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Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-002449-MR

JEFF JONES AND ANN JONES — APPELLANTS

v.

APPEAL FROM LINCOLN CIRCUIT COURT
HONORABLE JEFFERY T. BURDETTE, JUDGE
ACTION NO. 01-CI-00437

PBK BANK — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, DIXON AND TAYLOR, JUDGES.

DIXON, JUDGE: Appellants, Jeff Jones and Ann Jones, appeal from an order of the Lincoln Circuit Court granting summary judgment in favor of Appellee, PBK Bank, and dismissing Appellants' counterclaim seeking statutory damages under KRS 382.365 for PBK's failure to release two separate real estate mortgages. Finding no error, we affirm.

On December 27, 1999, the Joneses signed a promissory note in favor of PBK in the amount of $32,352.55, and executed a second mortgage[1] securing the note with real estate (Jones II). The 1999 note was a refinancing of a note and second real estate mortgage dated September 12, 1998 (Jones I). Both the 1998 and 1999 loans were negotiated by PBK loan officer, Jeff Singleton. In addition to the real estate mortgage, the Joneses had executed a loan with PBK on September 21, 1998, in the principal amount of $37,020.50, which was secured by liens on a 1996 Dodge truck and a 1981 Case tractor.

In September 2000, the Joneses decided to refinance the first and second mortgages on the real estate. On September 25, 2000, the Joneses executed a note and real estate mortgage for $194,000 with Bank One. It was the Joneses' intent that the Bank One loan would pay off the first real estate mortgage held by Farmers National Bank and the second real estate mortgage held by PBK. Collateral One Mortgage, Inc, a title company in Lexington, Kentucky, supervised the details of the refinance.

Prior to the closing, Collateral One faxed a request to PBK requesting a payoff amount for loan #67204186370, which was actually the 1998 note and mortgage (Jones I). In response to Collateral One's request, PBK faxed a notice stating that loan had been "paid out."[2] It is unclear from the record whether PBK also informed Collateral One that the debt had actually been refinanced in 1999

[1] Farmers National Bank in Danville, Kentucky, held the first mortgage on the real estate.

[2] Apparently, although the 1998 note had been refinanced in 1999 (Jones II), the mortgage evidencing the 1998 loan had never been released.

(Jones II) rather than paid off. Collateral One thereafter faxed a request for a payoff amount on loan #67204186820, which was not the 1999 note (Jones II), but was rather the chattel loan secured by the truck and tractor.

At the Bank One loan closing, $97,388.40 was disbursed to Farmers National Bank and applied to its first mortgage on the real estate, which was then released. An amount of $26,496.50 was disbursed to PBK Bank, which it applied to the truck/tractor loan rather than the second mortgage on the real estate. Thus, PBK did not release the 1999 second mortgage (Jones II). Interestingly, the check issued to PBK Bank designated its purpose as "mortgage payoff," and the stub of the check contained the notations "REAL ESTATE CLOSING," and "For: mortgage payoff."

Subsequent to the closing, Jeff made three payments to PBK: (1) a check dated December 16, 2000, in the amount of $2,032.56; (2) a check dated May 1, 2001, in the amount of $1,038.08, which included the notation "2nd mortgage on farm;" and (3) a check dated May 11, 2001, in the amount of $2,700, which also included the notation "2nd mortgage." Evidently, the May 11, 2001, check was the last payment received by PBK and applied to the 1999 loan and mortgage (Jones II).

On November 29, 2001, PBK wrote the Joneses a letter questioning their failure to pay the second real estate mortgage. Jeff responded, stating that the second mortgage had been paid off with the monies from Bank One. Thereafter, on December 27, 2001, PBK filed a complaint in the Lincoln Circuit Court to

collect on the debt and to foreclose on the real estate. PBK alleged that it had a first and prior lien on the real estate and that the Joneses had defaulted on the 1999 note (Jones II).

On January 22, 2002, the Joneses filed an answer claiming that PBK's loan had been voluntarily paid off with proceeds from the Bank One loan at the time of their refinancing in 2000, but that PBK had chosen to apply the proceeds to another loan it had with the Joneses that was not secured by a mortgage on the real estate. The Joneses also counterclaimed that PBK had refused to release its 1999 mortgage in violation of KRS 382.365, and that PBK had misappropriated, concealed, misapplied and converted the proceeds paid to it by Bank One causing damages in the amount of the payoff made to PBK bank with interest. The Joneses further demanded punitive damages.

On March 12, 2003, the trial court granted summary judgment in favor of PBK, ruling that PBK had a first and superior mortgage lien on the real estate. The trial court found that : (1) there was no misconduct by PBK and no misapplication of the payoff proceeds from Bank One; (2) PBK had followed the request for payoff made by the Joneses as a direct result of their meeting with Collateral One, and therefore did not violate any duty to the Joneses; (3) it was the Joneses' duty to ensure that Collateral One had the proper loan account information to pay off the mortgage and that it was the obligation of Collateral One and Bank One to verify the account number of the loan that was being paid off;

and (4) the existing loan to PBK was not paid off as evidenced by the Joneses' own checks to PBK after the date of the Bank One mortgage.

The Joneses thereafter appealed to this Court. On November 24, 2004, a panel of this Court rendered an unpublished opinion vacating summary judgment and remanding the matter to the trial court. *Jones, et al. v. PBK Bank,* 2003-CA-001512-MR (November 24, 2004). The opinion questioned the trial court's imposition of a duty upon the Joneses to ensure that Collateral One had the correct loan account numbers, noting that there was no legal authority for such. Further, the Court determined that Jeff's testimony regarding his relationship with PBK and loan officer Singleton presented a factual question as to PBK's involvement and knowledge of the Joneses' refinancing attempts, and whether PBK had correctly applied the loan proceeds. Accordingly, the Court held:

> [G]enuine issues of material fact should have precluded the trial court from determining that it was impossible for the Joneses to prevail at trial. Further, even if the evidence in the record shifted the burden of proof to the Joneses, Jones's testimony regarding his discussions with Singleton, which PBK Bank could not explain and did not deny, met the threshold to defeat summary judgment.

By the time the matter was returned to the trial court, the Joneses had divorced and Ann had retained separate counsel. Ann thereafter filed an amended counterclaim that incorporated the original counterclaim and raised two additional claims against PBK. Of relevance to this case, Ann claimed that PBK had violated KRS 382.365 by failing to release the 1998 mortgage (Jones I). After depositions

were taken, PBK filed a motion for summary judgment on the two claims involving the alleged violations of KRS 382.365.

On June 30, 2006, the trial court granted summary in favor of PBK, finding that the statutory requirements of KRS 382.365 had not been satisfied. Following the denial of a CR 59.05 motion to alter, amend or vacate the order of summary judgment, Jeff and Ann appealed to this Court.

On appeal, the Joneses argue that the trial court failed to properly apply the standard for summary judgment. Essentially, it is their position that our first opinion in this case established that summary judgment is not proper, and thus, PBK should not be entitled to "two bites at the apple." The Joneses contend that the arguments presented by PBK did not flow from any new evidence developed after this case was remanded to the trial court. Accordingly, since this Court ruled that genuine issues of material fact prohibited summary judgment, the Joneses assert that the trial court erred in granting summary judgment again on remand. We disagree.

As noted in the June 30, 2006, order granting summary judgment, the applicability of KRS 382.365 was not addressed by the trial court in the first summary judgment, nor was it reviewed by this Court in our November 2004 opinion. The trial court, in granting summary judgment on this limited issue, did not dismiss the Joneses' other claims. In fact, the trial court granted the Joneses' request, over the objection of PBK, to continue the trial pending the outcome of this appeal, and those issues still remain to be determined.

The Joneses next argue that the trial court erred in ruling that PBK was not liable for damages under KRS 382.365 for its failure to timely release the 1998 and the 1999 mortgages. Again, we must disagree.

KRS 382.365 was amended in 2006. However, the version that is applicable to this case provides, in pertinent part:

> (1) A holder of a lien on real property, including a lien provided for in KRS 376.010, shall release the lien in the county clerk's office where the lien is recorded within thirty (30) days from the date of satisfaction.
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> (2) A proceeding may be filed by any owner of real property or any party acquiring an interest in the real property in District Court or Circuit Court against a lienholder that violates subsection (1) of this section. A proceeding filed under this section shall be given precedence over other matters pending before the court.
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> (3) Upon proof to the court of the lien being satisfied, the court shall enter a judgment releasing the lien. The judgment shall be with costs including a reasonable attorney's fee. If the court finds that the lienholder received written notice of its failure to release and lacked good cause for not releasing the lien, the lienholder shall be liable to the owner of the real property in the amount of one hundred dollars ($100) per day for each day, beginning on the fifteenth day after receipt of the written notice, of the violation for which good cause did not exist.
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> (4) A lienholder that continues to fail to release a satisfied real estate lien, without good cause, within forty-five (45) days from the date of written notice shall be liable to the owner of the real property for an additional four hundred dollars ($400) per day for each day for which good cause did not exist after the forty-fifth day from the date of written notice, for a total of five hundred dollars ($500) per day for each day for which good cause did not exist after the forty-fifth day from the

> date of written notice. The lienholder shall also be liable for any actual expense including a reasonable attorney's fee incurred by the owner in securing the release of real property by such violation.
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> . . .
>
> (6) For the purposes of this section, "date of satisfaction" means that date of receipt by a holder of a lien on real property of a sum of money in the form of a certified check, cashier's check, wired transferred funds, or other form of payment satisfactory to the lienholder that is sufficient to pay the principal, interest, and other costs owing on the obligation that is secured by the lien on the property.

The statute basically requires three things: (1) that the debt be satisfied; (2) that the lienholder be provided with written notice of its failure to release the mortgage; and (3) that the lienholder lack good cause for failing to release the mortgage once notice is given. KRS 382.365. Thus, even when a mortgage lien is not released within 30 days from satisfaction of the debt, KRS 382.365 does not authorize the imposition of penalties until and unless written demand for release has been made to the lienholder and the lienholder thereafter fails to release the mortgage within 15 days. *See Union Planters Bank, N.A. v. Hutson*, 210 S.W.3d 163, 166 (Ky. App. 2006) ("KRS 382.365 expressly requires that the notice must be received before a penalty may be imposed. It is an element of the cause of action and is the date from which the penalties are imposed . . . .")

Regarding the 1998 mortgage (Jones I), the Joneses are correct that the debt was satisfied when it was refinanced by the 1999 note and mortgage (Jones II). Further, they argue that Collateral One's September 18, 2000, payoff

request faxed to PBK on the account that was represented by the 1998 note put PBK on notice of its failure to release that mortgage or, at a minimum, create a duty on PBK's part to investigate the situation.

However, it is undisputed that Collateral One's payoff request did not contain any language specifically notifying PBK that it had failed to release a satisfied lien. In her deposition, Ann conceded that she was unaware of any documentation showing written notice to PBK of its failure to release the 1998 mortgage. Further, she acknowledges that the mortgage was, in fact, released prior to her bringing her amended counterclaim.

Indeed, we agree with the reasoning espoused by the trial court:

> This Court disagrees with Defendant Ann Jones regarding the "sufficiency" of notice provided by any documentation or circumstances surrounding this litigation. Ann Jones may not rely on a payoff request from one bank to another as notice, and then wait five (5) years until its release, then file a claim to collect thousands of dollars under this statute. At the very least, a follow-up letter with clear language referencing a request to release the specific mortgage lien would be required to start the clock ticking. In any regard, the lien was ultimately released prior to her claim being filed, and no action lies.

Clearly, the Joneses failed to demonstrate that the statutory requirements of KRS 382.365 were satisfied with regard to the 1998 mortgage. Thus, we are of the opinion that the trial court correctly ruled that there was no genuine issue as to any material fact and summary judgment was proper as a

matter of law. *Steelvest, Inc. v. Scansteel Service Center, Inc*., 807 S.W.2d 476 (Ky. 1991).

With respect to the 1999 mortgage, the Joneses argue that Jeff's December 14, 2001, letter responding to PBK's nonpayment inquiry was sufficient notice under the statute. We simply cannot agree. Certainly, Jeff's letter signaled his confusion as to the status of the 1999 loan. However, given the fact that the second mortgage clearly had not been satisfied, and further that Jeff had made additional payments towards that loan, his letter cannot be interpreted as the notice contemplated by KRS 382.365.

We again agree with the trial court's conclusions with respect to the 1999 mortgage:

> KRS 382.365 requires the debt at issue to be satisfied. In point of fact, it is undisputed that another debt was satisfied. There is no claim that PBK simply held the monies, or applied the monies to a third party's debt. The monies paid off a debt owed by the Joneses. Still, the debt at issue has never been satisfied, so as it follows, the "satisfaction" requirement has not been met. There is no genuine issue as to material fact and summary judgment is proper.
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> Further, even if the debt had been satisfied, and it has not been, the written notice requirement would require more than a letter referencing in general, confusion relevant to payments. The statute requires the lien holder to receive "written notice" of its failure to release, and the generalized letter emphasizing confusion in response to PBK's letter, after payments were made by the Joneses subsequent to the alleged satisfaction of the debt makes that letter insufficient. And, PBK has shown, for the purposes of this particular statute, that good cause existed for not releasing . . . .

Accordingly, we conclude that the trial court properly found that no genuine issue of material fact existed and the Joneses could not prevail on their claims under KRS 382.365. As such summary judgment in favor of PBK on these limited claims was proper as a matter of law. As previously noted, the summary judgment at issue herein is in no manner dispositive of whether PBK has priority status in its 1999 mortgage, or whether PBK misapplied monies and was negligent in their application thereof. Clearly, genuine issues of material fact exist as to these remaining claims, as pointed out by this Court in our prior opinion. *Jones, et al. v. PBK Bank,* 2003-CA-001512-MR (November 24, 2004).

The order of the Lincoln Circuit Court granting summary judgment in favor of PBK on Jeff and Ann Jones claims under KRS 382.365 is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Richard Clay
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BRIEF FOR APPELLEE:

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