RENDERED: NOVEMBER 13, 2026; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2026-CA-0099-MR

EDWARD PENZINER — APPELLANT

v.

APPEAL FROM MERCER CIRCUIT COURT
HONORABLE WHITNEY Z. JOHNS, JUDGE
ACTION NO. 24-CI-00115

DISCOVER BANK — APPELLEE

OPINION
VACATING AND REMANDING

** ** ** ** **

BEFORE: CETRULO, EASTON, AND MCNEILL, JUDGES.

CETRULO, JUDGE: Edward Penziner ("Penziner") appeals a Mercer Circuit Court order granting Discover Bank's ("Discover") motion for judgment on the pleadings. Discover had argued Penziner presented no defense, but the record suggests otherwise. As there exist issues of material fact and an unsupported conclusion of law, we VACATE and REMAND for additional proceedings.

BACKGROUND

On April 4, 2024, Discover initiated a credit card collection action against Penziner in Mercer Circuit Court. Relevantly, the complaint states:

> 7. [Penziner] defaulted on the terms of the Agreement when [Penziner] failed to make payments pursuant to the terms of the Agreement.
>
> 8. As a result of the default by [Penziner], [Discover] has accelerated the full balance due and owing pursuant to the terms of the Agreement.
>
> 9. Demand was made upon [Penziner].
>
> 10. As of today's date, [Penziner] has . . . failed to pay [Discover] pursuant to the terms of the Agreement.
>
> 11. As [Penziner] [has] materially breached the terms of the Agreement, the balance due and owing to [Discover] after deducting all just and lawful offsets, payment, and credits is the sum of $6,736.34. Account statement records or balance history records substantiating the balance due are attached hereto . . . .

The record on appeal includes Penziner's affidavit, dated April 17, wherein he admitted as true the statements in the complaint "except #11." In this April 17 affidavit, Penziner also requested additional information about the total owed and gave a hardship excuse, *i.e.*, that he was 79 years old, had suffered a stroke, and was unemployed and on Social Security.

Next, the record on appeal includes a June 27 letter, entered by the clerk on July 1, sent from Penziner to the judge assigned to the case. With this

letter, Penziner included a copy of his "second request" to Discover's legal counsel for additional information on the alleged debt. This second request demanded verification of the debt, and stated, "I am hereby disputing this debt and invoking my rights under the [Fair Debt Collection Practices Act] and any other applicable state laws as well."

On August 7, Discover moved for a judgment on the pleadings pursuant to CR[1] 12.03 and stated Penziner admitted liability in his answer. Attached to the motion, Discover included a copy of Penziner's April 17 affidavit.

On September 10, Penziner – now represented by legal counsel – objected to Discover's motion and moved to compel arbitration. Citing the Federal Arbitration Act ("FAA"), he moved the circuit court to stay the action "for sixty days to allow Discover time to initiate arbitration and to dismiss the action with prejudice in the event that Discover fail[ed] to initiate arbitration within this time."

On October 24, Discover withdrew its motion for judgment on the pleadings and moved for a sixty-day stay "to allow time for [Penziner] to initiate arbitration with the American Arbitration Association ("AAA")." Discover argued the contract between the parties (*i.e.*, the credit card agreement) stated that the FAA governed the agreement and arbitration must proceed only with the AAA. As

[1] Kentucky Rule of Civil Procedure.

the AAA prohibits business creditors from initiating arbitration against a consumer in such matters, Discover argued arbitration "must be initiated by the consumer."

On November 21, the circuit court signed an order granting a sixty-day stay to allow Penziner time to initiate arbitration, submit proof thereof, and pay the associated arbitration fees.

On May 1, 2025, Discover moved to reinstate the case to the court's active docket due to Penziner's failure to initiate arbitration or serve any notices upon Discover. On May 6, Penziner filed his objection, again arguing that he had no legal obligation to initiate arbitration against himself and that he had not waived arbitration by failing to initiate it. On May 29, the circuit court lifted the stay.

On June 13, Discover filed a renewed motion for judgment on the pleadings pursuant to CR 12.03 as Penziner "failed to deny the allegations of [Discover's] Complaint and ha[d] failed to raise any triable issue of fact." Thus, Discover asserted, the pleadings should be closed, and it was entitled to judgment as a matter of law. In support of its motion, Discover included one new attachment: a letter from Penziner, dated September 2, 2024, that he sent to both the circuit court and legal counsel for Discover. In that September 2 letter, Penziner explained that he engaged the services of a debt consolidation company to restructure his financial affairs following his stroke. Penziner alleged that his identity was stolen from the debt consolidation company during a data breach, and that the credit card charges

were made by an unauthorized perpetrator. Penziner stated: "I did not authorize the $14,000 in charges. Nor did I ever receive the funds that I am being sued for." Penziner indicated that he had reported the identity theft to the Kentucky Attorney General's office and the Kentucky State Police who were currently investigating.

On July 9, Penziner objected to any judgment against him, focusing on the arbitration agreement, and again argued he had no legal obligation to initiate arbitration and that he had not waived arbitration.

The circuit court granted Discover's motion for judgment on the pleadings and signed its tendered order entering judgment against Penziner because he had "not raised a defense to the action." The circuit court's order did not explicitly state that there was no issue of material fact or that Discover was entitled to judgment as a matter of law.[2] Penziner appealed.

ANALYSIS

We have reviewed the record in full, but it is unclear if anyone else involved in this action did the same. Penziner's appellant brief on appeal addressed only arbitration; Discover did not submit an appellee brief. Even if Penziner somehow waived arbitration, that does not eliminate the requirement that Discover follow through with its obligation to prove its claim.

[2] Notably, the order also lacked findings verifying the amount of the debt and included open-ended language allowing Discover to recover "all additional court costs that may be incurred in enforcing this Judgment."

The order on appeal does not expressly grant Discover's CR 12.03 motion, but that is its effect. Yet, CR 12.03 motions are not appropriate avenues for ending litigation when issues of material facts exist. *Mosley v. Arch Specialty Ins. Co.*, 626 S.W.3d 579, 584-85 (Ky. 2021) (citations omitted). More specifically,

> [a] motion for judgment on the pleadings should be granted if it appears beyond doubt that the nonmoving party cannot prove any set of facts that would entitle him/her to relief. These motions are based purely on whether the plaintiff has stated a cause of action as a matter of law and do not require or permit the trial court to make any findings of fact. Because a trial court's ruling on a motion for judgment on the pleadings is a question of law, appellate review of a judgment on the pleadings is de novo.

Id. (internal quotation marks and citations omitted).

Additionally, Discover's motion for judgment on the pleadings pursuant to CR 12.03 included matters outside the pleadings, *i.e.*, Penziner's September 2 letter. It is unclear what the circuit court considered in reaching its conclusion, but as the court did not exclude the letter, we shall treat the motion as one for summary judgment. *See KentuckyOne Health, Inc. v. Reid*, 522 S.W.3d 193, 197 (Ky. 2017) (quoting CR 12.03) ("Under CR 12.03, once 'matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided for in [CR] 56.'").

The standard of review upon appeal of an order granting 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." *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky. App. 1996) (citing CR 56.03). Upon a motion for summary judgment, all facts and inferences in the record are viewed in a light most favorable to the non-moving party and "all doubts are to be resolved in his favor." *Steelvest, Inc. v. Scansteel Serv. Ctr., Inc.*, 807 S.W.2d 476, 480 (Ky. 1991). The trial court "must examine the evidence, not to decide any issue of fact, but to discover if a real issue exists." *Id.* Thus, a summary judgment looks only to questions of law, and we review *de novo*. *Brown v. Griffin*, 505 S.W.3d 777, 781 (Ky. App. 2016).

In essence, the circuit court entered a judgment against Penziner, finding in Discover's favor, because Penziner had "not raised a defense to the action." Yet, from our review of the record, whether or not Penziner raised a defense to the action presents a question of material fact.

In an April 17 affidavit, Penziner admitted to default but not to breach of the credit card agreement nor acceptance of the total amount owed. In a June 27 letter, he demanded verification of the debt and disputed the debt. Then, in a September 2 letter, he denied ownership of the debt and alleged third-party criminal acts. All these statements occurred prior to Penziner obtaining legal counsel on September 10. Notably, this September 2 letter was the *only* support attached to Discover's motion, and these conflicting defense statements by

Penziner are not mentioned in his response to Discover's motion. Yet, whether Penziner raised a defense to the action presents an issue of material fact, thereby requiring additional findings and precluding judgment under CR 12.03 or CR 56 at this time. *See Mosley*, 626 S.W.3d at 584-85.

CONCLUSION

Accordingly, we VACATE the Mercer Circuit Court's granting Discover's motion for judgment on the pleadings and REMAND for additional proceedings consistent with this Opinion.

ALL CONCUR.

BRIEF FOR APPELLANT:

James H. Lawson
Shelbyville, Kentucky

NO BRIEF FOR APPELLEE.