

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-000688-MR

WHITAKER BANK, INC.

APPELLANT

v.

APPEAL FROM LAUREL CIRCUIT COURT
HONORABLE RODERICK MESSER, JUDGE
ACTION NO. 05-CI-01088

FIRST NATIONAL BANK AND TRUST
OF LONDON; STEVE ROBINSON AND
PAUL ROBINSON

APPELLEES

OPINION
AFFIRMING

** ** *

BEFORE: CLAYTON, DIXON, AND STUMBO, JUDGES.

STUMBO, JUDGE: Whitaker Bank, Inc. (hereafter Appellant) appeals from a summary judgment of the Laurel Circuit Court sustaining the motion of Appellees First National Bank and Trust of London (hereinafter First National) and Steve and Paul Robinson (hereinafter the Robinsons). The judgment denied Appellant's motion for summary judgment. At issue is the question of priority to the proceeds

of a Commissioner's sale between Appellant's judgment lien and Appellees' separate mortgage liens. Appellant contends that the mortgages are not valid as they did not secure any services or debt owed by the mortgagor. The Appellees argue that their mortgages are valid and, because they were recorded first, should get priority over the money received from the Commissioner's sale. We find that the summary judgment in favor of First National and the Robinsons was proper and affirm.

The facts of this case are complicated, but essential to our decision. As such, they will be recounted in detail. The property at issue here is a building on Tenth Street in London, Kentucky, which is owned by Daoud Trading Company, Inc. (hereinafter Daoud Trading).

Peggy Daoud owned and controlled two legal entities relevant to this action: Daoud Trading and Daoud Realty, LLC (hereinafter Daoud Realty). First National is the assignee of a promissory note and corrected real estate mortgage executed by Daoud Trading to James Boggs dated April 6, 2005, which was recorded in the Laurel County Court Clerk's Office. The mortgage was for the Tenth Street property and secured payment of money owed to Boggs for work done for Daoud Realty. The assignment of the note and mortgage by Boggs to First National was also recorded. The mortgage secures a note executed and delivered to First National by Boggs dated July 12, 2005.

On or about May 31, 2005, Daoud Realty sold some apartments at the Pepperhill development near London, Kentucky. The Robinsons were the listing

agents for this transaction. The property sold for \$750,000 and the Robinsons' standard commission was to be 10%, which would be \$75,000. Appellant and First National held mortgages on this property and after those were paid, only about \$50,000 remained. The Robinsons agreed to accept that amount as their commission.

At closing, it was discovered that almost \$22,000 was due in back taxes on this property. To keep the sale from falling through, the Robinsons agreed to accept approximately \$27,000 for a portion of their commission. Daoud Trading, through Ms. Daoud, executed an acknowledgement of indebtedness in the amount of \$45,000 in favor of the Robinsons for the balance of the commission and a mortgage on the Tenth Street property was executed to secure it.

Appellant's lien arose from a January 15, 2003, loan given by Appellant to Daoud Realty. Daoud Realty then executed a promissory note, the terms of which are not relevant. Daoud Trading then executed a Guaranty of Payment in writing whereby it promised to guarantee the payment of the loan. Daoud Realty breached the conditions of the note and defaulted on the loan. To collect its debt, Appellant filed suit and received a judgment in November of 2005. A judgment lien pursuant to KRS 426.720 was recorded later that month and Appellees were joined in the instant action to enforce the lien.

A default judgment and order of sale was entered on March 10, 2006. The Tenth Street property was to be sold by the master commissioner and the proceeds be distributed. All liens and mortgages were recorded and the order of

recording was First National, the Robinsons, and then Appellant. All three parties sought summary judgment to determine priority to receive the proceeds.

Appellant's was denied, but the Appellees' was granted. This appeal followed.

Appellant contends that Daoud Trading was never indebted to First National or the Robinsons, but rather that Daoud Realty was the obligated party, and as such, First National and the Robinsons should not have priority over Appellant's judgment lien. The Appellees argue that their transactions with Daoud Trading were binding, properly recorded and should maintain priority over Appellant. We agree.

Appellant argues that since Daoud Trading never owed First National or the Robinsons a debt, the mortgage should not be given priority. We disagree. While it is true that the debt secured by these mortgages was one owed by Daoud Realty, a separate and distinct legal entity, contract law allows one person, or in this case one company, to take on the debt of another. This is basic contract law where the only requirement is that there is some sort of consideration.

If consideration is sufficient for a contract in other respects, it does not matter from or to whom it moves. The consideration may move to the promisor or a third person, and may be given by the promisee or a third person. To constitute consideration, it is not necessary that a benefit should accrue to the promisor; it is sufficient that something valuable flows from the person to whom the promise is made and that the promise is the inducement to the transaction.

Am. Jur. 2d §113.

A benefit to the promisor or a detriment to the promisee is sufficient consideration for a contract, regardless of the amount of the benefit or detriment. The terms “benefit” and “detriment” are thus used in a legal or technical sense and have no necessary reference to material advantage or disadvantage to the parties, or to any actual pecuniary gain or loss. Accordingly, sufficient consideration may consist either in some right, interest, profit, or benefit accruing to the one party, or some forbearance, detriment, loss, or responsibility given, suffered, or undertaken by the other.

Both benefit and detriment need not coexist before there is consideration. Benefit to the promisor is consideration for his or her promise, regardless of the existence of a detriment to the promisee or any other person, as indicated by use of the disjunctive “or” in the commonly used phrase, “benefit to promisor or detriment to promisee.” Consideration to support a promise need not even involve a benefit to the promisor; it is sufficient if the benefit is derived solely by a third person or consists only of detriment to the person to whom the promise is made.

Am. Jur. 2d §117.

Here, the Robinsons agreed to take the mortgage from Daoud Trading in lieu of their full commission so the sale of the Pepperhill property would go through. The mortgage given to Boggs, which was subsequently obtained by First National, was for payment of services. Both of these are valid mortgages to secure the debts of a third party and both have consideration. Daoud Realty owed debts to both the Robinsons and Boggs. When they became due, Daoud Trading stepped in and secured them by giving Boggs and the Robinsons a mortgage on the Tenth Street property.

The relevant Kentucky rule relating to summary judgment, CR 56.03, authorizes such a judgment “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.”

Steelvest, Inc. v. Scansteel Service Center, Inc., 807 S.W.2d 476, 480 (Ky. 1991).

“The law in Kentucky is quite clear that a recorded mortgage takes priority over any subsequent creditors.” *Midland-Guardian Co. v. McElroy*, 563 S.W.2d 752, 754 (Ky. App. 1978); KRS 382.270; KRS 382.280. Since the mortgages possessed by First National and the Robinsons are valid and were recorded first, they have priority in distribution of the proceeds of the Commissioner’s sale. Accordingly, we affirm the summary judgment in favor of the Appellees.

ALL CONCUR.

BRIEF FOR APPELLANT,
WHITAKER BANK, INC:

Ralph W. Hoskins
Corbin, Kentucky

BRIEF FOR APPELLEE,
FIRST NATIONAL BANK AND
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BRIEF FOR APPELLEES,
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James E. Hibbard
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