[Cite as *Professional Bank Servs. v. Grossman DT, Inc.*, 2019-Ohio-2230.]

COURT OF APPEALS OF OHIO

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

PROFESSIONAL BANK SERVICES, ET AL.,
Plaintiffs-Appellants,
v.
GROSSMAN DT, INC.,
Defendant-Appellee.

No. 107670

JOURNAL ENTRY AND OPINION

JUDGMENT: AFFIRMED
RELEASED AND JOURNALIZED: June 6, 2019

Civil Appeal from the Cuyahoga County Court of Common Pleas
Case No. CV-17-884532

Appearances:

Weltman, Weinberg & Reis Co., L.P.A., Robert B. Weltman, Scott S. Weltman, and Daniel A. Friedlander, *for appellants*.

Myron Watson, *for appellee*.

KATHLEEN ANN KEOUGH, J.:

{¶ 1} Plaintiffs-appellants, Professional Bank Services and Francis H. Calvert (collectively "appellants"), appeal the trial court's decision granting summary judgment in favor of defendant-appellee, Grossman DT, Inc., d.b.a.

Nemo's Beverage ("Grossman"). For the reasons that follow, we affirm the trial court's decision.

{¶ 2} In 2005, appellants obtained a default judgment against Elie F. Abboud ("Abboud"). In 2016, appellants attempted to garnish Abboud's personal earnings from Grossman, and an order of garnishment was sent to Grossman on May 16, 2017. When Grossman did not respond, appellants brought the underlying action against Grossman pursuant to R.C. 2716.21(F)(1) seeking to hold it responsible for the entirety of their judgment against Abboud.

{¶ 3} Following extensive discovery, Grossman moved for summary judgment, contending there is no genuine issue of material fact that Abboud was not employed by Grossman during the order of garnishment. In support, Grossman attached an affidavit executed by Fayez E. Abboud, president and majority shareholder of Grossman and also Abboud's son. The affidavit referenced and incorporated Grossman's payroll withholding records depicting that Abboud was not employed with Grossman when it was served with the garnishment order.

{¶ 4} Appellants opposed the motion, alleging that Grossman's failure to properly withhold taxes from all monies paid to Abboud should not be grounds for summary judgment. Specifically, appellants contended that Abboud receives remuneration from his children, including Fayez, who owns Grossman, that should be subject to garnishment because these monies allow Abboud to acquire certain assets. In support, appellants attached multiple court dockets, an affidavit by the process server, and Abboud's depositions dated February 28 and March 15, 2018.

{¶ 5} The trial court granted Grossman's motion, finding no genuine issue of material fact for trial. The court stated: "[p]laintiff's sole claim alleges defendant, as the employer of Elie F. Abboud, failed to comply with a wage garnishment order. While Elie F. Abboud was an employee of the defendant, his employment with the defendant ceased before defendant was served with the garnishment order."

{¶ 6} Appellants now appeal, contending in their sole assignment of error that the trial court erred in granting summary judgment in favor of the defendant. Specifically, appellants contend that the affidavit attached to the defendant's motion for summary judgment improperly incorporated unauthenticated business records. Appellants contend that even if the affidavit properly authenticated the business records, genuine issues of material fact exist regarding whether Abboud received personal earnings from Grossman that are subject to garnishment.

{¶ 7} Under Civ.R. 56(C), summary judgment is appropriate when (1) there is no genuine issue of material fact, (2) the moving party is entitled to judgment as a matter of law, and (3) after construing the evidence most favorably for the party against whom the motion is made, reasonable minds can only reach a conclusion that is adverse to the nonmoving party. *Zivich v. Mentor Soccer Club, Inc.*, 82 Ohio St.3d 367, 369-370, 696 N.E.2d 201 (1998); *Temple v. Wean United, Inc.*, 50 Ohio St.2d 317, 327, 364 N.E.2d 267 (1977). We review the trial court's judgment de novo, using the same standard that the trial court applies under Civ.R. 56(C). *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 671 N.E.2d 241 (1996). Accordingly, we stand in the shoes of the trial court and conduct an independent review of the record.

{¶ 8} On a motion for summary judgment, the moving party carries the initial burden of identifying specific facts in the record that demonstrate its entitlement to summary judgment. *Dresher v. Burt*, 75 Ohio St.3d 280, 292-293, 662 N.E.2d 264 (1996). If the moving party fails to meet this burden, summary judgment is not appropriate; if the moving party meets this burden, the nonmoving party has a reciprocal burden to point to evidence of specific facts in the record demonstrating the existence of a genuine issue of material fact for trial. *Id*. at 293. Summary judgment is appropriate if the nonmoving party fails to meet this burden. *Id*.

{¶ 9} On appeal, appellants contend that Grossman improperly supported its motion for summary judgment with an affidavit that incorporated unauthenticated business records. A review of appellants' brief in opposition to summary judgment, however, reveals that they did not raise this specific issue with the trial court.

{¶ 10} Civ.R. 56(C) places limitations on the types of documentary evidence a party must use in supporting or opposing a motion for summary judgment. Under Civ.R. 56(C), the materials that may be considered include the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact. Other types of documents may be introduced as evidentiary material only through incorporation by reference in a properly framed affidavit. *Dzambasow v. Abakumov*, 8th Dist. Cuyahoga No. 80621, 2005-Ohio-6719, ¶ 26.

{¶ 11} However, if the opposing party fails to object to improperly introduced evidentiary materials, the trial court may, in its discretion, consider those materials in ruling on the summary judgment motion. *Zapata Real Estate, L.L.C. v. Monty Realty, Ltd.*, 8th Dist. Cuyahoga No. 101171, 2014-Ohio-5550, ¶ 27; *Dzambasow* at ¶ 27. "'If, however, the opposing party objects to the materials on the basis that they have not been properly introduced under Civ.R. 56(C), the trial court may not rely upon them in ruling on the motion for summary judgment.'" *McHugh v. Zaatar*, 9th Dist. Lorain No. 14CA010591, 2015-Ohio-143, ¶ 8, quoting *Committee v. Rudolchick*, 9th Dist. Lorain No. 12 CA01086, 2013-Ohio-2373, ¶ 11.

{¶ 12} Failure of a party to move to strike or otherwise object to documentary evidence submitted by an opposing party in support of, or in opposition to, a motion for summary judgment waives any error in considering that evidence under Civ.R. 56(C). *Darner v. Richard E. Jacobs Group, Inc.*, 8th Dist. Cuyahoga No. 89611, 2008-Ohio-959, ¶ 15. This includes objections to affidavits submitted in support of a motion for summary judgment. *See, e.g., Chase Bank USA, NA v. Lopez*, 8th Dist. Cuyahoga No. 91480, 2008-Ohio-6000, ¶ 16 (defendant could not raise for the first time on appeal that affidavit attached to plaintiff's motion for summary judgment did not meet the requirements of Civ.R. 56(E)).

{¶ 13} Here, the objection raised by appellants with the trial court regarding Grossman's affidavit and business records incorporated therein did not assert that the affidavit was insufficient to properly authenticate the attached business records pursuant to Civ.R. 56(E) and Evid.R. 803(B). Rather the objection challenged that

the content contained in the affidavit and business records are insufficient for Grossman to satisfy its burden of demonstrating that no genuine issue of material fact exists. Given the absence of any timely objection by appellants, they waived such objections, and the trial court could properly consider Fayez's affidavit in ruling on Grossman's motion for summary judgment.

{¶ 14} Even if we were to consider the merits of appellants' arguments related to Fayez's affidavit, however, we would find that Fayez's affidavit was sufficient to comply with Civ.R. 56(E) and Evid.R. 803(6).

{¶ 15} Civ.R. 56(E) sets forth the requirements for affidavits submitted on summary judgment. It provides in relevant part:

> 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 matters stated in the affidavit. Sworn or certified copies of all papers or parts of papers referred to in an affidavit shall be attached to or served with the affidavit.

A party seeking to admit a business record into evidence under Evid.R. 803(B) must establish three essential elements: (1) the record must be one regularly made in a regularly conducted activity; (2) the contents of the record must have been entered or transmitted by a person with knowledge of the act, event, or condition recorded therein; and (3) the act, event, or condition must have been recorded at or near the time of the transaction. The "custodian of records" or other qualified witness must lay the requisite foundation for admissibility. Evid.R. 901(B)(10).

{¶ 16} Fayez's affidavit properly authenticated and set forth the proper foundation pursuant to Evid.R. 803(6) for the admissibility of the payroll records into evidence. Fayez averred that he is the president and majority shareholder of Grossman, who employed Abboud in 2015 until August 2016. He further averred that he is "the custodian of the corporate records of Grossman, DT, Inc. and [that he] examined the payroll withholding records attached [to the affidavit as exhibits] and confirmed them to the true and accurate copies of the original records, which were created and have been maintained in the ordinary course of business." He further averred that "these records corroborate [his] own knowledge of the time period in which my father was an employee of Grossman DT, Inc." Because Fayez's affidavit that Grossman filed with the trial court met the requirements of Civ.R. 56(E), it was sufficient to support its motion for summary judgment and could be properly considered.

{¶ 17} The documents attached as exhibits were Ohio Department of Job and Family Services Quarterly Summary of payroll withholdings dating from the first quarter of 2015 until the last quarter of 2017. The records demonstrate that Abboud was not employed by Grossman beyond the third quarter (July-September) of 2016. And at the time that Grossman was served with the notice of garnishment, May 2017, Abboud was not listed as an employee of Grossman for tax withholding purposes.

{¶ 18} Accordingly, Grossman identified evidentiary material in the record that satisfies its burden of demonstrating that no genuine issue of material facts

exists – Abboud was not employed by Grossman when it was served with the order of garnishment. Because Grossman satisfied its burden under Civ.R. 56(C), the burden shifted to appellants to demonstrate with specific facts that a genuine issue of material fact exists for trial.

{¶ 19} Appellants contend that even if Fayez's affidavit properly authenticated the business records attached, questions of fact remain whether Abboud received compensation from Grossman. According to appellants, Fayez's affidavit and supporting records merely establish that Abboud was employed from 2015 until 2016, but the affidavit does not specifically address Abboud's unemployment status in 2017 when the garnishment was filed. Appellants contend there is a genuine issue of fact regarding whether Abboud was being paid by Grossman whether on or off the books during this period. Contrary to appellants' assertion, Grossman, through Fayez's affidavit, did not have to specifically aver that "Abboud was not employed with Grossman during the garnishment period." The entire context of Fayez's affidavit and supporting documentation demonstrate that Abboud was not employed during that time.

{¶ 20} In their brief in opposition to summary judgment, appellants conclude that because Abboud has a vehicle and receives remuneration from his children, Grossman must be providing Abboud with money subject to garnishment. However, Abboud testified at deposition that he is retired and completely supported

by his children.[1] (Deposition tr. 48.) Appellants have not provided any documentary evidence or specific facts to refute this statement.

{¶ 21} Although appellants claimed they would "produce at trial documentation that evidences that Abboud listed Grossman as his employer as late as July 2017 at which time he indicated he was receiving gross monthly income of $9,000.00 for being its general manager," no documentary evidence was attached to their brief in opposition to summary judgment to support this allegation. "Mere speculation and unsupported conclusory assertions are not sufficient" to meet the nonmovant's reciprocal burden under Civ.R. 56(E) to withstand summary judgment. *Loveday v. Essential Heating Cooling & Refrigeration, Inc.*, 4th Dist. Gallia No. 08CA4, 2008-Ohio-4756, ¶ 9. Rather appellants were required to set forth specific facts and submit evidentiary materials disputing that Abboud was not receiving personal earnings when Grossman received the order of garnishment. Appellants have failed to do so.

{¶ 22} On appeal, appellants state that "all Grossman needed to do was to unequivocally state in a proper affidavit that Mr. Abboud was not employed by Grossman in 2017 and received no wages or other form of consideration of

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[1] Although appellants now complain on appeal that Grossman's affidavit attached to its motion improperly authenticated the business records attached, we note that the deposition attached to appellant's brief in opposition to summary judgment does not strictly comply with Civ.R. 56(C). For a deposition to be considered "legally acceptable for summary judgment purposes," it must, among other things, be filed with the court or otherwise authenticated. *See, e.g., Bank of N.Y. Mellon Trust Co., N.A. v. Unger*, 8th Dist. Cuyahoga No. 97315, 2012-Ohio-1950, ¶ 32. However, much like Grossman's affidavit, no objection was raised below. Accordingly, the trial court in its discretion, could rely on the deposition in ruling on summary judgment.

compensation of any kind from Grossman in 2017." Based on the record before this court, Grossman's motion for summary judgment and supporting documentary evidence makes this assertion. Fayez's affidavit states that Abboud was employed by Grossman from 2015 until 2016 and was not employed when the order of garnishment was served; the documentary evidence attached supports these averments. Absent any documentary evidence or specific facts to the contrary, Grossman is entitled to summary judgment.

{¶ 23} Accordingly, the trial court did not err in granting Grossman's motion for summary judgment. The assignment of error is overruled.

{¶ 24} Judgment affirmed.

It is ordered that appellee recover from appellants costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

KATHLEEN ANN KEOUGH, JUDGE

PATRICIA ANN BLACKMON, P.J., and
LARRY A. JONES, SR., J., CONCUR