

STATE OF MICHIGAN
COURT OF APPEALS

AMERICAN EXPRESS CENTURION BANK,

Plaintiff-Appellee,

v

ANDREW FREY,

Defendant-Appellant.

UNPUBLISHED

July 27, 2004

No. 248921

Oakland Circuit Court

LC No. 2002-041918-CZ

Before: Murphy, P.J., and Griffin and White, JJ.

PER CURIAM.

Defendant appeals as of right the circuit court's grant of summary disposition to plaintiff under MCR 2.116(C)(10), and entry of judgment in plaintiff's favor in the amount of \$33,496.54, in this breach of contract action arising from two charges to defendant's American Express credit cards that defendant claimed were improper. We reverse.

Plaintiff's four-paragraph complaint stated:

1. That the Defendant herein is indebted to the plaintiff upon open account or pursuant to contract, and defendant accepted same.
2. Plaintiff has completed performance and defendant agreed to pay the account, copy attached.
3. There is presently due and owing, over and above all legal counter claims, the sum of \$31,152.97.
4. Plaintiff requests judgment for \$31,152.97, plus interest, costs and attorney fees.

Attached to plaintiff's complaint was an account billing statement in defendant's name stating a balance due of \$26,872.89, as of November 20, 2001.

Defendant's answer to plaintiff's complaint denied as untrue the four allegations, and stated no affirmative defenses.¹

In response to plaintiff's interrogatories², defendant stated in pertinent part:

4. . . . please state all the facts and circumstances that you will rely upon in defense of your case.

a. Further, identify each witness and document on which you rely in support of your proofs and describe the nature of such testimony or contents of such documents.

ANSWER: E-Max wanted to purchase equipment from Exceed and talked to Donald Aberle. Exceed requested National Factoring Services to obtain credit information from E-Max. In response to the NFS inquiry, Mr. Frey gave them his American Express account numbers and expiration dates. NFS called Mr. Frey to tell him that they do not accept American Express and he responded the he would work it out with Exceed. In the meantime, Exceed delivered the equipment to E-Max, who pays for the equipment by check. Mr. Frey then discovered that Exceed has been involved in questionable conduct and defrauded Mr. Frey out of \$5,000 separate from the E-Max equipment purchase. Mr. Frey then called Mr. Chambers at Exceed to credit his charge card for the \$5,000. When Exceed failed to issue the credit, Mr. Frey called American Express to challenge the \$5,000 charge to his account and to alert American Express to the dubious business practices of Aberle, Chambers and Exceed. About two months later, Aberle and/or Chambers, on behalf of Exceed, requested NFS to process a charge against Mr. Frey for the \$28,000 or [sic of] equipment purchases that had already been paid for by E-Max. Mr. Frey disputed the charges with both Exceed and American Express, the latter wrongly concluding that there was no evidence of fraud and, therefore, refused to credit Mr. Frey's account. Instead, American Express reported Mr. Frey as delinquent to the credit reporting agencies, thereby causing Mr. Frey problems getting replacement credit cards and refinancing his home mortgage.

Plaintiff moved for summary disposition under MCR 2.116(C)(10).³ Plaintiff's motion argued: that defendant's answer had asserted no affirmative defenses and did not plead fraud

¹ Defendant's responses to plaintiff's first requests for admission denied that he received goods or benefits through the use of the credit card as provided by plaintiff, denied that he owed plaintiff \$28,782.56 for the overdue balance, denied that he was in breach of contract and owed \$28,782.56 for damages, admitted that he entered into a credit card contract with American Express, admitted that his signature is present on the credit card application, and admitted that the address on the account statement was his current residence.

² The lower court record contains defendant's answers to interrogatories 4 and 5 only, which are attached to defendant's responses to plaintiff's first requests for admission.

with specificity; that defendant then answered discovery admitting he applied and entered into a contract with plaintiff for this account; and that defendant stated that he gave his credit card account number to E-Max and National Factoring Services (NFS), that E-Max and NFS responded that they did not accept American Express, and that defendant responded that he would work it out with Exceed. The motion further asserted:

8. Defendant disputed several charges on his American Express account, including those to Exceed.

9. American Express conducted inquiries into these disputes, and credited Mr. Frey's account for those disputes it found to be legitimate, where Defendant did not provide his credit card account number to the creditors. However, these [sic] as to the charges at issue here, American Express found them to be legitimate based on the fact that Defendant willingly gave his credit card account number to Exceed and National Factoring Services.

Plaintiff submitted with its motion an affidavit of Barbara Berry, identified as "an agent on behalf of Plaintiff" who has information and personal knowledge of the facts giving rise to this cause of action. The affidavit states in pertinent part:

3. Plaintiff and Defendant entered into contractual [sic] relationship wherein Plaintiff agreed to provide a credit card account to Defendant.

4. Plaintiff fulfilled its obligation(s) to Defendant.

5. Defendant defaulted on its payments to Plaintiff.

6. To date, there is an outstanding balance due and owing from Defendant to Plaintiff, for the amount of \$28,782.56 exclusive costs [sic], interest and fees.

7. Defendant has defaulted on his obligations to Plaintiff.

Plaintiff's summary disposition motion requested judgment in the amount of \$28,782.56, interest of \$4,513.98, costs of \$125.00, and statutory attorney fees of \$75.00, totaling \$33,496.54.

Defendant's response to plaintiff's motion argued that questions of fact remained whether defendant was responsible for the "improper, unauthorized and fraudulent charges pursuant to the credit card agreement and issues as to whether Plaintiff properly concluded to allow the charges." Defendant further argued that American Express "allegedly investigated the charges and unilaterally and wrongly concluded to allow the charges." In the alternative, defendant argued that should the circuit court deem summary disposition proper, he should be allowed to amend his pleadings to assert affirmative defenses and a counterclaim. Defendant submitted no documentary evidence in response to plaintiff's motion, and relied on his response to

(...continued)

³ Plaintiff's motion was brought under MCR 2.116(C)(9) as well, but at the motion hearing, plaintiff's counsel dropped that sub-rule as a basis for the motion and proceeded under MCR 2.116(C)(10) alone.

interrogatory # 4, quoted *supra*, as setting forth the factual basis of his claim and as being tantamount to an affidavit, as it was sworn.

The circuit court granted plaintiff's motion, and entered judgment in the amount of \$33,496.54. The circuit court denied defendant's motion for reconsideration.

Defendant contends on appeal that the circuit court erred in granting summary disposition because plaintiff did not carry its burden of demonstrating entitlement to judgment as a matter of law. We agree.

This Court reviews de novo the circuit court's grant of summary disposition. A motion under MCR 2.116(C)(10) tests the factual support for a claim. *Smith v Globe Life Ins Co*, 460 Mich 446, 454; 597 NW2d 28 (1999). The court considers affidavits, pleadings, depositions, admissions, and documentary evidence submitted in the light most favorable to the nonmovant. *Id.*

In presenting a motion for summary disposition, the moving party has the initial burden of supporting its position by affidavits, depositions, admissions, or other documentary evidence. The burden then shifts to the opposing party to establish that a genuine issue of disputed fact exists. [*Smith, supra* at 455, quoting *Quinto v Cross & Peters Co*, 451 Mich 358, 362-363; 547 NW2d 314 (1996).]

Plaintiff's complaint alleged breach of contract, and its motion for summary disposition argued there was no genuine issue of fact that defendant had breached the contract and was indebted to plaintiff, yet at no time did plaintiff submit a copy of the contract it alleged defendant had breached. The contract not being before us, the parties' obligations thereunder in the event of unauthorized charges are unknown to us, beyond the cursory explanation provided on the back of monthly account statements, quoted *infra*. Nor did plaintiff submit below the application that defendant signed. The affidavit plaintiff submitted below states only broad, conclusory statements, is unsupported by pertinent documentation, and fails to address that defendant challenged the charges as unauthorized and the investigatory process plaintiff undertook thereafter. Plaintiff not only failed to produce the contract it alleged defendant breached, but also failed to cite or discuss any case or statutory authority to support its claim. The record before this Court contains only the following boilerplate language set forth on the back of defendant's American Express credit card statement/invoice:

Billing Rights Summary: In Case of Errors or Questions About Your Bill: If you think your bill is incorrect, or if you need more information about a transaction on your bill, write us on a separate sheet of paper at the address noted to the right. We must hear from you not later than 60 days after we sent you the FIRST bill on which the error or problem appeared. You can telephone us at the number indicated on the front of this statement, but doing so will not preserve your rights.

In your letter, give us the following information: 1. your name and account number; 2. The dollar amount of the suspected error; 3. Describe why you believe there is an error. If you need more information, describe the item you are unsure about. You do not have to pay the amount in question while we are

investigating, but you are still obligated to pay the parts of your bill that are not in question. While we investigate your question, we cannot report you as delinquent or take any action to collect the amount you question. If you have authorized us to pay your bill automatically from your savings or checking account, you can stop the payment on any amount you think is wrong. To stop the payment, your letter must reach us three business days before the automatic payment is scheduled to occur.

Defendant does not dispute that plaintiff removed certain charges from his account that it concluded were improper or unauthorized. However, defendant does dispute that the \$20,000 charge and \$5,000 charges *at issue here* were properly incurred and charged to him. The circuit court did not view the facts in a light most favorable to defendant, the non-movant, and erroneously concluded that plaintiff had met its burden to show entitlement to judgment as a matter of law by mere allegations that defendant had given his credit card number to two entities, Exceed and NSF, regardless of whether defendant authorized the charges at issue. Under these circumstances, summary disposition under MCR 2.116(C)(10) was improper.

Even assuming that plaintiff did meet its initial burden of production under MCR 2.116(C)(10), we conclude that the pleadings and documentary evidence submitted below, viewed in a light most favorable to defendant, raised a genuine issue of fact whether the disputed charges could be legitimately charged to defendant based simply on the fact that he gave his credit card number to the charging entities, given that defendant maintains he did not authorize the disputed charges.

Given our disposition, we need not reach defendant's claim that the circuit court erred in denying his motion to amend responsive pleadings to add a counterclaim for setoff, and a violation of the Michigan Consumer Protection Act (MCPA). Because the matter will again be before the circuit court, we direct the court to permit defendant to promptly amend as requested.

We reverse and remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ William B. Murphy
/s/ Richard Allen Griffin
/s/ Helene N. White