

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-000978-MR

STELLA A. HODGE

APPELLANT

v.

APPEAL FROM KNOX CIRCUIT COURT
HONORABLE RODERICK MESSER, JUDGE
ACTION NO. 00-CI-00511

DENNIS LYNCH

APPELLEE

OPINION
AFFIRMING IN PART,
REVERSING IN PART, AND
REMANDING

** ** * * *

BEFORE: BUCKINGHAM, DYCHE, AND JOHNSON, JUDGES.

BUCKINGHAM, JUDGE. Stella Hodge appeals from an order of the Knox Circuit Court granting a summary judgment in favor of Dennis Lynch on his claim of indebtedness against Hodge in the amount of \$121,762.14. Hodge admits that summary judgment against her on the issue of liability was appropriate. However, she argues, and we agree, that summary judgment on the issue of the amount of indebtedness was not appropriate. Thus, we affirm in part, reverse in part, and remand.

The parties to this appeal were named as co-defendants in a foreclosure action filed by National City Bank (NCB) on October 24, 2000. Lynch filed a cross-claim against Hodge based on a land contract and promissory note. In reply to the cross-claim, Hodge admitted the execution of the documents but denied the amount owed. Hodge subsequently paid off the indebtedness to NCB, and its complaint was dismissed, leaving Lynch's cross-claim.

Lynch filed a motion for summary judgment pursuant to CR¹ 56.03. A supporting affidavit was attached to the motion, whereby Lynch stated that Hodge was in default under the terms of the Land Contract and Promissory Note and that she thereby owed him \$121,762.14. Hodge filed a response to the motion, acknowledging that she was indebted to Lynch but putting into issue the amount of the indebtedness. Attached to the response was documentation signed by Hodge and Lynch, which purportedly reflected their actual agreement. Hodge denied owing an amount of indebtedness in excess of \$43,268.10.

The circuit court entered an order granting summary judgment in favor of Lynch stating:

CR 56.03 provides that a party opposing a motion for summary judgment serve opposing affidavits. In this case, no opposing affidavit has been filed by Hodge, nor did Hodge make any claim that such affidavits

¹ Kentucky Rules of Civil Procedure.

could not be presented, as is discussed in CR 56.06. When a party fails to counter affidavits of a moving party, summary judgment is appropriate. Gevedon v. Grigsby, 303 S.W.2d 282 (Ky. 1957).

Hodge subsequently filed a motion to alter, amend, or vacate the judgment. She argued that a genuine issue of material fact existed as to whether the land contract and note reflected the actual agreement with Lynch and that summary judgment was thus precluded. After the circuit court denied the motion to alter, amend, or vacate the judgment, Hodge appealed.

We first note that the circuit court did not find that there were no genuine issues of material fact. Rather, the court granted summary judgment in favor of Lynch for the sole reason that Hodge did not oppose the summary judgment motion with counter affidavits.

CR 56.03 states as follows:

The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if 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. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages. [Emphasis added.]

The rule makes it permissible for the party opposing summary judgment to file affidavits. However, we do not read the rule to require opposing affidavits. Indeed, Kentucky case law is to the contrary. "CR 56.03 provides that a party opposing a motion for summary judgment *may* file opposing affidavits, but does not require him to do so." Davis v. Dever, Ky. App., 617 S.W.2d 56, 57 (1981).

CR 56.06 states:

Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

The circuit court interpreted this rule to mean that if a party fails to file an affidavit in response to an affidavit, without stating why such affidavit could not be presented, summary judgment is appropriate. However, on its face, this rule merely permits a trial court to extend the time for obtaining affidavits, depositions, or discovery.

The trial court relied upon the case of Gevedon v. Grisby, Ky., 303 S.W.2d 282 (1957), in support of its interpretation. However, Gevedon does not hold that a party must counter an affidavit with an affidavit. In Gevedon, the only conflict of fact presented by the party opposing the motion

for summary judgment was a statement in an unverified complaint. Id. at 284. Gevedon merely held that an affidavit was sufficient to overcome an allegation in a complaint. Id. "[T]he party opposing the motion for summary judgment may not rely upon his pleadings alone to make an issue of fact, but is required in the proper case to make some showing to offset the impact of the matters presented in support of the motion." Hartford Ins. Group v. Citizens Fidelity Bank & Trust Co., Ky. App., 579 S.W.2d 628, 631 (1979), citing Hayes v. Rodgers, Ky., 447 S.W.2d 597 (1969).

CR 56.03 provides that summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. A well-supported motion for summary judgment can terminate litigation when, as a matter of law, it appears that it would be impossible for the responding party to produce evidence at trial warranting a judgment in its favor. Steelvest, Inc. v. Scansteel Serv. Ctr., Inc., Ky., 807 S.W.2d 476, 480 (1991), citing Paintsville Hosp. v. Rose, Ky., 683 S.W.2d 255 (1985). 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.

Kentucky case law supports our view that evidence opposing a properly supported summary judgment motion need not necessarily be in the form of an affidavit. In Conley v. Hall, Ky., 395 S.W.2d 575 (1965), the court held that "a party opposing a motion is not limited to the filing of affidavits." Id. at 583. Further, the Conley court stated, "we think it only sensible to construe the word 'affidavits' in CR 56.03 as including any other pertinent materials which will assist the court in adjudicating the merits of the motion." Id.

In Neal v. Welker, Ky., 426 S.W.2d 476 (1968), the court stated as follows:

When the moving party has presented evidence showing that despite the allegations of the pleadings there is no genuine issue of any material fact, it becomes incumbent upon the adverse party to counter that evidentiary showing by some form of evidentiary material reflecting that there is a genuine issue pertaining to a material fact. Tarter v. Arnold, Ky., 343 S.W.2d 377. [Emphasis added.]

Id. at 479. It is important to note that the court in Neal did not state that counter affidavits were necessarily the only form of evidentiary material required to counter a properly support summary judgment motion.

In Continental Cas. Co. v. Belknap Hardware & Mfg. Co., Ky., 281 S.W.2d 914 (1955), the court held as follows:

The party moving for a summary judgment has the burden of establishing that no genuine

issue as to any material fact exists and also that he is entitled to judgment as a matter of law. If uncontroverted affidavits which clearly disclose the facts show that a genuine issue does not exist, the opposing party has an obligation to do something more than rely upon the allegations of his pleading. Since the moving party has the burden, he must make a *prima facie* showing that would entitle him to a summary judgment. The opposing party is then required by counter-affidavit, or otherwise, to show that evidence is available justifying a trial of the issue involved. [Emphasis added.]

Id. at 916. Again, it is important to note that the court in Continental Cas. Co. did not limit evidentiary material opposing a properly supported summary judgment motion to counter affidavits. See also Collins v. Duff, Ky., 283 S.W.2d 179 (1955), wherein the court stated, "We think that on a motion for summary judgment the court is entitled to consider any evidentiary matter that has been presented to the court at any stage of the proceeding." Id. at 183.

In short, we conclude that the circuit court in the case *sub judice* erred when it held that Hodge was required to file a counter affidavit in order to overcome Lynch's summary judgment motion. The documentation attached to her response to the motion was sufficient to create a genuine issue of material fact as to the amount of the indebtedness. Specifically, Hodge attached documents to her response which were purportedly signed

by Lynch wherein he acknowledged that the true amount of indebtedness was not reflected by Hodge's note to him.²

The summary judgment of the Knox Circuit Court is affirmed in part to the extent it determined the issue of liability in Lynch's favor. However, the summary judgment is reversed in part and remanded as to the issue of the amount of the indebtedness.

JOHNSON, JUDGE, CONCURS.

DYCHE, JUDGE, CONCURS IN PART AND DISSENTS IN PART.

DYCHE, JUDGE, CONCURRING IN PART AND DISSENTING IN PART. I must respectfully dissent from so much of the majority opinion which remands this case for a determination of the amount owed by Hodge to Lynch. The unsworn "information" supplied by Hodge is insufficient to raise a genuine issue of material fact. The majority places too much emphasis on the term "affidavit." What CR 56 contemplates is sworn testimony of some sort, affidavit or otherwise, which creates such an issue. Continental Casualty Company, Inc. v. Belknap Hardware & Manufacturing Co., Ky., 281 S.W.2d 914 (1955). I would affirm the trial court *in toto*.

² It also appears that there may be issues concerning Lynch's right to recover from Hodge amounts owed by her to NCB. The debt to NCB was paid off by Hodge, and it is not clear why Lynch contends that Hodge owes him the full amount of that note.

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