

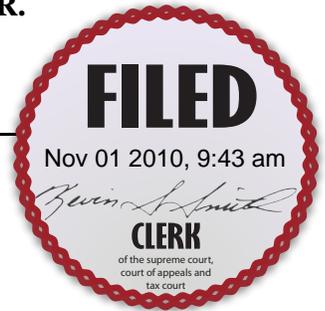
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**IN THE
COURT OF APPEALS OF INDIANA**

PHILLIP R. IBRAHIM, individually and d/b/a)
CARBANK and CARBANK/BOSTON.COM,)
)
Appellant-Defendant,)
)
vs.)
)
AUTOMOTIVE FINANCE CORPORATION,)
)
Appellee-Plaintiff.)

No. 49A02-1002-CC-99

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable S.K. Reid, Judge
Cause No. 49D14-0806-CC-27006

November 1, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

FRIEDLANDER, Judge

Phillip Ibrahim appeals the grant of summary judgment in favor of Automotive Finance Corporation (AFC), challenging the propriety of that ruling as the sole issue upon appeal.

We affirm.

The facts favorable to Ibrahim, the nonmovant, are that on August 20, 2004, Ibrahim executed a Demand Promissory Note and Security Agreement (the Note) in favor of AFC in which Ibrahim agreed to pay AFC the principal sum of \$750,000 pursuant to the terms of the Note. To secure the amounts due under the Note, Ibrahim granted AFC a security interest in various equipment and inventory, which AFC perfected by filing UCC Financing Statements. On August 20, 2004, Ibrahim also executed an Unconditional and Continuing Guaranty (the Guaranty), whereby Ibrahim personally guaranteed the full and prompt payments of amounts to be paid under the terms of the Note.

Ibrahim subsequently failed to make payments and therefore defaulted under the Note and Guaranty. Ibrahim also sold inventory that served as security for the debt incurred via the Note but did not tender the proceeds to AFC. Ibrahim issued seven checks to AFC for a total of \$94,105 in partial payment of the Note. In February 2007, however, those checks were returned unpaid by the bank due to insufficient funds. Thereafter, Ibrahim failed to cure the default on the Note and Guaranty and failed to make restitution on the balance of the denied checks. Therefore, on June 17, 2008, AFC filed a four-count complaint against Ibrahim, alleging breach of contract, breach of guaranty, fraud, and check deception. Ibrahim, pro se, answered in denial and raised numerous cross-claims.

On March 5, 2009, AFC filed a motion seeking summary judgment on all counts of its complaint. Because they are relevant to our disposition, we set forth in detail the events that followed in this litigation. On March 26, 2009, Ibrahim filed a motion for extension of time to submit a response to the summary judgment motion. Over AFC's objection, the trial court granted Ibrahim's motion, giving him until May 7, 2009 to file a response. On May 6, Ibrahim filed another motion for extension of time to file a response. On the same day, Ibrahim also filed his first request for production of documents from AFC. The court granted the request for extension, giving Ibrahim until June 18, 2009 to file a response to AFC's summary judgment motion. At this point, a dispute arose regarding Ibrahim's discovery requests.

On May 26, AFC filed a motion to hold discovery in abeyance. It appears that the request was premised upon AFC's claim that Ibrahim's request for materials was too broad and sought materials not relevant to this matter. On May 29, the trial court denied AFC's request to hold in abeyance, but issued the following directive:

IT IS, THEREFORE, ORDERED that the Discovery Requests issued by [Ibrahim] be, and the same hereby are, to be modified and reduced by [Ibrahim] to conform with Local Rules limiting discovery requests. [Ibrahim] to submit his discovery requests to [AFC] within 10 days of this Order.

Appellant's Appendix at 002. On June 5, Ibrahim filed "Defendant's Emergency Motion Regarding Demand For Document's Timetable", seeking thereby an extension of time to comply with the court's May 29 order to serve his modified discovery requests upon AFC. *Id.* at 003. That motion was granted and Ibrahim was given until June 16 to serve the modified requests. On June 9, Ibrahim filed three motions: (1) a motion to compel

discovery; (2) “Defendant’s Response To Plaintiff’s [sic] Objection Regarding Further Enlargement [sic] Of Time To Respond To AFC’s Motion For Summary Judgment Based On Further Discovery Requests”,¹ *id.* at ii; and (3) “Alternative Motion For Enlargement [sic] Of Time In The Event That Motion To Compel Documents Is Denied.” *Id.*

At some point, Ibrahim pared down his initial request for production from “ninety some”. *Id.* at 100. He submitted a motion to compel at the same time he submitted the modified request for production (now apparently consisting of sixty-eight separate requests). On July 22, the trial court conducted a hearing on Ibrahim’s motion to compel and AFC’s motion for protective order (from requests for production included in the modified request for production that it deemed irrelevant or otherwise undiscoverable). Ibrahim failed to appear at the hearing. The trial court denied Ibrahim’s motion to compel and granted AFC’s motion for protective order. On July 23, Ibrahim submitted a motion to set aside the July 22 orders. It appears that motion was denied on August 18.² On August 19, AFC submitted a verified notice of compliance with the trial court’s order

¹ We cannot find anywhere in the appellate materials the motion to which this motion purportedly responded. In fact, much relevant material appears to have been omitted from the appendix submitted by Ibrahim. In this regard, there is merit in AFC’s contention that Ibrahim’s appendix is one-sided, i.e., contains only those materials favorable to Ibrahim’s position. Of course, an appellant may not selectively submit only those documents favorable to its position; rather, it must include all relevant documents. *See Plaza Group Props., LLC v. Spencer County Plan Comm’n*, 877 N.E.2d 877 (Ind. Ct. App. 2007), *trans. denied*. The missing relevant documents impeded our review of this appeal.

² We say “it appears” because we are forced to resort to inference based only upon a CCS entry, dated August 8, 2009, that provides: “COURT DENIES ORDER GRANTING DFNT’S EMERGENCY MOTION VACATING DECISIONS REGARDING PLNTFF’S PROTECTIVE ORDER AND DFNT’S MOTION TO COMPEL, RE-SCHEDULINTG HEARING FOR BOTH MOTIONS FILED 8/14/09”. *Appellant’s Appendix* at ii. The record does not contain the motion or order alluded to in this entry. Without more, we interpret this language to reflect the denial of an order submitted by Ibrahim for the court’s signature.

to calculate the cost of reproducing and shipping responses to Ibrahim's discovery requests that were deemed proper. On August 28, Ibrahim filed a verified notice of plaintiff's non-compliance with discovery, claiming that AFC was wrongfully refusing to produce all of the materials Ibrahim requested. On September or October 17,³ Ibrahim filed a "MOTION TO COMPEL PLAINTIFF TO PRODUCE CORRESPONDENCE CLAIMED TO BE WORK PRODUCT OR ATTORNEY CLIENT PRIVILEGE FILED BY DEFENDANT, PROSE [sic][.]" *Id.* at ii. On November 19, AFC filed a motion asking the court to rule on its March 5 motion for summary judgment. On November 24, the trial court denied Ibrahim's second motion to compel and granted AFC's summary judgment motion, awarding approximately \$3 million to AFC in damages. Ibrahim appeals the grant of summary judgment against him.

Our standard of review in appeals from the grant or denial of a motion for summary judgment is well established:

When reviewing a grant or denial of a motion for summary judgment our well-settled standard of review is the same as it is for the trial court: whether there is a genuine issue of material fact, and whether the moving party is entitled to judgment as a matter of law. Summary judgment should be granted only if the evidence sanctioned by Indiana Trial Rule 56(C) shows that there is no genuine issue of material fact and the moving party deserves judgment as a matter of law. All factual inferences must be construed in favor of the non-moving party, and all doubts as to the existence of a material issue must be resolved against the moving party.

Kroger Co. v. Plonski, 930 N.E.2d 1, 4-5 (Ind. 2010) (some citations omitted). The trial court's decision on summary judgment "enters appellate review clothed with a

³ This motion is not included in Ibrahim's appendix. The CCS entry is bound in the appendix in such a way as to obscure the month this motion was filed. Assuming this entry is in chronological order, as all of the legible entries appear to be, this motion must have been filed in September or October.

presumption of validity.’” *Trustcorp Mortg. Co. v. Metro Mortg. Co., Inc.*, 867 N.E.2d 203, 211 (Ind. Ct. App. 2007) (quoting *Malone v. Basey*, 770 N.E.2d 846, 850 (Ind. Ct. App. 2002), *trans. denied*). Moreover,

[a] grant of summary judgment may be affirmed upon any theory supported by the designated evidence. While the trial court here entered specific findings of fact and conclusions of law in its order granting summary judgment for the appellees, such findings and conclusions are not required and, while they offer valuable insight into the rationale for the judgment and facilitate our review, we are not limited to reviewing the trial court’s reasons for granting or denying summary judgment.

Van Kirk v. Miller, 869 N.E.2d 534, 539-40 (Ind. Ct. App. 2007) (citations omitted), *trans. denied*.

We prefer to decide cases on the merits if that is possible. *See Hughes v. King*, 808 N.E.2d 146 (Ind. Ct. App. 2004). We note, however, AFC’s forceful argument that deficiencies in Ibrahim’s appellate materials provide plausible bases for affirming the judgment against him. Although Ibrahim’s brief is not *completely* lacking in the alleged particulars, it is nearly so. His “argument” is characterized chiefly by contentious, inappropriate language, not concise legal reasoning. The trial court does not escape his wrath, as he accuses the trial court of, among other things, “abdicat[ing] it’s [sic] responsibility”, *Appellant’s Brief* at 26, acting in bad faith, and issuing a judgment that is “completely ridiculous”. *Id.* at 29. Of course, the lion’s share of Ibrahim’s criticism is reserved for AFC, whose business practices Ibrahim labels as tantamount to “racketeering”, *id.* at 24, and whom Ibrahim describes more than once as “wicked.” *See, e.g., id.* at 19, 26. Unfortunately, the shortcomings in the presentation of Ibrahim’s appeal are not the only negative consequences of his decision to eschew legal counsel and

to defend himself in this action. Ultimately, Ibrahim's lack of knowledge regarding Indiana's discovery rules led to the entry of summary judgment against him. As we will explain, the "merits" in this case primarily include the events that occurred in that regard between the filing of AFC's summary judgment motion on March 5, 2009 and the ultimate granting of that motion on November 24, 2009.

Ibrahim contends the trial court erred in ruling on the motion for summary judgment without giving him notice that his second set of discovery requests had been denied. He contends he should have been given time after the second denial to respond to the summary judgment motion. As a general proposition, it is improper for a court to grant summary judgment while discovery requests are pending. *See, e.g., Kroger v. Plonski*, 930 N.E.2d 1. There are, however, exceptions to the general rule. *See id.* at 6 (stating that the discovery requests should be reasonable and that they should "bear on issues material to the motion"); *see also Ludwig v. Ford Motor Co.*, 510 N.E.2d 691 (Ind. Ct. App. 1987) (summary judgment is proper if the pending discovery is unlikely to develop a genuine issue of material fact), *trans. denied*. Moreover, we note that T.R. 56(A) permits a claimant to move for summary judgment any time after the expiration of twenty days after service, which presumably means even before any discovery is initiated.

In this case, by November 24, 2009, AFC's summary judgment motion was more than eight months old and it had been five months since the last extension to respond granted to Ibrahim had expired. During this time, Ibrahim had engaged in misguided attempts at discovery, seeking materials that apparently were, for the most part, not

subject to discovery. When called upon for a ruling in this ongoing dispute, the trial court consistently determined that AFC's objections were well-taken and that Ibrahim was not entitled to the documents in controversy. It seems that Ibrahim simply would not take "no" for an answer.

It is well settled that litigants who proceed pro se are held to the same standard as trained counsel and are required to follow procedural rules. *See Sumbry v. Boklund*, 836 N.E.2d 430 (Ind. 2005). Ibrahim's failure to file a timely response to AFC's summary judgment motion ultimately resulted from intransigence born of his ignorance of our discovery rules. As noted above, there are exceptions to the "general proposition [that] it is improper for a court to grant summary judgment while reasonable discovery requests that bear on issues material to the motion are still pending." *Kroger Co. v. Plonski*, 930 N.E.2d at 5. One exception inherent in the above language is that the pending requests must be "reasonable". *Id.* As detailed above, the trial court denied two motions to compel relative to the requests in question, and Ibrahim has failed even to challenge those rulings, much less offer a cogent argument that the controversial material is discoverable.

Ibrahim acknowledges that AFC produced some material in response to his requests for production, which he characterizes as "a box of 'junk'[".]” *Appellant's Brief* at 20. Read in context, this description undoubtedly reflects that the material produced did not contain the evidence that Ibrahim was looking for, i.e., "appropriate documents to corroborate the Appellant's first had [sic] account of the facts." *Id.* There is nothing in the appellate materials from which we might draw our own conclusions on this point. Ibrahim also refers to materials that AFC had copied and prepared to send, but was

holding until receiving payment from Ibrahim to cover the costs of reproduction and shipping. Ibrahim claims he had sent payment via check on August 17. Again, we can find no indication in the record as to whether payment was or was not ultimately received.

In the final analysis, summary judgment was entered against Ibrahim because he neglected to designate materials that, considered in conjunction with AFC's designated materials, reflected the existence of materials facts rendering summary judgment inappropriate. He did not do so because he refused to relent in his pursuit of discovering materials that, so far as we can tell, the trial court determined were not subject to discovery. At some point, a trial court must be permitted to determine that enough is enough. In this case, that point was reached. The trial court was more than patient in attempting to accommodate Ibrahim's unfamiliarity with our legal system and the rules pertaining to discovery. Months after a response was due, and after Ibrahim continually delayed responding based upon an imperfect knowledge of Indiana's discovery rules, the trial court finally ruled on AFC's summary judgment motion based upon the designated materials then before it. For the reasons set out above, this was appropriate from a procedural standpoint. Because Ibrahim has failed to present cogent argument that the ruling was substantively erroneous, we affirm the granting of summary judgment in favor of AFC.

Judgment affirmed.

ROBB, J., concurs.

BARTEAU, Sr. J., dissents with separate opinion.

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Appellee-Plaintiff.)
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BARTEAU, Senior Judge, dissenting

I respectfully dissent. Here, pursuant to Indiana Trial Rule 56(I), the trial court wisely altered the time limit to respond to the summary judgment motion because of the initial difficulty Ibrahim was having in obtaining discovery in this multi-million dollar case. Having altered the time limit, the trial court should have given Ibrahim time to

respond to the summary judgment motion after the denial of the second motion to compel.

While I agree that the trial court could not allow discovery to continue indefinitely, I do not agree that the trial court, after altering the time limit for response to the original summary judgment motion, should have granted the motion without notice to Ibrahim.

I would reverse and remand with instructions that the trial court vacate its order granting summary judgment, that it give Ibrahim a reasonable time to respond to the summary judgment motion, and that it proceed thereafter as it deems proper.