RENDERED: JANUARY 13, 2012; 10:00 A.M.
NOT TO BE PUBLISHED

# Commonwealth of Kentucky

# Court of Appeals

NO. 2010-CA-000598-MR

MONTIES RESOURCES, LLC AND
BARTOLOMEA MONTANARI — APPELLANTS

APPEAL FROM KNOX CIRCUIT COURT
v. HONORABLE GREGORY A. LAY, JUDGE
ACTION NO. 09-CI-00636

EMECO EQUIPMENT (USA), LLC — APPELLEE

AND NO. 2010-CA-001285-MR

MONTIES RESOURCES, LLC;
BARTOLOMEA MONTANARI;
AND LISA MONTANARI — APPELLANTS

APPEAL FROM WHITLEY CIRCUIT COURT
v. HONORABLE JERRY D. WINCHESTER, JUDGE
ACTION NO. 10-CI-00167

WHAYNE SUPPLY COMPANY — APPELLEE

AND NO. 2010-CA-001286-MR

MONTIES RESOURCES, LLC; EMLYN
COAL PROCESSING OF MINNESOTA, LLC;
AND BARTOLOMEA MONTANARI APPELLANTS

v. APPEAL FROM LAUREL CIRCUIT COURT
HONORABLE GREGORY A. LAY, JUDGE
ACTION NO. 09-CI-01398

EMECO EQUIPMENT (USA), LLC APPELLEE

OPINION
AFFIRMING IN PART, REVERSING IN PART,
AND REMANDING IN NO. 2010-CA-001285-MR;
AFFIRMING IN NO. 2010-CA-000598-MR; AND
AFFIRMING IN NO. 2010-CA-001286-MR

** ** ** ** **

BEFORE: ACREE, CLAYTON AND WINE,[1] JUDGES.

ACREE, JUDGE: This opinion addresses the appeals of separate rulings from three different circuit courts, each of which involves the same appellant, Monties Resources, LLC, and much the same subject matter. We have consolidated these appeals in the interest of judicial economy.

In the first case we address, No. 2010-CA-001285-MR, Monties asserts the Whitley Circuit Court abused its discretion in refusing to set aside a default judgment entered in favor of appellee, Whayne Supply Company, and erroneously calculated damages.

[1] Judge Thomas B. Wine concurred in this opinion prior to his retirement effective January 6, 2012. Release of the opinion was delayed by administrative handling.

In the second case we address, No. 2010-CA-000598-MR, Monties argues the Knox Circuit Court (i) abused its discretion in refusing to set aside an order of default judgment entered in favor of appellee, Emeco Equipment (USA), LLC; (ii) denied Monties the opportunity to have a hearing on the proper amount of damages; and (iii) improperly calculated the damages award.

In the third case, No. 2010-CA-001286-MR, Monties contends the Laurel Circuit Court erred in granting summary judgment in favor of Emeco because a genuine issue of material fact exists regarding whether Emeco mitigated its damages, and further erred in refusing to hold a hearing concerning the amount of damages owed.

With respect to the Whitley Circuit Court's order, we affirm in part, reverse in part, and remand for entry of an order consistent with this opinion. We find no error in the orders of the Knox and Laurel Circuit Courts, and we therefore affirm.

## I. Background

Monties is a Tennessee limited liability company authorized to do business in Kentucky, and operates coal mines in southeastern Kentucky. Appellants Bart and Lisa Montanari are Monties' current members.[2]

Both Whayne and Emeco are in the business of renting equipment to mine operators. Monties rented equipment from both Whayne and Emeco and used that equipment in the multiple counties in which these actions were brought. Following a downturn in the mining industry, around 2009, Monties became unable to make payment on the accounts with the two vendors. Whayne and Emeco brought the three actions now before us in an effort to collect Monties' debts on their respective accounts. We first consider the default judgments entered in Whitley Circuit Court and Knox Circuit Court in favor of Whayne and Emeco, respectively. Then we will consider the Laurel Circuit Court summary judgment entered in favor of Emeco.

## II. Default Judgments

### Nos. 2010-CA-001285-MR and 2010-CA-000598-MR

### *A. Standard of Review*

[2] We refer to these parties jointly as "Monties." Where the context requires, we differentiate between the company and its members.

Monties asks us to determine that there was "good cause" for setting aside the default judgments and, for that reason, we should reverse the default judgments entered by the Whitley and Knox circuit courts. We disagree.

"CR [Kentucky Rules of Civil Procedure] 55.02 authorizes the ***trial court*** [not the reviewing court] to set aside a default judgment for 'good cause shown . . . in accordance with Rule 60.02.'" *Roadrunner Min., Engineering & Development Co., Inc. v. Bank Josephine*, 558 S.W.2d 597, 598 (Ky. 1977) (emphasis supplied).

When this Court reviews a circuit court's order denying a motion pursuant to CR 55.02 (or CR 60.02) to set aside a default judgment, the standard is abuse of discretion. *Howard v. Fountain*, 749 S.W.2d 690, 692 (Ky. App. 1988) ("[T]rial courts possess broad discretion in considering motions to set them aside and we will not disturb the exercise of that discretion absent abuse."). However, this standard is entirely inapplicable in these cases.

As explained below, Monties did not appeal the judgments denying its CR 55.02 motions. Monties appealed the default judgments directly; therefore, our review is limited to whether the pleadings are sufficient to uphold the judgment, and whether Monties was actually in default.[3] *Jeffrey v. Jeffrey*, 153 S.W.3d 849,

[3] Of course, an inherent characteristic of a direct appeal from a default judgment is that the appellant has failed to preserve any claim of error. Ordinarily, we review unpreserved claims under the manifest injustice standard established in CR 61.02, the "substantial error" rule. However, the standard of review we apply now became a part of our common law in *Rouse v. Craig Realty Co.*, 203 Ky. 697, 262 S.W. 1083 (1924), before adoption of our current rules of civil procedure. Subsequent to the adoption of the current civil rules, the issue arose again in *Mingey v. Cline Leasing Service, Inc.*, 707 S.W.2d 794 (Ky. App. 1986), and we elected to apply the more specific *Rouse* standard of review despite the availability of CR 61.02. *Jeffrey* followed *Mingey*; therefore, we now follow *Jeffrey* rather than applying the substantial error rule.

851 (Ky. App. 2004), *disc. rev. denied* (No. 2004-SC-000373) (Ky. February 9, 2005) ("In Kentucky, it is permissible to appeal directly from a default judgment. 'However, the issue in such an appeal [is] limited to determining whether the pleadings were sufficient to uphold the judgment, or whether the appellant was actually in default.'").

That is the standard we shall apply to these cases.

***B. Default Judgment in No. 2010-CA-001285-MR (Whitley Circuit Court)***

In the fall of 2008, Monties rented equipment from Whayne and incurred a debt thereby for its use. Bart and Lisa personally guaranteed the debt. Monties failed to pay for the equipment rental. Consequently, on March 18, 2010, Whayne filed a complaint in Whitley Circuit Court seeking recovery of damages totaling $23,011.01.[4] The complaint identified as defendants Bart and Lisa, individually, and Monties. Whayne perfected service upon Monties and Bart on March 30, 2010.[5]

Neither Monties nor Bart filed an answer or otherwise responded to Whayne's complaint within twenty days following service of the summons, as required by CR 12.01.[6] On April 23, 2010, Whayne moved for judgment by

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[4] Whayne originally filed its complaint in Laurel Circuit Court on February 4, 2010. However, upon discovering the defendants resided in Whitley County, Whayne requested, and the Laurel Circuit Court granted, a change of venue to Whitley Circuit Court.

[5] While Lisa Montanari is named as a codefendant in the trial court and a party on appeal, she was never served with the summons and no judgment was entered against her.

[6] CR 12.01 provides, in pertinent part, the "defendant shall serve his/her answer within 20 days after service of the summons upon him/her."

default and served a copy of the motion on Monties and Bart. Monties and Bart again failed to respond in any way.

On June 7, 2010, the circuit court entered judgment in Whayne's favor in the amount of $23,011.01, plus attorney's fees. Monties filed a timely notice of appeal from that judgment.

On July 16, 2010, Monties moved the Whitley Circuit Court pursuant to CR 55.02 to set aside the default judgment. The circuit court denied Monties' motion on August 31, 2010. Monties could have filed a second notice of appeal from this order but did not. Therefore, we are considering only Monties' direct appeal of the default judgment.

*1.* *Review under Jeffrey of the Whitley Circuit Court Default Judgment*

Upon review of the default judgment, applying *Jeffrey*, we conclude that the pleadings were sufficient to support the judgment and that Monties and Bart were actually in default.

*(a) Pleadings were sufficient to uphold the judgment.*

A "default judgment may not be based on a complaint which completely fails to state a cause of action[.]" *Crowder v. American Mutual Liberty Ins. Co.,* 379 S.W.2d 236, 238 (Ky. 1964); *see also Morgan v. O'Neil*, 652 S.W.2d 83, 85 (Ky. 1983) (indicating a default judgment cannot lie if the complaint fails to state a claim upon which relief may be granted). Accordingly, an entry of default

is only proper if the pleadings support the judgment. *See Jeffrey*, 153 S.W.3d at 851. In so construing the complaint and pleadings, leniency is warranted. *Crowder,* 379 S.W.2d at 238.

A review of the pleadings reveals them to be sufficient to uphold entry of the default judgment. Whayne alleged in its complaint that Monties was indebted to the company in the amount of $23,011.01 and provided exhibits evidencing the debt and the amount thereof. Whayne's pleadings also show proper service upon Monties and Bart and no jurisdictional defects appear on the record. Whayne's complaint, construed with the exhibits attached thereto, adequately supports the default judgment.

*(b) Monties and Bart were actually in default.*

A trial court may properly enter default judgment "[w]hen a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules" of civil procedure. CR 55.01; *Statewide Environmental Services, Inc. v. Fifth Third Bank*, --- S.W.3d ---, 2011 WL 3207783 (Ky. App. 2011) (finality on September 27, 2011). Here, Whayne served its complaint on Monties and Bart and neither filed a timely answer or motion under CR 12.

Furthermore, when Whayne filed its motion for default judgment, it served a copy on Monties and Bart, despite the fact that such notice is required *only* "[i]f the party against whom judgment by default is sought *has appeared in*

*the action*[.]" CR 55.01 (emphasis supplied). Still, Monties and Bart failed to appear in any way prior to entry of default judgment.

Because Whayne's complaint was sufficient to uphold the judgment and Monties and Bart were actually in default by failing to appear at all, the circuit court properly entered default judgment in Whayne's favor.

*2. Determination of Damages*

Monties next takes issue with the circuit court's damages award in the amount of $23,011.01. Specifically, Monties contends the damages awarded must be reduced as a result of three payments it made to Whayne prior to the circuit court's entry of judgment, namely: $2,000.00 on February 16, 2010; $250.00 on April 5, 2010; and $250.00 on April 13, 2010.

With respect to the $2,000.00 payment, Whayne's complaint specifically stated "[Monties is] indebted to [Whayne] in the sum of $23,011.01, which represents money due on account less a payment of $2,000.00[.]" Consequently, the circuit court did not err in refusing to reduce the damages award by this amount. However, with respect to the two $250.00 payments made by Monties in April 2010, Whayne concedes Monties is entitled to a credit of $500.00. Accordingly, we reverse and remand with instructions to reduce the damages award by $500.00.

*3. Summary of review of No. 2010-CA-001285-MR (Whitley Circuit Court)*

The circuit court did not abuse its discretion in granting default judgment against Monties and Bart. That portion of the circuit court's June 7,

2010 order is affirmed. However, we reverse the damages portion of the judgment and remand for the entry of judgment reducing the damages owed by $500.00.

### *C. Default Judgment in No. 2010-CA-000598-MR (Knox Circuit Court)*

Emeco filed its complaint against Monties and Bart in Knox Circuit Court on November 24, 2009, to collect overdue payments for rental of mining equipment. Monties was served with summons on December 4, 2009, and Bart on December 7, 2009. Both defendants failed to file an answer or respond by motion to Emeco's complaint within twenty days following service of their summonses as required by CR 12. As a result, on February 16, 2010, Emeco served Monties' counsel with, and on February 18 filed, a motion for default judgment.[7]

On February 22, 2010, Monties tendered an answer to Emeco's complaint and moved for an enlargement of time to file the answer. On February 24, the circuit court entered default judgment in Emeco's favor, finding as follows:

> The allegations in [Emeco's] Complaint are true; that Monties Resources is a sham corporation and the alter ego of [Bart]; that [Bart] is personally liable for the debts of Monties, and there is due and owing from . . . Monties and [Bart] the sum of Eighty Eight Thousand Four Hundred Thirty Dollars and Forty-One Cents ($88,430.31) plus interest at the rate of Twelve Percent (12%) per annum from the date incurred until paid in full plus its court costs and reasonable attorneys fees expended herein, for which amount personal judgment is hereby rendered in favor of [Emeco] and against the Defendants, Monties and [Bart].

[7] Again, because Monties and Bart had made no appearance, Emeco was not required to give them notice of the default judgment motion.

The next day, February 25th, Monties filed a motion to consolidate this case with what Monties calls "the companion case" in Laurel County (now before this Court as No. 2010-CA-001286-MR) and also an after-the-fact response to Emeco's motion for default judgment. On March 3, 2010, Monties filed a motion to set aside the default judgment. While that motion was pending, Monties filed a timely notice of appeal from the February 24, 2010 default judgment.

On May 24, 2010, the circuit court set aside the portion of the default judgment pertaining to the piercing of Monties' corporate veil and Bart's individual liability; the remainder of the default judgment as against Monties corporately was unaffected.[8] As in the Whitley Circuit Court case, Monties declined to file a second notice of appeal challenging the Knox Circuit Court's denial of Monties' motion to set aside the default judgment against it.

*1. Review under Jeffrey of the Knox Circuit Court Default Judgment*

Again, because Monties and Bart are directly appealing the default judgment, we apply the standard in *Jeffrey*; we find that the pleadings are sufficient to support the judgment and that Monties and Bart were actually in default.

*(a) Pleadings were sufficient to uphold the judgment.*

As discussed in part II.B.1.(a) of this opinion, the guidelines for determining whether a complaint is sufficient to uphold a default judgment are found, among other cases, in *Crowder*, *Morgan*, and *Jeffrey*. Our review of the

[8] In this same order, the circuit court ordered the late answer that Monties and Bart tendered to be filed, but deemed the answer effective, or timely, only as to Bart and not to Monties. Emeco's claim against Bart is still pending before the Knox Circuit Court.

pleadings in the Knox Circuit Court action reveals that they sufficiently uphold entry of default judgment.

Emeco alleged in its complaint that Monties was indebted to Emeco in the amount of $88,430.41, and provided exhibits evidencing the debt and the amount thereof as well as a statement of mechanic's lien. Emeco's complaint, construed with the exhibits filed therewith, sufficiently stated all the elements of a cause of action necessary for the collection of an overdue account.

The pleadings were sufficient to uphold the default judgment.

*(b) Monties was actually in default.*

The record shows proper service upon Monties and Bart, and that both failed to file an answer or CR 12 motion within twenty days of service. CR 12.01. Nevertheless, Monties contends it was not in default because: (i) it filed a timely answer prior to entry of default, and (ii) it appeared by implication. We disagree.

As previously explained, a party is in default, thereby authorizing a trial court to enter judgment against it when a claim is properly pleaded "when a defendant who has appeared in the action fails to defend as the Rules require." *Statewide*, --- S.W.3d at --- (citation omitted).

Monties first argues that it answered timely when, on February 22, 2010 – eighty days after service of summons and two days before entry of judgment – it tendered an answer. Monties cites *Kearns v. Ayer*, 746 S.W.2d 94 (Ky. App.

1988), in support of its assertion that "[i]t simply matters that the answers[9] were filed before the default judgment was entered." Monties is wrong.

The timeliness of an answer is defined and made mandatory by CR 12.01 which says "[a] defendant shall serve his/her answer within 20 days after service of the summons upon him/her."). Monties "failed to plead or otherwise defend *as provided by these rules*," CR 55.01, specifically, CR 12.01. Under these rules, Monties was in default.

Monties' reliance on *Kearns* is misplaced. The defendant in that case "responded to the summons on April 16, 1985," ten days after being served with summons. 746 S.W.2d at 94. *Kearns* does not support Monties' argument that an answer is timely so long as it is filed before the circuit court rules; we know of no case that does support that assertion.

Second, Monties argues that it made a timely appearance in the action "by implication based on its participation in the Laurel Circuit suit . . . ." We agree with Monties that it made an appearance in this case, but not by implication.

"In construing the word 'appeared' in CR 55.01, we are of the opinion that it means the defendant has voluntarily taken a step in the main action that shows or from which it may be inferred that he has the intention of making some defense." *Smith v. Gadd*, 280 S.W.2d 495, 498 (Ky. 1955). Monties made an appearance when, prior to entry of default judgment on February 24, 2010, it served Emeco

[9] Monties uses the plural because it urges this Court to consider its tardy "Reply to Plaintiff's Motion for Default Judgment" a second answer, or appearance, in the case.

with an answer on February 20th, and then tendered that answer to the circuit court on February 22nd.

However, whether Monties appeared is not the issue; the issue is: what does that appearance mean? Under CR 55.01, it means nothing more than that Monties was entitled to be notified of Emeco's pursuit of a default judgment. As *Kearns* notes,

> [t]he notice provision of the rule provides: "If the party against whom judgment by default is sought has appeared in the action, he, or if appearing by representative, his representative shall be served with written notice of the application for judgment at least three (3) days prior to the hearing on such application."

*Kearns*, 746 S.W.2d at 95 fn.1 (quoting CR 55.01). Monties' appearance prior to entry of default did not equate to a timely answer. It simply entitled Monties to notice of Emeco's motion and the opportunity to oppose it prior to the entry of judgment.[10] Monties and Bart both acknowledge that on February 16, 2010,

[10] The Kentucky Supreme Court has approved Local Rule 12 of the Twenty-Seventh Judicial Circuit relative to CR 55.01. That rule disposes of the necessity of a hearing on the default judgment motion as to liability. In pertinent part, Local Rule 12 states:

> A. A party seeking a judgment by default under CR 55.01 shall file a written motion therefore. The motion should certify that the opposing party has been served with process and has served no papers upon the moving attorney. . . .
>
> B. The motion need not appear on the motion docket and no notice need be given the party against whom judgment by default is sought. The party seeking the default judgment shall cause the entire record in the case, the motion, and a proposed judgment to be placed in the appropriate division's orders/judgment basket in the Clerk's office.

Of course, whether a hearing on damages is required is a separate issue that remains governed by CR 55.01, which states, in pertinent part:

Emeco did notice them in the certificate of service of its motion and that such notice, in fact, was received. Therefore, Emeco properly satisfied Monties' right to notice under CR 55.01, the only right arising as a result of its late appearance.

Despite Monties' argument that all that mattered was that something was filed before entry of default judgment, an "appearance" sufficient only to entitle the defendant to notice of a default judgment motion is still a "fail[ure] to plead or otherwise defend *as provided by these rules*," CR 55.01 (emphasis supplied), which we understand to mean compliance with CR 12. *See Lexington Fayette County Food and Beverage Ass'n v. Lexington-Fayette Urban County Government*, 131 S.W.3d 745, 756-57 (Ky. 2004) (discussing operation of CR 12.01 and 12.02 in the context of CR 55.01).

Monties failed to comply with any part of CR 12, *i.e.*, "failed to plead or otherwise defend as provided by" the Kentucky Rules of Civil Procedure. Monties did not file an answer pursuant to CR 12.01, nor did Monties file a motion pursuant to CR 12.02, 12.03, 12.05, or 12.06. Therefore, time for filing an answer

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> If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court, without a jury, shall conduct such hearings or order such references as it deems necessary and proper, unless a jury is demanded by a party entitled thereto or is mandatory by statute or by the Constitution. A party in default for failure to appear shall be deemed to have waived his right of trial by jury.

Emeco went beyond the requirements of Local Rule 12 by serving Monties with the default judgment motion despite the fact that Monties had yet to appear in the action.

was not tolled pursuant to CR 12.01. Upon the lapse of twenty days from service of summons upon it, Monties was actually in default.

*2.* *Monties' motion to consolidate is irrelevant to our review.*

Monties next argues that it filed a timely motion to consolidate this matter with its companion case in Laurel County, and that the Knox Circuit Court should have granted the motion. We disagree for two reasons: (1) the motion was filed after default judgment was entered; and (2) any error regarding the motion to consolidate was unpreserved.

First, Monties urges us to consider the motion as representing another form of appearance that should have prevented the entry of default judgment. However, default judgment was entered on February 24, 2010. Monties' motion to consolidate was filed on February 25, 2010. Considering our acknowledgement that Monties did appear in the action, and the filing of the motion *after* entry of the default judgment, we fail to see how the motion to consolidate is relevant to our analysis of the effect of Monties' appearance prior to entry of default judgment.

Second, Monties contends the circuit court erred in refusing to grant its motion to consolidate. If the Knox Circuit Court had granted its motion, Monties argues, its "answer in the Laurel Circuit case would have been sufficient to constitute an answer in the Knox Circuit case," thereby defeating default judgment. Because the motion was filed *after* entry of the judgment from which this appeal is taken, no pre-judgment interlocutory order existed to merge into the final judgment Monties appeals. Therefore, we have nothing to review. Our

examination of the record reveals that no ruling has ever been entered, but if one had been entered after the default judgment, that order would not be before us.

Therefore, from the point of view of this Court, Monties is making an argument for the first time. "As the Court of Appeals is one of review," in the absence of a ruling by the trial court, there is simply nothing for this Court to review. *Florman v. MEBCO Ltd. Partnership*, 207 S.W.3d 593, 607 (Ky. App. 2006) (quoting *Lawrence v. Risen*, 598 S.W.2d 474, 476 (Ky. App. 1980)). We therefore deem this issue waived and warranting no further discussion.

*3.* <u>*No hearing as to damages was necessary*</u>

Monties argues it was entitled to a hearing on damages. We disagree.

Whether a damages hearing is necessary is a matter of the circuit court's discretion. *See State Farm Ins. Co. v. Edwards*, 339 S.W.3d 456, 460 fn.3 (Ky. 2011) ("We note that under the plain language of CR 55.01 the trial judge should exercise discretion . . . ."). Therefore, while review of a direct appeal from a default judgment applies *Jeffrey*, the narrower question of the circuit "court's determination that a hearing is not necessary to determine the amount of damages under Rule 55[.01] is reviewed for abuse of discretion." *Vesligaj v. Peterson*, 331 Fed.Appx. 351, 355 (6th Cir. 2009); *see also Howard*, 749 S.W.2d at 693 (noting similarity between CR 55.01 and Federal Rule of Civil Procedure (FRCP) 55(b) on this point).

Recognition of the trial court's discretion in this regard predates the rules of modern pleading.

> It is a familiar practice and an exercise of judicial power for a court upon default, by taking evidence when necessary *or by computation from facts of record*, to fix the amount which the plaintiff is lawfully entitled to recover and to give judgment accordingly.

*Pope v. U.S.*, 323 U.S. 1, 12, 65 S. Ct. 16, 22 (1944) (cited in *Howard*, 749 S.W.2d at 693) (emphasis supplied). Kentucky's rule itself states, in pertinent part,

> If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court, without a jury, shall conduct such hearings or order such references as it deems necessary and proper, unless a jury is demanded by a party entitled thereto or is mandatory by statute or by the Constitution. A party in default for failure to appear shall be deemed to have waived his right of trial by jury.

CR 55.01. This rule grants the circuit court discretion to determine damages without a hearing when the amount is liquidated and can be determined by a simple mathematical formula.[11] Monties' reliance on *Howard v. Fountain*, 749 S.W.2d 690 (Ky. App. 1988), is misplaced because that case stands for the proposition that "a defaulting party does not admit *unliquidated* damages [and]

[11] The federal rule from which CR 55.01 is crafted uses the following language to the same effect:

> The court may conduct hearings or make referrals--preserving any federal statutory right to a jury trial--when, to enter or effectuate judgment, it needs to:
>
> (A) conduct an accounting;
> (B) determine the amount of damages;
> (C) establish the truth of any allegation by evidence; or
> (D) investigate any other matter.

Federal Rule of Civil Procedure 55(b)(2).

should be permitted to participate in the damage assessment hearing." *Id.* at 693 (emphasis supplied).

In this case, Emeco's verified complaint set forth, either in the complaint itself or in an exhibit incorporated in the complaint, every fact necessary to allow the circuit court to calculate the liquidated amount that Monties owed Emeco for the equipment it had leased but for which it failed to make payment.

We see no abuse of discretion in the circuit court's failure to conduct a hearing for the purpose of establishing damages in conjunction with the entry of default judgment.

*4.* *No error in calculating damages*

In an argument subheading, Monties states that the circuit court did not assess the proper amount of damages. However, there is no reference to how, or where in the record, this error was preserved, *see* CR 76.12(4)(c); no reference to the calculation was included in Monties' prehearing statement, *see* CR 76.03(8); and there is no citation to any authority. Monties simply offers no reason of any kind in the body of the argument for affecting the circuit court's calculation.

> Our courts have established that an alleged error may be deemed waived where an appellant fails to cite any authority in support of the issues or arguments advanced on appeal. [W]ithout any argument or citation of authorities, [a reviewing c]ourt has little or no indication of why the assignment represents an error. It is not our function as an appellate court to research and

> construct a party's legal arguments, and we decline to do so here.

*Hadley v. Citizens Deposit Bank*, 186 S.W.3d 754, 759 (Ky. App. 2005) (citations and quotation marks omitted). We deem the error waived.

*5. Summary of review of No. 2010-CA-000598-MR (Knox Circuit Court)*

Although Monties made an appearance in this case, it nonetheless failed to plead or defend in accordance with the civil rules and was in default. The pleadings supported the judgment. Damages could be calculated by the court without a hearing and the court did so.

As to Monties, we affirm the judgment of the Knox Circuit Court. The circuit court's grant of the motion to set aside the default judgment as to Bart makes unnecessary any review of the judgment with regard to him personally.

## III. Summary Judgment
## No. 2010-CA-001286-MR (Laurel Circuit Court)

On March 2, 2010, Emeco moved for summary judgment against Monties claiming no genuine issue of material fact existed with regard to the balance due from Monties pursuant to the equipment rental agreements and that, as a result, Emeco was entitled to judgment as a matter of law. Emeco also claimed it was entitled to a lien on the leasehold encompassing the mine operated by Monties.

Emeco also sought summary judgment against Bart personally by claiming the right to pierce Monties' corporate veil.

On June 8, 2010, the circuit court granted Emeco's motion as to Monties, but denied the motion as to Bart individually. Monties promptly appealed.[12]

A party seeking summary judgment before the circuit court "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" evidence establishing a triable issue of material fact. *Lewis v. B & R Corp.*, 56 S.W.3d 432, 436 (Ky. App. 2001); *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 482 (Ky. 1991). That is to say, "[t]he party opposing a properly presented summary judgment motion cannot defeat it without presenting at least some affirmative evidence showing the existence of a genuine issue of material fact for trial." *City of Florence, Kentucky v. Chipman*, 38 S.W.3d 387, 390 (Ky. 2001). The trial court "must examine the evidence, not to decide any issue of fact, but to discover if a real issue exists." *Steelvest*, 807 S.W.2d at 480.

On review of a summary judgment, the appellate court must ascertain "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); CR 56.03. "Because summary judgment involves only legal questions and the existence of any disputed

[12] We note that the summary judgment failed to "adjudicat[e] all the rights of all the parties in an action or proceeding[.]" CR 54.01. However, it did adjudicate all the issues between Emeco and Monties. Therefore, the circuit court could, and did, make the judgment final and appealable by including the necessary recitations from CR 54.02(1).

material issues of fact, an appellate court need not defer to the trial court's decision and will review the issue *de novo*." *Lewis,* 56 S.W.3d 432 at 436.

Monties does not contest the circuit court's finding as to liability but takes issue only with the damages award, claiming a genuine issue exists as to whether Emeco properly mitigated its damages. We find Monties' argument unpersuasive.

An injured party "claiming damages for a breach of contract is obligated to use reasonable efforts to mitigate its damages occasioned by the other party's breach." *Deskins v. Estep*, 314 S.W.3d 300, 305 (Ky. App. 2010); *Morgan v. Scott*, 291 S.W.3d 622, 640 (Ky. 2009) ("Under Kentucky law, a party is required to mitigate his or her damages."). Under this rule, the non-breaching party need only undertake reasonable efforts "without undue risk, expense, burden, or humiliation" to minimize or avoid losses resulting from the defaulting party's breach. 24 *Williston on Contracts* **§** 64:27 (4th ed. 2010); *see, e.g., Whitley County Bd. of Ed. v. Meadors,* 444 S.W.2d 890, 892 (Ky. 1969); *Civil Service Bd., City of Newport v. Fehler*, 578 S.W.2d 254, 259 (Ky. App. 1979) (finding the non-defaulting party "made a reasonable effort to mitigate his damages"); *Whitley County Bd. of Ed. v. Meadors,* 444 S.W.2d 890, 892 (Ky. 1969). "All that is required of the non-defaulting party in measuring damages is that he or she act reasonably so as to not unduly enhance the damages caused by the breach." 22 Am. Jur. 2d *Damages* § 353 (2010).

Monties argues that Emeco failed to mitigate its damages by allowing monthly charges to accrue while the equipment sat idle at Monties' inoperative mines. However, by their own terms, the equipment rental agreements remained in effect until Monties returned the equipment to Emeco. Thus, when Monties discovered it was no longer able to pay for the equipment, Monties could have simply returned the dozers to Emeco and ceased incurring the monthly rental fee. Monties chose not to do so. Monties' mitigation argument, if successful, would illogically shift the duty under the rental agreements to Emeco.

Additionally, in his deposition, Bart admitted that an Emeco employee was working diligently with Monties' treasurer, Don Rosignoli, to obtain payment for the equipment rented. Accordingly, the record reveals Emeco took reasonable steps to minimize or avoid losses resulting from Monties' breach. *See* 24 *Williston on Contracts* § 64:27 (4th ed. 2010).

We have examined the record and the thorough and well-reasoned summary judgment; we find no error. Emeco was entitled to summary judgment because there were no genuine issues of material fact and judgment was warranted as a matter of law. The Laurel Circuit Court's grant of summary judgment is affirmed.

## IV. Conclusion

The Whitley Circuit Court's June 7, 2010 order is reversed and remanded for the entry of a new order adjusting damages downward in the amount of $500.00. In all other respects, the order is affirmed.

The Knox Circuit Court's February 24, 2010 order entering judgment by default in Emeco's favor is affirmed.

The Laurel Circuit Court's June 8, 2010 order partially sustaining and partially overruling Emeco's motion for summary judgment is affirmed.

ALL CONCUR.

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