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Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-002082-MR

ROY ARTHUR TAYLOR AND JACQUELINE TAYLOR — APPELLANTS

v.

APPEAL FROM BRACKEN CIRCUIT COURT
HONORABLE JOHN W. MCNEILL, III, JUDGE
ACTION NO. 05-CI-00147

INTEGRA BANK, N.A. S/B/M/W COMMUNITY FIRST BANK, N.A. — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: THOMPSON, JUDGE; BUCKINGHAM AND HENRY, SENIOR JUDGES.[1]

HENRY, SENIOR JUDGE: Roy Arthur Taylor and Jacqueline Taylor appeal from a summary judgment granted to Integra Bank, N.A., by the Bracken Circuit Court on August 30, 2006. The circuit court found that, due to a default in payment, the Taylors were indebted to Integra for the principal and interest on two promissory notes, plus attorney's fees, late fees, court costs and insurance. The Taylors argue that summary judgment was

[1] Senior Judges David Buckingham and Michael Henry sitting as Special Judges by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

inappropriate because the default, and the resultant fees and costs, were caused by the bank's refusal to adhere to prior practice and custom.

This case began as a partial foreclosure action on two mortgages granted by the Taylors to Community First Bank, N.A., which was subsequently succeeded by merger with Integra Bank. The mortgages secured two promissory notes, #38591 and #40134. The loans were cross-collateralized, in that they were both secured by the same ten properties.[2] Note # 38591 was signed by the Taylors on September 16, 1997. The original principal amount of the loan was $101,194.64. As of December 2, 2005, (the month in which the foreclosure action was filed) the Taylors owed principal on the loan in the amount of $51,582.23. Note # 40134 was signed on November 28, 1998, for the principal sum of $61,500.00. It was due to mature with a balloon payment (of all principal and interest due) on November 24, 2003. The notes and mortgages contained acceleration clauses which provided that if the Taylors defaulted with respect to any of the payments, the bank had the option, without notice, to declare the entire indebtedness, together with all interest, immediately due and payable at once, and to collect the same by suit at any time.

Prior to the maturity date of Note #40134, Taylor contacted Integra through its Ripley, Ohio, office in order to negotiate a renewal of the mortgage and promissory note. The bank was apparently unresponsive to Taylor's requests to

[2] The second note, #40134, was secured by one additional property.

negotiate such a renewal. Taylor had already experienced difficulties with Integra Bank, because it allegedly refused to follow the practices of its predecessor, Community First Bank. According to Taylor, Community First Bank would release mortgaged properties for sale in exchange for a portion of the purchase price. When Community Bank was succeeded by Integra, he attempted unsuccessfully to explain this previous procedure to bank personnel. According to Taylor, Integra's refusal to quote him an amount necessary to release individual parcels from the mortgages at issue here resulted in the cancellation of two transactions of sale.

After the balloon payment came due on November 24, 2003, the Taylors continued to make regular payments under the terms of the now-expired agreement. On January 24, 2004, two months after the maturity date of Note #40134, the Taylors were presented with a "Balloon Mortgage Modification Agreement" by Integra. Taylor objected to certain provisions of the agreement and refused to sign it. Integra eventually filed a partial foreclosure action in the Bracken Circuit Court on December 12, 2005. Because the two loans were cross-collateralized, a default on Note # 40134 constituted a default on Note #38591, and the bank exercised its option to declare the entire indebtedness secured by both mortgages immediately due and payable.

In their answer to Integra's complaint, the Taylors raised defenses and counterclaims based on the theories of equitable estoppel, promissory estoppel, and breach of contract.

They contended that their failure to pay on the note was based upon Integra's demand that they sign the Balloon Mortgage Modification Agreement without discussion, and Integra's refusal to give partial releases to the Taylors on parcels of mortgaged property so that the Taylors could pay the sums due under the terms of the original mortgage and note. The Taylors alleged that they had relied to their detriment on representations by Integra that the original mortgage would be extended and that the usual and customary business practices between the Taylors and Community First Bank would continue to be observed.

Integra filed a motion for summary judgment. On May 19, 2006, the circuit court held a hearing on the motion at which the Taylors did not dispute that Note #40134 was in default, but argued that issues of fact remained as to whether Integra was entitled to late fees and attorney's fees in light of Integra's refusal to follow the prior custom and practice of releasing mortgaged properties for sale. The Taylors offered to pay off the entire amount of Note #40134, and pointed out that Note #38591 was paid up to date. At that time, the court commented that "You can't be in default and then pay up when things look rough."

Further complications ensued when Integra used funds in the Taylors' bank account to cover the late charges and attorneys fees stemming from the default and foreclosure action. The Taylors filed a motion for a temporary injunction against Integra. A hearing on the injunction was held on June 16, 2006. Although it refused to grant the injunction, the circuit court

agreed that the bank could not apply the funds in the Taylors' account to attorneys fees and late charges that had not been approved by the court. The court also stated that while payment did not cure the default, all of the Taylors' funds that were in the hands of the bank would be applied first to interest, then to principal, on the loan.

On July 6, 2006, the court entered an interlocutory order granting partial summary judgment to Integra. It found that there was no dispute that Loan #40134 (secured by the balloon mortgage) was in default and that due to cross-collaterization, Loan #38591 was also in default. The court also addressed the Taylors' claims of promissory and equitable estoppel as they related to the prior policy of Community Bank in releasing mortgaged parcels of property for sale. The court noted that there was no clause in either of the notes or mortgages which obliged the creditor to release any part of its security upon a partial payment of the indebtedness. The court concluded that any verbal agreement to such effect was barred by the parol evidence rule and the doctrine of merger, and that "[a]s a matter of law, [when] the loans are in default the creditor is entitled to foreclose its lien upon the property securing the repayment of the notes." The court also stated that the "only factual issue remaining to be resolved was the amount due under each note and the appropriate per diem accrual."

Nonetheless, at the subsequent hearing on August 8, 2006, the court did allow the defendants to present evidence

relating to their counterclaims. Taylor, for example, testified for almost two hours and presented over thirty exhibits relating to his defenses and counterclaims. The court found the evidence to be non-persuasive, and rendered summary judgment in favor of Integra on the counterclaims.

On appeal, the Taylors argue that the grant of summary judgment was erroneous on both procedural and substantive grounds. On the procedural side, they contend that they were entitled to a hearing on the applicability of the doctrines of equitable estoppel and promissory estoppel. They contend that they pleaded and proved a prior pattern of usual and customary business practices by Integra's predecessor whereby mortgages secured by multiple parcels of real estate would be released piecemeal for sale to third parties. They also claim that they pleaded and presented proof of representations by Integra that the original mortgage would be extended. They contend that but for the breach of this agreement by the bank, the mortgage would have been paid and current. The Taylors assert that there was not a "trial" but only a hearing to determine the amount due under each note and the appropriate per diem accrual. They maintain that they are entitled to a trial on their claims.

Although we agree that there was not a full-blown trial on the Taylors' counterclaims (although the final hearing was described as a "trial" by the court), they were afforded ample opportunity at that hearing to present their arguments and evidence. The court expressly stated that it found the counterclaims unpersuasive. There was certainly sufficient

evidence presented to support the court's entry of summary judgment.

On the substantive side, they dispute the court’s reliance on the parol evidence rule and the doctrine of merger. The Taylors contend that the court’s reliance on the parol evidence rule was misplaced, because it only bars the admissibility of oral agreements made prior to the execution of a written contract.

In reviewing a grant of summary judgment, our inquiry focuses on whether the trial court correctly found that there was no genuine issue as to any material fact and that the moving party was entitled to judgment as a matter of law. Kentucky Rules of Civil Procedure (CR) 56.03. “[T]he proper function of summary judgment is to terminate litigation when, as a matter of law, it appears that it would be impossible for the respondent to produce evidence at the trial warranting a judgment in his favor.” *Steelvest v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 480 (Ky. 1991).

> The parol evidence rule is one of substantive law. *Johnson v. Johnson*, 297 Ky. 268, 178 S.W.2d 983, 986 (1944). It defines the limits of a contract. 30 Am.Jur.2d 154 (Evidence, s. 1017). ‘Where the parties put their engagement in writing all prior negotiations and agreements are merged in the instrument, and each is bound by its terms unless his signature is obtained by fraud or the contract be reformed on the ground of fraud or mutual mistake, or the contract is illegal.’ *Hopkinsville Motor Co. v. Massie*, 228 Ky. 569, 15 S.W.2d 423, 424 (1929).

Childers & Venters, Inc. v. Sowards, 460 S.W.2d 343, 345 (Ky. 1970).

The Taylors' alleged reliance appears to have been on statements made and actions taken prior to the execution of the notes and mortgages – essentially, they claim that Community Bank had previously allowed them to sell mortgaged properties. The Taylors have provided no evidence that such promises or representations to release properties were made to them after the execution of the notes and mortgages at issue here. In fact, the very basis of their counterclaim is that they were not allowed to sell any of the secured properties by Integra Bank. Evidence of any such representations or practices which occurred prior to the signing of the notes and mortgages is inadmissible under the parol evidence rule, as the Taylors have never alleged that the agreements are ambiguous.

The only representation which appears to have been made after the agreements were executed was Integra's offer to renew Note #40134. But this offer was made well after the note was due and the Taylors were already in default. Under the terms of their agreement, Integra was entitled as a matter of law to foreclose on the properties in question at any time after November 24, 2003.

The Bracken Circuit Court's entry of summary judgment is therefore affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:	BRIEF FOR APPELLEE:
Steven G. Bolton Frankfort, Kentucky	David T. Reynolds Owensboro, Kentucky