

Commonwealth of Kentucky
Court of Appeals

NO. 2008-CA-000613-MR

HELEN J. BROCK

APPELLANT

v. APPEAL FROM OLDHAM CIRCUIT COURT
HONORABLE KAREN A. CONRAD, JUDGE
ACTION NO. 07-CI-00737

GREEN TREE SERVICING, LLC,
AND CONSECO FINANCE SERVICING
CORPORATION

APPELLEES

OPINION
REVERSING

** ** ** ** **

BEFORE: CAPERTON, KELLER, AND LAMBERT, JUDGES.

LAMBERT, JUDGE: Helen Brock appeals from a summary judgment of the Oldham Circuit Court entered in favor of her creditor, Green Tree Servicing, LLC. For the reasons stated below, we reverse the summary judgment and remand the matter for further proceedings.

In December 1999, Brock purchased a mobile home from Trading Post Mobile Homes in Louisville, Kentucky. Brock financed the purchase of the home by executing a Retail Installment Contract in favor of Trading Post that was immediately assigned to Conseco Finance Servicing Corp., a processor entity to Green Tree Servicing, LLC. Brock financed a principal balance of \$38,314.44 with prepaid finance charges of \$2,168.74 for a total amount of \$36,145.70 and began making payments on March 15, 2000. The record reflects that Brock was often late on her monthly payments, sometimes by a few days and other times by two weeks or more. As a result, very little of her payment went to the principal balance and most went to interest that accrued as a result of the late payments.

On June 27, 2007, an investor group known as Centerbridge Partners, L.P. (hereinafter "Centerbridge") purchased an equity interest in Green Tree from its owners, affiliates of Fortress Investment Group and Cerberus Capital Management. The record is silent on the specifics of this transaction. Green Tree did not provide any documents referencing the transaction or indicating what rights each party obtained as a result thereof, other than an affidavit by a Green Tree employee indicating that Green Tree retained the ownership of Brock's loan.

When Brock defaulted on her contract, Green Tree filed suit, and an amended complaint was filed on October 19, 2007. On December 17, 2007, Green Tree filed a motion for summary judgment and attached an affidavit from Michelle Bray, the Collection Supervisor, stating that as of September 18, 2007, the outstanding balance on Brock's account was \$40,440.64. Summary judgment

was entered in Green Tree's favor on January 10, 2008, and a judgment was entered in the amount of \$40,440.64 against Brock. On January 30, 2008, the trial court held the previous summary judgment in abeyance, requesting that Green Tree provide additional evidence regarding Green Tree Servicing's status as the holder of the subject note, given the purchase by Centerbridge. Green Tree provided an affidavit from its own employee stating that it in fact continued to hold Brock's note. On February 25, 2008, the trial court reinstated the January 10, 2008, order of summary judgment. This appeal followed.

Brock now argues that material issues of fact existed which precluded summary judgment. Specifically, Brock argues that there is conflicting evidence regarding the loan balance and the ways in which the payments were applied to the loan amount and that a material issue of fact exists as to whether Green Tree retained the right to sue on the loan when Centerbridge purchased part of the company. We agree on both counts.

The standard of review on appeal when a trial court grants a motion for 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.' The trial court must view the evidence in the light most favorable to the non-moving party, and summary judgment should be granted only if it appears impossible that the non-moving party will be able to produce evidence at trial warranting a judgment in his favor.

Lewis v. B & R Corp., 56 S.W.3d 432, 436 (Ky. App. 2001), *quoting Scifres v. Kraft*, 916 S.W.2d 779, 781.

Green Tree argues that the evidence of the loan balance was not in dispute, claiming that Brock's initial loan balance was \$38,314.44 and that a simple amortization schedule shows that had Brock made each and every payment on its due date, her principal balance would have only been reduced to \$36,880.13 as of September 15, 2007. However, the copy of the contract attached to Green Tree's brief indicates a beginning balance of \$36,145.70, not the \$38,314.44 amount Green Tree now argues applies. The contract indicates that prepaid finance charges of \$2,168.74 were paid which were not subject to the loan balance. Further, Green Tree's complaint alleges that an interest rate of 12.75 percent applied, whereas the contract states that an interest rate of 13.58 percent applied in one section and in another references the 12.75 percentage.

Green Tree argues that Brock failed to prove that she paid any payments other than those listed on her payment history and that such failure on her part means that the evidence of the loan balance is not in dispute. We disagree. The only evidence of the amount due as of September 18, 2007, was the affidavit of the Collections Supervisor. There is nothing indicating how this amount was calculated and none of the documents in the record reflect such an amount. The amortization schedule is based on the higher amount of \$38,314.44 and stated that as of September 15, 2007, the balance would have been \$36,880.13. Green Tree's complaint uses the beginning loan balance of \$36,145.70. We find no conclusive proof, either from the history of payments, the amortization schedule, or the affidavit indicating that the amount owed was in fact \$40,440.64, as the judgment

reflects. Further, nothing in the court's orders indicates how this amount was calculated. Accordingly, a genuine issue of material fact exists as to the amount Brock owed at the time of her default.

Further, a genuine issue of material fact exists as to whether Green Tree retained its right to sue when Centerbridge acquired an ownership interest in Green Tree. Green Tree argues that pursuant to our unpublished opinion in *Green Tree Servicing, LLC v. Sanders*, 2006 WL 2033668 (Ky.App. 2006), it retained the right to sue to enforce a loan that is subject to a pooling and servicing agreement. If that were the only issue before us, we would agree. When Green Tree acquired the loan under the pooling and servicing agreement with Conseco, it did acquire the right to sue to enforce Brock's loan. However, nothing in the record indicates that Green Tree also retained this right when it was purchased in part by Centerbridge. Green Tree maintains that the sale only indicated a change in ownership and not a change in the company and that it still retained the right to sue. Unfortunately, there is nothing other than an affidavit from Green Tree indicating such a right. Absent in the record are any details of the purchase by Centerbridge, or of any of the assets purchased, which could include Brock's loan. Absent is any affidavit on behalf of Centerbridge indicating that Green Tree retained ownership of Brock's loan. Accordingly, a genuine issue of material fact exists and summary judgment was inappropriate.

For the foregoing reasons, we reverse the summary judgment entered by the Oldham Circuit Court and remand with directions for the court to allow the parties to conduct discovery on the material issues of fact mentioned herein.

CAPERTON AND LAMBERT, JUDGES, CONCUR.

KELLER, JUDGE, CONCURS IN RESULT ONLY.

BRIEFS FOR
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