RENDERED: DECEMBER 11, 2009; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-001972-MR

A.W.I., LLC APPELLANT

v.

APPEAL FROM LEE CIRCUIT COURT
HONORABLE THOMAS P. JONES, JUDGE
ACTION NO. 06-CI-00126

MICHEL GRIMAL;
DANIELE GRIMAL;
GARRETT E. BALLARD; AND
KENTEX OIL, INC. APPELLEES

OPINION
VACATING AND REMANDING

** ** ** ** **

BEFORE: LAMBERT AND STUMBO, JUDGES; HENRY,[1] SENIOR JUDGE.

HENRY, SENIOR JUDGE: A.W.I., LLC appeals from a judgment of the Lee Circuit Court dismissing its action filed against Appellees Michel Grimal, Daniele

[1] Senior Judge Michael L. Henry sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

Grimal, Garrett E. Ballard,[2] and Kentex Oil, Inc., in an effort to collect on a promissory note that had been purchased by the company. The trial court dismissed the action on the grounds that the fifteen-year statute of limitations set forth in KRS 413.090(2)[3] barred enforcement of the note.[4] After reviewing the record, we vacate the court's order of dismissal and remand for further proceedings consistent with this opinion.

On February 12, 1991, the Grimals, acting as individuals and on behalf of Kentex Oil, Inc., received a $200,000 loan from Citizens Guaranty Bank of Irvine, Kentucky and consequently executed a promissory note for that amount in favor of the bank. The note was secured by a mortgage on real property and various oil and gas leases in Lee County and in Madison County. Although the note contained language indicating that it was "due on demand," it also contained a monthly payment schedule and a maturity date of February 12, 1992, for final payment. An amendment to the note and mortgage also provided for an acceleration clause in the event of default that would allow the bank to declare the unpaid balance of the note (plus interest) "to be due and payable immediately and to proceed to enforce the collection of such indebtedness[.]"

---

[2] Ballard was originally named as a respondent in the subject litigation because of a mortgage that he held on certain property pertinent to the action. However, he has not filed any pleadings or otherwise made an appearance in the case.

[3] KRS 413.090(2) provides: "Except as provided in KRS 396.205, 413.110, 413.220, 413.230 and 413.240, the following actions shall be commenced within fifteen (15) years after the cause of action first accrued: . . . An action upon a recognizance, bond, or written contract[.]"

[4] We note that neither party has addressed whether KRS 355.3-118 applies to this case. Therefore, we decline to do the same.

On February 14, 2006, Citizens Guaranty Bank sold its interest in the promissory note and mortgage to A.W.I. According to an affidavit filed by John M. St. Clair, the Chairman/CEO of the bank, the balance due on the note at the time of the transfer, including interest, was $225,577.70. The affidavit also indicated that the debt had not been otherwise resolved by an accord and satisfaction and remained outstanding. Michel Grimal disagreed with this contention in an affidavit filed on May 28, 2008. He asserted that, after reaching an agreement with the bank, the Grimals sold their home in Richmond, Kentucky and gave the proceeds to the bank to satisfy, in full, any balance due on the note. According to Grimal, once this occurred, the Grimals were never contacted again by the bank or anyone else regarding the note until after it was transferred to A.W.I. A.W.I. subsequently filed a complaint against the Grimals and Kentex Oil in Lee Circuit Court on August 23, 2006, in an effort to collect on the promissory note.

On May 28, 2008, the Grimals moved to dismiss A.W.I.'s action on the grounds that it was not filed within the fifteen-year statute of limitations set forth in KRS 413.090(2). The Grimals argued that the promissory note was a "demand note," and, thus, the statute of limitations began running as of the date of the note – February 12, 1991. Since A.W.I. did not file suit until August 23, 2006 – more than fifteen years later – the suit was untimely and merited dismissal.

A.W.I. argued in response that while the promissory note did state that it was "due on demand," it also contained other features that were inconsistent with

a demand note, such as a monthly payment schedule. A.W.I. also argued that a later amended statement providing that the maturity date of the note was February 12, 1992, indicated that the note was not a "true" demand note but was instead intended to be an instrument "payable at a definite time" under KRS 355.3-108(2). Thus, the fifteen-year statute of limitations did not begin running until February 12, 1992, because the obligation did not fully mature – and, therefore, could not be enforced – until that date. Since A.W.I. filed suit on August 23, 2006, the argument goes, the action was brought within the fifteen-year statute of limitations and was therefore timely.

Despite A.W.I.'s argument, the trial court dismissed its action on the grounds that it was untimely filed; however, the court gave no indication as to whether it considered the promissory note to be a "true" demand note. A.W.I. subsequently filed a motion to alter, amend, or vacate judgment seeking to clarify the issue. A.W.I. also argued in its motion that even if the promissory note was a demand note, the Grimals had admitted to making a payment on the note sometime in 1991. A.W.I. alleged that the actual date of payment was September 16, 1991, and that this payment was an acknowledgment of an owed debt that served to suspend the running of the statute of limitations and to "reset" it to start again as of that date.

On October 10, 2008, the trial court entered an order rejecting all of A.W.I.'s arguments and confirming its dismissal of the action. The court clarified its earlier order and found that the promissory note was a demand note because of

language contained throughout the note indicating that it was "due on demand." Therefore, the statute of limitations began running as of the date the note was executed and rendered A.W.I.'s action untimely. The court, however, did not address A.W.I.'s argument that the alleged partial payment made by the Grimals in 1991 served to suspend the running of the statute of limitations up until that point. This appeal followed.

On appeal, A.W.I. argues that the trial court erred in dismissing its action on the grounds that it was not timely filed within the fifteen-year statute of limitations. The ultimate question before this Court is whether the promissory note in question is a true demand note or one payable at a definite time. It must be one or the other. *Corbin Deposit Bank & Trust Co. v. Mullins Enters., Inc.*, 641 S.W.2d 760, 762 (Ky. App. 1982). If the note is a demand note, the parties agree that A.W.I.'s action was untimely filed under KRS 413.290(2) and merited dismissal. *See Gould v. Bank of Independence*, 264 Ky. 511, 94 S.W.2d 991, 992 (1936) ("A note payable on demand is treated as a due note, and it is the settled rule that the statute of limitations, begins to run at the date of the note."). However, if the note is payable at a definite time, it "is not due until the date of maturity and the statute of limitations does not begin to run until after that date." *Id.*, 94 S.W.2d at 993. Thus, a closer examination of the note is required.

Under KRS 355.3-108, a promise or order is "payable on demand" if it "[s]tates that it is payable on demand or at sight, or otherwise indicates that it is payable at the will of the holder" or if it "[d]oes not state any time of payment."

KRS 355.3-108(1)(a) & (b). The promissory note here stated in bold-print, capital letters on the top of its first page that it was "DUE ON DEMAND." The first paragraph of the body of the note further provided:

> ON DEMAND OF THE LENDER, for value received, the undersigned (sometimes called 'You' or 'Your'), jointly and severally promise to pay to the order of the LENDER, named above, at its main office or any branch office, the Principal Amount shown above, together with interest, at the annual interest rate checked below beginning on the Date of Note and continuing until paid in full.

Immediately thereafter, the note stated, again in bold-print, capital letters: "THE UNPAID PRINCIPAL AMOUNT, AND ALL ACCRUED INTEREST THEREON, IS DUE AND PAYABLE ON DEMAND OF THE LENDER." This statement was followed by an agreed payment schedule: "IF THE FULL AMOUNT IS NOT DEMANDED SOONER you promise to make the payment(s) as follows: (amount, frequency, and due date) 11 monthly payments of $2,422.90 beginning 03/12/91, continuing on the same day of every month thereafter. 1 payment of $197,425.32 due 2/12/92." The second page of the note further stated, in relevant part: "DEMAND OF FULL PAYMENT: Lender has the right to demand payment in full of this Note, at any time and for any reason. If the Lender demands payment of this Note, then, at the Lender's option, all liabilities of any or all of you to the Lender shall forthwith become due and payable without further demand or notice." At first blush, all of these statements reflect an intent that the promissory note was "due on demand."

However, A.W.I. correctly points out that the note contains a number of other items that are arguably inconsistent with a "due on demand" note. For example, as indicated above, the note contains a monthly installment payment schedule and a maturity date of February 12, 1992, along with an acceleration clause that allowed the bank to declare any unpaid balance of the note (plus interest) "to be due and payable immediately and to proceed to enforce the collection of such indebtedness" in case of a default. A.W.I. asserts that such an acceleration clause would be unnecessary if the note were a true demand note since such notes can be recalled at any time. These arguments contain a certain amount of logic. Under KRS 355.3-108, a promise or order is "payable at a definite time" if it is "payable on elapse of a definite period of time after sight or acceptance or at a fixed date or dates or at a time or times readily ascertainable at the time the promise or order is issued," and if it is subject to rights of prepayment, acceleration or extension at the option of the holder. KRS 355.3-108(2)(a)-(d). Accordingly, there are parts of the subject note that are consistent with an intent that it be considered "payable at a definite time."

Having said this, we have previously recognized that "[i]nstruments stated to be payable on demand have been held to be so payable even though they contained provisions for payment of interest periodically or for payment in stated or indefinite installments and even though they also contained acceleration clauses operative upon failure to make the prescribed payments." *Corbin*, 641 S.W.2d at 761. We have also recognized, though, that there have been instances in which "a

note payable 'on demand' that also provided for the payment of interest and stated monthly payments has been held to be payable in installments and not on demand." *Id.* Thus, it is apparent that the question of whether a note is a demand note or one payable at a definite time necessarily hinges on the facts of each particular case.

The trial court here concluded that the subject note was a demand note based simply on the fact that the note contained language therein identifying itself as such. While this language certainly supports such a conclusion, we do not believe that it is entirely determinative of the issue in light of other provisions contained within the note. Ultimately, based on the limited record before us, we believe that the note is ambiguous as to whether it is due on demand or payable at a definite time. Therefore, we believe that the trial court's order of dismissal must be vacated and this matter remanded so that extrinsic evidence can be produced and considered as to the intent of the parties when the note and any related amendments were originally prepared and as to any other pertinent facts relating to the question of whether the note is a demand note or one payable at a definite time. *See Central Bank & Trust Co. v. Kincaid*, 617 S.W.2d 32, 33 (Ky. 1981).

Because of our decision, A.W.I.'s other arguments need not be addressed. The judgment of the Lee Circuit Court is vacated, and this matter is remanded for further proceedings consistent with this opinion.

ALL CONCUR.

BRIEF FOR APPELLANT:

Thomas K. Hollon
Beattyville, Kentucky

BRIEF FOR APPELLEE:

David A. Franklin
Lexington, Kentucky