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Commonwealth of Kentucky

Court of Appeals

NO. 2016-CA-000590-MR

BOBIE J. PATTON — APPELLANT

v.

APPEAL FROM LAUREL CIRCUIT COURT
HONORABLE GREGORY A. LAY, JUDGE
ACTION NO. 15-CI-00447

DISCOVER BANK — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, J. LAMBERT, AND THOMPSON, JUDGES.

CLAYTON, JUDGE: In a debt collection case, Bobie J. Patton appeals the Laurel Circuit Court's summary judgment and its denial of his motion to amend the judgment. After review, we affirm.

BACKGROUND

This is a consumer collection action brought by Discover Bank ("Discover") to recover a debt owed by Bobie J. Patton as a result of a default on a Discover credit card account. In 1996, Patton applied telephonically for a consumer credit card with Discover. The application was accepted, and Discover extended a consumer credit card to Patton for his individual use. Thereafter, in 2008, ostensibly, Discover approached Patton about opening a separate credit card for his business, Sunrise Automotive, LLC ("Sunrise"), which he did.

Next, in late 2009, Patton and other members of Sunrise approached Discover seeking an extension of credit on the commercial account. Discover declined, but according to Patton, personnel at the bank proposed that Patton use the personal account, which is the subject of this action, to cover business expenses. He maintains that over the telephone, he had a discussion with an unidentified or unknown Discover representative about converting the consumer credit card to a commercial account for Sunrise. He provided no documentation supporting this claim other than his personal affidavit.

After this supposed agreement was reached, Patton believed that his personal credit card would now be governed by the terms of a business card agreement and that he was no longer personally liable on the Discover Consumer Credit Card. Additionally, beginning in the latter part of 2009 until the present, Patton alleges that he only used the card for Sunrise's business expenses.

Meanwhile, Sunrise's automotive business declined, and while initially making the minimum monthly payment on the credit card debt, after May 2014, Patton was unable to make any payment. By April 2015, the unpaid balance was over $18,000.

Discover filed a complaint on June 30, 2015, seeking to recover the unpaid balance of $18,437.52. The complaint named Patton as the sole defendant and sought to hold him personally responsible for the debt. (Discover also filed another action against Patton to recover the unpaid balance on the aforementioned Sunrise credit card.)

On January 15, 2016, Discover filed a motion for summary judgment claiming the pleadings contained no genuine issues of material fact. In his response to the motion, Patton filed an affidavit maintaining a genuine issue of material fact existed regarding whether the Cardmember Agreement had been modified to merge Patton's personal credit card account into a commercial credit card account for Sunrise. This modification would make Sunrise the actual debtor. Discover responded, acknowledging the existence of two credit card accounts, but denying any correlation between the extension of credit.

A hearing was held on the motion for summary judgment. On February 15, 2016, the trial court entered a perfunctory order granting summary judgment. Shortly thereafter, the presiding judge resigned. Subsequently, Patton filed a motion for findings of fact and to amend under Kentucky Rules of Civil Procedure (CR) 52.02 and 59.05. A special judge presided at a hearing on this

motion on March 11, 2016, and ordered the parties to submit findings of fact and conclusions of law. After the findings were submitted, a new judge was appointed and signed Discover's proposed order without an additional hearing. This order was entered on March 24, 2016. Patton now appeals these orders.

STANDARD OF REVIEW

The standard of review on appeal when a trial court grants a motion for summary judgment is whether the trial court correctly found no genuine issue of material fact and that the moving party was entitled to judgment as a matter of law. *Stewart v. Univ. of Louisville*, 65 S.W.3d 536, 540 (Ky. App. 2001); CR 56.03. The movant bears the initial burden of convincing the court by evidence of record that no genuine issue of fact is in dispute, which then shifts the burden to the party opposing summary judgment to provide "at least some affirmative evidence showing that there is a genuine issue of material fact for trial." *Steelvest, Inc. v. Scansteel Serv. Ctr., Inc.*, 807 S.W.2d 476, 482 (Ky. 1991). And the Court must view the record in a light most favorable to the non-movant and resolve all doubts in his or her favor. *Commonwealth, Nat. Res. & Envtl. Prot. Cabinet v. Neace*, 14 S.W.3d 15, 19 (Ky. 2000).

Moreover, summary judgment is not considered a substitute for a trial, so the trial court must review the evidentiary record not to decide any issue of fact, but to determine if any real factual issue exists and whether the non-movant cannot prevail under any circumstances. *Steelvest*, 807 S.W.2d at 480. Lastly, an appellate court need not defer to the trial court's decision on summary judgment

and will review the issue *de novo* since factual findings are not at issue. *Lewis v. B & R Corp.*, 56 S.W.3d 432, 436 (Ky. App. 2001); *Lawson v. Menefee*, 132 S.W.3d 890, 892 (Ky. App. 2004).

Having explicated the relevant standard of review, we turn to the matter at hand.

ANALYSIS

On appeal, Patton requests that the following issues be reviewed: whether his affidavit provides a material issue of fact; whether he can be held liable on the account when no proof of an unequivocal waiver of his personal immunity was provided; and, whether the trial court's entry of an order prepared by Discover was proper.

We begin with the issue of whether the affidavit creates a genuine issue of material fact. Patton claims that he is not personally responsible for the debt on the credit card because Discover allowed him, in early 2009, to alter the account from a personal account to a business account, thereby making the business, Sunrise, liable for the debt. The only evidence proffered by Patton to support this claim is his own affidavit

Discover provided an affidavit setting forth its ownership of the credit card account and the amount due. It also produced a copy of the credit card application, a copy of the credit card agreement, which was issued when the account was closed for nonpayment, the service agreement, copies of monthly bill statements, and copies of checks tendered by Patton for payment on the account.

Discover supports the authenticity of these documents with an affidavit endorsed by Franklin T. Akers, a litigation support specialist for Discover Products, Inc.

To counter Patton's assertion that the Cardmember Agreement changed from 1996 to 2009, Discover provided copies of all Cardmember Agreements from 1996 until the closure of the account. In essence, the Cardmember Agreements showed that there was never any substantive change in the terms of the Cardmember Agreement. Nor did Patton point out, with any particularity, a change in terms that would have permitted a telephonic conversation to change the account from a personal to a commercial one.

Discover maintains that it has met the burden to sustain a summary judgment. It cites *Bruner v. Discover Bank*, 360 S.W.3d 774, 778 (Ky. App. 2012), which provides the three elements a plaintiff must prove in a debt collection matter in Kentucky before summary judgment may be entered in that plaintiff's favor. The creditor must establish proof of the debt, proof of how the debt was calculated, and proof the defendant is the person responsible for the debt. Here, Patton does not dispute the first two issues but disputes his responsibility for the credit card debt.

Discover counters that Patton's affidavit is insufficient to create a genuine issue of material fact because it is based only on his bare assertions. Discover points out their evidence, including Akers' affidavit and the other documentation, adequately support its position that Patton is liable for the credit card debt.

Additionally, Discover maintains that besides never agreeing to modify Patton's personal account, he has provided no evidence of the modification. Discover states that the affidavit alone is insufficient to support Patton's claim and notes that it cannot produce evidence of the lack of an agreement because it is impossible to prove a negative.

In studying Patton's brief, we observe that Patton wrote that in late 2009, he approached Discover to extend the credit on Sunrise's commercial account. Discover stated that a second card could not be issued but suggested that Patton could use the personal account to cover charges for Sunrise's business expenses. Patton alleges that he understood the extension would be governed by the business card agreement.

Still, Patton's suggestion that Discover stated that he could use his personal account for Sunrise expenses does not transform the personal account into a commercial one. Patton supports his position by claiming that he only used the credit card for business purposes after 2009. This assertion is irrelevant. Patton was able to use his personal credit card for any expense, business or otherwise regardless of any alleged modification of the card. The use of the credit card does not change its characterization. Patton was always free to use his personal credit card for any expense allowed in the Cardmember Agreement. And the only prohibition in the Cardmember Agreement is for "illegal transactions."

Keeping in mind that Patton has the burden to produce at least some affirmative evidence showing that there is a genuine issue of material fact for trial,

he has provided only a self-serving affidavit that the personal account was modified.

Discover cites the statute of frauds to establish that such a modification must be in writing. However, even though Discover's argument under Kentucky Revised Statute (KRS) 371.010(4), the statute of frauds, is misplaced since KRS 371.010(9) obviates the requirement of a writing when it states "but this subsection shall not apply to agreements pursuant to which credit is extended by means of a credit card or similar device, or to consumer credit transactions[,]" the Cardmember Agreement suggests that a writing is necessary to modify the obligor and the type of account.

A perusal of the Cardmember Agreement indicates regarding changes to the agreement:

> The rates, fees and terms of this Agreement may change from time to time. We may add or delete any term of this Agreement. If required by law, we will give you advance written notice of the change(s) and a right to reject the changes.

Therefore, modifications to the credit line of an agreement are done by the creditor not the credit card user. And the Cardmember Agreement provides that no assignment or transfer of an account may be done to an account without the prior written consent of Discover.

> We may sell, assign or transfer your Account or any portion of it without notice to you. You may not sell, assign, or transfer your Account without first obtaining our prior written consent.

Thus, if Discover had permitted such a change, it would have had to support the change with a written notice. Further, the appendix of Patton's brief has both a Cardmember Agreement for a personal account and also one for a business account. The agreements are quite different. If Patton's personal account had been modified to a commercial one, changing the obligor to Sunrise, it would not only have been in writing but a new Cardmember Agreement would be needed.

Hence, we concur with the trial court that Patton's affidavit was insufficient to demonstrate a modification of his personal credit card to a commercial credit card obligating Sunrise, rather than him, for the debt. 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. *Steelvest*, 807 S.W.2d at 482. And the Court has held that an affidavit alone may not be enough to establish that a genuine issue of material fact exists. *First Fed. Sav. Bank v. McCubbins*, 217 S.W.3d 201, 204 (Ky. 2006). The summary judgment was proper.

Patton next requests us to clarify Discover's suggestion that if the account is commercial, Patton would still be liable as a shareholder. Discover argues, notwithstanding the veracity of Patton's allegations in the affidavit, that he would still be individually liable for the debt as a joint accountholder with Sunrise. Patton disputes this liability without proof of an unequivocal waiver of personal immunity on his part as required by statute.

Patton contends that under KRS 275.150 a shareholder is immune from personal liability for a company's debt unless the shareholder agrees in writing to be obligated for such debts. Since we have decided that no genuine issue of material fact exists regarding whether Patton's consumer credit card was modified into a commercial account, we decline to address this argument. The argument has no merit since we have determined that no evidence has been provided that the credit card was modified to a commercial account.

Indeed, Discover states on page 9 of its Brief, "[t]his defense is premised upon the false assumption that this Discover credit card was modified from his [Patton] personal credit card to a business credit card for Sunrise." Appellate courts do not address manufactured facts. Accordingly, we are not persuaded by this argument.

Lastly, Patton criticizes the handling of this matter procedurally because the trial court entered findings of fact verbatim that had been prepared by Discover, which he alleges was improper. Patton admits that under CR 52.01, findings of fact and conclusions of law are not required for decisions pertaining to motions under CR 12 or 56. Then, he points out that this matter was considered by three different judges and insinuates that the final judge entered the order without review. Patton then cites cases, which hold that it is not an acceptable practice to adopt findings prepared by counsel.

Patton's procedural arguments are without merit. First, CR 52.01 provides that findings are not necessary in CR 56 matters. Hence, findings were

not necessary. Moreover, it is completely hypothetical and without substantiation to imply that the trial judge did not make an independent review of this matter. First, Patton had an opportunity to submit proposed findings and conclusions for the trial court judge's consideration. Second, as explained by Discover, the trial judge did make changes to Discover's proffered conclusions of law. Clearly, the trial court judge who signed the order denying the motion to alter did not do so blindly. We conclude that Patton provided no procedural error warranting reversal.

CONCLUSION

For the foregoing reasons, the order of the Laurel Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:	BRIEF FOR APPELLEE:
John F. Kelley, Jr. London, Kentucky	James T. Hart Cincinnati, Ohio