RENDERED: May 29, 1998; 2:00 p.m.
NOT TO BE PUBLISHED

96-CA-3263-MR

BOB BARNES and CFW, INC. — APPELLANTS

v.

APPEAL FROM WARREN CIRCUIT COURT
HONORABLE THOMAS R. LEWIS, JUDGE
ACTION NO. 95-CI-0499

JIMMY MORGAN and RON STUDLE — APPELLEES

OPINION

REVERSING AND REMANDING

* *

BEFORE: BUCKINGHAM, KNOX, and MILLER, Judges.

BUCKINGHAM, JUDGE. Appellants Bob Barnes and CFW, Inc., d/b/a The Insurance Mart, appeal from a summary judgment entered against them by the Warren Circuit Court. For the reasons set forth hereinafter, we reverse and remand for trial.

Appellees Jimmy Morgan (Morgan) and Ron Studle (Studle) were formerly employed by The Insurance Mart as insurance agents. Their employment was terminated in early 1995, after which they filed a complaint in the Warren Circuit Court against Barnes and CFW. The complaint alleged that Barnes and CFW owed Morgan and Studle a sum in excess of $20,000 for past-due commissions. Barnes and CFW denied that commissions were owed and

counterclaimed for breach of contract for alleged solicitation of CFW clients and for violation of the exclusive agent clause of their contract with CFW.

A bench trial was held on September 11, 1995; however, the trial judge halted the trial before its conclusion and directed the parties to attempt to settle the case. Approximately one year later, Morgan and Studle moved the court to redocket the case and also filed a motion for summary judgment claiming that they were entitled to summary judgment because "due to the lack of participation of the Defendant and/or his counsel the Plaintiffs are entitled to the relief sought in their complaint." The certificate of service on the summary judgment motion stated that it was served by placing it in the mail on October 7, 1996, and the notice on the motion stated that it would be heard by the court on October 16, 1996, at 9:00 a.m. The motion did not contain any supporting affidavits or other supporting material or information and cited no grounds for granting the motion other than the alleged lack of participation by Barnes and CFW or their counsel. On the day before the hearing on the summary judgment motion, counsel for Barnes and CFW faxed their written response to the motion to the circuit clerk for filing and to counsel for Morgan and Studle.

A hearing was held on the motions of Morgan and Studle on October 16, 1996, as scheduled. Morgan and Studle and their attorney were present at the hearing, as was Barnes. However, counsel for Barnes and CFW did not appear at the hearing. The

trial judge considered statements made by the attorney for Morgan and Studle and by Barnes before stating that he would award summary judgment in favor of Morgan and Studle. No affidavit or supporting material was offered to prove the amount owed, no mention was made by the trial court or anyone else concerning the exact amount to be awarded, and the trial judge directed counsel for Morgan and Studle to prepare a summary judgment for his signature. The trial judge did state that the amount of the judgment would be that claimed by Morgan and Studle and that he expected that the summary judgment would prompt Barnes and CFW to present their figures to him in a later motion to set the judgment aside.

On October 28, 1996, the trial court entered judgment in favor of Morgan and Studle and against Barnes and CFW in the amount of $12,729.26 plus interest and court costs. Although the order and judgment made no mention of the counterclaim of Barnes and CFW against Morgan and Studle, it did state that "this is a final and appealable order . . . and there is no just cause for delay." Thereafter, Barnes and CFW filed a motion to alter or amend the judgment which the trial court refused to hear on the ground that it was not timely filed. This appeal by Barnes and CFW followed.

Barnes and CFW first argue that the summary judgment should be set aside because insufficient notice of its hearing was given. Civil Rule (CR) 56.03 provides in relevant part that "[t]he motion [for summary judgment] shall be served at least 10

days before the time fixed for the hearing." The motion was clearly not served at least ten days prior to the hearing in this case. However, "the ten-day requirement of CR 56.03 may be waived absent a showing of prejudice." Equitable Coal Sales, Inc. v. Duncan Machinery Movers, Inc., Ky. App., 649 S.W.2d 415, 416 (1983). Counsel for Barnes and CFW was aware of the hearing on the motion and even filed a response to it on the day before. Barnes was present at the hearing, and he made no objection to the hearing going forward. Furthermore, the response filed by counsel for Barnes and CFW made no objection to the hearing being held.

Counsel for Barnes and CFW states in their brief that she could not be present due to the illness of her mother who was hospitalized in Louisville. Counsel also states that the court was advised of this prior to the hearing and that a telephone number where counsel could be reached was left with the trial judge's secretary. Counsel further argues that "[i]t was agreed that a telephonic hearing would be conducted, as had been previous hearings." Other than counsel's bare allegations in the brief, we find nothing in the record to substantiate her claim that she was with her ill mother in Louisville, that a message was left with the judge's secretary, or that there was an agreement that a telephonic conference would be conducted on the motion. Furthermore, relief due to insufficient notice was not raised as a ground in support of the motion to alter or amend judgment.

In short, the record indicates that counsel for Barnes and CFW voluntarily failed to appear for the argument of the summary judgment motion made by Morgan and Studle. No continuance was requested, and no objection was made by anyone concerning the ten-day requirement of CR 56.03. Barnes and CFW waived the ten-day requirement of CR 56.03, and there is no showing that they were prejudiced by the motion being heard when it was. See Equitable Coal, supra.

Barnes and CFW also complain that the trial court failed to address their counterclaim. This statement is made in the brief without further elaboration and without the citation of any legal authority. We assume that Barnes and CFW intend to argue that the judgment was not final and appealable since it did not dispose of the counterclaim. CR 54.02(1) provides in relevant part:

> When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may grant a final judgment upon one or more but less than all of the claims or parties only upon a determination that there is no just reason for delay. The judgment shall recite such determination and shall recite that the judgment is final.

The summary judgment in this case finally adjudicated the claim of Morgan and Studle against Barnes and CFW and contained the necessary recitals pursuant to the rule. The judgment was, therefore, final and appealable.

The argument by Barnes and CFW that summary judgment should not have been granted since there were genuine issues of material fact has merit. CR 56.03 provides in relevant part:

> The judgment sought shall be rendered forthwith 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.

Also, "[t]he standard of review on appeal of a summary judgment 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." Scifres v. Kraft, Ky. App., 916 S.W.2d 779, 781 (1996).

The only ground for summary judgment stated by Morgan and Studle in their motion was "the lack of participation of the Defendant and/or his counsel . . . ." The motion does not even allege that there were no genuine issues of material fact nor does it contain any information as to the amount owed, if any. Furthermore, at all phases of the proceedings, Barnes and CFW denied owing the commissions.

In response to the arguments raised by Barnes and CFW in their brief, Morgan and Studle contend that Barnes and CFW "ignored the court's requests to produce evidence of the amount of commissions owed" and that "[w]here the Defendants' action show [sic] a calculated and unnecessary lack of cooperation with the Trial Court process, the Trial Court has the discretion to

grant Summary Judgment against the non-conforming party . . . ." Morgan and Studle cite no authority, nor are we aware of any, for their argument that a summary judgment may be granted due to the "lack of participation" or "lack of cooperation" of the opposing party.

More importantly, Morgan and Studle do not cite to anything in the record which would support their argument that there is no genuine issue of material fact concerning the amount owed being $12,729.26. Their brief makes no reference to any admission, any deposition testimony, any exhibit, any interrogatory response, any affidavit, or anything else that would indicate that the aforementioned amount is clearly owed and that there is no issue in that regard. They merely state that they examined the records of the business and that "by their calculations, found that they were owed $12,729.26."

[T]he movant must convince the court, by the evidence of record, of the nonexistence of an issue of material fact." Steelvest, Inc. v. Scansteel Service Center, Inc., Ky., 807 S.W.2d 476, 482 (1991). Since there were genuine issues of material fact concerning whether commissions were owed and, if so, in what amount, the trial court erroneously awarded summary judgment to Morgan and Studle. Scifres, supra.

The judgment of the Warren Circuit Court is reversed, and the case is remanded for trial.

ALL CONCUR.

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