

RENDERED: DECEMBER 11, 2015; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-002099-MR

SARA ELIZABETH SISCO

APPELLANT

v. APPEAL FROM PIKE CIRCUIT COURT
HONORABLE JOHN DAVID CAUDILL, JUDGE
ACTION NO. 13-CI-00431

UNIVERSITY OF PIKEVILLE;
DOUG J. COTTLE; ALLEN E.
ABSHIRE; JEFF KENDRICK;
MATT THACKER; BRIAN MCGUIRE;
TRACEY NICKLES; AND
J. CHRISTOPHER ROBINSON

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: JONES, STUMBO, AND VANMETER, JUDGES.

VANMETER, JUDGE: Under CR¹ 36.01(2), a matter with respect to which a request for admission is made is deemed admitted, unless an answer or objection is made within thirty days. In this case, we must determine whether the Pike Circuit

¹ Kentucky Rules of Civil Procedure.

Court erred in granting summary judgment in favor of the University of Pikeville and its officers and employees and against Sara Elizabeth Sisco dismissing her complaint, based on her failure to respond timely to Requests for Admission. We conclude that the court did not err and therefore affirm.

I. Factual and Procedural Background.

Sisco initiated this action on April 24, 2013, against the University of Pikeville and named defendant security officers and university officials² (hereinafter collectively “University”). The allegations included false imprisonment, assault, intentional infliction of emotional distress, negligent supervision, negligent training, negligent hiring, and violation of constitutional right of freedom of association. The complaint was served two days later, on April 26, on the University of Pikeville (the entity), as shown by certified mail receipt filed in the record on April 29. On May 15, all named defendants, by counsel, filed an answer to the complaint denying the allegations and raising various defenses. The record discloses that on July 10, 2013, each of the individual defendants was apparently served with the complaint, and proof of service was filed with the circuit clerk on July 11. The reason the individual summonses were deemed necessary is unclear, since the individual defendants had entered their appearances by the answer filed May 15.

In any event, on August 9, 2013, Sisco filed her “Motion to Quash Answer Filed by Defendants on May 15, 2013.” Sisco attached to this motion

² The named defendants were the University of Pikeville, Doug J. Cottle, Allen E. Abshire, Jeff Kendrick, Matt Thacker, Brian McQuire, Tracey Nickles, and J. Christopher Robinson.

documents which appear to be copies of envelopes, certified mail, return receipt requested, addressed to the seven individual defendants which contain markings indicating “refused, return to sender.” Sisco’s contention appears to have been that the University’s answer should be quashed due to this initial refusal of service. The trial court never ruled on this motion.

In order to simplify the issues and parties involved, the individual defendants each served Requests for Admissions on Sisco pursuant to CR³ 36. Notices of Filing of the Requests for Admission indicated service on Sisco, through her counsel, on August 7. These Notices were filed with the court on August 12. Sisco failed to respond or object to these Requests for Admission, and did not request an extension of time to respond.

The University filed a Motion for Summary Judgment on September 26, 2013, arguing that no issues or facts remained for consideration based on Sisco’s failure to respond to the Requests for Admissions. Following a hearing, the trial court granted summary judgment for the University. From that judgment, Sisco appeals.

II. Standard of Review.

CR 56.03 provides that summary judgment is appropriate when no genuine issue of material fact exists and the moving party is therefore entitled to judgment as a matter of law. Summary judgment may be granted when “as a matter of law, it appears that it would be impossible for the respondent to produce

³ Kentucky Rules of Civil Procedure.

evidence at the trial warranting a judgment in his favor and against the movant.”

Steelvest, Inc. v. Scansteel Serv. Ctr., Inc., 807 S.W.2d 476, 483 (Ky. 1991)

(internal quotations omitted). Whether summary judgment is appropriate is a legal question involving no factual findings, so a trial court’s grant of summary judgment is reviewed *de novo*. *Coomer v. CSX Transp., Inc.*, 319 S.W.3d 366, 370-71 (Ky. 2010).

III. Issues on Appeal

Sisco makes two arguments on appeal. First, she argues that the trial court erred in granting summary judgment in a matter in which her Motion to Quash the Answer of the Defendants, filed before the motion for summary judgment, was pending. Second, she argues that summary judgment for the University was granted improperly as the record does not support this finding. We disagree.

A. Granting Summary Judgment while Another Motion Was Pending.

First, Sisco argues the trial court erred in granting summary judgment for the University while her Motion to Quash the Answer of the Defendants was still pending before the court. She argues that the trial court erred by not first ruling on her Motion to Quash before granting summary judgment for the University. Sisco bases her Motion to Quash the Answer on the individual defendants’ initial refusal of service of summons by certified mail.

This argument seems to misconstrue the purpose of a summons. A summons is merely a means to put a named defendant on notice of a pending legal

action. CR 3; CR 4.01; *see* 83 C.J.S. *Summons* (West Publ. Co., 1953) (stating “a summons is a means or process whereby a defendant is notified to appear at the proper time and place to answer the complaint . . .”). CR 4.02, titled “Summons—Form” provides,

The summons shall be issued in the name of the Commonwealth, be dated and signed by the clerk, contain the name of the court and the style and number of the action, and **be directed to each defendant, notifying him that a legal action has been filed against him** and that unless a written defense is made by him or by an attorney in his behalf within 20 days following the day on which the summons is served on him a judgment may issue against him for the relief demanded.

(Emphasis added). As we read the rule, the requirement that an answer be filed within twenty days following service of summons does not create a window within which an answer must be filed, but rather an outer limit. In other words, a defendant who receives information that an action may be pending is not required to wait for official service of summons, but may answer prior to service, thereby effectively waiving service.

All named defendants, both the entity and the individuals, were clearly on notice of this action, as evidenced by the answer and entry of appearance by all named defendants. Therefore, the purpose of the summonses was satisfied, and no need existed for each individual defendant to receive and accept summons. Thus, a motion to quash an answer due to the initial refusal of a summons by certified mail appears nonsensical in light of the purpose of a summons and the fact that an answer was actually filed. Sisco does not point this court to any

authority allowing for such a motion to quash a responsive pleading for an initial refusal of service.

As to Sisco's claim that the trial court improperly granted summary judgment while her motion was pending, Sisco's motion was designated as "Motion to Quash Answer Filed by Defendants on May 15, 2013[.]" The body of motion restates it is as a Motion for Default Judgment" and makes the factual assertions as to the date of the filing of the complaint, the sending of the complaint and summons to the defendants which they refused, and the date of filing of their answer. Finally, the Motion requests relief in the form of quashing the answer. These factual assertions do not constitute legal grounds for quashing or striking an answer. To the extent the trial court failed to rule on the Sisco's motion, the failure was harmless error. *See* CR 61.01 (stating "no error or defect in any ruling or order or in anything done or omitted by the court . . . is ground . . . for vacating, modifying, or otherwise disturbing a judgment . . . , unless refusal to take such action appears to the court inconsistent with substantial justice[.]").

Furthermore, Sisco does not direct this court to anywhere in the record where she asked the court to rule on this motion; she failed to notice the motion for hearing with Hon. John David Caudill once he was assigned to this case as Special Judge in August 2013. We cannot rule on any matter not ruled upon by the trial court. *See* CR 76.12. The "reviewing court will not consider any argument on appeal that has not been preserved in the trial court." *Am. Founders Bank, Inc. v. Moden Invs., LLC*, 432 S.W.3d 715, 721 (Ky. App. 2014) (internal citation

omitted). In this case, although Sisco mentions her Motion to Quash in her response to the University's Motion for Summary Judgment, she neither demanded that the court rule on her motion nor filed a Motion to Amend, Alter, or Vacate the court's order granting summary judgment. *See Gullion v. Gullion*, 163 S.W.3d 888, 891 (Ky. 2005) (CR 59.05 may be used to dispute an order or judgment a party believes to be incorrect). Since the trial court never ruled on this motion, it cannot be the basis for appeal. CR 76.12(4) (c)[(v)] "emphasizes the importance of the firmly established rule that the trial court should first be given the opportunity to rule on questions before they are available for appellate review. [O]nly to avert a manifest injustice [will] this court . . . entertain an argument not presented to the trial court." *Elwell v. Stone*, 799 S.W.2d 46, 48 (Ky. App. 1990) (citation omitted). No manifest injustice exists which would compel this court to consider a baseless Motion to Quash the Defendants' Answer.

B. Failure to File Requests for Admissions in the Record.

Second, Sisco argues that the University's failure to file the actual Requests for Admission with the trial court, in addition to the Notice of Filing for the Requests, renders summary judgment improper. The University served the Requests for Admission on Sisco, through counsel, and filed a Notice of Filing with the clerk. Sisco candidly acknowledged receiving these Requests for Admission, but argues that only the Notice of Filing is time-stamped from the clerk, not the Requests for Admission. Thus, she argues, summary judgment was

improper since the Requests did not appear in record when summary judgment was granted.

Pursuant to CR 5.06(1), a request for admission made under Rule 36 “shall not be filed with the Court unless the Court orders otherwise. . . . The party responsible for service of the document shall retain the original and become the custodian. The custodian shall provide access to all parties of record during the pendency of the action.” In this case, the University was not ordered to file the Requests for Admission with the court, and thus as required by CR 5.06, properly filed only the Notice of Filing with the trial court, and served the Requests for Production on Sisco.

Additionally, Sisco argues that the circuit court erred in issuing summary judgment against her because the record is too sparse to support such a judgment. The admission of a Request for Admission is reviewed as an evidentiary issue and discovery dispute, for which the standard of review is abuse of discretion. *Manus, Inc. v. Terry Maxedon Hauling, Inc.*, 191 S.W.3d 4, 8 (Ky. App. 2006). “The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles.” *Goodyear Tire & Rubber Co. v. Thompson*, 11 S.W.3d 575, 581 (Ky. 2000). “CR 36 details the procedure for obtaining requests for admission.” *Manus*, 191 S.W.3d at 8. Pursuant to CR 36.01(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 the application of law to fact, including the genuineness of any documents described in the request... The request may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons upon that party.

“The matter is admitted unless, within 30 days after service of the request... the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter, signed by the party or by his attorney[.]” CR 36.01(2). “Any matter admitted under Rule 36 is conclusively established unless the court on motion permits withdrawal or amendment of the admission.” CR 36.02. Therefore, the trial court explicitly followed the process set forth in CR 36 in admitting the Requests for Admission when Sisco failed to respond and did not abuse its discretion.

Although Sisco contends that the record is “barren” and summary judgment could not have been found based only on the Notice of Filing of the Requests for Admission, the Requests for Admission are part of the record. Under CR 5.06(3),

When a document not filed pursuant to Rule 5.06(1) is needed for appeal purposes, post-trial motions, or any other purpose, the court before which the case is pending shall, upon motion of any party, order the necessary document be filed with the Clerk and it shall become part of the record. The parties may, at any time by stipulation, file documents not filed pursuant to Rule 5.06(1).

The Requests for Admission appear in the record on appeal, and support the trial court’s grant of summary judgment. As a result of these admissions, no genuine

issue of material fact exist, and the University was therefore entitled to judgment as a matter of law. Reviewed *de novo*, the University has shown that Sisco “could not prevail under any circumstances” and summary judgment is appropriate in this case. *Steelvest*, 807 S.W.2d at 480.

The order of the Pike Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Diana Carter Wiedel
Williamson, West Virginia

BRIEF FOR APPELLEE:

Donald L. Jones
Paintsville, Kentucky

Donald H. Combs
Pikeville, Kentucky