

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-002600-MR

CHARLES L. WHITLEY

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE STEPHEN P. RYAN, JUDGE
ACTION NO. 02-CI-006125

JOHN J. JENKINS,
d/b/a STOCKYARDS BANK;
and DAVID BROOKS,
d/b/a STOCKYARDS BANK

APPELLEES

OPINION

AFFIRMING

** ** * * *

BEFORE: BARBER, GUIDUGLI AND PAISLEY, JUDGES.

GUIDUGLI, JUDGE. Charles L. Whitley ("Whitley") appeals from an order of the Jefferson Circuit Court dismissing his action against John J. Jenkins ("Jenkins") and David Brooks ("Brooks"). Whitley's pro se complaint alleged that Jenkins and Brooks engaged in fraud, forgery, breach of contract, and other claims arising from four promissory notes entered into by Whitley and

made payable to Stockyards Bank. For the reasons addressed below, we must affirm the order on appeal.

On September 5, 1997, Whitley entered into a personal loan agreement with Stockyards Bank. The note was secured by a 1997 Chevrolet van. In 1999, 2000, and 2001, Whitley entered into three additional loan agreements with Stockyards Bank, each note being secured by an additional vehicle.

Sometime thereafter, it appears from the record that Whitley defaulted on the loans. Whitley and Stockyards Bank entered into a series of written communications regarding the defaults, and on June 13, 2002, Stockyards Bank proposed to take title to the security in full satisfaction of the notes. Whitley apparently rejected the offer.

On June 24, 2002, Whitley filed the instant action against Stockyard Bank vice-president Jenkins and Chairman and CEO Brooks in their personal capacities.¹ He alleged therein that Jenkins and Brooks engaged in fraud, forgery, violation of the "Truth and Lending Act", failure to possess the original notes, failure to give consideration, breach of contract, attempting to destroy his marriage, and, other causes of action. It is fair to say that the complaint is incoherent and does not set forth generally recognized causes of action.

¹ The action was filed in Jessamine Circuit Court, and transferred to Jefferson Circuit Court via an order rendered on August 13, 2002 because the notes were executed in Jefferson County and Stockyard Bank's registered office is in Jefferson County.

On July 15, 2002, Jenkins and Brooks filed a motion to dismiss the action. As basis for the motion, they noted that Stockyards Bank is a corporate entity and that Whitley's claims would lie, if at all, only against the corporation. Since Whitley did not bring the action against Stockyards Bank, did not serve its registered agent, and instead sued Jenkins and Brooks in their individual capacities, they maintained that they were entitled to a dismissal. They also maintained that the action should be dismissed for improper venue (see footnote 1). Whitley responded with a reply to the motion, and a motion for summary judgment.

After Whitley tendered additional motions, the trial court rendered an order on November 18, 2002 granting the motion of Jenkins and Brooks to dismiss the action, and denying Whitley's motion for summary judgment. Whitley's subsequent motion to vacate the order of dismissal was denied, and this appeal followed.

Whitley now argues that the trial court erred in dismissing the action. He first claims that CR 8.04 should operate to extend or otherwise support his cause of action against Jenkins and Brooks because they did not file an answer to his complaint. He regards their failure to answer as an admission that his causes of action are meritorious, and relies

on this tacit admission as a basis for seeking reversal of the order on appeal.

CR 8.04 states in relevant part that, "[A]verments in a pleading to which a responsive pleading is required are admitted when not denied in the responsive pleading" In the matter at bar, Jenkins and Brooks did not file an answer to Whitley's complaint. They did, however, file a motion to dismiss, and did so within the time period during which an answer may be filed. This clearly is a responsive pleading, and Jenkins and Brooks denied therein that Whitley was asserting an actionable claim. Since the motion to dismiss was made before the answer was required, we do not regard either its filing or the subsequent failure to file an answer as a tacit admission that Whitley's claims were meritorious. Since the trial court ruled on the motion in favor of Jenkins and Brooks, the action was dismissed and no answer was necessary.

Not only was the motion to dismiss a responsive pleading made in conformity with CR 8.04, it was also allowable under CR 12.02 which permits certain motions to be filed in advance of filing an answer. It states that,

[E]very defense . . . shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (a) lack of jurisdiction over the subject matter, (b) lack of jurisdiction over the person, (c) improper venue, (d)

insufficiency of process, (e) insufficiency of service of process, [and] (f) failure to state a claim upon which relief can be granted (Emphasis added).

Jenkins and Brooks' motion to dismiss alleged improper venue and failure to state a claim upon can be granted. As such, it clearly was a proper responsive pleading under CR 12.02.

Whitley next argues that the failure of Jenkins and/or Brooks to respond to his written communications constitutes a tacit admission that the allegations contained in the written communications were true. He notes that the letters contained language advising Jenkins and/or Brooks that their failure to respond would be regarded as an admission of his claims, and relies on this alleged admission as a basis for reversing the order on appeal.

Whitley's argument on this issue is specious and is not supported by the law. Jenkins and Brooks were under no legal duty to respond to the written communications, and their failure to respond is not the functional equivalent of an admission. This claim of error does not serve as a basis for tampering with the order on appeal.

In his final argument, Whitley apparently maintains that the court erred in concluding that he failed to state a claim upon which relief can be granted. While Whitley characterizes the issue in terms of whether the word "pray" was

used in his complaint, the dispositive question is whether the court erred in concluding that action should be dismissed because the real party in interest was Stockyards Bank. Since Stockyards Bank was not served by its registered agent nor named as a defendant, and as Whitley's causes of action could not be prosecuted against Jenkins and Brooks individually, we find no basis for concluding that the trial court erred in dismissing the action. Accordingly, we find no error on this issue.

For the foregoing reasons, we affirm the order of the Jefferson Circuit Court dismissing Whitley's action.

ALL CONCUR.

BRIEF FOR APPELLANT:

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