

Not Reported in S.W.3d, 2005 WL 1125218 (Ky.App.)

Only the Westlaw citation is currently available.

Unpublished opinions shall never be cited or used as authority in any other case in any court of this state. See KY ST RCP Rule 76.28(4).

Court of Appeals of Kentucky.

PROVIDIAN NATIONAL BANK, Appellant

v.

Timothy WOODS, Appellee.

No. 2003-CA-000094-MR.

May 13, 2005.

Appeal from Jefferson Circuit Court, Action No. 02-CI-001629; [Geoffrey P. Morris](#), Judge. [Paul Croushore](#), Cincinnati, OH, for appellant.

No Brief Filed for Appellee.

Before [BUCKINGHAM](#), [JOHNSON](#), and [SCHRODER](#), Judges.

OPINION

[BUCKINGHAM](#), Judge.

*1

_____(Cite as: 2005 WL 1125218, *1 (Ky.App.))_____

Providian National Bank appeals from orders of the Jefferson Circuit Court discharging Timothy Woods from his obligations under an agreed judgment. We reverse.

Woods formally began his relationship with the bank on October 19, 2000, when he executed a credit card agreement with the bank. The bank issued Woods a credit card, and he incurred charges on the account. However, Woods did not fulfill his payment obligations under the account agreement. As a result, the bank filed a breach of contract claim against him in the Jefferson Circuit Court on March 4, 2002.

The court entered summary judgment in favor of the bank on May 14, 2002. On May 29, 2002, Woods and the bank entered into an agreed judgment. That judgment recognized damages of \$5,510.27 as principal, \$255.64 as interest through April 24, 2002, and costs. The judgment further recognized an interest rate of 19.99% in accordance with the terms of the account agreement.

In addition to setting out the damages, the judgment set out a payment plan for Woods. Under the terms of the judgment, Woods was required to pay \$165 per month, due on the 25th of each month, until the judgment was paid. In return, the bank agreed not to seek execution on the judgment so long as Woods complied with the payment plan. In the event Woods failed to meet his obligations under the payment schedule, the bank had the right to execute on the judgment without further court action.

Woods made timely payments in May and June of 2002. However, he was late with his July payment and made no payment during August. The bank concedes that Woods made a double payment in September, thus bringing the amount due current. However, since Woods had twice failed to comply with the payment schedule, the bank elected to execute on the judgment. On October 23, 2002, the bank sought and obtained garnishment on a bank account maintained by Woods.

On November 6, 2002, Woods filed a motion seeking relief from further obligations under the agreed judgment. Further, he asked the court to direct the bank to take steps necessary to release the garnishment on his bank account. In an affidavit in support of his motion, Woods stated that at the time the bank sought the garnishment he had fully paid the amounts due under the agreement. Neither his affidavit nor his motion made mention of the fact that he had twice failed to meet the payment schedule.

The bank failed to appear for the hearing on Woods's motion, and the motion was granted by the court in an order entered on September 10, 2002. The bank filed a motion seeking to vacate the order under [CR](#)^{FN1} 59.05 and [CR 60.02](#). The court denied the motion, and the bank filed this appeal.

FN1. Kentucky Rules of Civil Procedure.

Woods did not file an appellee's brief.^{FN2} When "the appellee's brief has not been filed within the time allowed, the court may: (i) accept the appellant's statement of the facts and issues as correct; (ii) reverse the judgment if appellant's brief reasonably appears to sustain such action; or (iii) regard the appellee's failure as a confession of error and reverse the judgment without considering the merits of the case." [CR 76.12\(8\)\(c\)](#). Because the bank is entitled to relief based on the merits of their arguments, we will address the case in that manner rather than penalize Woods for not filing a brief.

[FN2](#). Woods was represented by an attorney before the circuit court, but his attorney was granted leave to withdraw by this court after the bank filed its appeal. The order allowing Woods's attorney to withdraw gave Woods 30 days to obtain new counsel. Further, the order stated that Woods would be proceeding pro se should he fail to retain new counsel to represent him.

*2

(Cite as: 2005 WL 1125218, *2 (Ky.App.))

In Woods's motion to be relieved from his obligations under the agreed judgment, he alleged that the bank breached the terms of the judgment when it garnished his bank account even though he was current in his payments. Although a judgment may be collaterally attacked under [CR 60.02](#) (see [Cumberland Falls Chair Lift, Inc. v. Commonwealth, 536 S.W.2d 316 \(Ky.1976\)](#)), Woods's motion made no reference to [CR 60.02](#) or to any grounds for relief thereunder. Nevertheless, the court ordered that Woods be discharged from any further obligations under the agreed judgment and that the bank release the garnishment on the bank account.

The effect of the court's order is unclear. It could be interpreted to mean that the court relieved Woods of *all* obligations under the judgment, meaning that he did not owe any money to the bank despite the fact that it had been awarded summary judgment earlier in the case. Alternatively, the court's order could be interpreted to mean that Woods was no longer required to make the monthly payment to satisfy the judgment. If that were the case, the bank would still have been entitled to execute on the judgment. Regardless, we conclude that it was error for the court to relieve Woods of his obligations under the agreed judgment and to order the bank to lift the garnishment.

"A party who commits the first breach of a contract is deprived of the right to complain of a subsequent breach by the other party." [Fay E. Sams Money Purchase Pension Plan v. Jansen, 3](#)

[S.W.3d 753, 759 \(Ky.App.1999\)](#). See also [Blue Diamond Coal Co. v. Robertson, 235 Ky. 425, 31 S.W.2d 701, 703 \(1930\)](#).^{FN3} Woods was late with his July payment and missed his August payment. Therefore, he breached the terms of the agreed judgment, and the bank was within its rights under the judgment to execute on the bank account.^{FN4}

^{FN3}. These two cases deal with breach of contract rather than breach of the terms of an agreed judgment. However, *Black's Law Dictionary* 842 (6th ed.1990) defines an agreed judgment as “[a] judgment entered on agreement of the parties, which receives the sanction of the court, and it constitutes a contract between the parties to the agreement[.]”

^{FN4}. Although Woods had no right to complain of a breach of the terms of the agreed judgment by Providian since he committed the first breach, we do not hold that Providian committed a subsequent breach. Rather, as we have noted, Providian was within its rights to execute on the bank account once Woods breached the terms of the agreed judgment.

Woods cited no authority to the court, other than the *Jansen* and *Blue Diamond* cases, to support his argument that he was entitled to relief from the judgment. Those cases do not support his argument but support the bank's argument because Woods committed the first breach of the contract. We know of no authority, nor did Woods cite any, that would give him relief from his obligations under the judgment.

The order of the Jefferson Circuit Court is reversed.

ALL CONCUR.

Ky.App.,2005.
Providian Nat. Bank v. Woods
Not Reported in S.W.3d, 2005 WL 1125218 (Ky.App.)

END OF DOCUMENT