RENDERED: OCTOBER 6, 2017; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2014-CA-001258-MR

PBI BANK, INC. — APPELLANT

v.

APPEAL FROM BARREN CIRCUIT COURT
HONORABLE PHIL PATTON, JUDGE
ACTION NO. 12-CI-00715

INVESTORS CAPITAL PARTNERS II, LP;
INVESTORS EQUITY HOLDINGS, LLC;
INVESTORS EQUITY PARTNERS II, LLC;
INVESTORS CAPITAL FUND SERVICES II,
LLC; ROBERT D. PIERCE; JAMES HIMELRICK;
DOLLAR TREE STORES, INC.; MARQUEE
CINEMAS, INC.; KIMBERLY DALE, INC.;
BARREN COUNTY, KENTUCKY;
GLASGOW WATER COMPANY; AND
ALLIANCE CORPORATION[1] — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: JOHNSON, MAZE, AND NICKELL, JUDGES.

[1] Of the twelve parties named in the Notice of Appeal, only Alliance Corporation has participated in the appeal. The other parties, having presented no arguments, shall be referenced only as is necessary for completeness.

NICKELL, JUDGE: PBI Bank, Inc., has appealed from the Barren Circuit Court's judgment and order of sale which, in pertinent part, granted summary judgment in favor of Alliance Corporation ("Alliance") and concluded Alliance was entitled to twenty-five percent of the proceeds of a foreclosure sale. Following a careful review, we affirm.

On September 26, 2006, PBI loaned $9.8 million to Investors Capital Partners II, L.P. ("Investors"), for the commercial development of a parcel of real property in Glasgow, Kentucky. Investors subsequently contracted with Alliance to provide materials and labor for the commercial improvements to be undertaken on the project. The development ran into trouble, leading Investors to fail to make required payments to Alliance. By February of 2009, Alliance was owed in excess of $690,000 and it filed a Mechanics Lien against the property to secure payment of the amounts due.

On November 3, 2009, Investors, Alliance and PBI entered into an agreement which is at the center of the instant litigation and the subject of this appeal. In the Agreement, Alliance agreed to forego its right to enforce its lien and force a judicial sale of the property and to convert its Mechanics Lien into a promissory note and second mortgage, subordinate only to PBI's first and prior mortgage on the property. In consideration of this concession by Alliance, the parties

> further agree that, as sales of portions of the real property included in Exhibit A[2] hereof are sold, 25% of the proceeds (deducting only the expenses of sale) thereof shall be paid to ALLIANCE, for application to the indebtedness secured by its Real estate Mortgage, such payments to ALLIANCE first to be applied to accrued interest, and the balance to principal, and ALLIANCE shall release its Mortgage Lien with respect to the property sold, provided, however, Mortgagor may also deduct, should PBI allow the expense, the expense of sale with respect to the first out parcel sold from the mortgaged premises those items included in a budget supplied to PBI Bank, by Mortgagor.

Similar language was included near the end of the document. It is abundantly clear throughout the Agreement that PBI would retain its first mortgage priority, including any additional advances made to Investors subsequent to the date of the Agreement, and proceeds of sales would be apportioned according to the stated percentages. Nothing in the Agreement specifically addressed or mentioned disposition upon foreclosure.

After the Agreement was executed, two lots of the development were sold and the proceeds divided according to its terms. Unfortunately, Investors continued to be unable to meet its obligations and in late 2012, PBI filed a foreclosure action on its mortgage. In its answer to PBI's complaint, Alliance set up a counter-claim seeking recovery of its twenty-five percent share of the proceeds from an expected judicial sale of the development property. PBI argued the Agreement did not apply to judicial sales and strenuously resisted Alliance's position.

[2] Apparently, no "Exhibit A" was ever attached to the Agreement describing the subject property.

In April of 2013, PBI sought summary judgment and an order of judicial sale against Investors and the named guarantors of the loan. Alliance responded with a competing motion for summary judgment, wherein it argued entitlement to twenty-five percent of the proceeds of any judicial sale pursuant to the terms of the November 3, 2009, Agreement. PBI countered that a foreclosure and resultant judicial sale did not qualify as a "sale" as that term was envisioned under the Agreement and thus, Alliance was not entitled to share in the proceeds. Alternatively, PBI contended the Agreement was ambiguous and since it had been drafted by Alliance, any ambiguity should be construed against it, again removing any entitlement to a portion of the proceeds. Following a hearing, the trial court entered a judgment and order of sale on June 26, 2014, granting summary judgment in favor of both PBI and Alliance and, *inter alia*, enforcing the Agreement provision requiring division of sale proceeds between the two. After denial of its motion to alter, amend or vacate the judgment, PBI initiated the instant appeal challenging the grant of summary judgment in favor of Alliance.

Summary judgment serves to terminate litigation where "the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." CR[3] 56.03. Summary judgment should be granted only if it appears impossible the nonmoving party will be able to produce evidence at trial

[3] Kentucky Rules of Civil Procedure.

warranting a judgment in his favor. *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476 (Ky. 1991). Summary judgment "is proper where the movant shows that the adverse party could not prevail under any circumstances." *Id.* (citing *Paintsville Hosp. Co. v. Rose*, 683 S.W.2d 255 (Ky. 1985)).

On appeal, we must consider whether the trial court correctly determined there were no genuine issues of material fact and the moving party was entitled to judgment as a matter of law. *Scifres v. Kraft*, 916 S.W.2d 779 (Ky. App. 1996). Because summary judgment involves only questions of law and not the resolution of disputed material facts, an appellate court does not defer to the trial court's decision. *Goldsmith v. Allied Building Components, Inc.*, 833 S.W.2d 378 (Ky. 1992). Our review is *de novo*. Likewise, the issues in this case involve the interpretation and meaning of terms in a contract. The interpretation of a contract or statute is a question of law for the courts and is subject to *de novo* review. *Cumberland Valley Contractors, Inc. v. Bell County Coal Corp.*, 238 S.W.3d 644, 647 (Ky. 2007).

As an initial matter, we note it is uncontroverted that PBI and Alliance were each entitled to summary judgment on their claims to foreclose on the subject property. Investors had clearly defaulted on its obligations and did not set up a viable defense to the foreclosure claims. There were no genuine issues of material fact presented and PBI and Alliance were entitled to judgment as a matter of law as the trial court correctly concluded. Thus, the sole matter subject to discussion is

the trial court's conclusion Alliance was entitled to share in the proceeds of any resultant judicial sale of the property.

PBI presents a multifaceted attack on the trial court's ruling. First, it contends the Agreement, Alliance Note and Alliance Second Mortgage must be read in conjunction with one another to determine the intent of the parties. Next, PBI argues nothing in the three documents alters its position as a first priority mortgage holder, the documents establish Alliance is a second lienholder, and only private sales by Investors are subject to apportionment. Third, PBI alleges the Agreement does not act as a mortgage subordination but reinforces its priority mortgage position. Finally, PBI posits the documents contain ambiguities which must be construed against Alliance as the drafter. Although seemingly presenting multiple arguments militating in favor of reversal, PBI's arguments center on essentially a single theme—it has a first in time, first in right lien and although it agreed to apportion proceeds of sales of the mortgaged property, that agreement is inapplicable to judicial sales. We agree PBI has a first mortgage interest in the property but disagree as to interpretation of the apportionment agreement.

As urged by PBI, we have undertaken a careful review of the Agreement[4] at the core of this matter and determined the clear intent of the parties for PBI to retain a first priority mortgage on the subject property. However, the

[4] PBI encourages us to read and construe the Agreement, Alliance Note and Alliance Second Mortgage as a whole. However, this position fails to comprehend that the Agreement is the only contract to which PBI is a party; provisions of the note and mortgage between Alliance and Investors are inapplicable *vis-à-vis* PBI, and any language contained therein cannot and does not change PBI's rights and obligations.

Agreement alters that priority position only to the extent PBI agreed to apportion and divide sales proceeds with Alliance. Contrary to PBI's assertion, the apportionment provision applies to any sale of the subject property—private or judicial—and contains no limitation language restricting its application solely to private sales.

The Agreement mentions judicial sales in other provisions and clearly could have included the limiting language urged by PBI. It does not. The provision at issue refers to "sales" but does not differentiate between private sales and judicial sales. We are not at liberty to add language to a contract that the parties themselves did not choose to include. Interpreting the Agreement to mean apportionment of sales proceeds is inapplicable in the event of foreclosure and subsequent judicial sale would necessarily require this Court to add language to that provision. This we cannot do. A court may not read words into or add conditions to a contract but is bound to consider the contract as written. *See Alexander v. Theatre Realty Corp.*, 253 Ky. 674, 70 S.W.2d 380 (1934).

In addition, and contrary to PBI's suggestion, the language of the Agreement provision at issue is plain, clear and contains no ambiguity requiring us to resort to extrinsic evidence. A contract must be enforced as it is written if there is no ambiguity. *McMullin v. McMullin*, 338 S.W.3d 315, 320 (Ky. App. 2011).

Were PBI to be granted the relief it seeks, the courts would essentially be negating what PBI now sees as an unfavorable bargain and relieving it from its own mistake in negotiating the deal; such a result cannot be countenanced. The

trial court correctly concluded the Agreement applied to "any" sale of the subject property and properly mandated division of the proceeds of the judicial sale. There was no error.

Wherefore, for the foregoing reasons, the judgment of the Barren Circuit Court is AFFIRMED.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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No other briefs filed.