

RENDERED: May 6, 2005; 2:00 p.m.  
NOT TO BE PUBLISHED

# Commonwealth Of Kentucky

## Court of Appeals

NO. 2003-CA-002731-MR

VICKIE BOGGS HATTEN

APPELLANT

V. APPEAL FROM CARTER CIRCUIT COURT  
HONORABLE SAMUEL C. LONG, JUDGE  
CIVIL ACTION NO. 00-CI-00133

FIRST NATIONAL BANK OF GRAYSON;  
ESTATE OF MURIEL JACKSON BOGGS,  
DECEASED, D/B/A BOGGS MOTOR SPORTS;  
ROBERT L. CAUMMISAR, PUBLIC ADMINISTRATOR  
OF THE ESTATE OF MURIEL JACKSON BOGGS;  
M. JACK BOGGS, INC.;  
CARTER COUNTY, KENTUCKY;  
CLASSIC BANK, N.A.; AND  
LAWRENCE COUNTY, KENTUCKY

APPELLEES

OPINION  
AFFIRMING

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BEFORE: COMBS, CHIEF JUDGE; MINTON, JUDGE; AND MILLER, SENIOR  
JUDGE.<sup>1</sup>

MINTON, JUDGE:

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<sup>1</sup> Senior Judge John D. Miller sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

## I. INTRODUCTION.

While Vickie Hatten and Jack Boggs were married, they borrowed money at different times from the First National Bank of Grayson (FNBG) and secured these debts by separately mortgaging two properties. In their divorce settlement, Jack received Vickie's interest in these properties along with the mortgage payments. Under the settlement, Vickie was entitled to receive money from Jack in installments which she later secured by a judgment lien covering the mortgaged properties. When FNBG moved to foreclose following Jack's death, Vickie claimed that her judgment lien had priority over FNBG's mortgage liens. She asserted that KRS<sup>2</sup> 382.385 mandates that a mortgage instrument securing a line of credit must explicitly say so or the mortgage is void or, alternatively, subordinated to an otherwise inferior lien.<sup>3</sup> Lacking a specific statement "in substance or effect"

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<sup>2</sup> Kentucky Revised Statutes.

<sup>3</sup> The relevant parts of KRS 382.385 state:

- 1) As used in this section:
  - (a) "Line of credit" means a note, commitment, instrument, or agreement in writing between a lender and a debtor pursuant to which:
    1. The lender may extend loans, advances, or other extensions of credit to, or for the benefit of, the debtor; and
    2. The total amount of loans, advances, or extensions of credit outstanding may increase or decrease from time to time.

that identified the mortgage as a credit line mortgage, Vickie argued that FNBG's mortgages were thus flawed making them void or, at least, totally subordinate to her judgment lien.

The trial rejected Vickie's argument, ruling that FNBG's mortgage liens were valid and superior to the full extent of the original principal amount, plus future advances. The court concluded that KRS 382.385 was not the exclusive method of securing the debt and that as a signatory to the original notes and mortgages, Vicki was fully apprised of the bank's debt and its secured position when she settled the divorce and filed her judgment lien. We find no error in the circuit court's decision and affirm.

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. . . .

- 2) (a) Any mortgage of real property may secure payment of any or all sums due and payable by the debtor under a line of credit or under a revolving credit plan if the mortgage:
  1. States, in substance or effect, that the parties intend that the mortgage secures the line of credit or revolving credit plan;
  2. Specifies the maximum principal amount of credit which may be extended under the line of credit or the maximum credit limit of the revolving credit plan which, in each case, may be outstanding at any time or times under the line of credit or plan, and which is to be secured by the mortgage.

## II. THE BACKGROUND FACTS AND PROCEEDINGS IN CIRCUIT COURT.

Jack died in 2000. At that time, he owed Vickie about \$82,000.00 which represented about half of the total dollars Jack had promised to pay Vickie in annual installments when they settled their divorce in 1997. Their property settlement agreement, which was incorporated into the final decree, provided that Jack's property settlement debt to Vickie would be treated as a "preferred claim against his estate should he die prior to final payment . . . ." Vickie had attempted to secure her position by recording a notice of judgment lien for the payments due her under the settlement agreement. She filed the judgment lien on October 2, 1998. This judgment lien applied to all of Jack's property located in the county, including the two parcels mortgaged to FNBG.

Jack owed FNBG about \$179,000.00 when he died. This debt was the culmination of several banking transactions secured mainly by two mortgages. The oldest and largest of the notes dated back to a transaction in 1994 when Jack and Vickie, together, signed, individually, a one-year note to permit M. Jack Boggs, Inc. to borrow the principal amount of \$100,000.00 with an initial draw limited to \$35,000.00 and then in \$5,000.00 increments upon request. This note was secured by a \$100,000.00 mortgage on property called the commercial building belonging to Jack and Vickie. It is undisputed that

this mortgage was properly recorded with the county clerk. It contained a future advance clause that allowed advances totaling \$50,000.00 in addition to the \$100,000.00 principal amount. The future advance clause stipulated that "[s]uch Future Advances, with interest thereon, shall be secured by this Mortgage when evidenced by promissory notes stating that said notes are secured hereby." On the one-year anniversary of the note, Jack and Vickie took up the old note and signed a new one each consecutive year through 1997. After the divorce, Jack alone signed the renewal note in 1998 and 1999. The last expression of the original 1994 debt was the note signed by Jack on July 30, 1999, for the principal amount of \$99,821.89. The note stated that it was secured by the original mortgage on the commercial building and on the Cooke Hollow mortgage, the instrument discussed below.

The other mortgage, referred to as the Cooke Hollow mortgage, secured an \$80,000.00 installment note signed by Jack and Vickie on June 10, 1996. This mortgage also included a future advances provision which differed in its term from the commercial building mortgage in that it did not require that notes reflecting the future advance specifically state that they were secured by the mortgage. The Cooke Hollow mortgage allowed security for future advances up to \$50,000.00 in addition to the principal amount.

When FNBG filed the foreclosure action against Jack's estate, it demanded a money judgment for the debt represented by the July 30, 1999, note and four smaller notes. The four smaller notes were all signed by Jack and consisted of the following: (1) a line of credit checking account known as Checking Plus Agreement, dated September 15, 1998; (2) an installment loan, signed October 26, 1998; (3) an additional line of credit, dated February 5, 1999; and (4) a note, signed September 7, 1999. FNBG argued that all of these notes were secured by either the commercial building mortgage, the Cooke Hollow mortgage, or by both mortgages. The bank demanded that the property described in the mortgages be sold and that it be adjudged to have a priority claim on the proceeds of the judicial sale.

FNBG named Vickie as a defendant because of her judgment lien. Vickie counterclaimed against FNBG and cross-claimed against Jack's estate asserting that her judgment lien was superior to FNBG's mortgage liens. The trial court referred the dispute to its master commissioner who conducted an evidentiary hearing on the validity and priority of liens. After hearing the evidence, the master commissioner filed his report consisting of recommended findings of fact, conclusions of law, and judgment in favor of FNBG. Vickie filed exceptions. But the circuit judge denied Vickie's exceptions and signed the

judgment as recommended by the master commissioner. Vickie has now appealed to our Court.

### **III. ANALYSIS.**

The crux of Vickie's argument on appeal is the same one she made unsuccessfully in circuit court: that FNBG's secured position under the commercial building mortgage is, at most, void or, at least, inferior to her judgment lien because the commercial building mortgage does not make specific reference to the fact that it secures a line of credit. Specifically, she argues that KRS 382.385 provides the "mandatory and exclusive means" of creating a mortgage to secure a line of credit. Similarly, she argues that as to any of the smaller loans that are lines of credit, the trial court erred to the extent that it ruled that they are included as a future advance by either the commercial building mortgage or the Cooke Hollow mortgage. Finally, she argues that any of the smaller notes that fail to reference the commercial building mortgage as required by the future advance clause of that mortgage cannot be considered secured as a future advance of the commercial building mortgage. Vickie concedes that the smaller loans, dated October 26, 1998, and September 7, 1999, appear to be properly secured under the future advance clause of the Cooke

Hollow mortgage. All of the issues presented to us in this appeal are pure questions of law which we review de novo.

Effective July 14, 1992, the laws of the Commonwealth explicitly recognized the line of credit type mortgage and the revolving credit type mortgage in KRS 382.385. The enactment of the statute occurred as a legislative response to the sudden upsurge in the 1980s of demand for credit line mortgages to secure fluctuating lines of consumer credit.<sup>4</sup> "The type of mortgage which secured a note which had no maturity date and the balance of which could go up or down daily depending upon draws or payments by the borrower, was, arguably, not explicitly recognized by any [prior Kentucky] statute."<sup>5</sup> Presumably, the statute gave clear and explicit approval to the use of credit line mortgages; and as a result, financial institutions and title insurance companies were assured that credit line advances would receive the original mortgage's priority and the potential trouble and expense of performing title examination updates before every disbursement could be eliminated.<sup>6</sup>

We must reject Vickie's argument that an alleged failure to follow KRS 382.385 invalidates the commercial

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<sup>4</sup> T. J. Brandt, *Kentucky Real Estate Law Survey: 1990 through 1993*, 21 N. Ky. L. Rev. 435, 445 (1994).

<sup>5</sup> *Id.*

<sup>6</sup> See RESTATEMENT (THIRD) OF PROPERTY: MORTGAGES § 2.3 reporters' note (1997).

building mortgage or renders subsequent line of credit loans unsecured by either mortgage. First, we are not convinced that the notes and commercial building mortgage as first created in 1994 or as later renewed is truly a line of credit despite the fact that both sides have given it that name. The amount of the loan and the maturity date of the loan were specifically stated in the documents. Second, even if it were a line of credit type mortgage, as the trial court concluded, "KRS 382.385 is not the exclusive method, manner, or limited writing by which a mortgage may be created." The language of the statute uses the permissive *may*.<sup>7</sup> And KRS 382.385(7) expressly provides that "[t]his section is not exclusive and shall not prohibit the use of other types of mortgages or other instruments given for the purpose of creating a lien on real property permitted by law."

To decide the contest between competing lienholders, we look to this fundamental rule: chronology governs the priority of liens.<sup>8</sup> Application of this rule decides this case. At root, there is no dispute that FNBG's mortgages were both recorded before Vickie's judgment lien. After that, renewals and extensions of the original FNBG notes continued to be secured by the original mortgages and with their original

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<sup>7</sup> Ocean Accident & Guar. Corp. v. Milford Bank, 236 Ky. 457, 33 S.W.2d 312, 313 (1930).

<sup>8</sup> KRS 382.280.

priority.<sup>9</sup> Both FNBG mortgages also contained future advance clauses. And in Kentucky, future advances take the priority of the original mortgage, making no distinction between advances that the mortgagee is contractually obligated to make and those that are optional.<sup>10</sup> Thus, applying these basic principles of law, we hold that the trial court did not err when it found that FNBG's claim had priority over Vickie's claim. Moreover, we must agree with the trial court that giving priority to FNBG's mortgages over Vickie's judgment lien, even though unfortunate for Vickie, is not unfair. As the trial court aptly noted in its judgment, Vickie participated in the creation of the debts and the recorded mortgages. When she and Jack eventually settled the property division in their divorce, she was fully aware that Jack took the property and the debt it secured.

Finally, since we have upheld the validity of the mortgages, Vickie's argument regarding the failure of certain of the smaller notes to contain the required reference to the commercial building mortgage to be valid, though correct, is moot. The future advance clause of the Cooke Hollow mortgage adequately secures those notes that fail to reference the commercial building mortgage.

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<sup>9</sup> KRS 382.520(1).

<sup>10</sup> KRS 382.520(2).

**IV. CONCLUSION.**

For the reasons discussed in this opinion, the judgment of the circuit court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Rebecca K. Phillips  
Grayson, Kentucky

BRIEF FOR APPELLEE:

W. Jeffrey Scott  
Grayson, Kentucky