

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-001921-MR
AND
NO. 2003-CA-002158-MR

CHARLES L. CLARK, SR.; SANDRA
CLARK; CHARLES L. CLARK, JR.;
AND GINA CLARK

APPELLANTS

APPEALS FROM DAVIESS COURT
v. HONORABLE HENRY M. GRIFFIN III, JUDGE
ACTION NO. 01-CI-00146

ROBERT ANDERSON TRUST; JAMES D.
WILLIAMS; AND LINDA WILLIAMS

APPELLEES

OPINION
AFFIRMING

** ** * * *

BEFORE: BUCKINGHAM AND JOHNSON, JUDGES; EMBERTON, SENIOR JUDGE.¹

EMBERTON, SENIOR JUDGE: These consolidated appeals stem from the entry of summary judgment and the refusal to quash enforcement of that judgment in complex litigation concerning a personal guaranty agreement for debt owed to appellee Robert

¹ Senior Judge Thomas D. Emberton sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

Anderson Trust. Finding no error in the trial court's determinations in either of these matters, we affirm.

This litigation was commenced by the filing of an action to enforce a mechanics' lien by a vendor who had supplied materials for construction of an apartment complex known as the Brushwood Apartments. Appellee Robert Anderson Trust was joined as holder of a mortgage on the real estate subject to the mechanics' lien. The record indicates that Gary and Kathy Mason, no longer parties, conceived an idea for construction of the project in the late 1990s and that they were the initial members of Mercury Investment & Management, a Kentucky limited liability corporation, formed for the purpose of proceeding with the project. Appellants Larry Clark Sr. and Larry Clark Jr. subsequently came to own interests in Mercury. Appellee James D. Williams, the cousin of Clark Sr., later became an investor in Mercury.

On December 13, 1999, a guaranty agreement, which is the focus of this appeal, was executed by the parties. Under the terms of that document, the Clarks and their spouses Sandra and Gina, and James and Linda Williams agreed to personally guarantee payment of indebtedness to Anderson Trust, which included the following specified loans:

- i. Note executed by Three Putt Investments, LLC dated March 26, 1999,

in the original principal sum of \$250,000.

- ii. Note executed by Mercury Investments and Management, LLC dated September 13, 1999, in the original principal sum of \$500,000.
- iii. Note executed by Mercury Investments and Management, LLC dated October 27, 1999, in the original principal sum of \$1,000,000.

The document also recited the following with respect to consideration:

NOW, THEREFORE, in furtherance of the agreement between the parties and for other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, and to induce Lender from time to time, in its discretion, to extend or continue credit to Borrowers, and acknowledging that Lender in extending such credit shall rely on this guarantee...

On April 18, 2001, Anderson Trust filed a third-party complaint in the lien foreclosure litigation to enforce the guaranty agreement and subsequently moved for summary judgment against the Clarks and the Masons and for default judgment against the Williamses. Partial summary judgment was entered on August 28, 2001, against all four Clarks, reserving three issues for later adjudication: 1) whether there was consideration for the guarantee given to Anderson Trust; 2) whether the promissory notes signed by Charles L. Clark [Jr.] constitute obligations enforceable against Mercury Investments; and 3) whether there is

a genuine issue of fact as to whether Mercury is indebted to Anderson Trust on the unsigned note of September 13, 1999.

In early October 2001, Anderson Trust settled its claims against the Williamses in exchange for payment of \$266,000, which came from the sale of property known as "Riverwood", and the execution of a \$550,000 promissory note payable to Anderson Trust by Owensboro Acquisition, LLC, which had been formed in March 2001, by James Williams as its sole stockholder. As part of that agreement, Anderson Trust assigned to Owensboro Acquisition its rights under the Mercury Guaranty Agreement. The trial court thereafter granted Anderson Trust's motion for summary judgment against the Clarks on the reserved issues. In explaining his decision on the reserved issues, the trial judge offered the following rationale:

The Guaranty Agreement states that the loans were made on the express condition that the repayment be guaranteed by the Third Party Defendants. Furthermore, the continuation of credit by the Anderson Trust was specified in the Guaranty Agreement to be consideration for its execution by the Third Party Defendants. There is no factual issue regarding the issue of consideration given by the Anderson Trust for the execution of the Guaranty Agreement by the Third Party Defendants.

The second issue raised by Third Party Plaintiff, the Robert Anderson Trust, is whether the promissory notes signed by Charles L. Clark, Jr. on behalf of Mercury Investments & Management, LLC constitute an enforceable obligation of that entity. In his deposition, Charles L. Clark, Jr.

testified that he had the authority to execute the Notes. The Operating Agreement of Mercury, at Section 3.6(c), and KRS 275.135 dictate that the execution of said Notes is binding on the LLC. Furthermore, there is nothing in the record which indicates that Robert Anderson was advised that Mr. Clark did not have authority to execute the Notes in question. There is no issue of material fact regarding the authority of Mr. Clark to bind the LLC.

The final issue raised by the Third Party Plaintiff in the Motion for Summary Judgment is whether Mercury Investments & Management is indebted to the Robert Anderson Trust for the \$500,000.00 borrowed on September 13, 1999, for which the Promissory Note is unsigned. In his deposition, Charles L. Clark, Jr. testified that Mercury received the \$500,000.00 from the Anderson Trust on September 13, 1999. He further testified that the failure to sign the Note was an oversight. The debt has been acknowledged as owed by the LLC and there has been no evidence to dispute that the loan has not been repaid. Therefore there is no issue of material fact regarding whether Mercury is indebted to the Anderson Trust as a result of the \$500,000.00 borrowed on September 13, 1999.

In June 2002, Anderson Trust initiated a separate action in Daviess Circuit Court against Owensboro Acquisition and the Williamses stemming from Owensboro Acquisition's default on the note it had given the Trust as part of the October 2001 settlement agreement. Judgment in the amount of \$550,000 was entered in July 2002, and Anderson Trust thereafter domesticated that judgment in Michigan. Anderson Trust, Owensboro Acquisition and the Williamses reached an agreement settling the

July 2002 judgment and the Michigan action for payment to the Trust of the sum of \$525,000.

Because a previous appeal of the October 11, 2001, summary judgment was dismissed by this Court as interlocutory, the trial court certified the judgment as final and appealable pursuant to CR 54.02 on April 16, 2003. The trial judge also heard argument on the Clarks' motion to quash non-wage garnishments filed by Owensboro Acquisition which had been assigned the right to collect the Anderson Trust's October 2001 judgment against the Clarks. With respect to the latter, the trial judge concluded that the execution by the Clarks and the Williamses of a February 2001 mutual release concerning obligations and claims related to Mercury Investments prohibited James Williams from enforcing the Anderson judgment personally or through Owensboro Acquisition.

In May 2003, Anderson Trust, Owensboro Acquisition and the Williamses entered into an agreement rescinding their October 2001 settlement agreement. Under the new agreement, Owensboro Acquisition specifically relinquished its interest in the Anderson judgment against the Clarks to Anderson Trust. The agreement also contained the following provision:

Any monies collected by the Trust as a result of enforcement of the Clark Judgment shall be split equally between the Trust and Williams until the Trust has received \$12,217.35, net of any "Costs of

Enforcement" incurred by the Law Firms.
Upon the Trust's receipt of such amount, the
Trust agrees to remit 100% of any additional
moneys collected by the Trust with respect
to the Clark Judgment to Owensboro
[Acquisition].

The Anderson Trust subsequently undertook action to enforce its
October 2001 judgment against the Clarks, filing non-wage
garnishments on the Clarks' bank accounts and notices of
judgment liens against the Clarks' real property.

On July 17, 2003, the trial court denied the Clarks
motion to quash these garnishments and to enforce the mutual
release with respect to Mercury obligations. In denying the
motion the trial court noted that Anderson Trust is an
"independent entity with no legal connection to James Williams."
The trial judge also concluded that there was no legal
prohibition against Anderson Trust enforcing its judgment
"despite the alleged 'collusion' with Williams or his wholly
owned corporation, Owensboro Acquisition, LLC." A subsequent
"CR 59" Motion to Alter, Amend or Vacate that order was denied
by order entered September 11, 2003, which included the
following determinations:

This is a complex case involving a
large number of parties and issues. The
issue presently before the Court requires a
determination of whether a partial release
entered into by certain of the named
Defendants precluded enforcement of a final
judgment in favor of the Robert Anderson
Trust. The issue has been decided as a

matter of law. The movants argued originally that "collusion" between the trustee of the Robert Anderson Trust and James Williams, a party to the partial release, voids the judgment in favor of the Anderson Trust. The validity of the judgment is not in issue. It is undisputed that the trust assigned the judgment to Owensboro Acquisition, Inc., a corporation wholly owned by Defendant, James Williams. After the Court ruled that Owensboro Acquisition, Inc. could not collect the judgment, the trust and Owensboro Acquisition, Inc. entered into an agreement rescinding the assignment. The trust now seeks enforcement in its own name. Movants object that the trust has become an instrument to circumvent the release like the corporation which was disallowed in the Court's April 18, 2003, order. In its order of July 17, 2003, the Court ruled as a matter of law that the judgment is enforceable by the trust against the named Defendants notwithstanding any collusion provable by the movants.

Since the entry of the order of July 17, 2003 the movants have raised a defense to enforcement of the judgment of accord and satisfaction and urged the imposition of a constructive trust on judgment proceeds remitted to Williams. A judgment creditor can only collect the judgment once. The Court finds that accord and satisfaction is an affirmative defense which must be proved by the movants in a supplemental evidentiary proceeding. **The Court makes no finding in regard to this defense.** Imposition of a constructive trust would likewise require a supplemental evidentiary hearing. **The Court does not decide this issue.** Neither of these issues is sufficiently raised by evidence to quash enforcement of the judgment at this time.

The Court finds that assignment of a judgment to the corporation and rescission of the assignment back to the trust does not

constitute champerty and movant's claim based on that assignment is denied.²

The Clarks' appeal from this order is number 2003-CA-002158. The denial of the Clarks' motion to alter, amend or vacate the April 16, 2003, order which made the October 11, 2001, summary judgment final and appealable precipitated appeal number 2003-CA-001921. As previously noted, these appeals have been consolidated for resolution.

Before turning to the merits of the issues raised in these appeals, we must address appellees' contention that appellants' CR 59.05 motion from the denial of its motion to quash the garnishment of its bank accounts and real property did not operate to stay the time for appeal. Appellees argue the CR 59.05 is limited by its own terms to relief from "final judgments" and thus is inapplicable to an order denying a motion to quash. While that argument has some surface appeal, we need not reach that question because the issues advanced in the appeal from the denial of appellants' motion to quash are not proper subjects of CR 59 relief.

In Gullion v. Gullion,³ the Supreme Court of Kentucky recently undertook an analysis of the proper use of CR 59 which

² Emphasis added by this Court is set out in bold text.

³ 163 S.W.3d 888 (Ky. 2005).

we find to be dispositive of the appeal from the denial of appellants' motion to quash:

A party cannot invoke CR 59.05 to raise arguments and to introduce evidence that should have been presented during the proceedings before the entry of the judgment. Unlike CR 60.02, CR 59.05 does not set forth the grounds for the motion. But, because "reconsideration of a judgment after its entry is an extraordinary remedy which should be used sparingly," the federal courts, in construing CR 59.05's federal counterpart, Federal Rule of Civil Procedure 59(e), have limited the grounds:

There are four basic grounds upon which a Rule 59(e) motion may be granted. First, the movant may demonstrate that the motion is necessary to correct manifest errors of law or fact upon which the judgment is based. Second, the motion may be granted so that the moving party may present newly discovered or previously unavailable evidence. Third, the motion will be granted if necessary to prevent manifest injustice. Serious misconduct of counsel may justify relief under this theory. Fourth, a Rule 59(e) motion may be justified by an intervening change in controlling law.⁴

In the order denying appellants' CR 59 motion, the trial court expressly notes that after the entry of its order of July 17, 2003, appellants had raised issues concerning accord and satisfaction, imposition of a constructive trust, and champerty. The trial judge specifically stated that he would not rule on

⁴ Id. at 893 (citations omitted).

the first two of those issues. This Court will not address matters upon which the trial judge has not ruled. The champerty issue, which was decided by the trial court, was not the proper subject of CR 59 relief since it could have been raised prior to the ruling on the motion to quash. It is therefore plain that none of these issues has been preserved for our review.

Turning to the issues that are properly before us, we find nothing in the record to support appellants' claim that the trial judge erred in declining to rule that James Williams was collaterally estopped from relitigating the issue of whether Owensboro Acquisition could enforce a judgment against the Clarks. Contrary to appellants' assertion, the trial judge did not relitigate the issue of Williams's right to collect the October 11, 2001, judgment; rather, the court made clear that it found no prohibition to Anderson Trust collecting its own judgment. We fully agree that the doctrine of collateral estoppel is not implicated because the issue of Anderson Trust's right to collect its judgment is not identical to the question of James Williams's or Owensboro Acquisition's right to collect that judgment on the basis of a wholly separate agreement either had with the Clarks.

The issues in appeal 2003-CA-001921 focus upon the propriety of the trial court's ruling with respect to the reserved issues concerning the guaranty agreement. Appellants

first contend that the 1999 guaranty agreement is unenforceable for lack of valid and contemporaneous consideration. We disagree, finding the consideration given for this agreement to be virtually indistinguishable from the personal guaranty agreement approved in Kennedy v. Joy Manufacturing Company:⁵

Under Kentucky law, an agreement to extend future credit is sufficient consideration to support the guarantor's promise to pay the debtor's past and future indebtedness. See McGowan v. Wells' Trustee, 184 Ky. 722 213 S.W.573 (1919); 38 Am.Jur.2d Guarantee §43 (1968). In other words, Joy Manufacturing's promise to continue dealing with Marrick Company constituted sufficient consideration to support Kennedy's personal guarantee.

The continuation of credit by Anderson Trust was specifically cited as consideration for the Clarks' execution of the guaranty and we agree with the trial judge that it was entirely sufficient to support their personal promise on the guaranty agreement.

Finally, we find no merit in appellants' complaint that there was a genuine issue of fact as to what debt was guaranteed. In addition to the three separately identified notes, the Clarks specifically agreed to guarantee payment of:

(D) Any and all other Promissory Notes, debts, liabilities, and obligations of Borrowers to Lender, whether created directly by Borrowers or acquired by assignment or otherwise, whether joint or several, matured or unmatured, absolute or

⁵ 707 S.W.2d 362, 364 (Ky.App. 1986).

contingent, whether now existing or hereafter arising, and whether or not the creation of same was reasonably foreseeable or would be naturally contemplated by Borrowers, Lender, or Guarantors on the date of this Agreement, it being the intent of Guarantors and Lender that all of the same be part of the obligations for all purposes of this guaranty. . . .

The provision goes on to cap the guarantors' liability at \$2,000,000, exclusive of interest, costs, and other miscellaneous expenses. The affidavit in support of Anderson Trust's motion for summary judgment explained that on December 28, 1999, Mercury gave the Trust a note in the amount of \$750,000, representing the combination of the outstanding balance on the \$250,000 note and the \$500,000 note, which had already become due. We find it clear beyond dispute that this indebtedness was specifically covered by the plain language of the guaranty agreement and no genuine issue of material fact existed that would have precluded entry of summary judgment to Anderson Trust.

The judgment of the Daviess Circuit Court is affirmed in each appeal.

ALL CONCUR.

BRIEFS AND ORAL ARGUMENT FOR
APPELLANT:

Russ Wilkey
Owensboro, Kentucky

BRIEF AND ORAL ARGUMENT FOR
APPELLEE:

Jennifer E. Spreng
Owensboro, Kentucky