

Commonwealth Of Kentucky

Court Of Appeals

NO. 2000-CA-002219-MR

KENNETH MITAN

APPELLANT

v. APPEAL FROM BOONE CIRCUIT COURT
HONORABLE JOSEPH F. BAMBERGER, JUDGE
ACTION NO. 98-CI-01174

HUNTINGTON NATIONAL BANK

APPELLEE

OPINION
AFFIRMING
** **

BEFORE: HUDDLESTON, KNOPF, AND SCHRODER, JUDGES.

KNOPF, JUDGE: Kenneth Mitan appeals from a summary judgment against him entered by the Boone Circuit Court. Mitan contends that the trial court prematurely entered summary judgment in favor of the appellee, Huntington National Bank (HNB) because there were genuine issues of material fact regarding his defense of estoppel. We agree with the trial court that Mitan failed to allege sufficient facts which would support his defense of estoppel, and that summary judgment was otherwise appropriate. Hence, we affirm.

The underlying facts of this action are not seriously in dispute. Mitan is the president of Majestic Management

Department D, Inc. (Majestic Inc.), a Michigan corporation. Majestic Inc. is a general partner of Majestic Management Department D, Limited (Majestic Ltd.), a Michigan limited partnership. Finally, Majestic Ltd. is a general partner of Casa Auto, Limited (Casa Auto), another Michigan limited partnership.

In December 1997, Casa Auto purchased real estate located at 7525 Industrial Road, Florence, Boone County, Kentucky. In connection with the purchase, HNB loaned Casa Auto the \$600,000.00 purchase price, secured by a mortgage on the property. On behalf of Casa Auto, Mitan executed a promissory note in favor of HNB. In addition, HNB required Mitan to execute a loan Guaranty Agreement, in which he personally guaranteed repayment of the loan.

On November 13, 1998, HNB filed a foreclosure action against Casa Auto after it fell behind in its payments on the note. HNB also sought to recover against Mitan as guarantor of the note, and against Majestic Ltd. and Majestic Inc., since those entities have controlling interests in Casa Auto. In their answer, Casa Auto and Mitan raised the affirmative defenses of waiver, laches, failure of HNB to provide accounting, premature acceleration and "[f]urther affirmative defenses that may be discovered."

Shortly thereafter, HNB filed a motion for summary judgment against Casa Auto and Mitan. In his response, Mitan alleged that he had delayed taking action on the loan deficiency in reliance upon statements made by HNB's Senior Vice President, Mark Linton. Specifically, Mitan stated in an affidavit that

Linton told him that HNB had no intention of pursuing Mitán personally on the loan. As a result, Mitán contended that HNB was estopped from enforcing the guaranty agreement against him. The trial court denied HNB's motion for summary judgment, finding that genuine issues of material fact existed. The trial court then referred the matter to the Master Commissioner to make findings of fact, conclusions of law and recommendations.

By a stipulated judgment entered on July 23, 1999, the trial court entered a judgment in the amount of \$625,173.06, plus interest, attorneys fees and costs, against Casa Auto, Majestic Ltd., and Majestic Inc. The court also ordered the property to be sold by the master commissioner. However, the court reserved a ruling on HNB's claims against Mitán.

The commissioner's office initially issued an appraisal of the property in the amount of \$900,000.00. HNB objected to this finding and asked for a re-appraisal. Thereafter, the commissioner's office issued a new appraisal of the property in the amount of \$550,000.00, which the trial court adopted. Mitán did not object to the new appraisal nor did he seek to introduce any contrary evidence. On December 2, 1999, HNB purchased the property at the commissioner's sale for \$400,000.00. The trial court entered orders confirming the commissioner's sale and the commissioner's final report on December 14, 1999 and January 11, 2000 respectively.

Shortly thereafter, HNB renewed its motion for summary judgment against Mitán. After Mitán failed to respond, the trial court granted the motion and entered a judgment in favor of HNB

in the amount of \$278,804.21, plus interest. Mitan filed a motion to set aside the judgment pursuant to CR 59.05, alleging that he had not been given notice of the motion for summary judgment. The trial court set aside the judgment and allowed Mitan to respond to HNB's motion. After full briefing by the parties, the trial court again determined that HNB was entitled to judgment as a matter of law. Accordingly, the court re-entered its prior judgment for HNB. Mitan filed another motion to set aside the judgment, which the trial court denied on August 3, 2000. This appeal followed.

Our standard of review for a summary judgment is summarized in Scrifres v. Kraft,¹ as follows:

The standard of review on appeal of a summary judgment is whether the trial court correctly found that there were no genuine issues 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. There is no requirement that the appellate court defer to the trial court since factual findings are not at issue. Goldsmith v. Allied Building Components, Inc., Ky., 833 S.W.2d 378, 381 (1992). "The record must be viewed in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor." Steelvest, Inc. v. Scansteel Service Center, Inc., Ky., 807 S.W.2d 476, 480 (1991). Summary "judgment is only proper where the movant shows that the adverse party could not prevail under any circumstances." Steelvest, 807 S.W.2d at 480, citing Paintsville Hospital Co. v. Rose, Ky., 683 S.W.2d 255 (1985). Consequently, summary judgment must be granted "[o]nly when it appears impossible for the nonmoving party to produce evidence at trial warranting a judgment in his favor . . ." Huddleston v. Hughes, Ky.App., 843

¹ Ky. App., 916 S.W.2d 779 (1996).

S.W.2d 901, 903 (1992), citing Steelvest, supra (citations omitted).²

The central question in this case is whether HNB was entitled to judgment as a matter of law. Mitan first argues that the trial court should have allowed him to complete discovery before it granted HNB's motion for summary judgment. In addition, Mitan contends that the stipulated judgment entered on September 14, 1999, against Casa Auto, Majestic Ltd., and Majestic Inc. reflects the parties' agreement that Mitan's defense would be fully adjudicated.

Generally, summary judgment is only proper after a party has been given ample opportunity to complete discovery, and then fails to offer controverting evidence.³ Nevertheless, there is no question that Mitan was liable under the Guaranty Agreement. Unless Mitan had alleged facts which would support his defense of estoppel, further discovery would not alter the fact that HNB was entitled to judgment as a matter of law. Furthermore, the stipulated judgment merely states that the trial court was reserving a ruling on HNB's claims against Mitan "pending further proceedings before the Master Commissioner and Order of this Court." The stipulated judgment did not preclude HNB from renewing its motion for summary judgment following confirmation of the commissioner's sale.

Primarily, Mitan argues that the trial court overlooked genuine issues of material fact which would have precluded the

² Id. at 781.

³ Hartford Ins. Group v. Citizens Fidelity Bank & Trust Co., Ky.App., 579 S.W.2d 628 (1979).

entry of summary judgment for HNB. He cites Burrus v. Farmers Bank of Nicholasville,⁴ for the proposition that he need only present evidence of mutual understanding between him and HNB to alter the terms of the Guaranty Agreement. In Burrus, Harold and Janice Burrus signed a note without indicating they were signing in their capacity as representatives of a corporation. The note, however, indicated that the corporation was the sole borrower of the debt and the corporate name was typed under Harold's signature. The court found that because the Burruses did not sign the note indicating their representative capacity, but the note did name the entity represented, parole evidence was admissible to show the understanding of the parties as to the Burruses' personal liability on the note.⁵

In this case, there is no question that Mitan intended to be personally obligated on the note because he clearly signed the Guaranty Agreement in his personal capacity. Rather, he contends that HNB is estopped from enforcing that agreement against him due to its subsequent conduct. Thus, the rule set out in Burrus is not applicable to this case.

Mitan's defense is not based upon the written contract, but upon an alleged promise made by HNB and his alleged reliance on that promise. The estoppel defense is based on the theory that detrimental reliance becomes a substitute for consideration

⁴ Ky. App., 938 S.W.2d 889 (1997).

⁵ Id. at 890.

under the facts of a given case.⁶ Equitable estoppel is adopted on the opposite ground of legal estoppel: to promote equity and justice of the individual case by preventing a party from asserting a right or defense under a technical rule of law.⁷ Gray v. Jackson Purchase Credit Association,⁸ sets forth the elements of estoppel:

(1) Conduct, including acts, language and silence, amounting to a representation or concealment of material facts; (2) the estopped party is aware of these facts; (3) these facts are unknown to the other party; (4) the estopped party must act with the intention or expectation his conduct will be acted upon; and (5) the other party in fact relied upon this conduct to his detriment.⁹

Mitan alleges that Mark Linton of HNB told him in December 1998 that HNB would not be pursuing any deficiency against him personally. On a motion for summary judgment, the court must view all facts and inferences in the light most favorable to the party opposing the motion.¹⁰ Yet even granting Mitan the benefit of these inferences, he has failed to state a valid defense of estoppel. In order to prevail on a theory of estoppel, there must be proof not only of an intent to induce inaction on the party to be estopped, but also of reasonable

⁶ McCarthy v. Louisville Cartage Co., Inc., Ky. App., 796 S.W.2d 10, 12 (1990).

⁷ Id.

⁸ Ky. App., 691 S.W.2d 904 (1985).

⁹ Id. at 906. See also Howard v. Motorists Mut. Ins. Co., Ky., 955 S.W.2d 525, 527 (1997).

¹⁰ Steelvest, 807 S.W.2d at 480.

reliance by the party claiming the estoppel.¹¹ HNB filed its foreclosure action against Casa Auto and Mitan personally in November 1998 - one month before the alleged statements by Linton. At that time, Mitan was aware or reasonably should have been aware that HNB intended to pursue him on his obligation under the Guaranty Agreement. Linton's alleged statements would have been directly at odds with HNB's already-displayed intention to pursue Mitan personally. Mitan could not reasonably have relied on those statements at that point in time.

Mitan also argues that the parties' conduct during the commissioner's sale is further evidence of an agreement by HNB to waive its rights to proceed against him personally. In particular, he points to the substantial difference between the first and second appraisal, the fact that the second appraisal was for less than the original sale price of the property, and the fact that HNB purchased the property (and Mitan's improvements to the property) for \$200,000.00 less than the original sale price. He contends that he would not have agreed to step aside in the foreclosure action if he had believed that he would be held liable for any deficiencies.

Again, Mitan's argument fails to hold up to close scrutiny. HNB clearly stated its intention to enforce the Guaranty Agreement against him when it filed its first motion for summary judgment in April of 1999. In the stipulated judgment, the parties agreed to sell the property at the commissioner's sale and then litigate the remaining issue of Mitan's liability.

¹¹ Gailor v. Alsabi, Ky., 990 S.W.2d 597, 604 (1999).

Had the property sold for more than the amount owed to HNB, then the issue of Mitán's liability under the Guaranty Agreement would have been moot. However, Mitán declined to participate in the foreclosure-sale proceedings before the master commissioner. Thus, he waived any objection to the commissioner's appraisal or to the sale price. Although Mitán now admits that his failure to participate in the sale was a mistake, his unilateral mistake cannot relieve him of liability under the Guaranty Agreement.

Having found that Mitán failed to allege sufficient facts to survive a motion for summary judgment, we need not consider HNB's argument that Mitán waived any estoppel defense by his failure to specifically plead it in his answer, or that he waived the defense when he signed the Guaranty Agreement. Mitán's complaints about the sufficiency of HNB's notice to him of its second summary judgment motion are also moot because the trial court set aside its initial judgment and allowed Mitán to file a response to the motion.

Accordingly, the judgment of the Boone Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Carroll M. Redford, III
Susan Y.W. Chun
Miller, Griffin & Marks, PSC
Lexington, Kentucky

BRIEF AND ORAL ARGUMENT FOR
APPELLEE:

Colleen M. Blandford
Kohnen & Patton LLP
Cincinnati, Ohio

ORAL ARGUMENT FOR APPELLANT:

Carroll M. Redford, III
Lexington, Kentucky