RENDERED: April 15, 2005; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-001778-MR

FIRST FEDERAL SAVINGS BANK — APPELLANT

v.

APPEAL FROM BULLITT CIRCUIT COURT
HONORABLE THOMAS L. WALLER, JUDGE
ACTION NO. 04-CI-00206

TOMMY LEE MCCUBBINS — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: GUIDUGLI AND MINTON, JUDGES; EMBERTON, SENIOR JUDGE.[1]

GUIDUGLI, JUDGE: In this action to collect an alleged unpaid balance due on a Note, First Federal Savings Bank (hereinafter "the Bank") has appealed from the Bullitt Circuit Court's August 13, 2004, Order granting Tommy Lee McCubbins' motion for summary judgment. We affirm.

[1] Senior Judge Thomas D. Emberton, sitting as Special Judge by assignment of the Chief Justice pursuant to Section 100(5)(b) of the Kentucky Constitution and KRS 21.580.

On May 11, 1978, McCubbins and his wife, who is now deceased, obtained a loan in the amount of $16,000 from Bullitt Federal Savings and Loan Association, the predecessor of the Bank. The loan was secured by a mortgage on their residence in Lebanon Junction, Kentucky. They signed a Note on the same date indicating that they would pay the amount of $135.37 per month starting June 1, 1978, and continue paying until the Note was paid, or May 1, 2003. On October 19, 1978, McCubbins and his wife obtained a second loan in the amount of $1,600, which was for the same term as the previous loan. The new loan amount ($14.41 per month) was added to their previous loan amount, for a total of $176.39 per month, including the monthly escrow payment.

In the summer of 2002, McCubbins, thinking that his loan was ready to be paid off, went to the Bank with his daughter to inquire into its status. He was informed that the payoff amount was $20.41, which he paid on July 3, 2002. He received a letter of the same date from Loan Administrator Leticha Ellis regarding his "recently paid loan" and enclosing the Note dated May 1, 1978, stamped "PAID IN FULL" on July 3, 2002, as well as the Mortgage on his property entered into on May 1, 1978, also stamped "PAID IN FULL" on July 3, 2002. The Mortgage, as did the letter, referenced loan number 601001397. On July 25, 2002, a Deed of Release of the Mortgage signed by

the Bank's Senior Vice President Alan R. Howell was recorded in the Bullitt County Clerk's records.

On February 27, 2004, close to two years later, the Bank filed suit against McCubbins to recover a balance in the amount of $6,547 it claimed he owed on the Note. McCubbins filed an answer and counterclaim, asserting that the Note had been paid in full and that the Bank had never provided a payment history as he requested. He attached copies of the Note and Mortgage stamped "PAID IN FULL" sent to him by the Bank, as well as the Deed of Release, to support his claim that the debt had been paid in full. For his counterclaim, McCubbins alleged claims of breach of contract, fraud, outrageous conduct, and violations of the unfair business practices act. The counterclaim is still pending below.

In discovery, the Bank was requested to produce, and did produce, its loan file for McCubbins and its loan history on the Note at issue. McCubbins then filed a motion for summary judgment, arguing that the Bank discharged his obligation under the Note pursuant to KRS 355.3-604(1)(a) by a voluntary and intentional act and pointing out that the loan history only dated back to January 4, 1999, while the loan dated back to 1978. The Bank objected to the motion, and while admitting that it mailed the original Note and Mortgage stamped "PAID IN FULL" to McCubbins and filed the Deed of Release, it maintained that

those actions were clerical errors on the part of its employees. There was no intention to release McCubbins from his obligation on the $16,000 Note. Rather, the Bank asserted that McCubbins had only paid off the $1,600 loan. In sum, the Bank argued that there remained a factual issue as to whether the Bank intentionally and voluntarily released McCubbins from his obligation to pay the remaining balance allegedly due on the $16,000 loan. In support, the Bank attached an affidavit from Recovery and Preservation officer David G. Bush, who indicated in the affidavit that only the smaller loan had been paid off and that the Bank had mistakenly mailed the original of the larger Note along with the Mortgage and released the Mortgage securing the Note. In reply, McCubbins reiterated that he still had not received a full payment history from the Bank and that the Bank had not provided any affidavits from those responsible for discharging the Note and Mortgage or for causing the Deed of Release to be recorded.

On August 13, 2004, the circuit court entered the following Order:

> The Defendant, Tommy McCubbins, having moved the Court for Summary Judgment in his favor on the Plaintiff's claims and the Court having reviewed the evidence of record and having held a hearing on this Motion and having found that the bank acknowledged on July 3, 2002[,] that Mr. McCubbins had paid the final payment on the Note and further that the Plaintiff had provided the

> Defendant with the original Note marked "PAID IN FULL" and the Mortgage marked "PAID IN FULL" and that the Plaintiff also filed a Deed of Release, and further that the Plaintiff does not have a payment history on the subject Note for the years 1978 through January 1, 1999;
>
> IT IS HEREBY FOUND AND ADJUDGED that in accordance with KRS 355.3-604(1)(a) the Plaintiff discharged the obligation of Mr. McCubbins, if any, by its intentional voluntary acts, including the surrender of the Mortgage and Note to the party together with letters indicating that he had paid the Note in full. These acts show intentional and voluntary acts on the part of the Plaintiff to discharge the Defendant from any obligation under the Note.
>
> This is a final and appealable judgment and there is no just cause for the delay of its entry.

This appeal followed.

On appeal, the Bank continues to argue that the issue as to whether its discharge of McCubbins' liability was intentional and voluntary remained a disputed fact. On the other hand, McCubbins asserts that the Bank did not establish that any disputed facts existed because it could not establish that any debt actually remained to be paid.

In Lewis v. B&R Corporation,[2] this Court addressed the standard of review applicable in an appeal from the entry of a summary judgment:

[2] 56 S.W.3d 432, 436 (Ky.App. 2001).

> The standard of review on appeal when a trial court grants a motion for summary judgment is "whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law."[3] The trial court must view the evidence in the light most favorable to the nonmoving party, and summary judgment should be granted only if it appears impossible that the nonmoving party will be able to produce evidence at trial warranting a judgment in his favor.[] The moving party bears the initial burden of showing that no genuine issue of material fact exists, and then the burden shifts to the party opposing summary judgment to present "at least some affirmative evidence showing that there is a genuine issue of material fact for trial."[4] . . . Because summary judgment involves only legal questions and the existence of any disputed material issues of fact, an appellate court need not defer to the trial court's decision and will review the issue *de novo.*[]

With this standard in mind, we shall review the circuit court's Order.

Our decision in this case is based upon the application of KRS 355.3-604(1), which provides:

> A person entitled to enforce an instrument, with or without consideration, may discharge the obligation of a party to pay the instrument:

[3] Scifres v. Kraft, 916 S.W.2d 779, 781 (Ky.App. 1996); Palmer v. International Ass'n of Machinists & Aerospace Workers, 882 S.W.2d 117, 120 (Ky. 1994); CR 56.03. (Footnote 4 in original).

[4] Steelvest, 807 S.W.2d at 482. See also Hubble v. Johnson, 841 S.W.2d 169, 171 (Ky. 1992); Hibbitts v. Cumberland Valley Nat'l Bank & Trust Co., 977 S.W.2d 252, 253 (Ky.App. 1998). (Footnote 6 in original).

> (a) By an intentional voluntary act, such as surrender of the instrument to the party, destruction, mutilation, or cancellation of the instrument, cancellation or striking out of the party's signature, or the addition of words to the instrument indicating discharge.

The Bank has not claimed that any type of fraud was involved, which would have negated the Bank's action in discharging the alleged indebtedness on the note.[5] What the Bank has argued is that that its discharge of McCubbins' obligation was neither voluntary nor intentional, and that therefore a disputed factual issue remains. We disagree for two reasons.

First, it does not appear that the Bank met its burden of bringing forward at least some affirmative evidence to dispute McCubbins' evidence that the debt had been fully paid. McCubbins provided the Note and Mortgage stamped "PAID IN FULL" he received from the Bank and the Deed of Release. The Bank only produced an affidavit from bank officer David G. Bush, whose role in the situation is unknown. Although he indicated that he had personal knowledge of the circumstances, the affidavit fails to indicate how he was involved. Moreover, neither the loan officer who sent the letter to McCubbins along with the stamped Note and Mortgage nor the vice president who signed the Deed of Release provided any type of testimony or

[5] Citizens Fidelity Bank & Trust Co. v. Stark, 431 S.W.2d 722 (Ky. 1968).

evidence in this matter. The affidavit is not enough, in and of itself, to meet the Bank's burden to establish that there is an undecided material factual issue.[6]

The Bank relies upon this Court's decision in Richardson v. First Nat'l Bank of Louisville[7] to argue that its action in discharging McCubbins' obligation was not intentional, but rather was a clerical error. In Richardson, the bank mistakenly informed the appellants in December 1980 that a note had been paid off. The following April, only four months later, the bank realized its mistake and filed suit to recover the amount due on the note. In that case, the Court examined KRS 355.3-605(a)(1)[8] and found substantial evidence in the record to establish that the bank did not have the requisite intent to cancel the note. It held that a clerk's stamping a note "canceled" or "paid" does not establish that intent when a note has not in fact been paid,[9] and stated, "once the appellee filed an affidavit stating that a remaining indebtedness existed on the note, it was incumbent upon the appellants to file a counter-affidavit disputing such a statement."[10]

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[6] Steelvest, 807 S.W.2d at 482.

[7] 660 S.W.2d 678 (Ky.App. 1983).

[8] The current version of KRS 355.3-604 is analogous to former KRS 355.3-605.

[9] Id. at 679.

[10] Id. at 680.

While at first blush Richardson appears to be controlling here, we hold that it is not. The most obvious difference is the time element. In Richardson, the bank wasted little time in recognizing its error and filing suit to recover the balance due, while in the present case, the Bank waited over twenty months before filing suit. Furthermore, unlike in Richardson, McCubbins most certainly presented both documentary evidence and affidavits to establish that the Note at issue had been paid off.

Second, we agree with McCubbins that the Bank cannot establish that a debt is even owed. The Bank never provided a full payment or loan history prior to 1999 either before suit was filed or as a response to discovery requests in the present suit. As the Note dated back to 1978, over twenty years of payment history are missing. In Keeton v. Kennedy,[11] the former Court of Appeals stated:

> [I]t is the general rule that when the maker of a note admits its execution and pleads payment, the burden is on him to prove payment. However, when the maker of the note pleads payment and files with his answer the receipt of the payee showing payment and satisfaction in full, the burden then shifts to the payee. (Emphasis added.)

Here, McCubbins pleaded payment and provided the Note and Mortgage stamped "PAID IN FULL", both of which he received from

[11] 174 S.W.2d 781, 783 (Ky. 1943).

the Bank, as well as a Deed of Release for the Mortgage. The Bank could only provide a payment history dating back to 1999. While this may have something to do with its taking over of the original bank, the Bank cannot meet its burden and establish that any debt remained when it cannot produce records reflecting the full payment history of the loan. Therefore, there can be no disputed facts on this issue, and the Bank's action must fail as a matter of law.

For the foregoing reasons, the Order of the Bullitt Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:	BRIEF FOR APPELLEE:
Russell Sizemore Elizabethtown, KY	John F. Carroll Shepherdsville, KY