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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-002075-MR

JOHN D. COLLINGWOOD AND
PAULA K. COLLINGWOOD — APPELLANTS

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE JAMES M. SHAKE, JUDGE
ACTION NO. 09-CI-000349

BANK OF NEW YORK AS TRUSTEE;
BANK OF AMERICA, N.A.; AND
LAKE FOREST COMMUNITY
ASSOCIATION, INC. — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, KRAMER, AND VANMETER, JUDGES.

VANMETER, JUDGE: John and Paula Collingwood appeal the Jefferson Circuit Court's order granting the Appellees's Motion for Judgment on the Pleadings. For the following reasons, we affirm.

John and Paula Collingwood defaulted on their mortgage with Bank of New York and Bank of America, N.A. (collectively "banks") and the banks filed a foreclosure action. The Collingwoods were also indebted to Lake Forest Community Association ("Association") for unpaid fees and the Association was joined as a party in the foreclosure action as a result of its lien on the property. The parties ultimately entered into a settlement agreement in August 2010, by which the banks would advance a sum of money to the Collingwoods who would then endorse that sum to the Association to release them from all accrued fees. The agreement also said that the Collingwoods would be liable for fees to the Association beginning January 1, 2011, if they were still the record title holders as of that date. At the time of signing the agreement, a foreclosure sale was scheduled for November 9, 2010, but was subsequently withdrawn by the banks. Upon learning of the sale's withdrawal, the Collingwoods attempted to transfer their interest in the property but the banks refused to accept the quitclaim deed. The Association later sued the Collingwoods to collect fees that began accruing in 2011 and the Collingwoods filed a claim against the banks alleging that they should be liable to the Association. The trial court granted the banks' CR[1] 12.03 Motion for Judgment on the Pleadings. This appeal follows.

CR 12.03 is to be treated as a motion for summary judgment, and provides that a motion for judgment on the pleadings is appropriate when no dispute of material fact exists and the moving party is therefore entitled to judgment as a

[1] Kentucky Rules of Civil Procedure.

matter of law. *Shultz v. Gen. Elec. Healthcare Fin. Servs., Inc.*, 360 S.W.3d 171, 177 (Ky. 2012). Judgment on the pleadings is reviewed *de novo*. *Id.*

The Collingwoods allege that the banks breached the settlement agreement by acting in bad faith when they withdrew the November 2010 sale of the foreclosed property and should thus be liable to the Association for any fees accrued since 2011. This argument, however, is unpersuasive. The settlement agreement acts as a binding contract, subject to the rules of contract law. *Cantrell Supply, Inc. v. Liberty Mut. Ins. Co.*, 94 S.W.3d 381, 384 (Ky. App. 2002). If the final agreement is complete and unambiguous on its four corners, parol evidence of the parties' intentions and drafts of the agreement may not be introduced in an attempt to "construe a contract at variance with its plain and unambiguous terms." *Id.* at 385.

The settlement agreement that the Collingwoods, banks, and the Association signed expressly states that the homeowners would be relieved of past amounts owed upon endorsement of the banks' money to the Association but that they "will timely pay the 2011 assessment if they are still the owners of the property as of January 1, 2011, and will pay all future assessments as they come due if they own the property." Evidence of draft agreements the Collingwoods have introduced showing they contemplated an agreement that released them from all present *and future* liability upon payment to the Association is irrelevant. If the Collingwoods wanted to be released from future liability they should have negotiated to keep those terms in the agreement before ultimately signing it. Although a sale had

been scheduled when the agreement was signed, the Collingwoods failed to show any provision of the agreement requiring that the sale take place by a certain date. Furthermore, the Collingwoods point us to no provision in the agreement requiring a sale to occur; thus, they ultimately bore the risk that the sale would not take place as scheduled.

The Collingwoods cite *Ranier v. Mt. Sterling Nat'l Bank*, 812 S.W.2d 154 (Ky. 1991) to illustrate a claim against a bank acting in bad faith in its application of loan payments first to unsecured debt and then to secured debt. *Ranier* is distinguishable because, although the Kentucky Supreme Court found the bank had ultimately breached its duty of good faith, the loan agreement did not specify that payments had to be applied a specific way. In the present case, the settlement agreement signed by all parties expressly allocated liability. For these reasons, the trial court's determination that the Collingwoods could not prevail is affirmed.

The Collingwoods also request an award of attorneys fees. This argument, however, was not preserved for appeal. Furthermore, attorneys fees under the "American Rule" are only awarded when a statute mandates such or the signed agreement expressly calls for the award. *Flag Drilling Co., Inc. v. Erco Inc.*, 156 S.W.3d 762, 766 (Ky. App. 2005). Because the Collingwoods fail to cite a statute that entitles them to attorneys fees and the settlement agreement expressly states that each party "will bear their own costs and attorneys fees incurred as a result of the foreclosure and appeal cases," the request of attorney's fees is denied.[2]

[2] The Collingwoods also cite *King v. City of Covington*, 289 Ky. 695, 160 S.W.2d 13 (1942) for the proposition that an attorney that has worked for a class of plaintiffs is entitled to attorneys

Additionally, the Collingwoods' request for reimbursement for a foregone tax exemption is moot, as the 2014 Mortgage Forgiveness Debt Relief Act was extended retroactively at the end of the year after their brief was filed.

Because the Collingwoods' third-party complaint against the banks could not have prevailed under any set of facts, we affirm the Jefferson Circuit Court's grant of the banks' Motion for Judgment on the Pleadings.

ALL CONCUR.

BRIEF FOR APPELLANTS:

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BRIEF FOR APPELLEES BANK OF NEW YORK AND BANK OF AMERICA:

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fees. We find the current case factually distinguishable and therefore decline to apply the equitable remedy set forth in *King*.