

RENDERED: DECEMBER 31, 2008; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-000035-MR

CARL D. FOOTE

APPELLANT

v. APPEAL FROM GREEN CIRCUIT COURT
HONORABLE ALLAN RAY BERTRAM, JUDGE
ACTION NO. 07-CI-00028

APPLIED CARD BANK

APPELLEE

OPINION
REVERSING AND REMANDING

** ** * * * * *

BEFORE: CAPERTON, DIXON AND VANMETER, JUDGES.

DIXON, JUDGE: Appellant, Carl D. Foote, *pro se* appeals from an order of the Green Circuit Court granting summary judgment in favor of Appellee, Applied Card Bank. For the reasons set forth herein, we reverse and remand the matter to the lower court for further proceedings.

On March 12, 2007, Appellee filed a complaint in the Green Circuit Court alleging that Appellant owed \$4,043.60 plus accrued interest on two credit card accounts. Appellant thereafter filed a response claiming that he ceased paying on the accounts after he discovered that Appellee was charging excess and improper fees on the account balances. After receiving Appellant's answer, Appellee tendered several discovery requests, including interrogatories, requests for production of documents, as well as requests for admissions. Although the discovery requests were not filed of record, the certificate of service indicates that they were mailed to Appellant on July 30, 2007.

On November 9, 2007, Appellee filed a motion for summary judgment on the grounds that because Appellant failed to respond to the request for admissions, under CR 36 Appellant was deemed to have admitted the averments set forth in Appellee's complaint, including its entitlement to the sums of money claimed. As a result, Appellee argued that there was no genuine issue of material fact and it was entitled to summary judgment as a matter of law. Appellee's motion was scheduled to be heard on December 5, 2007.

On December 3, 2007, Appellant filed his response to interrogatories and requests for admissions. The record indicates that on the same day, Appellant sent a fax to Appellee's counsel advising him that the responses had been filed. Nevertheless, during motion hour on December 5, 2007¹, the trial court entered an order granting summary judgment in favor of Appellee, noting "the Court having

¹ The record indicates that neither party was present.

reviewed the pleadings, and having specifically found that the Defendant has failed to respond to Plaintiff's discovery requests, including Requests for Admissions which are deemed admitted pursuant to CR 36.01[.]” Appellant thereafter appealed to this Court.

Appellant argues on appeal that the trial court erred in granting summary judgment on the grounds that he failed to respond to Appellee's interrogatories and requests for admissions. Clearly, as Appellant points out, he filed his responses two days before the hearing and entry of the order. Further, Appellant claims that he was never informed of the date and time of the hearing, and would have appeared to argue his case had he been aware of such. Although he acknowledges that Appellee's motion contains a certificate of service indicating that he was mailed sufficient notice, Appellant argues that he works out of state and never received the notice.

We would note that Appellee has failed to participate in the appeal to this Court and has therefore offered no grounds to support the trial court's judgment. Notwithstanding, we conclude that reversal is required because the trial court's order granting summary judgment is based on the erroneous finding that Appellant failed to respond to the request for admissions.

CR 36.01 provides, in pertinent part,

(1) A party may serve upon any other party a written request for the admission, for purposes of the pending action only, of the truth of any matters within the scope of Rule 26.02 set forth in the request that relate to statements or opinions of fact or of application of law to

fact, including the genuineness of any documents described in the request. . . .

(2) Each matter of which an admission is requested shall be separately set forth. The matter is admitted unless, within 30 days after service of the request, or within such shorter or longer time as the court may allow, the party to whom the request is directed serves upon the party requesting the admission or written answer or objection addressed to the matter, signed by the party or by his attorney

Pursuant to CR 36.01 the failure of a party to respond to a request for admissions means that the party admits the truth of the allegations asserted. *Rose v. Rawlins*, 358 S.W.2d 538 (Ky. 1962); *Commonwealth of Kentucky Department of Highways v. Compton*, 387 S.W.2d 314 (Ky. 1964). Furthermore, any matter admitted under the rule is held to be conclusively established unless the trial court permits the withdrawal or amendment of the admissions. CR 36.02. However, the trial court retains wide discretion to permit a party's response to a request for admissions to be filed outside the time limit delineated by the rule. *Harris v. Stewart*, 981 S.W.2d 122 (Ky. App. 1998).

If the trial court herein had ruled that Appellant's response was untimely, and thus each matter of which Appellee sought an admission was deemed admitted, Appellant's claim would lack merit. However, by the plain language of the order, the trial court was apparently unaware that a response had been filed. Certainly, Appellee could have brought it to the court's attention, but failed to do so. And Appellee has chosen not to provide any explanation or

justification as to why Appellant's response was not considered. Thus, we are compelled to find that the trial court's grant of summary judgment was improper.

The judgment of the Green Circuit Court is reversed and the matter is remanded for further proceedings.

ALL CONCUR.

BRIEF FOR APPELLANT:

Carl D. Foote, *Pro Se*
Greensburg, Kentucky

BRIEF FOR APPELLEE:

No Brief for Appellee