

# Commonwealth of Kentucky

## Court of Appeals

NO. 2007-CA-000477-MR

DONALD SPARKS

APPELLANT

v.

APPEAL FROM MEADE CIRCUIT COURT  
HONORABLE ROBERT A. MILLER, JUDGE  
ACTION NO. 04-CI-00035

CAVALRY SPV I, LLC, ASSIGNEE OF THE  
INTEREST OF AMERICAN INVESTMENT  
BANK, N.A.

APPELLEE

OPINION  
AFFIRMING

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BEFORE: NICKELL, THOMPSON AND VANMETER, JUDGES.

NICKELL, JUDGE: Donald Sparks (“Sparks”) has appealed from the February 1, 2007, Findings of Fact, Conclusions of Law and Judgment of the Meade Circuit Court granting summary judgment in favor of Cavalry SPV I, LLC, Assignee of the Interest of American Investment Bank, N.A. (“Cavalry”). For the following reasons, we affirm.

Cavalry filed its complaint in this action on February 3, 2004, seeking to collect a debt owed to it by Sparks by virtue of an installment loan contract he executed on October 31, 2000. Cavalry asserted Sparks had defaulted on the loan and owed in excess of \$7,000.00 plus costs, interest and attorneys fees. Sparks was served a copy of the complaint on February 4, 2004, and filed his answer on April 12, 2004.<sup>1</sup> In his answer, Sparks admitted he was indebted to Cavalry, but generally denied liability and default on the debt. He also asserted an affirmative defense under the Soldiers' and Sailors' Civil Relief Act of 1940 (“the Act”).<sup>2</sup>

Following limited discovery and pre-trial conferences, Cavalry moved the circuit court for summary judgment on July 19, 2004, to which Sparks objected, again denying default on the debt and asserting protection under the Act. The circuit court granted six continuances on the motion based upon representations made by Sparks' counsel that he was deployed abroad on active military duty. On February 1, 2007, following a hearing, the circuit court entered an order granting summary judgment to Cavalry, and specifically finding Sparks was no longer in active military service. Sparks timely appealed to this Court.

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<sup>1</sup> Cavalry filed a motion for Default Judgment on March 18, 2004, however, no ruling on this motion appears in the record before us.

<sup>2</sup> 50 App. United States Code Annotated (U.S.C.A.) §501 et seq.

Sparks now argues the trial court erred in (1) concluding he was no longer in active military service, and (2) granting summary judgment in favor of Cavalry. Having carefully reviewed the record on appeal, we disagree with Sparks' arguments and affirm the circuit court.

First, the Act, although a federal law, is explicitly applicable to state courts. *See* 50 App. U.S.C.A. §512(a)(2) (stating the Act applies to each of the States and all political subdivisions thereof). The Act permits a court to issue a stay of any civil proceedings pending before it upon application by an active duty member of the armed services, or upon its own motion. 50 App. U.S.C.A. §522. However, the Act also grants discretion to the court to determine whether to grant or deny the stay, *Pacific Greyhound Line v. Superior Court of the City and County of San Francisco*, 28 Cal.2d 61, 168 P.2d 665 (1946), and a stay should be granted only when a showing is made that a person's "rights might be prejudiced without their presence to prosecute the action or to conduct a defense." *Charles Tolmas, Inc. v. Streiffer*, 199 La. 25, 5 So.2d 372 (1941). This determination is based upon the court's opinion as to whether a defendant's ability to conduct his defense is materially affected by his military service. A mere showing of military service is insufficient to support a stay of an action. *Cooper v. Roberts*, 722 S.W.2d 910 (Ky.App. 1987) (citing *Boone v. Lightener*, 319 U.S. 561, 63 S.Ct. 1223, 87 L.Ed.2d 1587 (1943)). *See also Hibbard v. Hibbard*, 230 Neb. 364, 431 N.W.2d 637

(1988); *Norris v. Superior Court of Mohave County*, 481 P.2d 553 (Az.App. 1971).

Based on these authorities, we now review the trial court's determination of whether to grant the stay for an abuse of discretion.

Sparks was granted six continuances covering a period in excess of two and one-half years based upon his counsel's representations that Sparks was deployed overseas in active military service for 545 days commencing on June 6, 2004. Counsel's representations to the court were supported by an unverified copy of a letter from the United States Army ordering Sparks to active duty. In answering interrogatories propounded by Cavalry, Sparks indicated he would be available to appear in the matter in approximately June 2006. No further proof of Spark's military status appears in the record before us. Sparks contends the trial court, in ruling on Cavalry's motion for summary judgment, erred in finding he was no longer stationed overseas and thus not entitled to protection under the Act. We disagree and are unable to hold the trial court abused its discretion based on the record before us.

The trial court's order states a hearing was held at which it was determined Sparks was no longer stationed overseas. However, the record does not contain a videotape, audiotape, or other transcript of the hearing in question and the record does not contain any indication of the evidence presented at the hearing. It is well-settled that an appellant has a duty to ensure that the record on appeal is complete. *Commonwealth*,

*Dept. of Highways v. Richardson*, 424 S.W.2d 601, 603 (Ky. 1968). To the extent the record is incomplete, we must presume the omitted portion of the record supports the trial court's order. *Id.* As noted in *Burberry v. Bridges*, 427 S.W.2d 583, 585 (Ky. 1968), “[i]t is also reasonable to place upon the appellant the duty to designate and file a record sufficient to enable the court to pass on the alleged errors.” Based on the incomplete record, we are unpersuaded by Sparks' argument urging reversal based upon his military service.

Next, Sparks argues the trial court erred in granting summary judgment as Cavalry had failed to prove there were no genuine issues of fact or law or that Sparks could not possibly prevail at trial. In contrast, Cavalry contends Sparks failed to demonstrate the existence of a genuine issue of any material fact and thus it was entitled to summary judgment.

A moving party is entitled to summary judgment as a matter of law when the record reveals the existence of no genuine issue of material fact. Kentucky Rules of Civil Procedure (CR) 56.03; *Steevest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476 (Ky. 1991). Further, “a party opposing a properly supported summary judgment motion cannot defeat it without presenting at least some affirmative evidence that there is a genuine issue of material fact for trial. *Id.* at 482 (citations omitted).

Here, Sparks merely issued a general denial of liability or default on the underlying debt. He presented no evidence to support his contention. Nothing in the record indicates a genuine issue of material fact existed to warrant a trial in this matter. “The party opposing summary judgment cannot rely on their own claims or arguments without significant evidence in order to prevent a summary judgment.” *Wymer v. JH Properties, Inc.*, 50 S.W.3d 195, 199 (Ky. 2001). While we agree with Sparks that he should not be required to try his case on a motion for summary judgment, he is required to do more than merely deny arrearage on the debt to overcome the properly supported motion. As Sparks failed to show the existence of a genuine issue of material fact, we hold the trial court did not commit reversible error by granting summary judgment.

For the foregoing reasons, the Findings of Fact, Conclusions of Law and Judgment of the Meade Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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BRIEF FOR APPELLEE:

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