

Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-002111-MR

LISHA-FAYE MCLANE

APPELLANT

v. APPEAL FROM BULLITT CIRCUIT COURT
HONORABLE THOMAS L. WALLER, JUDGE
ACTION NO. 03-CI-00479

MRC RECEIVABLES CORPORATION¹

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: JOHNSON² AND TAYLOR, JUDGES; BUCKINGHAM,³ SENIOR JUDGE.

JOHNSON, JUDGE: Lisha-Faye McLane, pro se, has appealed from the summary judgment entered by the Bullitt Circuit Court on October 5, 2005, in favor of MRC Receivables Corp. in an action filed by MRC to recover money owed by McLane on a revolving

¹ In her notice of appeal, McLane incorrectly listed MRC Receivables Corp. as "MCR Receivables Corp." We will use the correct spelling throughout this Opinion.

² Judge Rick A. Johnson completed this opinion prior to the expiration of his term of office on December 31, 2006. Release of the opinion was delayed by administrative handling.

³ Senior Judge David C. Buckingham sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

credit card account. Having concluded that there is no genuine issue as to any material fact and that MRC is entitled to summary judgment as a matter of law, we affirm.

MRC filed its complaint against McLane on May 9, 2003, in an attempt to collect \$7,244.27 owed by McLane on a revolving credit card account. A response was filed on May 27, 2003, but this response was signed by Mark Alan McLane, who was not a party to the circuit court action. Upon MRC's motion, the response was stricken by order entered on July 14, 2005.⁴ McLane never filed a proper response to the complaint.

On July 25, 2005, MRC mailed interrogatories, requests for production of documents, and requests for admissions to McLane, which went unanswered.⁵ MRC sent McLane a letter dated August 29, 2005, asking for McLane's responses to the discovery requests, but McLane did not reply.

⁴ The delay incurred in this case stemmed from the inability of MRC to serve the complaint on McLane for lack of a correct address. On May 11, 2005, the trial court issued a notice to dismiss the case for lack of prosecution. MRC filed an amended complaint on May 18, 2005, which was served on McLane via certified mail on May 28, 2005. Thereafter, the trial court declined to dismiss the case.

⁵ McLane filed a motion to dismiss on August 24, 2005, which was denied because she failed to serve notice on MRC. McLane filed an amended motion to dismiss on August 31, 2005, which the trial court took no action upon because McLane did not notice the motion for any specific regular civil motion hour in the Bullitt Circuit Court. McLane filed an amended motion for dismissal on September 7, 2005, noting that the motion would be brought before the trial court on September 12, 2005. The trial court twice continued hearing the motion until counsel for MRC could appear. There is no entry in the record of an order by the trial court specifically denying McLane's motion to dismiss; however, the order granting summary judgment to MRC and the separate order denying McLane's motion for summary judgment had the effect of denying the motion to dismiss.

On September 14, 2005, McLane filed a motion for summary judgment. MRC filed its motion for summary judgment with an accompanying memorandum on September 26, 2005, claiming that because McLane never responded to its discovery requests, the requests were deemed admitted and no issues of material fact remained.⁶ McLane did not file a response to MRC's motion, but

⁶ MRC states that by failing to reply to the discovery requests, the following facts were deemed admitted:

1. McLane received credit from MRC, or its assignor;
2. McLane had an account with MRC for goods or services;
3. McLane had an obligation to make payments to MRC, or its assignor, on her account;
4. McLane received everything she expected to receive in consideration of, or in exchange for, the extension of credit to her by MRC or its assignor;
5. Prior to the filing of the lawsuit in Bullitt Circuit Court, McLane never notified MRC, or its assignor, of any reason why she was not obligated to pay the amount being sought;
6. McLane made no payments to MRC or its assignor, which are not reflected in the principal balance sued for in the complaint;
7. The balance of \$7,244.27 is due and owing by McLane to MRC;
8. McLane has no evidence that she is entitled to any credits, offsets, or deductions not already reflected in the balanced sued for in MRC's complaint;
9. Demand was made by MRC upon McLane for payment of the claim prior to the date of filing of the complaint;
10. Every statement or allegation contained in MRC's complaint is true and correct.

did file a memorandum in support of her motion for summary judgment. MRC responded to McLane's motion for summary judgment on September 30, 2005. On October 5, 2005, the trial court entered an order granting summary judgment in favor of MRC and denying McLane's motion for summary judgment. This appeal followed.

The standard of review governing an appeal of a summary judgment is well-settled. We must determine whether the trial court erred in concluding that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.⁷ Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."⁸ In Paintsville Hospital Co. v. Rose,⁹ the Supreme Court of Kentucky held that for summary judgment to be proper the movant must show that the adverse party cannot prevail under any circumstances. The Court has

11. There are no facts involved in this matter that support any of the affirmative defenses that McLane asserted in this case.

⁷ Scifres v. Kraft, 916 S.W.2d 779, 781 (Ky.App. 1996).

⁸ Kentucky Rules of Civil Procedure (CR) 56.03.

⁹ 683 S.W.2d 255, 256 (Ky. 1985).

also stated that "the proper function of summary judgment is to terminate litigation when, as a matter of law, it appears that it would be impossible for the respondent to produce evidence at the trial warranting a judgment in his favor."¹⁰ There is no requirement that the appellate court defer to the trial court since factual findings are not at issue.¹¹ "The record must be viewed in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor" [citation omitted].¹² Furthermore, "a party opposing a properly supported summary judgment motion cannot defeat it without presenting at least some affirmative evidence showing that there is a genuine issue of material fact for trial."¹³

Although the arguments in McLane's brief are convoluted and difficult to discern, we have narrowed them down into three main arguments. The remainder of McLane's contentions were not raised before the trial court and, therefore, are not properly before us for our review.¹⁴

¹⁰ Steelvest, Inc. v. Scansteel Service Center, Inc., 807 S.W.2d 476, 480 (1991).

¹¹ Goldsmith v. Allied Building Components, Inc., 833 S.W.2d 378, 381 (Ky. 1992).

¹² Steelvest, 807 S.W.2d at 480.

¹³ Id. at 482. See also Philipps, Kentucky Practice, CR 56.03, p. 321 (5th ed. 1995).

¹⁴ See CR 76.12(4)(c)(iv); and Parrish v. Kentucky Board of Medical Licensure, 145 S.W.3d 401 (Ky.App. 2004).

First, we must determine whether the trial court abused its discretion in ruling that McLane's failure to answer the discovery requests propounded upon her by MRC be deemed as admissions.¹⁵ In Commonwealth v. English,¹⁶ our Supreme Court defined the test for abuse of discretion as "whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles" [citations omitted]. Also, in Kuprion v. Fitzgerald,¹⁷ the Supreme Court stated that "[a]buse of discretion in relation to the exercise of judicial power implies arbitrary action or capricious disposition under the circumstances, at least an unreasonable and unfair decision'" [citations omitted].

In Harris,¹⁸ this Court stated:

A proper request for admissions is often an effective tool in pretrial practice and procedure.¹⁹ Once a party has been

¹⁵ Lewis v. Kenady, 894 S.W.2d 619 (Ky. 1994); Harris v. Stewart, 981 S.W.2d 122 (Ky.App. 1998).

¹⁶ 993 S.W.2d 941, 945 (Ky. 1999).

¹⁷ 888 S.W.2d 679, 684 (Ky. 1994).

¹⁸ 981 S.W.2d at 124.

¹⁹ "CR 36.01(2) provides in part as follows:

Each matter of which an admission is requested shall be separately set forth. The matter is admitted unless, within 30 days after service of the request, or within such shorter or longer time as the court may allow, the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter, signed by the party or by his attorney, but, unless the court shortens the time, a defendant shall not be required to serve answers or objections before the

served with a request for admissions, that request cannot simply be ignored with impunity. Pursuant to CR 36.01, the failure of a party to respond to such a request means that the party admits the truth of the allegations asserted. See, Commonwealth of Ky. Dep't. of Highways v. Compton, Ky., 387 S.W.2d 314 (1964). Furthermore, any matter admitted under the rule is held to be conclusively established unless the trial court permits the withdrawal or amendment of the admissions. CR 36.02. Thus, an inattentive party served with a request for admissions may run the risk of having judgment entered against him based upon the failure to respond. See, Lewis v. Kenady, Ky., 894 S.W.2d 619 (1995) [emphasis original].

It is not disputed that McLane failed to or refused to answer the requests for admissions. Thus, the trial court did not abuse its discretion by deeming the facts, as stated in the requests, admitted.²⁰ Without any genuine issue of material fact to resolve at a trial, and with MRC being entitled to summary judgment as a matter of law, the trial court correctly granted MRC's motion for summary judgment.

McLane's arguments as to whether MRC is entitled to judgment under the law are summarized as follows: (1) this action is based upon a promissory note that MRC cannot prove exists; (2) MRC did not have standing to bring the suit because it was without right of subrogation; and (3) national banks

expiration of 45 days after service of the summons upon him."

²⁰ Rose v. Rawlins, 358 S.W.2d 538 (Ky. 1962).

cannot loan credit. All of these arguments are misplaced and easily rejected.

First, McLane's debt arose from her failure to pay on a revolving credit card account. It is not an action based upon a negotiable instrument, or "promissory note",²¹ because McLane did not promise to pay a fixed amount of money. Furthermore, McLane's promise to repay was conditioned upon her use of the credit card issued to her by MRC.

Second, the definition of subrogation negates McLane's claim that MRC did not have standing to bring its lawsuit against her. Subrogation is defined as "[t]he substitution of one party for another whose debt the party pays, entitling the paying party to rights, remedies, or securities that would otherwise belong to the debtor."²² This claim is not a subrogation claim because MRC is the current holder of the account on which McLane has failed to pay the outstanding balance.

Finally, MRC's assignor, First Consumers National Bank, did not lend its credit to McLane. Rather, the bank lent her money. When McLane used the credit card issued to her by MRC for purchases or services, MRC's assignor paid for those

²¹ KRS 355.3-104 provides the definition of a negotiable instrument as "an unconditional promise or order to pay a fixed amount of money[.]"

²² Black's Law Dictionary 1440 (7th ed. 1999).

purchases or services on McLane's behalf. In return, McLane was obligated to repay the money lent to her with interest. We agree with the statement made by MRC that "[McLane's] refusal to repay her loan compromises [the bank's] ability to repay its customers."²³ When a bank makes a loan, such as repayment of a credit account, it is utilizing funds deposited by other customers. If those customers demand the deposited funds, the bank must pay out those funds regardless of whether loaned funds have been repaid to the bank.

Based upon well-settled law, summary judgment was proper because all necessary facts had been admitted and MRC was entitled to judgment as a matter of law. Accordingly, the summary judgment of the Bullitt Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Lisha-Faye McLane, Pro Se
Mt. Washington, Kentucky

BRIEF FOR APPELLEE:

John R. Tarter
Louisville, Kentucky

²³ See 12 U.S.C.A § 1813 (2004), wherein it is noted that when customers of a bank deposit money into a savings or checking account, those funds must be paid out to the customer on demand.