RENDERED: November 13, 1998; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

Nos. 1997-CA-000319-MR and 1997-CA-000880-MR

J. GREGG CLENDENIN, JR. APPELLANT

v. APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE WILLIAM W. TRUDE, JR., SPECIAL JUDGE
ACTION NO. 94-CI-000125

DORIS C. EDWARDS APPELLEE

OPINION
AFFIRMING

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BEFORE: BUCKINGHAM, KNOX, and SCHRODER, Judges.

BUCKINGHAM, JUDGE. J. Gregg Clendenin, Jr. (Clendenin), appeals pro se from an order of the Franklin Circuit Court granting summary judgment to Doris C. Edwards (Edwards). Clendenin also appeals from an order of the Franklin Circuit Court denying his motion to vacate the summary judgment order. The two appeals have been consolidated.

Edwards filed a complaint in the trial court against Clendenin in 1994 seeking to recover money which she had loaned to him. The loan was represented by a promissory note signed by Clendenin in June 1993 in the amount of $48,034.72. Edwards alleged that Clendenin had defaulted in making the payments set forth in the note. In his answer to Edwards' complaint, Clendenin admitted that he had signed the June 1993 promissory note, but he claimed as a defense that he was under duress when he signed it.[1]

Edwards' initial motion for summary judgment was filed in July 1994. That motion was never heard by the trial court, although it was scheduled and rescheduled several times. In November 1996, Edwards filed a renewed motion for summary judgment which contained an affidavit outlining the particulars of Clendenin's alleged default on the note and which stated that Clendenin had failed to object or answer a request for admissions served on him by Edwards within the thirty-day window provided in CR 36.01(2).[2] This renewed motion for summary judgment stated in

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[1] Clendenin also filed a counterclaim alleging outrageous conduct by Edwards and alleging money due for professional services rendered in an unspecified amount. The summary judgment order did not address the counterclaim, and it is not subject to this appeal. Although the summary judgment order did not dispose of "all the rights of all the parties" (see CR 54.01), the judgment was nonetheless a final judgment due to the finality language included therein. See CR 54.02(1).

[2] CR 36.01(2) provides in pertinent part that "[e]ach matter of which an admission is requested shall be separately set forth. The matter is admitted unless, within 30 days after service of the request, . . . the party to whom the request is directed

(continued...)

its certificate of service that it was mailed to Clendenin on November 6, 1996, and that it would be heard by the court on December 6, 1996.

The renewed motion was apparently not heard on December 6, 1996, because the next document in the record is a renotice of the motion filed by Edwards. That renotice states that it was mailed on December 6, 1996, and that the motion would be heard on December 13, 1996. Clendenin filed a response to the renewed motion for summary judgment on December 13, 1996. That response reiterates his earlier defense (duress) and further alleges that he agreed to answer the request for admissions "provided the Plaintiff [Edwards] appear at a scheduled deposition, which she has failed or refused to do for almost two (2) years." Clendenin's response to the motion did not contain a statement either denying that he had failed to answer or objecting to the request for admissions.

The renewed motion for summary judgment was submitted to the trial court for a decision on December 13, 1996. In January 1997, the trial court entered an order granting Edwards' motion. The order granting summary judgment explicitly stated that the trial court had considered "the Requests for Admission to which the defendant [Clendenin] failed to respond . . . ."

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[2](...continued)
serves upon the party requesting the admission a written answer or objection . . . ."

Clendenin now appeals from that order and from the order denying his motion to vacate the summary judgment.

Clendenin's first argument is that the trial court erred when it deemed Edwards' request for admissions to have been admitted because he [Clendenin] objected to the request in writing and served a signed objection on Edwards within thirty days of receipt of the request. The record does not contain any response made by Clendenin to Edwards' request for admissions, however. Clendenin claims that his written objection to the request for admissions was timely filed and stated as its grounds that Edwards had not given her deposition.

CR 5.06(1) provides that requests for admission do not have to be filed with the court. Although the rule does not specifically provide that responses to those requests would also be exempt, we will assume for the sake of argument that the responses are also exempt. However, CR 5.06(2) requires that any document exempted from the filing requirement of CR 5.06(1) "shall" be filed with the court if it is "to be used at trial or is necessary to a pre-trial motion . . . ." Thus, Clendenin's response should have been filed in the court record. We do not believe that the record supports Clendenin's argument that he complied with CR 36.01(2) by serving on Edwards a written objection to the request for admission.[3]

[3] Edwards acknowledges that she received a letter from Clendenin stating, among other things, that he thought it fair and reasonable for Edwards' deposition to be taken prior to his (continued...)

Clendenin's second argument is that the trial court erred because there were material issues of fact remaining to be resolved, even if Edwards' requests for admission were deemed admitted. Clendenin does not, however, state what he perceives those issues to be.

In responding to Edwards' summary judgment motion, Clendenin filed a supporting affidavit which stated:

> The date the note was signed, the Affiant was under great and disabling distress due to telephone harassment of the Affiant's wife by the Plaintiff, and other factors. . . . The Plaintiff's harassment put the Affiant's wife in fear of the safety of herself, her children, and the Affiant. . . . But for the duress, the Affiant would not have signed the note.

It is generally true that an agreement obtained by duress is invalid. See 25 Am. Jur. 2d Duress and Undue Influence § 21 at 534 (1996). However, Clendenin's allegation of duress due to "other factors" is insufficient to overcome Edwards' summary judgment motion, as general allegations of duress are insufficient. See 25 Am. Jur. 2d, supra, § 26 at 540-41.

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[3](...continued)
responding to further discovery. We question whether such a broad response by Clendenin would constitute an objection under CR 36.01(2), and we resolve this issue in Edwards' favor, as Clendenin did not make a copy of the letter a part of the record for our review. Also, we have no transcript or tape of the hearings on the summary judgment motion before the trial court, and we are unaware of the specific facts upon which the trial court relied in determining that Clendenin failed to respond to the request for admission. Thus, "we must presume that the judgment of the trial court was supported by the evidence." Miller v. Commonwealth, Dept. of Highways, Ky., 487 S.W.2d 931, 933 (1972).

Also, although alleged duress due to telephone harassment of Clendenin's wife does specify particular facts, that allegation is likewise insufficient to defeat Edwards' motion. The June 1993 promissory note was a replacement note for six earlier notes, with a total value of $43,200.00 and interest through the date of that note in the sum of $4,834.72. Clendenin admitted this fact when he failed to answer or respond pursuant to CR 36.01(2) to the request for admission.[4] Since each of the notes was signed by Clendenin prior to his marriage, there could have been no duress directed toward his wife at the time those notes were executed.

Clendenin argues that the earlier notes were not mentioned in Edwards' complaint and "are therefore irrelevant and immaterial." We disagree. The fact that the June 1993 note did not represent a new obligation, but only served as a replacement note for obligations already in place, is relevant to whether Clendenin was under duress when he signed it. In short, we conclude that the trial court properly granted summary judgment in favor of Edwards, as there was no genuine issue of material fact concerning the duress defense. Hubble v. Johnson, Ky., 841 S.W.2d 169, 171 (1992).

Clendenin's final argument is that the summary judgment order should be vacated because the motion was filed and served less than ten days prior to the time fixed for the hearing. See

[4] Clendenin likewise does not deny this fact on appeal.

CR 56.03. This argument is without merit for two reasons. First, the renewed motion for summary judgment was served on Clendenin on November 6, 1996, was noticed to be heard on December 6, 1996, and was actually submitted to the trial court for ruling on December 13, 1996. It was the renoticing of a hearing on the renewed motion for December 13, 1996, that was served within ten days of the hearing and not the summary judgment motion itself. Thus, Edwards complied with CR 56.03 by serving the renewed motion for summary judgment at least ten days before the time fixed for the hearing. Furthermore, Clendenin does not state how he has preserved any error in this regard as required by CR 76.12(c)(iv), and it appears that he waived any insufficient notice of the hearing by not objecting. See Equitable Coal Sales, Inc. v. Duncan Machinery Movers, Inc., Ky. App., 649 S.W.2d 415, 416 (1983).

The judgment of the Franklin Circuit Court is affirmed.

ALL CONCUR.

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