

RENDERED: AUGUST 15, 2008; 2:00 P.M.
 NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2007-CA-002328-MR

CAMPTON QUICK STOP, INC.

APPELLANT

APPEAL FROM WOLFE CIRCUIT COURT
v. HONORABLE FRANK ALLEN FLETCHER, JUDGE
ACTION NO. 07-CI-00016

JACKSON WHOLESALE COMPANY, INC.

APPELLEE

OPINION
VACATING AND REMANDING

*** * * * *

BEFORE: CAPERTON, KELLER, AND NICKELL, JUDGES.

CAPERTON, JUDGE: Campton Quick Stop, Inc. appeals the grant of summary judgment in favor of Jackson Wholesale Co., Inc. in the Wolfe Circuit Court. On appeal Campton argues that the court erred by sua sponte ordering summary judgment without the required ten (10) day notice provided by CR 56.03. We agree with Campton and therefore must vacate and remand back to the trial court.

On November 8, 2007, both parties attended a motion to set the matter for trial. There was no written motion for summary judgment filed by either side before the court. When Jackson requested a trial date the court stated that it would grant summary judgment. Both parties objected but the trial court insisted upon granting summary judgment and entered an order the next day. It is from this order that Campton appeals.

CR 56.03 states that the summary judgment “motion shall be served at least 10 days before the time fixed for the hearing.” Before a trial court may rule on a summary judgment motion, the procedural requirements must be strictly complied with.¹ *See McAtee v. Wigland of Louisville, Inc.*, 457 S.W.2d 265 (Ky.1970) and *Rexing v. Doug Evans Auto Sales, Inc.*, 703 S.W.2d 491 (Ky.App.1986). Before a trial court can sua sponte enter summary judgment it must comply with the ten day notice requirement. *Hay v. Hayes*, 564 S.W.2d 224 (Ky.App. 1978). As the court failed to comply with the notice requirement and such failure is dispositive of this appeal, we will not address whether any genuine issues of material fact exist which would preclude entry of summary judgment on remand.

Accordingly, we vacate and remand back to the trial court for further proceedings.

¹ We do note that it is possible to waive this requirement where the nonmoving party fails to object, did not ask for a continuance, and cannot show prejudice from the procedural defect. *See Equitable Coal Sales, Inc. v. Duncan Machinery Movers, Inc.*, 649 S.W. 2d 415 (Ky.App.1983). This is not the case here, during the trial courts sua sponte order of summary judgment both parties objected.

ALL CONCUR.

BRIEF FOR APPELLANT:

Melissa C. Howard
Tammy E. Howard
Jackson, Kentucky

BRIEF FOR APPELLEE:

Brendon D. Miller
Jackson, Kentucky