RENDERED: MARCH 11, 2011; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-002256-MR

IDY TALL — APPELLANT

v. — APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE MITCHELL PERRY, JUDGE
ACTION NO. 08-CI-009651

ALASKA AIRLINES/HORIZON AIR
FEDERAL CREDIT UNION — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: LAMBERT AND MOORE, JUDGES; ISAAC,[1] SENIOR JUDGE.

MOORE, JUDGE: Idy Tall appeals from an order of the Jefferson County Circuit Court in which the trial court adopted the deputy Master Commissioner's report and granted the motion for summary judgment filed by Alaska Airline/ Horizon Air Federal Credit Union. After a careful review of the record, we affirm because Tall failed to preserve for appeal his claims of error following the Master

[1] Senior Judge Sheila R. Isaac, sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

Commissioner's report and, alternatively, because the parties did not form a binding settlement agreement. Furthermore, we decline to find Appellee in violation of Jefferson County Local Rule 402 or to issue sanctions against Appellant in this case.

I. FACTUAL AND PROCEDURAL BACKGROUND

Appellant Idy Tall and Appellee Alaska Airlines/Horizon Air Federal Credit Union entered into a credit agreement on May 10, 1999. Tall later defaulted on his repayment of the loan. Pursuant to the default provisions of the original agreement, the Credit Union brought suit against Tall, seeking to recover $5,671.95, plus interest at 12.5% accruing thereon since February 2008, plus attorneys fees and costs incurred in recovering the amount owed. Tall, *pro se*, answered the Credit Union's complaint by essentially denying that he owed any debt to the Credit Union and claiming that he and the Credit Union's attorney had previously discussed a settlement whereby Tall would bring his account current. However, Tall has offered no evidence of that agreement, and the only reference to the Credit Union's offer to settle for monthly payments is in a letter dated December 16, 2008, wherein the Credit Union references a previous settlement offer sent by a letter dated September 29, 2008.

Following Tall's answer, the Credit Union propounded on Tall's requests for admissions. Request No. 5 stated: "There is a balance due and owing pursuant to the [credit agreement] in the amount of $5,671.95, plus interest thereon that is accumulating at the rate of 12.5% from February 2008 going forward." Tall

did not respond. Instead, there is some evidence of a telephone conversation between Tall and the Credit Union's attorney where Tall attempted to offer a lump sum payment. In response, the Credit Union wrote the December 16, 2008 letter to Tall, specifically rejecting his "recent lump sum settlement offer [as] it is far too low." This letter reiterated the Credit Union's previous monthly payment settlement proposal, which included amounts for interest and costs, and concluded by stating: "This is the only settlement that I can offer. If it is acceptable, please propose a monthly payment amount."

The Credit Union therefore moved for summary judgment. Meanwhile, Tall tendered a check for $5,671.95 to the Credit Union and subsequently moved for summary judgment. The trial court referred the matter to the Master Commissioner, who conducted a hearing. The Commissioner's report specifically found that Tall's failure to respond to the Credit Union's request for admissions deemed the requests admitted. Thereafter, the Jefferson Circuit Court adopted the Commissioner's findings, and entered a final order granting the Credit Union's motion for summary judgment, finding that Tall had failed to raise any issue of material fact, and ordering Tall to pay the Credit Union $590.83 in interest accrued since February 2008, plus interest on that amount at 12.5% accruing thereon until the judgment is paid; and $4,480.00 in attorney fees, plus costs.

Tall now appeals the trial court's grant of summary judgment for the Credit Union, claiming: 1) that Tall had a binding agreement with the Credit Union whereby the lawsuit would settle if he brought his account current; and 2)

essentially that the Credit Union took advantage of Tall's *pro se* representation during discovery, in violation of Jefferson County Local Rule 402.

II. STANDARD OF REVIEW

"The standard of review on appeal of a summary judgment is whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law." *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky. App. 1996). "The record must be viewed in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor." *Steelvest, Inc. v. Scansteel Serv. Ctr., Inc.*, 807 S.W.2d 476, 480 (Ky. 1991). "Even though a trial court may believe the party opposing the motion may not succeed at trial, it should not render a summary judgment if there is any issue of material fact." *Id*. Further, "the movant must convince the court, by the evidence of record, of the nonexistence of an issue of material fact." *Id*. at 482.

III. ANALYSIS

A. TALL DID NOT PROPERLY PRESERVE THE ISSUES FOR APPEAL WHEN HE FAILED TO ENTER WRITTEN OBJECTIONS TO THE MASTER COMMISSIONER'S REPORT.

The Credit Union argues that Tall did not properly raise written objections to the Master Commissioner's Report, and therefore that Tall's objections were not properly preserved for appeal. We agree.

The Master Commissioner specifically determined that Tall's failure to respond to the Credit Union's request for admissions deemed his responses admitted pursuant to Kentucky Rules of Civil Procedure (CR) 36.01(2). "For that reason," the Commissioner found that she "[could] not recommend in favor of Mr. Tall's motion to dismiss and instead recommend[ed] in favor of [the Credit Union] . . . . " The report of the Master Commissioner also requested the Credit Union to submit a supporting affidavit regarding attorney fees. Following that report, the Credit Union submitted written exceptions regarding only the attorney fees issue. The Master Commissioner then entered a supplemental report followed by an amended Master Commissioner report, and the Credit Union again responded with exceptions, all of which also solely dealt with the issue of the Credit Union's attorney fees request. However, at no point did Tall enter any objections to the Master Commissioner's findings. Therefore, under CR 53.05(2), Tall's arguments are not properly before this court.

CR 53.05(2) provides:

> Within 10 days after being served with notice of the filing of [the commissioner's] report any party may serve written objections thereto upon the other parties. Application to the court for action upon the report and upon objections thereto shall be by motion and upon notice as prescribed in CR 6.04.

Despite the permissive language of CR 53.05(2), that parties may enter written objections to the commissioner's report, the Kentucky Supreme Court has held that such objections are necessary if a party intends to preserve claims of error if and when the trial court adopts the report. *See Eiland v. Ferrell*, 937

S.W.2d 713 (Ky. 1997). If we did not require objections to the Commissioner's report to be entered following the procedures outlined in CR 53.05(2), then the undesirable result would be that "appeals would be taken from trial court judgments adopting commissioner's reports without the trial court ever having been apprised of any disagreement with the report." *Id*. at 716. In *Eiland*, the Court went on to explain that "[n]ot only would this amount to the blind-siding of trial courts, it would also result in unnecessary appeals, confusion in appellate courts, needless reversals, and . . . would invite all the mischief associated with appellate review of unpreserved error." *Id*.

Here, Tall did not submit any objections or exceptions following the hearing and the Commissioner's reports. Therefore Tall's claims on appeal are not properly preserved, since Tall had ample opportunity to defend, to object, or simply to respond to the Commissioner's report, but failed to do so before raising the issues on appeal.

B. ALTERNATIVELY, THE PARTIES DID NOT FORM A BINDING CONTRACT TO SETTLE THE CASE.

Although Tall's failure to object to the Commissioner's report is dispositive, we will briefly address the merits of Tall's claims. Tall essentially argues that he had a contract with the Credit Union, entered into on the Credit Union's behalf by its attorney, whereby Tall's payment of a lump sum amount would bring his account current and would settle the Credit Union's case against him. Tall claims this would absolve him from liability for the amounts of interest accrued on his account and any attorney fees and costs.

Settlement agreements are a type of contract and therefore are governed by contract law. *Frear v. P.T.A. Indus.*, 103 S.W.3d 99, 105 (Ky. 2003). As a long-standing rule, formation of a settlement agreement, like any contract, requires a meeting of the minds between the parties. *Barr v. Gilmore*, 265 S.W. 6, 204 Ky. 582, 588 (1924). The difference between a settlement agreement and accord and satisfaction is that an unexecuted accord and satisfaction does not bar an original cause of action, whereas a settlement agreement does. *Id*. Moreover, a settlement agreement, as a contract, requires an offer of compromise and an acceptance of that offer. *Id*.

Here, the only evidence of an offer made by the Credit Union is in a letter from December 16, 2008, which purports to reiterate an offer made in September 2008. According to the December 16th letter, the Credit Union's September settlement offer would provide for monthly payments toward the entire balance due, and upon default, acceleration of the entire balance. Even assuming such an offer was made, there is no evidence (a) that Tall accepted the September offer, or (b) that acceptance of that offer involved Tall's paying a lump sum in satisfaction of his debt. The December 16th letter in fact rejected Tall's offer to settle for a lump sum payment, since it was too low because it did not take into account interest and costs. That letter also marked the end of the parties' correspondence regarding any sort of settlement agreement.

The letter seems to contain some reference to the Credit Union's prior settlement offer, inviting Tall to accept that offer by "propos[ing] a monthly

payment amount." Rather than accepting the offer, Tall sent a check covering the principal amount of his debt to the Credit Union. The payment of the lump sum amount, which did not include interest owed, costs, or fees, without any indication otherwise, was not an acceptance of the Credit Union's offer. Consequently, there was no "meeting of the minds" to that effect. Therefore, we reject Tall's argument that a binding settlement agreement existed.

C. APPELLEE DID NOT VIOLATE LOCAL RULE 402.

Tall next argues that the Credit Union's counsel violated Local Rule 402 by taking advantage of Tall's ignorance of the law when the Credit Union propounded requests for admissions on Tall's acting *pro se*. Jefferson County's Local Rule 402 provides:

> Counsel in civil and criminal cases shall make a good faith effort to resolve disputes among themselves which arise in the course of discovery. No motions pertaining to discovery shall be made to the Court without a certificate of counsel that she has conferred with opposing counsel, that they are unable to reconcile their differences and that she has otherwise exhausted all extrajudicial means in an effort to reconcile her differences with opposing counsel. To the extent that extrajudicial means have not disposed of the matter, a party may file an appropriate order under CR 37. The motion shall be accompanied by a supporting memorandum with citation to legal authority, if any. The motion and memorandum shall also be accompanied by a copy of the discovery requests in dispute. Response to the motion shall be filed pursuant to CR 37.

We do not believe that Rule 402 applies in the context of a request for admissions, and it certainly does not impose a duty upon counsel to compel discovery from an

opposing party. Because unanswered admission requests are deemed admitted pursuant to CR 36.01(2), there is no foreseeable reason for a party to seek to compel such admissions. Accordingly, Local Rule 402's permissive language does not impose a duty on a party to pursue, or even to follow up on, its request for admissions. Tall's argument faintly suggests that the Credit Union's counsel exercised bad faith by failing to remind Tall, as a *pro se* defendant, of the danger of CR 36.01(2)'s deemer clause. Kentucky has never placed such a duty on opposing counsel to a *pro se* litigant. Instead, *pro se* parties are required, like any other party, to know and follow the rules of civil procedure. *Louisville & Jefferson County Metro. Sewer Dist. v. Bischoff*, 248 S.W.3d 533, 537 (Ky. 2005). Therefore, Tall's argument lacks merit.

D. RULE 11 SANCTIONS ARE IMPROPER.

Finally, we disagree with the Credit Union's argument that Tall's appeal is frivolous and that it is entitled to fees. Having reviewed the arguments of counsel, Tall's appeal, although unsuccessful, was not wholly unreasonable. Specifically, we note that Tall's argument that he believed that the matter was resolved upon his lump-sum payment, while incorrect, is not so completely lacking in merit as to justify the imposition of sanctions or to deem this appeal frivolous.

Accordingly, the judgment of the Jefferson County Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Aubrey Williams
Louisville, Kentucky

BRIEF FOR APPELLEE:

John Tarter
Louisville, Kentucky