

Commonwealth Of Kentucky

Court of Appeals

NO. 2001-CA-002045-MR

WILLMOTT HARDWOODS, INC.;
AND JOHN WILLMOTT

APPELLANTS

v. APPEAL FROM SCOTT CIRCUIT COURT
HONORABLE PAUL F. ISAACS, JUDGE
ACTION NO. 98-CI-00294

FARMERS BANK AND TRUST COMPANY

APPELLEE

OPINION

REVERSING AND REMANDING

** ** * * *

BEFORE: BARBER, DYCHE AND TACKETT, JUDGES.

BARBER, JUDGE: Appellant Willmott Hardwoods, a Kentucky corporation, appeals from entry of summary judgment as to Willmott Hardwood's claim against Farmers Bank & Trust Company for alleged breach of a promise to lend money. Willmott Hardwoods was wholly owned by John Willmott, both parties are hereinafter collectively referred to as Willmott.

Willmott Hardwoods entered into loan agreements with Fifth Third Bank in Cincinnati. John Willmott's personal property was part of the guaranty for those loans. Willmott Hardwoods' assets were also collateral for those loans. Willmott was dissatisfied with Fifth Third as a lender, and sought a loan from Farmers Bank to replace its relationship with Fifth Third, and to pay off a portion of its loans from Fifth Third. Willmott also sought loans from three additional financial institutions to completely pay off its debt to Fifth Third.

The record shows that Farmers Bank issued a written commitment to lend money to Willmott on June 11, 1996. The letter stated that "closing of the loan shall occur on or before August 10, 1997, unless extended in writing by the Bank. If the loan is not closed by the specified date, this letter and the Bank's obligation to make the loan shall terminate without any further liability or obligation by the Bank." On July 17, 1996, Willmott signed the loan agreement and paid a loan fee of \$2,500.00. Farmers Bank provided Willmott with a draft loan agreement which would be executed at the loan closing, scheduled for August 10, 1996, "or at such other time and such other date as the parties shall mutually agree upon." The loan was not closed on August 10, 1996. After August 10, 1996, an alternate closing date of August 23, 1996 was agreed to by David Smith,

Vice-President at Farmers Bank, and Willmott. The record does not show that either party had an objection to the alternate closing date, or the extension of the time for closing.

During their discussions regarding the loan, Willmott informed Smith that he had to have closing on the loan on or before September 1, 1996, due to the nature of Willmott Hardwoods' business. Failure to obtain a loan by that date would adversely financially affect the business and require closing of the business. Willmott asserts that he also informed Smith that without the loan, Willmott's business would be severely jeopardized. There is no evidence in the record showing that Willmott failed to communicate his reliance on the loan, or the effect failure to close the loan on that date would have on his business.

On August 19, 1996, prior to the alternate closing date set by the parties' counsel for Farmers Bank contacted Willmott and informed him that Farmers Bank would not close the loan on August 23, and provided no later date for such closing. Farmers Bank asserts that after the closing date of August 10, 1996 was not met by Willmott, it learned of financial circumstances which were "a materially adverse fact or condition" leading it to determine that the loan should not be extended. These alleged facts were not communicated to Willmott. Counsel informed Willmott that Board approval would

be necessary prior to any loan. The Bank failed to take any action to obtain such approval or consider the loan after that date. Willmott asserts that without the loan from Farmers Bank, Willmott Hardwoods was forced to close. Willmott claims damages in excess of \$7,551,000.00 resulting from the closure of the business. Willmott argues that Farmers Bank is liable for the damages his business incurred.

Willmott states that the closing date of the loan was extended by written agreement between the parties, based upon the Bank's letter stating that an alternate date could be set. Willmott argues that the letter from Farmers Bank stating that the date could be changed, and the written contract providing for such change by agreement of the parties, constitutes a written extension of the date for closing. Willmott asserts that by signing the agreement, and providing the loan fee of \$2,500.00, the parties agreed that they had a contract, and that it would be fulfilled at a later date. Farmers Bank argues that the letter and the setting of a new date did not obviate the closing date set in the initial agreement.

The trial court found that the oral agreement to extend the closing date of the loan was for the purpose of permitting Willmott "to accept the written option after it had expired." The trial court stated that the letter transmitting the loan agreement was a negotiation on the terms of the loan

agreement, and "did not affect the closing date for the loan in any way." The trial court found that while the loan document did provide for extension of the date by mutual agreement, no such mutual agreement was reached prior to expiration of the offer. Farmers Bank asserts that the trial court correctly found that there was no extension of the closing date prior to expiration of the Bank's offer to make the loan.

Willmott argues that the phrase in the letter permitting mutual extension of the time for closing constitutes a written extension of the loan period. The trial court correctly found otherwise. Where the terms of the loan agreement provide for an expiration date, the loan commitment only remains open for the period provided therein. Penthouse International v. Dominion Federal Savings & Loan, 855 F.2d 963, 976 (2nd Cir. 1988). Written or oral extension of the closing date by agreement of the parties holds the expiration date in abeyance until the alternate date set. Where, as here, a factual issue exists regarding an agreement between the bank and another party, that factual issue precludes entry of summary judgment. Burrus v. Farmers Bank of Nicholasville, Ky. App., 938 S.W.2d 889, 891 (1997).

Willmott asserts that his actions in accepting the agreement, which were taken on August 17, were within the period of time provided for such acceptance. Willmott argues that the

time for acceptance of the loan was extended by the parties until August 23, 1996, the closing date scheduled by the parties. The trial court stated in its order that any discussions of a later closing date were new negotiations, and not binding upon the Bank. Farmers Bank asserts that any verbal discussions between the Bank's officer and Willmott breached the Statute of Frauds, KRS 371.010(9), and were therefore not binding on the Bank. The Bank's offer in writing of an agreement to set an alternate date, coupled with the actual setting of such alternate date by the parties, is sufficient to create an issue of fact as to whether an agreement may have been reached. Willmott further asserts that should any ambiguity be found in the documents, it should be resolved in favor of Willmott, and the contract should be held to bind the Bank. Willmott argues that his detrimental reliance on the Bank's agreement to a closing date of August 23 removed the matter from the statute of frauds, and made the agreement binding on the parties. Detrimental reliance by one party upon the representations of another precludes reliance on the statute of frauds to bar the action. United Parcel Service v. Rickert, Ky. 996 S.W.2d 464, 469 (1999).

In addition, Willmott claims that because the contract did not state that time was of the essence, acceptance within a reasonable time of the offer was sufficient to bind the Bank.

The record does not refute this assertion. This argument also shows the existence of a genuine issue of material fact precluding entry of summary judgment in the Bank's favor. Where an issue of fact material to the complaint before the court is shown, summary judgment cannot be entered. Steelvest, Inc. v. Scansteel Service Ctr., Ky., 807 S.W.2d 476, 486 (1991).

Willmott objects to entry of summary judgment, arguing that the trial court improperly invaded the province of the jury by making a determination as to Willmott's claim of fraud against the bank. Willmott argues that even if the business claim against the Bank was properly dismissed, he has a valid cause of action against Farmers Bank for the loss of his personal property. In ruling on this issue, the trial court found that "Willmott did not suffer a separate and distinct injury from that of Hardwoods, and that Willmott was not a third party beneficiary to the contract between Hardwoods and Farmers."

Farmers Bank asserts that Willmott cannot claim individual harm for actions taken with regard to the corporate entity. Kentucky law holds that only parties to a contract may sue for its breach. Sexton v. Taylor County, Ky. App., 692 S.W.2d 808, 810 (1985). Willmott claims that the trial court's ruling was in error, as his personal property had been placed into consideration for the loan from Farmers Bank and he was

therefore a party to the agreement. As Willmott was personally affected by the Bank's action, we find that he has standing to bring that argument before the trial court. Where a factual issue exists as to damages claimed, entry of summary judgment is premature. Paducah Burley Floors, Inc. v. Peoples First Nat. Bank & Trust Co., Ky. App., 757 S.W.2d 196, 199 (1988).

Willmott asserts that Farmers Bank breached its fiduciary duty of good faith and fair dealing, and should be held liable for all damages resulting from this breach. Farmers Bank denies that such breach occurred. Kentucky law requires that a bank act in good faith and with fair dealing in transactions with customers. Christie v. First American Bank, Ky. App., 908 S.W.2d 679, 680 (1995). The record contains questions of fact sufficient to preclude entry of summary judgment in favor of the Bank. For this reason, the trial court's entry of summary judgment is REVERSED, and the case is REMANDED for further prosecution of the action.

ALL CONCUR.

BRIEFS AND ORAL ARGUMENT FOR
APPELLANT:

Stephen M. O'Brien, III
Lexington, Kentucky

BRIEF FOR APPELLEE:

William L. Montague
Lexington, Kentucky

Robert W. Kellerman
Lexington, Kentucky

J. Mel Camenisch, Jr.
Lexington, Kentucky

ORAL ARGUMENT FOR APPELLEE:

Robert W. Kellerman
Lexington, Kentucky