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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-001866-MR

EDDIE A. LILES, II — APPELLANT

v.

APPEAL FROM GREENUP CIRCUIT COURT
HONORABLE ROBERT B. CONLEY, JUDGE
ACTION NO. 11-CI-00080

DALLAS LILES — APPELLEE

OPINION
AFFIRMING
** ** ** ** **

BEFORE: JONES, KRAMER, AND MAZE JUDGES.

JONES, JUDGE: This appeal involves a loan between two brothers, Eddie A. Liles, II, and Dallas Liles. The Greenup Circuit Court determined that the loan was not one payable upon demand as alleged in Eddie's complaint. This appeal followed. For the reasons set forth below, we AFFIRM.

I. Background

Between May of 2008 and July of 2009, Eddie loaned his brother, Dallas, a total of $102,000. According to a Loan Agreement the brothers executed on December 15, 2009, Dallas used the loans to purchase two different properties on South Shore Drive, and a 2008 Ford 4x4 truck. The Loan Agreement indicated that no interest was to be applied to the loans.

With respect to repayment, the Loan Agreement called for the loan for 554 South Shore Drive to be repaid first, followed by the loan for the truck, and finally the loan for the 540 South Shore Drive. The Loan Agreement called for Dallas to make payments of "[a] minimum of $600.00 per year," which it specified could be "multi-payments or one payment of $600.00." It was also clear that Dallas could pay more than $600 per year towards the indebtedness, if he so desired.

The Loan Agreement also indicated, that, if the loan was still outstanding at the time of Eddie's death, and Dallas was still living, it would be deemed forgiven. If, however, Dallas survived Eddie and the loan remained unsatisfied, the property would revert to Eddie. If both men died at the same time, and before satisfaction of the loan, the property was to pass to John B. Liles, II, or his estate.

After the brothers executed the Loan Agreement, Eddie filed it of record with the Greenup County Clerk. Thereafter, Dallas began making

periodic payments to Eddie. By January 2, 2011, Dallas had reduced his indebtedness to $89,400.

According an affidavit filed by Dallas, he and Eddie had an argument about a haircut in January of 2011. This argument escalated to the point where the brothers were no longer speaking to one another. Sometime shortly thereafter, Eddie refused to accept any additional installment payments from Dallas and demanded that he pay the full balance due under the Loan Agreement, $89,400.00. Dallas refused, but continued to make payments into an escrow account since Eddie would not accept any further installment payments from him.

On February 3, 2011, Eddie filed suit in Greenup Circuit Court. Eddie alleged in his complaint that he had demanded payment of the amount owed in full and his demand had gone unanswered by Dallas. He requested a judgment against Dallas in the amount of $89,400, together with his costs and attorney's fees. Eddie attached a copy of the Loan Agreement to his complaint. Dallas filed an answer denying that Eddie had a right to demand full payment under the terms of the Loan Agreement.

Eventually, Eddie filed a motion for summary judgment. Dallas objected to it. On January 12, 2012, the circuit court concluded that the note was "not one that is 'callable' on demand" and overruled Eddie's motion. Thereafter, Eddie filed a motion to clarify, or in the alternative, a renewed motion for summary judgment. By order entered April 10, 2012, the court

again overruled Eddie's motion for summary judgment. On September 13, 2012, Eddie moved to make the April 10, 2012, order final and appealable. The circuit court granted Eddie's motion by order entered October 1, 2012.[1]

This appeal followed.

II. Standard of Review

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) (citing Kentucky Rules of Civil Procedure (CR) 56.03). "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).

"Because summary judgment involves only legal questions and the existence of any disputed material issues of fact, an appellate court need not defer to the trial court's decision and will review the issue *de novo*." *Lewis v. B&R Corp.*, 56 S.W.3d 432, 436 (Ky. App. 2001).

III. Analysis

We begin our analysis with Kentucky Revised Statute ("KRS") 355.3-108. It provides:

[1] The circuit court's order states that it is making its April 10, *2011*, order final and appealable. The year is clearly a typographical error. The circuit court did not enter any order on April 10, *2011*. It is plain the circuit court's order is meant to refer to the April 10, *2012*, order.

> (1) A promise or order is "payable on demand" if it:
>
> (a) States that it is payable on demand or at sight, or otherwise indicates that it is payable at the will of the holder; or
>
> (b) Does not state any time of payment.
>
> (2) 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, subject to rights of:
>
> (a) Prepayment;
>
> (b) Acceleration;
>
> (c) Extension at the option of the holder; or
>
> (d) Extension to a further definite time at the option of the maker or acceptor or automatically upon or after a specified act or event.
>
> (3) If an instrument, payable at a fixed date, is also payable upon demand made before the fixed date, the instrument is payable on demand until the fixed date and, if demand for payment is not made before that date, becomes payable at a definite time on the fixed date.

In *Corbin Deposit Bank & Trust Co. v. Mullins Enters., Inc.*, 641 S.W.2d 760, 762 (Ky. App. 1982), this court reiterated the premise that "[a] negotiable instrument . . . must either be payable on demand or at a definite time." We must turn to the Loan Agreement in question to ascertain whether it is one that was payable on demand or at a definite time.

The Loan Agreement does not explicitly say that it is payable on demand. Thus, it does not satisfy KRS 355.3-108(1)(a). However, this does not end our inquiry. The Loan Agreement may be deemed payable on demand if it does not "state any time for payment." In other words, we must determine whether the Loan Agreement was payable at a definite time. The statute instructs us that a note 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." KRS 355.3-108(2).

The Loan Agreement called for minimum yearly payments of at least $600. Thus, it was payable at times readily ascertainable on the face on the Loan Agreement, *i.e.*, every year. Likewise, the entire term of the loan is ascertainable because the amount of the indebtedness is listed along with the minimum yearly payment of $600. Under the terms of the loan, it would be fully paid, at a minimum, in 170 years.

While this is no doubt an absurdly long time, we are mindful that it is nevertheless a readily ascertainable one. It is not our job to rewrite the parties' Loan Agreement. It is likewise not our job to rewrite the General Assembly's statute to include an outer limitation on the definite time.

Accordingly, for the reasons set forth above, we agree with the circuit court that the Loan Agreement is not a note which is payable on demand.

Accordingly, the circuit court made the correct legal finding. This finding essentially ends this matter. Accordingly, we affirm the circuit court.

ALL CONCUR.

BRIEF FOR APPELLANT:

James W. Lyon, Jr.
Greenup, Kentucky

BRIEF FOR APPELLEE:

Gregory C. Shields
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