

Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-000138-MR

SHARON FOSTER BURDICK

APPELLANT

v. APPEAL FROM ANDERSON CIRCUIT COURT
HONORABLE CHARLES R. HICKMAN, JUDGE
ACTION NO. 14-CI-00125

CAPITAL ONE, N.A.

APPELLEE

OPINION
AFFIRMING

** ** * ** * **

BEFORE: KRAMER, CHIEF JUDGE; DIXON AND TAYLOR, JUDGES.

KRAMER, CHIEF JUDGE: Sharon Foster Burdick appeals from the Anderson Circuit Court's order granting summary judgment in favor of Capital One, N.A.

("Capital One"). Finding no error, we affirm.

Capital One brought the underlying first-party debt collection action on April 14, 2014, against Burdick alleging that a credit card account it had issued

to her was in default with an outstanding balance of \$10,387.03. Burdick filed a *pro se* answer denying Capital One's allegations; additionally, as one of several "affirmative defenses" she asserted Capital One had violated the Fair Debt Collection Practices Act ("FDCPA"), 15 United States Code (U.S.C.) § 1692, *et seq.*, by engaging in harassing conduct over the course of its pre-litigation attempts at collection.

Following discovery, Capital One filed a motion for summary judgment. In support, Capital One provided its "Customer Agreement" (with a copyright date of 2010) stipulating the contract between itself and its cardholders. It provided billing statements associated with the credit card from October 26, 2011, through November 25, 2013, detailing the card number, interest rates, use of the card, the monthly balances, and the payments made towards the balance each month. Collectively, these statements illustrate the progression of the outstanding balance associated with this account, which was reflected in final statement as \$10,387.03. The roughly two years of billing statements were also addressed to "Sharon Foster Burdick, 1663 Glensboro Rd., Lawrenceburg, KY 40342-9503" (the same address where Burdick was served with process in this matter, and the same address Burdick has listed on all of her pleadings and briefs); and referenced an account in the name of "Sharon Foster Burdick."

Capital One also provided the affidavit of its record keeper and designated representative, Diane Trittipoe, explaining Burdick's account had originated as a Chase Bank account; Chase Bank had subsequently sold,

transferred, and assigned it to Capital One on or about August 31, 2010, at a time when Burdick's account remained in good standing; Burdick's account became a Capital One account at that point; the Customer Agreement and various billing statements referenced above applied to Burdick's Capital One credit card; and that at the time Capital One filed its action against Burdick, Burdick's account was, as the billing statements reflected, in default of the terms of the Customer Agreement with an outstanding balance of \$10,387.03.

In response, Burdick argued that what Capital One had presented was insufficient for purposes of summary judgment because it did not demonstrate she had signed a contract with Capital One. Further, she argued the contract that actually applied to her account had not been produced by Capital One, and that it differed because, from her recollection, it had more favorable terms and a clause that allowed her to elect binding arbitration in lieu of circuit court proceedings. She concluded by stating "I am hereby invoking that right and requesting transfer of this matter to private federal arbitration." However, Burdick did not produce any evidence in support of her response to Capital One's motion, much less a copy of the other contract she believed applied to her account.

After considering Capital One's motion and Burdick's response, the circuit court granted Capital One summary judgment; its order included the finality language of Kentucky Civil Rule (CR) 54.02(1).

Thereafter, Burdick timely moved to set aside the judgment on the basis of arbitration. Attached to her motion was a document entitled "Customer

Agreement” (with a copyright date of 2005), which purported to stipulate the contract between Capital One and its cardholders, and appeared to be in much the same format as the Customer Agreement Capital One had produced prior to judgment—the key difference being that it included a clause allowing either Capital One or its cardholders to elect binding arbitration in lieu of circuit court proceedings. In her motion, Burdick explained this was the “Agreement used by Plaintiff before 2010,” and it therefore demonstrated her right to arbitrate.

Among its several arguments in response, however, Capital One pointed out that even if the document Burdick produced had stipulated its contract with its cardholders before 2010, Burdick was not its cardholder before 2010; Burdick became its cardholder *during* 2010. Thus, what Burdick had produced did not demonstrate Burdick had a right to arbitrate this dispute, much less a basis for setting aside the judgment. Subsequently, the circuit court overruled Burdick’s motion. This appeal followed.

Summary judgment shall be granted 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.” CR 56.03. The trial court must view the record “in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor.” *Steelvest, Inc. v. Scansteel Serv. Ctr., Inc.*, 807 S.W.2d 476, 480 (Ky. 1991) (citations omitted). 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.” *Id.* at 482 (citations omitted).

Our standard of review 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.” *Lewis v. B & R Corp.*, 56 S.W.3d 432, 436 (Ky. App. 2001) (citations omitted). Because no factual issues are involved and only legal issues are before the court on a motion for summary judgment, our review is *de novo*. *Hallahan v. Courier–Journal*, 138 S.W.3d 699, 705 (Ky. App. 2004).

On appeal, Burdick presents three reasons why, in her view, the circuit court erred in granting summary judgment in favor of Capital One. First, she argues Capital One failed to adduce sufficient evidence establishing its debt collection claim. In this vein, she primarily focuses upon the fact that Capital One failed to produce a contract with her signature on it demonstrating she agreed to the terms of the Customer Agreement Capital One produced with its motion for summary judgment.

To prevail on a claim for debt collection, the creditor must demonstrate ownership of the alleged debt; documentation detailing the amounts of principal and amount owed; and evidence that the alleged debtor is the person responsible for the debt. *Bruner v. Discover Bank*, 360 S.W.3d 774, 778 (Ky. App. 2012). The evidence Capital One produced, as discussed above and properly

authenticated through the affidavit of Capital One's representative and record keeper, satisfied these burdens. And, although the cardholder agreement is not signed by Burdick, it did not need to be signed under the circumstances. These types of agreements are exempt from the statute of frauds and take effect upon the cardholder's activation and use of the credit card. *See* Kentucky Revised Statute (KRS) 371.010(9); KRS 371.300. Capital One's evidence supports Burdick activated and used the credit card it issued.

Next, Burdick argues summary judgment should have been set aside because she had a right to arbitrate this dispute.

As an aside, the right to dismissal on the grounds of arbitration is an affirmative defense. *See* CR 8.03. In other words, it is a defense that generally must be asserted in a responsive pleading. CR 12.02. It was also Burdick's obligation to produce evidence in support. *See Ping v. Beverly Enterprises, Inc.*, 376 S.W.3d 581, 590 (Ky. 2012) (“[A] party seeking to compel arbitration has the initial burden of establishing the existence of a valid agreement to arbitrate.”) Here, the first time Burdick asserted this affirmative defense was in her response to Capital One's motion for summary judgment; she never sought leave to amend her answer to include it. That alone would have entitled the circuit court to disregard Burdick's arbitration defense as waived. *Commonwealth Dept. of Highways v. Chinn*, 350 S.W.2d 622, 623 (Ky. 1961); *Independent Order of Foresters v. Chauvin*, 175 S.W.3d 610, 614 (Ky. 2005).

However, the circuit court's apparent¹ reason for denying Burdick's request for arbitration—a reason agreed upon by both of the parties in their respective pleadings and motions below²—was that Burdick failed to produce evidence supporting she had a right to arbitrate. This conclusion was correct. The agreement Burdick produced pre-dated 2010; Burdick contended in her pleadings that it applied prior to 2010; and, Burdick makes no contention that she ever had a Capital One credit card prior to 2010. The only evidence of what Capital One's agreement with its cardholders was on 2010 is reflected in the Customer Agreement Capital One produced with its motion for summary judgment, and the Customer Agreement it produced provided no right of arbitration.

Lastly, Burdick argues summary judgment was improper because, in her view, Capital One violated the FDCPA by engaging in harassing conduct over the course of its pre-litigation attempts at collection. Burdick cites her own unsupported allegations to this effect, rather than any evidence of record.

This is a point Burdick failed to raise in either her response to Capital One's summary judgment motion or her prehearing statement before this Court.

Ultimately, however, it is irrelevant whether Burdick could prove her allegations

¹ The circuit court did not include any explanation in its order regarding why it had granted summary judgment in favor of Capital One, despite Burdick's request for arbitration. Ordinarily, a circuit court must include findings of fact and conclusions of law with its order granting or denying a request for arbitration. *Kindred Nursing Centers Ltd. Partnership v. Sloan*, 329 S.W.3d 347 (Ky. App. 2010). Findings of fact and conclusions of law are unnecessary, however, “[i]n cases where the record is so clear that the court does not need the aid of findings[.]” *Clark Mechanical Contractors, Inc. v. KST Equipment Co.*, 514 S.W.2d 680, 682 (Ky. 1974); *see also Perry v. McLemore*, 414 S.W.2d 141, 142 (Ky. 1967).

² According to the parties, this was the reason given from the bench by the circuit court following oral arguments on Capital One's motion. The recording of the oral arguments is not of record.

regarding Capital One's conduct relative to the FDCPA, or whether she even preserved this as an issue for our review. The actions Burdick claims Capital One took in violation of the FDCPA have nothing to do with the issue of whether Burdick actually defaulted on her obligation to pay Capital One the amount alleged; they do not constitute a defense to the substance of the underlying collection action that was the subject of the entry of summary judgment; and thus, they offer no basis for invalidating the entry of summary judgment. In other words, despite Burdick's mischaracterization of it in her answer, any violation of the FDCPA on the part of Capital One would be the basis for a *counterclaim*, not a defense to its collection action. *See Bauman v. Bank of America, N.A.*, 808 F.3d 1097, 1102-03 (6th Cir. 2015) (explaining a claim on an underlying debt is a permissive counterclaim to a FDCPA action, and vice-versa).

Whether Burdick properly asserted an FDCPA counterclaim is beyond the scope of this opinion. Suffice it to say that even if she did, the circuit court's inclusion of the finality language of CR 54.02(1) permitted the circuit court to enter a final and appealable judgment in favor of Capital One without making a ruling on it; nothing of record reflects the circuit court made any ruling on it; thus, we have no reason to discuss the merits of such a claim.

In short, Burdick has not demonstrated the Anderson Circuit Court erred in granting summary judgment in favor of Capital One. We therefore AFFIRM.

DIXON, JUDGE, CONCURS.

TAYLOR, JUDGE, DISSENTS.

BRIEF FOR APPELLANT:

Sharon Foster Burdick, *pro se*
Lawrenceburg, Kentucky

BRIEF FOR APPELLEE:

James T. Hart
Cincinnati, Ohio