RENDERED: AUGUST 15, 2008; 2:00 P.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-001389-MR

DAVID W. BOWEN APPELLANT

v. APPEAL FROM POWELL CIRCUIT COURT
HONORABLE FRANK ALLEN FLETCHER, JUDGE
ACTION NO. 04-CI-00165

PEOPLES EXCHANGE BANK APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: DIXON, LAMBERT, AND STUMBO, JUDGES.

STUMBO, JUDGE: David W. Bowen appeals from an order of the Powell Circuit Court granting summary judgment in favor of Peoples Exchange Bank in a foreclosure action instituted by the Bank. Bowen contends that the trial court erred in failing to find that a genuine issue of material fact exists as to whether the Bank falsely verbally assured Bowen that it would loan him funds in excess of the amount memorialized in the loan agreement. Bowen also contends that the trial

court should have found the existence of a genuine issue of material fact on the question of whether he relied on that assurance to his detriment. For the reasons stated below, we affirm the order on appeal.

On August 22, 2003, Bowen and the Bank entered into a construction loan agreement providing that the Bank would loan to Bowen the sum of $242,448 for the purpose of constructing a house. The loan, which was secured by the real property and improvements, was structured in such a manner that Bowen would receive funds in installments as the project progressed and as the funds were required. The parties had successfully entered into a number of similar loan agreements in the past.

Construction on the project commenced after the loan was executed. Within a matter of a few months, the project experienced a number of unforeseen delays which resulted in substantial unexpected material and labor costs. About three months after building commenced, the Bank's loan officer visited the site and noted that about 22% of the construction was completed but about 58% of the loan amount had been expended by Bowen. This disparity was recognized by the parties as a serious problem, and the Bank's Chief Operating Officer, Tony Parrish, would later state that the Bank could have reasonably responded by refusing to distribute the remaining funds to Bowen.

Construction continued and eventually the total loan amount of $242,448 was distributed to Bowen. Even after all of the funds had been expended, however, the project remained uncompleted. On July 2, 2004, the Bank

filed the instant foreclosure action against Bowen in Powell Circuit Court. It alleged that Bowen had defaulted on the loan, that $35,245.80 plus interest remained unpaid, and that the note was immediately due and payable. Discovery would later reveal that the home - as it existed in its unfinished state - was worth approximately $100,000.

Bowen answered the complaint and maintained that the Bank was estopped from proceeding with the foreclosure action because it conducted several inspections of the premises and continued to allow Bowen to make regular draws on the loan. Bowen then filed an amended answer and counterclaim alleging that the Bank, acting through its employee Jim Kaiser, orally represented to Bowen that it would loan him 100% of the funds necessary to complete the project. Stated differently, he alleged that the Bank agreed to loan him funds in excess of the $242,448 amount memorialized in the loan agreement. This purported agreement was not reduced to writing. Bowen maintained that acting in reliance on this representation, he drew out the maximum amount of funds from the construction loan rather than stop the project. The Bank later refused to provide funding in excess of the original amount, which Bowen claimed constituted misrepresentation, fraud and deceit entitling him to damages. In response, the Bank maintained that it never agreed to provide additional funding.

The matter proceeded in Powell Circuit Court, during which time Bowen filed a petition in United States Bankruptcy Court seeking Chapter 7 bankruptcy protection. The parties then entered into an agreed order permitting the

house to be sold at public auction for $100,000 resulting in a loss to the Bank of over $150,000.

The action proceeded on Bowen's counterclaim. On April 13, 2007, the Bank filed a motion for summary judgment on the counterclaim arguing that it never promised to loan additional funds to Bowen and that Bowen had produced no proof of such a promise. Citing *Klein v. Citizens Union National Bank*, 136 S.W.2d 770 (Ky. 1940), the Bank maintained that even if it had orally agreed to loan additional funds to Bowen - which it denied - any such agreement would be so vague and indefinite in its terms as to be unenforceable. In response, Bowen claimed that a genuine issue of material fact existed as to whether the Bank made the assurance to Bowen that it would loan him additional funds, and he noted that the Bank had in fact loaned him additional funds on two prior loan agreements, each of which had been successfully repaid.

After hearing the proof, the circuit court rendered a summary judgment in favor of the Bank on May 16, 2007. As a basis for the judgment, the court determined that even if it were true that the Bank agreed to loan Bowen additional funds, the terms and conditions of the alleged agreement were not sufficiently definite to determine therefrom the measure of damages in the case of a breach. This appeal followed.

The sole issue for our consideration is Bowen's argument that the Powell Circuit Court erred in sustaining the Bank's motion for summary judgment on Bowen's counterclaim. He maintains that he provided ample evidence that the

Bank assured him that additional funds to complete the project were forthcoming; that those funds were necessary to complete the project; that the assurance was false; and, that he relied on this false assurance to his detriment. He also argues that the court improperly characterized his counterclaim as arising in contract rather than tort. In sum, he contends that the record was sufficient to overcome the Bank's motion for summary judgment and that his counterclaim should have proceeded to a jury trial.

We find no error in the summary judgment on appeal. Bowen's counterclaim centers on the assertion that he was entitled to receive funds from the Bank in excess of those memorialized in the loan agreement based on the oral assurances of its agent. *Arguendo*, even if that claim is correct - a claim which the Bank denies - there is little question but that any such agreement must be reduced to writing to be enforceable. As the Bank properly notes, KRS 371.010 states that,

> No action shall be brought to charge any person: . . .
>
> (9) Upon any promise, contract, agreement, undertaking, or commitment to loan money, to grant, extend, or renew credit, or make any financial accommodation to establish or assist a business enterprise or an existing business enterprise . . . unless the promise, contract, agreement, representation, assurance, or ratification, or some memorandum or note thereof, be in writing and signed by the party to be charged therewith, or by his authorized agent.

The statute of frauds does not address the issue of whether a contract has been formed, but rather prevents the enforcement of a contract which does not comply with the statute. *Bennett v. Horton*, 592 S.W.2d 460 (Ky. 1979). The case law

cited by the Bank and relied upon by the circuit court in its summary judgment, to wit, *Klein*, *supra*, bolsters this notion by requiring a degree of specificity in the purported agreement sufficient to prove its existence and to support an award of damages upon a breach. While the parties are in agreement that the Bank had on prior occasions extended additional funds to Bowen to complete various construction projects, the fact remains that any such agreements - including the alleged agreement at bar - must be reduced to writing to be enforceable.

Bowen brought his counterclaim as an action alleging that the Bank fraudulently made promises (to lend additional funds) that it did not intend to fulfill, and that he reasonably relied on these promises to his detriment. As such, he contends that the circuit court should have addressed the summary judgment issue as one arising in tort rather than contract. In support of his assertion that an action for fraud may stand against a bank whether or not the promise is enforceable as a contract, Bowen relies on *Hanson v. American National Bank & Trust Company*, 865 S.W.2d 302 (Ky. 1993). *Hanson*, however, is distinguishable from the instant facts in that the *Hanson* plaintiff executed loan agreements which he later alleged formed the basis of the lender's fraud. That is to say, Hanson alleged that the Bank fraudulently induced him into executing various loan agreements. Furthermore, the statute of frauds was not at issue in the formation or execution of the *Hanson* loans. In the instant case, no loan agreement addressing additional funds was either contemplated or executed, and it was upon that basis that the Powell Circuit Court based its summary judgment. Accordingly, we find no error.

Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the affidavits, 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." Kentucky Civil Rule 56.03. "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.,* 807 S.W.2d 476, 480 (Ky. 1991). "Even though a trial court may believe the party opposing the motion may not succeed at trial, it should not render a summary judgment if there is any issue of material fact." *Id.* Finally, "[t]he 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." *Scifres v. Kraft,* 916 S.W.2d 779, 781 (Ky. App. 1996).

When viewing the record in a light most favorable to Bowen and resolving all doubts in his favor, we find no basis for concluding that the circuit court erred in determining that no genuine issue of material fact existed and that the Bank was entitled to summary judgment as a matter of law. Accordingly, we affirm the summary judgment of the Powell Circuit Court.

ALL CONCUR.

BRIEFS FOR APPELLANT:

M. Alex Rowady
Winchester, Kentucky

BRIEF FOR APPELLEE:

Roy Fugitt
Winchester, Kentucky