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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-001733-MR
AND
NO. 2012-CA-001787-MR

RAMONA PARKER

APPELLANT

v. APPEALS FROM KENTON CIRCUIT COURT
HONORABLE GREGORY M. BARTLETT, JUDGE
ACTION NO. 11-CI-00005

KENTUCKY HOUSING
CORPORATION

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: KRAMER, TAYLOR, AND VANMETER, JUDGES.

VANMETER, JUDGE: Ramona Parker appeals from the Kenton Circuit Court's order confirming the Master Commissioner's report and granting Kentucky Housing Corporation's ("KHC") motion for summary judgment and order of sale, and from the court's subsequent Judgment and Order of Sale. For the following reasons, we affirm.

In October 2000, Parker executed and delivered a note in the principal amount of \$82,321, plus interest, to purchase a home, and simultaneously executed and delivered a mortgage on the property to secure payment of the note. The note and mortgage were subsequently assigned to KHC. The note required a monthly payment of \$561.58 in principal and interest. Parker first defaulted on her loan in June 2001, and again in August 2004. In November 2004, KHC granted Parker a three-month loan modification, evidenced by a “Special Forbearance Agreement” executed by Parker and delivered to KHC. This agreement allowed Parker to make reduced monthly payments in December 2004, and January and February 2005. Parker successfully complied with the terms of this agreement.

In March 2005, KHC agreed to temporarily modify the terms of Parker’s note by reducing the interest rate for a period of two years. This agreement was evidenced by a document entitled “Modification of Promissory Note” dated March 15, 2005 (the “2005 modification”) which reduced Parker’s monthly principal and interest payments to \$417.07. The terms of the 2005 modification expressly stated that Parker’s monthly payments would revert back to the original amount through the maturity of the note. Parker also successfully complied with the terms of the 2005 modification.

After Parker’s payments reverted back to their original amount in March 2007, she again defaulted in September 2008. In January 2010, KHC agreed to grant Parker temporary assistance by way of an “Unemployment Forbearance,” which suspended Parker’s obligation to make payments from February 2010

through April 20, 2010. In May 2010, KHC agreed to enter into another forbearance agreement with Parker, evidenced by an agreement entitled “Special Forbearance Agreement.” Pursuant to the terms of this agreement, Parker was required to attend three counseling sessions as a prerequisite for the approval of any further remedial action on her loan, and expressly stated that beginning in August 2010, Parker’s financial situation and loan status would be re-evaluated and a final determination made.

On October 27, 2010, KHC sent a notice to Parker informing her that after careful review of her financial situation, KHC had determined that it could no longer offer her payment assistance. KHC made this determination based on Parker’s insufficient income, failure to attend mandatory counseling sessions, and failure to provide updated financial documentation as required by the Special Forbearance Agreement. Since Parker was unable to meet the terms of her note, KHC decided to foreclose.

KHC filed its complaint on January 3, 2011, seeking to collect the balance due on the note and foreclose on the mortgage. In October 2011, the trial court entered an order striking the deposition of Joseph C. Smith, which was tendered by Parker but stricken for failure to notify KHC of the planned discovery. Smith, the president of a loss mitigation company formerly employed by KHC, known as DMM, revealed in his deposition testimony that he had a contract with KHC to work with borrowers to evaluate their financial situation, determine their ability to pay their mortgage, and determine their eligibility for loan modifications and other

relief plans. Smith's company was involved in negotiating the 2005 modification with Parker.

Smith explained in his deposition that once his company completed its evaluation, it would submit a request for loan modification to KHC, and the borrower would begin a three-month "trial modification period" to determine whether the borrower would be successful in making payments under a long term modification. If successful, the borrower would be given a modification for a two-year period. Smith testified that at the end of the modification period, the borrower's financial situation would be re-assessed. If the borrower's financial situation had improved, the borrower would revert back to the original payment. If the borrower's financial situation had not improved at the end of the two-year modification, he or she would either continue with the reduced rate for another temporary period or be granted a permanent modification at the reduced rate. Smith claims this was explained to borrowers at the time they executed their loan modifications, and borrowers were expected to rely on these representations when entering into a loan modification agreement rather than pursuing other relief options. Parker argued to the trial court as a defense to foreclosure that DMM made her believe that if her financial situation had not improved by the end of the 2005 modification period, the modification would be extended or made permanent.

After the trial court struck Smith's deposition, Parker filed a motion to reconsider, arguing that Smith's deposition testimony should be allowed in the

record as an affidavit. The trial court denied Parker's motion to reconsider.¹ KHC filed a renewed motion for judgment and order of sale, and the matter was referred to the Kenton County Master Commissioner. The Master Commissioner issued his Report and Recommendations, recommending summary judgment in favor of KHC, to which Parker filed objections. The trial court determined there were no issues of material fact in dispute, and confirmed the Master Commissioner's report granting KHC summary judgment. A Judgment and Order of Sale was entered on October 5, 2012. This appeal follows.

On appeal, Parker argues that a genuine issue of material fact exists as to whether KHC abided by the terms of the 2005 modification and thus, summary judgment was improper. She claims that she had an oral agreement with KHC (via Smith's company, DMM) that her modification would continue past the period of the 2005 modification if her financial situation had not improved, and the statute of frauds does not apply when an oral agreement is asserted as a defense, rather than as a claim or counterclaim. Next, she claims that her assertions of fraud and estoppel are not barred by the statute of frauds, and such defenses should preclude summary judgment in favor of KHC.

CR² 56.03 provides that summary judgment is appropriate when no genuine issue of material fact exists and the moving party is therefore entitled to judgment

¹ KHC argues Smith's affidavit should not be considered due to denial of Parker's motion to reconsider. However, the Master Commissioner considered Smith's affidavit in his recommendation and report, and KHC did not file a cross-appeal alleging error on those grounds. Therefore, we will consider Smith's testimony as part of the record.

² Kentucky Rules of Civil Procedure.

as a matter of law. Summary judgment may be granted 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) (internal quotations omitted). Whether summary judgment is appropriate is a legal question involving no factual findings, so a trial court’s grant of summary judgment is reviewed *de novo*. *Coomer v. CSX Transp., Inc.*, 319 S.W.3d 366, 370-71 (Ky. 2010).

Subsection nine (9) of Kentucky’s statute of frauds, KRS³ 371.010, concerns promises to lend money. It reads:

No action shall be brought to charge any person:

(9) Upon any promise, contract, agreement, undertaking, or commitment to loan money, to grant, extend, or renew credit, or make any financial accommodation to establish or assist a business enterprise or an existing business enterprise including, but not limited to the purchase of realty or real property, but this subsection shall not apply to agreements pursuant to which credit is extended by means of a credit card or similar device, or to consumer credit transactions;

unless the promise, contract, agreement, representation, assurance, or ratification, or some memorandum or note thereof, be in writing and signed by the party to be charged therewith, or by his authorized agent. It shall not be necessary to express the consideration in the writing, but it may be proved when necessary or disproved by parol or other evidence.

The note signed by Parker and held by KHC is covered by subsection nine (9) of the statute of frauds and was required to be in writing. The Kentucky Supreme

³ Kentucky Revised Statutes.

Court has held that any modification materially altering the terms of a contract covered under the statute of frauds must also comply with the statute of frauds, and thus must be in writing. *Farmers Bank & Trust Co. of Georgetown v. Willmott Hardwoods, Inc.*, 171 S.W.3d 4, 8 (Ky. 2005). The amount of interest charged or the amount due on each payment on a note is undoubtedly a material term of a contract to loan money, so any agreement to modify those terms must comply with the statute of frauds and be in writing.

Parker first claims that the statute of frauds is inapplicable to her case because she is not bringing an action to enforce the oral agreement regarding extension of the 2005 modification she claims she made with KHC via its then agent, Smith, but rather is asserting a defense to KHC's claims by referring to the oral agreement. However, what Parker essentially asks is for us to find the alleged oral agreement enforceable so that KHC cannot foreclose on her home. Unless the oral agreement Parker claims would have extended her reduced payments is enforceable, the court has no choice but to look to the terms of the enforceable agreements, specifically the 2005 modification, which states that Parker's payments would return to the usual amount stated in the 2000 note at the end of the 2-year modification period.

Any oral agreement made between Parker and Smith concerning a reduced interest rate and payment would have materially altered the terms of the original note, and therefore, must have been in writing to satisfy the statute of frauds. Since no writing exists concerning the promises Parker claims were made, only the

agreements that satisfy the statute of frauds are enforceable, and Parker is bound by the terms of her note and the 2005 modification. For that reason, KHC did not breach any agreement by demanding that Parker return to the original interest rate and payment amount at the end of the modification period, and KHC has the right to foreclose in the event of Parker's default. KHC assisted Parker in avoiding foreclosure multiple times without being required to do so. No dispute exists under the terms of the note that when KHC reached the conclusion that Parker was ultimately unable to repay her note, foreclosure was permissible. Pursuant to the terms of the written agreements between Parker and KHC, the trial court properly found that no issue of material fact existed, and KHC was entitled to judgment as a matter of law.

Next, Parker alleges that she was the victim of fraud by KHC, and the statute of frauds cannot act as a bar to enforcement of an oral contract in cases of fraud. *See Willmott*, 171 S.W.3d at 11 (the Kentucky Supreme Court addressed a claim of fraud despite the statute of frauds barring enforcement of an oral agreement). KHC asserts that Parker has not explicitly asserted a claim of fraud with particularity as required by CR 9.02, and therefore her claim of fraud is barred. Since Parker did not allege fraud until she filed her objections to the Master Commissioner's report, the trial court never addressed Parker's fraud claim. Even if we assume that Parker's objections to the Master Commissioner's report qualify as asserting the claim with particularity, we do not believe Parker's allegations rise to the level of fraud. A party claiming fraud must establish six elements: (1)

material representation; (2) which is false; (3) known to be false or recklessly made; (4) made with inducement to be acted upon; (5) acted in reliance thereon; and (6) causing injury. *Id.* at 11. Further, “[i]ntent to deceive is a necessary element of actionable fraud.” *Id.* (citation omitted). Nothing in the record suggests that KHC intended to deceive Parker. Consequently, Parker cannot sustain a claim of fraud against KHC.

Lastly, Parker claims the statute of frauds is not a bar to a promissory or equitable estoppel claim. In *Willmott*, the Court did find that equitable estoppel would remove a case from the coverage of the statute of frauds. Equitable estoppel has five elements: “(1) Conduct, including acts, language and silence, amounting to a representation or concealment of material facts; (2) the estopped party is aware of these facts; (3) these facts are unknown to the other party; (4) the estopped party must act with the intention or expectation his conduct will be acted upon; and (5) the other party in fact relied on this conduct to his detriment.” *Gray v. Jackson Purchase Prod. Credit. Ass’n.*, 691 S.W.2d 904, 906 (Ky. App. 1985). We do not believe KHC’s conduct amounted to a concealment of material facts or a representation that Parker’s monthly payment would remain at the reduced amount. The 2005 modification clearly stated that Parker’s payments would revert back to the original amount in March 2007, and Parker made her regular contractual payments from March 2007 until September 2008. Parker should have been aware of the fact that her payments would and did revert back to the original amount in March 2007. Thus, no facts were concealed or misrepresented, and

Parker was not unaware of the limited tenure of her reduced payments.

For the above reasons, the Kenton Circuit Court's order confirming the Master Commissioner's report and the subsequent Judgment and Order of Sale are affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Randy Blankenship
Erlanger, Kentucky

BRIEF FOR APPELLEE:

Stephen R. Solomon
Prospect, Kentucky