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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-000238-MR

LEONARD RULE

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE JAMES D. ISHMAEL, JR., JUDGE
ACTION NO. 05-CI-01933

FIRST NATIONAL BANK OF OMAHA

APPELLEE

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: ABRAMSON AND DIXON, JUDGES; HOWARD,¹ SPECIAL JUDGE.

DIXON, JUDGE: Appellant, Leonard Rule, appeals *pro se* from an order of the Fayette Circuit Court granting summary judgment in favor of Appellee, First National Bank of Omaha (FNBO). Finding no error, we affirm.

¹ Special Judge James I. Howard completed this opinion prior to the expiration of his Special Judge assignment effective February 9, 2007. Release of the opinion was delayed by administrative handling.

Rule is a former homebuilder in Lexington, Kentucky. In the 1990's, he applied for and received several credit cards that were used to pay bills for his home building enterprise. According to Rule, using credit cards to pay the monthly construction and material bills helped ease the cash flow burden of paying subcontractors early and then waiting for bank draws. Rule applied for credit cards with FNBO in 1995. Over the seven year period that followed, Rule's credit line increased. A 2004 credit report indicated that Rule owed \$690,000 in outstanding mortgages and \$787,000 in outstanding total credit. Rule's balance with FNBO was only 16% of his total outstanding \$100,160 of unsecured credit card debt.²

In March 2004, Republic Bank denied an increase in Rule's home building line of credit. In August 2004, Rule was denied a construction loan with Citizens Bank of Versailles. Both denials were apparently due, in part, to Rule's extensive unsecured credit. As a result, Rule claims he was no longer able to continue his business and he voluntarily ceased paying all credit card bills.

On May 2, 2005, FNBO filed a complaint in the Fayette Circuit Court alleging that Rule owed \$11,037.30 on an unpaid Visa credit card and \$7,492.83 on an unpaid Mastercard. Rule filed a response wherein he admitted his failure to pay on either account since early 2004, but asserted the affirmative defenses of estoppel, contributory negligence, impossibility, prevention, and frustration of purpose. Further,

² According to FNBO, in addition to the action herein, Rule is being sued in the Fayette Circuit Court by Citizens Commerce Bank in case 06-CI-00048, MBNA Bank in case 05-CI-03914, CitiBank in cases 05-CI-02502 and 05-CI 00540, and First Third Bank in case 04-CI-05146. Citizens Commerce Bank has brought an action against Rule in the Woodford Circuit Court in case 05-CI-340. Further, FNBO has filed a fraudulent conveyance action in the Fayette Circuit Court alleging that Rule transferred his assets to Leonard Rule Builder, Inc., which was formed fifteen days after he stopped paying all creditors.

Rule filed a counterclaim against FNBO alleging (1) age discrimination, (2) violation of the Federal Truth in Lending act, (3) violation of the Kentucky Consumer Protection Act, (4) gross negligence, (5) breach of contract, (6) intentional interference with prospective contractual relation, (7) fraud in the inducement, and (8) unjust enrichment.

Both parties thereafter filed motions for summary judgment. Following a hearing on November 18, 2005, the trial court granted summary judgment in favor of FNBO. The order stated,

The court finds that the Defendant admitted the credit card debts, when questioned by this court as to charges and the balances on the cards, and admitted voluntarily stopping all future payments on the cards in February 2004. The court finds the Defendant owes a debt to the Plaintiff, First National Bank of Omaha, and they are entitled to and shall have judgment on its complaint for \$11,037.30 on an unpaid Visa credit card account, and a judgment for \$7, 492.83 on an unpaid Mastercard credit card account, for a total of \$18,530.13 against the Defendant, Leonard Rule. . . .

On the Defendant's counterclaims, this court is compelled to follow the law set forth by (chief) Judge Hayburn (sic), in *John and Julie Stafford vs. Cross County Bank*, 262 F. Supp.2d 776 (W.D. Ky. 2003) wherein he stated that the Fair Credit Reporting Act granted immunity from state law claims, as set forth under 15 USCA 168h(e). Further, this court finds that the Defendant's counterclaim fails to state a cause of action on any of the claims set forth herein, based on his admissions at today's hearing. The Defendant had admitted paying his monthly credit card bill for approximately 10 years until he voluntarily stopped. The Plaintiff had sued on the debt, and this court finds no justification for the claims made in the counterclaim. The Defendant admitted the Plaintiff reported credit information accurately to three national credit bureaus, and this court finds that the bank was not negligent in dealing with the Defendant. Further, the bank does not create the scoring number given by the credit bureaus. Also, the Defendant

failed to prove that the Plaintiff was a cause of two local banks refusing to grant him new credit when he applied for it in 2004. This court finds that the counterclaim fails to state a cause of action and therefore this court sustains the Plaintiff's motion for summary judgment.

On appeal, Rule, again *pro se*, claims that (1) the trial court erred by prematurely granting summary judgment before he had the opportunity to complete discovery; (2) the trial court misinterpreted the holding in *Stafford v. Cross Country Bank*, 262 F. Supp.2d 776 (W.D. Ky. 2003) ; and (3) there are material facts at issue that warrant a jury trial. We find no merit in these claims.

Essentially, Rule's underlying theory in this case is that FNBO negligently advanced his unsecured credit limits. As a result, the enormous amount of unsecured debt he amassed caused other banks not to loan him money, thus resulting in the failure of his business. Rule goes so far as to even argue that he stopped making his credit card payments "to mitigate damages." However, regardless of how Rule seeks to characterize this case, the fact of the matter is this is nothing more than a run-of-the-mill credit card debt collection action. We wholly agree with the trial court that once Rule admitted the credit card accounts were his and that he voluntarily stopped making payments on those accounts, FNBO was entitled to a judgment in its favor. Further, while Rule's counterclaim is certainly novel, it has no basis in fact or law.

With regard to Rule's argument in this Court that he was denied ample opportunity to complete discovery, the record clearly refutes such claim. Both parties had completed interrogatories, document production and discovery requests prior to the summary judgment hearing. Further, as FNBO points out, in addition to filing his own

motion for summary judgment, Rule filed a 25-page reply to FNBO's motion for summary judgment that contained twelve pages of exhibits; a five page affidavit with 44 pages of exhibits; and an additional 15-page response to summary judgment with twenty-two pages of exhibits. Clearly, Rule had ample opportunity to advise the trial court of his position. “It is not necessary to show that the respondent has actually completed discovery, but only that respondent has had an opportunity to do so.” *Hartford Insurance Group v. Citizens Fidelity Bank & Trust Co.*, 579 S.W.2d 628, 629 (Ky. App. 1979).

Under Kentucky law, it is well-settled that “[t]he standard of review on appeal of a summary judgment is whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law.” *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky. App. 1996). CR 56.03 provides that summary judgment shall be rendered “[i]f the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with affidavits, if any, show 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.” Summary judgment is improper unless it would be “impossible for the respondent to produce evidence at trial warranting a judgment in his favor and against the movant.” *Steelvest v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 483 (Ky. 1991). “The inquiry should be whether, from the evidence of record, facts exist which would make it possible for the non-moving party to prevail. In the analysis, the focus should be on what is of record rather than what might be presented at trial.” *Welch v. American Publishing Co. of Kentucky*, 3 S.W.3d 724, 730 (Ky. 1999); *See also Paintsville Hospital Co. v. Rose*, 683 S.W.2d 255 (Ky. 1985).

Without question, we find that it would be “impossible for [Rule] to produce evidence at trial warranting a judgment in his favor and against the [FNBO]” *Steevest, supra*. Accordingly, the trial court properly granted summary judgment in favor of FNBO.

The judgment of the Fayette Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Leonard Rule, *Pro Se*
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BRIEF FOR APPELLEE:

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