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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2014-CA-000097-DG

MARK BRADFORD APPELLANT

v.

ON DISCRETIONARY REVIEW FROM WARREN CIRCUIT COURT
HONORABLE STEVE ALAN WILSON, JUDGE
ACTION NO. 12-XX-00005

CAPITAL ONE BANK (USA), N.A. APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, KRAMER, AND NICKELL, JUDGES.

CLAYTON, JUDGE: This matter is before us upon an order granting discretionary review on April 23, 2014. Mark Bradford, *pro se*, sought discretionary review of an order of the Warren Circuit Court in a debt collection case involving a credit card issued to him by Capital One Bank, (USA) N.A.

(hereinafter "Capital One"). The circuit court affirmed the grant of summary judgment by the Warren District Court in favor of Capital One. We also affirm.

BACKGROUND

On November 14, 2011, Capital One filed a debt collection action against Bradford in Warren District Court. In his answer, Bradford admitted that Capital One issued him a credit card and that he owed an outstanding balance on the card but set forth numerous affirmative defenses.

Bradford asserted a number of affirmative defenses including impossibility of performance because the federal government seized his assets and that Capital One engaged in unfair, deceptive, or unconscionable conduct by accepting Troubled Asset Relief Program (TARP) bailout funds. Further, Bradford alleged that an implied contract existed between Capital One and him since Capital One's national advertising campaign was directed at him personally, and as such, Capital One improperly profited from the use of his likeness.

On January 18, 2012, Capital One filed a motion for summary judgment claiming that it had conclusively established a breach of contract by Bradford, and therefore, no genuine issues of material fact existed. Bradford responded that his defenses created issues of material fact and qualified as counterclaims. He moved under Kentucky Rules of Civil Procedure (CR) 8.03 that his pleading of the affirmative defense of a setoff be treated as a counterclaim. However, at this time, Bradford did not move to either amend his Answer or assert

a counterclaim nor did the district court ever recognize these defenses as counterclaims.

Bradford next propounded interrogatories and requests for production to Capital One. Capital One objected to each question and the request for documents on the basis of relevancy pursuant to Kentucky Rules of Evidence (KRE) 401 and 402. It also answered Bradford's response to the summary judgment motion. Following a hearing on March 20, 2012, the district court granted the summary judgment in favor of Capital One in its debt collection action.

Bradford appealed the summary judgment to the Warren Circuit Court, which, after a hearing, affirmed the summary judgment on October 18, 2013. Bradford then filed a motion to reconsider, which the circuit court also denied. After this denial, Bradford moved our Court for discretionary review, which we granted.

STANDARD OF REVIEW

Because this case is before us on a grant of summary judgment, we are mindful of our standard of review when resolving such matters. For the trial court to grant summary judgment, a party must prove no genuine issue of material fact exists, and he or she "should not succeed unless his right to judgment is shown with such clarity that there is no room left for controversy." *Steelvest, Inc., v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 482 (Ky. 1991). Furthermore, a trial court must view the evidence in favor of the non-moving party. *City of Florence, Kentucky v. Chipman*, 38 S.W.3d 387, 390 (Ky. 2001). And finally, the

non-moving party must present "at least some affirmative evidence showing the existence of a genuine issue of material fact [.]" *Id*.

On appeal, 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." *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky. App. 1996). Additionally, because summary judgments do not involve fact-finding, our review of the district court's summary judgment and the circuit court's opinion are reviewed *de novo*. *Blankenship v. Collier*, 302 S.W.3d 665 (Ky. 2010). With these standards in mind, we turn to the case at hand.

ANALYSIS

In the case at bar, Bradford contends that the courts below erred by declaring the summary judgment to be final and appealable while, according to him, there were pending counterclaims. Capital One counters that Bradford's defenses/counterclaims are not relevant to the credit card action; that he failed to provide any evidence of an implied contract; that discovery was complete at the time of the summary judgment; and, that the summary judgment was properly designated as final and appealable.

Initially, we address the efficacy of the summary judgment with regard to the debt collection action. To prevail on a claim for debt collection, the creditor must demonstrate ownership of the alleged debt; documentation detailing the amounts of principal and amount owed; and, evidence that the alleged debtor is the person responsible for the debt. *Bruner v. Discover Bank*, 360 S.W.3d 774,

778 (Ky. App. 2012). Here, not only was proof provided by Capital One but also Bradford conceded several times, including in the answer to the complaint, that the credit card was issued to him and that he did not make payments. The district court found that Capital One proved the elements of its claim, which was affirmed by the circuit court. We agree that summary judgment on the debt collection was proper.

However, in the case at hand, Bradford does not dispute the debt but merely that the debt should be excused because he had proffered counterclaims – the federal government seized his assets and Capital One illegally profited from the use of his likeness in national advertisements. Since the counterclaims were pending, he maintains that the grant of summary judgment was untimely.

Nonetheless, "a party opposing a properly supported summary judgment motion cannot defeat that motion without presenting at least some affirmative evidence demonstrating that there is a genuine issue of material fact requiring trial." *Hubble v. Johnson*, 841 S.W.2d 169, 171 (Ky. 1992). Hence, Bradford cannot defeat the summary judgment motion without providing some evidence of his (counter)claims. However, the affirmative defenses and/or counterclaims proffered by Bradford are simply not relevant to the debt collection action. Additionally, Bradford provides no evidence supporting them. A defendant cannot rest on bare assertions in his pleadings but must provide evidentiary proof to support his or her claims. *Educational Training Systems, Inc. v. Monroe Guar. Ins. Co.*, 129 S.W.3d 850, 853 (Ky. App. 2003).

A review of the procedural history shows that Capital One provided a complete accounting of the credit card debt, which was acknowledged by Bradford. Regarding his affirmative defenses, which he later asserted were counterclaims, he relied on vague and rather fantastic innuendo in his original answer and later in the response to the summary judgment motion. Again, providing only vague assertions is not sufficient to raise a genuine issue of fact. *Hartford Ins. Group v. Citizens Fidelity Bank & Trust Co.*, 579 S.W.2d 628, 631 (Ky. App. 1979).

Moreover, we are not persuaded by Bradford's allegation that his ability to establish his counterclaim was cut off by the district court's summary judgment. The summary judgment motion was submitted by Capital One on January 18, 2012. Appended to the motion was a complete accounting of the credit card debt. Bradford had opportunity and did file a response to the motion. Further, he had time to make a motion to treat the affirmative defense as a counterclaim, since he argued that if he prevailed, it would be a setoff of Capital One's debt collection. In addition, he also had time to submit interrogatories and a request for production of documents.

Capital One responded to Bradford's arguments and on March 16, 2012, served its responses to Bradford's interrogatories and request for production of documents. On March 20, 2012, the district court held a hearing, and after the hearing, entered the order for summary judgment. Essentially, before the district court ruled, Bradford was able to challenge Capital One's assertion that no genuine

issue of material fact existed in this case, but the district court disagreed with his reasoning.

Consequently, Bradford's contention that he did not have sufficient time to complete discovery is untrue. Although it is true that "summary judgment may not properly be entered before the respondent has had an opportunity to complete discovery ... [i]t is not necessary to show that the respondent has actually completed discovery, but only that respondent has had an opportunity to do so." *Hartford Ins. Group*, 579 S.W.2d at 630. In the case at bar, Bradford had time to do so.

Bradford also had to do more than suggest a genuine issue of material fact existed that merely alleges that the federal government froze his assets and Capital One used his likeness in advertisements, and thus, violated an implied contract. He provided no documentation of his assets being frozen or any Capital One advertisement that used his likeness. In fact, during the time that Bradford was able to challenge the summary judgment, he never proffered any real proof, but continued to only assert rather fantastical arguments without any evidentiary support. In addition, his allegations were irrelevant to the debt collection actions; that is, he never addressed the contract with the credit card company or that he reneged on it.

Moreover, it has been reasoned that the mere presence of a counterclaim, which is shown to be a sham, frivolous, or without merit, does not bar relief under summary judgment statutes and rules. 73 Am. Jur. 2d *Summary*

Judgment § 46 (2015). And our highest Court expressly ruled that the presence of a counterclaim, which was without merit, did not bar relief under summary judgment proceedings. *See Riedling v. Dearborn Motors Credit Corp.*, 313 S.W.2d 279, 280 (Ky. 1958).

In that case, the appellate court, in an action to recover farm equipment under a conditional sales contract, ruled that the plaintiff was still entitled to judgment as a matter of law against defendants who made a counterclaim for alleged fraud by the plaintiff's agent. *Id*. In *Riedling,* the plaintiff filed an uncontroverted deposition affidavit and exhibits demonstrating that the alleged fraud did not exist, and therefore, the Court held that the plaintiff was entitled to judgment as a matter of law. *Id*.

We believe that this case is similar. Capital One denied the accusations as baseless. Given the nature of the allegations, Capital One had no other recourse – it is not possible to provide proof of a negative. Additionally, Bradford was allowed to proffer interrogatories, a request for production of documents, and a legal memorandum to support his counterclaims. He had opportunity to provide some evidence of his counterclaims. Hence, the counterclaim is without merit. We conclude that the award of summary judgment was proper.

Finally, we address Bradford's claim that the district court's order of summary judgment should not have been designated as "final and appealable" with

"no just reason for delay" because of his ostensible pending counterclaim.

Kentucky Rules of Civil Procedure (CR) 54.02 states:

> When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may grant a final judgment upon one or more but less than all of the claims or parties only upon a determination that there is no just reason for delay.

The decision to make an order final and immediately appealable rests soundly with the discretion of the trial court and must be reviewed on a case-by-case basis. *Commonwealth Bank & Trust Co. v. Young*, 361 S.W.3d 344, 350-351 (Ky. App. 2012) (citations omitted).

Thus, a trial court has discretion to grant a final judgment upon one or more claims if there is no just reason for delay. In this routine debt collection case, Capital One proved, without question, that Bradford defaulted on his credit card agreement. Therefore, the plain meaning of the rule permits the district court to designate the case as "final and appealable" with "no just reason for delay."

And, as explained by the Kentucky Supreme Court in *Watson v. Best Financial Services, Inc.*, 245 S.W.3d 722, 726 (Ky. 2008), a reviewing court examines the trial court's certification to ascertain whether it rendered a final adjudication on one or more claims and conclusively determines the rights of the parties in that particular phase, and if the trial court rendered a final adjudication upon one or more claims in the litigation, then a reviewing court examines the certification for an abuse of discretion.

In the case at hand, the counterclaim was unsupported by any evidence on the record and was of questionable merit. Second, the debt collection action was conclusively established. Finally, it is unclear as to whether the counterclaim was ever properly presented to the trial court since Bradford never sought under CR 15.01 to amend his pleadings or filed a counterclaim under CR 13.01. His reliance on CR 8.03 is misplaced since the record does not reflect that the district court ever recognized the affirmative defense as a separate counterclaim. Hence, we conclude that the district court did not abuse its discretion in designating the case as "final and appealable."

CONCLUSION

We concur that it is indisputable that Bradford would be unable to produce evidence at trial warranting a judgment in his favor and against Capital One in this debt collection action. *See Steelvest, supra.* Accordingly, the opinion of the circuit court upholding the district court's grant of summary judgment in favor of Capital One was proper. The judgment of the Warren Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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