

RENDERED: DECEMBER 24, 2003; 10:00 a.m.  
NOT TO BE PUBLISHED  
(OPINION RENDERED FEBRUARY 7, 2003 WITHDRAWN)

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 2002-CA-000076-MR

THE CECILIAN BANK

APPELLANT

APPEAL FROM HARDIN COUNTY CIRCUIT COURT  
v. HONORABLE T. STEVEN BLAND, JUDGE,  
ACTION NO. 00-CI-01171

DWIGHT SARVER

APPELLEE

### OPINION

### VACATING AND REMANDING

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BEFORE: BARBER, DYCHE, AND TACKETT, JUDGES.

BARBER, JUDGE: In 1988 Appellee Dwight Sarver signed a promissory note with his son and daughter-in-law for a loan provided by Appellant Cecilian Bank. Sarver's son and daughter-in-law defaulted on the note in 1990. After default, Cecilian made no attempt to repossess the motor vehicle which was collateral for the loan, or to notify Sarver that he was potentially liable for the debt as surety to the note. Cecilian accepted many late, or interest-only payments on the loan after default.

Under Kentucky law, acceptance of late or partial payments, or changes in the terms of a note may create a

suspension or revocation of the terms of the note. Nunnelly v. Herndon, Ky. App., 685 S.W.2d 206, 208 (1985).

In late 2000, ten years after the default, Cecilian demanded that Sarver repay the note balance of \$10,398.98, interest of \$7,972.92 and late charges in the sum of \$425.00. Sarver denied Cecilian's claim for payment, and argued that the statute of limitations to bring action on the note had expired. The trial court entered summary judgment in favor of Sarver, pursuant to KRS 355.311A.

At the time the loan was entered into, the limitation of actions for suit on the note was fifteen years. The maturity date of the note was January 15, 1994. Sarver argued that due to the enactment of KRS 355.3-118 on January 1, 1997, the limitations period for action on a note was shortened to six years after the maturity of the note. Sarver asserted that the limitations period to sue on the note ended on January 15, 2000. The underlying action in this case was not brought until August 31, 2000. Based on Sarver's argument, the trial court found the suit untimely, and entered judgment on Sarver's behalf.

Cecilian claims that use of the statute of limitations to bar action on the note constitutes improper retroactive application of a statute. Sarver argues that statutes of limitation are remedial in nature, and may be shortened or lengthened without being found to impair vested rights. See: Stone v. Thompson, Ky., 460 S.W.2d 809, 810 (1970).

An amicus curiae brief was submitted by the Kentucky Bankers Association. In this brief the bankers assert that KRS 446.080(3) limits KRS 355.3-118 to prospective rather than retroactive application of the change in limitations period. KRS 446.080(3) holds that no statute shall be construed to be retroactive, unless expressly so declared. The changes in the Uniform Commercial Code were not declared to be retroactive. As Articles 3 and 4 of the Commercial Code previously contained no limitations period, the change in the law expressly providing for a limitations period was substantive, and should only have prospective effect. Kentucky courts have held that the legislature has proclaimed that it will expressly indicate those instances in which an act is retrospective in nature. Hudson v. Commonwealth, Ky., 597 S.W.2d 610, 611 (1980). As the statute at issue does not contain such an express declaration, we find that the trial court ruled incorrectly, and that Sarver was not entitled to summary judgment based on his lower court argument that the limitations period had expired.

The amicus brief also argues that as the Uniform Commercial Code's purpose is to make uniform the law among various jurisdictions with regard to commercial transactions, pursuant to KRS 355.1-102(2)(c), the trial court should have adopted the position on prospective application of the limitations period used in other jurisdictions. Other states have found that a change in the limitations period on notes

should not be retroactively applied. See: Sarasota-Coolidge Equities II, LLC v. S. Rotondi & Sons, Inc., 770 A2d 1264 (N.J. Super. 2001); McNeal Construction Co. v. Wilson, 522 S.W.2d 222 (Ga. 1999).

Cecilian also argues that the trial court's ruling impaired an obligation of contract in violation of law, under Cotton, et al v. Walton-Verona Indep. Graded School Dist., Ky., 174 S.W.2d 712 (1943) which holds that the law which exists at the time and place of making of a contract is incorporated into it. It claims that reduction of the statute of limitations from fifteen years to six years was an impairment of the obligations under the contract. As we find that the statute was, by its terms, not properly retroactively applied, this argument is moot.

Sarver argues that if the six year limitations period does not apply, that the proper limitations period is seven years under KRS 413.220(3). This issue was not before the trial court. Sarver asserts that which limitations period applies, and how such limitations periods affected his rights create an issue of fact requiring reversal and remand of the action.

Sarver argues that a genuine issue of material fact exists as to whether he was an accommodation maker for the note. He states that this requires reversal and remand for further proceedings. KRS 355.3-415(1) holds that an accommodation maker is A. . . one who signs the instrument in any capacity for the purpose of lending his name to another party to it.@ An

accommodation maker receives no benefit from the instrument. This issue was not determined by the trial court on motion for summary judgment, and therefore cannot be ruled upon by this Court.

In its Order granting summary judgment, the trial court stated that there was a purely legal issue before it, that being the applicable limitations period. Based on the statute erroneously thought applicable by the parties, the trial court found the action untimely. As the statute relied upon is inapplicable to this action, we must vacate the trial court's entry of summary judgment, and remand this action.

ALL CONCUR.

BRIEFS AND ORAL ARGUMENT FOR  
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APPELLEE:

Keith D. Duerr  
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