

Commonwealth of Kentucky
Court of Appeals

NO. 2014-CA-000644-MR

PRESTON L. URSINI

APPELLANT

v. APPEAL FROM MCCRACKEN CIRCUIT COURT
HONORABLE CRAIG Z. CLYMER, JUDGE
ACTION NO. 13-CI-00373

FIRST FINANCIAL BANK, USA

APPELLEE

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: COMBS, JONES, AND MAZE, JUDGES.

MAZE, JUDGE: Preston Ursini appeals the McCracken Circuit Court's order denying his motion to compel and awarding summary judgment in favor of First Financial Bank, USA (hereinafter "First Financial"). As no genuine issues of material fact remained regarding the sole contested issue, we affirm.

Background

On April 15, 2013, First Financial filed suit against Ursini to recover debt which Ursini accrued through his use of a credit card First Financial issued to him under the terms of an application and agreement the parties executed in 2005. First Financial sought damages in the amount of the underlying debt, \$6,301.73, as well as interest and costs. Following First Financial's amended complaint of December 19, 2013, Ursini filed a response and counterclaim. In this filing, Ursini did not dispute the debt; however, he alleged that First Financial had violated the Fair Debt Collection Practices Act, 15 U.S.C. §1692, *et seq.* (hereinafter "the Act") by calling him repeatedly regarding the debt. Ursini also alleged that First Financial had changed the terms of its agreement with him several times, making his "maintenance" of the account impossible. In addition to his Response and Counterclaim, Ursini requested admissions and production of documents from First Financial. First Financial responded to Ursini's request for admissions but objected to his request for documents on various bases.

On February 4, 2014, First Financial filed a motion for summary judgment. In support of its motion and memorandum, First Financial attached documentation of Ursini's application and agreement with First Financial as well as his payment and billing history and the affidavit of a collections attorney for First Financial attesting to the debt. Ursini responded by reiterating the allegations he leveled against First Financial in his counterclaim and by moving the trial court to compel First Financial's response to his requests for admissions and documents.

After a brief reply from First Financial, the trial court entered an order overruling Ursini's motion to compel and granting summary judgment in favor of First Financial. Specifically, the trial court held that Ursini “failed to produce any affirmative evidence disputing the unpaid balance....” Regarding First Financial’s alleged violation of the Act, the trial court held as a matter of law that First Financial was a “creditor” and not a “debt collector” as defined in the statute; and therefore, it was not subject to the provision Ursini cited. Accordingly, the trial court ruled in favor of First Financial and awarded it the debt owed, interest, and costs. Ursini now appeals.

Standard of Review

Ursini’s arguments on appeal address themselves exclusively to the matter of summary judgment. As summary judgment involves no fact finding, this Court's review is *de novo*, in the sense that we owe no deference to the conclusions of the trial court. *Blevins v. Moran*, 12 S.W.3d 698, 700 (Ky. App. 2000).

Analysis

As he did before the trial court, Ursini concedes his liability for the debt which was the subject of First Financial’s Complaint. Therefore, that no genuine issues of fact exist concerning Ursini’s liability for the debt is both uncontested and self-evident. Instead, Ursini argues on appeal that genuine issues of fact remained regarding First Financial’s alleged violation of the Act. However, the Act itself and the record in this case show this argument to be unpersuasive.

The Act forbids a “debt collector” from communicating with a consumer in connection with collection of a debt under certain circumstances and subject to some exceptions. Ursini alleges that First Financial knowingly called him at his place of employment in direct contravention of 15 U.S.C. § 1692c(a)(3). However, Section 1692a(6) defines a “debt collector” as

any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another. Notwithstanding the exclusion provided by clause (F) of the last sentence of this paragraph, the term includes any creditor who, in the process of collecting his own debts, uses any name other than his own which would indicate that a third person is collecting or attempting to collect such debts. ... The term does not include--

(A) any officer or employee of a creditor while, in the name of the creditor, collecting debts for such creditor....

As even Ursini concedes on appeal, the statute expressly excludes creditors like First Financial from “debt collector” status.

“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.” *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 480 (Ky. 1991). By rule, summary judgment is appropriate only “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.” CR¹ 56.03. Put more simply, for summary judgment to be proper, the movant must show that the adverse party cannot prevail under any circumstances. *Paintsville Hosp. Co. v. Rose*, 683 S.W.2d 255, 256 (Ky. 1985). First Financial accomplished just that.

The trial court correctly concluded that Ursini’s argument regarding the Act failed as a matter of law and that summary judgment on his counterclaim was therefore appropriate. Notwithstanding Ursini’s allegation, the Act did not forbid such a communication.

Furthermore, it is an unchallenged legal requirement that a party opposing summary judgment “cannot rely on the hope that the trier of fact will disbelieve the movant’s denial of a disputed fact, but must present affirmative evidence in order to defeat a properly supported motion for summary judgment.” *O’Bryan v. Cave*, 202 S.W.3d 585, 587 (Ky. 2006), *quoting Steelvest*, 807 S.W.2d at 481 (internal citations and quotations omitted). Ursini’s response to First Financial’s motion for summary judgment was a mere reiteration of the arguments contained in his counterclaim. This was insufficient to defeat First Financial’s properly supported motion.

Conclusion

No genuine issue of material fact remained regarding the subject of First Financial’s initial complaint or Ursini’s counterclaim. Therefore, the

¹ Kentucky Rules of Civil Procedure.

McCracken Circuit Court's order overruling the motion to compel and granting summary judgment is affirmed.

ALL CONCUR.

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