

Commonwealth Of Kentucky

Court of Appeals

NO. 2001-CA-000747-MR

MICHAEL W. CLARK
AND TRICIA LITCHFIELD, Individually
d/b/a MIDWEST PRODUCTIONS and
d/b/a DIRECT MARKETING

APPELLANTS

v. APPEAL FROM CLAY CIRCUIT COURT
HONORABLE R. CLETUS MARICLE, JUDGE
ACTION NO. 98-CI-00099

COMMONWEALTH OF KENTUCKY,
EX REL. A.B. CHANDLER III,
ATTORNEY GENERAL

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: EMBERTON, CHIEF JUDGE; BUCKINGHAM AND PAISLEY, JUDGES.
BUCKINGHAM, JUDGE: Michael Clark, Tricia Litchfield, and their
respective businesses appeal from a summary judgment rendered by
the Clay Circuit Court enjoining them from soliciting for
charitable purposes in violation of the Kentucky Charitable

Solicitations Act (KRS¹ 367.650-.670) and imposing civil penalties and costs totaling \$4,000 against each of them. We affirm.

On March 20, 1998, the office of the Attorney General of the Commonwealth of Kentucky, Consumer Division, filed a civil action in the Clay Circuit Court against Clark, Litchfield, and their respective business entities. The suit alleged violations of the Kentucky Charitable Solicitations Act. Specifically, the suit alleged that Clark and Litchfield were operating as charitable solicitors from a location in Kentucky without having registered with the Attorney General's office and posting a surety bond.

Shortly after the suit was filed, a temporary injunction was entered. On July 6, 1999, the Commonwealth served requests for admissions on Clark and Litchfield. They did not respond in any manner to the requests. On September 7, 1999, the attorney for Clark and Litchfield was permitted by the court to withdraw from his representation of them.

No action took place in the case for some time thereafter. Finally, on January 22, 2001, the court entered a Notice to Dismiss for Lack of Prosecution pursuant to CR² 77.02(2). That notice prompted the Commonwealth to file a

¹ Kentucky Revised Statutes.

² Kentucky Rules of Civil Procedure.

motion for summary judgment supported by a lengthy memorandum of law and several exhibits. As Clark and Litchfield had not retained new counsel to represent them, the summary judgment motion was served on them individually.

Clark and Litchfield did not respond in any manner to the Commonwealth's motion for summary judgment, and the circuit court entered summary judgment against them in an order dated March 7, 2001. By order dated May 4, 2001, an amended summary judgment order was entered by the court. The judgment enjoined Clark and Litchfield from soliciting for charitable purposes in violation of the Kentucky Charitable Solicitations Act and imposed civil penalties of \$3,000 and costs of \$1,000 on each of them. This appeal followed.

Clark and Litchfield argue that the affidavits and reports submitted in support of the Commonwealth's summary judgment motion were inadequate to support the entry of a summary judgment. Having reviewed the material supporting the Commonwealth's motion and considering the admissions made by Clark and Litchfield due to their having failed to answer the requests for admissions,³ we conclude that the supporting material was sufficient to support the entry of summary judgment in this case. Furthermore, in the face of a well-supported summary judgment motion, it was incumbent upon Clark and

³ See CR 36.01(2).

Litchfield to respond by counter-affidavits or other information or material indicating the existence of a genuine issue of material fact. See Wymer v. JH Properties, Inc., Ky., 50 S.W.3d 195, 199 (2001). In light of their failure to respond to the summary judgment motion, the trial court properly awarded summary judgment to the Commonwealth.

Clark and Litchfield next argue that the reports supporting the summary judgment motion contain "hearsay upon hearsay" and that the affidavits contain allegations which were insufficient to support the entry of summary judgment. We have addressed this argument above. Further, Clark and Litchfield cite no authority prohibiting the use of hearsay evidence in support of a summary judgment motion.

Clark and Litchfield also argue that the Notice to Dismiss for Lack of Prosecution entered by the court after the case had no action for over one year was "evidence" that the Commonwealth had lost interest in the case and "further evidence" that they (Clark and Litchfield) had reason to believe the case had been dropped. We disagree. First, even if the Commonwealth had lost interest in the case for a period of time, it clearly regained interest as evidenced by the filing of the summary judgment motion. Further, Clark and Litchfield obviously knew or should have known that the Commonwealth

intended to pursue the case when the summary judgment motion was filed.

Finally, Clark and Litchfield state that they were not kept properly informed of the proceedings and that they want an opportunity to defend themselves. In fact, they state at the beginning of their brief that "[t]his appeal is being taken for the reason that the appellant's did not have an adequate opportunity to present a defense at the trial court level." They state that they want the opportunity to convince a judge or jury "that there was not any intended violation of KRS Chapter 367 or any intended violation of any other statute in Kentucky." In short, Clark and Litchfield apparently allege that their attorney did not properly keep them informed of the proceedings and that they have valid defenses they now wish to assert.

In connection with this argument, Clark and Litchfield filed a CR 60.02 motion after the filing of the notice of appeal herein. The CR 60.02 motion alleges the same grounds raised by Clark and Litchfield in this argument. We believe that argument, that their attorney's representation was deficient, states insufficient grounds to warrant relief. See Vanhook v. Stanford-Lincoln Co. Rescue Squad, Inc., Ky. App., 678 S.W.2d 797, 799 (1984); Natural Resources and Environmental Protection Cabinet v. Adams, Ky. App., 873 S.W.2d 834, 835 (1994).

The summary judgment of the Clay Circuit Court is affirmed.

ALL CONCUR.

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