RENDERED: February 18, 2005; 10:00 a.m.
NOT TO BE PUBLISHED

# Commonwealth Of Kentucky

# Court of Appeals

NO. 2003-CA-001191-MR

TERRY E. FOX — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE STEPHEN P. RYAN, JUDGE
ACTION NO. 02-CI-005680

MIDWESTERN TRAINING CENTERS, INC. — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, CHIEF JUDGE; GUIDUGLI AND SCHRODER, JUDGES.

GUIDUGLI, JUDGE: In this collection action, Terry E. Fox, proceeding pro se, has appealed from the Jefferson Circuit Court's May 7, 2003, summary judgment entered in favor of Midwestern Training Centers, Inc. (hereinafter "Midwestern"), the plaintiff below. We affirm.

We shall first set out the factual background of this case. We note that both Fox and Midwestern have included in their respective briefs background material that is outside of the certified record. We shall confine our recitation of the

facts to only those found in the certified record. Midwestern, a truck driving school, filed its complaint against Fox, a resident of Jefferson County, Kentucky, to recover $8,413.87 he owed the company pursuant to a Retail Installment Contract entered into on September 25, 2000. In the complaint, Midwestern alleged that Fox had defaulted on his obligations under the contract, which allowed it to accelerate all amounts due. Despite its demands, Fox did not make any payments, other than one payment of $100.89 on June 25, 2001. Fox was served with the complaint and timely filed an answer, in which he denied the allegations of the complaint. Fox also asserted that Midwestern was a foreign corporation without authorization to transact business in the Commonwealth and that he and Midwestern had entered into an accord and satisfaction, which acted as a complete defense to the complaint.

In November, Midwestern filed a motion for summary judgment, arguing that Fox never responded to its discovery requests, which included a request for admissions. Because Fox did not respond, those admissions were deemed admitted pursuant to CR 36, and at least one of the admissions concerned the outstanding balance owed. Fox never filed a response to the motion for summary judgment. No further action was taken until the circuit court entered a sua sponte order the following April scheduling a status conference in June. A few days later,

Midwestern filed an AOC-280 Notice of Submission of Case for Final Adjudication with the circuit court. The form was mailed on May 7, 2003, and the circuit court entered a summary judgment in favor of Midwestern the same day. In the summary judgment, the circuit court held that there were no genuine issues as to any material fact, and awarded Midwestern a judgment in the amount requested along with 18% interest and costs. This appeal followed.

In his brief, Fox presents several arguments concerning the propriety of the entry of summary judgment. He asserts that the circuit court erred in determining that there was no accord and satisfaction without a hearing and without viewing his evidence; in allowing Midwestern a double recovery; in deciding the case when no evidence was produced; and in that Midwestern lacked the capacity to bring the suit. On the other hand, Midwestern argues that the circuit court did not abuse its discretion in deeming its discovery requests admitted, and that in any event Fox did not present any evidence of accord and satisfaction or of a double recovery. Furthermore, the circuit court did not have to conduct a hearing on its motion for summary judgment. Therefore, the circuit court properly entered a summary judgment in its favor. Midwestern also argues that Fox's appeal is more in line with a motion for relief pursuant to CR 60.02, which should have been brought before the circuit

court rather than this court, and that, although it was a foreign corporation, it did have the capacity to bring this action.

In Lewis v. B&R Corporation,[1] this Court addressed the proper standard of review in appeals from summary judgments:

> The standard of review on appeal when a trial court grants a motion for summary judgment is "whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law." The trial court must view the evidence in the light most favorable to the nonmoving party, and summary judgment should be granted only if it appears impossible that the nonmoving party will be able to produce evidence at trial warranting a judgment in his favor. The moving party bears the initial burden of showing that no genuine issue of material fact exists, and then the burden shifts to the party opposing summary judgment to present "at least some affirmative evidence showing that there is a genuine issue of material fact for trial." The trial court "must examine the evidence, not to decide any issue of fact, but to discover if a real issue exists." While the Court in Steelvest[, Inc. v. Scansteel Service Center, Inc.][2] used the word "impossible" in describing the strict standard for summary judgment, the Supreme Court later stated that that word was "used in a practical sense, not in an absolute sense." Because summary judgment involves only legal questions and the existence of any disputed material issues of fact, an appellate court need not defer to the trial court's decision and will review the issue de novo. (citations in footnotes omitted.)

[1] 56 S.W.3d 432, 436 (Ky.App. 2001).
[2] 807 S.W.2d 476, 480 (Ky. 1991).

With this standard in mind, we shall review the present appeal.

Although Fox raised a plethora of issues in his brief, which for the most part addressed the merits of the underlying case, we hold that Fox's failure to respond either to its discovery request for admissions or to its motion for summary judgment is fatal. CR 36.01(1) provides that "[a] party may serve upon any other party a written request for the admissions, for purposes of the pending action only, of the truth of any matters within the scope of Rule 26.02 set forth in the request that relate to statements or opinions of fact or of the application of law to fact." CR 36.01(2) then provides that a matter is deemed to be admitted unless within thirty days the party provides an answer or objects to the request. In Lyons v. Sponcil,[3] the former Court of Appeals addressed the effect of the failure to respond to requests for factual admissions, holding that such facts "stand admitted and require no proof in respect thereto by the plaintiff." A year later, the same court addressed a trial court's refusal to accept answers to a request for admissions tendered five months late and on the day of trial, and affirmed its later decision to accept as true those unanswered admissions.[4]

In the present matter, Midwest asserted in its motion for summary judgment that Fox had failed to respond to its

[3] 343 S.W.2d 836, 837 (Ky. 1961).
[4] Rose v. Rawlins, 358 S.W.2d 538 (Ky. 1962).

discovery requests, including a request for admission concerning the outstanding balance it was owed. Pursuant to CR 36.01(2), those unanswered requests were deemed admitted. Furthermore, there is no indication that Fox ever attempted to file his answers between the filing of the motion for summary judgment in November and the entry of the summary judgment the next May. We also recognize that Fox did not respond to the motion for summary judgment. He at no time has provided any evidence to support his various assertions made both in his answer to the complaint or in his brief to this Court. Because Midwestern had met its burden of proof in its motion for summary judgment in that its requests to Fox were deemed admitted, the burden then shifted to Fox to present some affirmative evidence to establish that a genuine issue of material fact still existed. Because he failed to do so or even respond to the motion, the circuit court properly entered a summary judgment in Midwestern's favor.

On a related issue, Fox also argues that the circuit court failed to hold a hearing on the motion for summary judgment. Midwestern properly cited to Jefferson Circuit Court Local Rule 401(A), which provides that motions for summary judgment "shall not be noticed for a hearing," but that prior to submission, counsel could file a motion for an oral argument. In this case, Midwestern filed its motion for summary judgment along with a memorandum in support, and neither Midwestern nor

Fox requested an oral argument. Therefore, the circuit court was not required to hold a hearing prior to ruling on the motion for summary judgment. The other issues Fox raises are equally without merit, as they do not address the sole issue before us regarding the propriety of the summary judgment, and we shall not address them any further.

For the foregoing reasons, the Jefferson Circuit Court's summary judgment is affirmed.

ALL CONCUR.

| BRIEF FOR APPELLANT: | BRIEF FOR APPELLEE: |
| --- | --- |
| Terry E. Fox, pro se<br>Louisville, KY | Drayer L. Bott<br>Louisville, KY |