

Commonwealth of Kentucky

Court of Appeals

NO. 2017-CA-002007-MR

KAY SHELTON, Individually and as
ADMINISTRATRIX OF THE ESTATE
OF JERRY SMITH

APPELLANT

v. APPEAL FROM ROCKCASTLE CIRCUIT COURT
HONORABLE DAVID A. TAPP, JUDGE
ACTION NO. 16-CI-00112

AMY HOLTKAMP

APPELLEE

OPINION
AFFIRMING

** ** * ** * **

BEFORE: ACREE, COMBS, AND MAZE, JUDGES.

MAZE, JUDGE: Kay Shelton appeals the Rockcastle Circuit Court's order granting partial summary judgment in favor of Appellee, Amy Holtkamp. Finding no error, we affirm.

Shelton and Holtkamp were named the co-administrators of the estate

of Jerry Smith. Holtkamp was Smith's only child. Shelton was Smith's girlfriend. Smith's estate consisted primarily of various pieces of real estate which passed to either Shelton or Holtkamp. Smith died with an outstanding debt of approximately \$200,000 to Citizens Bank, which was secured by his real property.

Shelton eventually negotiated a deal with Citizens Bank in which the bank would receive \$90,000 in exchange for releasing the encumbrances on the properties she received from Smith. As a result, only the property Holtkamp received from Smith was subject to foreclosure in order to satisfy Smith's debt. Citizens Bank subsequently foreclosed on an 84-acre farm Holtkamp received from Smith.

Holtkamp then filed suit against Shelton, alleging Shelton had breached her fiduciary duty as a co-administrator of Smith's estate. Thereafter, Shelton's attorney moved out-of-state and received leave to withdraw as counsel of record. For reasons unknown, Shelton did not timely retain a new attorney. Three months later, Holtkamp served Shelton with written requests for admission. These requests for admission requested that Shelton admit, amongst other things, that she owed a fiduciary duty to Holtkamp and breached that duty by obtaining a release on the property she inherited from Smith. The requests for admissions went unanswered and were deemed admitted pursuant to CR¹ 36.01(2).

¹ Kentucky Rules of Civil Procedure.

On November 15, 2017, Holtkamp moved for summary judgment based on Shelton's admissions. The motion was supported by an affidavit in which Holtkamp stated that Shelton's actions had left her primarily responsible for Smith's debt to Citizens Bank. The affidavit stated that, based on PVA values of the properties in question, she suffered a loss of at least \$80,000.

Pursuant to CR 56.03, Shelton should have received at least ten days' notice for Holtkamp's motion. However, the trial court held a hearing on the matter on November 20, 2017. Shelton did not appear at the hearing, and the trial court entered an order granting Holtkamp summary judgment and \$80,000 in damages on November 21, 2017.

A month later, Shelton finally retained substitute counsel. Substitute counsel did not seek relief from final judgment pursuant to CR 60.02 but did file a timely notice of appeal. On appeal, Shelton argues the trial court committed reversible error by failing to comply with CR 56.03. Shelton also contends there was insufficient evidence to support Holtkamp's alleged damages. We disagree on both fronts.

CR 56.03 provides that a motion for summary judgment "shall be served at least 10 days before the time fixed for the hearing." In *Equitable Coal Sales, Inc. v. Duncan Machinery Movers, Inc.*, 649 S.W.2d 415, 416 (Ky. App. 1983) we held that the ten-day requirement of CR 56.03 may be waived absent a

showing of prejudice. In that case, the non-moving party appeared at the hearing for the summary judgment motion but failed to ask for a continuance or object to receiving less than ten days' notice. *Id.*

Shelton argues that *Equitable Coals Sales, Inc.* is applicable only if a party appears at the summary judgment hearing yet fails to object to the insufficient notice. A different panel of this Court rejected a similar argument in *Waggoner v. Mortgage Electronic Registration Systems, Inc.*, 2003-CA-002666-MR, 2005 WL 2175439 (Ky. App. Sept. 9, 2005). In that case, the defendant failed to respond to the summary judgment motion, attend the scheduled hearing, or object to the lack of ten days' notice until filing an appeal. *Id.* at *1. Citing *Equitable Coal Sales, Inc.*, the Court held that the appellant "waived his right to ten days' notice under CR 56.03 by failing to object to the hearing date, attend the hearing, or otherwise make his objections known." *Id.*

Similarly, Shelton failed to respond to Holtkamp's motion for summary judgment or make her objections known through any pre- or post-judgment pleadings. Accordingly, we hold that Shelton waived her right to ten days' notice under CR 56.03. We now turn to the merits of the summary judgment order.

Summary judgment is appropriate when "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.” CR 56.03. “The record must be viewed 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 Service Center, Inc.*, 807 S.W.2d 476, 480 (Ky. 1991). In essence, for summary judgment to be proper, the movant must show that the adverse party cannot prevail under any circumstances. *Paintsville Hosp. Co. v. Rose*, 683 S.W.2d 255, 256 (Ky. 1985).

To establish breach of fiduciary duty, Holtkamp was required to show 1) the existence of a fiduciary duty; 2) breach of that fiduciary duty; and 3) that Shelton’s breach caused her injury. *Seeger Enterprises, Inc. v. Town & Country Bank and Trust Company*, 518 S.W.3d 791, 795 (Ky. App. 2017). Shelton does not argue Holtkamp failed to provide evidence to support the first two elements of this claim. “It is not our function as an appellate court to research and construct a party’s legal arguments, and we decline to do so here.” *Hadley v. Citizen Deposit Bank*, 186 S.W.3d 754, 759 (Ky. App. 2005). Instead, Shelton argues the trial court’s summary judgment order should be reversed because the amount of damages awarded was not supported by substantive or demonstrable evidence. We disagree. Holtkamp’s affidavit alleged that Shelton’s action caused the foreclosure of her property, which she swore a PVA had valued at \$80,000. Shelton did not

provide any contravening evidence. “[I]t is now generally held that the uncertainty which prevents a recovery is uncertainty as to the fact of the damage and not as to its amount and that where it is certain that damage has resulted, mere uncertainty as to the amount will not preclude the right of recovery.” *Kellerman v. Dedman*, 411 S.W.2d 315, 317 (Ky. 1967). Uncontroverted affidavits may provide grounds for a trial court to award summary judgment. *Daniel v. Turner*, 320 S.W.2d 135, 137 (Ky. 1959). Although this case may have ended differently had Shelton responded to discovery or Holtkamp’s dispositive motion, the trial court’s award of summary judgment was proper under the uncontroverted evidence.

Accordingly, the order of the Rockcastle Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Jerry W. Gilbert
Richmond, Kentucky

BRIEF FOR APPELLEE:

Michael S. Fore
Richmond, Kentucky