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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-001615-MR

AMERICREDIT FINANCIAL SERVICES — APPELLANT

v.

APPEAL FROM HARDIN CIRCUIT COURT
HONORABLE KELLY MARK EASTON, JUDGE
ACTION NO. 07-CI-01975

BENJAMIN A. ALVAREZ — APPELLEE

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: TAYLOR, CHIEF JUDGE; COMBS AND NICKELL, JUDGES.

NICKELL, JUDGE: AmeriCredit Financial Services has appealed from the Hardin Circuit Court's August 7, 2009, findings of fact, conclusions of law and judgment which enforced a settlement agreement between AmeriCredit and Benjamin A. Alvarez. For the following reasons, we reverse and remand for further proceedings.

Initially, we note Alvarez has not filed a brief in this Court. When an appellee fails to file a brief, CR[1] 76.12(8)(c) provides three possible avenues of action for the reviewing court:

> If the appellee's brief has not been filed within the time allowed, the court may: (i) accept the appellant's statement of the facts and issues as correct; (ii) reverse the judgment if appellant's brief reasonably appears to sustain such action; or (iii) regard the appellee's failure as a confession of error and reverse the judgment without considering the merits of the case.

"The decision as to how to proceed in imposing such penalties is a matter committed to our discretion." *Roberts v. Bucci*, 218 S.W.3d 395, 396 (Ky. App. 2008) (citing *Kupper v. Kentucky Bd. of Pharmacy,* 666 S.W.2d 729, 730 (Ky. 1983); *Flag Drilling Co., Inc. v. Erco, Inc.,* 156 S.W.3d 762, 766 (Ky. App. 2005)). After reviewing AmeriCredit's brief and the record on appeal, we do not believe reversal is mandated solely because of Alvarez's failure to respond; so we will address the merits of AmeriCredit's arguments. However, as permitted by CR 76.12(8)(c)(i), we shall accept AmeriCredit's statement of the facts and issues as correct.

Alvarez purchased a vehicle on December 28, 2000, and AmeriCredit provided financing for the purchase. Alvarez defaulted on his payments and AmeriCredit repossessed the vehicle. The car was sold at auction and a deficiency balance remained on Alvarez's account in the amount of $10,241.82, plus interest

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[1] Kentucky Rules of Civil Procedure.

on that sum. Alvarez has not contested the repossession, the sale of the vehicle, nor the amount of the deficiency balance.

AmeriCredit referred the account to a collection agency, Insurex, Inc. Alvarez negotiated with Insurex to settle the account for one-half of the outstanding balance of $11,045.72. Alvarez was to make two payments in the amount of $2,761.43 each to retire the balance due. The first payment was due on December 15, 2005, and the second on January 15, 2006. Upon payment of these sums, AmeriCredit agreed to adjust the account to reflect it had been paid in full.

Contrary to the agreement, Alvarez did not tender the first payment until March 22, 2006. The second installment was not tendered until July 9, 2007, after Alvarez had been contacted by AmeriCredit's attorneys regarding the severely overdue payment. Alvarez included a notation of "final payment" on the second check. AmeriCredit cashed both checks and applied the sums to Alvarez's account. AmeriCredit filed suit on September 22, 2007, seeking to collect the balance due on the original indebtedness, requesting Alvarez be credited with the payments made to date, and seeking its attorneys fees. Alvarez answered the suit alleging a settlement of the debt and an accord and satisfaction. He sought dismissal of the suit.

The case proceeded to a bench trial. Immediately prior to the start of the trial, the parties stipulated to most of the facts recited above. They also agreed the balance due on the original account was $6,612.70. Numerous documents were offered as joint exhibits for consideration by the trial court. Alvarez was the only

person to testify. He admitted he had not timely paid the sums due under the settlement agreement nor had he paid the full amount of the original indebtedness. AmeriCredit argued it was entitled to full payment of the deficiency balance because Alvarez had breached the terms of the settlement agreement, he was not entitled to assert a defense pursuant to an alleged accord and satisfaction because it had not accepted the second check as a final payment as evidenced by its subsequent letters to Alvarez, and he had not proven payment in full of his debt. Alvarez contended that he had fully complied with the substantive terms of the settlement agreement by making the two payments and thus, there was an accord and satisfaction. He argued his failure to make the payments on the time schedule set forth in the agreement was insignificant and AmeriCredit's acceptance of the second check—conspicuously containing the notation "final payment"—prohibited further collection actions, whether under the terms of the new agreement or accord and satisfaction.

The trial court found Alvarez had breached the terms of the settlement agreement by not timely making the required payments. However, the trial court believed the amount of Alvarez's debt was in dispute based on variances contained in various communications from AmeriCredit to Alvarez, the amount listed in the settlement agreement, and the amount claimed in the complaint. Further, it believed the "final payment" notation on the second check and AmeriCredit's acceptance of the tendered payment was sufficient to prove an accord and

satisfaction pursuant to KRS[2] 355.3-311. The trial court discounted AmeriCredit's argument that Alvarez had acted in bad faith and such actions should be a bar to his assertion of the defense of accord and satisfaction. Ultimately, the trial court discharged the remaining balance on Alvarez's account, but granted AmeriCredit interest on the amounts due under the settlement agreement from their due dates to the dates they were actually paid. AmeriCredit was also awarded its court costs. This appeal followed.

AmeriCredit contends the trial court erred in finding Alvarez was entitled to enforcement of the settlement agreement in spite of his admitted breach of its terms. Further, AmeriCredit argues the trial court erred in finding Alvarez's delinquent payments constituted an accord and satisfaction of the debt. We agree.

It is undisputed that Alvarez failed to timely make the payments due under the settlement agreement. His first payment was three months late and the second was more than eighteen months late. The trial court ruled that since the settlement agreement failed to explicitly state that "time is of the essence" Alvarez should not be penalized because of his tardy payments. However, an intention to make time of the essence may be implied from the words of a contract. *Farmers Bank & Trust Co. of Georgetown, Kentucky v. Willmott Hardwoods, Inc.*, 171 S.W.3d 4, 9 (Ky. 2005). "Whether time is of the essence of the contract 'is viewed from the standpoint of the parties as gathered from the contract involved, under the rule that unless the intention to make time of the essence is evidenced by

[2] Kentucky Revised Statutes.

expression, or implication, it may not be so regarded.'" *Id*. at 8 (citing *Distillery Rectifying & Wine Workers International Union of America v. Brown-Forman Distillers Corp.,* 308 Ky. 380, 213 S.W.2d 610, 612-13 (1948)).

Here, the settlement agreement provided express due dates for the two payments Alvarez was to make. Although setting specified due dates does not necessarily mean that time is of the essence, *Strother v. Miller*, 124 S.W. 358 (1910), clearly the facts of this case make it apparent that the parties intended that the settlement agreement would be ineffectual if not timely performed. Prompt payment was the sole consideration which could support the formation of a new contract or entry into the settlement agreement. No evidence to the contrary was presented to the trial court.

Further, even if time were not of the essence, Alvarez would be allowed a "reasonable period" to tender the amounts due, and it cannot be said that making the second required payment more than a year and a half after its due date was reasonable. *See Carhartt Holding Co. v. Mitchell*, 261 Ky. 297, 87 S.W.2d 360 (1935). Alvarez was clearly not in compliance with the terms of the settlement agreement. As the trial court correctly noted, "AmeriCredit did not get what it bargained for in permitting timely partial payment as a full satisfaction of the debt." To hold otherwise would be to allow Alvarez to selectively enforce the terms of the settlement agreement—getting the benefit of paying the lowered negotiated amount while ignoring the due dates for the payments. Such selective

enforcement is unacceptable. The trial court erred in not so finding and the judgment must be reversed.

Although we believe the trial court incorrectly enforced the settlement agreement based on Alvarez's breach of its terms, we must also comment on the trial court's finding that Alvarez proved an accord and satisfaction. To be entitled to the defense of accord and satisfaction, a debtor must prove: (1) he tendered an instrument in full satisfaction of a claim in good faith; (2) the amount of the claim was unliquidated or subject to a bona fide dispute; and (3) the creditor obtained payment of the tendered instrument. KRS 355.3-311(1). Thus, existence of a disputed amount of a debt is a necessary requirement.

Alvarez has never contested the amount due to AmeriCredit. Although differing amounts due were reflected on various pieces of correspondence issued by AmeriCredit, the trial court was informed that these discrepancies occurred due to interest calculations, refunds of prepaid amounts for an extended warranty Alvarez purchased, and credits for amounts paid. Thus, it cannot reasonably be concluded there was a bona fide dispute over the amounts due and the trial court erred in so finding. Further,

> [t]he general rule is where a debt is liquidated and undisputed, the payment of a sum less than the amount of the debt, even though accompanied with a statement that it is in full, does not operate to defeat the creditor from collecting the balance of his debt for the reason that there is no consideration for the surrender of the unpaid portion.

McCreary County v. Bybee, 301 Ky. 794, 193 S.W.2d 423, 424 (1946) (citing S*hawnee Sanitary Milk Company v. Fulkerson's G. & M. Shop*, 258 Ky. 639, 79 S.W.2d 229 (1935); *Lewis v. Browning*, 223 Ky. 771, 4 S.W.2d 734 (1928)). Therefore, Alvarez's notation of "final payment" on his second check had no legal significance. There was no accord and satisfaction and Alvarez did not prove he had paid his debt.

AmeriCredit was entitled to a judgment for the full amount of the outstanding balance owed and the trial court erred in not so finding. Therefore, the judgment of the Hardin Circuit Court is reversed and this matter is remanded for further proceedings in accordance with this Opinion.

TAYLOR, CHIEF JUDGE, CONCURS.

COMBS, JUDGE, DISSENTS BY SEPARATE OPINION.

COMBS, JUDGE, DISSENTING: I respectfully dissent as I am persuaded that the doctrine of accord and satisfaction applies in this case to bar AmeriCredit Financial Services from pursuing any additional collection action against Mr. Alvarez.

The state of Kentucky law on accord and satisfaction is best stated in *Ross Bros. Constr. Co. v. Mark West Hydrocarbon Inc.*, 588 UCC Rep. Serv.2d 799, 2005 WL 1378841 at *6 (E.D. Ky. June 9, 2005):

> Once the claimant accepts payment that satisfies [KRS] § 355,3-311's four-part test and **fails to tender back payment within 90 days**, a valid accord and satisfaction occurs, which thereafter **constitutes a complete defense**

to any attempt by the claimant enforce its former claims against the former obligor.

Citing *Morgan v. Crawford*, 106 S.W.3d 480 (Ky. App. 2003). (Emphases added.)

Incorporating the elements of KRS § 355.3-311, the *Morgan* court enumerated the following four factors to test whether or not accord and satisfaction had occurred: 1) payment was tendered in good faith in full satisfaction of the claim; 2) the amount of the claim was unliquidated or the subject of a *bona fide* dispute; 3) the plaintiff obtained payment of the instrument; and 4) the instrument or an accompanying written communication contained a conspicuous statement to the effect that the instrument was tendered as full satisfaction of the claim.

In the case before us, the majority found that the four factors were not satisfied because the amount was not the subject of a *bona fide* dispute. AmeriCredit had referred the account to a collection agency, Insurex, which negotiated a settlement with Alvarez on behalf of AmeriCredit. Although both of the installment payments were tendered late, AmeriCredit nevertheless accepted them.

When the second and last payment was late in coming, AmeriCredit contacted Alvarez directly through its attorneys in order to compel payment of the balance still owed on the original contract, thus keeping alive the *bona fide* dispute.[3] Upon learning that he might file for bankruptcy in lieu of making payment, AmeriCredit (presumably upon advice of counsel, who had become involved on behalf of AmeriCredit) agreed to accept the second payment late.

[3] The lower court made a finding that a disputed amount did exist.

Alvarez clearly inscribed the notation "final payment" on the face of the check. Nonetheless, AmeriCredit accepted and negotiated the check. Although AmeriCredit subsequently sent letters to Alvarez seeking more money, it **never** tendered repayment of the amount of the second check pursuant to KRS 355.3-11(3)(b), which requires a claimant to make repayment in order to keep his claim viable. In overruling previous case law that allowed a claimant to make a verbal protest upon a check and thus to keep a claim viable, *Morgan* instead held that accepting a check "under protest" did not suffice and that repayment within ninety days was required in order to defeat the application of accord and satisfaction.

In *Ross*, *supra,* this Court discussed and summarized the evolution of this concept in a manner pertinent to the case before us:

> Finally, the Court notes . . . that Kentucky law no longer permits a claimant to avoid an accord and satisfaction by marking "under protest" on the tendered payment.
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> * * * *
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> Once the claimant accepts a payment that satisfies § 355.3-311's four part test and fails to tender back payment within 90 days, a valid accord and satisfaction occurs, which thereafter constitutes a complete defense to any attempt by the claimant to enforce its former claims against the former obligor.

As AmeriCredit clearly tried to "have it both ways" in derogation of *Morgan* and the pertinent statute, its claim against Alvarez must fail.

BRIEF FOR APPELLANT:

John R. Tarter
Louisville, Kentucky

BRIEF FOR APPELLEE:

No brief filed.