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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-001019-MR

DONAVON R. DAVIS — APPELLANT

v.

APPEAL FROM SCOTT CIRCUIT COURT
HONORABLE PAUL F. ISAACS, JUDGE
ACTION NO. 11-CI-00266

FIA CARD SERVICES, N.A. — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, LAMBERT, AND VANMETER, JUDGES.

CLAYTON, JUDGE: This is an appeal from the Scott Circuit Court's granting of a summary judgment motion in an action regarding an amount due on a credit card. Based upon the following, we will affirm the decision of the trial court.

BACKGROUND INFORMATION

The appellant had an account with the appellee, FIA Card Services, N.A. (FIA). FIA brought an action in the Scott Circuit Court asserting that Davis had defaulted on the account and owed $18,694.58. Davis contended that he stopped paying on the account due to an increase in the interest rate. He also questioned the amount owed.

FIA filed a motion for summary judgment and the trial court granted the motion, holding as follows:

> The customer account agreement clearly states the Default Rate for balances is up to 27.99% corresponding Annual Percentage Rate. *** The terms of the contract are clear and unambiguous as to the interest rate. The Defendant claims the amount in question was not borrowed and statements proving the amount to be correct were not provided by Plaintiff, even after Defendant's request. Moreover, Defendant argues notice of the change in interest rates was never given, and the initial interest rate was 0%. However, the Defendant unmistakably accepted the terms of customer agreement that clearly stated the amount of the default interest rate, which was subject to increase without notification. The acceptance of the account agreement was implied through the Defendant's conduct. *** Accordingly, the Defendant's conduct in using the account after receiving the account agreement with the default interest rate listed, as well as, receiving and paying monthly billing statements is implied acceptance of the agreement. *** Based on the contract, there is no issue of material fact and Plaintiff is entitled to judgment as a matter of law. The Plaintiff is to submit a proposed judgment for the full amount requested plus post judgment interest at the legal rate and costs.

Opinion at pp 2-3.

Davis then brought this appeal asserting that he was not provided the discovery he had requested from FIA and that, consequently, summary judgment was inappropriate.

STANDARD OF REVIEW

In reviewing the granting of summary judgment by the trial court, an appellate court must determine 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." Kentucky Rules of Civil Procedure (CR) 56.03.

"[A] trial court must view the evidence in the light most favorable to the nonmoving party, and summary judgment should be granted only [when] it appears impossible that the nonmoving party will be able to produce evidence at trial warranting a judgment in his favor. [While] [t]he moving party bears the initial burden of [proving] that no genuine issue of material fact exists, . . . the burden shifts to the party opposing summary judgment to present 'at least some affirmative evidence showing that there is a genuine issue of material fact for trial.'" *Community Trust Bancorp, Inc. v. Mussetter*, 242 S.W.3d 690, 692 (Ky. App. 2007).

Since summary judgment deals only with legal questions as there are no genuine issues of material fact, we need not defer to the trial court's decision and must review the issue *de novo*. *Lewis v. B&R Corp.*, 56 S.W.3d 432, 436 (Ky. App. 2001). With this standard in mind, we will review the issues before us.

DISCUSSION

Davis first contends that summary judgment was inappropriate since FIA failed to comply with his discovery requests regarding disputed issues of material fact. Davis contends that without all the monthly statements, which include how the debt was incurred and how the interest rate was calculated, FIA was unable to prove that he owed the amount in question.

Davis admits that some statements were supplied by FIA but contends that he should have all statements.

CR 26.02(1) sets forth that:

> Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery…It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible material.

Davis did not file a Motion to Compel discovery and there was adequate time to complete discovery. Also, the materials asked for by Davis were not required to be kept by FIA under Federal law. Consequently, we do not find the trial court erred in denying Davis's claim that discovery was not complete.

In finding for FIA, the trial court held that the interest rate was clear from the Cardholder Agreement. As to the amount owed, it appears that the lack of any written objection sent to FIA by Davis and the fact that Davis made monthly payments on the amount was sufficient evidence to prove the amount owed was

that asserted by FIA. We find no error in the trial court's ruling. Without more than vague assertions that the amount was incorrect and with the Cardholder Agreement setting forth the amount of the default interest, we find the court correctly granted summary judgment in FIA's favor. Thus, we affirm the decision of the trial court.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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