

Commonwealth of Kentucky
Court of Appeals

NO. 2013-CA-001849-MR

JEFF H. CHOATE

APPELLANT

v. APPEAL FROM TRIGG CIRCUIT COURT
HONORABLE CLARENCE A. WOODALL III, JUDGE
ACTION NO. 02-CI-00189

BANK OF CADIZ & TRUST CO.

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: DIXON, J. LAMBERT, AND TAYLOR, JUDGES.

TAYLOR, JUDGE: Jeff H. Choate brings this appeal from a September 26, 2013, Deficiency Judgment of the Trigg Circuit Court in favor of Bank of Cadiz & Trust Co. in the amount of \$337,194.52 plus interest. We affirm.

In 2002, Bank of Cadiz & Trust Company (Cadiz Bank) instituted a foreclosure proceeding in the Trigg Circuit Court. Cadiz Bank claimed that Choate defaulted under the terms of a promissory note which was secured by a mortgage upon certain real property owned by Choate. Cadiz Bank sought to accelerate

payment of the promissory note due to Choate's default and to enforce its mortgage lien against the real property to satisfy payment of the note.

By judgment and order of sale entered January 13, 2003, the circuit court determined that Cadiz Bank was entitled to recover \$439,785 plus interest upon the promissory note. The court also ordered the sale of the real property subject to the bank's lien by the master commissioner with the net proceeds from the sale to be applied against the judgment debt. Kentucky Revised Statutes (KRS) 426.570; Kentucky Rules of Civil Procedure (CR) 53.02. The real property was duly sold by the master commissioner, and the circuit court confirmed the sale by order entered April 16, 2003. KRS 426.571; KRS 426.575. Then, by order of distribution entered June 6, 2003, the circuit court determined that Cadiz Bank was entitled to receive \$167,193.61 of the sale proceeds in partial satisfaction of the judgment indebtedness against Choate.

After the sale, the case was dormant until August 7, 2013. On that date, Cadiz Bank filed a Motion for Deficiency Judgment. Therein, Cadiz Bank asserted "there remains a deficiency balance on the foreclosure judgment" in the amount of \$337,194.52. Motion for Deficiency Judgment at 2. Choate responded and filed a motion under CR 12.02(a) to deny the motion. Choate argued that the circuit court lost jurisdiction to render a deficiency judgment due to the passage of time. Choate maintained that Cadiz Bank was required to bring an independent action in order to obtain a deficiency judgment.

By order entered September 23, 2013, the circuit court concluded that it retained jurisdiction to render the deficiency judgment and granted Cadiz Bank's motion for deficiency judgment. The court noted that "a separate deficiency judgment will be entered." Order at p.3.

Cadiz Bank then filed an affidavit for Writ of Non-Wage Garnishment on September 25, 2013. Cadiz Bank sought to garnish insurance proceeds payable to Choate held by State Farm Fire and Casualty Company.¹ KRS 425.501. The Clerk of the Trigg Circuit Court issued an Order of Garnishment on September 25, 2013.

On September 26, 2013, the circuit court rendered a deficiency judgment against Choate in the amount of \$337,194.52 plus interest.

Thereafter, on October 2, 2013, Choate filed a motion to quash the garnishment issued against State Farm. KRS 425.501(4). Choate argued that the insurance proceeds were exempt from execution per KRS 427.110(1) and that Choate's wife possessed an interest in the insurance proceeds that was not subject to execution.

By order entered October 10, 2013, the circuit court directed \$337,194.52 of the insurance proceeds to be deposited with the clerk pending outcome of the proceedings. CR 67. The circuit court also observed that it was

¹ Jeff H. Choate's residence was destroyed by fire in March 2013, and the insurance proceeds were to be paid to Choate under a homeowner's policy with State Farm Fire and Casualty Company.

not “prepared to decide” the legal issue of whether the insurance proceeds were exempt from garnishment but reserved the ruling for a later time.

On October 25, 2013, Choate filed a notice of appeal in this Court from the September 26, 2013, deficiency judgment. This appeal follows.

Choate argues that the circuit court lost jurisdiction to render the September 26, 2013, deficiency judgment as more than eleven years had elapsed since the January 13, 2003, judgment. Choate maintains that Cadiz Bank’s motion for deficiency judgment was an attempt to alter the January 13, 2003, judgment. We disagree.

In the January 13, 2003, judgment, the circuit court determined that Cadiz Bank was entitled to recover \$439,785 upon the promissory note.² The record establishes that the mortgaged real property was subsequently sold by the master commissioner and that \$167,193.61 was recovered by Cadiz Bank in partial satisfaction of the January 13, 2003, judgment.

Under the applicable law, Choate was personally liable for the entire judgment indebtedness rendered on January 13, 2003, and remained personally liable for any deficiency that existed after the sale of the mortgaged real property. *See Ky. Joint Stock Land Bank v. Farmers Exchange Bank*, 274 Ky. 525, 119 S.W.2d 873 (1938). As Choate remained personally liable for any deficiency on the January 13, 2003, judgment, Cadiz Bank, as judgment creditor, could proceed,

² Neither party appealed the January 13, 2003, judgment.

subject to applicable statutes of limitation, to pursue any and all collection remedies legally permissible at anytime.³

Cadiz Bank filed a motion for deficiency judgment within fifteen years of the January 13, 2003, judgment. Although not specifically recognized under either the Kentucky Civil Rules of Procedure or our statutes, a deficiency judgment represents a legal fiction created to aid the parties in the enforcement of a judgment. It serves to set forth the outstanding amount of deficiency by judicial act. And, a deficiency judgment is a nonessential but logical step in the enforcement of a judgment. The circuit court undoubtedly possessed jurisdiction to render a deficiency judgment concomitantly with its jurisdiction to enforce its own judgments. And, the circuit court possesses inherent jurisdiction to render orders enforcing its own judgment. *EIC, Inc. v. Bank of Virginia*, 582 S.W.2d 72 (Ky. 1979).

In this case, the September 26, 2013, deficiency judgment merely set forth the current outstanding deficiency owed by Choate under the January 13, 2003, judgment and was simply a step in the enforcement of the January 13, 2003,

³ The statute of limitations to collect the judgment personally against Choate was fifteen years as set forth in Kentucky Revised Statutes (KRS) 413.090(1). Recently, our Supreme Court interpreted the fifteen-year statute of limitations in KRS 413.090(1) very broadly. *Wade v. Poma Glass & Specialty Windows, Inc.*, 394 S.W.3d 886 (Ky. 2012). Relevant herein, the Court interpreted the term “execution” as stated in KRS 413.090(1) to mean “the act of enforcing, carrying out, or putting into effect the court’s judgment.” *Id.* at 895.

judgment.⁴ Accordingly, we conclude that the circuit court possessed jurisdiction to render the September 26, 2013, deficiency judgment.

Choate also maintains that the insurance proceeds from State Farm are exempt from execution under KRS 427.110(1). Choate filed the instant appeal from the September 26, 2013, deficiency judgment. In the September 26, 2013, deficiency judgment, the circuit court did not decide the issue of whether the insurance proceeds were exempt from execution. Thus, we decline to reach this issue. Choate must bring an appeal from the court's final order or judgment adjudicating that issue.

For the foregoing reasons, the Deficiency Judgment rendered by the Trigg Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Terrence L. McCoy
Louisville, Kentucky

BRIEF FOR APPELLEE:

Thomas J. Keuler
Paducah, Kentucky

⁴ We are aware of no authority in Kentucky that would create a separate fifteen-year statute of limitation for collection of the deficiency judgment. Rather, the deficiency judgment remains subject to the original limitations period for the original judgment under KRS 413.090(1).