IN THE COURT OF APPEALS OF TENNESSEE

EASTERN SECTION

GREENE COUNTY BANK,	)	C/A NO. 03A01-9604-CH-00124
	)	
Plaintiff-Appellee,	)	BLOUNT CHANCERY
	)	
v.	)	HON. DENNIS H. INMAN,
	)	CHANCELLOR
SOUTHEASTERN PROPERTIES, INC., et al.,	)	(SITTING BY INTERCHANGE)
	)	
	)	AFFIRMED AS
Defendants-Appellants.	)	MODIFIED

KENNETH CLARK HOOD, ROGERS, LAUGHLIN, NUNNALLY, HOOD & CRUM, Greeneville, for Plaintiff-Appellee.

L. LEE KULL, BIRD, NAVRATIL, KULL & McCROSKEY, Maryville, for Defendants-Appellants.

OPINION

Franks. J.

In this action in debt, the Chancellor entered judgment against defendants for the deficiency and pre-judgment interest.

Defendants have appealed. Appellants, Kings, were in default on loans made by Greene County Bank (Bank). The Bank gave the Kings time to execute a plan to sell several properties secured by the loans and complete their sub-

division project, La Vista. The plan was not carried out.

In order to avoid foreclosure, the Kings entered another agreement with the Bank wherein the Bank would market the secured properties and apply the proceeds to the indebtedness. Upon the properties being deeded to the Bank, the properties were sold, leaving a deficiency.

The Chancellor determined that while the Bank had the burden of proving the amount of the deficiency, the defendants had the burden of proving that the Bank did not pursue the sale diligently or in good faith according to the terms of the contract. He found that the defendants did not carry the burden of proving the Bank failed to exercise good faith and diligence, but refused to award attorneys fees.

Appellants argue that the intent of the contract was to establish a trust. Under this interpretation, the Bank would owe appellants a higher duty, due to its fiduciary relationship. The issue was not raised in the Kings' answer or at trial, and will not be considered on appeal. In their reply brief, the Kings argue they did not ask the Court to impose a trust agreement, but assert that the Bank breached the express covenant of ?good faith and diligence?.
The issue of failure to exercise good faith and diligence is an affirmative defense to the deficiency action, and the burden of proof for an affirmative defense is placed upon the party which raised it. *Association of Owners of Regency Park Condominiums v. Thomasson*, 878 S.W.2d 560 (Tenn.App. 1994).

The issue thus becomes did the Bank fulfill its contractual agreement to exercise good faith and diligence in the sale of the properties. The contract reads in pertinent

part:

> After execution, acknowledgment and delivery of said deed from the Borrowers to the Lender, Greene County Bank, the Lender shall then apply the net proceeds of said sale or sales, after payment of all sale expenses, including but not limited to, payment of all indebtedness related to prior encumbrances . . . [l]ender hereby agrees to exercise good faith and diligence in marketing for sale and selling said properties which are being transferred unto the Lender by deed, pursuant to the terms of this Agreement.
>
> (Emphasis added).

The Kings assert that the bank failed to meet the standard of ?good faith and diligence? required under the terms of the contract. They argue that the properties sold at less than their appraisal value, that the bank did not list the properties with a real estate agent or broker, and that little advertising was done.

The Bank described its marketing strategy as follows: (1) obtaining appraisals, (2) notifying the business community of the availability of the properties through its 'network of contacts,' and (3) for the residence only, advertising in the local newspaper. The procedures followed by the Bank do not demonstrate bad faith or lack of persistence. It is open to speculation whether more advertising or an exclusive listing with a realtor instead of agreeing to pay the commission of any realtor who produced a buyer, would have resulted in a greater sales price. It is significant that this was a failed development and, given the bank's contact with investors in the community, the improvements necessary on some of the properties, the Kings' apparent difficulty in selling the properties under the plan formed when their loan was declared in default, and the bank

having to provide an interest free loan to persuade a purchaser to buy LaVista, establish that the steps taken by the Bank were reasonable. We affirm the Chancellor's finding that the Kings did not carry the burden of showing the Bank failed to use ?good faith and diligence?.

The question of when interest would stop accruing is not directly addressed in the contract. However, parts of the contract refer to the general process by which the debt would be reduced:

> 3. That in exchange for the conveyance from said Borrowers unto the Lender, Greene County Bank, Lender shall release their respective liens on the Deeds of Trust, hereinabove referred to, however, said conveyance by Deed from the Borrowers unto the Lender, Greene County Bank, shall not be deemed and is not a satisfaction of the indebtedness owing to the lender under the Promissory Notes, hereinabove referred to . . .
> 4. After execution, acknowledgment and delivery of said deed from the Borrowers to the Lender, Greene County Bank, the Lender shall then market said properties for sale and shall apply the net proceeds of said sale or sales, after payment of all sale expenses . . . with the remaining balance to be applied to the indebtedness owing by the Borrowers unto the Lender . . . .
>
> (Emphasis added).

The contract states that the conveyance of the properties to the bank does not satisfy the indebtedness. The debt is to be reduced by the net proceeds after the bank has sold the property. Under these terms, it is clear that the loan continued in force until the properties were sold. The Chancellor properly held that interest would accumulate until the properties were sold.

The Chancellor denied attorneys fees to the Bank because ?this contract guaranteed litigation, and in that regard the bank has as much culpability as do defendants.?

The Bank argues that the Chancellor did not have the discretion to ignore the language of the promissory notes providing for ?a reasonable attorney's fee? if the note was placed in the ?hands of an attorney-at-law for collection?. The Kings argue that the latter contract was a novation, extinguishing the Bank's rights to attorney fees.

While a novation extinguishes an existing contract and substitutes a new one, *Pacific Eastern Corp. v. Gulf Life Co.*, 902 S.W.2d 946 (Tenn. App. 1995), the burden of proof is on the party asserting the novation and the parties must have intended to extinguish the previous obligations. *In re O'Brian*, 154 B.R. 480 (W.D.Tenn. 1993). Here, the terms of the contract do not establish such intent:

> 6. This Agreement shall not prevent the Lender from pursuing any legal action or actions against the Borrowers (and each of them) for collection of any deficiency judgment in regard to the indebtedness as evidenced by the Notes and Deeds of Trust, and Guaranties hereinabove referred to.

This section of the contract reserves the right of the Bank to sue on the promissory notes. The contract does not extinguish the previous contract, *see O'Brian*. The terms of the promissory note, providing for the recovery of reasonable attorney's fees, remained in force.

A court of equity cannot make or alter a contract between the parties, however, all contracts in equity are enforceable in accordance with equity and good conscience. Here, the parties entered into a subsequent contract which became the focal point of this action, but the fact remains that defendants contracted to pay reasonable attorney's fees for the collection of the indebtedness. *See Young v. Jones*,

255 S.W.2d 703 (CA 1952). However, the Bank would not be entitled to collect attorney's fees for the full scope of this litigation. Upon remand, the Trial Court is directed to establish a reasonable attorney's fee for the collection of the indebtedness. Not to be taken into account are time, expense and effort expended in the litigation over whether the subsequent contract was breached.

The cost of the appeal is assessed to Appellants, and the cause remanded.

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Herschel P. Franks, J.

CONCUR:

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Houston M. Goddard, P.J.

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Don T. McMurray, J.