

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

BMI Federal Credit Union, :
 :
 Plaintiff-Appellee, :
 :
 v. : No. 09AP-1024
 : (M.C. No. 2009 CVF 012969)
 Timothy D. Burkitt, : (ACCELERATED CALENDAR)
 :
 Defendant-Appellant. :

D E C I S I O N

Rendered on June 30, 2010

Weltman, Weinberg & Reis Co., L.P.A., and Andrew J. Sonderman, for appellee.

Timothy D. Burkitt, pro se.

APPEAL from the Franklin County Municipal Court.

SADLER, J.

{¶1} Appellant, Timothy D. Burkitt ("appellant"), filed this appeal seeking reversal of a judgment by the Franklin County Municipal Court granting judgment in favor of appellee, BMI Federal Credit Union ("appellee"). For the reasons that follow, we affirm.

{¶2} Appellee filed this action seeking recovery on a credit card account, asserting that appellant had defaulted on the account. Appellee sought recovery of the

balance owed on the account, plus interest. Appellee attached to the complaint copies of two credit card applications signed by appellant, and a statement of the account showing the balance owed.

{¶3} Appellant filed a motion seeking dismissal of the complaint, arguing, among other things, that appellee's complaint failed to state a claim for which relief could be granted and that appellee was not a real party in interest. Appellee filed a memorandum contra, and appellant filed a reply memorandum. The trial court overruled the motion.

{¶4} Appellant filed an answer and counterclaim that was stricken by the trial court for failure to comply with Civ.R. 11 because appellant had signed the pleading in his own name, but indicated that he was signing as an "authorized representative." The trial court ordered appellant to file an answer that was properly signed either by an attorney or by appellant in his own capacity, and not as an authorized representative.

{¶5} Appellant then filed a properly signed answer and counterclaim. Appellant denied each of the allegations in appellee's complaint, and asserted as a counterclaim that:

5. On or around March 24th 2009, Plaintiff's Attorney sent Defendant a letter dated March 20, 2009 attempting to collect a debt. A copy of Plaintiff's March 20, 2009 letter is attached as Exhibit "F" marked ACCEPTED FOR VALUE AND RETURNED FOR VALUE.

6. Plaintiff's Attorney filed this lawsuit without giving Defendant 30 day's [sic] to reply to his March 20, 2009 letter attempting to collect a debt. A Copy of the Lawsuit is attached as Exhibit "G" marked ACCEPTED FOR VALUE AND RETURN [sic] FOR VALUE FOR SETTLEMENT AND CLOSURE.

7. The Defendant and Plaintiff did not enter into a contract signed by agents for both parties.

8. Plaintiff used TIMOTHY D. BURKITT'S credit to obtain the funding for the Credit Card transaction between the Defendant and the Plaintiff.

9. Plaintiff is in receipt of a copy of IRS form 1099B year 2005 sent by Defendant.

10. The IRS form 1099B year 2005 shows Timothy Dean Burkitt as Payer and BMI FEDERAL CREDIT UNION as Recipient.

11. Plaintiff is in receipt of a copy of IRS Form 1099A year 2009 sent by Defendant.

12. The IRS form 1099A year 2009 shows TIMOTHY D. BURKITT as the Lender and BMI FEDERAL CREDIT UNION as the Borrower.

13. Plaintiff is in receipt of BMI FEDERAL CREDIT UNION, STATEMENT OF ACCOUNT, Payment Due Date 4/26/09, marked ACCEPTED AND PAID IN FULL per 1099-B. This STATEMENT OF ACCOUNT is attached as Exhibit "H".

14. Through the use of TIMOTHY D. BURKITT'S credit, Plaintiff has been made whole.

{¶6} It appears that by way of this initial counterclaim, appellant was seeking to assert as defenses that: (1) there was no valid contract between he and appellee, (2) he had paid the amount owed on the account, as evidenced by the IRS form 1099B he had sent to appellee, and (3) he loaned money to appellee, and appellee had thereby been made whole, as evidenced by the IRS form 1099A. Subsequently, appellant sought leave to amend his answer and counterclaim, asserting that the claims in his initial counterclaim had not been "fully stated." In the proposed amended counterclaim, appellant neither repeated nor incorporated the claims he had made in his initial counterclaim. Appellant

argued that he should be granted judgment against appellee based on appellee's failure to respond to an "affidavit" appellant had purportedly sent to appellee.

{¶7} The "affidavit" upon which appellant based his amended counterclaim was attached to the amended answer and counterclaim as an exhibit. The purported affidavit is labeled as a "DEMAND FOR DEBT VALIDATION," and states at its beginning that "[t]his affidavit is the record unless rebutted by a sworn affidavit of someone, a living man or woman with personal firsthand knowledge, duly served upon all the other parties, given under penalties of perjury unlimited liability, rebutting each issue, point for point. Failure to rebut each and every point is deemed an admission of all of the points contained herein."

{¶8} The purported affidavit then sets forth appellant's personal lack of "record or evidence" on a list of 22 separate factual or legal points, ranging from the relatively straightforward ("6. TIMOTHY D. BURKITT has no record or evidence indicating that TIMOTHY D. BURKITT has refused to pay or discharge any valid obligation owed to BMI FEDERAL CREDIT UNION.") to the largely unintelligible ("16. TIMOTHY D. BURKITT has no record or evidence that, in part, TIMOTHY D. BURKITT'S remedy is not provided within the Supplemental Rules of Admiralty, wherein the Remedy to a hostile presentment, which is a criminal scienter act, is to file a Certificate of Exigency with the Clerk of the Court (Warrant Officer), who is then [sic] accept, concur and agree to all statements and claims made herein by TIMOTHY D. BURKITT, by simply remaining silent pursuant to 5 U.S.C. 556(d)."). The purported affidavit then directed the recipient to respond within ten days by sending its response to a notary public whose name and address were listed.

{¶9} Ultimately, the trial court granted appellant's motion to amend his answer and counterclaim. Prior to the trial court granting appellant leave to amend, appellee filed a motion seeking summary judgment, pursuant to Civ.R. 56(C), arguing that it was entitled to judgment as a matter of law on its claim against appellant and on appellant's counterclaim, regardless of whether the counterclaim at issue was the one filed initially or the one appellant was seeking to file as an amended counterclaim. Appellee supported its motion for summary judgment with: (1) an affidavit executed by Kevin Van Bibber, an employee of appellee, attesting to the credit card agreement and the balance owed on it, and additionally asserting the lack of any valid setoffs by way of counterclaims; and (2) an affidavit executed by Douglas Dahmer, an attorney with the law firm representing appellee, attesting to the initial efforts to collect the debt. Appellee argued that none of the documents used to support appellant's claim that he had paid the debt, such as the IRS forms, provided any legal support for appellant's counterclaim. Appellee also attached exhibits of printouts from websites purporting to provide debt relief to individuals based on arguments such as those set forth by appellant in his counterclaim, although none of these exhibits were incorporated into the record by way of affidavit.

{¶10} Appellant then filed a pleading entitled a "NOTICE AND DEMAND LACK OF COMMENCEMENT." In this pleading, appellant stated that "[d]emand is made for a claim made by sworn statement and signed with a wet ink signature by the Real Party of Interest of the Ratification of Commencement, and the production of the original wet ink contract upon which is the foundation of action number 2009 CVF 012969, for examination. No legal determination is to be made for defendant." It appears that appellant was arguing by this pleading that the action had not been properly commenced

due to the failure to have appellee indicate its ratification of the filing of this action by appellee's counsel, and by the failure to file a copy of the original credit card agreement. Appellee filed a motion asking the trial court to strike this pleading, and for an award of sanctions pursuant to Civ.R. 11.

{¶11} Appellant filed a memorandum contra appellee's motion for summary judgment. Appellant argued that appellee had failed to carry its initial burden of proving that there were no genuine issues of material fact, and that appellee was entitled to judgment as a matter of law, because: (1) appellant had failed to file original copies of either the credit card agreement or the credit card application, (2) appellee had failed to identify the terms and conditions of the contract appellant had defaulted on, (3) no verified statement of account had been entered into the record, and (4) the affidavit executed by Kevin Van Bibber constituted inadmissible hearsay. Appellant also attached the purported affidavit entitled "DEMAND FOR DEBT VALIDATION" and a copy of another letter appellant had sent to appellee's counsel regarding counsel's authorization to practice law and collect debt on appellee's behalf. Finally, appellant attached an affidavit he had executed setting forth a number of the statements made in the "DEMAND FOR DEBT VALIDATION" that, in general, denied the existence of any debt.

{¶12} Appellant also filed a separate pleading stating that it was a memorandum contra appellee's motion to dismiss his counterclaim. Appellant subsequently filed a pleading stating that it was an amendment to that memorandum contra. In that memorandum, appellant largely repeated the assertions he had made in his amended counterclaim. Appellee filed a motion to strike this pleading, pointing out that it had not actually filed a motion to dismiss appellant's counterclaim.

{¶13} While appellee's motion for summary judgment was pending, appellant filed a pleading entitled a "NOTICE OF OFFER TO MOVE TO DISCOVERY." Appellant stated in this pleading that he wished to conduct discovery in order to obtain additional facts to support his claims. In addition, appellant offered to waive or withdraw any pending motions, and sought to have appellee similarly waive or withdraw all motions. Appellant then filed a pleading withdrawing his earlier notice regarding lack of commencement, stating that he was doing so because the discovery process would allow him to obtain the documents he was seeking by way of that notice. There was no request within the document for the court to stay its ruling on appellee's motion for summary judgment.

{¶14} Next, appellant filed a number of discovery requests, including interrogatories, requests for admissions, and requests for production of documents. Appellant did not file a motion, pursuant to Civ.R. 56(F), asking the court to stay any ruling on appellee's motion for summary judgment in order to allow appellant to conduct discovery in order to respond to that motion.

{¶15} Appellee filed a motion seeking leave to file a supplemental affidavit executed by Kevin Van Bibber in support of its motion for summary judgment. That affidavit included additional information, including a copy of the credit card agreement in effect at the time appellant signed the credit card application, copies of the monthly statements of account, and additional information regarding communications between the parties regarding the debt and appellee's attempts to collect that debt. The trial court granted appellee's motion to file the supplemental affidavit.

{¶16} On September 25, 2009, the trial court filed a judgment entry granting summary judgment in favor of appellee on its claim against appellant and on appellant's counterclaim. On October 1, 2009, appellee filed a notice indicating that it had responded to appellant's discovery requests. On October 30, 2009, appellant filed a notice of appeal. On the same date, appellant filed a motion with the trial court seeking reconsideration of its decision granting summary judgment. In support of this motion, appellant pointed to the responses to his requests for discovery that had been received after the trial court granted the motion.

{¶17} Appellant's brief does not set forth an assignment of error, but in his statement of the issues presented, appellant argues that the trial court erred when it granted summary judgment while appellant's discovery requests were still pending. The remedy for a party that must respond to a motion for summary judgment prior to completion of adequate discovery is to file a motion, pursuant to Civ.R. 56(F), seeking to have the trial court stay ruling on the motion pending completion of the required discovery. *Morantz v. Ortiz*, 10th Dist. No. 07AP-587, 2008-Ohio-1046. When a party fails to file a motion, pursuant to Civ.R. 56(F), that party has failed to preserve his rights on appeal, and it is not error for the trial court to rule on the motion for summary judgment. *Taylor v. XRG, Inc.*, 10th Dist. No. 06AP-839, 2007-Ohio-3209.

{¶18} In this case, since appellant failed to file a Civ.R.56(F) motion asking the trial court to delay ruling on appellee's motion for summary judgment pending completion of the outstanding discovery requests, appellant cannot argue on appeal that the trial court erred by ruling on the motion for summary judgment. Therefore, to the extent that

the issue presented by appellant in his brief represents an assignment of error, we overrule that assignment of error.

{¶19} In the interest of giving appellant full consideration, we will also review the trial court's grant of summary judgment. We review the trial court's grant of summary judgment de novo. *Coventry Twp. v. Ecker* (1995), 101 Ohio App.3d 38. Summary judgment is proper only when the party moving for summary judgment demonstrates: (1) no genuine issue of material fact exists, (2) the moving party is entitled to judgment as a matter of law, and (3) reasonable minds could come to but one conclusion, and that conclusion is adverse to the party against whom the motion for summary judgment is made, when the evidence is construed in a light most favorable to the non-moving party. Civ.R. 56(C); *State ex rel. Grady v. State Emp. Relations Bd.*, 78 Ohio St.3d 181, 1997-Ohio-221.

{¶20} Under summary judgment motion practice, the moving party bears an initial burden to inform the trial court of the basis for its motion, and to point to portions of the record that indicate that there are no genuine issues of material fact on a material element of the non-moving party's claim. *Dresher v. Burt*, 75 Ohio St.3d 280, 1996-Ohio-107. Once the moving party has met its initial burden, the non-moving party must produce competent evidence establishing the existence of a genuine issue for trial. *Id.*

{¶21} The evidentiary materials attached to appellee's motion for summary judgment established the existence of the credit card account, appellant's default, and the balance owed on the account. The supplemental evidentiary materials offered by appellee further showed the terms of the credit card agreement and copies of the monthly statements of account. These evidentiary materials were sufficient to carry appellee's

burden of showing that there were no genuine issues of material fact, and that it was entitled to judgment as a matter of law.

{¶22} In his memorandum contra, appellant did not point to any evidentiary materials that demonstrated the existence of any genuine issues of material fact. Appellant argued that there was no valid contract between the two parties, and appeared to be arguing that payment had been made. However, the evidentiary materials upon which appellant relied to support his arguments were the purported affidavit entitled "DEMAND FOR DEBT VALIDATION" and another affidavit executed by appellant that generally repeated a number of the legal points set forth in that document as well as other pleadings filed by appellant.

{¶23} The "DEMAND FOR DEBT VALIDATION" was inadequate to show the existence of genuine issues of material fact for a number of reasons. First, the statements made by appellant in that document do not constitute denials of the validity of the evidentiary materials offered by appellee, but instead constitute averments made by appellant as to the lack of any such "record or evidence" in his possession. Second, the statements made in the "DEMAND FOR DEBT VALIDATION" generally do not set forth factual disputes with the evidence presented by appellee, but instead seek to raise legal arguments regarding appellant's liability for the debt owed on the account. These arguments have no support in the law or are irrelevant to the issue of appellant's liability for debt owed on an account. Finally, there is no basis in the law for the process by which appellant claimed that the "DEMAND FOR DEBT VALIDATION" established his lack of liability for the debt owed. The process somewhat mirrors the provisions of Civ.R. 36 governing requests for admission in that a party's failure to specifically deny a request can

constitute an admission of the matters set forth in the request; however, the "DEMAND FOR DEBT VALIDATION" is not designated as a request for admissions, pursuant to Civ.R. 36, nor does it otherwise comply with the requirements of Civ.R. 36.

{¶24} Similarly, the affidavit appellant attached to his memorandum contra appellee's motion for summary judgment is not sufficient to demonstrate the existence of any genuine issues of material fact. The affidavit mostly repeats the statements made in the "DEMAND FOR DEBT VALIDATION," including appellant's averments as to his lack of "record or evidence" rather than a denial of the validity of the evidentiary materials provided by appellee in support of its motion.

{¶25} The evidentiary materials provided by appellee in support of its motion for summary judgment were sufficient to meet appellee's initial burden of showing that there were no genuine issues of material fact, and that appellee was entitled to judgment as a matter of law on its claim against appellant and on appellant's counterclaim. Appellant's evidentiary materials were not sufficient to meet his reciprocal burden under summary judgment motion practice. Accordingly, the trial court did not err by granting appellee's motion for summary judgment.

{¶26} During the pendency of this appeal, a number of motions were filed that were held for consideration of the merits of the appeal. In one motion, appellee filed a motion seeking to strike pleadings filed by appellant with this court.

{¶27} One of the pleadings filed by appellant was entitled a "CERTIFICATE OF FOREIGN JUDGMENT." Accompanying that pleading was a document entitled a "PRIVATE ADMINISTRATIVE DEFAULT JUDGMENT - DECISION." That document purported to be a judgment issued by a panel of three notaries public awarding judgment

against appellee in favor of appellant in the amount of \$1,800,000 and finding that appellant owed nothing on the credit card account. The judgment also included a provision imposing a penalty of \$2,000,000 for any attempt to reverse the decision of the panel.

{¶28} Appellant also filed affidavits executed by each of the three members of the notary panel: Wayne Kline, Rosemary E. Kline, and Joanna Finster-Whitesel. In these affidavits, each of the members of the notary panel repeated the conclusion that appellant owed appellee nothing on the credit card account, and that appellant was entitled to \$1,800,000 in damages against appellee. Appellee's motion to strike included a request to strike these affidavits.

{¶29} First, as an appellate court we are confined to a review of the record from the trial court below, and the pleadings filed by appellant are outside of the record. In addition, and more importantly, the documents have no basis in the law. Section 1, Article IV of the Ohio Constitution vests all judicial power in the state in "a supreme court, courts of appeals, courts of common pleas and divisions thereof, and such other courts inferior to the supreme court as may from time to time be established by law." There is no provision in Ohio law allowing notaries public to constitute a court that may award judgments enforceable in the state. Although the "judgment" filed by appellant purports to be from outside the courts of Ohio and the United States, the authority of the members of the panel supposedly comes from their status as notaries public, a status that comes from their commission by the state of Ohio.

{¶30} The "CERTIFICATE OF FOREIGN JUDGMENT" and the affidavits executed by the three notaries public are not properly part of the record before us, and do

not represent any judgment that Ohio courts are bound to recognize. Accordingly, appellee's motion to strike those pleadings is sustained.

{¶31} In a second motion, appellee seeks, pursuant to App.R. 23, to recover attorney fees incurred in filing a motion to strike another pleading filed by appellant. That motion to strike involved a pleading whereby appellant sought an order vacating the trial court's judgment granting summary judgment. Appellant argued that jurisdiction over appellee's claim regarding the credit card account had been revoked by the judgment issued by the panel of notaries. We denied appellant's petition seeking to have the trial court's order vacated, and stated that we would consider appellee's request for attorney fees when we considered the merits of appellant's appeal.

{¶32} We find that appellee is entitled to sanctions arising from appellant's petition to have the trial court's judgment vacated. Accordingly, we sustain appellee's motion, and award an amount to be determined at a hearing before a magistrate of this court.

{¶33} In a third motion, appellant filed a motion seeking recovery of expenses due to "Affidavits made in Bad Faith and for Delay pursuant to Civil Rule 56(G)." In this motion, appellant argued that the affidavits executed by Kevin Van Bibber in support of appellee's motion for summary judgment were made in bad faith. In this motion, appellant argued that the trial court should not have considered Van Bibber's affidavits because they were not admissible into evidence. However, there is no basis to conclude that Van Bibber's affidavits were not proper evidentiary materials. Therefore, appellant's motion is denied.

{¶34} In a fourth set of motions, appellant filed a pleading entitled "NOTICE OF UNCLEAR HANDS AND DEMAND THAT CASE BE DISMISSED." In this pleading,

appellant repeats his arguments for why summary judgment should not have been granted below, and points once again to the "CERTIFICATE OF FOREIGN JUDGMENT" based on the purported judgment issued by the panel of notaries public. Appellee filed a motion to strike this pleading and for an award of attorney fees as a sanction pursuant to App.R. 23. For the reasons discussed above, appellee's motion to strike appellant's pleading entitled "NOTICE OF UNCLEAN HANDS AND DEMAND THAT CASE BE DISMISSED" is sustained. Appellee's motion for an award of attorney fees is also sustained, and we award appellee an amount to be determined at a hearing before a magistrate of this court.

{¶35} Accordingly, we affirm the judgment by the Franklin County Municipal Court, sustain appellee's motion to strike the "CERTIFICATE OF FOREIGN JUDGMENT" and the affidavits executed by Wayne Kline, Rosemary E. Kline, and Joanna Finster-Whitesel, deny appellant's motion regarding the affidavits used to support appellee's motion for summary judgment, sustain appellee's motion to strike appellant's pleading entitled "NOTICE OF UNCLEAN HANDS AND DEMAND THAT CASE BE DISMISSED," sustain appellee's motions seeking recovery of attorney fees in connection with its two motions to strike, and refer this matter to a magistrate of this court to determine the amount of attorney fees to be awarded.

*Judgment affirmed;
appellee's motions to strike sustained;
appellant's motion denied;
and appellee's motion for attorney fees sustained
and matter referred to magistrate.*

CONNOR, J., concurs.
BRYANT, J., concurring separately.

BRYANT, J., concurring separately.

{¶36} I agree with the majority's disposition of the pending appeal and related motions, with one exception. Although I would grant appellee's motion for sanctions, I would not refer the matter to a magistrate but would award appellee \$350 in attorney fees.
