

RENDERED: MARCH 18, 2011; 10:00 A.M.

NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-001440-MR

WINDHAM INVESTMENTS, INC.

APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE AUDRA J. ECKERLE, JUDGE
ACTION NO. 08-CI-010876

ESDJ PROPERTIES, LLC

APPELLEE

OPINION AFFIRMING

** ** * ** * ** *

BEFORE: LAMBERT AND MOORE, JUDGES; ISAAC,¹ SENIOR JUDGE.

ISAAC, SENIOR JUDGE: Windham Investments, Inc. appeals from a Jefferson Circuit Court order denying its motion to set aside a default on an agreed judgment. We affirm.

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

On August 25, 2005, Windham executed a promissory note acknowledging receipt of a loan of \$80,000 from ESDJ Properties, LLC. On October 14, 2008, ESDJ filed a complaint in Jefferson Circuit Court alleging that Windham had failed to repay the loan in accordance with the terms of the note. A bench trial was scheduled but before it was held the parties entered into an agreed judgment which provided that ESDJ would recover \$103,000 plus interest and costs from Windham. The sum was to be paid in installments, with an “acceleration clause” in the event that the payments were not made in a timely manner. The pertinent portions of the agreed judgment provided as follows:

\$1,000.00 to be paid by the Defendant [Windham] to the Plaintiff [ESDJ] as set forth below on or before May 15, 2009 and on the fifteenth of each month thereafter, for thirty (30) payments. The remaining balance to be paid in full with accrued interest on the thirty-first (31st) payment. However, no pre-payment penalty exists. The above amount shall accrue interest in the amount of ten percent (10%) per annum on the unpaid balance until paid.

So long as said payments are made timely and without fail, no execution or garnishment shall issue. Upon default by the Defendant under the terms described above, the entire amount of \$103,000.00, less any payments, shall be due and owing, including interest at the rate of ten (10) percent per annum on said amount calculated from August 2, 2005 until paid, plus any court costs and/or attorney fees the Plaintiff may incur to be as determined by the Court.

According to the affidavit of Jeff Owens, the President of Windham, on May 15, 2009, the day that the first payment was due, his father-in-law was ill

and a trip was planned to visit him in St. Louis. Owens wrote a check for \$1,000 which did not name a payee and left the check with his secretary. She filled in the name of the payee and Owens hand-delivered the check to ESDJ on the following Monday, May 18, 2009. ESDJ refused to accept the payment and notified Windham that it was in default. It also commenced garnishment proceedings. Windham moved the court to overturn the default, to order ESDJ to accept the tendered payments and to quash the garnishments. The circuit court denied the motion after a hearing. This appeal by Windham followed.

Windham argues that the court erred in denying its motion to set aside the default and to force ESDJ to accept the late payment because agreed judgments are subject to collateral attack. In *Browning v. Cornn*, 240 S.W.3d 671 (Ky.App. 2007), it was held that a motion to alter, amend or vacate an agreed judgment was only valid insofar as it was a collateral attack on that judgment on the grounds of fraud or mistake.

An agreed judgment is nonetheless a judgment of the court when entered and signed, although it is the consummation of a contract. The terms of the contract are merged into and superseded by the judgment. If that judgment contains a judicial error, it is nevertheless binding on all the parties. The fact that the consideration for the contract failed cannot be regarded as nullifying the judgment insofar as it is valid. If erroneous, the remedy of the agreed party is by timely procedure in the court rendering the judgment or by appeal to this court, subject to the rule that a party will not be permitted to complain on an appeal of a judgment to which he consented, unless it is on the ground of fraud or mistake.

Browning, 240 S.W.3d at 674 quoting *Little v. Mann*, 302 Ky. 661, 664, 195 S.W.2d 321, 323 (Ky.1946) (internal citations omitted).

Windham is alleging neither fraud nor mistake relating to the agreed judgment. Windham merely wishes to be excused from the terms of the agreed judgment on equitable grounds, arguing that its president was occupied with pressing personal matters that prevented the timely payment of the first installment and that ESDJ was not irreparably harmed by the late payment. Equitable determinations are generally left to the circuit court's discretion. In this case, we can find no abuse of that discretion as the court's decision was not "arbitrary, unreasonable, unfair, or unsupported by sound legal principals." *Goodyear Tire & Rubber Co. v. Thompson*, 11 S.W.3d 575, 581 (Ky.2000).

The other cases relied upon by Windham are distinguishable. *Harris v. Greenleaf* involved a lapsed payment on a real estate purchase contract, not an agreed judgment. 117 Ky. 817, 79 S.W. 267 (1904). In *Racing Investment Fund 2000, LLC v. Clay Ward Agency, Inc.*, 2008 WL 5102151 (Ky. 2008)(2007-CA-002282-MR), this Court affirmed the trial court's decision to find a party in civil contempt for failing to pay the full amount of an insurance premium. Neither case involves a challenge to an agreed judgment.

The order of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Steven A. Snow
Louisville, Kentucky

BRIEF FOR APPELLEE:

Steven D. Yater
Louisville, Kentucky