

Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-001213-MR

RON JARBOE

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE OLU A. STEVENS, JUDGE
ACTION NO. 05-CI-008130

MORRIS, GARLOVE, WATERMAN
& JOHNSON, PLLC

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: CAPERTON, TAYLOR, AND THOMPSON, JUDGES.

TAYLOR, JUDGE: Ron Jarboe brings this appeal from a June 15, 2012, order of the Jefferson Circuit Court, denying his motion to set aside the December 27, 2011, summary judgment in favor of Morris, Garlove, Waterman & Johnson, PLLC. We affirm.

On September 22, 2005, the law firm Morris, Garlove, Waterman & Johnson, PLLC (appellee) filed a complaint against Ron Jarboe¹ (appellant) and his company, Freedom Express, Inc. (Freedom Express) in Jefferson Circuit Court. Appellee alleged it was owed attorney's fees and costs associated with its legal representation of appellant and Freedom Express. Appellant was represented by counsel and ostensibly filed an answer on October 22, 2005.² Appellee then served a request for admissions on October 26, 2005, and a second request was served on June 20, 2006. Subsequently, a default judgment was entered in favor of appellee on November 13, 2007. Appellant and appellee subsequently agreed that the November 13, 2007, default judgment should be set aside. By agreed order entered January 4, 2008, the November 13, 2007, default judgment was set aside.

Appellant's deposition was noticed for February 1, 2008, for which he failed to appear. Thereafter, there was little additional activity of record in this litigation during the remainder of 2008 and most of 2009. On December 7, 2009, appellee filed a motion for summary judgment. Appellee argued summary judgment was appropriate as appellant failed to respond to its previous requests for discovery. Appellee asserted that such requests were deemed admitted pursuant to

¹ Appellant entered into an agreement for professional legal services with appellee. On October 20, 2003, appellant executed the agreement in his individual capacity and as President of his company, Freedom Express. Counsel for appellant did not designate Freedom Express as an appellant in the notice of appeal; thus, Freedom Express is not a party to this appeal.

² Appellant asserts that an answer to the complaint was served upon appellee on October 22, 2005. However, in the record on appeal there is not an answer filed on October 22, 2005. The answer in the record was stamped "filed" October 24, 2005, but the record is not in chronological order and it appears some documents may be missing. We caution the circuit clerk to maintain court records in accordance with Kentucky Rules of Civil Procedure 76.12. In this appeal, we were able to dispose of the merits as the dispositive documents were eventually located.

Kentucky Rules of Civil Procedure (CR) 36.01. Appellant filed a response to the motion on December 24, 2009, by counsel, asserting that he was incarcerated in federal prison and requested appointment of a guardian *ad litem* (GAL). The circuit court appointed a GAL for appellant by order entered January 19, 2010; however, the GAL did not file a report or make a defense.

Again, the case record reflects that this action was dormant until the appellant was reportedly released from prison, whereupon the appellee renewed its motion for summary judgment on August 17, 2011. By opinion and order entered December 27, 2011, the circuit court granted appellee's motion for summary judgment and entered judgment against appellant in the amount of \$9,341.83 plus interest. Appellant subsequently moved to have the summary judgment set aside. Appellant argued that although he was represented by retained counsel during this entire proceeding, he was entitled to have the additional protection of a guardian *ad litem* pursuant to CR 17.04. Appellant further argued that summary judgment could not be entered without the GAL having made a defense or having filed a report. The circuit court denied appellant's motion to set aside the December 27, 2011, judgment by order entered June 15, 2012. This appeal follows.

Appellant contends the circuit court erred by granting summary judgment in favor of appellee. However, the only error alleged by appellant in his brief to this Court is that the circuit court failed to comply with CR 17.04. Thus, our review has been limited to this one allegation of error below. We further note that summary judgment is proper where there exists no genuine issue of material

fact and movant is entitled to judgment as a matter of law. CR 56; *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476 (Ky. 1991). Our review proceeds accordingly.

Appellant specifically asserts that a judgment could not be entered in this action until the appointed guardian *ad litem* (GAL) made a defense or filed a report pursuant to CR 17.04. Appellant emphasizes in his argument that the GAL did not file a report or make a defense; thus, appellant contends the circuit court committed reversible error by rendering summary judgment.

CR 17.04 provides, in relevant part:

Actions involving adult prisoners confined either within or without the State may be brought or defended by the prisoner. If for any reason the prisoner fails or is unable to defend an action, the court shall appoint a practicing attorney as guardian ad litem, and no judgment shall be rendered against the prisoner until the guardian ad litem shall have made defense or filed a report stating that after careful examination of the case he or she is unable to make defense.

CR 17.04(1) (emphasis added).

The language of CR 17.04 is clear. The court must appoint a guardian *ad litem* for an adult prisoner if the prisoner either fails to defend an action or is unable to defend. While application of CR 17.04 is mandatory, it applies only in the limited circumstances described – where a prisoner has either failed to defend an action or is unable to defend. CR 17.04 was intended “to prevent the failure of a prisoner to obtain counsel as being deemed a waiver of his right to due process.” *Davidson v. Boggs*, 59 S.W.2d 662 (Ky. App. 1993). However, CR 17.04 was not

intended to allow a prisoner who was represented by counsel to have a judgment set aside because a guardian *ad litem* was not appointed or because a guardian *ad litem* was appointed but did not make a defense or file a report. In other words, CR 17.04 may not be used offensively as a delay tactic for a defendant in a civil proceeding.

In the case *sub judice*, appellant was represented by counsel during the entire proceeding below. Shortly after the November 13, 2007, default judgment was entered, appellee agreed with appellant's request to set aside the judgment. Thereafter, appellee waited until 2009 to file a motion for summary judgment upon the basis that appellant had not responded to discovery requests propounded years earlier in the litigation. Appellant then made his first request for appointment of a GAL on December 24, 2009, in response to the initial motion for summary judgment. When retained counsel informed the court that appellant was incarcerated in federal prison, the court honored counsel's request for appointment of a GAL. Even though a GAL was appointed, the GAL failed to defend the action or file a report. Under the rule, the GAL was not required to take any action, given that appellant at all times was represented by counsel in the litigation. Appellee did not renew its motion for summary judgment until appellant was reportedly released from prison in August of 2011. Considering that appellant was represented by retained counsel throughout this entire proceeding and given the otherwise unique circumstances surrounding the appointment of the GAL, we do not believe appellant was entitled to the protections afforded under CR 17.04.

Simply stated, CR 17.04 is not applicable to the facts of this case. Appellant has not submitted any legal authority in support of his position nor can this Court find any case authority applicable to the circumstances of this case. Accordingly, we are of the opinion that the circuit court properly granted summary judgment.

For the foregoing reasons, the order and summary judgment of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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Brian K. Darling
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BRIEF AND ORAL ARGUMENT
FOR APPELLEE:

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ORAL ARGUMENT
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