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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-002502-MR

EMORY M. DAVIS AND CAROL DAVIS

APPELLANTS

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE LISABETH HUGHES ABRAMSON, JUDGE
ACTION NO. 99-CI-001264

STOCKYARDS BANK & TRUST COMPANY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: KNOPF, TAYLOR, AND VANMETER, JUDGES.

TAYLOR, JUDGE: Emory M. Davis and Carol Davis bring this appeal from a Summary Judgment of the Jefferson Circuit Court entered on September 23, 2003, awarding Stockyards Bank & Trust Company the sum of \$127,869.09 plus attorney's fees and costs. We affirm.

This dispute has its genesis in the sale of S.B. Glass Company, Inc. (S.B. Glass) located in Louisville, Kentucky. Since 1986, S.B. Glass was owned by appellants, and appellee had

extended S.B. Glass numerous loans. These loans were personally guaranteed by appellants; however, S.B. Glass was the primary debtor on the loans.

In 1998, appellants began negotiations with Kenneth Mitan for the sale of S.B. Glass. The parties desired Mitan to personally guarantee the S.B. Glass loans and to obtain a release of appellants' guarantees. Eventually, appellee rejected Mitan's loan application and so informed appellants. Appellee asserted the loan denial was because of Mitan's lack of liquid collateral and because Mitan was an out-of-state resident.

Nevertheless, appellants sold the stock of S.B. Glass to Mitan Development Division, Inc. A portion of the purchase price was financed by appellants through a promissory note secured by a lien on S.B. Glass's assets. Appellants remained as guarantors on the S.B. Glass loans to appellee but obtained Mitan's personal guaranty for the debt that they would remain liable for to appellee.

Within a short time after the sale, Mitan "swept" the banking accounts of S.B. Glass, and S.B. Glass's checks, including payroll checks, began to be returned for insufficient funds. Within forty days of the sale, appellee closed S.B. Glass's account, and S.B. Glass defaulted on the loans to appellee, upon which appellants were still guarantors thereof.

Mitan also defaulted on the promissory note and personal guarantee to appellants.

As a result, appellants filed an action to enforce Mitan's promissory note and to secure the assets of S.B. Glass as collateral. Appellants also alleged that appellee breached its fiduciary duty to them and was "guilty" of criminal facilitation. Appellee then sought to recover against appellants, as guarantors, for the balance owed on the bank loans.

Ultimately, the circuit court entered summary judgment in favor of appellee. The circuit court awarded appellee \$127,869.09, or the outstanding note to the bank, plus attorney's fees in the amount of \$38,415.50 and court costs of \$2,303.50.¹ This appeal follows.

Appellants contend the circuit court erroneously entered summary judgment in favor of appellee. Summary judgment is proper where there exist no material issues of fact and movant is entitled to judgment as a matter of law. Steelvest, Inc. v. Scansteel Service Center, Inc., 807 S.W.2d 476 (Ky. 1991).

Appellants argue that material issues of fact exist upon whether appellee breached a fiduciary duty it owed appellants and whether appellee committed criminal facilitation

¹ The circuit court's summary judgment included Ky. R. Civ. P. 54.02 language.

to which it would be answerable by civil remedy. We have reviewed the erudite opinion of the circuit court and are compelled to agree with it. Accordingly, we adopt its well-reasoned opinion herein:

In this case Plaintiffs contend two crimes were committed by Mitan and facilitated by the Bank: theft by deception, KRS 514.040 and defrauding secured creditors, KRS 517.060. The theft by deception claim is premised on Mitan and his companies, including S.B. Glass, passing "bad" checks. Plaintiffs have focused on checks drawn on a PNC Bank account for which Stock Yards Bank is the payee as well as payroll and vendor checks drawn on a Stock Yards Bank account. As to the former checks the Bank, as payee, is actually the victim of the thefts not one who aided in their commission. As to the latter checks, the Bank stands in no different position than any other bank which has a customer writing checks with insufficient funds. In essence, Plaintiffs are claiming (without any legal authority) that financial institutions are facilitating theft when a customer "bounces" several checks. Even if at some point after repeated writing of bad checks a bank could bear some responsibility, as Plaintiffs acknowledge in this case, the Bank closed the S.B. Glass account within days of the receipt of multiple checks written by Mitan on insufficient funds. Moreover, to the extent S.B. Glass, the drawer, committed theft by deception through the issuance of bad checks, Plaintiffs would only have standing to recover as to the check or checks written to them personally. Certainly there is no credible basis, even at this stage of the proceedings, to conclude that the Bank knew that Mitan/S.B. Glass was committing or intending to commit theft by deception as to the Plaintiffs and that the Bank intended to aid in the

commission of that crime by providing means or opportunity.

Defrauding a secured creditor occurs when a person "destroys, removes, conceals, encumbers, transfers, or otherwise deals with property subject to a security interest with intent unlawfully to hinder enforcement of that interest." The difficulty with Plaintiffs' position on this claim is the same as with the check for which the Bank was payee. Any property subject to a security interest in favor of Plaintiffs was subject to a superior security interest in favor of the Bank. Thus, if the Bank facilitated destruction, removal or other interference with S.B. Glass property by Mitan, the primary victim was the Bank itself. This convoluted criminal facilitation claim would require a finding that the Bank knowingly aided Mitan in his defrauding of Plaintiffs by providing Mitan with the means or opportunity to destroy, remove, encumber, transfer or otherwise deal with S.B. Glass property (which the Bank had a superior interest in) with the intent to unlawfully hinder Plaintiffs' security interest in that same property. Ultimately, Plaintiffs have nothing more than their personal belief that the Bank should have acted more quickly in calling the S.B. Glass loan and taking possession of the property. Again Plaintiffs offer absolutely no legal authority for the proposition that a bank can be a criminal facilitator in the defrauding of a secured creditor (with a subordinate security interest) simply by the manner in which it exercises its discretion to call a loan due.

In essence, Plaintiffs have concluded that Kenneth Mitan is a criminal and that the Bank should be responsible for facilitating his criminal activities. The broad brush with which Plaintiffs paint this picture is not sufficient. Plaintiffs' criminal facilitation argument does not

survive a review of the relevant statutes and the facts. The Bank is entitled to summary judgment on the criminal facilitation claim.

Plaintiffs' final claim is for breach of fiduciary duty. The Bank responds to this claim by noting initially that a banking relationship alone does not constitute a fiduciary relationship and the circumstances under which a relationship arises have been narrowly defined in Kentucky. Plaintiffs and the Bank acknowledge that the legal relationship between them is best defined by the Kentucky Supreme Court in Steelvest, Inc. v. Scansteel Service Center, Inc., Ky., 807 S.W.2d 476,485 (1991).

First National Bank states that Lucas and his corporation occupied no confidential relationship with the bank and they were merely loan customers. However, because the circumstances which may create a fiduciary relationship are so varied, it is extremely difficult, if not impossible, to formulate a comprehensive definition of it that would fully and adequately embrace all cases. Nevertheless, as a general rule, we can conclude that such a relationship is one founded on trust or confidence reposed by one person in the integrity and fidelity of another and which also necessarily involves an undertaking in which a duty is created in one person to act primarily for another benefit in matters connected with such undertaking.

The Bank correctly notes that in this case the borrower/customer was S.B. Glass. Plaintiffs, the former owners of S.B. Glass, were the guarantors on promissory notes made

by S.B. Glass and, as a result, mortgaged their own property to secure the corporate debt. The Bank correctly notes that its duty to its actual customer, S.B. Glass, was primary.

In Steelvest, the bank had a current banking relationship with both the corporation, Steelvest, and its president, William Lucas. Lucas had a personal loan with the bank and the Supreme Court concluded he had "reposed a certain degree of trust and confidence" in that bank by disclosing confidential information in order to obtain that personal loan. Id. at 486. The bank had also financed Scansteel, a competitor of Steelvest formed by a Steelvest executive while he was still employed by Steelvest. In this context the Court stated:

The bank may have breached this fiduciary relationship by agreeing to lend money to Scanlan to help him form Scansteel with the knowledge that such formation could have an adverse effect on Steelvest. There is also a legitimate factual question concerning whether First National improperly used and relied upon certain information concerning Steelvest obtained from Lucas in processing his loan when it proceeded to finance Scansteel.

807 S.W.2d at 486.

Obviously the factual scenario before this Court is very difficult. The guarantor of a corporate note is alleging a fiduciary relationship which required the Bank to disclose confidential financial information about the purchaser of 100% of the stock in the corporation and to assert the bank's superior security interest in that corporation's assets.

Plaintiffs' first alleged breach would require the Bank to violate its responsibility to maintain in confidence all financial information provided by customers and potential customers. Assuming a fiduciary relationship did exist between the Bank and Plaintiffs, as guarantors of S.B. Glass debt, there is no credible legal argument that such duty included the obligation to disclose confidential information provided by Mitan, an individual to whom the Bank declined a loan.

Although Plaintiffs suggest that full disclosure of Mitan's finances by the Bank would have enlightened them, the evidence establishes that while the Bank rejected Mitan's loan application without reviewing a credit report, the report actually revealed only a \$129,000 lien with all other debts satisfactorily paid. Thus, the only evidence in the record is that the credit report was "good."

As to the Bank's perceived "slow" action after the sale of S.B. Glass, the record reflects that Plaintiffs' lawyer assured the Bank that its own position was secure after Plaintiffs sold their stock to Mitan. Plaintiffs state:

First, there was no doubt that Stock Yards Bank very well knew that there had been a managerial change without its permission. In point of fact, Mr. Jenkins noted that they were not going to act on that issue "at that time." This obvious implication was they were going to "wait and see" what occurred. There was no waiver of this default provision by Stock Yards Bank. Moreover, SB Glass, Inc. had defaulted on its loan payments. The Bank, by its secured interest and loan agreements, had the right to

accelerate and demand full payment of all notes, and to, if it felt its security threatened, to come in and take possession of those assets. There is no question that SB Glass, Inc. had defaulted on its loan payments.

By doing nothing, the Bank facilitated Mr. Mitani's ongoing crimes of devastating the assets of SB Glass, Inc. As noted above, on or about October 27, 1998, the officer of the Bank made a determination that their assets were "in jeopardy" and yet thereafter, did nothing except pursue the Davis'.

Understandably the Bank protest that the October 27, 1998 "jeopardy" situation was Plaintiffs' own sale of the SB Glass stock without informing the Bank, a sale that was followed by Plaintiffs' attorneys assuring the Bank its loan was secure. As to post-October developments, Plaintiffs are factually wrong in stating that the Bank did nothing but pursue the Plaintiffs on the SB Glass debt: the record reflects that the corporate assets were ultimately sold pursuant to the Bank's tendered Judgment and Order of Sale. Finally, there is no legal or factual basis for concluding that the Bank's course of action in foreclosing on its loan to S.B. Glass exposes it to breach of fiduciary duty liability to the guarantors of that loan.

While we certainly empathize with appellants' situation, we cannot conclude that appellee breached any fiduciary duty or committed criminal facilitation; rather, the situation is the culmination of poor business decisions coupled with unscrupulous business practices. In sum, we are of the

opinion the circuit court properly entered summary judgment in favor of appellee.

For the foregoing reasons the Summary Judgment of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

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