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NOT TO BE PUBLISHED

**Commonwealth of Kentucky**

**Court of Appeals**

NO. 2011-CA-001056-MR

W. CURTIS SHAIN

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT  
HONORABLE JAMES M. SHAKE, JUDGE  
ACTION NO. 10-CI-001038

STEWART TITLE AND  
APEX TITLE, LLC

APPELLEES

AND

NO. 2011-CA-001406-MR

W. CURTIS SHAIN

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT  
HONORABLE JUDITH E. MCDONALD-BURKMAN, JUDGE  
ACTION NO. 08-CI-004432

PARK COMMUNITY FEDERAL CREDIT UNION  
AND CLARA MACKIN-FULKERSON

APPELLEES

OPINION

DISMISSING APPEAL NO. 2011-CA-001056-MR  
AND AFFIRMING APPEAL NO. 2011-CA-001406-MR

BEFORE: STUMBO, TAYLOR AND THOMPSON, JUDGES.

THOMPSON, JUDGE: In Appeal No. 2011-CA-001056-MR, W. Curtis Shain, *pro se*, appeals from the denial of his motion to set aside an order dismissing Stewart Title as a party. In Appeal No. 2011-CA-001406-MR, Shain appeals from an order granting summary judgment to Park Community Federal Credit Union (Park Credit Union).

APPEAL NO. 2011-CA-001056-MR

Shain filed a complaint against two parties, Apex Title, LLC, and Stewart Title. He alleged Apex Title was liable for errors in real estate closings it performed for him and Stewart Title was liable under title insurance Shain purchased for these properties. Stewart Title filed a motion to dismiss, claiming Shain was not a proper party to enforce the title insurance policies because the policies were issued to Capital Distribution Fund, LLC, and not Shain. The circuit court granted the motion to dismiss Stewart Title. Shain subsequently filed two motions to reconsider, both of which were denied. Shain appeals from the order denying his second motion to reconsider. We dismiss the appeal because Shain appealed from a non-final order.

An appeal is premature if it is not taken from a “final order adjudicating all the rights of all the parties in an action or proceeding, or a judgment made final under Rule 54.02.” CR 54.01. In the absence of a recitation of finality and a determination that “there is no just reason for delay,” an order that only dismisses

one party is interlocutory because the claims against the other party remain unresolved. CR 54.02(1); *Marr v. Falls City Stone Co.*, 329 S.W.2d 71, 71-72 (Ky. 1959).

While the order resolved the case as to Stewart Title, the case is still pending against Apex Title. Therefore, because the order did not state it was final and appealable, and there is no just reason for delay, it is interlocutory and cannot be appealed at this time.<sup>1</sup> CR 54.02(2). Accordingly, we dismiss this appeal.

APPEAL NO. 2011-CA-001406-MR

In December 2007, Shain and Clara Mackin-Fulkerson opened accounts at Park Credit Union for Spirit Productions, LLC, (Spirit) and Athletic Spirit Foundation, LLC, (Athletic). Shain was a signatory on these accounts.

Initially, the Spirit account did not contain any funds. On January 7, 2008, Shain deposited a check for \$67,890 into this account. The check was made payable to Mary Gribbons and drawn on National City Bank from Harrison Land Title Company – Escrow Account (Harrison Title). Park Credit Union provisionally credited Spirit for the amount of the deposit and Shain wrote checks on this account totaling \$5,034.99. He also purchased a \$10,000 cashier's check payable to Capital Distribution Fund.

Capital Distribution Fund had a bank account with Wilson & Muir Bank & Trust Company (Wilson Bank) and Shain was an authorized signatory on the

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<sup>1</sup> Neither the order granting the motion to dismiss nor either of the orders denying the motions to reconsider contained the required language of finality.

account. Capital Distribution Fund's account was \$30,000 overdrawn when Shain deposited the cashier's check into it.

On January 10, 2008, the Federal Reserve contacted Park Credit Union and informed it the Harrison Title check was being returned because it was written on a non-existent account. Park Credit Union attempted to stop payment on the four checks but they had cleared the previous day. Park Credit Union informed Wilson Bank it would not honor the cashier's check.

Wilson Bank filed a complaint against Park Credit Union alleging it violated provisions of the Uniform Commercial Code by initially warranting the cashier's check and then later changing its position. Wilson Bank filed a motion for summary judgment claiming it was entitled to collect on the cashier's check as a holder in due course. The circuit court agreed, granted summary judgment to Wilson Bank and awarded it \$10,000.

Park Credit Union filed a complaint against Athletic, Spirit, Shain and Mackin-Fulkerson for breach of contract and breach of the covenant of good faith and fair dealing claiming it was owed for the amount the account became overdrawn because of the four checks, the cashier's check and associated fees. The complaint contained additional claims against Shain for theft by deception and fraud. Park Credit Union sought both compensatory and punitive damages.

Park Credit Union filed a motion for summary judgment against Shain on its breach of contract claim arguing Shain had no defense to his indebtedness to Park Credit Union for the overdrawn account. Park Credit Union attached exhibits

containing Spirit's account application that Shain signed as an authorized signer indicating he was the CEO of Spirit. Park Credit Union's credit services manager, Melissa Stillwell, filed a supporting affidavit stating: (1) Shain was a signatory on the Spirit account opened with Park Credit Union; (2) Shain deposited a \$67,890 check to Gribbons from Harrison Title in the Spirit account; (3) Shain wrote four checks totaling \$5,034.99 and obtained the \$10,000 cashier's check from the Spirit account; (5) after the Harrison Title check was returned, the Spirit account was overdrawn by \$15,000; and (6) there remains an outstanding balance of \$15,740.94 on the Spirit account. Stillwell's affidavit was signed, notarized and dated.

However, the date only contained the month and the year, with the space for the day left blank: "on this \_\_\_ day of January, 2010."

Shain opposed the motion for summary judgment, arguing he had instructed the depositing teller not to make the funds available until the Harrison Title check cleared and he was entitled to rely on Park Credit Union's honoring of the Harrison Title check when he issued his checks and obtained the cashier's check. He also requested that Stillwell's affidavit be stricken because it was not properly dated.

The circuit court granted Park Credit Union's motion for summary judgment determining Park Credit Union was obligated to provisionally credit the Harrison Title check deposit to the Spirit account, but Park Credit Union had the right to charge back the Spirit account once the deposited check was returned unpaid. Accordingly, it awarded Park Credit Union \$15,740.94 in compensatory damages,

attorney fees and costs. The circuit court order contained the finality language: “This is a final and appealable order and there being no just cause for delay.”

Shain argues the circuit court erred by relying upon Stillwell’s affidavit which failed to comply with CR 43.13, Park Credit Union failed to establish the existence of the Spirit overdrawn checking account and there were genuine issues of material fact precluding summary judgment. This appeal is proper because the order granting summary judgment was a final adjudication of one claim, conclusively determined the rights of the parties as to that claim and contained the appropriate language of finality. CR 54.02(1); *Hale v. Deaton*, 528 S.W.2d 719, 722 (Ky. 1975).

We review Shain’s appeal from summary judgment to determine whether the circuit court correctly found there were no genuine issues as to any material fact and Park Credit Union was entitled to judgment as a matter of law. *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky.App. 1996); CR 56.03. Granting of a summary judgment motion “should only be used ‘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 and against the movant.’” *Steelvest, Inc. v. Scansteel Serv. Ctr., Inc.*, 807 S.W.2d 476, 483 (Ky. 1991) (quoting *Paintsville Hospital Co. v. Rose*, 683 S.W.2d 255, 256 (Ky. 1985)).

We determine the circuit court’s use of Stillwell’s affidavit to support the motion for summary judgment was appropriate. CR 43.13(2) requires that affidavits be signed, notarized and dated. Park Credit Union substantially

complied with these requirements. The omission of the day the affidavit was signed was a mere scrivener's error that did not affect the validity of the affidavit. The exact day the affidavit was signed was not important to interpreting the statements made in the affidavit. Therefore, its omission could not result in any prejudice to Shain.

Shain argues the attachments to the affidavit were insufficient to establish Shain's liability for the Spirit account. We disagree. The failure to attach appropriate account disclosures did not preclude the summary judgment in light of the attachments provided and Shain's answer admitting opening the accounts and some liability for the overdraft of the Spirit account.

Shain argues genuine issues of material fact precluded summary judgment. Shain argues Park Credit Union did not establish he perpetrated a fraud or breached the covenant of good faith and fair dealing. However, summary judgment was only granted based on breach of contract and other claims remain pending against Shain.

Shain argues Park Credit Union failed to prove the existence of a contract. He failed to raise this argument as a defense to liability or raise it below in his response to the motion for summary judgment. Additionally, the undisputed evidence before the circuit court established that a contract existed between Shain and Park Credit Union.

Shain argues he had a justifiable reliance that Park Credit Union had collected the funds from the Harrison Title check before he purchased the cashier's

check and, therefore, he is not liable for the \$10,000. We agree with the circuit court that any misunderstanding Shain had about why the funds were available at the time he obtained the cashier's check did not preclude his liability for the shortfall in the account. While a bank may provisionally credit its customer for a check, it is merely acting as an agent to the customer in attempting to collect on it regardless of whether credit given for the item is withdrawn. KRS 355.4-201(1). The credit given for such a check remains provisional "even though credit given for the item is subject to immediate withdrawal as of right or is in fact withdrawn[.]" *Id.*

(1) If a collecting bank has made provisional settlement with its customer for an item and fails by reason of dishonor . . . to receive settlement for the item which is or becomes final, the bank may revoke the settlement given by it, charge back the amount of any credit given for the item to its customer's account, or obtain refund from its customer[.]

. . .

(4) The right to charge back is not affected by:

(a) Previous use of the credit given for the item[.]

KRS 355.4-214. "A bank may charge against the account of a customer an item that is properly payable from that account even though the charge creates an overdraft." KRS 355.4-401(1). Therefore, Shain had the right to write the checks and obtain the cashier's check from the Spirit account based on the provisional credit granted to the account before the Harrison Title check finally cleared but Park Credit Union had the right to collect the amount of the overdraft that resulted



when the Harrison Title check was dishonored. Even if Shain was acting in good faith in obtaining the cashier's check, this does not preclude his liability. As no factual issues remain, summary judgment was appropriately granted to Park Credit Union for breach of contract.

Accordingly, we dismiss Appeal No. 2011-CA-001056-MR and affirm Appeal No. 2011-CA-001406-MR.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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TITLE:

Allison Brown Vermilion  
Cornelius E. Coryell, II  
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BRIEF FOR APPELLEE, PARK  
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