

RENDERED: SEPTEMBER 8, 2006; 2:00 P.M.  
NOT TO BE PUBLISHED

**Commonwealth Of Kentucky**  
**Court of Appeals**

NO. 2004-CA-001352-MR

DISCOVER BANK, ISSUER OF THE  
DISCOVER CARD, BY ITS SERVICING  
AGENT, DISCOVER FINANCIAL SERVICES, INC. APPELLANT

v. APPEAL FROM GRAVES CIRCUIT COURT  
HONORABLE JOHN T. DAUGHADAY, JUDGE  
ACTION NO. 03-CI-00553

ANDREW WILSON APPELLEE

OPINION  
VACATING AND REMANDING

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BEFORE: JOHNSON AND VANMETER, JUDGES; HUDDLESTON,<sup>1</sup> SENIOR JUDGE.  
JOHNSON, JUDGE: Discover Bank has appealed from the June 17,  
2004, order of the Graves Circuit Court which dismissed, with  
prejudice, its claim under a credit card agreement against  
Andrew Wilson. Having concluded that the circuit court  
improperly dismissed the action, we vacate and remand for  
further proceedings.

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<sup>1</sup> Senior Judge Joseph R. Huddleston sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

On November 3, 2003, Discover Bank, by its counsel, Ernest V. Thomas, III, whose address was listed in Cincinnati, Ohio, filed its complaint against Wilson alleging that he had defaulted on a credit card agreement with Discover Bank. Wilson responded on December 16, 2003, by filing a motion, with an affidavit in support, to dismiss the complaint for lack of subject-matter jurisdiction.

On December 29, 2003, Vincent Thomas, an attorney located in Newport, Kentucky, filed a notice of appearance on behalf of Discover Bank stating that he was "now appear[ing] as Trial Attorney for Plaintiff." The notice of appearance was served on Wilson and provided Vincent Thomas's Kentucky address. Vincent Thomas also filed a response to Wilson's motion to dismiss.

On March 1, 2004, Vincent Thomas, on behalf of Discover Bank, filed a motion to compel Wilson to answer the interrogatories and requests for production as propounded on him by Discover Bank. Vincent Thomas also filed a motion for summary judgment. Wilson responded on April 8, 2004, by filing an objection to the motion to compel and an objection to Discover Bank's interrogatories and requests for production.

On May 12, 2004, Vincent Thomas filed a second motion to compel answers to interrogatories and requests for production and a second motion for summary judgment. Wilson responded by

requesting a hearing on his motion to dismiss.<sup>2</sup> On June 17, 2004, the circuit court entered an order granting Wilson's motion to dismiss, stating as follows:

[Wilson] having filed a Motion to Dismiss on grounds of lack of subject matter jurisdiction, and this motion having been noticed for May 24, 2004, at 8:30 a.m., and passed by the Court and again noticed by [Wilson] for hearing on June 14, 2004, at 8:30 a.m., with notice to [Discover Bank's] attorney of record, Thomas & Thomas, 2323 Park Avenue, Cincinnati, OH 45206, and the Court having called said case, and [Wilson] being present and [Discover Bank] having failed to appear . . . NOW GRANTS [Wilson's] Motion to Dismiss [Discover Bank's] claim with prejudice and with costs assessed against [Discover Bank].

This appeal followed.<sup>3</sup>

A motion to dismiss should only be granted if "it appears the pleading party would not be entitled to relief under any set of facts which could be proved in support of his claim" [citation omitted].<sup>4</sup> When ruling on the motion, the allegations in the pleadings "should be liberally construed in a light most favorable to the plaintiff and all allegations taken in the

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<sup>2</sup> According to the notice on Vincent Thomas's motion to compel and the notice on Wilson's request for hearing, both were noticed to be heard by the circuit court on May 24, 2004. However, no hearing on either motion was held on May 24, 2004.

<sup>3</sup> We note that Ernest Thomas's name is listed on the appellant's brief with Vincent Thomas, and both are listed with the same address in Newport, Kentucky.

<sup>4</sup> Pari-Mutuel Clerks' Union of Kentucky, Local 541, SEIU, AFL-CIO v. Kentucky Jockey Club, 551 S.W.2d 801, 803 (Ky. 1977).

complaint to be true" [citation omitted].<sup>5</sup> In making this decision, the trial court is not required to make any factual findings.<sup>6</sup> Therefore, "the question is purely a matter of law[,]"<sup>7</sup> and the circuit court's decision will be reviewed de novo on appeal.<sup>8</sup>

While Discover Bank argues two issues on appeal, we are vacating and remanding on the procedural issue only because of the circuit court's premature dismissal of the case. We do not reach the merits of Discover Bank's argument regarding Wilson's alleged defense of lack of subject-matter jurisdiction.

Discover Bank claims that because Vincent Thomas had filed a notice of appearance listing him as attorney-of-record and listing his Kentucky address, Wilson was required to give him notice of filing of all pleadings. We agree.

CR 5.02 provides the method of giving legal notice and provides that service, when required, shall be made to the attorney if a party is represented by counsel. "Service upon the attorney or upon a party shall be made by delivering a copy to him or by mailing it to him at his last known address[.]"<sup>9</sup>

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<sup>5</sup> Gall v. Scroggy, 725 S.W.2d 867, 868 (Ky.App. 1987).

<sup>6</sup> James v. Wilson, 95 S.W.3d 875, 884 (Ky.App. 2002).

<sup>7</sup> Id.

<sup>8</sup> Revenue Cabinet v. Hubbard, 37 S.W.3d 717, 719 (Ky. 2000).

<sup>9</sup> CR 5.02.

In this case, Wilson did not err in sending notice of the hearing on the motion to dismiss to Ernest Thomas at the Cincinnati address because he had not ever withdrawn from the case. However, because Vincent Thomas had filed his appearance as trial counsel, and had been the attorney primarily handling the filing of documents on behalf of Discover Bank, Wilson was also required to send notice of the hearing to him. Because Wilson failed to provide adequate notice of the hearing, the trial court erred in dismissing the case simply because counsel did not appear.

Therefore, we vacate the order of the Graves Circuit Court dismissing the case with prejudice, and remand this matter for further proceedings consistent with this Opinion.

ALL CONCUR.

BRIEF FOR APPELLANT:

Ernest V. Thomas, III  
Vincent E. Thomas  
Newport, Kentucky

BRIEF FOR APPELLEE:

No brief filed.