NO. COA08-27

NORTH CAROLINA COURT OF APPEALS

Filed: 18 November 2008

OLIPHANT FINANCIAL CORPORATION,
Plaintiff,

v.

Halifax County
No. 06-CVS-316

ALVIN SILVER and GLENDORA N. SILVER,
Defendants.

Appeal by defendants from judgment and order entered 27 August 2007 by Judge Thomas D. Haigwood in Halifax County Superior Court.

Heard in the Court of Appeals 22 May 2008.

Clontz & Clontz, PLLC, by Ralph C. Clontz III, for plaintiff appellee.

Alvin Silver and Glendora N. Silver, Pro Se, defendant appellants.

McCULLOUGH, Judge.

Alvin Silver and Glendora Silver (collectively "defendants") appeal from the grant of summary judgment in favor of Oliphant Financial Corporation ("plaintiff").

The relevant facts and procedural history are as follows: On 21 September 1995, defendants applied for and received an extension of credit in the amount of $11,780.00 from Household Bank, N.A. ("Household Bank") to finance the purchase of vinyl siding from American Remodeling, Inc. ("American Remodeling"). By signing the

credit application, defendants agreed to the terms set forth in a credit agreement entitled "Household Bank Cardholder Agreement and Disclosure Statement" ("finance agreement"). Defendants signed this agreement at the time that they applied for such credit.

Thereafter, American Remodeling failed to complete the vinyl siding installation as promised, leaving substantial areas of the house's exterior exposed. Defendants complained about the matter repeatedly to American Remodeling, but defendants did not take any legal action against the company.

Defendants continued to make payments to Household Bank until 25 September 2003, when they defaulted under the terms of the financing agreement. On 19 October 2004, Household Bank sold, assigned, and conveyed all rights, title and interest in defendants' credit account to plaintiff. As part of the transaction, plaintiff acquired all of the billing records related to such credit account.

On 14 April 2005, defendants advised plaintiff that they were not going to make further payments on the account because the siding was defective and faxed plaintiff an undated inspection report, documenting gaps, cracks, and severe deterioration of the siding. On 13 March 2006, plaintiff filed suit against defendants to collect the outstanding balance. On 6 June 2006, defendants, acting *pro se*, responded to plaintiff's complaint by filing with the court a letter to plaintiff's counsel, which is dated 8 May 2006. Defendants' letter provides in part:

> We have disputed the validity of this debt over and over again with Oliphant

> Financial Corporation (Nick). We paid monthly installments to Household continuously, we decided to stop payments until they could return to finish the job that we agreed upon.

On 29 May 2007, plaintiff moved for summary judgment against defendants. On 28 June 2007, defendants, acting *pro se*, filed a supplemental answer and asserted counterclaims pursuant to the North Carolina Retail Installment Sales Act, N.C. Gen. Stat. §§ 25A-25 and -35 (2007); North Carolina Unfair and Deceptive Trade Practices Act, N.C. Gen. Stat. § 75-1.1 (2007); The F.T.C. Holder Rule, 16 C.F.R. § 433.2(a); and the Truth-in-Lending Act, 15 U.S.C. § 1601, *et seq*. Defendants also asserted counterclaims for breach of contract and failure of consideration. After a hearing on the motions, on 27 August 2007, the trial court concluded that there was no genuine issue of material fact, that plaintiff was entitled to judgment as a matter of law, and entered judgment against defendants jointly and severally for the principal balance of $17,573.59 plus interest, costs, and attorney's fees in the amount of $3,220.52.

Defendants appeal the trial court's entry of summary judgment. Under N.C. R. Civ. P. 56(c) (2007), summary judgment is properly granted when "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 any party is entitled to a judgment as a matter of law." Thus, "the standard of review on appeal from summary judgment is whether there is any genuine issue of material fact and whether the moving party is entitled to a judgment as a

matter of law. Further, the evidence presented by the parties must be viewed in the light most favorable to the non-movant." *Bruce-Terminix Co. v. Zurich Ins. Co.*, 130 N.C. App. 729, 733, 504 S.E.2d 574, 577 (1998).

I.

First on appeal defendants contend that the affidavit submitted in support of plaintiff's motion for summary judgment should not have been considered by the court because it failed to meet the foundational requirements of Rule 56(e) of the North Carolina Rules of Civil Procedure. Defendants contend that the affidavit of plaintiff's employee, Sherri Lapointe, which sets forth facts concerning the contents of the billing records of the credit account that plaintiff purchased from Household Bank, does not satisfy the foundational requirements of Rule 803(6) of the North Carolina Rules of Evidence because Lapointe is not an employee of Household Bank or any of its affiliates. We disagree.

Affidavits submitted in support of a motion for summary judgment must meet the requirements of N.C. Gen. Stat. § 1A-1, Rule 56(e):

> Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein.

"The converse of this requirement is that affidavits or other material offered which set forth facts which would not be admissible in evidence should not be considered when passing on the

motion for summary judgment." *Borden, Inc. v. Brower*, 17 N.C. App. 249, 253, 193 S.E.2d 751, 753, *rev'd on other grounds by* 284 N.C. 54, 199 S.E.2d 414 (1973). Generally, at trial, a "witness may not testify to a matter unless evidence is introduced sufficient to support a finding that he has personal knowledge of the matter." N.C. Gen. Stat. § 8C-1, Rule 602 (2007). However, in *U.S. Leasing Corp. v. Everett, Creech, Hancock and Herzig*, 88 N.C. App. 418, 423, 363 S.E.2d 665, 667 (citation omitted), *disc. review denied*, 322 N.C. 329, 369 S.E.2d 364 (1988), this Court determined that even though the knowledge of the witness may be "limited to the contents of plaintiff's file with which he had familiarized himself, he could properly testify about the records and their significance so long as the records themselves were admissible under the business records exception to the hearsay rule[.]" Under the business records exception, the following items of evidence are admissible at trial:

> [a] memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, . . . made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness.

N.C. Gen. Stat. § 8C-1, Rule 803(6) (2007).

In this case, it is clear that, throughout her affidavit, Lapointe refers to documents from plaintiff's file and that she did

not have personal knowledge of the matters contained in those documents. However, it is also clear that the documents to which Lapointe refers are admissible in evidence under the business records exception to the hearsay rule. The record shows that in the course of ordinary business, Oliphant Financial purchased defendant's credit account and all of the billing records for that account from Household Bank. Lapointe's affidavit provides that the documents were "kept in the ordinary course of business and were made at or around the time of the transactions described therein." Further, Lapointe's affidavit provides that "[a]ffiant has custody" of the records and that "this affidavit is based upon Affiant's personal knowledge of those records." Accordingly, the facts set forth in Lapointe's affidavit would be admissible at trial under the business records exception. *See N.C. Indus. Capital, LLC v. Clayton*, 185 N.C. App. 356, 375, 649 S.E.2d 14, 32-35 (2007). It was therefore proper for the trial court to consider this affidavit in support of plaintiff's motion for summary judgment under N.C. Gen. Stat. § 1A-1, Rule 56(e). Accordingly, defendants' argument is overruled.

II.

Next on appeal, defendants contend that the evidence of record shows material issues of fact regarding the amount of the debt and the applicable interest rate. Specifically, defendants contend that issues of fact exist because (1) the financing agreement contained in the record is printed in an illegible font size and (2)

plaintiff did not produce an accounting of all payments made by defendants since 1995. We disagree.

Where a motion for summary judgment is supported by proof which would require a directed verdict in his favor at trial, the movant is entitled to summary judgment, unless the opposing party comes forward to show a triable issue of material fact. *Watson v. Watson*, 49 N.C. App. 58, 63, 270 S.E.2d 542, 545 (1980). The opposing party is not entitled to have the motion for summary judgment denied on the mere hope that at trial he will be able to discredit the movant's evidence; he must, at the hearing, be able to point out to the court something indicating the existence of a triable issue of material fact. *Kidd v. Early*, 289 N.C. 343, 368, 222 S.E.2d 392, 408 (1976).

Here, plaintiff prepared and filed a motion for summary judgment, along with a supporting affidavit, which set forth the contractual basis for defendants' liability to plaintiff, the nature of defendants' default, documentation of plaintiff's purchase of the account from Household Bank in 2004, and the current balance on the account and applicable interest rate. In response, defendants asserted a defense, which if successful, would bar defendants' liability for the outstanding balance on the account, as a matter of law, and argued that plaintiff's evidence of defendant's liability for the debt was insufficient as a matter of law; however, defendants have not by supporting documents produced any evidence showing that plaintiff's documents are inaccurate as to the amount of the debt or as to the terms of the

agreement nor have they by affidavit alleged that they have made payments that are not reflected in the statements produced by plaintiff. Thus, defendants have failed to establish a triable issue of fact regarding the amount of the outstanding balance on the account or the applicable interest rate. *See United Virginia Bank/Citizens & Marine v. Woronoff*, 50 N.C. App. 160, 272 S.E.2d 618 (1980), *cert. denied*, 302 N.C. 629, 280 S.E.2d 449 (1981). Defendants are not entitled to have the motion for summary judgment denied on the mere hope that at trial they will be able to discredit the movant's evidence. This assignment of error is overruled.

III.

Next on appeal, defendants contend that the trial court erred in granting summary judgment in favor of plaintiff because defendants' liability to plaintiff is barred by affirmative defenses. We disagree.

Rule 15 of the North Carolina Rules of Evidence provides, in part:

> A party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within 30 days after it is served. **Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party;** and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within 30 days after service of the amended pleading, unless the court otherwise orders.

N.C. Gen. Stat. § 1A-1, Rule 15 (2007).

"[T]he Rules of Civil Procedure promote the orderly and uniform administration of justice, and all litigants are entitled to rely on them. Therefore, the rules must be applied equally to all parties to a lawsuit, without regard to whether they are represented by counsel." *Goins v. Puleo*, 350 N.C. 277, 281, 512 S.E.2d 748, 751 (1999).

Here, defendants did not amend their answer within the 30-day period allowed by Rule 15. Accordingly, under Rule 15, defendants could not amend or supplement their answer without obtaining consent of opposing counsel or filing a motion with the court. Defendants did neither of these things before filing their supplemental answer and counterclaims, which were filed more than a year after defendants' original answer. Accordingly, the only counterclaim or defense properly before the trial court in ruling on the motions for summary judgment, pursuant to Rule 15, was the counterclaim for breach of contract contained in defendants' original answer. We conclude that this counterclaim is barred by the statute of limitations.

In general, an action for breach of contract must be brought within three years from the time of the accrual of the cause of action. N.C. Gen. Stat. § 1-52(1) (2007). This statute of limitations is also applicable to counterclaims for breach of contract. *PharmaResearch Corp. v. Nash*, 163 N.C. App. 419, 425, 594 S.E.2d 148, 153-54, *disc. review denied*, 358 N.C. 733, 601 S.E.2d 858 (2004). A cause of action generally accrues and the statute of

limitations begins to run as soon as the right to institute and maintain a suit arises. *Reidsville v. Burton*, 269 N.C. 206, 211, 152 S.E.2d 147, 152. The statute begins to run on the date the promise is broken. *Pickett v. Rigsbee*, 252 N.C. 200, 204, 113 S.E.2d 323, 326 (1960).

Here, the facts relevant to whether the statute of limitations has expired on defendants' counterclaims are not in dispute. The statute of limitations on the claim for breach of contract against American Remodeling began to run in 1995 on the date that American Remodeling broke its promise to finish the installation of the vinyl siding on defendants' home. While defendants complained to American Remodeling about this breach, defendants did not assert a cause of action against American Remodeling for such claim during the three-year window provided by N.C. Gen. Stat. § 1-52(1). Because the statute of limitations with respect to that claim has expired, defendants cannot now assert such claim against plaintiff. Accordingly, the trial court properly concluded that plaintiff was entitled to summary judgment.

Because defendants' remaining assignments of error relate to claims that were not timely filed and were not considered by the trial court pursuant to Rule 15 of the North Carolina Rules of Civil Procedure, they are without merit.

For the foregoing reasons, we affirm.

Affirmed.

Judges BRYANT and STEPHENS concur.

Report per Rule 30(e).