

RENDERED: MARCH 14, 2014; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2012-CA-001975-MR

HERBERT VANARSDALE, II

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE OLU A. STEVENS, JUDGE
ACTION NO. 11-CI-003935

JOHN E. LYNCH; MARY LYNCH TOOMY;
ELIZABETH LYNCH; MICHAEL B.
LYNCH, JR.; MATTHEW M. LYNCH;
SHARON M. LYNCH; LYNN M. LYNCH;
AND AARON J. SILLETTO

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: CAPERTON, TAYLOR, AND THOMPSON, JUDGES.

THOMPSON, JUDGE: The appellant, Herbert VanArsdale II, appeals from an order of the Jefferson Circuit Court, granting summary judgment to appellees, John E. Lynch, Mary Lynch Toomy, Elizabeth Lynch, Michael B. Lynch, Jr., Matthew

M. Lynch, Sharon M. Lynch and Lynn M. Lynch in an action filed by appellees to recover the alleged balance due on a promissory note executed by VanArsdale and assigned by National City Bank to the appellees. VanArsdale argues summary judgment was erroneously granted because there remains a factual dispute concerning the amount owed and the standing of certain appellees as plaintiffs. He further argues attorney fees to Aaron J. Silletto should not have been awarded. We affirm.

On April 28, 1997, VanArsdale executed a note payable to the Estate of Roy E. Shaffer in the principal sum of \$225,000. The note was payable in 240 monthly installments of \$1,882 beginning on June 1, 1997, with a final installment of \$1,876.11. The note provided that in the event of default, VanArsdale would be responsible for attorney fees.

On March 21, 2001, VanArsdale, in his capacity as co-executor of the Roy E. Shaffer Estate, assigned the note to National City Bank of Kentucky as Trustee of the Roy E. Shaffer GST Non-Exempt Trust Under Agreement. On September 13, 2004, National City assigned and transferred the note to John E. Lynch (21% interest), Mary Lynch Toomy (29% interest), Elizabeth Lynch (29% interest), and Michael B. Lynch (21% interest). At that time, the note had a principal balance of \$180,156.76.

Michael B. Lynch died and his children, Michael B. Lynch, Jr., Matthew M. Lynch, Sharon M. Lynch and Frank M. Lynch, each inherited a

portion of his share of the note. After Frank M. Lynch died, his surviving spouse, Lynn M. Lynch, inherited his interest in the note.

The appellees filed a complaint on June 6, 2011, alleging VanArsdale, while serving as the co-executor of Roy E. Shaffer's estate, executed and delivered a note on April 28, 1997, promising to pay the estate \$225,000 over 20 years with interest at the rate of 8% per annum. Copies of the note and assignment were attached to the complaint. It was further alleged that beginning in February 2011, VanArsdale stopped making payments when due. Appellees sought judgment for all principal and interest owed under the note and costs and fees.

Discovery was conducted. In response to appellees' request for admissions, VanArsdale admitted making payments under the note to each of the appellees, including Elizabeth Lynch and Lynn M. Lynch, since September 1, 2010. VanArsdale further admitted he had not made certain payments when due beginning in early 2011.

Appellees moved for summary judgment arguing: (a) appellees had standing to enforce the note; (b) VanArsdale admitted to having breached the terms of the note; (c) the affidavit of appellees' retained certified public accountant calculated the amount of unpaid principal under the note to be \$118,126.27; (d) appellees were entitled to pre- and post-judgment interest of 8% per annum; and (e) appellees were entitled to attorney fees.

VanArsdale responded arguing it should be denied on the following grounds: (a) Lynn M. Lynch did not have standing because appellees did not show

she accepted the bequest of her late husband's share of the note; (b) Elizabeth Lynch did not have standing because the assignment was made to Elizabeth Lynch Haluska; (c) appellees attached copies of only two of their assignments of the note to their complaint but had not attached the assignments to the other five appellees; (d) the accountant's report and affidavit attached to the motion were insufficient to support summary judgment; and (e) VanArsdale should have an opportunity to take the deposition of appellees' accountant or obtain evidence in the form of an expert witness regarding the amount due on the note. VanArsdale attached his affidavit to his response, denying liability on the basis he believed the note and assignments were invalid and appellees' accountant's calculations as to the amounts owed under the note were erroneous. VanArsdale did not attach an accountant's or other expert's affidavit to his response or state the amount he believed owed.

After appellees filed a reply to VanArsdale's response, VanArsdale filed a motion to permit him to file a surreply opposing the motion for summary judgment. Appellees objected to the motion, arguing it merely repeated the same arguments contained in VanArsdale's initial response. Following a hearing, the court denied VanArsdale's motion to file a surreply and took the motion for summary judgment under submission.

An order granting summary judgment was granted to appellees on September 12, 2012. The court rejected VanArsdale's standing arguments stating:

The Defendant has not provided anything in the way of support for the assertion that Elizabeth Lynch and Elizabeth Lynch Haluska are not the same person. It is readily apparent that Ms. Lynch took on a married name in the interim. Similarly, Lynn M. Lynch is the sole beneficiary of Frank Lynch's estate. This is sufficient for the purpose of establishing her standing in this matter. Accordingly, the Plaintiffs have standing to pursue this action.

Regarding VanArsdale's argument that the accountant's report erroneously determined the amount owed under the note, the court pointed out VanArsdale had not rebutted the report submitted by appellees and denied VanArsdale's request for additional time for discovery. Concluding there was no genuine issue of material fact, it granted appellees' motion for summary judgment and awarded appellees \$118,126.27, plus pre- and post-judgment interest and reserved the issue of attorney fees pending submission of an affidavit of counsel. After counsel submitted an affidavit, the court entered an order awarding \$11,065.50 in attorney fees.

VanArsdale filed a motion to set aside the summary judgment, arguing the circuit court incorrectly ruled on the standing issues because there was no evidence Elizabeth Lynch assumed a married name, or whether Lynn M. Lynch renounced her status as a beneficiary under her late husband's will. Further, VanArsdale argued the accountant's report filed by appellees was inaccurate because it did not account for cancelled checks issued. The court denied the motion and this appeal followed.

Preliminary to addressing the issues as framed by VanArsdale, we observe there was no error in the trial court's denial of his motion to file a surreply. The surreply provided nothing additional that would have assisted the court in deciding the summary judgment motion.

VanArsdale argues the court should have denied appellees' motion for summary judgment because his affidavit, motion for summary judgment and notice-motion-order to permit filing of surreply created questions of fact. Alternatively, VanArsdale argues the court should have granted additional time for discovery on the accuracy of the accountant's computation or referred the case to the master commissioner.

Appellees counter there were no genuine issues of material fact precluding summary judgment. They assert VanArsdale's liability on the note was clearly established and VanArsdale failed to present evidence of any factual issue regarding the balance due. Appellees argue VanArsdale had ample time in the year after the complaint was filed to obtain his own accountant to calculate what he believed was the correct amount owed under the note and no additional time for discovery was warranted.

Our standard for reviewing a trial court's entry of summary judgment on appeal 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." *Scrifes v. Kraft*, 916 S.W.2d 779, 781 (Ky.App. 1996). Because summary judgments involve no fact-finding, we review the trial court's decision

de novo. 3D [Enterprises Contracting Corp. v. Louisville & Jefferson County Metro. Sewer Dist.](#), 174 S.W.3d 440, 445 (Ky. 2005).

We agree with appellees there is no genuine issue of material fact concerning VanArsdale's liability on the note. VanArsdale has not disputed he signed the note, it was a valid and enforceable negotiable instrument, or that he breached the note by failing to make payments when due. Because VanArsdale's liability on the note and its breach were established by undisputed facts, the only remaining issues were the timing of the breach and damages.

“It has long been recognized that a party opposing a properly supported summary judgment motion cannot defeat that motion without presenting at least some affirmative evidence demonstrating that there is a genuine issue of material fact requiring trial.” *Hubble v. Johnson*, 841 S.W.2d 169, 171 (Ky. 1992). “The hope or bare belief...that something will ‘turn up,’ cannot be made [the] basis for showing that a genuine issue as to a material fact exists.” *Neal v. Welker*, 426 S.W.2d 476, 479-480 (Ky. 1968).

At the time appellees filed their motion for summary judgment, this case had been pending for over one year during which the parties conducted discovery. In response to appellees' requests for admissions, VanArsdale admitted he made some payments under the note but not certain payments when due. Therefore, from its inception, a contested issue in this case was the amount due. As reasonably anticipated, to refute VanArsdale's assertion, appellees retained an expert to calculate the amount of unpaid principal and interest under the note and

submitted an accountant's report and affidavit in support of their motion for summary judgment.

In response, VanArsdale submitted an affidavit setting forth his legal theory the note and assignments were invalid and his belief the accountant's calculations regarding the amount owed were erroneous. He did not submit a supporting affidavit from an expert or state facts to contradict the appellees' accountant's calculations or the amount owed. VanArsdale's responsive affidavit was essentially a reiteration of his answer to the complaint. His affidavit based on his mere beliefs was insufficient to defeat appellees' motion for summary judgment.

Id.

VanArsdale's argument he should have been permitted additional time to conduct discovery is unavailing. It is a well established legal maxim summary judgment should not be entered "as a form of penalty for failure of the plaintiff to prove his case quickly enough." *Conley v. Hall*, 395 S.W.2d 575, 580 (Ky. 1965). Consequently, summary judgment is proper only after the opposing party is afforded ample opportunity to complete discovery yet fails to offer controverting evidence. *Suter v. Mazyck*, 226 S.W.3d 837, 841 (Ky.App. 2007). When a party challenges a summary judgment as premature, this Court must "consider whether the trial court gave the party opposing the motion an ample opportunity to respond and complete discovery before the court entered its ruling." *Blankenship v. Collier*, 302 S.W.3d 665, 668 (Ky. 2010). However, the trial court's determination sufficient time was given will not be disturbed absent an abuse of discretion. *Id.*

VanArsdale was given such an opportunity and should not be permitted to prolong this litigation with additional discovery.

If VanArsdale believed he could obtain evidence to refute appellees' accountant's calculations if granted additional time to obtain an expert, he was required to request a continuance at the summary judgment hearing to secure an accountant and submit a proper affidavit. As artfully stated in *Neal*, 426 S.W.2d at 479:

The curtain must fall at some time upon the right of a litigant to make a showing that a genuine issue as to a material fact does exist. If this were not so, there could never be a summary judgment since 'hope springs eternal in the human breast.'

VanArsdale argues the motion for summary judgment was improperly granted because factual issues remain regarding Elizabeth Lynch and Lynn M. Lynch standing to sue because neither were real parties in interest as required by Kentucky Rules of Civil Procedure (CR) 17.01. While acknowledging an assignment for "Elizabeth Lynch Haluska" accompanied the motion for summary judgment, VanArsdale asserts no explanation or evidence was provided that Elizabeth Lynch and Elizabeth Lynch Haluska are the same. Concerning Lynn M. Lynch, VanArsdale notes the complaint listed her as, "an individual and resident of the State of Connecticut and surviving spouse of Frank M. Lynch, who was the son of Michael B. Lynch," and although the record contains a copy of the assignments to Frank M. Lynch, it does not contain an assignment from his personal representative to Lynn M. Lynch or evidence Lynn M. Lynch was the real party in

interest. Despite that appellees included a copy of the will of Frank M. Lynch with a certificate reflecting its probate in Connecticut, VanArsdale argues the mere fact Lynn M. Lynch is the residuary sole beneficiary of Frank Lynch's will does not establish her standing to sue on the assigned note, or her status as a real party in interest.

Appellees point out that to prevail on the issue of standing, VanArsdale must establish none of the appellees had standing to maintain the action. *City of Beechwood Village v. Council & City of St. Matthews*, 574 S.W.2d 322, 324 (Ky.App. 1978). There is no argument or evidence that none of the appellees had standing: Clearly, they do. While VanArsdale argues a determination of proper standing to sue was required to determine the division of a judgment for damages among the various claimants, this is not so. The court's judgment was entered in favor of all appellees jointly. If the appellees disagree how to divide the proceeds, the issue may be addressed in a separate action. We conclude there was no error.

Finally, we reject VanArsdale's contention the award of attorney fees was improper. VanArsdale concedes the note provided for attorney fees in the event of default. Because we affirm the summary judgment, attorney fees were properly awarded. Kentucky Revised Statutes 411.195.

For the reasons stated, the summary judgment of the Jefferson Circuit Court is affirmed.

TAYLOR, JUDGE, CONCURS.

CAPERTON, JUDGE, DISSENTS.

BRIEFS FOR APPELLANT:

Walter L. Cato, Jr.
Louisville, Kentucky

BRIEF FOR APPELLEES:

Aaron J. Silletto
Prospect, Kentucky