

RENDERED: NOVEMBER 9, 2012; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-001377-MR

RICK FOSTER, AS EXECUTOR,
OF THE LAST WILL AND TESTAMENT
OF RAYMOND FOSTER, DECEASED

APPELLANT

v. APPEAL FROM WAYNE CIRCUIT COURT
HONORABLE VERNON MINIARD, JR., JUDGE
ACTION NO. 10-CI-00303

THE MONTICELLO BANKING COMPANY

APPELLEE

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: ACREE, CHIEF JUDGE; MOORE AND THOMPSON, JUDGES.

THOMPSON, JUDGE: Rick Foster, executor of Raymond Foster's estate, appeals a summary judgment finding that indebtedness remained on a promissory note secured by a mortgage with Raymond and ordering the judicial sale of the property.

Raymond entered into an agreement with Monticello Bank on March 25, 1998, when he obtained a loan for two parcels of property. He was to make monthly payments of \$215.45 per month and a final balloon payment including interest and remaining principal. The mortgage provided that Raymond could not transfer the property without written consent by Monticello. The promissory note was renewed by Monticello and Raymond in 2003 and 2008.

Without Monticello's consent, on March 4, 2002, Raymond entered into a contract for deed with Judy Clark and Melinda Shelton to buy one of the parcels, Tract No. 2, for \$26,068, payable in 103 monthly payments of \$251 and a final payment of \$215. After the contract was executed, Judy and Melinda paid Raymond's mortgage using the provided payment book. However, the contract for deed did not provide for the final balloon payment due under Raymond's mortgage and promissory note.

After Raymond's death, Rick as executor of his estate, filed an action against Monticello, Judy and Melinda seeking the return of the two properties to the estate. Monticello cross-claimed against Rick, Judy and Melinda. Judy and Melinda cross-claimed against Rick and Monticello. Rick and Monticello each filed motions for summary judgment. In Monticello's motion for summary judgment, it claimed that the transfer of the property was void because it did not consent to the sale and requested a judgment allowing it to sell the property to recover the amounts due and awarding attorney's fees.

The trial court granted Monticello's motion for summary judgment, concluding that: 1) Monticello had a valid and enforceable mortgage and promissory note, which did not allow for any sale of the properties without its consent which had not been altered; 2) it had not consented to the sale of one of the properties; and 3) under the terms of the promissory note as secured by the properties, as of June 28, 2011, \$17,737.58, remained due on the loan.

Accordingly, the trial court awarded Monticello this amount, plus post-judgment interest, attorney's fees and costs, ordered the properties to be sold at public auction, with the contract for deed between Raymond, Judy and Melinda extinguished and nullified by the judicial sale. Rick appealed.

Summary judgment should be granted "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." CR 56.03. "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); CR 56.03. Granting of a summary judgment motion "should only be used 'to terminate litigation when, as a matter of law, it appears that it would be impossible for the respondent to produce evidence at the trial warranting a judgment in his favor and against the movant.'" *Steelvest*,

Inc. v. Scansteel Serv. Ctr., Inc., 807 S.W.2d 476, 483 (Ky. 1991) (quoting *Paintsville Hospital Co. v. Rose*, 683 S.W.2d 255, 256 (Ky. 1985)).

The interpretation of a mortgage is governed by contract law and its interpretation is a matter of law subject to *de novo* review on appeal. *First Commonwealth Bank of Prestonsburg v. West*, 55 S.W.3d 829, 835-836 (Ky.App. 2000). When a contract is unambiguous, its interpretation is limited to the “four corners of the document.” *3D Enterprises Contracting Corp. v. Louisville & Jefferson County Metro. Sewer Dist.*, 174 S.W.3d 440, 448 (Ky. 2005).

The trial court correctly determined that there were no genuine issues of material fact. The mortgage unambiguously prohibited the sale of the property without Monticello’s consent and, therefore, gave Monticello priority to foreclose on its loan to Raymond. Regardless of whether Monticello had notice of the sale to Judy and Melinda, this clause in the mortgage remained enforceable against Raymond.

Rick claims that Monticello failed to meet its obligation of good faith and fair dealing by renewing its promissory notes because it had constructive notice of the recorded contract for deed and knew that Raymond was illiterate. “The implied covenant of good faith and fair dealing simply imposes on the parties . . . a duty to do everything necessary to carry out the contract.” *Harvest Homebuilders LLC v. Commonwealth Bank and Trust Co.*, 310 S.W.3d 218, 220 (Ky.App. 2010) (internal quotation marks omitted). The record demonstrates no improper actions by Monticello and that it fulfilled its obligations under the mortgage and

promissory notes. There is no evidence in the record to show that Monticello had actual notice of Judy and Melinda's deed, that Raymond's renewals of these promissory notes were ill-informed, or that Monticello took any improper actions towards Raymond.

Rick's claim that the grant of summary judgment should be reversed because it lacked any proper supporting affidavits is without merit. Monticello's original motion for summary judgment contained a proper accompanying affidavit by bank officer Rick McClendon stating the amount of indebtedness remaining under the promissory note. The trial court delayed ruling on the motion to allow the parties to take depositions. When the motion was renoticed, it did not have an accompanying affidavit. Rick alleges that the trial court erroneously considered affidavits by McClendon on the amount of indebtedness and Monticello's attorney, Van F. Phillips, on the amount of attorney's fees due, which were not attached to the motion for summary judgment and not served on the parties, but were filed at the summary judgment hearing.

CR 6.04 requires that "when a motion is supported by affidavit, the affidavit shall be served with the motion[.]" This allows the party opposing the motion sufficient time to prepare and submit opposing affidavits. Although Rick knew about the alleged error, he failed to object when the affidavits were submitted to the trial court, file a motion to alter or amend, or file a CR 60.02 motion. Rick has failed to demonstrate any prejudice. He does not object to the substance of the

affidavits or claim that he was unable to file affidavits in response, but objects to the violation of a procedural rule alone without showing prejudice.

Rick claims that he was not afforded an opportunity to review the requested attorney's fees, but he does not claim that it was improper for Monticello to be awarded these fees or object to the amount of the fees. The mortgage expressly provides for attorney's fees. As no prejudice has been shown, reversal is not warranted.

Based on the foregoing, the grant of summary judgment to Monticello by the Wayne Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

James M. Frazer
Monticello, Kentucky

BRIEF FOR APPELLEE:

Van F. Phillips
Monticello, Kentucky