

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2014-CA-000806-MR

SPIRIT OF PEACE MISSIONARY  
BAPTIST CHURCH, INC.

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT  
HONORABLE JUDITH MCDONALD-BURKMAN, JUDGE  
ACTION NO. 13-CI-400186

ACQUIRED CAPTIAL II, L.P.

APPELLEE

OPINION  
AFFIRMING

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BEFORE: CLAYTON, KRAMER AND VANMETER, JUDGES.

KRAMER, JUDGE: Spirit of Peace Missionary Baptist Church, Inc. (Spirit of Peace) appeals from a judgment of foreclosure entered May 6, 2014, by the Jefferson Circuit Court in favor of appellee, Acquired Capital II, L.P. (Acquired Capital). After careful review, we affirm.

The factual and procedural posture of this case and the issue forming the basis of this appeal are well-summarized by the circuit court's order and judgment in this matter, which provided in relevant part:

Spirit of Peace is a church located in the troubled Norfolk neighborhood in Louisville, Kentucky and is led by Rev. Miller.<sup>[1]</sup> Spirit of Peace granted a Mortgage for \$155,000 and Assignment of Leases and Rents to Great Financial Federal Bank on November 7, 1991. Rev. Miller testified that due to the changing neighborhood dynamics, Spirit of Peace's congregation became smaller and began to suffer financial difficulties. He contacted Jeff Reynolds at Firststar Bank. Great Financial Federal Bank had been acquired by Firststar. Rev. Miller stated that he and Mr. Reynolds[FN] discussed the church's importance in the neighborhood, and they reached an agreement that Spirit of Peace would pay \$500 per month on its mortgage payment, to be applied entirely to the principal balance.

[FN] Mr. Reynolds was not called as a witness at trial.

Spirit of Peace's financial statements would be reviewed every few months to determine if any further adjustments were needed. Nothing about the interest on the loan was discussed. The modification of the payment terms was evidenced by a letter from Mr. Reynolds dated December 29, 1999.<sup>[2]</sup>

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<sup>1</sup> Reverend R.Z. Miller.

<sup>2</sup> In relevant part, Reynolds's December 29, 1999 letter to Spirit of Peace provided:

Dear Rev. Miller,

As a follow-up to our phone conversation on Wednesday, December 22, I would like to reiterate the terms we discussed for repayment of the above referenced loan. Beginning as soon as possible, Spirit of Peace Missionary Baptist Church will submit a check in the amount of \$500 each month to be applied entirely toward the principal balance of the loan. In addition, the church will provide Firststar with financial statements every 2-3 months in order for both parties to review the financial performance of the church and make any necessary

Although Rev. Miller believed the interest was to be waived, it continued to accrue as evidenced by the loan invoice dated March 23, 2009, which reflects \$74,256.66 as “Past Due Int” and \$614.56 in accrued interest for the billing cycle. Late charges were also being imposed. When questioned why the invoice showed interest being charged, Rev. Miller testified he was told by the bank not to worry about the statements and just to remain in contact with the bank.

On or about June 22, 2012, US Bank f/k/a Great Financial Federal sold Spirit of Peace’s loan to Acquired Capital. The Mortgage and Assignment of Leases and Rents were assigned to Acquired Capital on September 7, 2012. By a letter dated June 26, 2012, described as a “standard hello letter,” Acquired Capital notified Spirit of Peace that it had purchased the loan. According to Acquired Capital, the principal balance at that time was \$85,074 plus accrued unpaid interest and other charges if applicable. An invoice dated June 24, 2012 shows a total of \$137,162.81 due.

Despite the agreement to pay \$500 per month, Spirit of Peace was not always able to make the payments. The last payment made was on or about March 4, 2012. Acquired Capital filed this foreclosure action on January 16, 2013, alleging Spirit of Peace owed \$188,564.41 as of December 12, 2012. Spirit of Peace contested the amount owed, and Acquired Capital made adjustments in favor of Spirit of Peace, including giving credit for disputed payments and calculating interest at a fixed 4.75% annual rate instead of the variable rate called for in the Note.[FN] These adjustments reduced the total amount due to \$132,440.06 as of May 15, 2013.

[FN] The March 23, 2009 invoice showed a 7.75% interest rate, while the June 24, 2012 invoice showed a 5.75% rate.

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adjustments to the monthly payments. Both the monthly checks and financial information can be mailed directly to me at:

Firstar Bank, N.A.  
One Financial Square KY-BR-0850  
Louisville, KY 40202

The primary issue presented to the Court is whether the December 29, 1999 letter constituted a modification of the original note waiving interest on the loan. Spirit of Peace argues the letter was ambiguous because it did not refer to the interest, and therefore should be construed against Acquired Capital. McMullin v. McMullin, 338 S.W.3d 315 (Ky. App. 2011). A contract is ambiguous if a reasonable person would find it susceptible to different or inconsistent interpretations. Transport Ins. Co. v. Ford, 886 S.W.2d 901, 905 (Ky. App. 1994); Luttrell v. Cooper Industries, Inc., 60 F.Supp.2d 629, 631 (E.D. Ky. 1998). After hearing the evidence, the letter was not ambiguous. Any waiver of interest on a promissory note would be a vital term to be included in any loan modification, and its absence in the December 29, 1999 letter indicates interest was not waived.

Firststar and US Bank continued to assess interest on the loan for years after the modification, which indicates the payment arrangement and application of payments constituted an agreement to bring the loan out of default. It was never intended to be a permanent arrangement, as the letter anticipated periodic financial review of Spirit of Peace in order to “make any necessary adjustments to the monthly payment.” Furthermore, monthly billing statements showed interest being assessed on the loan. Spirit of Peace did not produce any evidence to the contrary other than self-serving statements.

(Internal citations to trial exhibits omitted.)

Spirit of Peace does not contest that it was in default of its loan obligations when Acquired Capital filed the instant foreclosure action, or that it has remained in default to date. Its sole argument on appeal is that Rev. Miller’s testimony, coupled with Reynolds’s letter, qualified as evidence that all interest was permanently waived on Spirit of Peace’s loan as of December, 1999.

Even if Rev. Miller's testimony and Reynolds's letter could be considered evidence of a waiver of interest, however, Spirit of Peace's argument largely misses the point. The circuit court's judgment arises from a bench trial. Therefore, the question is not whether some evidence could have supported a contrary decision. Rather,

CR<sup>3</sup>] 43.01 placed the burden and risk of non-persuasion on the appellant as to the issues upon which the trial court made findings. CR 52.01 limits our review to the question of whether those findings are clearly erroneous and admonishes us to give due regard to the opportunity of the trial court to judge the credibility of the witnesses. When the trial court makes a finding of fact adverse to the party having the burden of proof and his is the only evidence presented, the test of whether its finding is clearly erroneous is not one of support by 'substantial evidence', but rather, one of whether the evidence adduced is so conclusive as to compel a finding in his favor as a matter of law. Cf. *Withers v. Berea College*, Ky., 349 S.W.2d 357 (1961); *Begley v. Wooton*, Ky., 350 S.W.2d 497 (1961).

*Morrison v. Trailmobile Trailers, Inc.*, 526 S.W.2d 822, 824 (Ky. 1975).

With that said, it was Spirit of Peace's burden to prove and persuade the circuit court that a waiver of interest had occurred in this matter. CR 8.03.

"The common definition of a legal waiver is that it is a voluntary and intentional surrender or relinquishment of a known right, or an election to forego an advantage which the party at his option might have demanded or insisted upon." *Greathouse v. Shreve*, 891 S.W.2d 387, 390 (Ky.1995) (quoting *Barker v. Stearns Coal & Lumber Co.*, 291 Ky. 184, 163 S.W.2d 466, 470 (1942)).

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<sup>3</sup> Kentucky Rules of Civil Procedure.

Upon review, we agree with the circuit court's conclusion that no documentary evidence of record either demonstrates interest was waived on Spirit of Peace's loan or is susceptible to such an interpretation. We agree that the documentary evidence of record actually undermines that notion. As the finder of fact, the circuit court was also entitled to disregard Rev. Miller's testimony to the contrary. Moreover, in light of the fact that Rev. Miller's testimony was unsupported and self-serving, it was not so compelling that it warranted a finding in favor of Spirit of Peace as a matter of law. For these reasons, we AFFIRM.

ALL CONCUR.

BRIEF FOR APPELLANT:

Dennis J. Stilger  
Louisville, Kentucky

BRIEF FOR APPELLEE:

Glenn E. Algie  
Covington, Kentucky