

Commonwealth Of Kentucky
Court of Appeals

NO. 2004-CA-001616-MR

ENVIRONMENTAL CAPITAL INTERNATIONAL, LLC

APPELLANT

v. APPEAL FROM LINCOLN CIRCUIT COURT
HONORABLE JEFFREY T. BURDETTE, JUDGE
ACTION NO. 01-CI-00215

PBK BANK, INC.

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: BARBER, HENRY, AND KNOPF, JUDGES.

BARBER, JUDGE: This is an appeal by Appellant, Environmental Capital International, LLC (ECI) against Appellee, PBK Bank, Inc. (PBK), from the Lincoln Circuit Court's order granting of summary judgment against ECI, as well as, a denial of ECI's motion for partial summary judgment¹ on July 28, 2004. Following a review of the record, we affirm.

PBK is a Kentucky bank which began making construction loans to Maverick Environmental & Construction Services, Inc.

¹ ECI's motion was for partial summary judgment based upon its unjust enrichment claim.

(Maverick), in October 1998. On October 23, 1998, PBK prepared a note and security agreement which was signed by Jeff Jones, Maverick's president (Jones). To perfect its interest, PBK filed a UCC financing statement November 24, 1998. Jones also signed the UCC financing statement. PBK continued a lending relationship with Maverick after Maverick began dealing with ECI.

ECI is a factoring company that purchased selected accounts receivable from Maverick beginning in June 1999. On June 24, 1999, Maverick entered into a Master Reimbursement Claims Purchase Agreement² (Master Agreement) for the purpose of factoring certain trust fund work.³ The risk of loss for ECI was very low because the Commonwealth was the debtor on the accounts receivable it purchased from Maverick. Following its first account receivable purchase, ECI filed a UCC financing statement July 27, 1999 to perfect its security interests in accounts receivable purchased by ECI. The financing statement was signed by John Paul Bekish, vice president of Maverick (Bekish). Later, ECI and Maverick⁴ signed an Addendum to the Master Agreement extending ECI's purchases to include non-trust fund

² The Master Agreement was signed on Maverick's behalf by Jones.

³ Trust fund work refers to work done to clean up petroleum discharge pollution and paid for by a state agency.

⁴ The Addendum was signed on Maverick's behalf by Bekish.

work.⁵ ECI subsequently began purchasing accounts receivable related to Maverick's non-trust fund work. Maverick eventually went defunct, owing large sums of money to both PBK and ECI. ECI filed a complaint against PBK alleging that PBK owed it monies related to Maverick's accounts receivable purchased by ECI.

There is a dispute as to what type of relationship ECI had with PBK during their respective involvements with Maverick. ECI claims that it had an agreement with PBK that it was the priority lien holder for accounts receivable ECI purchased from Maverick. However, PBK maintains it always insisted that it was the priority lien holder for all Maverick's accounts receivable due to its November 24, 1998 financing statement.

ECI filed a motion for partial summary judgment based upon its claim of unjust enrichment against PBK March 25, 2004. PBK responded to ECI's partial summary judgment motion and filed its own motion for summary judgment on April 30, 2004. On June 4, 2004, ECI filed its reply to PBK's response as well as its response to PBK's motion for summary judgment. Lastly, PBK filed its reply to ECI's response June 9, 2004. The circuit court found there was no genuine issue of material fact remaining and PBK was entitled to judgment as a matter of law

⁵ The Addendum does not contain a date, but ECI states in its Complaint that the Addendum was signed on or before January 2000.

and denied ECI's motion for partial summary judgment.⁶

Specifically, the circuit court found the following:

PBK had secured a superior and valid lien relevant to this matter; the security agreement contained specific language requiring changes to be with express written permission; ECI, with knowledge of this lien superiority, proposed without success, a subordination of PBK's lien to ECI's security interest; there is no writing or intercreditor agreement to the contrary and payment monies received by PBK was "Maverick's money." Therefore, the arguments of ECI fail and the facts of the record distinguish this case from cases cited or presented by the Plaintiff, ECI.

ECI appealed the circuit court's summary judgment order August 10, 2004.

The standard of review on appeal when a trial court grants a motion for summary judgment is whether the trial court correctly found there was no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law. Hallahan v. The Courier-Journal, 138 S.W.3d 699, 704 (Ky.App. 2004), (citing Palmer v. International Assoc. of Machinists, 882 S.W.2d 117, 120 (Ky. 1994)). The movant bears the initial burden of convincing the court by evidence of record that no genuine issue of fact is in dispute, and then the burden shifts to the party opposing summary judgment to present "at least some affirmative evidence showing that there is a genuine

⁶ According to the record, the parties had oral arguments before the court on April 30, 2004.

issue of material fact for trial." Id. at 705, (citing Steelvest, Inc. v. Scansteel Service Center, Inc., 807 S.W.2d 476, 482 (Ky. 1991)). The party opposing summary judgment cannot rely on their own claims or arguments without significant evidence in order to prevent summary judgment. Hallahan, supra, 138 S.W.3d at 705. The court must view the record in the light most favorable to the nonmovant and resolve all doubts in his favor. Id., (citing Commonwealth v. Whitworth, 74 S.W.3d 695, 698 (Ky. 2002)).

In order for summary judgment to be proper, the movant must show that the adverse party cannot prevail under any circumstances. Motorists Mutual Insurance Co., supra 149 S.W.3d at 439, (citing Paintsville Hospital Co. v. Rose, 683 S.W.2d 255, 256 (Ky. 1985)). Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the affidavits,⁷ 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." Motorists Mutual Insurance Co. v. Grange Mutual Casualty Co., 149 S.W.3d 437, 439 (Ky.App. 2004), (citing Ky CR 56.03). The focus should be on what is of record rather than what might be presented at trial. Hallahan, supra,

⁷ "Affidavits" in CR 56.03 includes any other pertinent materials which will assist the court in adjudicating the merits of the motion. Conley v. Hall, 395 S.W.2d 575, 583 (Ky. 1965).

138 S.W.3d at 705, (citing Welch v. American Publishing Co. of Kentucky, 3 S.W.3d 724, 730 (Ky. 1999)). Further, an appellate court need not defer to the trial court's decision on summary judgment and will review the issue *de novo* because only legal questions and no factual findings are involved. Id.

We agree with the circuit court that the determinative issue in this matter is which party had priority to Maverick's accounts receivable at issue. The version of KRS 355.9-312 applicable in 1998 stated in relevant part:

(5) In all cases not governed by other rules stated in this section ... priority between conflicting security interests in the same collateral shall be determined according to the following rules: (a) Conflicting security interests rank according to priority in time of filing or perfection.

. . . .

(7) If future advances are made while a security interest is perfected by filing . . . the security interest has the same priority for the purposes of subsection (5) of this section . . . with respect to the future advances as it does with respect to the first advance. If a commitment is made before or while the security interest is so perfected, the security interest has the same priority with respect to advances made pursuant thereto. In other cases a perfected security interest has priority from the date the advance is made.

We first examine what is required to perfect a security interest in collateral. Security agreements are

effective according to its terms between the parties, against purchasers of the collateral and against creditors. KRS 355.9-201 (1998). [A] security interest is not enforceable against the debtor or third parties with respect to the collateral and does not attach unless: (a) . . . the debtor has signed a security agreement which contains a description of the collateral . . . (b) value has been given; and (c) the debtor has rights in the collateral. KRS 355.9-203(1)(a)-(c) (1998). Attachment occurs as soon as all of the events specified in subsection (1) of this section have taken place unless explicit agreement postpones the time of attaching. KRS 355.9-203(2) (1998). A financing statement must be filed to perfect all security interests. KRS 355.9-302(1) (1998). A financing statement is sufficient if it gives the names of the debtor and the secured party; is signed by the debtor; gives an address of the secured party from which information concerning the security interest may be obtained; gives a mailing address and identification number of the debtor; and contains a statement indicating the types, or describing the items, of collateral. KRS 355.9-402(1) (1998). A financing statement may be filed before a security agreement is made or a security interest otherwise attaches. Id. As such, actual notice of possible future advances to any would-be subsequent creditor is provided by the future advance clause appearing in the security agreement

rather than the financing statement. First National Bank of Grayson v. Citizens Deposit Bank and Trust, 735 S.W.2d 328, 331 (Ky.App. 1987). A filed financing statement is effective for a period of five (5) years from the date of filing. KRS 355.9-403(2) (1998). [A] security interest continues in collateral notwithstanding sale, exchange or other disposition thereof unless the disposition was authorized by the secured party in the security agreement or otherwise, and also continues in any identifiable proceeds including collections received by the debtor. KRS 355.9-306(2) (1999).

With this in mind, we turn to PBK's October 23, 1998 security agreement and November 24, 1998 financing statement. PBK argues that these documents resulted in a blanket lien for PBK on future advances made to Maverick. The security agreement stated in pertinent part:

Multiple Advance: The principal sum shown above is the **maximum** amount of principal I can borrow under this note. On October 23, 1998, I will receive the amount of \$30,000 and future principal advances are contemplated.

Conditions: The conditions for future advances are AS NEEDED FOR BUSINESS PURPOSES.

SECURITY INTEREST: [Maverick] gives [PBK] a security interest in all of the Property described below that [Maverick] now own[s] and that [Maverick] may own in the future (including, but not limited to, all parts, accessories, repairs, improvements, and

accession to the Property), wherever the property is or may be located, and all proceeds and products from the Property.

. . . .

Accounts, Instruments, Documents, Chattel Paper and Other Rights to Payment: All rights [Maverick] ha[s] now and that [Maverick] may have in the future to the payment of money including, but not limited to:

(a) payment for goods and other property sold or leased or for services rendered, whether or not [Maverick] ha[s] earned such payment by performance; and

(b) rights to payment arising out of all present and future debt instruments, chattel paper and loans and obligations receivable.

The above include any rights and interests (including all liens and security interests) which [Maverick] may have by law or agreement against any account debtor or obligor of mine.

. . . .

The secured property includes, but is not limited by, the following: ACCOUNTS RECEIVABLES TO MAVERICK EQUIPMENT (sic) & CONSTRUCTION SERVICES, INC.⁸

. . . .

The corresponding UCC Financing Statement stated in relevant part:

5. This financing Statement Covers the Following Types (or Items) of Property: SEE ATTACHED SHEET FOR COMPLETE DESCRIPTION. ACCOUNTS RECEIVABLES

⁸ The Borrower's name and signatory section each contain the proper name for Maverick.

TO MAVERICK EQUIPMENT (sic) & CONSTRUCTION SERVICES, INC.⁹

. . . .

The attached Addendum to the financing statement stated:

The Financing Statement to which this addendum is attached covers the types (or items) of property indicated below that [Maverick] now own[s] and that [Maverick] may own in the future, together with all parts, accessories, repairs, improvements, and accessions to the property, wherever it is located, and all proceeds and products from the property:

Accounts, Instruments, Documents, Chattel Paper, and Other Rights to Payment: All rights [Maverick] ha[s] now or may have in the future to the payment of money including, but not limited to: (a) payment for goods sold or leased or for services rendered, whether or not [Maverick] ha[s] earned such payment by performance; and (b) rights to payment arising out of all present and future debt instruments, chattel paper and loans and obligations receivable. The above include any rights and interests (including all liens and security interests) which [Maverick] may have by law or agreement against any account debtor or obligor of mine.

PBK's security interest in Maverick's accounts receivable was perfected when the UCC financing statement was filed on November 24, 1998 in accordance with KRS 355.9-302(1)(1998). Perfection of a security interest gives constructive notice to the world of the claim or interest of the one asserting it. 68A Am.Jur. 2d *Secured Transactions* §259 (2005).

⁹ The Debtor section contains the proper name for Maverick.

ECI admitted that it did not retain an attorney to perform a UCC search on its behalf prior to doing business with Maverick.¹⁰ The search that was conducted on ECI's behalf did not discover PBK's 1998 UCC filings. Also, Maverick represented to ECI that there were no other liens on its accounts receivable in the Master Agreement and Addendum.¹¹ As a result, ECI began doing business with Maverick. ECI's security interest in Maverick's accounts receivable which were factored by ECI became perfected on July 27, 1999. PBK's lien on Maverick's accounts receivable took priority over ECI's lien because PBK perfected its security interest more than eight months prior to ECI's perfection of their security interest. Therefore, PBK was entitled to all Maverick's accounts receivable, including those factored by ECI.

ECI also claims the circuit court erred in denying its motion for partial summary judgment based upon a theory of unjust enrichment. We disagree. There was never a written

¹⁰ Beard testified in his April 3, 2003 deposition that ECI utilized the services of an internet based company, CSC, to perform all UCC searches on its behalf for a flat fee.

¹¹ The following is from the Master Agreement which was adopted in the Addendum:

XIII. REPRESENTATIONS AND WARRANTIES OF [MAVERICK]

. . . .
I. No Liens or Rights of Setoff. The Claims are not subject to any claim, counterclaim, setoff, adjustment, subcontractor liens or other security interests and encumbrances except as provided in the Reimbursement Program.

agreement between PBK and ECI according to Robert K. Beard,¹² ECI President, and Robert Folger, PBK CEO.¹³ The October 23, 1998 Security Agreement specifically requires modifications of the agreement to be made with PBK's express written consent. According to the record, all contracts were between ECI and Maverick. While we sympathize with ECI's current position following Maverick's demise, that does not mean that they should recoup lost monies from PBK, which had a priority lien on Maverick's accounts receivable. Therefore, we believe that the circuit court properly denied ECI's motion for partial summary judgment related to its unjust enrichment claim against PBK.

Based on the foregoing, the granting of the summary judgment to PBK by the circuit court was appropriate in that no genuine issues of material fact remained. We also believe the circuit court's denial of ECI's partial summary judgment motion on its claim of unjust enrichment was proper. Therefore, we affirm Lincoln Circuit Court.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Donald L. Cox
Frederic J. Cowan
Louisville, Kentucky

BRIEF FOR APPELLEE:

John K. Bush
Ann Toni Kereiakes
Louisville, Kentucky

¹² Beard deposition taken April 3, 2003.

¹³ Folger deposition taken July 12, 2002. At the time of Folger's deposition, he had resigned from his position as CEO of PBK.