

Supreme Court, U.S.
FILED

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No. 23-54

OFFICE OF THE CLERK

In the
Supreme Court of the United States

ROBERT MARK SCOTT,

Petitioner,

v.

FORCHT BANK, N.A.,

Respondent.

On Petition for a Writ of Certiorari to the
Commonwealth Court of Kentucky

PETITION FOR A WRIT OF CERTIORARI

Robert Mark Scott
Petitioner Pro Se
49 Executive Est
London, KY 40744
(606) 224-3622
robert.scott@med.ge.com

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QUESTIONS PRESENTED

1. Whether Summary Judgment is proper where material issues of fact exist?
2. Whether Scott detrimentally relied on any promise made by and through Forcht Bank's employee, Chris Jasper?
3. Whether the Circuit Court erred in granting a Summary Judgment where evidence exists of false testimony by a key witness: Forcht loan officer, Mike Sharp?
4. Whether the Circuit Court erred in overruling Plaintiff's Motion to Reconsider?

PARTIES TO THE PROCEEDINGS

Plaintiff

- Robert Mark Scott

Defendant

- Forcht Bank, NA

LIST OF PROCEEDINGS

Supreme Court of Kentucky

No. 2023-SC-0018-D

Robert Mark Scott, *Movant*, v. Forcht Bank, N.A.,
Respondent

Date of Final Order: April 19, 2023

Court of Appeals of the Commonwealth of Kentucky

No. 2022-CA-0224-MR

Robert Mark Scott, *Appellant*, v. Forcht Bank, N.A.,
Appellee

Date of Final Order: December 8, 2022

Laurel Circuit Court for the 27th Judicial Circuit of
the Commonwealth of Kentucky, Division II

Civil Action No. 12-CI-00962

Robert Mark Scott, *Plaintiff*, v. Forcht Bank, N.A.,
Defendant.

Date of Final Order: February 15, 2022

Court of Appeals of the Commonwealth of Kentucky
2020-CA-1326

Robert Mark Scott, *Appellant*, v. Forcht Bank, N.A.,
Appellee

Order Dismissing: August 30, 2021

Court of Appeals of the Commonwealth of Kentucky
No. 2015-CA-00594

Robert Mark Scott, *Appellant*, v. Forcht Bank, N.A.,
Appellee

Date of Final Opinion: May 12, 2017

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PETITION FOR A WRIT OF CERTIORARI



OPINIONS BELOW

Plaintiff Robert Mark Scott requests that this court issue a writ of certiorari to Reverse and remand the decisions below:

Supreme Court of Kentucky
2023-SC-0018-D, (2022-CA-0224)
Order Denying Discretionary Review
April 19, 2023

Commonwealth of Kentucky, 27th Judicial Circuit
Laurel Circuit Court
12-CI-00962
Order Overruling Plaintiff's Motion to Set Aside
Judgment
February 15, 2022

Commonwealth of Kentucky
Court of Appeals
2015-CA-000594-MR
Opinion Affirming
July 13, 2017

Commonwealth of Kentucky
Court of Appeals
2015-CA-000594-MR
Opinion Affirming
May 15, 2017

Commonwealth of Kentucky
27th Judicial Circuit, Laurel Circuit Court
12-CI-00962
Order Denying Plaintiff's Motion to Reconsider

Commonwealth of Kentucky
27th Judicial Circuit, Laurel Circuit Court
12-CI-00962
Findings of Fact, Conclusions of Law and Judgment
March 16, 2015



JURISDICTION

Filing deadline is calculated from the most recent Order:

Supreme Court of Kentucky
2023-SC-0018-D
(2022-CA-0224)
Order Denying Discretionary Review
April 19, 2023

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a)



STATUTORY PROVISIONS INVOLVED

KRS § 371.010

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 including, but not limited to the purchase of realty or real property, but this subsection shall not apply to agreements pursuant to which credit is extended by means of a credit card or similar device, or to consumer credit transactions; 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. It shall not be necessary to express the consideration in the writing, but it may be proved when necessary or disproved by parol or other evidence.



STATEMENT OF THE CASE

Scott had just completed construction on a home he had built to rent. Citizens National Bank, Somerset, Kentucky financed the construction loan. Scott returned to The Mortgage Place, LLC and discussed with Barbara Sparkman, mortgage broker, his desire

to obtain another application for funds to build another rental property. Sparkman took his application. Scott paid for an appraisal per plans and specifications for the new construction.

Sparkman took Scott's application and relevant documents to Citizens Bank to discuss and obtain another construction loan for Scott to build another rental home. Citizen's loan officer advised Sparkman that they were not currently making loans outside their area and did not discuss or review any of Scott's documents. For the past approximate 20 years, Sparkman had brokered constructions with Citizens. At that point she did not have any other source for construction lending. (Sparkman Depo 11/14/2013). Although she did not have an agreement to place a construction loan through her company with Laurel National Bank (now Forcht), Sparkman decided, as a favor to Scott, to discuss Scott's loan application with Chris Jasper, a loan officer at the Bank. Jasper advised he was interested in taking the loan application. Scott stated, "I came to Chris Jasper with an appraisal in hand and asked him if I could get a loan and told him why I was needing the loan to build these rentals on these two (2) lots." (Scott depo 03/05/2013). The Defendant Bank loaned Scott \$121,952.59. From his discussions with Jasper, Scott states he had the understanding he would be able to make application to apply for funds to build another rental on the second lot #23. (Scott depo 03/05/2013 pg 25). Jasper states in his deposition "As I've told Mr. Scott and Mr. Meader Previously I have been very cautious to say we would entertain a loan application and qualify subject to the underwriting at that time". (Jasper Depo 05/15/2013).

Scott understood this statement as a promise of another loan application. As stated above, Jasper's statement was part of the record when Judge Jensen held that Scott's claim was barred by the Statute of Frauds, and clears Scott from the Statute of Frauds:

The Kentucky legislature added Subsection 9 to the Kentucky Statute of Frauds in 1990. It provides:

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, including but not limited to the purchase of realty or Real property, but this subsection shall not apply to agreements pursuant to Which credit is extended by means of a credit card or similar device, or to Consumer credit transactions; 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. It shall not be necessary to express the Consideration in writing, but it may be proved when necessary or Disproved by parol or other evidence.

KRS § 371.010.

Upon completion of construction on Lot #26, Scott went to the Bank to see Jasper and apply for permanent financing. Scott learned that Jasper had been fired and a new loan officer would meet with him.

(Jasper Depo 05/14/2013 pg 8). The new loan officer was Mike Sharpe. Scott states Sharpe did not process the construction loan to permanent financing. Rather than rent the completed home, Scott states he was told by Sharpe to sell the home. Sharp states that according to the original construction loan presentation, the source of repayment on the loan says sale of the house. (Sharp Depo 05/15/2013 pg 6). Forcht loan officer, Chris Jasper, stated he was for sure when he [Scott] came in, he was building a house for rental purposes. (Jasper Depo 05/15/2013).

The aforementioned testimony of the following three people — Sparkman who took Scott's initial application; Forcht loan officer, Jasper; and Scott who made the application — reveal that Robert Mark Scott's loan application was for funds to build a rental home.

Nevertheless, Scott states he tried to work with the Bank in doing as he was instructed by Sharpe. Sharpe did not tell Scott then that he would not be able to apply for another construction loan. (Scott Depo pg 120)

Scott attempted for six months to sell the home as instructed by Sharpe. Scott states he depleted the reserve funds of \$13,000.00 during the six months period paying interest at \$900/month interest on his construction loan at the Bank as Sharpe extended the construction loan. He lost \$1,200.00/month rental income during the time the home was for sale. Scott decided, as he had originally planned, that he had to rent the home to cover his expenses including his construction loan payment.

Then Scott says Sharpe took him by the arm and escorted him to the door. (Scott Depo pg 122).

Scott filed his Complaint against Forcht Bank, NA, successor in interest to Laurel National Bank, on October 2, 2012.

The Circuit Court granted Forcht Bank's Motion for Judgment on the Pleadings dismissing Scott's Complaint stating the Bank did not owe Scott a fiduciary duty and that his claim was barred by the Statute of Frauds, since Scott did not produce any writing supporting his claims. (See Findings of Fact, Conclusions of Law and Judgment, 03/16/2015).

Forcht Bank took control of Scott's loan when construction was completed, where loan officer, Mike Sharp, directed Scott to sell the home. Sharp further extended the construction loan by holding the property for six months in construction status. The standard banking procedure at the end of construction is to go to a permanent mortgage within 30 days, paying the construction loan with proceeds of the permanent loan, preferably with a fixed rate.

Barbara Sparkman, mortgage broker, stated in her deposition the following:

"Am I allowed to give an opinion here? The critical error, the very critical error, and I feel like it is inexcusable, once that loan, once that home was finished, that loan should have either went to permanent mortgage here at Laurel or he should have been told at that time relationship was over. At that time, I could have got Mark a construction loan on that other lot. Why? Because he had some reserves to start his new home, just

like he wanted Laurel National to do. He had good credit scores to my knowledge. I mean, he had just finished, and again, I'm basing on what he told me, but at the end of the six months, where the six months had come out, he lost his reserves, he lost six months rent on his home, he lost six months of constructing lending income that he really relied upon. And he had no reserves. There was nothing I could do, there was nothing no one could do at that time. It was over for Mark, and it still is today, and its — listen. You wouldn't want a bank to do that to you, and I wouldn't either to do it to me.

(Sparkman Depo 04/11/14 pg 67, 68).

Based upon a promise from the bank (see Jasper Depo pg. 34) that he could apply for an additional loan to construct a second rental home on the second lot, Scott purchased both lots. Then after construction was completed on the first lot, the Bank refused to allow Scott to apply for a second loan to construct a home on the second lot.

The Bank's action in not allowing the application for, or approval of, the second loan made it impossible for Scott to build on that lot, causing him great financial loss. Scott alleged the actions of the Bank were the direct and proximate cause of his injuries.

The following statements made by Mike Sharpe in his deposition 05/15/2013 have no evidence in the record to indicate these to be truthful statements:

1. Sharpe stated (pg 4) he took over control of Scott's loan September 3, 2009. Record shows

he took over the loan in 2008 when Jasper left.

2. According to the original construction presentation, the source of repayment on the loan says sale of house (Pg 6). Record of testimony of three witnesses: Scott (pg 12 thru 14), Jasper (pg 13) and Sparkman (pg 13, 16 thru 21) all state Scott application for a loan to build rental property.
3. The original loan was set up for it to be sold. (Pg 11)
4. He doesn't know of any single family houses built for rental purposes. (Pg 16)
5. Could not make a draw from his construction loan for his own work on the Home. (Pg 28)
Cannot draw for personal labor. (Pg 30-31)

The Defendant in making the above statements under oath where three witnesses for the Plaintiff give testimony that tends to support the testimony of falsity. (18 U.S.C. § 1621)

A. Laurel Circuit Court Erred By Granting the Bank's Motion for Judgment on the Pleadings.

Apparently, the Circuit Court simply reviewed the Bank's statement of the law in Its Motion of Law and Judgment on the Pleadings and in its Findings of Fact, Conclusions of Law and Judgment without actually applying the law to the facts at issue to the Court.

Material issues of disputed facts existed, making a Judgment on the Pleadings improper.

Archer v. Citizens Fidelity Bank and Trust Co., 365 S.W. 2d 727 (Ct. App. Ky., 1962) gives a helpful analysis. It states “[Ky.] CR 12.03 is the Kentucky counterpart of F. R. Civ. P. [R]ule 12(c). Each has been construed as meaning that a judgment on the Pleadings can be granted only if, on the admitted material facts, the movant is clearly entitled to a judgment.” *Archer* at 729, citing to *Spencer v. Woods*, 282 S.W.2d 851 (Ky. App. 1955); 2 MOORE’S FEDERAL PRACTICE, Second Edition, Section 12.15, Pg 2269 (citations omitted). *Archer* continues “Relief must be denied if there is a material issue of fact” citing to *Noel v. Olds*, 80 U.S. App. D.C. 63, 149 F.2d 13 (1945); *Friedman v. Washburn Company*, 145 F.2d 715 (7th Cir. 1944). The Motion is, of course, to be determined solely on the pleadings. Thus, the Motion is akin to a Summary Judgment standard, and indeed *Archer* cites to a couple of cases where “similar results” occurred under CR 56. Citing to *Collins v. Duff*, 283 S.W.2d 179 (Ky. App. 1955) and *Burd v. Commonwealth*, 335 S.W.2d 945 (Ky. App. 1960) (a motion for summary judgment treated as a motion under CR 12.03)

Further, “[w]hen a party move for judgment on the pleadings, he admits for the purposes of his motion not only the truth of all of his adversary’s well-pleaded allegations of fact and fair inferences therefrom, but also the untruth of all of his own allegations which have been denied by his adversary.” *Archer*, citing to *Clay*, Ky. CR 12.03, Comment 2; *United States v. Hole*, D.C., 38 F. Supp. 600 (D.C. Montana, 1941); *M.*

Snower & Co. v. United States, 140 F. 2d 367 (7th Cir. 1944). *Archer* is over 50 years old and has never been overruled or cautioned against. When set against this canvas, the Circuit Court's error becomes plain.

B. The Circuit Court Further Erred in Overruling Scott's Motion to Reconsider.

Based on the foregoing, it was also inappropriate for the Circuit Court to deny Scott's Motion to Reconsider. As stated above, the purpose of a judgment on the pleadings is "to expedite the termination of a controversy where the ultimate and controlling facts are not in dispute." *City of Pioneer Village, supra* at 759. "It is designed to provide a method of disposing of cases where the allegations of the pleadings are admitted and only a question of Law is to be decided."

Here, the "ultimate and controlling facts" are greatly in dispute; the Bank claims they never made the promise of a second loan on which Scott detrimentally relied. Further, the allegations in the pleadings are not admitted, and relevant questions of fact do remain, not "only a question of law" is to be decided.

Likewise, here, the pleadings limited discovery in the matter have not yielded an answer to the question of material fact outlined above. Further, issues of equity related to the detrimental reliance of Scott on the Bank's promises were not even addressed, let alone redressed by the Court. Thus, the Motion to Reconsider should have been granted, the judgment on the pleadings overturned, and the matter allowed to proceed through discovery and to trial.



REASONS FOR GRANTING THE PETITION

The Circuit Court erred because the Bank's loan to Scott fell outside the Statute of Frauds, and a factual issue of detrimental reliance existed, thereby making a judgment on the Pleadings and a subsequent dismissal of Scott's Motion to Reconsider improper.

During negotiations, Scott made the Bank aware that Scott was not interested in purchasing the second lot unless the Bank promised to make the second loan. The Bank made the promise; Scott undertook the loan in detrimental reliance on this promise; and then the Bank did not even allow Scott to apply for the second loan when the first home was completed. Scott was unable to rent or sell the constructed home, and suffered thousands of dollars in damages, as well as anxiety and harm to his credit and reputation.

Scott maintains the record reveals Forcht Bank, defendant, by and through their employee, Mike Sharpe, made false statements in testimony on the key issue regarding the purpose of the loan. Sharpe testimony was proven to be false by statements made by three (3) witnesses: Chris Jasper, Forcht Bank employee; Barbara Sparkman, Mortgage Broker; Robert Mark Scott, Plaintiff.

The "law of the case" doctrine precludes reconsideration of a previously decided issue unless one of three "exceptional circumstances" exists: (1) when substantially different evidence is raised at a subsequent trial, (2) when a subsequent contrary view of the law is decided by the controlling authority, or

(3) when a decision is clearly erroneous and would result in a manifest injustice.

The record reveals the Laurel Circuit Court decision to be clearly erroneous and would result in a manifest injustice.

Therefore, the appellate courts below erred in affirming the Laurel Circuit Court's decision.



CONCLUSION

For the foregoing reasons, Petitioner prays this Court grant his Petition for Writ of Certiorari.

Respectfully submitted,

Robert Mark Scott
Petitioner Pro Se
49 Executive Est
London, KY 40744
(606) 224-3622
robert.scott@med.ge.com

July 18, 2023



