

RENDERED: May 1, 1998; 2:00 p.m.
NOT TO BE PUBLISHED

NO. 96-CA-002864-MR

WORLD OMNI FINANCIAL CORPORATION

APPELLANT

V. APPEAL FROM HART CIRCUIT COURT
HONORABLE LARRY RAIKES, JUDGE
CIVIL ACTION NO. 95-CI-000082

TIMOTHY S. TAPSCOTT

APPELLEE

OPINION

AFFIRMING

** ** * * * * *

BEFORE: EMBERTON, HUDDLESTON and JOHNSON, Judges.

HUDDLESTON, JUDGE. World Omni Financial Corporation appeals from an order directing it to release its lien on a 1994 Mazda pickup truck owned by Timothy S. Tapscott. In April 1995, Omni sued Tapscott to collect on a delinquent account which resulted from Tapscott's purchase of the pickup truck and to enforce its lien against the vehicle. After answering Omni's complaint, Tapscott entered the United States Marine Corps. Thereafter, his mother represented his interests in this action.

On August 12, 1996, Omni moved the circuit court to dismiss its complaint. On August 20, 1996, the court dismissed the complaint, but did so "with prejudice." Within ten days following

entry of the dismissal order, Tapscott moved the court, presumably pursuant to Ky. R. Civ. Proc. (CR) 59.05, to order Omni to release the lien covering his vehicle. When Omni failed to appear for the September 17, 1996, hearing scheduled to consider Tapscott's motion,¹ the court ordered Omni to release "all liens and blemishes" on the automobile. A motion to reconsider filed by Omni on September 30, 1996, was denied by the court. This appeal followed.

Ky. R. Civ. Proc. (CR) 41.01(2) addresses the voluntary dismissal of actions. It provides that a dismissal is without prejudice unless otherwise specified. The Supreme Court has made it clear that the voluntary dismissal rule, CR 41.01(2), "does not contemplate that the trial judge may elect to transform a voluntary dismissal into an involuntary dismissal on the merits, i.e., with prejudice." Louisville Label, Inc. v. Hildesheim, Ky., 843 S.W.2d 321, 325 (1992). When confronted with a plaintiff's voluntary motion to dismiss, a trial judge has the option to deny the motion or to impose conditions such as the payment of costs and attorney's fees if the action is refiled, but the court has no authority to select dismissal with prejudice as an alternative mode of adjudication. Id. As the Supreme Court has elsewhere noted, "one who wishes to preserve the viability of a dismissed claim should see that the proper notation is affixed by the trial court or seek appellate relief." Commonwealth v. Hicks, Ky., 869 S.W.2d 35, 38

¹ Omni later filed the affidavit of its attorney, Lisa A. Herndon, who stated that she had not appeared because she received information from the Hart Circuit Court Clerk's office that a hearing to consider Tapscott's motion would not be held.

(1994). Omni did not seek amendment of the order dismissing this action with prejudice, nor has it appealed the order. The only issue it raises on appeal is whether the trial court exceeded its authority when it implicitly held that the dismissal "with prejudice" operated as an adjudication on the merits thus entitling Tapscott to an order directing Omni to release its lien.

A "judgment on the merits" is "one which determines the rights and liabilities of the parties based on the ultimate fact as disclosed by the pleadings or issues presented for trial." Black's Law Dictionary 844 (6th ed. 1990).

When this action was dismissed with prejudice, Omni lost its right to collect against Tapscott and its right to enforce its lien. The dismissal with prejudice left Omni without recourse; "subsequent litigation was thereby barred." Commonwealth v. Hicks, supra at 38. Thus, the circuit court properly amended the order of dismissal to require Omni to release its lien.

The order from which this appeal is prosecuted is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

Timothy S. Tapscott, Pro se
Horse Cave, Kentucky