

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-000138-MR

ROBERT C. HORN A/K/A ROBIN C. HORN
AND PAMELA Q. HORN

APPELLANTS

v. APPEAL FROM OLDHAM CIRCUIT COURT
HONORABLE KAREN A. CONRAD, JUDGE
ACTION NO. 07-CI-00468

AMERICAN FOUNDERS BANK, INC.

APPELLEE

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: ACREE, JUDGE; HENRY AND ISAAC,¹ SENIOR JUDGES.

HENRY, SENIOR JUDGE: Robert C. Horn, a/k/a Robin C. Horn, and Pamela Q. Horn appeal from a summary judgment entered in favor of American Founders Bank, Inc (AFB). The trial court also dismissed the Horns' counterclaims finding there were no genuine issues of material fact. The Horns argue that summary

¹ Senior Judges Michael L. Henry and Sheila R. Isaac sitting as Special Judges by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

judgment was premature because the trial court failed to allow them sufficient time to complete discovery. We affirm.

The Horns operated Robin's Nest bakery in Midway, Kentucky, producing Kentucky Silk Pies for over 25 years. On December 18, 2002, they borrowed \$360,000 from AFB to purchase and remodel a bakery building in Midway. The initial loan was insufficient to complete the entire remodeling project and the Horns borrowed additional funds as a result of what they claim were improper and illegal activities by AFB's loan officer. Those allegations and that loan are the subject of a separate action brought in Woodford Circuit Court and are not at issue in the Oldham Circuit Court case now before us.

As part of their efforts to restructure their debt to AFB, the Horns mortgaged property they owned in Oldham County. The principal amount of that loan was \$92,000 and it was secured by a mortgage lien on the property. The note called for a variable interest rate with payment being mandated as three interest-only quarterly payments beginning on March 31, 2005, with a final payment of \$93,681.21 due on December 31, 2005, which represented the quarterly interest as well as the principal balance. The loan maturity was later extended to November 28, 2006, by written agreement of the parties.

The Horns were unable to meet the November 28, 2006, payment deadline and AFB declared the note in default. On July 2, 2007, AFB filed its complaint in Oldham Circuit Court seeking recovery on the loan in the amount of

\$92,000. The Horns filed their answer and counterclaim on August 1, 2007, where they claimed the existence of an oral promise from AFB to extend the loan until the Oldham County property could be sold. At a deposition begun in July 2008 and concluding in September 2008, Mr. Horn testified that he had accepted an offer from a third party to purchase the mortgaged property for \$85,000, but no closing date for the sale had been set.

Finally, after almost two years, AFB filed its motion for summary judgment on April 6, 2009. The payoff amount of the loan was by then \$111,160.06 with interest accruing at the rate of 7.25% per annum from March 18, 2009. AFB additionally sought foreclosure and judicial sale of the property that secured the loan.

After the Horns filed their response to the motion for summary judgment and AFB filed its reply, the trial court took the issue under submission without a hearing. The trial court granted the motion for summary judgment, dismissed the counterclaims, and provided for the sale of the property securing the loan. This appeal followed.

The Horns argue that summary judgment was prematurely granted because the trial court did not permit them to complete discovery and develop evidence that might controvert AFB's position. "The standard of review on appeal of a summary judgment is whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law." *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky. App.

1996). “The record must be viewed in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor.” *Steelvest, Inc. v. Scansteel Serv. Ctr., Inc.*, 807 S.W.2d 476, 480 (Ky. 1991). “The party opposing a properly presented summary judgment motion cannot defeat it without at least presenting some affirmative evidence showing the existence of a genuine issue of material fact for trial.” *City of Florence, Kentucky v. Chipman*, 38 S.W.3d 387, 390 (Ky. 2001).

“[S]ummary judgment is only proper after a party has been given ample opportunity to complete discovery[.]” *Pendleton Brothers Vending, Inc. v. Commonwealth Finance and Administration Cabinet*, 758 S.W.2d 24, 29 (Ky. 1988). We have previously found six months was sufficient time for a party to at least initiate some discovery prior to a grant of a motion for summary judgment. “It is not necessary to show that the respondent has actually completed discovery, but only that respondent had the opportunity to do so.” *Hartford Insurance Group v. Citizens Fidelity Bank & Trust Co.*, 579 S.W.2d 628, 630 (Ky. App. 1979).

The Horns had almost two years to develop any pertinent discovery information. They have not identified any specific evidence that could possibly create a genuine issue of material fact. Merely requesting more time to conduct discovery was not sufficient to overcome AFB’s motion for summary judgment. It was incumbent on the Horns to at least present an affidavit to the trial court providing reasons why additional time to conduct discovery would put them in a position to generate “facts essential to justify [their] opposition” to the motion for

summary judgment. Kentucky Rules of Civil Procedure (CR) 56.06; *Neel v. Wagner-Shuck Realty Co.*, 576 S.W.2d 246, 250 (Ky. App. 1978). Therefore, the trial court properly granted summary judgment in favor of AFB.

Accordingly, the judgment of the Oldham Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANTS:

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BRIEF FOR APPELLEE:

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