

RENDERED: JUNE 13, 2003; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-001555-MR

CHAZ CONCRETE COMPANY, LLC

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE THOMAS J. KNOFF, JUDGE
ACTION NO. 02-CI-001684

MARK LECHNER and CHRIS DEZINGER

APPELLEES

OPINION VACATING AND REMANDING

** ** * * *

BEFORE: BARBER and COMBS, JUDGES; and MILLER, Special Judge.¹
COMBS, JUDGE. Chaz Concrete Company, LLC ("Chaz") appeals from
a summary judgment entered in favor of Mark Lechner and Chris
Dezinger² in a contract action for recovery of payment for
materials supplied. We vacate and remand.

In March 2002, Chaz filed suit against Lechner and
Dezinger alleging that it had supplied concrete products for

¹ Senior Status Judge John D. Miller sitting as Special Judge by
assignment of the Chief Justice pursuant to Section 110(5)(b) of the
Kentucky Constitution.

² Dezinger has indicated in his affidavit that his true name is
Chris Dischinger. However, for the sake of continuity, we have used
his assumed name to identify him.

various projects in which the defendants were involved. Chaz claimed that it sold the materials on credit to the defendants individually and that each had failed and refused to fulfill his personal obligation under the agreement. Chaz sought to recover the sum of \$54,000.00 with interest. Lechner and Dezingler answered the complaint and denied any personal liability with respect to the materials supplied to their limited liability companies.

On April 4, 2002, Chaz served Lechner and Dezingler with interrogatories and requests for the production of documents. Before complying with the discovery requests, Lechner and Dezingler moved for summary judgment. In support of their motion, Lechner and Dezingler submitted an affidavit in which they each denied having had "any dealings whatsoever directly with [Chaz Concrete]" in a personal capacity. They each further attested as follows:

2. Neither have I even spoken to them with regard to any orders made by any company in which I am involved, Millennium or LDG may have at times ordered materials from Chaz Concrete.

3. I have signed no personal guarantee at [sic] any materials or labor for Chaz Concrete on behalf of either Millennium or LDG.

Chaz filed a verified response to the motion for summary judgment. Chuck Berkley, president of the corporation, attested that Lechner and Dezingler each personally requested

Chaz to provide materials for various job sites owned or controlled by them; that the material had been delivered with credit extended to each of them in their individual capacities; and that neither of them had previously denied personal liability on the debt.

The trial court granted the motion for summary judgment solely because Lechner and Dezingler had denied any direct interaction with Chaz in their individual capacities and had denied ever having signed any personal guarantees on behalf of their limited liability companies. The court concluded that summary judgment was proper because Chaz had failed to present "any significant evidence to show that [Lechner and Dezingler] are individually liable for any debt owed Chaz Concrete."

On appeal, Chaz argues that the trial court erred by entering summary judgment because there remains a genuine issue of material fact as to whether Lechner and Dezingler assumed the obligations of the limited liability companies as their own personal liabilities. We agree that summary judgment is inappropriate at this juncture.

Summary judgment is proper only where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Kentucky Rules of Civil Procedure (CR) 56.03. 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. Wymer v. JH Properties, Inc., Ky., 50 S.W.3d 195 (2001), citing Steelvest, Inc. v. Scansteel Service Center, Ky., 807 S.W.2d 476 (1991). 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, supra at 482. As to what form that evidence must take, CR 56.06 provides that it shall be by affidavit, which the courts have construed as including any other pertinent material that will assist the court in adjudicating the merits of the motion. Conley v. Hall, Ky., 895 S.W.2d 575 (1965). But, see Hartford Ins. Group v. Citizens Fidelity Bank & Trust Co., Ky. App., 579 S.W.2d 628 (1979), holding that a party opposing the motion cannot rely on his pleadings alone to show the existence of a material issue of fact.

Chaz argues that its verified response to the motion for summary judgment presented sufficient evidence of the existence of a material issue of fact -- namely, whether Lechner and Dezinger acted in such a way as to make each jointly or either separately personally liable on the debt. In reviewing a summary judgment, an appellate court need not defer to the trial court's decision and will review questions of law *de novo*.

Scifres v. Kraft, Ky. App., 916 S.W.2d 779 (1996). It will scrutinize the facts only to ascertain if any issue of material fact remains in dispute.

We conclude that the verified response was sufficient to create a genuine issue of material fact in this case. The bare denials of Lechner and Dezinger at this juncture in the proceedings were not sufficient to refute the evidentiary value of Chaz's sworn statements regarding their personal liability on the debt. Nor does it appear that Chaz had been given sufficient time to develop its case before the action was summarily dismissed. Therefore, we hold that the trial court erred by granting the motion for summary judgment.

The summary judgment is vacated, and the matter is remanded for further proceedings.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEES:

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