

RENDERED: SEPTEMBER 4, 2015; 10:00 A.M.  
NOT TO BE PUBLISHED

# Commonwealth of Kentucky

## Court of Appeals

NO. 2014-CA-000730-MR

THOMAS MCKINNEY  
AND DEANDREA MCKINNEY

APPELLANTS

v. APPEAL FROM JEFFERSON CIRCUIT COURT  
HONORABLE OLU A. STEVENS, JUDGE  
ACTION NO. 13-CI-400649

PBI BANK, INC.

APPELLEE

OPINION  
AFFIRMING

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BEFORE: ACREE, CHIEF JUDGE; NICKELL AND TAYLOR, JUDGES.

TAYLOR, JUDGE: Thomas McKinney and Deandrea McKinney bring this appeal from an October 22, 2013, summary judgment and order of sale of the Jefferson Circuit Court. We affirm.

On September 25, 2009, the McKinneys executed a promissory note in the amount of \$21,250 in favor of PBI Bank, Inc. Concomitant therewith, the

McKinneys also granted PBI a mortgage in certain real property located at 425 Amy Avenue in Louisville, Kentucky, as security for the promissory note. The promissory note was executed in return for PBI extending the McKinneys a line of credit in the net principal amount of \$18,322.74.<sup>1</sup> Three days after executing the promissory note, on September 28, PBI debited and withdrew the sum of \$18,322.74<sup>2</sup> on the line of credit and applied the funds toward unpaid interest that had accrued on a commercial loan PBI previously extended to the McKinneys in 2007 for property located at 421 Poplar Level Road, known as Chateau Village Apartments (Chateau Village loan). The McKinneys made regular payments on the 2009 promissory note, without protest for a period of time, but eventually defaulted in payment of the promissory note indebtedness.

On February 8, 2013, PBI instituted foreclosure proceedings in the Jefferson Circuit Court upon the Amy Avenue property to collect the balance owed on the September 2009 note indebtedness. The McKinneys timely answered and denied default upon the promissory note. PBI then moved for summary judgment alleging that it was uncontroverted that the McKinneys defaulted under the terms of the promissory note and that judicial sale of the Amy Avenue property was warranted.

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<sup>1</sup> While the total amount of the promissory note was \$21,250, some \$2,927.26 consisted of fees and other costs, thus reducing the available line of credit to \$18,322.74 on September 28, 2009. PBI Bank, Inc., actually withdrew \$19,046.74 from the line of credit, however, all fees and costs were not yet paid at that time and the excess funds were used to pay same.

<sup>2</sup> While the actual amount was \$19,046.74 such amount was reduced by payment of fees and costs associated with the line of credit, leaving the principal amount of \$18,322.74. For sake of simplicity, we will use the \$18,322.74 figure hereinafter in this opinion.

By summary judgment and order of sale entered October 22, 2013, the circuit court concluded that the McKinneys defaulted under the terms of the promissory note and that PBI was entitled to recover some \$27,565 in damages. The circuit court also ordered a judicial sale of the Amy Avenue property by the master commissioner to satisfy the judgment. This appeal follows.

The McKinneys contend that the circuit court erred by entering summary judgment and ordering the sale of the Amy Avenue property.

To begin, summary judgment is proper where there exist no material issues of fact and movant is entitled to judgment as a matter of law. Kentucky Rules of Civil Procedure (CR) 56; *Steelvest, Inc. v. Scansteel Serv. Ctr., Inc.*, 807 S.W.2d 476 (Ky. 1991). When reviewing a summary judgment, all facts and inferences therefrom are to be viewed in a light most favorable to the nonmoving party. *Id.* Our review proceeds accordingly.

The McKinneys specifically argue that PBI improperly debited the credit line and removed the maximum amount of funds available thereunder (\$18,322.74). The McKinneys point out that PBI unilaterally withdrew the sum of \$18,322.74 on September 28, 2009, and applied such sum to the Chateau Village loan for accrued interest owed thereon. The McKinneys claim that they never authorized PBI to withdraw funds from the credit line to pay interest on the 2007 loan and that PBI acted improperly in so doing.

Under the terms of the promissory note, an agent of PBI was authorized to unilaterally debit and withdraw funds from the credit line:

LINE OF CREDIT: . . . The following person or persons are authorized to request advances and authorize payments under the line of credit until Lender receives from Borrower, at Lender's address shown above, written notice of revocation of such authority: An authorized agent of PBI Bank, Inc. is the only authorized person that can request an advance from this loan. Borrower agrees to be liable for all sums either: (A) advanced in accordance with the Instructions of an authorized person or (B) credited to any of Borrower's accounts with Lender. . . .

Under the plain terms of the promissory note, PBI could authorize withdrawals of funds from the McKinneys' line of credit, and the McKinneys agreed to be liable for funds advanced per request of PBI, pursuant to the terms of the promissory note. Consequently, we believe that PBI could have properly debited the McKinneys' line of credit.

The McKinneys also argue that PBI "breached its promise to disburse the proceeds [from the line of credit] to pay property taxes." McKinney's Brief at 6. In support thereof, the McKinneys cite to Thomas McKinney's affidavit, wherein he averred:

[3]. In or around August of 2009, Charles Darst, whom I understood was a loan officer and representative of Plaintiff, PBI Bank, Inc., approached me about applying for a "line of credit" with Plaintiff (the "Line of Credit"). The purpose of the credit line was to pay 2008 and 2009 property taxes for real property I owned known as the Chateau Village Apartments, located at 5055/220 Poplar Level Road, Louisville, Kentucky (the "Poplar Road Property"). At the time, PBI Bank, Inc.[,] had a mortgage interest in the Poplar Road Property. Mr. Darst advised me that the line of credit would be secured by a

mortgage against certain real property I owned, located at 435 Amy Avenue, Louisville, Jefferson County, Kentucky, the mortgage at issue in this action.

[4]. In reliance on Mr. Darst's promises and representations, I agreed to open the Line of Credit with PBI Bank, Inc., in the principal amount of \$21,250.00 in or around September of 2009.

[5]. However, PBI Bank, Inc.[,] failed to use the proceeds of the Line of Credit to pay the 2008 and 2009 property taxes.

[6]. In 2011, American Tax Funding filed suit against me and my wife, Deandra McKinney, relating to the 2008 and 2008 [sic] property taxes that PBI Bank, Inc.[,] failed to pay from the Line of Credit proceeds.

As the proceeds from the line of credit were not utilized to pay the 2008 and 2009 taxes upon the Chateau Village property, the McKinneys maintain that PBI breached an oral agreement to do so.

In this Commonwealth, it is well-settled that “[w]here the parties put their engagement in writing all prior negotiations and agreements are merged in the instrument, and each [party] is bound by its terms unless his signature is obtained by fraud or the contract be reformed on the ground of fraud or mutual mistake, or the contract is illegal.” *Hopkinsville Motor Co. v. Massie*, 228 Ky. 569, 15 S.W.2d 423, 424 (1929) (citation omitted); *see Childers & Venters, Inc. v. Sowards*, 460 S.W.2d 343 (Ky. 1970); *New Life Cleaners v. Tuttle*, 292 S.W.3d 318 (Ky. 2009). Simply stated, an oral agreement made prior to a written contract is deemed to have merged into the written contract and is unenforceable. *Prudential Life Ins.*

*Co. of America v. Bowling*, 237 Ky. 290, 35 S.W.2d 322 (1931); *New Life Cleaners*, 292 S.W.3d 318.

In the case at hand, the McKinneys have failed to specifically set forth claims of either fraud or mutual mistake. So, any alleged oral agreement that predated the promissory note merged into the promissory note upon its execution and is unenforceable. We, thus, reject the McKinneys' contention that PBI breached an oral agreement as to the distribution of funds from the line of credit.

The McKinneys further argue that the doctrine of equitable estoppel bars PBI's claim. We disagree.

The elements of equitable estoppel are as follows:

- (1) [C]onduct which amounts to false representation or concealment of material facts or at least which is calculated to convey the impression the circumstances are in a particular state that is inconsistent with the party's subsequent position; (2) the intention or expectation that such conduct shall influence the other party to act; and, (3) knowledge, constructive or actual, of the true facts. The party claiming the estoppel must show: (1) a lack of knowledge and of the means of knowledge of the true facts; (2) a good faith reliance on the words or conduct of the party to be estopped; and, (3) a detrimental change in position or status by the party claiming estoppel due to such reliance.

*City of Shelbyville ex rel. Shelbyville Mun. Water and Sewer Com'n v. Com.*

*Natural Res. and Env'tl. Prot. Cabinet*, 706 S.W.2d 426, 429 (Ky. App. 1986)

(quoting *Electric & Water Plant Bd. of the City of Frankfort v. Suburban Acres Dev. Inc.*, 513 S.W.2d 489, 491 (Ky. 1974)).

In the case *sub judice*, the McKinneys failed to demonstrate a detrimental change as the McKinneys received the benefit of an \$18,322.74 credit applied against outstanding interest owed by the McKinneys on the Chateau Village loan. Moreover, it is doubtful that the McKinneys could demonstrate a good faith reliance on any oral agreement made prior to the promissory note. Incident to execution of the promissory note, the McKinneys signed a document entitled “Notice of Final Agreement.” Therein, the McKinneys agreed:

BY SIGNING THIS DOCUMENT EACH PARTY REPRESENTS AND AGREES THAT: (A) THE WRITTEN LOAN AGREEMENT REPRESENTS THE FINAL AGREEMENT BETWEEN THE PARTIES, (B) THERE ARE NO UNWRITTEN ORAL AGREEMENTS BETWEEN THE PARTIES, AND (C) THE WRITTEN LOAN AGREEMENT MAY NOT BE CONTRADICTED BY EVIDENCE OF ANY PRIOR, CONTEMPORANEOUS, OR SUBSEQUENT ORAL AGREEMENTS OR UNDERSTANDINGS OF THE PARTIES.

Under the above language, the McKinneys acknowledged that “no unwritten oral agreements exist between the parties” and that the promissory note could not be contradicted by prior oral agreements. Accordingly, we do not believe that the McKinneys presented a *prima facie* case under the doctrine of equitable estoppel.

The McKinneys alternatively maintain that the “defense of failure of consideration bars [PBI’s] claims.” McKinneys’ Brief at 7. The McKinneys argue that PBI failed to properly apply the \$18,322.74 from the line of credit to the Chateau Village loan, thus resulting in a failure of consideration. Specifically, the McKinneys assert that PBI “overstated the interest charges on the Chateau Village

Loan,” in the amount of some \$23,000. McKinneys’ Brief at 7. However, a review of the record reveals that the McKinneys did not raise this issue below by asserting a counterclaim against PBI upon the Chateau Village loan. Therefore, it is not within the purview of this appeal to order an accounting upon the Chateau Village loan, although the McKinneys certainly have legal recourse to seek such an accounting through an independent action on that loan.

The McKinneys also argue that the circuit court prematurely granted summary judgment before they had a reasonable time to conduct discovery. The record reveals that PBI filed this action on February 8, 2013, and summary judgment was entered on October 22, 2013. The McKinneys had over six months to conduct discovery. We view this time period as being sufficient under the circumstances. *See Hartford Ins. Group v. Citizens Fidelity Bank & Trust Co.*, 579 S.W.2d 628 (Ky. App. 1979).

The McKinneys lastly assert that PBI was not entitled to summary judgment. Based upon our resolution of the above issues, this issue is rendered moot.

In sum, we are of the opinion that the circuit court properly rendered summary judgment adjudicating PBI’s entitlement to recover \$27,565 upon breach of the promissory note and properly ordering the master commissioner to sell the Amy Avenue property.

For the foregoing reasons, the October 22, 2013, summary judgment and order of sale of the Jefferson Circuit Court is affirmed.

ALL CONCUR.



BRIEFS AND ORAL ARGUMENT  
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BRIEF AND ORAL ARGUMENT  
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