

RENDERED: SEPTEMBER 5, 2008; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2007-CA-001976-MR

4 ZANE MANAGEMENT, LLC

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE GEOFFREY P. MORRIS, JUDGE
ACTION NO. 04-CI-008833

SOUTHEASTERN REAL ESTATE,
INC.

APPELLEE

OPINION
AFFIRMING

** ** * ** * **

BEFORE: CLAYTON, DIXON AND WINE, JUDGES.

WINE, JUDGE: 4 Zane Management, LLC (“4 Zane”) appeals the Jefferson Circuit Court’s order granting attorney fees to Southeastern Real Estate, Inc. (“Southeastern”) during a foreclosure action. Finding no error, we affirm.

The facts of this case are not in dispute. On September 2, 2003, Southeastern conveyed a parcel of real property located at 1111 Zane Street,

Louisville, Kentucky (“Zane Street Property”) to a group of investors consisting of TKY Investments, Inc.; Yoni Cohen and his wife, Harriet Cohen; Isaac Azencot and his wife, Anat Cohen; and Uri Cohen and his wife, Natalie Cohen. In addition to \$200,000.00 in cash, they gave Southeastern a mortgage for \$525,000.00 with monthly payments of \$4,289.69. Subsequently, on September 16, 2003, Yoni Cohen, Tal Yona, Uri Cohen and Isaac Azencot formed 4 Zane. Thereafter, the Zane Street Property was conveyed to 4 Zane by the original purchasers of the property *via* quitclaim deed in September 2003. Following execution of this deed, 4 Zane assumed all duties and obligations under the note and property mortgage.

The mortgage required the purchasers to maintain fire insurance coverage on the Zane Street Property. Pursuant to this provision, 4 Zane acquired property insurance coverage against fire loss in the amount of \$750,000.00 in November 2003. However, the insurance policy terminated in November of 2004 and 4 Zane was unable to secure replacement insurance.

On October 19, 2004, 4 Zane and Yoni Cohen filed suit against Southeastern and its owner, Joseph Dooley, alleging various contractual claims and seeking to recover rents and utility money incurred by Southeastern during its use of the Zane Street Property. Joseph Dooley and Southeastern counterclaimed against Yoni Cohen and 4 Zane and filed a third-party complaint against Harriet Cohen, Uri Cohen, Natalie Cohen, Tal Yona, Keren Yona, Isaac Azencot, Anat Azencot, M-H Properties, Inc., and TKY Investments, Inc., seeking to accelerate

the mortgage and foreclose on the Zane Street Property, asserting that they had failed to insure the property as required by the mortgage.

After extensive briefing, the trial court entered an order on April 10, 2007, granting Southeastern's motion for partial summary judgment as to the amounts due and owing under the terms of the parties' mortgage and note, including attorney fees pursuant to Kentucky Rules of Civil Procedure ("CR") 54.02(1). The court found that Southeastern was entitled to accelerate the mortgage pursuant to Clause Three because the property was not covered by fire insurance and further was entitled to recover attorney fees pursuant to Clause Five. On April 12, and June 20, 2007 (supplement), 4 Zane moved the court to reconsider its April 10 order. The trial court denied the motions on September 4, 2007. This appeal followed.

On appeal, 4 Zane asserts that the trial court erred in granting attorney fees to Southeastern. 4 Zane argues that the mortgage contract does not clearly authorize an award of attorney fees under these circumstances. Given this ambiguity, 4 Zane contends that the contract provision allowing an award of attorney fees should be narrowly construed.

"Generally, the interpretation of a contract, including determining whether a contract is ambiguous, is a question of law for the courts and is subject to *de novo* review." *Cantrell Supply, Inc. v. Liberty Mut. Ins. Co.*, 94 S.W.3d 381, 385 (Ky. App. 2002). The first question when interpreting a contract is whether the terms are ambiguous. In the absence of ambiguity, "a court will interpret the

contract's terms by assigning language to its ordinary meaning and without resort to extrinsic evidence.” *Frear v. P.T.A. Industries, Inc.*, 103 S.W.3d 99, 106 (Ky. 2003).

The parties agree that the mortgage outlines three types of default in the Second, Third, and Fourth Clauses. The Second Clause provides for default for non-payment of property taxes and assessments; the Third Clause for failure to maintain insurance on the property; and the Fourth Clause for non-payment of the mortgage. If 4 Zane failed to adhere to one of these clauses, Southeastern could treat the note as due and proceed to enforce the mortgage.

In this case, 4 Zane failed to maintain fire insurance as required by Clause Three, which reads as follows:

The mortgagors further covenant, that until the note and interest aforesaid are fully paid, they will keep the improvements upon the tract of land herein conveyed, insured against loss from fire in the tract of land herein conveyed, insured against loss from fire in the sum of at least \$725,000.00, or to the extent of the value of the improvements if more; will cause the policy or policies therefore to be made payable to or transferred to the mortgagee, as collateral security, for the payment of the debt hereby secured, the proceeds of such insurance to be applied to its payment, and to deposit all such policies with the mortgagee or the holder of said note; If mortgagors fail to obtain said insurance, then mortgagee, at its option, may obtain same and add the cost thereof to the note to earn interest as stated on said note or the mortgagee or the holder of said note, may, at their option, treat the said note as due, and may proceed to enforce this mortgage therefore.

Thus, in the event that 4 Zane failed to have the appropriate fire insurance, Southeastern had the option of obtaining the insurance itself or proceeding to enforce the mortgage (treat as a default). 4 Zane points out that this clause does not authorize an award of attorney fees. Rather, the only reference to attorney fees is found in Clause Five, which specifically authorizes attorney fees upon default in payments:

In the event mortgagors default on the payments herein, and renting the premises, then mortgagee may collect any and all rents, after default, and mortgagors do hereby assign said rent proceeds to mortgagee as additional security for this debt. Upon default mortgagors shall pay all costs of collection including mortgagee's reasonable attorney fees. All parties hereto agree exclusive jurisdiction and venue for enforcement or collection or any other action concerning this mortgage shall be Jefferson County, Kentucky, and that this mortgage shall be governed by Kentucky law.

4 Zane maintains that the attorney fees provided in Clause Five apply only to a default under that section – for a default in mortgage payments. Thus, 4 Zane argues that attorney fees are not authorized for a default based upon the earlier sections. We disagree.

Clause Five is not a separate ground for default, but is merely a general section outlining the mortgagee's rights upon the mortgagor's default. The first sentence provides that, upon "default in payments," Southeastern is entitled to collect and to take an assignment of any rent proceeds. The term "default in payments" as used in this sentence clearly refers to the payments owed for taxes and assessments, failure to maintain insurance, and non-payment of the mortgage

in Clauses Two through Four. Likewise, the following sentence clearly allows Southeastern to recover attorney fees upon the mortgagor's default on any provision of the mortgage. Since 4 Zane's failure to maintain fire insurance amounted to a default on its obligations under the mortgage, the trial court was authorized to award attorney fees to Southeastern.

Accordingly, the Jefferson Circuit Court's order awarding attorney fees to Southeastern is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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