

Commonwealth Of Kentucky
Court of Appeals

NO. 2003-CA-002522-MR

ERIC TURNER AND EVA TURNER

APPELLANTS

v. APPEAL FROM GRAVES CIRCUIT COURT
HONORABLE JOHN T. DAUGHADAY, JUDGE
ACTION NO. 03-CI-00237

EMC MORTGAGE CORPORATION

APPELLEE

OPINION AND ORDER
(1) AFFIRMING; AND
(2) GRANTING MOTION TO STRIKE REPLY BRIEF

** ** * * *

BEFORE: BUCKINGHAM AND JOHNSON, JUDGES; EMBERTON, SENIOR JUDGE.¹

EMBERTON, SENIOR JUDGE: This is a mortgage foreclosure action filed by EMC Mortgage Corporation against Eric and Eva Turner. Eric and Eva, both pro se, filed separate answers to the complaint. Eva responded by denying all allegations except that she was a resident of Graves County and owned an interest in the property. Eric filed an identical answer but added a statement alleging that the Department of Housing and Urban Development failed to insure the loan and, therefore, the mortgage was

¹ Senior Judge Thomas D. Emberton sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

invalid. EMC filed a motion for summary judgment supported by an affidavit of its vice president, stating that the account was in default and itemized the amount due. The Turners responded again asserting the invalidity of the mortgage because of the failure of HUD to insure the property and the lack of jurisdiction of the circuit court. The Court granted EMC's motion and entered its judgment and order of sale on October 21, 2003.

Our standard of review on appeal of a summary judgment is whether there is a genuine issue of material fact and whether the moving party is entitled to judgment as a matter of law.² A party can not defeat a motion for summary judgment unless some affirmative evidence is presented demonstrating that there is no material issue of fact.³

The Turners' defense to EMC's action is that because the mortgage did not qualify for FHA mortgage insurance, the mortgage and note are invalid. A mortgage is a contract between the borrower and lender subject to the rules of interpretation applicable to contracts. When the language is clear and free

² James v. Wilson, 95 S.W.3d 875 (Ky. App. 2002).

³ Hubble v. Johnson, 841 S.W.2d 169, 171 (Ky. 1992).

from ambiguity, it needs no construction and will be enforced according to its express terms.⁴

The mortgage contains an acceleration clause providing that EMC could declare the entire amount due and payable if the Turners defaulted in making payments. The Turners have presented no evidence to contradict EMC's affidavit that the Turners defaulted.

EMC pursued its foreclosure action on the basis of the Turners' default and not on the failure of the loan to qualify for FHA mortgage insurance. The failure of the mortgage to qualify for insurance does not, either under the law or the terms of the mortgage, alleviate their obligation to pay the amount owed and does not raise a material issue of fact so as to preclude summary judgment. As explained by the Wyoming Supreme Court in Kilmer v. Citicorp Mortgage, Inc.,⁵ mortgage insurance obtained through HUD protects a mortgagee when it loans money to a higher risk mortgagor. "[F]ederal mortgagee insurance is not an alternate mechanism for the repayment of defaulted loans which extinguishes a mortgagor's obligation thereon or its liability for a deficiency judgment."⁶ And there is no language

⁴ First Commonwealth Bank of Prestonsburg v. West, 55 S.W.3d 829 (Ky.App. 2001).

⁵ 860 P.2d 1165,1168 (Wyo.1993).

⁶ Platte Valley Savings by Resolution Trust Corporation v. Crall, 821 P.2d 305, 307 (Colo.Ct.App. 1991).

in any of the loan documents indicating that mortgage insurance is a condition precedent to the parties being bound by the terms of the mortgage and note.

There is no merit to the Turners' attempt to challenge the Graves Circuit Court's jurisdiction. The property is located in that county and the Turners are residents of Graves County.⁷

EMC's motion to strike the reply brief and exhibits is granted in that the brief contains arguments and evidence not presented to the circuit court.⁸ The reply brief is hereby ORDERED stricken from the record.

The judgment of the Graves Circuit Court is affirmed.

ALL CONCUR.

ENTERED: July 1, 2005

/s/ Thomas D. Emberton
JUDGE, COURT OF APPEALS

BRIEF FOR APPELLANT:

Eric B. Turner, Pro Se
Hickory, Kentucky

BRIEF FOR APPELLEE:

James D. Keffer
LERNER, SAMPSON & ROTHUSS
Cincinnati, Ohio

⁷ KRS 452.400(3).

⁸ Kentucky Rules of Civil Procedure 76.12(4)(c)(iv).