

STATE OF MICHIGAN
COURT OF APPEALS

FIFTH THIRD BANK,

Plaintiff-Appellee,

v

SIDNEY BRADLEY,

Defendant-Appellant.

UNPUBLISHED

October 5, 2010

No. 293097

Wayne Circuit Court

LC No. 08-018750-CK

Before: GLEICHER, P.J., and ZAHRA and K. F. KELLY, JJ.

PER CURIAM.

In this matter concerning an allegedly unpaid debt, defendant, Sidney Bradley the debtor, appeals as of right from the trial court's order granting plaintiff, Fifth Third Bank, summary disposition pursuant to MCR 2.116(C)(10). The trial court entered a judgment in plaintiff's favor for \$98,969.70. We reverse.¹

Defendant contends that the trial court erred by granting plaintiff's motion for summary disposition because plaintiff did not meet its initial burden of providing evidence in support of its motion. We agree. We review a trial court's decision on a motion for summary disposition de novo. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). Summary disposition may be granted under MCR 2.116(C)(10) when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Id.* at 120. When a party moves for summary disposition under this rule, the moving party must specifically identify the matters that it believes have no disputed factual issues, MCR 2.116(G)(4), and has the initial burden of presenting affidavits, depositions, admissions, or other documentary evidence in support of the motion. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996); MCR 2.116(G)(5). Once the moving party has met this burden, the burden shifts to the opposing party to show that a genuine issue of material fact exists. *Quinto*, 451 Mich at 362.

Here, plaintiff moved for summary disposition on the grounds that defendant allegedly entered into a security agreement and promissory note with plaintiff and subsequently defaulted on the note by failing to make the required payments. In support of its motion, plaintiff

¹ This appeal has been decided without oral argument pursuant to MCR 7.214(E).

submitted a copy of an installment loan application signed by defendant, a copy of the note for \$147,754, and a single affidavit in which the affiant averred that the principal amount owing on the note was \$98,680.21. The affidavit further indicated that records of defendant's account were attached to the affidavit, but no such records were attached. Significantly, plaintiff failed to provide any evidence or factual support showing that defendant had stopped paying the debt or whether any collateral had been seized by plaintiff and any sums received from the possible sale of any such collateral.

Given the foregoing, we conclude that plaintiff did not present any factual support for its contention that defendant had defaulted in his payments. The credit application and note provide factual support for plaintiff's claim that defendant entered into a financing agreement, but they do not show that defendant defaulted in his payments. The affidavit also does not establish that point. The affidavit merely states the account balance. Although the affidavit also refers to attached records of defendant's account, no records were attached. Because the evidence submitted by plaintiff failed to show that defendant was in default, plaintiff did not meet its initial burden of providing factual support for its motion and the trial court erred by granting plaintiff's motion for summary disposition. Cf. *Oliver v Smith*, 269 Mich App 560, 566-567; 715 NW2d 314 (2006). Because we have concluded that the trial court's order was erroneous and must be reversed, we need not consider the substance of defendant's argument that reversal is also required based on the trial court's failure to address defendant's claim that plaintiff failed to timely file a response to defendant's answer and affirmative defenses, to which defendant had demanded a reply. See MCR 2.110(B)(5). However, on remand, the trial court must determine whether plaintiff will be permitted to file a late response to defendant's affirmative defenses in accordance with MCR 2.108(E). And, assuming the trial court allows plaintiff's late response, it shall permit the parties additional time for discovery as it sees fit.²

Reversed and remanded for further proceedings. We do not retain jurisdiction.

/s/ Elizabeth L. Gleicher
/s/ Brian K. Zahra
/s/ Kirsten Frank Kelly

² If the trial court denies plaintiff's request to permit its late response denying defendant's affirmative defenses, then plaintiff would be deemed to have admitted the affirmative defenses. MCR 2.111(E)(1). Consequently, plaintiff's suit would be rendered moot and judgment in defendant's favor would be appropriate.