

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 1999-CA-001416-MR

JAMES S. BULLOCK

APPELLANT

v. APPEAL FROM BOONE CIRCUIT COURT  
HONORABLE JOSEPH F. BAMBERGER, JUDGE  
ACTION NO. 98-CI-01014

PACKARD BELL NEC, INC.

APPELLEE

OPINION  
AFFIRMING  
\*\* \*\* \* \* \* \* \*

BEFORE: GUIDUGLI, McANULTY, AND TACKETT, JUDGES.

McANULTY, JUDGE: James Bullock appeals from the Boone Circuit Court order dismissing his suit for failure to state a claim upon which relief can be granted, pursuant to CR 12.02, and the order denying his motion for a default judgment, pursuant to CR 55.01. Upon a review of the record, we find no error and therefore affirm.

According to his Complaint, on February 28, 1995, Bullock purchased a Packard Bell computer system. Included in the purchase price was a warranty contract which provided for one year of on-site service. Bullock asserts that on December 17,

1995, he contacted Packard Bell to have them repair or replace a defective modem. After sixty days had passed and the modem had not been repaired or replaced, Bullock sent a letter dated February 15, 1996, to the president of Packard Bell, informing him that Bullock considered Packard Bell in breach of its "On-Site Limited Warranty." This letter also notified Packard Bell that Bullock assessed what he deemed a "performance penalty" against them in the amount of \$500,000.00. Bullock granted Packard Bell thirty days in which to pay the penalty before interest at the rate of 10% per month would begin to accrue. After Packard Bell surprisingly failed to pay the performance penalty, Bullock filed suit *pro se* in circuit court to recover the amount.

Packard Bell filed a notice of removal of the action to the United States District Court for the Eastern District of Kentucky. The U.S. District Court eventually entered an order on February 10, 1999, remanding the case back to Boone Circuit Court for failure to satisfy the court's jurisdictional amount. Once the Boone Circuit Court again possessed jurisdiction, Packard Bell moved to dismiss on the grounds that the complaint failed to state a claim upon which relief may be granted. Subsequently, Bullock filed a motion for a default judgment on the grounds that counsel for Packard Bell had failed to respond to his requests for proof of their license to practice law in Kentucky. On May 19, 1999, the trial court dismissed Bullock's action with prejudice and on May 21, 1999, it denied Bullock's motion for a default judgment. This appeal followed.

Bullock essentially argues that the trial court erred in granting the motion to dismiss. He also implies that the trial court is part of a conspiracy. Finally, he contends that the trial court erred in denying his motion for a default judgment.

In considering the motion to dismiss, the trial court was bound to liberally construe the pleadings in the light most favorable to the plaintiff and take as true all allegations contained in the complaint. Gall v. Scroggy, Ky. App., 725 S.W.2d 867 (1987). Upon a review of the complaint and the record, we conclude that the trial court did not err in deciding that Bullock failed to state a claim. On appeal, Bullock couches his claim as one for breach of contract. However, it is clear from the complaint that Bullock sought to collect a "performance penalty" which he unilaterally assessed against Packard Bell.

While we may appreciate his frustration in dealing with Packard Bell to get his modem replaced or repaired, there is simply no basis in common law or statutory law which would permit him to recover this fee. In fact, the warranty to which he refers expressly states:

**NEITHER PACKARD BELL NOR ITS AUTHORIZED SERVICE PROVIDER SHALL BE LIABLE FOR ANY SPECIAL, INCIDENTAL, OR CONSEQUENTIAL DAMAGES OR FOR LOSS, DAMAGE OR EXPENSE DIRECTLY OR INDIRECTLY ARISING FROM CUSTOMER'S USE OF OR INABILITY TO USE THE EQUIPMENT EITHER SEPARATELY OR IN COMBINATION WITH OTHER EQUIPMENT, OR FOR PERSONAL INJURY OR LOSS OR DESTRUCTION OF OTHER PROPERTY, OR FROM ANY OTHER CAUSE. (Emphasis in original.)**

The warranty therefore prohibits the imposition of any damages, including a "performance penalty".

At the trial court level Bullock indicated that he modified the warranty, by assessing the performance penalty, pursuant to KRS 355.2-201(2). His argument is without merit as he has misconstrued this statute. The aforementioned statute is the statute of frauds which requires a writing for a contract for the sale of goods over \$500. The particular subsection to which Bullock refers provides:

Between merchants if within a reasonable time a writing in confirmation of the contract and sufficient against the sender is received and the party receiving it has reason to know its contents, it satisfies the requirements of subsection (1) against such party unless written notice of objection to its contents is given within ten (10) days after it is received.

KRS 355.2-201(2). Subsection (1) requires contracts for the sale of goods over \$500 be in writing. In other words, subsection (2) concerns a writing in confirmation of a contract for the sale of goods and circumvents the requirement that the contract be signed by the party against whom it is enforced. This law is not applicable to the current situation because Bullock is not attempting to enforce a contract for the sale of goods. The letter, or confirmatory memorandum, upon which he relies is not a contract for the sale of goods but Bullock's attempt to suggest a remedy for Packard Bell's breach of warranty. Bullock cannot invoke KRS 355.2-201(2) to automatically bind Packard Bell to pay a "performance penalty" he assessed, to which Packard Bell has not assented.

In short, the letter Bullock sent to the president of Packard Bell had no legally binding effect whatsoever. Because he sued to enforce the contents of this letter, the trial court correctly determined that Bullock failed to state a claim upon which relief could be granted. In light of our decision, Bullock's argument concerning the conspiracy theory must fail.

The trial court acted properly at all times, including the denial of Bullock's motion for default judgment. Bullock contends that because counsel for Packard Bell failed to demonstrate their admission to practice law in the Commonwealth of Kentucky, all pleadings filed by said counsel shall be held as void and he is therefore entitled to a default judgment for Packard Bell's failure to answer. There is no requirement that counsel respond to Bullock's request for such information. The Kentucky Supreme Court governs the admission to the practice of law within this Commonwealth. SCR 2.000, et seq. In response to a request, Bullock received certification, dated April 20, 1999, from the Clerk of the Supreme Court that both counsel had been admitted to the practice of law in Kentucky. He also received a letter from the deputy clerk of the Supreme Court which informed him that he could inquire from the Kentucky Bar Association as to the current status of attorneys admitted to the practice of law in Kentucky. In light of the evidence that counsel for Packard Bell have been admitted to practice in Kentucky and in the absence of evidence that said counsel are not currently in good standing, the trial court properly denied Bullock's motion for default judgment.

For the foregoing reasons, the orders of the trial court are affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

James S. Bullock, pro se  
Hebron, KY

BRIEF FOR APPELLEE:

Samuel D. Hinkle IV  
Lea Pauley Goff  
Stoll, Keenon & Park, LLP  
Louisville, KY