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Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-001034-MR

TERESA GRAY — APPELLANT

v.

APPEAL FROM BELL CIRCUIT COURT
HONORABLE JAMES L. BOWLING, JR., JUDGE
ACTION NO. 04-CI-00134

FIRST STATE FINANCIAL, INC.;
AND CHARLES BISHOP — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: LAMBERT, MOORE AND VANMETER, JUDGES.

VANMETER, JUDGE: Teresa Gray appeals from a summary judgment entered by the Bell Circuit Court in favor of appellees First State Financial, Inc.,[1] and Charles Bishop. We affirm.

Satch's Jewel Box was a retail business owned by Gray and her former husband, Everly Eads. A line of credit with First State was established in

[1] Formerly First State Bank of Pineville, Kentucky, Inc.

1995 and was renewed annually until 2002. From 1995 until 2001, Eads personally guaranteed the loans. In 2001, First State required both Eads and Gray personally to guarantee the loan, and Gray signed the note both individually and in her capacity as Satch's president.

In 2002, First State's loan committee declined to renew the 2001 credit note when it matured, directing loan officer Bishop to instead convert the balance of the credit note, calculated at $104,796.71 plus interest, into an installment loan supported by collateral held by the bank. For reasons disputed by the parties, a three-month bridge note was created for the loan balance for the period between November 2002 and February 2003. On December 30 Gray signed the backdated bridge note, both individually and in her capacity as Satch's president. The parties agreed that an installment loan would be created at the bridge note's expiration, using as collateral Gray's personal property consisting of a bracelet valued at $200,000.

When the bridge note expired on February 5, 2003, the installment loan paperwork remained uncompleted. On March 3, Bishop and Gray met at Satch's and discussed the loan. Gray asserts the meeting's purpose was to complete the loan paperwork, while Bishop contends he was at Satch's only to take the bracelet on the bank's behalf. Bishop inspected the bracelet and told Gray he had no loan papers for her to sign. When Gray left the office to serve a customer, Bishop put the bracelet in his briefcase and left Satch's, telling Gray that he had everything he needed. Bishop then returned to First State and put the bracelet in

the bank's vault. By the time Gray realized the bracelet was missing, she was unable to contact Bishop. The next day Gray's employee went to the bank and obtained Bishop's signed "Memorandum of Collateral." Gray contacted the county attorney and a state police investigation followed. After seven days, First State returned the undamaged bracelet to Gray's attorney. First State's loan committee subsequently declined to grant Gray the installment loan.

One year later, in March 2004, Gray filed a petition alleging violations of the Kentucky Consumer Protection Act, breach of contract, fraud, conversion and wrongful possession. First State denied each claim, and filed a counterclaim seeking recovery of the loan amount. The trial court denied both parties' motions for summary judgment.

In April 2007, the court permitted Gray to file a second amended complaint raising claims of promissory estoppel, fraud, conversion, and trespass to chattels. First State again denied all claims and filed another motion for summary judgment, which the trial court granted after a hearing. Gray, who had appeared *pro se* at the hearing, obtained counsel and filed a motion to vacate the summary judgment, which the court subsequently denied. This appeal followed.

Summary judgment shall be granted only 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." CR[2] 56.03. The trial court must view the record "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 Serv. Ctr., Inc.,* 807 S.W.2d 476, 480 (Ky. 1991). Further, "a party opposing a properly supported summary judgment motion cannot defeat it without presenting at least some affirmative evidence showing that there is a genuine issue of material fact for trial." *Id.* at 482. On review, the appellate court must determine "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).

First, Gray contends that the trial court erred by failing to find that a genuine issue of material fact existed as to whether she and First State had an enforceable contract "for the conversion of the line of credit into an installment note." We disagree.

Kentucky law requires a legally enforceable agreement to "contain definite and certain terms setting forth promises of performance to be rendered by each party." *Kovacs v. Freeman*, 957 S.W.2d 251, 254 (Ky. 1997). An agreement which "leaves the resolution of material terms to future negotiations . . . is generally unenforceable for indefiniteness unless a standard is supplied from which the court can supplant the open terms should negotiations fail." *Cinelli v. Ward*, 997 S.W.2d 474, 477 (Ky.App. 1998). Thus, the Kentucky Supreme Court held in

[2] Kentucky Rules of Civil Procedure.

Farmers Bank & Trust Co. v. Willmott Hardwoods, Inc., 171 S.W.3d 4 (Ky. 2005), that oral negotiations regarding the extension of a loan closing date were insufficient to satisfy the statute of frauds and extend the closing date previously set out in a written contract.

Here, the record includes excerpts from the minutes of two loan committee meetings conducted by First State. According to the minutes of the November 26, 2002, meeting, Bishop

> presented a loan request for Satch's Jewel Box, Inc. in the amount of $125,000 revolving line of credit. The purpose of the loan is annual renewal of their inventory line of credit. Collateral for the loan is a UCCI filing on Inventory of both stores valued @ $800,000. Terms are 12 months with an interest rate of Prime + .75%. The committee declined. The committee stated that the loan officer needs to tell the borrower that the renewal has been denied and that the loan needs to be put on a pay out note and secure it with collateral that we possess.

The minutes of the March 11, 2003, meeting stated that Bishop

> presented a loan request for Satch's Jewel Box, Inc. and Teresa Eads in the amount of $107,300. The purpose of the loan is to put temporary loan on pay out. Terms are 3 year note @ 6.0% tied to NY Prime + 1% based on 180 month amortization. Collateral for the loan is 33.3 Carat diamond bracelet and blanket lien on inventory. FSB had taken possession of this collateral and gave customer collateral receipt. Customer had accused FSB of improperly possessing collateral. FSB will return collateral to customer and allow terms of existing loan to govern relationship with customer. Existing loan is currently past due 33 days. The committee declined.

Both Gray and Bishop testified by deposition that they understood, after the November 2002 loan committee meeting, that they would be entering into

an installment loan agreement. Although Bishop's March 2003 request to the loan committee listed the loan's amount, interest rate and duration, the loan was an internal bank document which provided no evidence that the terms had been conveyed to Gray. The request not only lacked a closing date as in *Willmott*, but the requested loan in fact was never approved by the necessary committee. Thus, any alleged agreement to make a loan was too indefinite to be enforceable. *Id.*

Moreover, any alleged agreement between Gray and First State was not enforceable pursuant to the statute of frauds, which provides in part:

> 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.

KRS[3] 371.010. Contrary to Gray's assertion, First State timely raised this defense in response to the breach of contract allegations in Gray's first amended complaint. Bishop's mere recommendation and the loan committee's discussion of a possible loan were insufficient to obligate First State, and Bishop's signed memorandum of collateral was rendered moot when, upon Gray's request, First State returned the bracelet to Gray prior to executing any loan approval documents. As no agreement

[3] Kentucky Revised Statutes.

was memorialized "in writing and signed by the party to be charged therewith, or by his authorized agent[,]" KRS 371.010, the terms of the proposed installment loan are not enforceable. Finally, as employment contracts are not addressed by KRS 371.010, a different result is not compelled by Gray's reply brief and citation of employment contract cases, including *Smith v. Bd. of Educ.*, 23 F. Supp. 328 (E.D. Ky. 1938), and *Mills v. McGaffee*, 254 S.W.2d 716 (Ky. 1953).

Next, Gray asserts that the trial court erred by failing to find that a genuine issue of material fact existed as to whether she was entitled to relief, on grounds of promissory estoppel. We disagree.

The *Restatement (Second) of Contracts* § 90(1) (1981) describes the concept of promissory estoppel as follows:

> A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. The remedy granted for breach may be limited as justice requires.

See Meade Constr. Co. v. Mansfield Commercial Elec., Inc., 579 S.W.2d 105 (Ky. 1979). As stated in *Rivermont Inn, Inc. v. Bass Hotels & Resorts, Inc.,* 113 S.W.3d 636, 642 (Ky.App. 2003), "[p]romissory estoppel can be invoked when a party reasonably relies on a statement of another and materially changes his position in reliance on the statement." *See also Stephenson v. State Farm Ins. Co.,* 217 S.W.3d 878, 880 (Ky.App. 2007).

Here, Gray contends that she materially changed her position based on statements made by Bishop and First State regarding the conversion of her line of credit into an installment loan. According to an affidavit accompanying her motion to vacate, Gray abandoned talks with another bank regarding the refinancing of the line of credit only because Bishop advised her that First State would grant an installment loan. She alleges she otherwise would have obtained financing with the other bank. However, we are not persuaded by Gray's assertion that, because the *Restatement (Second) of Contracts* § 90(1) eliminates a prior requirement that reliance be of "a definite and substantial character," equitable estoppel was proven by her assertion that she abandoned efforts to secure other financing. Such argument ignores the fact that, as amended, § 90(1) introduces the clause that "[t]he remedy granted for breach may be limited as justice requires." In other words, if no measurable injustice has occurred, no remedy is warranted.

Gray provided no evidence to support her claim that she was damaged by First State's refusal to grant the installment loan. More specifically, she submitted no affirmative evidence to show that First State's action resulted in significant impact upon her credit status, including the denial of financing from another institution. In fact, the record shows that while the First State loan was outstanding, Gray was able to obtain and personally secure other credit lines for both Satch's and then another store which opened in the same location after Satch's filed bankruptcy. Thus, even if Gray could show that she materially changed her position because of her reliance on First State's alleged promise to

grant an installment loan, she provided no evidence of economic loss or other measurable injustice. She therefore was not entitled to relief.

Further, we are not persuaded by Gray's argument that a genuine issue of material fact existed as to whether her personal guaranty on the bridge loan note extinguished her right to contribution against Eads and therefore constituted detriment for purposes of promissory estoppel in this action against First State. The record shows that Gray and Eads became jointly and severally liable for the entire debt when they signed the 2001 guaranty as co-makers. After the note expired, Gray became the sole signatory and guarantor of both the 2002 note and the subsequent bridge loan note.

Even if we assume without deciding that Gray's right to receive contribution from Eads was extinguished, Gray did not timely allege or produce evidence to show that First State was involved in or influenced any decision leading to the absence of Eads' signature from the 2002 note. Indeed, the record shows that at the time of the 2002 note, Gray and Eads were involved in divorce proceedings and a murder charge was pending against Eads. Any contribution obligation between Gray and Eads is wholly separate from Gray's claims that First State agreed to provide an installment loan. Thus, any claim of detriment relating to Gray's failure to recover from Eads does not support a promissory estoppel claim by Gray against First State. The trial court did not err by granting summary judgment for First State.

The summary judgment entered by the Bell Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

John F. Kelley, Jr.
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BRIEF FOR APPELLEE:

James D. Cockrum
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