

RENDERED: JUNE 12, 2020; 10:00 A.M.  
NOT TO BE PUBLISHED

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2018-CA-000880-MR

DIVERSIFIED DEMOLITION, LLC

APPELLANT

v. APPEAL FROM BATH CIRCUIT COURT  
HONORABLE WILLIAM EVANS LANE, JUDGE  
ACTION NO. 16-CI-90119

ROSEBIRD PROPERTIES, LLC;  
ESTATE OF RICKY LEE WILLIAMS;  
JENIFER WILLIAMS; HONORABLE  
JULIE WILLIAMSON, AS EXECUTRIX  
OF THE ESTATE OF RICKY LEE  
WILLIAMS; AND ERICA WILLIAMS,  
AS FORMER EXECUTRIX OF THE  
ESTATE OF RICKY LEE WILLIAMS

APPELLEES

OPINION  
AFFIRMING

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BEFORE: JONES, LAMBERT, AND L. THOMPSON, JUDGES.

LAMBERT, JUDGE: Diversified Demolition, LLC, (Diversified) appeals from the Bath Circuit Court order granting summary judgment and dismissing its claim as untimely. We affirm.

In 2014, Diversified was hired to demolish a commercial property in Lexington, Kentucky. Rick Williams, of Rosebird Properties, LLC, (Rosebird) agreed to salvage, for consignment sale purposes, everything but steel, copper, and electrical wiring from the property. The agreed upon price was \$52,000.00, due as items were sold but within thirty days of removal. There was no written contract. All memorialized communications were via text messaging between Williams and John Conley, president of Diversified.

The equipment and materials were removed, and Williams made cash payments to Diversified as items were sold. The payments from Williams were sporadic, and Diversified extended the deadline several times. On August 15, 2014, Williams sent a check to Diversified in the amount of the balance due, namely, \$35,300.00. However, there were nonsufficient funds in Rosebird's bank account to cover the check. Diversified agreed to hold the check as evidence of monies owed. Several more cash payments were made to Diversified. When Williams unexpectedly passed away on September 10, 2015, the balance remaining to Diversified had been reduced to \$15,300.00.

Erica Williams, daughter of Ricky, offered her father's will in Bath District Court on September 23, 2015. She was appointed executrix of the estate. On April 8, 2016, Diversified filed its claim in the probate action for the amount due on the agreement with Williams and Rosebird. On September 12, 2016, Diversified filed a claim in Bath Circuit Court. The Estate did not file an answer, and Diversified filed a motion for default judgment on October 24, 2016. The Estate filed a motion for summary judgment the following April. Diversified responded to the motion and filed its own motion for summary judgment. All pending motions were taken under advisement on June 9, 2017.

On August 1, 2017, in Bath District Court, Erica was removed as executrix of Ricky's estate; Julie S. Williamson was appointed as administratrix with the will annexed. On August 18, 2017, Diversified presented its claim to Williamson for payment, arguing that the applicable time frames recommenced with her appointment. On September 13, 2017, in Bath Circuit Court, Jenifer Williams (ex-wife to Ricky and a secured creditor against his estate via their 2013 dissolution of marriage property settlement agreement) moved, pursuant to Kentucky Rule of Civil Procedure (CR) 19, to be joined as a party defendant to this action; she also filed a motion for summary judgment requesting dismissal of Diversified's claim against the Estate. Diversified opposed both the joinder of Jenifer as a party and her motion for summary judgment.

A hearing was held on September 21, 2017, after which (and by order entered on October 17, 2017) the circuit court granted Jenifer’s joinder motion and took the motions for summary judgment under advisement, with a status conference scheduled for the following November 16. A further hearing was held, as were status conferences. On February 19, 2018, the Bath Circuit Court held “upon all of the factual evidence presented to the Court that the Plaintiff, Diversified Demolition, LLC, is not a secured creditor.” Jenifer’s motion for summary judgment was held in abeyance, and the matter was remanded to the probate court. On March 1, 2018, Diversified filed a motion to alter, amend, or vacate (pursuant to CR 59 and 60) that order, arguing that the circuit court had improperly adjudicated issues of fact. On May 10, 2018, the circuit court granted Jenifer’s motion for summary judgment, denied Diversified’s motion for summary judgment, and granted Diversified’s CR 59 motion to the extent that it added finality language to its February 19 order. Diversified filed its notice of appeal on June 8, 2018, naming as appellees Rosebird, the Estate, Jenifer, Erica (as former executrix<sup>1</sup>), and Julie Williamson (the current administratrix).

We begin by stating our standard of review, namely:

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<sup>1</sup> In its notice of appeal, Diversified maintained that Erica was not removed as a party at the circuit court level, yet an agreed order, signed by counsel, was entered on August 23, 2017, in which “Ms. Erica Williams is removed as a party representative of the Estate of Ricky Lee Williams, as she has been removed as Executrix by Order of the Bath District Court dated August 1, 2017[.]”

“The standard of review on appeal of summary judgment is whether the trial court correctly found there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law.” *Carter v. Smith*, 366 S.W.3d 414, 419 (Ky. 2012). Summary judgment involves only legal questions; whether a fact is material and, if so, whether there is a genuine issue regarding that material fact are legal questions. *Stathers v. Garrard County Bd. of Educ.*, 405 S.W.3d 473, 478 (Ky. App. 2012). Thus, we utilize a *de novo* review standard. *Id.*

Kentucky courts have repeatedly stated, and we continue to adhere to these bedrock principles, that summary judgment is an extraordinary remedy, it is to be “cautiously applied[,]” and it “should not be used as a substitute for trial.” *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 483 (Ky. 1991). “The trial court must review the evidence, not to resolve any issue of fact, but to discover whether a real fact issue exists.” *Shelton v. Kentucky Easter Seals Soc’y*, 413 S.W.3d 901, 905 (Ky. 2013) (footnote omitted). This requires both the trial court and this Court to review the record “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*, 807 S.W.2d at 480.

*Joiner v. Kentucky Farm Bureau Mutual Insurance Company*, 582 S.W.3d 74, 77-78 (Ky. App. 2019). Here, the facts must be viewed in a light most favorable to Diversified. *Id.* at 78.

The questions of law to be decided on this appeal are not only whether summary judgment was proper, but also whether Diversified was a secured

creditor and, if not, whether it had filed a timely claim against the Estate. At the time of the within action, Kentucky Revised Statute (KRS) 396.011(1)<sup>2</sup> read:

All claims against a decedent's estate which arose before the death of the decedent, excluding claims of the United States, the State of Kentucky and any subdivision thereof, whether due or to become due, absolute or contingent, liquidated or unliquidated, founded on contract, tort, or other legal basis, if not barred earlier by other statute of limitations, are barred against the estate, the personal representative, and the heirs and devisees of the decedent, unless presented **within six (6) months after the appointment of the personal representative, or where no personal representative has been appointed, within two (2) years after the decedent's death.**

(Emphasis added.) There is no dispute that Diversified filed its claim against the Estate more than six months after Erica had been appointed executrix.

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<sup>2</sup> This statute has been approved for amendment as follows:

(1) All claims against a decedent's estate which arose before the death of the decedent, excluding claims of the United States, the State of Kentucky and any subdivision thereof, whether due or to become due, absolute or contingent, liquidated or unliquidated, founded on contract, tort, or other legal basis, if not barred earlier by other statute of limitations **or non-claim statutes**, are barred against the estate, the personal representative, and the heirs and devisees **and non-probate transferees** of the decedent, unless presented **within the earlier of the following:**

**(a) Eight (8) months after the decedent's death;**

**(b) The time period provided in subsection (2) of Section 7 of this Act for creditors who are given actual notice; or**

**(c) The time period provided in subsection (1) of Section 7 of this Act for creditors who are barred by publication.**

2020 Kentucky Acts Ch. 25 (HB 155) (emphases denote changes).

It was thus incumbent upon Diversified to prove that it was a secured creditor under KRS 396.011(2)(a), an exception to the six-month limitation, which then provided that “[n]othing in this section shall affect or prevent . . . [t]o the extent of the security only, any proceeding to enforce any mortgage, pledge, lien or other security interest securing an obligation of the decedent or upon property of the estate[.]”

Secured transactions fall under the purview of Article 9 of KRS Chapter 355, Kentucky’s Uniform Commercial Code (UCC). Consignment agreements are considered secured transactions under KRS 355.9-109(1)(d). However, “a security agreement that provides a description of the collateral” is required by the UCC. KRS 355.9-203(2)(c)1. “The requirement of authentication under KRS 355.9-203(2)(c)1 is that the debtor must sign a security agreement. KRS 355.9-102(1)(g).” *Meade v. Richardson Fuel, Inc.*, 166 S.W.3d 55, 57 (Ky. App. 2005) (footnote omitted). Additionally, the following language is instructive:

To determine whether collateral is so reasonably identified, the Court utilizes an “inquiry test:”

[A] description of collateral is sufficient for either a security agreement or a financing statement **if it puts subsequent creditors on notice so that, aided by inquiry, they may reasonably identify the collateral involved.**

*Nolin Prod. Credit Ass’n v. Canmer Deposit Bank*, 726 S.W.2d 693, 697 (Ky. App. 1986).

*Bishop v. All. Banking Co.*, 412 S.W.3d 217, 219 (Ky. App. 2013) (emphasis added).

Here there was no security agreement per se. Diversified insists that the text messaging between its president and Williams as well as the cold check Williams wrote for the balance owed were sufficient to satisfy the statutory requirements. We disagree. Nowhere was the collateral reasonably identified, other than by Conley's testimony, which did not "put [] subsequent creditors on notice[.]" *Nolin*, 726 S.W.3d at 697.

The collection of the disputed funds had been ongoing since 2014. Diversified sought no action against Williams prior to his death, and we can see no justification for allowing its untimely action here to go forward. *Williams v. Hawkins*, 594 S.W.3d 189, 199 (Ky. 2020) ("No extraordinary circumstance justifies deviating from the routine application of the statute of limitations.").

We need not reach the issue of the propriety of Jenifer's joinder as a party. As stated previously, the Estate (with Erica as executrix) filed its motion for summary judgment in April 2017. Williamson, as administratrix with will annexed, renewed the motion after her appointment. The result would be the same, with or without Jenifer's joinder as a party.

We lastly address Diversified's motion before this Court to strike the appellees' briefs. In support thereof, Diversified claims that the briefs contain



citations to materials not part of the record on appeal. We have ruled on the propriety of summary judgment without reference to the allegedly extraneous materials. Accordingly, Diversified's motion to strike is deemed moot and will be denied in a separate order issued with this opinion.

The judgment of the Bath Circuit Court is affirmed.

ALL CONCUR.

**BRIEFS FOR APPELLANT:**

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**BRIEF FOR APPELLEE  
JENIFER WILLIAMS:**

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