



## Peoples Bank of Bullitt County v. Stout's Feed Store

2004 | Cited 0 times | Court of Appeals of Kentucky | March 5, 2004

NOT TO BE PUBLISHED

OPINION VACATING AND REMANDING

The sole issue for consideration in this appeal is whether the doctrine of marshaling of assets is appropriately applied in this case.

Tim and Chantal Pearson purchased real property in Bullitt County, Kentucky for the purpose of building a house. The People's Bank of Bullitt County (People's Bank), and appellant here, agreed to lend monies to the Pearsons for this purpose in return for a mortgage on the property as security. The Pearsons executed a promissory note for \$50,000.00 to People's Bank along with a lien deed that included a future advance clause for up to an additional \$150,000.00.

Subsequent to the lien deed being filed, Stout's Feed Store, Inc. d/b/a Stout's Building Center (Stout's), notified the bank of its intent to provide materials or supplies to the Pearsons on credit. Stout's did so and eventually filed a materialman's lien against the same property as the bank had previously filed its lien deed.

By October 1998, prior to Stout's filing of its materialman's lien, People's Bank had advanced \$117,500.00 to the Pearsons. By January 1999 People's Bank held a series of promissory notes from the Pearsons for \$125,778.48. All of these promissory notes were secured by the original lien deed filed by People's Bank in accordance with KRS 382.520(1) & (2).

In February 1999 People's Bank agreed to advance an additional \$25,000.00 to the Pearsons if, in addition to the real property covered by its lien deed, the Pearsons provided further security. As a result, additional collateral consisting of a different parcel of real estate and the co-signatures of Chantal Pearson's parents were obtained. It is not clear from the record to whom the additional real property belonged. People's Bank then advanced the Pearsons an additional \$25,000.00.

The Pearsons failed to honor their payment obligations to People's Bank, Stout's, and others. Stout's filed suit to collect on its materialman's lien against the Pearsons and made People's Bank a party.<sup>1</sup> The real property covered by the original lien deed from People's Bank was sold by the master commissioner with the circuit court to determine distribution of the funds.

At the circuit court, the only issue between the various parties was the priority of liens. The court



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found that People's Bank had priority to all proceeds until its final disbursement of \$25,000.00. The court then found that the equitable doctrine of marshaling of assets applied to that final amount with the result being that Stout's received payment on its materialman's lien. The court ultimately ordered People's Bank to receive \$130,771.84 and Stout's to receive \$21,882.17, thereby disbursing all funds received from the sale of the property.

People's Bank appealed and argues that the court should not have applied the doctrine of marshaling of assets to the final \$25,000.00 loaned to the Pearsons. Stout's has not cross-appealed. Thus, as stated above the only issue for consideration is whether the circuit court correctly applied the doctrine of marshaling of assets to a portion of the proceeds from the sale of the real property in this case. People's Bank argues that the elements required to apply the doctrine are lacking while Stout's maintains that the circuit court ruled properly.

In order for a court to apply the marshaling of assets doctrine it must appear that there exist two creditors who seek satisfaction of their debts from a common debtor. One of the creditors must have two funds belonging to the debtor available to satisfy its debt while the other creditor(s) only has available the common asset. If this is the case then the creditor who has two funds available may be required to look to the funds that the other creditor cannot reach. *Humphries v. Fitzpatrick*, 253 Ky. 517, 69 S.W.2d 1058, 1060 (1934); *M.A. Walker Co., Inc. v. PBK Bank, Inc.*, Ky. App., 95 S.W.3d 70, 76, 49 UCC Rep.Serv.2d 589 (2002).

Application of the doctrine is discretionary with the circuit court. However, in this case it is unclear whether all of the elements required to apply the doctrine exist. Clearly there are two creditors, People's Bank and Stout's, who seek satisfaction of their debt from a common debtor, the Pearsons.

The question is whether two funds exist from which People's Bank may satisfy its debt. Plainly the bank can look to the property that it secured with its original lien deed and for which it loaned the money to the Pearsons to satisfy the debt that the Pearsons owe.

In order to marshal assets, Stout's must show that the two funds from which People's Bank can receive payment are in the hands of their common debtor - the Pearsons. *Bartley v. Pikeville National Bank & Trust Co.*, Ky., 532 S.W.2d 446, 448 (1975). There is no evidence of record regarding the ownership of the second piece of property described only as "Real Estate Mtg Dated 9-6-97" used to further secure the final disbursement of \$25,000.00 from the bank to the Pearsons.

If the Pearsons own the property then marshaling of assets may be appropriate if the court determines that all other elements required for the doctrine to apply exist. However, if the property does not belong to the Pearsons then marshaling of assets is clearly inapplicable because there would not exist two funds from which the bank could receive payment. Sureties do not qualify as a fund in the hands of the common debtor. *Gaines v. Hill*, 147 Ky. 445, 144 S.W. 92, 94 (1912). Therefore, People's Bank cannot be forced to seek recompense from the Pearsons' co-signers under the doctrine



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of marshaling of assets.

The decision of the Bullitt Circuit Court is vacated with respect to the finding that marshaling of assets is appropriate and the case is remanded for further proceedings.

ALL CONCUR.

1. Stout's also made Tim and Chantal Pearson, Cox Interior, Inc., and Franklin Industries parties. D & I Insulation and Drywall intervened in the action. These parties, although named as appellees in this appeal, have not filed notices of cross-appeals nor briefs with this Court. Thus, the only issue to be resolved is between People's Bank and Stout's.

