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Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-001757-MR

CYNTHIA BULLOCK

APPELLANT

v. APPEAL FROM BOONE CIRCUIT COURT
HONORABLE KEVIN HORNE, SPECIAL JUDGE
ACTION NO. 06-CI-00348

WORLDWIDE ASSET PURCHASING,
LLC BUYER OF NEXTCARD, INC.

APPELLEE

OPINION
REVERSING AND REMANDING

** ** * * * **

BEFORE: CAPERTON, LAMBERT, AND THOMPSON, JUDGES.

THOMPSON, JUDGE: Cynthia Bullock appeals the Boone Circuit Court's grant of summary judgment in favor of Worldwide Asset Purchasing, LLC.

(Worldwide). For the reasons stated herein, we reverse and remand.

On February 22, 2006, Worldwide filed a complaint against Bullock alleging that she owed it a debt arising from her use of a credit card which had

been provided by NextCard, Inc. According to its complaint, Worldwide purchased the delinquent debt account from NextCard and, therefore, acquired the ownership rights to the delinquent account.

On March 20, 2006, Bullock filed a motion to dismiss in which she asserted several defenses against Worldwide's claim. As one of her grounds for dismissal, Bullock contended that Worldwide's bill of assignment and other supporting documentation were insufficient to establish that she owed it a valid debt. She further attached several documents to her motion indicating that she had requested the validation of the debt numerous times from Worldwide.

After Bullock's motion was denied, citing Kentucky Rules of Civil Procedure (CR) 33 as authority, Worldwide served Bullock with a request for admissions. After reading the cited rule, Bullock returned the unanswered request for admissions to Worldwide along with a letter providing that the request was inappropriate. Subsequently, Worldwide moved for summary judgment against Bullock. Strangely, in its summary judgment motion and memorandum, Worldwide cited Ohio's civil rules and case law as authority rather than Kentucky's authorities. Bullock then filed a motion opposing the summary judgment in which she argued that Worldwide had never responded to her requests for debt validation or proved by sufficient evidence that it owned her delinquent account. After Bullock's motion was filed, the trial court granted Worldwide's motion for summary judgment. This appeal followed.

The standard of review applicable to an appeal of a summary judgment is well-established. An appellate court must decide whether the trial court correctly ruled that there was no genuine issue as to any material fact and that the moving party was entitled to a judgment as a matter of law. *Barnette v. Hospital of Louisa, Inc.*, 64 S.W.3d 828, 829 (Ky.App. 2002). Specifically, “[s]ummary judgment is proper ‘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.’” *Id.*, quoting CR 56.03.

Summary judgment should only be granted when it appears that it would be impossible for the non-moving party to produce sufficient evidence to succeed at trial. *Paintsville Hosp. Co. v. Rose*, 683 S.W.2d 255, 256 (Ky. 1985). Because there are no disputed facts involved with summary judgments, we review the decision of the trial court without deference. *Kreate v. Disabled American Veterans*, 33 S.W.3d 176, 178 (Ky.App. 2000).

Bullock’s first two allegations are that the trial court erred when it granted summary judgment to Worldwide because there was no evidence establishing that an injured party was before the trial court. Specifically, in her appellate brief, she alleges that there “is no evidence that Worldwide exists. There is no evidence that Worldwide will suffer a palpable injury if Bullock does not pay them money on demand.” Essentially, she alleges that Worldwide had not established that it had standing to sue.

Standing to sue is established when a party has a judicially recognizable interest in the subject matter of the suit. *City of Ashland v. Ashland F.O.P. No. 3, Inc.*, 888 S.W.2d 667, 668 (Ky. 1994). The plaintiff's interest must be present or substantial rather than just a mere expectancy. *Id.* The legitimacy of a party's standing is to be determined based on the unique facts of each case. *Rose v. Council for Better Education, Inc.*, 790 S.W.2d 186, 202 (Ky. 1989).

The plaintiff in this case produced documentation establishing that it, as a business entity, was claiming to have purchased Bullock's delinquent credit card account from NextCard. Worldwide produced some billing records for Bullock's credit account which were prepared by Worldwide from the business records furnished by NextCard. Therefore, Worldwide established that it was a party with a present and substantial interest in this litigation. Clearly, Worldwide possessed more than an expectancy interest in this case as it potentially had a rightful claim to over \$8,000 in outstanding debt obligations. Therefore, Worldwide acted properly when it sought to obtain a delinquent debt through a civil action.

Bullock's next allegation is that Worldwide committed fraud and otherwise failed to establish that she owed it a valid debt when it attached to its complaint an inadequate "Bill of Sale & Assignment of Accounts." Specifically, she alleges that the bill of sale document did not list her name, account number, or the amount of her debt, and was difficult to read because of its poor resolution. Thus, she alleges that this document was insufficient to establish the existence of a

valid debt and constitutes fraud. With the exception of her fraud allegation, we agree.

Worldwide's documentary evidence was insufficient to warrant summary judgment. Worldwide's bill of sale document did not list Bullock's account number, the amount she owed, or properly identify Bullock as the individual responsible for the liability. As a matter of fact, the bill of sale specifically provides, in pertinent part, the following:

...all of [NextCard's] right, title and interest in and to each of the Accounts (the "Accounts") identified in the Account Schedule attached hereto as Exhibit B, together with the right to collect all principal, interest or other proceeds of any kind with respect to the Accounts remaining line and owing as of the date hereof (including but not limited to proceeds derived from the conversion, voluntary or involuntary, of any of the Assets into cash or other liquidated property, including, without limitation, insurance proceeds and condemnation awards), from and after the date of this Bill of Sale & Assignment of Accounts.

However, Exhibit B, identifying Bullock's account, was not attached to the bill of sale or ever entered into the record. This lack of documentation is patently insufficient to establish that Worldwide had a valid debt against Bullock.

From a review of the record and from the nature of debt collection cases, in order to ensure that our courts are reaching the correct conclusion, Worldwide and other similarly situated plaintiffs must be required to prove three elements of a claim before a judgment can be entered against a defendant. Worldwide must produce a bill of sale listing the name and account number of the

defendant; it must produce a document specifically detailing how it reached the principal and interest amounts that it is suing for; and it must produce documentary evidence that the defendant is in fact the person responsible for the debt. These requirements simply were not met in this case.

Worldwide contends that Bullock admitted to the validity of the debt when she failed to respond to its request for admissions in which she was asked to admit that Worldwide possessed the rightful ownership of her delinquent account. However, Worldwide failed to cite Bullock to the correct civil rule. Worldwide's request for admissions cited CR 33 for the proposition that "each of the matters of which an admission is requested shall be deemed admitted unless your sworn statement is in compliance with such Rule is timely made."

However, CR 33 does not provide that failing to answer a request for admissions results in the admitting of the unanswered matters. The rule that provides for Worldwide's proposition is actually CR 36.01(2). Knowing that Bullock was a *pro se* defendant, Worldwide's counsel was obligated to cite Bullock to the correct rule so that she could properly comply with the request. Worldwide's failure to cite Bullock to the correct rule must be seen in the light that it exclusively cited Ohio law in its motion and memorandum for summary judgment. Therefore, under the circumstances of this case, Bullock's failure to answer Worldwide's discovery requests could not be used to admit matters for which she had repeatedly denied.

For the foregoing reasons, the summary judgment of the Boone Circuit Court is reversed and remanded for further proceedings consistent with this opinion.

LAMBERT, JUDGE, CONCURS.

CAPERTON, JUDGE, CONCURS AND FILES SEPARATE OPINION.

CAPERTON, JUDGE, CONCURRING. I concur in the decision of the court but write separately because I believe a more appropriate decision would have been to relieve Appellant, Cynthia Bullock, of the effect of the request for admissions under CR 36.02, specifically wherein the court may permit withdrawal of the admission when justice is served and no prejudice results to the party who obtained the admission.

Under the facts of this case, the omission of “Exhibit B” which purported listed the accounts sold to Appellee certainly gives rise to a question of fact, i.e., what accounts were sold, at the least. I see no prejudice to Appellee. Therefore, application of CR 36.02 appears appropriate.

I do agree with the trial court that the parties are bound by the Rules of Civil Procedure. To conduct our courts in an orderly procedure we must all abide by the same rules. I do note, however, that the Appellee below appeared quite persistent in trying to apply Ohio law to our Kentucky courts. While the Appellant may not have been knowledgeable of our rules, she was aware that the laws of the Commonwealth of Kentucky were applicable.

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