

IN THE COURT OF COMMON PLEAS FOR THE STATE OF DELAWARE  
IN AND FOR KENT COUNTY

Discover Bank, :  
 : C.A. No. 07-04-0017  
Plaintiff, :  
 :  
v. :  
 :  
Eleanor Turner, :  
 :  
Defendant. :  
 :

Submitted: August 28, 2006

Decided: August 29, 2006

**Decision on Defendant's Motion for Reargument**

**Defendant's Motion is denied.**

**Neal J. Levitsky, Esquire, Fox Rothschild, LLP, Post Office Box 2323, Wilmington, Delaware 19899-2323, Attorney for Plaintiff.**

**Maggie Clausell, Esquire, 9 East Lookerman Street, Suite 205, Dover, Delaware 19901, Attorney for Defendant.**

**Trader, J.**

In this civil action, the defendant's motion for reargument is denied because the defendant did not file any counter-affidavit prior to the hearing on plaintiff's motion for summary judgment. Additionally, the defendant's late filed counter-affidavit does not set forth any facts that would cause me to reconsider my previous decision.

The facts of the case are as follows: on April 22, 2007, the plaintiff, Discover Bank, filed a civil action on a revolving account against the defendant, Eleanor Turner, for the sum of \$6165.82, plus post-judgment interest at the legal rate, court costs, and 20% attorney's fees. On April 24, 2007, the defendant filed a *pro se* Answer denying the allegations contained in the Complaint. On May 7, 2007, the plaintiff filed a notice of service of interrogatories on the defendant, but the defendant has not filed with this Court a notice of service of the answers to these interrogatories on the plaintiff. On June 25, 2007, Discover Bank filed a motion for summary judgment asserting there was no genuine issue of any material fact. The plaintiff's motion for summary judgment was accompanied by an affidavit that stated in its pertinent part that "the defendant applied for and was approved for a credit account number and that the amount due and owing to the plaintiff by the defendant pursuant to the credit account was \$6,165.82, plus interest, court costs, and 20% attorney's fees." On July 16, 2007, Maggie Claussel, Esquire, entered her appearance on behalf of the defendant, but she did not file a counter-affidavit. On July 17, 2007, after oral argument, the Court granted plaintiff's motion for summary judgment on the grounds that there was no genuine issue of any material fact.

On August 23, 2007, the defendant filed a motion for reargument pursuant to Civil Rule 59(e) and Rule 60(b)(3) of this Court. The defendant contests the reliability of the supporting documents attached to the affidavit in plaintiff's motion for summary

judgment. She alleges that in one billing statement, the defendant's former husband's name has been deleted from the billing statement and in another statement the address has been changed from her former husband's address to her address. The defendant attached a sworn affidavit to the motion for reargument stating that the statements in her attorney's motion for reargument were true and correct. On August 6, 2007, the plaintiff filed a more comprehensive affidavit by its custodian of records which indicates that John Turner, a deceased cardholder, was removed from the account and subsequent account statements would only show the name of Eleanor Turner, the remaining cardholder.

In considering the motion under Civil Rule 59(e), a court must consider whether it "overlooked a precedent or legal principle that would have controlling effect, or that it has misapprehended the law or the facts such as would affect the outcome of the decision." *Gass v. Truax*, 2002 WL 1426537, \*1 (Del. Super. Ct. 2002)((citing *Monsanto Co. v. Aetna Cas. and Sur. Co.*, 1993 WL 5632461, \*2 (Del. Super. Ct. 1993), *aff'd*, 653 A.2d 305 (Del. 1994)). In this case I find no new facts that warrant a reexamination of the issues raised.

Under Civil Rule 56 of this Court, a motion for summary judgment should be granted as a matter of law where there is no genuine issue of material fact. *See Court of Common Pleas Civil Rule 56*. Plaintiff bears the burden of demonstrating, with reasonable certitude, that there was no genuine issue as to any material fact. *Matas v. Green*, 171 A.2d 916, 918 (Del. Super. Ct. 1961). When the plaintiff is the moving party, the facts are taken in the light most favorable to the defendant. *Id.* "When a motion for summary judgment is 'supported' by such a showing under the Rule, the burden shifts to a non-moving party to demonstrate that there are material issues of fact." *Moore v.*

*Sizemore*, 405 A.2d 679, 681 (Del. 1979). Subsequently, if the non-moving or adverse party does not meet this burden, judgment shall be entered against the non-moving party. *Court of Common Pleas Civil Rule 56(e)*.

Pursuant to Civil Rule 56(c) of this Court, “the adverse party *prior to the day of [the motion for summary judgment] hearing* may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” *See Id. Rule 56(c)*(emphasis added).

In the case before me on June 20, 2007, the defendant was properly served with the plaintiff’s motion for summary judgment, copies of the account statements reflecting the correct balance due, and the affidavit by the plaintiff’s record keeper verifying the authenticity of the statements. The defendant did not file any response or counter-affidavits prior to the July 17, 2007 hearing. As a *pro se* litigant during the period prior to the date of hearing, it was her obligation to respond to the motion as required under the Court of Common Pleas Civil Rules. If the defendant wished to submit a counter affidavit in response to the affidavit submitted by the plaintiff, she “was required under the rules to do so at the time [s]he file[d her] response to the motion.” *Ward v. Hennessey*, 875 A.2d 632, 2005 WL 1249340, \*2 (Del. 2005). The *pro se* status of a litigant does not excuse and does not justify the defendant’s failure to meet the procedural requirements. *Arots v. Salesianum School*, 2003 WL 21398017, \*4 (D. Del. 2003). Therefore, I should not reconsider the issues in this case based on the defendant’s

untimely affidavit filed six days after the hearing on plaintiff's motion. Furthermore, the defendant's late filed affidavit does not raise a genuine issue of a material fact.

Civil Rule 55(e) states “[w]hen a motion for summary judgment is made and supported as provided in this Rule, an adverse party *may not rest upon the mere allegations or denials of the adverse party's pleadings*, but the adverse party's response, by affidavits or as otherwise provided in this Rule, *must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.*” *Court of Common Pleas Civil Rule 56(e)*(emphasis added).

The defendant does not set forth specific facts showing that there is a genuine issue of fact for trial. The defendant in her affidavit asserts that the debt sued upon was that of her deceased former husband. The defendant further asserts that some of the billing statements attached to plaintiff's affidavit are different because her husband is listed on some billing statements and on other statements her husband has been deleted from the billing statements. She also asserts that the address on the billing statements has been changed from that of her former husband to her address. This discrepancy is explained by the fact that it is the plaintiff's policy to change the name and address on the billing statements upon the death of one of the cardholders. The defendant does not explicitly deny in her affidavit that she was a cardholder on the account. “A party cannot oppose a motion for summary judgment on the basis of unauthenticated and inadmissible documents.” *Monsanto Co. v. Aetna Cas. and Sur. Co.*, 1993 WL 563246, \*1 (Del. Super. Ct. 1993); *See Chrysler Corp. v. New Castle County*, 464 A.2d 75, 85 (Del. Super.

Ct.1983). The defendant's allegations in her affidavit calls for speculation and conjecture.

Finally, the defendant moved for relief of judgment under Rule 60(b)(3). Civil Rule 60(b)(3) of this Court states “[o]n motion and upon such terms that are just, the Court may relieve a party . . . from a final judgment, order, or proceeding for the following reasons: . . . (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party. . . .” *Court of Common Pleas Civil Rule 60(b)(3)*. There is no evidence of any fraud, misrepresentation or other misconduct by the plaintiff.

Based on these findings of fact and conclusions of law, the defendant's motion for reargument is denied.

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Merrill C. Trader  
Judge