

Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-000634-MR

LELAND HAYS

APPELLANT

v. APPEAL FROM BREATHITT CIRCUIT COURT
HONORABLE FRANK ALLEN FLETCHER, JUDGE
ACTION NO. 09-CI-00271

CITIBANK, N.A., SUCCESSOR
TO CITIBANK (SOUTH DAKOTA)
N.A.

APPELLEE

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: CLAYTON, LAMBERT, AND VANMETER, JUDGES.

VANMETER, JUDGE: Leland Hays appeals from the Breathitt Circuit Court's order granting summary judgment in favor of Citibank, N.A. ("Citibank").¹

Finding no genuine issue of material fact, we affirm.

¹ Citibank is the successor to Citibank (South Dakota), N.A.

Citibank brought the underlying debt collection action against Hays, alleging that a credit card account issued to him was in default with an outstanding balance of \$18,492.74. Hays filed a *pro se* answer claiming a lack of knowledge of the credit card account and requesting proof of the charges. Following discovery, Citibank filed a motion for summary judgment. Hays retained an attorney and filed a response to the motion, alleging that the credit card at issue was missing for a period of time during which many of the charges were incurred. The trial court denied Citibank's motion for summary judgment, citing the need for further discovery regarding the possibility of fraudulent charges raised by Hays.

Citibank renewed its motion for summary judgment five months later. In support of that motion, Citibank provided a cardholder agreement stipulating the contract between the cardholder and the creditor. Although the agreement is not signed by Hays, it takes effect upon the cardholder's activation and use of the credit card. Citibank also provided billing statements associated with the credit card from January 28, 2004, thru May 8, 2009, detailing the use of the card, the monthly balances, and the payments made towards the balance each month. The final statement indicated an outstanding balance of \$18,492.74. Finally, Citibank presented a check drawn on Hays's bank account, executed by Hays, and offered as payment and credited to the credit card account in August 2008.

Hays again objected to the motion, asserting the same grounds as before. This time, the trial court granted Citibank's motion for summary judgment,

excepting certain late fees and penalties calculated by Citibank for a total amount due of \$17,736.93 plus interest at the rate of 12% per annum from the date of judgment. This appeal followed.

Summary judgment shall be granted only 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.” CR² 56.03. The trial court must view the record “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) (citations omitted). Further, “a party opposing a properly supported summary judgment motion cannot defeat it without presenting at least some affirmative evidence showing that there is a genuine issue of material fact for trial.” *Id.* at 482 (citations omitted).

Our standard of review 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.” *Lewis v. B & R Corp.*, 56 S.W.3d 432, 436 (Ky. App. 2001) (citations omitted). Because no factual issues are involved and only legal issues are before the court on a motion for summary judgment, we do not defer to the trial court and our review is *de novo*. *Hallahan v. Courier-Journal*, 138 S.W.3d 699, 705 (Ky. App. 2004).

² Kentucky Rules of Civil Procedure.

On appeal, Hays argues the trial court erred by granting Citibank's motion for summary judgment because a genuine issue of fact existed regarding whether he was responsible for the debt. We disagree.

To succeed on a motion for summary judgment in a debt collection action, the creditor must show "(1) a bill of sale listing the name and account number of the defendant; (2) a document specifically detailing how the creditor/plaintiff reached the principal and interest amounts that it is suing for; and (3) documentary evidence that the defendant is in fact the person responsible for the debt." *Bruner v. Discover Bank*, 360 S.W.3d 774, 778 (Ky. App. 2012) (citation omitted).

Hays asserts that his claim of fraudulent charges credited to the credit card account prevented summary judgment because it creates a genuine issue of fact regarding whether he received the benefit of the charges amounting to the delinquent balance on the card. However, without the presentation of affirmative evidence adequate to defeat a properly supported motion for summary judgment, Hays's defense claim fails. *See Steelvest*, 807 S.W.2d at 481 (holding that a party opposing summary judgment "cannot rely on the hope that the trier of fact will disbelieve the movant's denial of a disputed fact, 'but must present affirmative evidence in order to defeat a properly supported motion for summary judgment'") (citations omitted). Despite having ample time for discovery between the two motions for summary judgment, Hays did not present any affirmative evidence to support his position that he was not responsible for the debt. Rather, the evidence provided by Citibank demonstrates that Hays continued to make payments towards

the balance during the period of time he alleged the credit card was missing, the last payment being credited four days prior to the final approved purchase with the credit card.

Hays further argues that summary judgment was improper because the billing statements contained different account numbers throughout the billing history. However, our careful review of the record shows that the different account numbers were used for the same credit card account. Furthermore, irrespective of the changing account numbers, the account number remained the same from the last billing statement indicating a zero balance through the final billing statement. Therefore, the entirety of the debt now sought was shown to have accumulated by the use of one credit card linked to one credit account. If any of the charges during this time period are not attributable to Hays, he failed to set forth any affirmative evidence to support that defense. As a result, we do not find the trial court erred by granting summary judgment in favor of Citibank.

The order of the Breathitt Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Melissa C. Howard
Jackson, Kentucky

BRIEF FOR APPELLEE:

Megan J. Linder
Cincinnati, Ohio