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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-002007-MR

CANDACE M. CATLETT
AND MICHAEL CATLETT — APPELLANTS

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE SHEILA R. ISAAC, JUDGE
CIVIL ACTION NO. 04-CI-02429

NATIONAL CITY BANK OF KENTUCKY;
KERRY F. MORGAN;
KENNETH C. MORGAN, II;
KEVIN R. MORGAN;
AND KELLY C.S. MORGAN — APPELLEES

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: BARBER, MINTON, AND TACKETT, JUDGES.

MINTON, JUDGE: Candace Morgan Catlett and Michael Catlett appeal from an order enforcing the terms of a settlement that the circuit court found they had made to conclude litigation with National City Bank of Kentucky and Candace's brothers, Kerry, Kenneth, Kelly, and Kevin Morgan. The Catletts argue that the circuit court erred by finding that they had given

their attorney authority to settle. We agree with the Catletts. So we reverse the circuit court order and remand the case for findings on whether failure to enforce the settlement will substantially harm the other parties.

In 1999, Kerry Morgan was appointed legal guardian for his mother, Carol Morgan. In October 2000, Carol died. Carol's will directed that her estate be divided equally among her five children, Kerry, Kenneth, Kelly, and Kevin Morgan, and Candace Catlett. National City Bank was appointed as the administrator of Carol's estate.

For various reasons unnecessary to the resolution of this appeal, Carol's estate has not yet been settled. In fact, the administration of Carol's estate has spawned three lawsuits. In a suit in Arizona, National City sought to recover money Candace and Michael allegedly owed Carol's estate. The Arizona trial court ruled in favor of National City's claim and ordered the Catletts to pay National City over $160,000.00, plus interest, on behalf of the estate.

The Catletts appealed the judgment to the Arizona Court of Appeals. And while the appeal was pending, they filed suit in the Fayette Circuit Court against Kerry alleging that he had engaged in improper conduct during his tenure as Carol's

guardian.[1] National City intervened as a plaintiff in that suit. While that Kentucky action was pending, in February 2004, the Arizona Court of Appeals affirmed the judgment against the Catletts.

After the Arizona appellate court's decision, the Catletts' Arizona attorney, Gordon Bueler, sent National City's Kentucky attorney, W. Craig Robertson, III, a letter, dated April 12, 2004, proposing a "global" settlement. That letter says, in part, the following:

> As you requested earlier, we [are] writing with the Catlett's proposal to resolve this protracted litigation. We have spoken with Dr. and Mrs. Catlett to this end and both have expressed their desire to see this case resolved. The dispute has gone on long enough and hard feelings need to be put in the past. The Catlett's hope the end of this case will help that to be so.
>
> . . . .
>
> Notwithstanding all this, the Catletts want an end. In "global" settlement, the Catletts will immediately pay to the estate the difference between Candace's $111,000.00 inheritance and $180,000.00 in full settlement ([t]he estate has collected over $4,000.00 from the Catletts through legal collection). The Catletts will sign whatever releases and waivers the Bank and all other heirs believe necessary to conclude estate administration.
>
> This offer is fair from every perspective. The total amount paid by the

[1] In fact, the Fayette District Court rejected Kerry's proposed final accounting and settlement of his guardianship.

> Catletts to the estate in resolution of the estate's claim against them would be over $185,000.00, far more than they originally offered to pay to resolve the claim. The payment under this arrangement is a close approximation of the amounts they owe under judgment. In addition, the Catletts would be giving up valuable legal rights, including legal redress over the actions of the estate guardian and estate administrator. . . .

Robertson responded to Bueler's letter with a letter of his own, dated April 19, 2004. Robertson's letter states that "[a]s I understand your letter, you are proposing that the Catletts pay $69,000.00 in additional monies into the estate and thereafter the Catletts would agree to release the Bank and all other heirs from any further claims related to the estate." Robertson's letter then proposes that the Catletts pay an additional $6,000.00 to the estate in order to effectuate a mathematically correct settlement. Finally, Robertson's letter informs Bueler that he had not spoken to the remaining Morgan children but would advise them to accept the proposed settlement if the Catletts paid the additional $6,000.00.

Robertson contends in his affidavit that Bueler called him on April 28, 2004, and told him that the Catletts had agreed to settle "all matters" in accordance with the terms outlined in Robertson's April 19 letter. Bueler's affidavit contains no mention of an April 28, 2004, phone call to Robertson. Ostensibly spurred on by his conversation with Bueler, Robertson

faxed Bueler a letter (which all parties agree was incorrectly dated March 4, 2004) stating in its entirety as follows:

> This will confirm that the heirs have agreed to a settlement in accordance with our discussions and my letter to you dated April 19, 2004. I will begin drafting a settlement agreement and release. In the interim, if you have any questions or concerns please do not hesitate to call.

Robertson later forwarded settlement documents to Bueler, which Bueler admits receiving in May 2004. At this point, the parties' versions diverge. Robertson's affidavit relates that in early June 2004, Bueler orally "indicated that the Settlement Agreement and Release was 'fine' and Michael and Candace Catlett were coming in to sign it the next day." Bueler's affidavit, by contrast, states that he spoke to both the Catletts and their Kentucky attorney, Jerry Anderson, after which "it was my certain knowledge the Catlett's would not sign the settlement agreement. . . . I am also certain I did not tell Craig Robertson that the Catlett's were coming to my office the next day to sign the settlement agreement." Similarly, the Catletts' joint affidavit says "[w]e do not know what our Arizona lawyer told Craig Robertson in early June 2004 but each of us knows without doubt we did not expressly or otherwise direct our Arizona attorney to represent we had agreed to the settlement agreement and release. We did not agree and we did

not tell our Arizona lawyer we would be in to sign it the next day."

The Catletts did not sign Robertson's tendered settlement agreement. Instead, they filed another action against National City and Candace's siblings in the Fayette Circuit Court in June 2004 alleging that National City had failed aggressively to prosecute the action for improper guardianship activities against Kerry.

Kevin Morgan eventually filed a motion to enforce the settlement agreement tendered by Robertson alleging that the Catletts were bound by Bueler's representation that the case had been settled. The Fayette Circuit Court agreed finding that "Mr. Bueler had the express authority to settle this case, and did in fact settle the case, on behalf of the Catletts in accordance with: (1) the letters dated April 12, 19 and 28, 2004; and (2) the conversation between Mr. Bueler and Mr. Robertson on April 28, 2004." Thus, the trial court dismissed the action and ordered the Catletts to abide by Robertson's tendered settlement, which would resolve all the litigation involving Carol's estate. The Catletts then filed this appeal.

The ultimate decision of whether to settle a case resides with the clients, not the attorneys.[2] Thus, an attorney generally must possess actual, not mere apparent, authority in order to bind his clients to a settlement.[3] Without actual authority, an attorney may bind the client to a settlement only if it is "determined that third parties who may be dealing with such attorneys would be substantially and adversely affected by unauthorized attorney settlements[.]"[4] If a party to a purported settlement can show that he would be substantially harmed if the settlement were not enforced, then a court has the equitable power to enforce the agreement.[5] If a dispute arises as to whether an attorney has been given settlement authority, then a trial court "shall summarily decide the facts."[6] On appeal, we review those summarily-decided findings of fact under the clearly erroneous standard.[7]

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[2] Clark v. Burden, 917 S.W.2d 574, 575 (Ky. 1996).

[3] *Id.* at 576-577.

[4] *Id.* at 576.

[5] *Id.* at 577.

[6] *Id.*

[7] Ford v. Beasley, 148 S.W.3d 808, 810-811 (Ky.App. 2004) ("When conducting the first part of the inquiry (as to whether the client has given settlement authority) the Supreme Court directed the trial court 'to summarily decide the facts.' We therefore review the circuit court's findings of fact under the clearly erroneous standard, with due regard for the opportunity of the trial court to judge the credibility of the witnesses.") (internal quotation marks and citation omitted).

In the case at hand, the trial court examined the record, which included multiple affidavits, and found that Bueler had the express authority to settle the Kentucky action based upon the April 12, 19, and 28, 2004, letters, as well as the April 28, 2004, conversation between Bueler and Robertson. We disagree.

Bueler's affidavit expressly states that he was authorized to begin settlement negotiations but "was not authorized to accept or agree to the terms of the settlement agreement and mutual release [tendered by Robertson]." Likewise, the Catletts' affidavit provides that "[a]t no time in early June[] 2004 or ever, did we authorize our Arizona attorney Gordon Bueler to indicate to W. Craig Robertson, III that the settlement agreement and release was fine. We did not represent to Gordon Bueler nor was Gordon Bueler authorized by either of us to tell W. Craig Robertson we would be in the next day to sign the settlement agreement and release." Furthermore, there is no indication that Bueler, an Arizona attorney, was involved in the Kentucky litigation in any way. In fact, Jerry Anderson's affidavit states that he had been representing the Catletts in the Kentucky litigation since November 2003. So it would have been logical for Anderson, not Bueler, to initiate settlement of the Kentucky action. Not only did Anderson not initiate the settlement discussions, he told the trial court at

a July 30, 2004, hearing that he took no role in the settlement negotiations between Bueler and Robertson. In short, neither National City nor the Morgans have pointed to anything specific in the record to contradict the Catletts' unequivocal declarations that Bueler did not have the express authority to accept Robertson's counteroffer on behalf of the Catletts,[8] which would have settled both the Kentucky and Arizona cases.[9]

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[8] Although Bueler's affidavit does not address Robertson's contention that Bueler told him verbally that the Catletts had agreed to Robertson's counteroffer, it does not necessarily follow that Bueler actually had the authority to make and enforce such a statement. In other words, there is nothing in the record to show that the Catletts had authorized Bueler to accept Robertson's counteroffer.

[9] Because it is not necessary to the ultimate resolution of this appeal, we reach no conclusion as to whether Bueler had the express authority to settle the Kentucky case based on the terms set forth in his April 12 letter to Robertson. But that letter's use of the word *global* and its reference to the Catletts giving up their legal rights against Carol's guardian and estate administrator would tend to lead to the conclusion that Bueler did have such authority. But since Robertson changed the terms of Bueler's proposed settlement in the April 19 letter, Robertson's letter in response must be construed as a counteroffer——one that there is no indication that Bueler had the authority to accept. *See, e.g.,* Edmondson v. Pennsylvania Nat. Mut. Cas. Ins. Co., 781 S.W.2d 753, 756 (Ky. 1989) ("Absent estoppel there is no contract principle, in insurance law or otherwise, converting an offer of settlement into a binding contract unless and until it is accepted in accordance with its terms.").

We also reject Kevin's claim that the Catletts' failure to respond to his counterclaim, in which he sought enforcement of the purported settlement, precludes the Catletts from contesting the settlement. As Kevin did not move for default judgment, he is not entitled to it. *See* Tharp v. Security Ins. Co. of New Haven, Conn., 405 S.W.2d 760, 763 (Ky. 1966) ("A default under the Rules of Civil Procedure does not operate automatically against the party responsible for it. One seeking to take advantage of an opposing party's omission must take affirmative action thereon.").

Having determined that Bueler did not have actual authority, the next step is to determine whether National City and the Morgans would suffer substantial harm if it were not enforced. Since the trial court found that Bueler had actual authority, it understandably did not address this issue. And since the resolution of the substantial harm question is one that will certainly necessitate factual findings, which an appellate court cannot make, we must remand this matter to the trial court.

Finally, the Catletts have moved to strike National City's appellee brief; and National City has moved to strike the Catletts' reply brief. Each party contends, correctly, that the other has referenced and relied upon evidence not in the record.[10] Reference to matters outside the record is improper,[11] and these materials could be stricken.[12] The parties should be aware that we have not relied upon any materials not contained in the record. So the motions to strike are denied as moot.

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[10] For example, page seven of National City's brief contains a quote from a letter Robertson allegedly sent Bueler on March 4, 2004, which is not in the record. Similarly, the Catletts' reply brief to National City's brief has several exhibits containing matters outside the record, such as a document purporting to be a copy of Carol's will.

[11] Callahan v. Fluhr, 267 Ky. 637, 103 S.W.2d 109, 110 (1937) ("Counsel for respective parties have gone outside the record and refer to matters which of course cannot be considered by this court, as the appeal must be determined by matters in the record.").

[12] Rohleder v. French, 675 S.W.2d 8, 9 (Ky.App. 1984) (striking portions of a brief referring to matters outside the record).

But we admonish counsel to refrain from citing to any matters outside the record in the future.

For the foregoing reasons, the order of the Fayette Circuit Court dismissing this action and ordering the Catletts to comply with Robertson's tendered settlement agreement is reversed; and this matter is remanded for further findings regarding substantial harm, or the lack thereof, to the other parties to the settlement. All motions to strike are denied as moot.

ALL CONCUR.

BRIEFS AND ORAL ARGUMENT FOR APPELLANTS:

Barbara Anderson
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BRIEF AND ORAL ARGUMENT FOR APPELLEE NATIONAL CITY BANK OF KENTUCKY:

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BRIEF AND ORAL ARGUMENT FOR APPELLEE KEVIN R. MORGAN:

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