

RENDERED: SEPTEMBER 30, 2005; 10:00 a.m.  
NOT TO BE PUBLISHED

## Commonwealth Of Kentucky

### Court of Appeals

NO. 2004-CA-002304-MR

THE NORMAN CLAY MARTIN  
PRESENT INTEREST TRUST,  
BY AND THROUGH  
NANCY M. ERWIN, TRUSTEE

APPELLANT

APPEAL FROM JEFFERSON CIRCUIT COURT  
v. HONORABLE JUDITH E. McDONALD-BURKMAN, JUDGE  
ACTION NO. 04-CI-002549

STOCK YARDS BANK  
& TRUST COMPANY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: GUIDUGLI AND MINTON, JUDGES; ROSENBLUM, SENIOR JUDGE.<sup>1</sup>

GUIDUGLI, JUDGE: The Norman Clay Martin Present Interest Trust, by and through Nancy M. Erwin, Trustee, appeals from an order of the Jefferson Circuit Court dismissing its action against Stock Yards Bank & Trust Company. The trust alleged that Stock Yards

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

breached a fiduciary duty and converted trust assets by improperly exercising control over the corpus of the trust after Stock Yards's security interest in the trust was released. The trial court dismissed the action upon finding that Stock Yards retained a security interest in the trust assets after those assets were transferred to Merrill Lynch. For the reasons stated below, we affirm the order on appeal.

On March 21, 1997, a trust agreement was executed for the benefit of Norman Clay Martin. Under the terms of the trust, Nancy M. Erwin was appointed trustee, and her minor nephew Martin was granted the right to terminate the trust and control its assets upon reaching age 21. In June, 1997, Erwin, as trustee, entered into an agreement with Stock Yards allowing Stock Yards to manage the trust assets.

On June 29, 2000, Martin, then age 20, executed a \$275,000 line of credit agreement with Stock Yards. Martin and Erwin each signed the agreement, which pledged the trust assets as security. The agreement went on to state that the loan would be held in default if the value of the trust dipped below \$345,000.

On August 23, 2002, Erwin transferred the trust account from Stock Yards to Merrill Lynch. Contemporaneously, Stock Yards executed a lien release stating that it no longer had an interest in the collateral, and a "Collateral Account

Control Agreement" giving Stock Yards contractual rights to the trust assets now being managed by Merrill Lynch. It is the interpretation of the Collateral Account Control Agreement which forms the basis of the instant dispute.

Thereafter, Erwin and/or Martin withdrew at least \$60,000 from the Merrill Lynch account. When the account balance fell below \$345,000, Stock Yards exercised its rights under the Collateral Account Control Agreement and caused Merrill Lynch to liquidate trust assets of \$101,510 equaling the amount then outstanding on the Martin loan.

On March 24, 2004, Erwin, as trustee, filed the instant action against Stock Yards asserting theories of breach of fiduciary duty, conversion and breach of an implied duty of good faith and fair dealing. On April 30, 2004, Stock Yards responded with a motion to dismiss on the grounds that when the applicable law was applied to the allegations, the trustee had failed to state a claim upon which relief may be granted.<sup>2</sup> Erwin subsequently filed an amended complaint.

Upon considering the matter, on September 17, 2004, the trial court rendered an opinion and order granting Stock Yards's motion to dismiss. As a basis for the motion, the court found that the agreement unambiguously allowed Stock Yards to control the trust assets in the event the loan agreement was

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<sup>2</sup> CR 12.02.

breached. It also disposed of the breach of fiduciary duty claim by finding that Erwin, as trustee, rather than Stock Yards, owed the fiduciary duty to Martin. In sum, it found that Erwin had failed to state a claim upon which relief could be granted and dismissed the action. This appeal followed.

Erwin now argues that the trial court erred in dismissing the action. She maintains that the pleading sufficiently stated a claim for conversion of trust assets, breach of a duty of ordinary care, and breach of duty of good faith and loyalty. She argues Stock Yards's motion to dismiss raised only one question - whether the complaint stated a claim upon which relief may be granted. Since, she contends, the complaint and amended complaint state such claims, the trial court erred in granting the motion to dismiss.

CR 12.02 states that "[E]very defense, in law or fact, to a claim for relief in any pleading, . . . shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: . . . (f) failure to state a claim upon which relief can be granted . . . ." The rule goes on to state,

[I]f, on a motion asserting the defense that the pleading fails to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all

parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

In the matter at bar, the trial court grounded its order dismissing the action on its interpretation of various documents not contained in or appended to the complaint. These documents include the Collateral Account Control Agreement, and a Notice of Exclusive Control sent from Stock Yards to Merrill Lynch notifying the latter that Stock Yards was exercising a contractual right to take control of the collateral.

As these documents and other evidence outside of the complaint were referenced by the parties in the motion and response thereto, and relied upon by the court, we conclude that Stock Yards's motion to dismiss was treated by the parties and the court as a motion for summary judgment. Treating a motion to dismiss as a motion for summary judgment is proper where evidence outside the complaint is relied upon, and the conclusion that the matter was treated as a motion for summary judgment may be inferred from the order.<sup>3</sup>

The issue then arises as to whether the matter was correctly disposed of under CR 56.03. Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together

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<sup>3</sup> CR 12.02; Pearce v. Courier-Journal, 683 S.W.2d 633 (Ky.App. 1985); see also, Whisler v. Allen, 380 S.W.2d 70 (Ky. 1964).

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."<sup>4</sup> "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."<sup>5</sup> "Even though a trial court may believe the party opposing the motion may not succeed at trial, it should not render a summary judgment if there is any issue of material fact."<sup>6</sup> Finally, "[t]he standard of review on appeal of a 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."<sup>7</sup>

In the matter at bar, the trial court found that no issue of fact existed. Rather, the issue was purely one of law, to wit, the effect of the Collateral Account Control Agreement. The court found the agreement's language to be unambiguous on the issue of whether Stock Yards had the contractual right to control the trust's assets if certain criteria were not met, and this finding was dispositive. Having examined the Collateral Account Control Agreement, we agree with the trial court's conclusion that it operates to allow Stock Yards to exercise

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<sup>4</sup> CR 56.03.

<sup>5</sup> Steelvest, Inc. v. Scansteel Serv. Ctr., Inc., 807 S.W.2d 476, 480 (Ky. 1991).

<sup>6</sup> Id.

<sup>7</sup> Scifres v. Kraft, 916 S.W.2d 779, 781 (Ky.App. 1996).

control over the trust assets in the event that the trust value falls below \$345,000. Accordingly, we find no error on this issue.

Similarly, the record is also dispositive of the trust's claim that Stock Yards breached a fiduciary duty owed to the trust. While Stock Yards had certain duties related to its administration of the account, it did not serve as trustee and undertook no fiduciary duty in that capacity.

Lastly, the trial court properly disposed of the claim that Stock Yards wrongfully converted trust assets. The trust claimed that the conversion occurred when Stock Yards misinformed Merrill Lynch of its rights in the new trust account created at Merrill Lynch. Again, the Collateral Account Control Agreement states in clear and unambiguous terms that Stock Yards retained a security interest in the trust assets after the assets were transferred to Merrill Lynch. No genuine issue of material fact existed on this issue, and it was properly disposed of as a question of law.

For the foregoing reasons, we affirm the order of the Jefferson Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

Matthew W. Stein  
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BRIEF FOR APPELLEE:

David B. Tachau  
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