NO. COA09-552

NORTH CAROLINA COURT OF APPEALS

Filed: 8 December 2009

BROCK AND SCOTT HOLDINGS, INC.,
Plaintiff-Appellant

Iredell County
No. 08 CVD 1025

v.

LELIA R. BONDURANT,
Defendant-Appellee

Appeal by plaintiff from order entered 23 February 2009 by Judge Edward L. Hedrick, IV in Iredell County District Court. Heard in the Court of Appeals 28 October 2009.

Brock & Scott, PLLC, by Richard P. Cook, for plaintiff-appellant.

Lassiter & Lassiter, P.A., by T. Michael Lassiter, Jr., for defendant-appellee.

CALABRIA, Judge.

Brock & Scott Holdings, Inc. ("plaintiff") appeals an order granting summary judgment to Lelia R. Bondurant ("defendant"). We affirm.

Providian National Bank ("Providian") issued defendant a Visa credit card account. Defendant used her credit card and received periodic account statements from Providian. Defendant made a payment on the account on 4 February 2005, but failed to make any subsequent payments even though a balance still remained. On or

about 9 September 2005, Providian allegedly sent defendant a final accounting reflecting an outstanding balance of $2,687.75. Under the terms of Providian's cardholder agreement, defendant could object to any errors contained in a statement within 60 days of the first bill on which the error appeared.

On 25 October 2007, Providian assigned its interest in defendant's account to plaintiff. Plaintiff alleged it then sent defendant a notice of the assignment and a demand for payment. On 28 March 2008, plaintiff initiated an action in Iredell County District Court to recover the outstanding balance on defendant's account, along with prejudgment interest and attorney's fees.

Defendant filed an answer on 10 June 2008, admitting that she had failed to make payments on her account but asserting the affirmative defense of the statute of limitations. On 3 November 2008, plaintiff amended its complaint to add the alternative cause of action of an account stated.

Defendant filed a motion to dismiss plaintiff's complaint based upon the statute of limitations and plaintiff filed, with accompanying affidavits, a motion for summary judgment. The trial court conducted a hearing on both motions on 4 February 2009. On 23 February 2009, after reviewing both the arguments of counsel and the evidence provided by the parties, the trial court granted summary judgment to defendant based upon the statute of limitations. Plaintiff appeals.

> The standard of review for a trial court's grant of a motion for summary judgment is *de novo*. Viewing the evidence in the light most favorable to the non-moving party, we

> determine if any genuine issue of material fact exists and whether the moving party is entitled to judgment as a matter of law. The showing required for summary judgment may be accomplished by proving an essential element of the opposing party's claim does not exist, cannot be proven at trial, or would be barred by an affirmative defense. In determining if a grant of summary judgment is proper, we consider admissions in the pleadings, depositions on file . . . affidavits, and any other material which would be admissible in evidence or of which judicial notice may properly be taken.

Williams v. HomEq Servicing Corp., 184 N.C. App. 413, 417, 646 S.E.2d 381, 384 (2007) (internal quotations and citations omitted).

Plaintiff argues that the trial court erred by concluding that plaintiff's claims were barred by the statute of limitations. Plaintiff contends that it had a valid account stated and that the statute of limitations had not yet run on that stated account. We disagree.

In *Carroll v. Industries, Inc.*, our Supreme Court set out the requirements to establish an account stated as follows: "(1) a calculation of the balance due; (2) submission of a statement to plaintiff; (3) acknowledgment of the correctness of that statement by plaintiff; and (4) a promise, express or implied, by plaintiff to pay the balance due." 296 N.C. 205, 209, 250 S.E.2d 60, 62 (1978).

> An account becomes stated and binding on both parties if after examination the part(y) sought to be charged unqualifiedly approves of it and expresses his intention to pay it. . .. The same result obtains where one of the parties calculates the balance due and submits his statement of account to the other who expressly admits its correctness or

> acknowledges its receipt and promises to pay the balance shown to be due . . . .

Id. (quoting *Little v. Shores*, 220 N.C. 429, 431, 17 S.E.2d 503, 504 (1941)). A party to be charged may also acknowledge the correctness of a statement by failing to object within a reasonable time. *Santora, McKay & Ranieri v. Franklin*, 79 N.C. App. 585, 590, 339 S.E.2d 799, 802 (1986) (citation omitted).

> Notwithstanding the effect of an account stated, the debtor . . . may deny having assented to the statement or account submitted or may assert the absence of any transaction between the parties. In such cases, the burden is on the creditor as the plaintiff to establish the existence of the debtor's assent [and] its promise to pay. . . .

13 Arthur L. Corbin, *Corbin on Contracts* § 72.1(4) (2003).

Plaintiff relies upon the holding of this Court in *Paine, Webber, Jackson & Curtis, Inc. v. Stanley*, 60 N.C. App. 511, 299 S.E.2d 292 (1983), in arguing that an account has been stated between plaintiff and defendant. In *Paine*, the defendant received a statement indicating his indebtedness to the plaintiff, but failed to object to the statement within 10 days as required by an agreement between the parties. 60 N.C. App. at 513, 299 S.E.2d at 294-95. This Court held that "[b]y such failure to object in writing in accordance with the terms of the. . . Agreement the statement became conclusive as a matter of law and became an account stated." *Id.* at 515, 299 S.E.2d at 295.

Paine is distinguishable from the instant case. In *Paine*, the Court relied upon the fact that "[d]uring discovery defendant acknowledged receipt of [the statement] and produced the . . .

statement from his own records" as well as the subsequent correspondence between the parties to conclude that the statement had been submitted to the defendant. *Id.* at 513, 299 S.E.2d at 294. In the instant case, defendant denied that a statement had ever been submitted to her when she answered plaintiff's complaint. No additional evidence exists in the record that establishes the submission of a statement to defendant.

Plaintiff attached to its motion for summary judgment an affidavit from Darren Woods ("Woods"), plaintiff's Account Manager and Records Custodian. Woods' affidavit only established that the 9 September 2005 statement was "kept and maintained by [plaintiff] in the normal course of its regularly conducted business." This affidavit failed to provide evidence regarding defendant's receipt of this statement. Although the 9 September 2005 statement contains defendant's name and address, plaintiff provided no evidence to prove that it was placed in the mail and sent to defendant or that defendant ever received the statement. Plaintiff relies only on the allegation in its unverified complaint that the statement was submitted to defendant. Defendant, in her answer, denied this allegation. "[T]he trial court may not consider an unverified pleading when ruling on a motion for summary judgment." *21st Mortg. Corp. v. Douglas Home Ctr., Inc.*, 187 N.C. App. 770, 774, 655 S.E.2d 423, 425 (2007) (citation omitted).

Because plaintiff did not present any evidence that a statement was submitted to defendant, it cannot establish an account stated between the parties. Plaintiff concedes that

defendant made her last payment on 4 February 2005, more than three years before it filed its action against defendant, and therefore plaintiff's claim for an open account was barred by the statute of limitations. Because plaintiff had no valid claim against defendant, the trial court properly granted summary judgment to defendant.

Affirmed.

Judges HUNTER, Robert C. and GEER concur.

Report per Rule 30(e).