

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-002318-MR

PILLAR DEVELOPMENTS, LLC;
SUTEJ S. GILL; AND DEBORAH J. GILL

APPELLANTS

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE A. C. MCKAY CHAUVIN, JUDGE
ACTION NO. 09-CI-006418

MAINSOURCE BANK, INC.

APPELLEE

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: MOORE, NICKELL AND THOMPSON, JUDGES.

THOMPSON, JUDGE: Pillar Developments, LLC (Pillar), Sutej S. Gill, and Deborah J. Gill (the Gills) appeal from a summary judgment of the Jefferson Circuit Court in favor of MainSource Bank, Inc. The issue presented by Pillar and the Gills is whether MainSource's failure to respond to discovery requests in a separate action pending before the same circuit court precluded summary

judgment. We hold that summary judgment was proper, but deny MainSource's request that damages and costs be awarded pursuant to CR 73.02(4).

In December 2004, Pillar and the Gills were involved in a loan transaction with MainSource. To secure repayment of the note, MainSource was granted a mortgage on certain parcels of real estate owned by the Gills in Jefferson County. To further secure the debt, Pillar granted MainSource mortgage liens on additional properties it owned in Jefferson County.

After the Gills did not make the required payments on the loan, in June 2009, MainSource filed an action, Case No. 09-CI-06418 (the 6418 action), in the Jefferson Circuit Court to enforce the terms of the Gills' note and foreclose on the mortgaged properties. The Gills answered the complaint admitting execution of the loan documents and their default.

On March 10, 2010, MainSource moved for summary judgment in the 6418 action. After Pillar and the Gills responded, MainSource replied. Pillar and the Gills then filed a "sur-reply" arguing that because there was outstanding discovery in a separate and distinct action pending in the Jefferson Circuit Court, Case No. 09-CI-02722 (the 2722 action), summary judgment must be denied.¹ However, Pillar and the Gills conceded that the 2722 action involved a different note and real estate than the 6418 action.

The Jefferson Circuit Court found that there was no genuine issue of material fact and granted summary judgment to MainSource. Subsequently, it

¹ Because the 2722 action is a separate action, we do not have the record and, therefore, are not able to state with certainty the facts. However, our holding does not require such knowledge.

denied Pillar's and the Gills' motion to alter, amend or vacate and this appeal followed.

Pillar's and the Gills' sole argument is that summary judgment was improper because MainSource did not respond to discovery in the 2722 action. They allege that because their request for production of documents included all documents related to all loans and accounts involving MainSource, Pillar, and the Gills, the documents are "highly relevant" to the 6418 action. Relying on *Suter v. Mazyck*, 226 S.W.3d 837 (Ky.App. 2007), Pillar and the Gills contend that summary judgment should not have been granted until they had sufficient time to receive and fully review the documents. Its reliance is misplaced.

Suter involved a complex litigation in which this Court considered whether summary judgment was premature because there was insufficient time to conduct adequate discovery. *Id.* at 842. The present case is straight-forward. MainSource filed its action alleging that the Gills defaulted on their loan obligations and sought foreclosure. Pillar and the Gills admitted that the loan documents were executed and they defaulted. They did not file a counterclaim or conduct any discovery.

Pillar and the Gills explain that their failure to request the same documents in the 6418 action and the 2722 action was justified because "it would have been redundant and repetitious" to propound identical requests. If the requests were made in both cases and MainSource complied, Pillar and the Gills would receive duplicate documents. However, as admitted by Pillar and the Gills,

the actions are separate and distinct and, therefore, subject to separate and distinct discovery.²

Finally, we address MainSource's request that this Court award damages and costs. Kentucky Rule of Civil Procedure (CR) 73.02(4) provides:

If an appellate court determines that an appeal or motion is frivolous, it may award just damages and single or double costs to the appellee or respondent. An appeal or motion is frivolous if the court finds that it is so totally lacking in merit that it appears to have been taken in bad faith.

An appeal is frivolous if it is so totally lacking in merit that no reasonable attorney would assert such an argument and, therefore, bad faith can be inferred. *Leasor v. Redmon*, 734 S.W.2d 462 (Ky. 1987). Because the rule uses the permissive word "may," it is within this Court's discretion to award or deny damages and costs. Although we have rejected Pillar's and the Gills' arguments, after a thorough review of the record, we cannot infer bad faith and do not award damages and costs.

Based on the foregoing, the summary judgment of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

² According to MainSource's statements regarding the proceedings in the 2722 action, its objections to the requests for production as overly broad and unduly burdensome were sustained and the requests limited only to the documents related to the loan at issue in the 2722 action.

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