

Commonwealth of Kentucky
Court of Appeals

NO. 2006-CA-001830-MR

DEBBIE TAYLOR

APPELLANT

v. APPEAL FROM WAYNE CIRCUIT COURT
HONORABLE DAVID A. TAPP, JUDGE
ACTION NO. 05-CI-00188

SOUTHERN BELLE DAIRY CO., LLC;
AND ROBERT LEE TAYLOR

APPELLEES

OPINION
AFFIRMING

** ** * * *

BEFORE: COMBS, CHIEF JUDGE; ACREE, JUDGE; GRAVES,¹ SENIOR JUDGE.
ACREE, JUDGE: Debbie Taylor appeals from a summary judgment of the Wayne Circuit Court finding her jointly and severally liable with Robert Taylor, to whom she was married when the liability accrued, for monies due and owing to Southern Belle Dairy Co., LLC. These monies were due on an open account with Southern Belle for dairy products delivered to three stores operated by the Taylors. For the reasons stated, we affirm.

¹ Senior Judge John W. Graves sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

The Taylors owned three grocery stores, one each in Campton, Monticello, and Lancaster. The stores' day-to-day operations were mostly in Robert's hands. Debbie's primary occupation was as a schoolteacher.

In May 2005, Southern Belle filed suit against the Taylors alleging that the stores were operated by Robert and Debbie as partners. The complaint alleged that the Taylors were co-owners of each of the businesses and included copies of invoices supporting the claim that the Taylors owed Southern Belle \$73,962.98 for dairy products delivered to their stores on credit. The complaint also claimed interest due equal to eighteen percent per annum until the balance was paid, in accordance with the invoices.

In her answer, Debbie "admits that she and Robert Lee Taylor were co-owners of [the] retail stores" but also stated that she "believes that at least during part of the time . . . said retail stores were operated as limited liability companies[.]"

At her deposition, Debbie claimed ignorance of financial matters relating to the stores' operations, stating that Robert had operated them. She repeated her "belief" that the LLCs were formed in Tennessee "a few years ago," were recently dissolved and subsequently reinstated in Kentucky. (Deposition of Debbie Taylor, pp. 26-27). Nothing more

supportive of Debbie's claim of the LLC status of these stores existed in the record prior to the grant of summary judgment.

Southern Belle's motion for summary judgment relied, in part, on Debbie's admission of co-ownership. Her response to Southern Belle's motion was Debbie's opportunity to present documentation from the authorizing governmental authority substantiating her claim of the existence of LLCs in good standing. *Neel v. Wagner-Shuck Realty Co.*, 576 S.W.2d 246, 250 (Ky.App. 1978) ("If the appellant had proof that a genuine fact issue existed, it was appellant's duty to tender some proof to the court."). This she did not, and could not, do.²

Instead, both Debbie's response to the summary judgment motion, and counsel's arguments at the hearing on the motion, focused on Debbie's insistence that the debt to Southern Belle was owed solely by Robert. Debbie pointed to deposition testimony from Southern Belle's president, Mike Chandler, that he believed Robert was having mental health problems and possibly using drugs, but continued to extend him credit anyway. She also argued that Southern Belle had not introduced any evidence that Debbie personally entered into any contracts with Southern Belle. The trial court rejected these arguments and,

² "A court may properly take judicial notice of public records and government documents, including public records and government documents available from reliable sources on the internet." *Polley v. Allen*, 132 S.W.3d 223, 226 (Ky.App. 2004). We take judicial notice of records of the Kentucky Secretary of State showing that each of the stores to which Debbie admits co-ownership was once operated as an LLC, but also that each was administratively dissolved on November 9, 2004 - prior to Southern Belle's delivery of the dairy products evidenced by the invoices. Each LLC was reinstated on June 8, 2005, long after Taylor's liability had accrued and Southern Belle had filed its complaint. Each LLC was administratively dissolved again on November 2, 2006.

on the basis of Debbie's admission of co-ownership, and the absence of any evidence of the existence of the LLCs, granted summary judgment in favor of Southern Belle.

Debbie then filed a motion to alter, amend, or vacate the summary judgment pursuant to Kentucky Civil Rule (CR) 59.05. She argued that the trial court erred in applying partnership law to stores which were operated as limited liability companies. For the first time, Debbie presented copies of the articles of organization for the three stores. Southern Belle opposed the motion, correctly noting that CR 56.03 requires affidavits in opposition to summary judgment to be filed prior to the hearing on the motion. The trial court held that Debbie could not properly use CR 59.05 to raise arguments and introduce evidence that could have been presented before the judgment was entered, and denied her motion. This appeal followed. Although Debbie's Notice of Appeal designated her ex-husband, Robert, as an appellee, he has elected not to file a brief in this matter.

On appeal, Debbie argues that the trial court improperly applied the standard for determining when to grant summary judgment. We disagree.

CR 56.03 allows summary judgment to be granted for the moving party when "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." "[S]ummary judgment is to be cautiously applied and should not be used as a substitute for trial." *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 483 (Ky.

1991). The Kentucky Supreme Court outlined the standard for reviewing summary judgments as follows:

The proper standard of review on appeal when a trial judge grants a motion for summary judgment is whether the trial judge correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to a judgment as a matter of law. CR 56.03. It has long been held that a trial judge 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 demonstrating that no genuine issue of material fact exists and then the burden shifts to the party opposing summary judgment to produce at least some affirmative evidence showing that there is a genuine issue of material fact requiring trial.

First Federal Sav. Bank v. McCubbins, 217 S.W.3d 201, 203 (Ky. 2006). Summary judgments are reviewed *de novo* because they present only legal questions. *Lewis v. B & R Corporation*, 56 S.W.3d 432, 436 (Ky.App. 2001).

Debbie argues that she created a genuine issue of material fact as to whether the grocery stores were operated as LLCs. We disagree. All the trial court had before it when ruling on the motion was Debbie's "belief" of the existence of these LLCs. She expressed that belief in her answer and repeated it in her deposition. However, "[b]elief" is not evidence and does not create an issue of material fact. A plaintiff must present affirmative evidence in order to defeat a

properly supported motion for summary judgment." *Humana of Kentucky, Inc. v. Seitz*, 796 S.W.2d 1, 3 (Ky. 1990).

If these entities existed, it would have been a simple matter for Debbie to obtain a certificate of good standing from the appropriate office. She did not do this because it could not be done. She proved this herself by admitting as an exhibit to her deposition the photocopy of a letter, dated May 31, 2005, to the Kentucky Secretary of State applying for reinstatement of the stores as LLCs in Kentucky. Such a letter would have been unnecessary if the LLCs had not been administratively dissolved previously. Thus, we are convinced that Debbie failed to meet her burden of providing affirmative evidence of the existence of the LLCs after the burden shifted to her. The trial court, left with Debbie's admission of ownership, properly determined that Southern Belle was entitled to summary judgment as a matter of law.

Debbie also appealed from the trial court's order denying her motion to alter, amend, or vacate, pursuant to CR 59.05. In addition to re-asserting that her deposition testimony regarding the LLCs created a genuine issue of material fact, she filed, for the first time, copies of limited liability company articles of organization for the three stores, dated March 31, 2003. While this was a date well before both the complaint and the date on Southern Belle's invoices, they did not contradict Debbie's May 31, 2005, letter indicating that the LLCs had been administratively dissolved.

More importantly, and as the trial court correctly noted, CR 59.05 cannot be used to present evidence which could have and should have been presented before the judgment was entered. Consequently, Debbie's failure to produce affirmative evidence supporting the existence of a genuine issue of material fact regarding the operation of the stores as LLCs until after summary judgment was granted against her could not be remedied by filing a CR 59.05 motion.

For the foregoing reasons, the judgment of the Wayne Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Stephen Edward Neal
Mt. Sterling, Kentucky

BRIEF FOR APPELLEE, Southern
Belle Dairy Co., LLC:

Larry F. Sword
Elizabeth K. Broyles
Somerset, Kentucky

NO BRIEF FOR APPELLEE, ROBERT
LEE TAYLOR