STATE OF MINNESOTA
IN COURT OF APPEALS
A09-474

American Express Centurion Bank,
Respondent,

vs.

Danny Chuka, a/k/a Danny Onuigbo Chuka,
Appellant.

Filed December 15, 2009
Affirmed
Connolly, Judge

Hennepin County District Court
File No. 27-CV-08-26998

Marcus J. Hinnenthal, Meyer & Njus, P.A., 1100 U.S. Bank Plaza, 200 South Sixth Street, Minneapolis, MN 55402 (for respondent)

Danny Chuka, 10524 Xerxes Avenue South, Bloomington, MN 55431-2841 (pro se appellant)

Considered and decided by Shumaker, Presiding Judge; Worke, Judge; and Connolly, Judge.

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

CONNOLLY, Judge

Appellant cardholder argues that the district court erred in granting summary judgment in favor of respondent credit-card issuer and claims that a genuine issue of

material fact exists concerning the amount of interest and fees charged to appellant's account. Because there is no genuine issue of material fact in dispute and the district court did not err in its application of the law, we affirm.

FACTS

Appellant cardholder Danny Chuka has had a credit-card account with respondent American Express Centurion Bank for approximately 20 years. It is undisputed that appellant has charged hundreds of thousands of dollars to the account during this period and has paid back a majority of those charges. Appellant acknowledges that he occasionally made a few late payments. At some point, in or around 2007, respondent began charging interest at the default rate on appellant's unpaid balance. Appellant eventually stopped making payments on the account.

Claiming that $79,898.59 was due and owing on the account, respondent sued appellant on three theories: breach of contract, account stated, and unjust enrichment. Appellant served an answer on respondent, but did not file it with the district court, claiming he "didn't know [he] had to do that." Respondent acknowledges receiving appellant's answer. In his answer, appellant admits to having the account, but denies that he is in default; disputes the amount of fees and interest charged to the account; and argues that respondent did not give proper notice regarding either.

Respondent subsequently moved for summary judgment. Appellant did not file anything in response, but he appeared at the hearing. When asked by the district court what he had to say in response, appellant repeatedly emphasized that he disagreed with the interest rate applied to his account. Appellant also stated that he had never seen nor

was presented with the cardholder agreement submitted by respondent, which authorized the default rate. The district court entered summary judgment in favor of respondent for $79,898.59, plus interest, costs, and disbursements. This appeal follows.

D E C I S I O N

"A motion for summary judgment shall be 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 of material fact and that either party is entitled to a judgment as a matter of law." *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993) (citing Minn. R. Civ. P. 56.03).

> [T]here is no genuine issue of material fact for trial 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). "[T]he party resisting summary judgment must do more than rest on mere averments." *Id.* "On an appeal from summary judgment, we ask two questions: (1) whether there are any genuine issues of material fact and (2) whether the [district] court[] erred in [its] application of the law." *State by Cooper v. French*, 460 N.W.2d 2, 4 (Minn. 1990). "[T]he reviewing court must view the evidence in the light most favorable to the party against whom judgment was granted." *Fabio*, 504 N.W.2d at 761.

The district court did not expressly articulate which legal theory it applied when granting summary judgment. This court will affirm a grant of summary judgment,

however, "if it can be sustained on any grounds." *Myers through Myers v. Price*, 463 N.W.2d 773, 775 (Minn. App. 1990), *review denied* (Minn. Feb. 4, 1991). The language of the district court's order indicates that it used account stated based on the references to the existence of an open account and a balance due and owing. Under Minnesota law, "[a]n account stated is a manifestation of assent by a debtor and creditor to a stated sum as an accurate computation of an amount due the creditor." *Am. Druggists Ins. v. Thompson Lumber Co.*, 349 N.W.2d 569, 573 (Minn. App. 1984). "An account stated comes into being through an acknowledgment or an acquiescence in the existing condition of liability between the parties." *Meagher v. Kavli*, 251 Minn. 477, 487, 88 N.W.2d 871, 879 (1958). "A party's retention without objection for an unreasonably long time of a statement of account rendered by the other party is a manifestation of assent." *Am. Druggists Ins.*, 349 N.W.2d at 573.

To support its motion for summary judgment, respondent submitted an affidavit from Ira Axelrod, its manager of credit operations. Axelrod's sworn statement provided, among other things, that he had reviewed the records for appellant's account and, if called, would testify that (1) account statements were sent to appellant showing the balance due; (2) despite due demand, appellant failed to make payments on the account; and (3) the balance due and owing on the account is $79,898.59. Attached as exhibits to the Axelrod affidavit were the cardholder agreement and copies of monthly statements sent to appellant for June, July, August, September, October, and November 2008. Each month showed an outstanding balance of $79,898.59.

Appellant admits he has had the account with respondent for approximately 20 years, but he contends there are genuine issues of material fact regarding the terms of the agreement, namely, the interest rate. Appellant claims that he repeatedly objected "to certain charges" and that the default rate was not part of the original agreement. Appellant additionally asserts that respondent's counsel's failure to state with a mathematical certainty the interest rate actually applied shows "[c]onfusion over what amount of interest was actually charged," creating a genuine issue of material fact. Because of the "dispute" surrounding the applicable interest rate, appellant argues that the terms of the original agreement should control and that respondent has failed to produce it. We disagree.

First, rather than acknowledging a dispute concerning the interest rate, respondent's counsel appeared instead to be providing the district court with an estimate of the interest rate applied to appellant's account. Second, while appellant repeatedly states that he disputes the interest rate and objected to "certain charges," he provides no specificity of the disputed charges or documentation showing such disputes. Appellant argues that "Respondent acknowledges receiving disputes from Appellant, *although the nature of those disputes is not detailed*." (Emphasis added.) The "acknowledgment" cited by appellant is a single line from the Axelrod affidavit stating that "[a]ny disputes by Chuka were investigated by American Express and removed from his balance or if found not valid, any temporary credits were rebilled to his account." Moreover, while appellant argues that he "did not make generic or general objections to charges on the account, but rather, objected to specific amounts, specific percentages, and specific

increases, applied to the account," appellant offers no factual support for these contentions other than his testimony at the hearing, again merely objecting to the increased rate of interest. Appellant failed to provide any documents, affidavits, or other evidence disputing the balance owed at any time, including the time in or around 2007 when appellant asserts respondent began charging the default rate. *See Am. Druggists Ins.*, 349 N.W.2d at 573 (holding that retaining statements without objection can manifest assent to the amount due); *Citibank S.D., NA v. Otto*, No. A08-446, 2008 WL 5335823, at *1 (Minn. App. Dec. 23, 2008) (finding that cardholder's retention of account statements for approximately three years without objection created an account stated). In fact, appellant admits he continued making payments under the higher interest rate, stopping only when the rate "became crippling."

Appellant relies on this court's unpublished decision in *Nelson v. First National Bank Omaha*, No. A04-579, 2004 WL 2711032 (Minn. App. Nov. 30, 2004), to support his argument that respondent must produce the original, signed agreement between the parties. Notwithstanding the fact that unpublished opinions are not precedential, Minn. Stat. § 480A.08, subd. 3 (2008), the present matter and *Nelson* are factually distinguishable. *Nelson* involved two joint credit-card accounts opened up in the name of Nelson and his wife. 2004 WL 2711032, at *1. Nelson claimed he neither applied for the accounts nor knew they existed. *Id.* There was no evidence showing Nelson's signature on any credit-card application, charge slips, or checks payable to First National Bank Omaha. *Id.* Only Nelson's wife had made payments to the account, using their joint checking account. *Id.* This court reversed and remanded the case, finding a genuine

issue of material fact precluded summary judgment based on Nelson's "sworn statements, which deny that he (1) had personal knowledge of these accounts; (2) applied for or accepted these credit cards; and (3) agreed to pay any amount." *Id.* at *3.

Here, appellant was fully aware of his account with respondent, having maintained it for approximately 20 years. For most of their relationship, appellant received statements from respondent and paid the amounts stated. Appellant only recently challenged the interest rate when he was no longer able to make payments on the account. Additionally, the *Nelson* record contained affidavits from Nelson showing that a genuine issue of material fact existed concerning liability. *Id.* at *1, 3. Appellant has put forth no evidence demonstrating that a genuine issue of material fact exists.

In sum, appellant neither disputes his long-standing credit relationship with respondent, nor contends that he never received the statements sent by respondent. The lack of any factual support concerning the purported inaccuracies of the account and appellant's own admission that he never requested documentation showing how the balance was calculated suggests that appellant retained the statements without opposition, manifesting his assent to their accuracy; impliedly promised to pay the amount stated, as he had in years past; and only objected to the default rate when he was no longer able to make payments. Appellant has not satisfied his burden in response to respondent's motion for summary judgment. Having nothing before it other than appellant's mere averments that the interest rate is incorrect, the district court did not err in granting

summary judgment to respondent on the basis of an existing account with a stated debt of $79,898.59, plus interest, costs, and disbursements therein.

Affirmed.