

RENDERED: OCTOBER 6, 2006; 2:00 P.M.  
NOT TO BE PUBLISHED

# Commonwealth of Kentucky

## Court of Appeals

NO. 2005-CA-001663-MR

NANCYE BLACKBURN; PHILLIP BLACKBURN; APPELLANTS  
GROUSE POINT DEVELOPMENT CORPORATION; and  
R.H. RATLIFF CEMETERY CORPORATION

v. APPEAL FROM PIKE CIRCUIT COURT  
HONORABLE EDDY COLEMAN, JUDGE  
CIVIL ACTION NO. 04-CI-00088

FAMILY BANK, FSB APPELLEE

### OPINION AND ORDER

- (1) AFFIRMING AS TO THE BLACKBURNS  
(2) DISMISSING AS TO GROUSE POINT AND RATLIFF

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BEFORE: COMBS, CHIEF JUDGE; HUDDLESTON AND KNOPF, SENIOR JUDGES.<sup>1</sup>

HUDDLESTON, SENIOR JUDGE: Nancye Blackburn, Phillip Blackburn,  
Grouse Point Development and R.H. Ratliff Cemetery Corporation  
appeal from a summary judgment granted by Pike Circuit Court to  
Family Bank, FSB. For the reasons stated below, we affirm the  
judgment against the Blackburns and dismiss the appeal

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<sup>1</sup> Senior Judges Joseph R. Huddleston and William L. Knopf, sitting as Special Judges by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

purportedly filed on behalf of Grouse Point Development Corporation and R.H. Ratliff Cemetery Corporation.

On October 11, 1996, the Blackburns signed and delivered to Family Bank a promissory note, with a variable interest rate, in the principal sum of \$335,783.98. To secure the note, the Blackburns executed and delivered to Family Bank a mortgage on a tract of land in Pike County, Kentucky. On October 21, 1999, the promissory note was modified by written agreement between Family Bank and the Blackburns to change the variable interest rate to a fixed rate.

On October 30, 1998, the Blackburns signed and delivered to Family Bank a second promissory note in the principal sum of \$43,778.21. To secure that note, the Blackburns executed and delivered to Family Bank a mortgage on the same property covered by the October 11, 1996, mortgage and a mortgage covering additional properties which are not the subject of this appeal.

In 2003, the Blackburns failed to make several payments on the October 11, 1996, promissory note. Family Bank sent a letter to the Blackburns on November 6, 2003, demanding that they bring the payments current or face a foreclosure action. When the payments were not made, Family Bank initiated, on January 20, 2004, a foreclosure action by filing a complaint against the Blackburns as well as other possible lien holders,

including Grouse Point Development and R.H. Ratliff Cemetery Corporation, seeking judgment for the principal indebtedness, together with interest, late charges and attorney's fees. On April 20, 2004, the Blackburns filed an answer alleging that their loan payments were not made because Family Bank officials had orally promised to purchase the property subject to the mortgage.

Family Bank moved for summary judgment supported by the affidavit of its president and chief executive officer, John Blackburn. The Blackburns responded by submitting two affidavits. Nancye Blackburn averred that on some unspecified date in 1996, Family Bank orally agreed to purchase the Blackburns' property and at the same time agreed that the Blackburns could refrain from making payments on the October 11, 1996, promissory note pending the drafting of a land sale contract, with any past-due payments to be deducted from the purchase price. These alleged promises were not reduced to writing nor were the promissory note or the mortgage securing the note modified in writing. John O. Burchett, a former Family Bank branch manager, did not claim any personal knowledge of the discussions between the Blackburns and Family Bank, but he did aver that it was his "impression the intention [of Family Bank to purchase the Blackburns' property] had been manifested strongly enough that definite plans had been made."

On July 15, 2005, the circuit court granted Family Bank's motion for summary judgment and ordered the property subject to the October 11, 1996, mortgage sold.<sup>2</sup> This appeal followed.

We are mindful of the rule that summary judgment "shall be rendered forthwith 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."<sup>3</sup> In deciding whether to grant summary judgment, the circuit court was obliged to view the record in a light most favorable to the parties opposing the motion for summary judgment, the Blackburns, and resolve all doubts in their favor.<sup>4</sup> On appeal, we must determine whether the circuit court correctly found that there were no genuine issues as to any material fact and that

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<sup>2</sup> The circuit court determined that Inez Deposit bank held a first mortgage lien in the principal sum of \$2,437.96 and interest; that Family Bank held a second mortgage lien in the principal sum of \$313,314.25, together with late charges, interest and attorney's fees; that Family Bank held a third mortgage lien that was not in default; that Capital Crossing Bank held fourth, fifth, sixth and seventh mortgage liens in varying amounts; that Grouse Point Development Corporation's mechanic liens were invalid because an action to enforce them had not been filed within one year of their filing; and that an option granted to R.H. Ratliff Cemetery Corporation had expired. Various tax liens were also adjudged.

<sup>3</sup> Ky. R. Civ. Proc. (CR) 56.03.

<sup>4</sup> *Steelvest, Inc. v. Scansteel Serv. Ctr., Inc.*, 807 S.W.2d 476, 480 (Ky. 1991).

the moving party, Family Bank, was entitled to judgment as a matter of law.<sup>5</sup>

The Blackburns' only argument on appeal, which is just over a half page in length and which cites three irrelevant cases, is that summary judgment was not proper because their answer and the two affidavits that they filed in response to Family Bank's motion for summary judgment raised a material issue of fact as to whether Family Bank agreed to purchase their property sometime in 1996 and to allow them to defer payments on the October 11, 1996, promissory note pending the closing of the transaction.

The short answer is that a contract for the sale of realty, if in fact one existed,<sup>6</sup> is unenforceable under the Statute of Frauds<sup>7</sup> unless it is in writing, signed by the parties to be charged [the Blackburns as vendors] and delivered to and accepted by the vendee [Family Bank]. Furthermore, where a contract, such as a mortgage or a promissory note due in over

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<sup>5</sup> *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky. App. 1996).

<sup>6</sup> The Blackburns claim that they entered into an oral agreement with Family Bank in 1996 that provided for the purchase by the bank of their property and the deferral of payments on their promissory note. The default in payment on the note which led to this foreclosure action occurred some seven years later, in 2003.

<sup>7</sup> Insofar as it is pertinent to this case, the Statute of Frauds, Ky. Rev. Stat. (KRS) 371.010, provides that "No action shall be brought to charge any person: \* \* \* (6) Upon any contract for the sale of real estate . . . ; (7) Upon any agreement that is not to be performed within one year from the making thereof; \* \* \* unless the promise, contract, agreement . . . , or some memorandum or note thereof, be in writing and signed by the party to be charged therewith, or by his authorized agent. \* \* \* "

one year, is required by the Statute of Frauds to be in writing to be enforceable, any modification of that contract must likewise be in writing to be enforceable.<sup>8</sup> Finally, the mortgage signed by the Blackburns, and the promissory note by incorporation, require that "no alteration or amendment to this Mortgage shall be effective unless given in writing and signed by the party or parties sought to be charged or bound by the alteration or amendment."

The Blackburns do not claim that they entered into a written agreement with Family Bank providing for the sale of their property or the modification of the mortgage and promissory note they executed on October 11, 1996. Therefore, there were no material facts at issue and Family Bank was entitled to judgment in its favor as a matter of law.

The notice of appeal filed by the Blackburns' attorney also names Grouse Point Development Corporation and R.H. Ratliff Cemetery Corporation as appellants. We find nothing in the record to indicate that that the Blackburns' attorney has entered his appearance as counsel of record for these two corporations which appear to have interests adverse to the Blackburns. In any event, neither corporation has filed a brief on appeal, so it is appropriate, pursuant to Kentucky Rules of Civil Procedure (CR) 76.12(8)(b), to dismiss their appeals.

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<sup>8</sup> Cox v. Venters, 887 S.W.2d 563, 566 (Ky. App. 1994).

Thus, the appeals filed on behalf of Grouse Point Development Corporation and R.H. Ratliff Cemetery Corporation are dismissed and the judgment is affirmed.

ALL CONCUR.

ENTERED: October 6, 2006

/s/ Joseph R. Huddleston  
SENIOR JUDGE, COURT OF APPEALS

BRIEF FOR APPELLANT:

Lawrence R. Webster  
Pikeville, Kentucky

BRIEF FOR APPELLEE:

Martin L. Osborne  
FITZPATRICK, OSBORNE,  
HEABERLIN & STURGILL, P.S.C.  
Prestonsburg, Kentucky