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STATE OF MINNESOTA
IN COURT OF APPEALS
A08-0446

Citibank South Dakota, NA,
Respondent,

vs.

Laurence R. Otto,
Appellant.

Filed December 23, 2008
Affirmed
Worke, Judge

Roseau County District Court
File No. 68-CV-07-1392

Jason A. Adams, Rausch, Sturm, Israel & Hornik, S.C., 680 Southdale Office Centre, 6600 France Avenue South, Minneapolis, MN 55435 (for respondent)

Laurence R. Otto, 60426 County Road 12, Warroad, MN 56763 (pro se appellant)

Considered and decided by Klaphake, Presiding Judge; Lansing, Judge; and Worke, Judge.

U N P U B L I S H E D   O P I N I O N

WORKE, Judge

On appeal from summary judgment in favor of respondent to recover money owed by appellant under the "account-stated" theory, appellant argues that (1) genuine issues of material fact preclude summary judgment; (2) respondent's attorney improperly acted as a witness and respondent failed to produce a witness to testify as to the account or the

amount owed; and (3) the affidavit of Shauna Houghton was improperly admitted into evidence. We affirm.

D E C I S I O N

On appeal from summary judgment, this court reviews two determinations: whether a genuine issue of material fact exists, and whether an error occurred in the application of the law. *Offerdahl v. Univ. of Minn. Hosps. & Clinics*, 426 N.W.2d 425, 427 (Minn. 1988). This court reviews the evidence in the light most favorable to the nonmoving party without deferring to the district court's application of the law. *Id.* "[S]ummary judgment is proper when the nonmoving party fails to provide the court with specific indications that there is a genuine issue of fact." *Thiele v. Stich*, 425 N.W.2d 580, 583 (Minn. 1988). No genuine issues of material fact exist "when the nonmoving party presents evidence which merely creates a metaphysical doubt as to a factual issue and which is not sufficiently probative with respect to an essential element of the nonmoving party's case to permit reasonable persons to draw different conclusions." *DLH, Inc., v. Russ*, 566 N.W.2d 60, 71 (Minn. 1997).

Account-Stated Theory

Appellant Laurence R. Otto argues that the district court improperly awarded summary judgment because it erred in its application of the doctrine of account stated. The doctrine of account stated is an alternative means of establishing liability for a debt other than pursuant to a contract claim. *Am. Druggists Ins. v. Thompson Lumber Co.*, 349 N.W.2d 569, 573 (Minn. App. 1984). An account stated is a manifestation of an agreement between a debtor and creditor that a stated amount is an accurate computation

of an amount due. *Id.* The retention of a statement of account without objection for more than a reasonable period of time demonstrates debtor acquiescence, implies a promise to pay the balance owed without further proof, and operates to create an account stated. *Meagher v. Kavli*, 251 Minn. 477, 487, 88 N.W.2d 871, 879 (1958). An account stated constitutes prima facie evidence of the liability of the debtor. *Erickson v. Gen. United Life Ins. Co.*, 256 N.W.2d 255, 259 (Minn. 1977).

In May 2001, appellant received his first credit-card statement from respondent Citibank South Dakota, NA. From May 2001 through February 2007, appellant received monthly statements from respondent, which he paid in full every month until September 2004. From September 2004 to May 2005, appellant made minimum monthly payments on the account, and in June 2005 appellant paid the account in full. Appellant continued to use the credit card, but in December 2005 he stopped making payments on the account. In February 2007, the outstanding balance on the account was $5,491.50. Based on the evidence, appellant retained the statement of account for approximately three years, which constitutes a reasonable amount of time. *See Meagher*, 251 Minn. at 487, 88 N.W.2d at 879. This demonstrates that appellant acquiesced to the statement of account, a promise to pay the balance incurred since June 2005 without further proof was implied, and an account stated has been created. *Id.* Therefore, respondent has presented prima facie evidence of appellant's liability. *See Erickson*, 256 N.W.2d at 259. Because there are no genuine issues of material fact and there was no err in the application of the law, the district court did not error in granting summary judgment in favor of respondent.

Basis for Summary Judgment

Appellant next argues that the district court relied solely on the statements of counsel in briefs, memoranda, and oral arguments as a basis for granting respondent's summary-judgment motion. Appellant relies on *Trinsey v. Pagliaro* in support of his argument. 229 F. Supp. 647 (E.D. Pa. 1964). The court in *Trinsey* held that "[s]tatements of counsel in their briefs or argument while enlightening to the Court are not sufficient for purposes of granting a motion to dismiss or summary judgment." *Id.* at 649. However, this holding was in reference to a motion to dismiss that was unsupported by affidavits or depositions. *Id.* Respondent's summary-judgment motion was supported by affidavits as well as other evidence. There is nothing in the record to show that the district court relied solely on the statements of counsel in granting respondent's summary-judgment motion.

Houghton Affidavit

Finally, appellant argues that the affidavit of Shauna Houghton was improperly admitted into evidence because no "admissible evidence" was attached to the affidavit. "Evidentiary rulings . . . are committed to the sound discretion of the [district] court and those rulings will only be reversed when that discretion has been clearly abused." *Pedersen v. United Servs. Auto. Ass'n*, 383 N.W.2d 427, 430 (Minn. App. 1986).

Minn. R. Evid. 803(6) sets forth the business-records exception to the hearsay rule. To qualify for the exception, the evidence must meet three requirements: (1) the evidence was "kept in the course of a regularly conducted business activity"; (2) "it was the regular practice of that business activity to make the memorandum, report, record, or data

compilation"; and (3) the foundation for this evidence is shown by the custodian or other qualified witness. Minn. R. Evid. 803(6). The affidavit of Shauna Houghton provides that respondent "maintains books and records of regularly conducted business activities, and that [she] is a custodian of those books and records, and that those books and records include copies of a credit card agreement between [appellant] and [respondent]." Because Shauna Houghton is a custodian of the records of respondent, she was a qualified witness and permitted under the Minnesota Rules of Evidence to lay the requisite evidentiary foundation for the business records. Further, attached to the affidavit are appellant's monthly credit-card statements from May 2001 through February 2007. The credit-card statements are records kept by respondent in the course of a regularly conducted business activity and are made as a part of the regular practice of respondent's business activity. Therefore, the credit-card statements are admissible as business records. The district court did not abuse its discretion in admitting the affidavit of Shauna Houghton and the attachments pursuant to Minn. R. Evid. 803(6).

Affirmed.