IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
December 9, 2014 Session

COMMUNITY FIRST BANK AND TRUST
V. THE VELLIGAN FAMILY TRUST ET AL.

Appeal from the Chancery Court for Maury County
No. 11578 Stella L. Hargrove, Chancellor

No. M2014-00370-COA-R3-CV – Filed May 1, 2015

The matters in dispute pertain to four promissory notes. After the Bank filed suit to collect on the notes, Defendants filed counterclaims against the Bank and cross-claims against one of its agents. Following discovery, the Bank and its agent moved for summary judgment on all claims; Defendants opposed summary judgment on several grounds. Finding that the unpaid balances on the notes and the resulting deficiencies were undisputed and that Defendants released all claims against the Bank and its agent when they executed forbearance agreements, the trial court granted summary judgment in favor of the Bank in the amount of $204,024.25, and summarily dismissed all claims asserted by Defendants. We affirm.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed

FRANK G. CLEMENT, JR., P.J., M.S., delivered the opinion of the Court, in which ANDY D. BENNETT and RICHARD H. DINKINS, JJ., joined.

Carol A. Molloy and Jonathan Lynn Miley, Lynnville, Tennessee, for the appellants, The Velligan Family Trust, Mark Velligan and Mary Margaret Velligan.

David M. Anthony, Anne C. Martin and Mandy Strickland Floyd, Nashville, Tennessee, for the appellee, Community First Bank & Trust.

OPINION

Between 2005 and 2007, Mark and Mary Velligan and The Velligan Family Trust[1] (collectively "the Velligans") executed four notes that are at issue in this appeal,[2] each of which is held by Community First Bank & Trust ("the Bank") and secured with real property located in Tennessee. On March 10, 2009, the Velligans executed a Forbearance Agreement which temporarily modified payments due under each note; subsequently, the Velligans executed an Amended and Restated Promissory Note for each note that modified the terms of repayment. On August 30, 2010, the Velligans executed a second forbearance agreement titled "Terms for the Forbearance Period" (the "Second Forbearance Agreement"). In the Second Forbearance Agreement, the Velligans acknowledged that they were in default and waived all claims against the Bank. The Bank continued to forbear enforcement of the notes for almost a year, but by letter dated July 29, 2011, the Bank declared each note in default, accelerated the entire principal and interest balance, and made a demand for payment in full.

On October 12, 2011, the Bank filed a complaint against the Velligans alleging that they failed to meet the terms of the demand, and seeking a judgment for balances owed under the notes and related documents plus interest, attorney's fees, and court costs. Subsequently, the Bank initiated foreclosure proceedings on two properties secured by the notes. These two properties were sold at a foreclosure sale in December 2011 and credits from the sales were applied against the deficiency owing on the notes.

The Velligans answered and asserted counterclaims against the Bank and cross-claims against C. Tucker Herndon, as the substitute trustee[3], asserting, *inter alia*, claims for fraudulent inducement, civil conspiracy, violations of the federal Racketeer Influenced and Corrupt Organizations Act. The Velligans also sought forgiveness of any debts owed to the Bank and return of the foreclosed properties.

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[1] The Velligans established The Velligan Family Trust in March 2005 and named themselves as Trustees.

[2] Five notes were issued but the Bank voluntarily dismissed its claims regarding one of them, loan number ending in 0763. The four promissory notes at issue in this appeal are: (1) loan number ending in 1380, executed October 24, 2005, principal amount of $105,000; (2) loan number ending in 2479, executed August 16, 2006, principal amount of $42,000; (3) loan number ending in 1036, executed November 21, 2006, principal amount of $365,300; and (4) loan number ending in 2520, executed January 29, 2007, principal amount of $363,800.

[3] Mr. Herndon was the acting trustee at the auction of the property owned by the Velligans.

On June 13, 2013, the Bank filed a motion for summary judgment seeking judgment as a matter of law on the Bank's claims against the Velligans and summary dismissal of all counterclaims and cross-claims filed by the Velligans. The motion was supported by, *inter alia*, the affidavit of the Bank's Special Assets Officer, Charlie Goatz which cited to the first Forbearance Agreement. In opposition to the Bank's motion for summary judgment, the Velligans filed a motion to strike the affidavit of Mr. Goatz asserting "a general objection to all of the documents referred to in [Mr. Goatz's] affidavit," that "[Mr. Goatz] is not the keeper of the record and he has not provided a proper foundation for any of the documents referred to in his affidavit," and that Mr. Goatz's "affidavit is in direct contradiction of his deposition testimony." Specifically, the Velligans asserted that the forbearance agreement referenced by Mr. Goatz and attached as an exhibit to the affidavit did not contain the language upon which he relied.

Following the Velligans' motion to strike the affidavit of Mr. Goatz, the Bank filed a motion for leave to correct and supplement its motion for summary judgment to account for the clerical error, that being that the original memorandum of law and the affidavit of Mr. Goatz incorrectly cited the First Forbearance Agreement executed on March 10, 2009, rather than the Second Forbearance Agreement, executed on August 30, 2010. The court granted leave and the Bank corrected its error by filing a supplemental memorandum of law and a second affidavit of Mr. Goatz that properly cited to the Second Forbearance Agreement, which was attached as an exhibit. Subsequently, the Velligans moved to strike the second affidavit of Mr. Goatz for the same reasons asserted in the first motion to strike.

A hearing on the Bank's motion for summary judgment was held on December 23, 2013. The trial court granted the Bank's motion for summary judgment, entered judgment in its favor in the amount requested of $204,024.25, and dismissed the Velligans' counterclaims and cross-claims against the Bank and Mr. Herndon. The trial court's final order read as follows:

> [T]he Court finds that there are four loans from the Bank to the Velligans remaining at issue in this litigation: . . . The record documenting the Loans includes four Adjustable Rate Notes, Amended and Restated Promissory Notes, Forbearance Agreements, Deeds of Trust, and Notices of Default and Intent to Foreclose. Two of the properties secured by the Loans were foreclosed upon in December of 2011, and the Bank obtained close to their fair market values in the foreclosure sales. Credits were applied to the unpaid balances on the Loans, leaving deficiency balances which were the subject of the Bank's claims in this action. Also in support of their motion for summary judgment the Bank and Herndon submitted two affidavits from Charlie Goatz, Special Assets Officer for the Bank (the "Goatz

> Affidavits"). The Goatz Affidavits are appropriate for the Court's consideration at summary judgment. The amounts contained in the Goatz Affidavit regarding the unpaid balances on the Loans and the resulting deficiencies are not in dispute and thus the judgment amount sought of $204,024.25 is accepted as accurate.
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> Even if the intent of the [Second Forbearance Agreement] is in dispute, it was signed by the Velligans dated August 30, 2010 and includes an agreement by the Velligans regarding the default, an agreement they did not have the ability to cure the default, and that the Bank was entitled to accelerate the balances on the Loans. All of the Forbearance Agreements were executed for the benefit of the Velligans who were in trouble with the Loans as early as March of 2009.
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> The [Second Forbearance Agreement] contains a release by the Velligans of the Bank, its successors, assigns, officers, directors, employees, agents, attorneys, and representatives, jointly and severally from all claims, counterclaims, demands, damages, debts, agreements, covenants, suits, contracts, obligations, liabilities, actions, and causes of action of any nature whatsoever, whether arising at law or in equity. This release language would include Herndon as an agent, attorney or representative of the Bank as successor trustee at the foreclosure sales.
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> The Court finds there is nothing in the record to substantiate [the Velligans'] mere allegations and conclusory statement in their counter and cross claims. In filing those claims [the Velligans'] are attempting to turn a simple collection action for the balance due on promissory notes into a complex and convoluted nest of allegations and conclusions not supported by the record.

This appeal followed. Although not stated as such, the Velligans present three issues for our review: 1) whether the trial court erred in considering the two affidavits of Mr. Goatz; 2) whether the Velligans raised sufficient questions of material fact to defeat summary judgment as to the amount of the judgment awarded to the Bank; and 3) whether the trial court erred in dismissing the Velligans' counterclaims and cross-claims.

STANDARD OF REVIEW

This appeal arises from the grant of summary judgment. Summary judgment is appropriate when a party establishes that there is no genuine issue as to any material fact

and that a judgment may be rendered as a matter of law. Tenn. R. Civ. P. 56.04; *Stovall v. Clarke*, 113 S.W.3d 715, 721 (Tenn. 2003). It is appropriate in virtually all civil cases that can be resolved on the basis of legal issues alone. *Byrd v. Hall*, 847 S.W.2d 208, 210 (Tenn. 1993); *Pendleton v. Mills*, 73 S.W.3d 115, 121 (Tenn. Ct. App. 2001). It is not appropriate when genuine disputes regarding material facts exist. *See* Tenn. R. Civ. P. 56.04.

To be entitled to summary judgment, the moving party who does not bear the burden of proof at trial shall prevail if it submits affirmative evidence that negates an essential element of the nonmoving party's claim or demonstrates that evidence provided by the nonmoving party is insufficient to establish an essential element of the nonmoving party's claim. Tenn. Code Ann. § 20-16-101. If the plaintiff files a motion for summary judgment on an element of one of his claims, the plaintiff "shifts the burden by alleging undisputed facts that show the existence of that element and entitle the plaintiff to summary judgment as a matter of law." *Hannan v. Alltel Publ'g Co.*, 270 S.W.3d 1, 9 n.6 (Tenn. 2008). If the plaintiff makes a properly supported motion, then the defendant is required to produce evidence of specific facts establishing that genuine issues of material fact exist. *Martin v. Norfolk S. Ry. Co.*, 271 S.W.3d 76, 84 (Tenn. 2008) (citing *McCarley v. W. Quality Food Serv.*, 960 S.W.2d 585, 588 (Tenn. 1998); *Byrd v. Hall*, 847 S.W.2d 208, 215 (Tenn.1993)).

Summary judgments do not enjoy a presumption of correctness on appeal. *BellSouth Adver. & Publ'g Co. v. Johnson*, 100 S.W.3d 202, 205 (Tenn. 2003). The resolution of a motion for summary judgment is a matter of law, thus, we review the trial court's judgment de novo with no presumption of correctness. *Martin*, 271 S.W.3d at 84. The appellate court makes a fresh determination that the requirements of Tenn. R. Civ. P. 56 have been satisfied. *Hunter v. Brown*, 955 S.W.2d 49, 50-51 (Tenn. 1977).

ANALYSIS

I. THE AFFIDAVITS OF CHARLIE GOATZ

The Velligans assert that the trial court erred by considering the affidavits of Charlie Goatz that were submitted in support of the Bank's motion for summary judgment because Mr. Goatz has no knowledge, personal or otherwise, regarding the Velligans' loans.[4]

[4]In their appellate brief, the Velligans also contend that the trial court failed to rule on their motions to strike the Goatz affidavits. The trial court's final order states that "[t]he Goatz Affidavits are appropriate for the Court's consideration at summary judgment." By considering whether the affidavits were appropriate for consideration and then deciding that they were, the trial court implicitly denied the Velligans' Motions to Strike.

"All affidavits used either to support or to oppose a motion for summary judgment must meet the requirements of Tenn. R. Civ. P. 56.06 that (1) the affidavit must be made on the affiant's personal knowledge, (2) the affiant's statements must otherwise be admissible in evidence, and (3) the affiant is competent to testify regarding the substance of the affidavit." *Church v. Perales*, 39 S.W.3d 149, 166 (Tenn. Ct. App. 2000). Decisions regarding the qualifications, admissibility, and relevancy of evidence are discretionary, and, therefore, appellate courts review these decisions using the abuse of discretion standard. *See Davis v. McGuigan*, 325 S.W.3d 149, 168 (Tenn. 2010); *Biscan v. Brown*, 160 S.W.3d 462, 468 (Tenn. 2005); *Mercer v. Vanderbilt Univ., Inc.*, 134 S.W.3d 121, 131 (Tenn. 2004).

Having examined each of the affidavits, we have concluded that they satisfy the requirements of Tenn. R. Civ. P. 56.06. Mr. Goatz identified himself and explained why and how he obtained personal knowledge of the Velligans' loans. As he explained in the affidavits, he was the Special Assets Officer for the Bank and, as such, he was in charge of loan rehabilitations and recovery. Further, because he is the Special Assets Officer, loans and debts due to the Bank were referred to him where default exists. As part of his duties, the four loans owed to the Bank by the Velligans were referred to him in accordance with Bank policy, and in fulfilling his duties he obtained personal knowledge of the details concerning the loan documents, the default status of each loan, and the deficiencies owned on each loan. Further, as he explained the status of the loans and what was owing thereon, he referred to specific bank documents, each of which was attached as an exhibit to his affidavit as required by Tenn. R. Civ. P. 56.06. Accordingly, Mr. Goatz, as the Bank's officer currently in charge of the Velligans' notes, was competent to testify regarding the notes, the existence of default, and the deficiency owed on each note.

The foregoing considered, we find no abuse of discretion by the trial court in considering the affidavits by Mr. Goatz in ruling on the Bank's motion for summary judgment. Accordingly, we affirm the trial court's denial of the Velligans' motions to strike the Goatz affidavits.

II. SUMMARY JUDGMENT

The trial court ruled that the Bank was entitled to summary judgment on its claims on the promissory notes and summarily dismissed the Velligans' counterclaims and cross-claims. We will first address the grant of the Bank's motion for summary judgment on its claims on the four promissory notes.

A. The Bank's Claims

"In an action to collect a debt, the plaintiff creditor bears the burden of proving the existence of the debt and that the debtor is indebted to the creditor in a certain amount." *LVNV Funding, LLC v. Mastaw*, No. M2011-00990-COA-R3-CV, 2012 WL 1534785, at *5 (Tenn. Ct. App. Apr. 30, 2012) (citing *Bellsouth Adver. & Publ. Corp. v. Wilson*, No. M2006-00930-COA-R3-CV, 2007 WL 2200170, at *5 (Tenn. Ct. App. July 30, 2007)). Accordingly, as the party moving for summary judgment, the Bank had the initial burden to demonstrate the elements required to support its claim that it was entitled to the unpaid indebtedness owing under each note, as well as post-maturity interest and the costs of collection. The Goatz affidavits, which we have concluded were proper for the trial court's consideration at summary judgment, established the existence and amount of default for each note.[5] As a consequence, the burden of production then shifted to the Velligans to demonstrate a genuine dispute as to the amount of indebtedness owed to render summary judgment inappropriate.[6] *See Martin*, 271 S.W.3d at 84 (citing *McCarley*, 960 S.W.2d at 588; *Byrd*, 847 S.W.2d at 215).

Although the burden of production shifted to the Velligans, they failed to present competent evidence to create a dispute of material facts. Specifically, in response to the Bank's undisputed facts, the Velligans merely relied upon the unsworn motions to strike the Goatz affidavits to demonstrate a dispute of fact regarding the amount due and owing under each note.[7] However, the conclusory allegations and denials on which the Velligans seek to rely do not establish the existence of disputed, material facts. The Velligans also submitted additional facts in an effort to dispute the amount of indebtedness. The facts assert, *inter alia*, that the Bank used the wrong accrual method on the notes and did not have an accurate accounting of the notes at the time it filed the

[5] The Goatz affidavits provide the following unpaid principal balance due and owing on each note: (1) loan number ending in 1380, $21,456.11 (reflecting a credit of $97,193.67 for the foreclosure sale of the "Meeks Road Property"); (2) loan number ending 2479, $9,283.21; (3) loan number ending in 1036, $22,997.55; and (4) loan number ending 2520, $84,113.83 (reflecting a credit of $352,750 for the foreclosure sale of the "Robin Road Property"). Pursuant to the terms of each note, the balances owed continued to accrue interest at the maximum rate allowed under the loan documents.

[6] The Velligans initially disputed the existence of the notes and the alleged default; however, at oral argument, they conceded the existence of the notes and that they were in default. Accordingly, the Velligans do not dispute that the Bank successfully shifted the burden of production to them. Instead, they contend the pivotal question is whether they created a dispute of material facts sufficient to defeat a motion for summary judgment as to the indebtedness owed. We have concluded that they did not.

[7] A representative sample of the Velligans' response to the Bank's statement of undisputed facts is as follows: "This paragraph is disputed. See Defendants' Motion to Strike Goatz' Affidavit. The Bank's and Herndon's conclusory statement is a legal conclusion and not a statement of fact."

Complaint; thus, the amount of indebtedness presented in the Goatz affidavit is disputed. The Bank conceded that the accrual on the loans was inaccurate *at one point*; however, the Bank provided an accurate accounting to the Velligans on or around February 22, 2013, prior to the motion for summary judgment and the evidence relied upon therein. Moreover, the Velligans failed to demonstrate how these facts would entitle them to escape liability for their default on the notes or create a dispute as to the amount of indebtedness.[8]

Considering the evidence in the light most favorable to the Velligans and resolving all inferences in their favor as summary judgment requires, *Martin*, 271 S.W.3d at 84, we have determined that the Velligans failed to create a genuine dispute of material fact regarding the existence and amount of the indebtedness owed to the Bank. Accordingly, the unpaid balances on the notes and the resulting deficiencies are undisputed. For the foregoing reasons, we affirm the trial court's grant of summary judgment and the judgment it entered in favor of the Bank against the Velligans in the amount sought of $204,024.25. We now turn to the dismissal of the Velligans' counterclaims and cross-claims.

B. The Velligans' Claims

The Bank and Mr. Herndon insist summary dismissal of the Velligans' counterclaims and cross-claims is proper because it is undisputed that the Second Forbearance Agreement was executed for the benefit of the Velligans after they defaulted on their obligations set out in the underlying notes, and, in consideration for the Bank agreeing to forbear the exercise of its rights and remedies under the notes, the Velligans agreed to waive any and all claims against the Bank. Specifically, per the language in the Second Forbearance Agreement, the Velligans released the Bank and Mr. Herndon, as the Bank's agent, "from all claims, counterclaims, demands, damages, debts, agreements, covenants, suits, contracts, obligations, liabilities, actions, and causes of action of any nature whatsoever, whether arising at law or in equity."

The Velligans first assert that the Second Forbearance Agreement did not contain the release language relied upon by the Bank and Mr. Herndon; alternatively, the Velligans contend that, even if there was such release language, they created a dispute of

[8] We acknowledge that the Velligans filed the affidavit of Cindy Long, a former Bank employee, the sum of which indicates that Ms. Long was the loan originator for the Vellians' notes, that to her knowledge the loans were residential 1-4 property loans, and that one of the loans was an owner occupied, residential loan. Ms. Long's affidavit, however, does not provide information as to how these facts dispute the existence or amount of default.

fact regarding the intent of the parties to enter into such agreement. We find no merit to either argument.

The Second Forbearance Agreement that was submitted in support of the Bank's motion for summary judgment reads in pertinent part:

> Borrowers are by, among other defaults, currently in monetary default, and Lender is entitled to declare default and accelerate all balances due under the Loan Documents. *Borrowers acknowledge default and have informed Lender that they do not have the ability to cure the default or to pay in full the indebtedness; and Borrowers have requested that Lender forbear in the exercise of its rights and remedies and agrees to waive any and all claims against Lender.*
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> Furthermore, *Borrowers do hereby release* Lender and its predecessors, successors, assigns, officers, directors employees, agents, attorneys, representatives, parent corporations, subsidiaries and affiliates jointly and severally from any and all claims, counterclaims, demands, damages, debts, agreements, covenants, suits, contracts, obligations, liabilities, actions, and causes of action of any nature whatsoever, whether arising at law or in equity (including without limitation any claims of Lender liability, usury, control, fraud, duress, or mistake) whether known or unknown, whether liability be direct or indirect, liquidated or unliquidated, whether presently accrued or to accrue hereafter, whether absolute or contingent, foreseen or unforeseen, and whether or not heretofore asserted, for or because of or as a result of any act, omission, communication, transaction, occurrence, representation, promise, damage, breach, fraud, violation of any statute or law, commission of any tort or any other matter whatsoever or thing done, omitted, or suffered to be done which has occurred in whole or in part or was initiated at any time through and including, the moment of the Forbearance Period.

To dispute the foregoing, the Velligans again relied upon the motions to strike the Goatz Affidavits and the unsupported assertion that the Second Forbearance Agreement did not establish the intent of the parties when the agreement was entered. The conclusory allegations and denials on which the Velligans seek to rely do not establish the existence of material, disputed facts. Accordingly, it is undisputed that, in consideration of the Second Forbearance Agreement by the Bank, the Velligans released all claims they may have against the Bank and Mr. Herndon. For the foregoing reasons, we affirm the summary dismissal of the Velligans counterclaims and cross-claims.

III. ATTORNEY'S FEES ON APPEAL

The Bank requests its attorney's fees associated with the costs of this appeal. Each Amended and Restated Promissory Note executed by the Velligans contains a clear provision whereby the Velligans agreed to pay "the reasonable attorney's fees, all court and other costs, and the reasonable costs of any other collection efforts." Accordingly, the Bank is entitled to its reasonable attorney's fees and costs incurred on appeal, and we remand this case to the trial court for a determination of this amount.

IN CONCLUSION

For the aforementioned reasons, we affirm the judgment of the trial court and remand for further proceedings consistent with this opinion. Costs on appeal are assessed against the appellants, Mark and Mary Velligan, and The Velligan Family Trust.

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FRANK G. CLEMENT, JR., JUDGE