated that "the proper function of summary judgment is to terminate litigation when, as a matter of law, it appears that it would be impossible for the respondent to produce evidence at the trial warranting a judgment in his favor."⁵ There is no requirement that the appellate court defer to the trial court since factual findings are not at issue.⁶ "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."⁷ Furthermore, "a party opposing a properly supported summary judgment motion cannot defeat it without presenting at least some affirmative evidence showing that there is a genuine issue of material fact for trial."⁸

Bradley contends the statute of limitations for this action did not commence to run until the wrongful act was discovered by him when he was appointed the administrator of the estate. Bradley contends that since his predecessor, Snider, was committing fraud upon the Thomas estate, that the earliest

⁵ Steelvest, Inc. v. Scansteel Service Center, Inc., Ky., 807 S.W.2d 476, 480 (1991).

⁶ Goldsmith v. Allied Building Components, Inc., Ky., 833 S.W.2d 378, 381 (1992).

⁷ Steelvest, 807 S.W.2d at 480 (citation omitted).

⁸ Id. at 482. See also Philipps, Kentucky Practice, CR 56.03, p. 321 (5th ed. 1995).

the conversion could have been discovered was the date of his appointment, August 16, 2001. Since this action commenced on January 14, 2003, Bradley contends this action was timely filed, and that the trial court erred by granting summary judgment to the Bank.

KRS 355.3-420 provides that an instrument is converted when "a bank makes or obtains payment with respect to the instrument for a person not entitled to enforce the instrument or receive payment." The statute of limitations provision at KRS 355.3-118(7)(a) states that "[f]or conversion of an instrument, for money had and received," an action "must be commenced within three (3) years after the claim for relief accrues." Bradley argues that if the three-year limitation is applied, it should be subject to the discovery rule.

While there is no Kentucky law precisely on point, we find Haddid's of Illinois, Inc. v. Credit Union 1 Credit Union,⁹ to be persuasive. In Haddid's, the Court held that "the discovery rule does not apply to causes of action for conversion of negotiable instruments" unless there is fraudulent concealment on the part of the defendant. In our case the concealment was by Snider, not the Bank, so under Haddid's the discovery rule would not apply to the claim against the Bank.

⁹ 678 N.E.2d 322, 326 (Ill.App. 1997).

The Court in Stefano v. First Union National Bank of Virginia,¹⁰ addressed the conversion of 23 checks and stated that "[a] cause of action for conversion of negotiable instruments . . . accrues when the bank "makes or obtains payment" with respect to the instrument." Similarly, the Court in Yeager v. Bank of Kentucky,¹¹ a case concerning the conversion of stocks, stated that "[t]he cause of action accrues so [sic] soon as the wrong has been committed . . . [and since] the cause of action accrues at the time of the conversion, the statute of limitations runs from that time[.]" None of the authority cited by Bradley supports applying the discovery rule to a conversion action and we decline to do so.

Bradley also makes reference in his brief to KRS 386.120, involving a bank's obligation in handling a fiduciary's account, and the five-year statute of limitations at KRS 413.120(2) for "[a]n action upon a liability created by statute," and to "common law claims." However, he had failed to comply with CR 76.12(4)(c)(v) which requires a statement in the brief as to how these issues were properly preserved for appellate review, and our review of the record indicates that

¹⁰ 981 F.Supp. 417, 421 (E.D.Va. 1997)(citing Va.Code § 8.01-230).

¹¹ 127 Ky. 751, 756, 106 S.W. 806, 807 (1908).

the issues were not raised below. Accordingly, we will not address them for the first time on appeal.¹²

Therefore, we conclude that Bradley's action against the Bank was not timely filed pursuant to KRS 355.3-118. The conversion occurred in October 1998, and this suit was commenced on January 14, 2003, more than four years after the Bank made the payments on the two checks. Since this action was barred by the three-year statute of limitations set forth in KRS 355.3-118(7)(a), summary judgment for the Bank was proper.

For the foregoing reasons, the judgment of the Fayette Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

C. David Emerson
Lexington, Kentucky

BRIEF FOR APPELLEE:

William T. Repasky
Louisville, Kentucky

¹² Regional Jail Authority v. Tackett, Ky., 770 S.W.2d 225, 228 (1989).