

**IN THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
TRUMBULL COUNTY, OHIO**

CAPITAL ONE BANK (USA), N.A. f.k.a. CAPITAL ONE BANK,	:	OPINION
	:	
Plaintiff-Appellee,	:	CASE NO. 2010-T-0109
	:	
- vs -	:	
	:	
ROBERT A. TENNEY, a.k.a. ROBERT A. TENNEY, SR.,	:	
	:	
Defendant-Appellant.	:	

Civil Appeal from the Niles Municipal Court, Case No. 10 CVF 00067.

Judgment: Reversed and remanded.

Randi L. Nine, Thomas & Thomas, 629 Euclid Avenue, Suite 740, Cleveland, OH 44114 (For Plaintiff-Appellee).

Robert A. Tenney, pro se, 903 Frederick Street, Niles, OH 44446 (Defendant-Appellant).

TIMOTHY P. CANNON, P.J.

{¶1} Appellant, Robert A. Tenney, Sr., appeals the summary judgment entered by the Niles Municipal Court in favor of appellee, Capital One Bank (USA), N.A., on its complaint to collect a balance owed on a credit card. At issue is whether Capital One properly demonstrated its entitlement to summary judgment. For the reasons that follow, we reverse and remand.

{¶2} In its complaint, Capital One alleged that, based on appellant's application for a Capital One credit card, it sent him an unsigned "customer agreement" containing the terms of the credit card and the credit card, itself. Capital One alleged that appellant used the credit card between 2001 and 2009 to purchase goods and/or services and thereby became bound to the terms of the customer agreement. The bank alleged that, after making payments on the account for many years, appellant stopped making the minimum monthly payment. The bank did not allege when appellant stopped making payments or when he defaulted. The bank attached to its complaint as exhibits the application, the customer agreement, and the last three monthly statements on appellant's account. The bank alleged that appellant is in default under the terms of the credit card, resulting in breach of contract, as a result of which appellant is liable to it in the amount of \$3,399.54 plus interest at 23.1 per cent per annum.

{¶3} In his answer, appellant admitted he applied for "a credit card" and that the application for a credit card attached to Capital One's complaint "appears to contain" his signature. However, he denied completing and signing the application for the instant credit card. Appellant admitted he received a credit card and that "he has used credit cards in the past," but he denied that any of the cards he has received and used were issued as a result of the instant application. Appellant specifically denied: (1) that he is liable on the instant credit card; (2) that the statements attached to the complaint were the statements on his account; (3) that he breached the customer agreement; (4) that he is in default on the credit card; (5) that the credit card has a balance of \$3,399.54; and (6) that he owes Capital One \$3,399.54 plus interest at 23.1 per cent.

{¶4} Thereafter, on July 16, 2010, because trial had already been scheduled in the case, appellant filed a motion for leave to file a motion for summary judgment and a

proposed motion for summary judgment. The trial court denied appellant's motion for leave.

{¶5} On July 28, 2010, Capital One filed a motion for leave to file a motion for summary judgment and a proposed motion for summary judgment. The court granted its motion for leave.

{¶6} In its motion for summary judgment, Capital One argued that appellant submitted an application for a credit card; that Capital One sent him a customer agreement and credit card; that appellant thereafter used the credit card to purchase goods and/or services; that Capital One sent appellant monthly statements containing the transactions made by appellant on the credit card; and that appellant made monthly payments until he defaulted.

{¶7} Capital One attached to its motion a copy of the credit card application, a copy of the customer agreement, and copies of statements on the account for July 2006 and from July 2008 through May 2009. Only 12 statements were provided for appellant's account that was open for nearly eight years. The statements were not complete and did not provide a running balance. The statement for July 2006, approximately five years after the account was opened, indicated that the previous balance for June 2006 was \$3,547 and the current balance was \$3,842.01. The July 2006 statement showed one current charge in the amount of \$200, but no other detail as to other transactions resulting in the previous or current balance. The next statement Capital One submitted was for July 2008, two years later. That statement showed a balance of \$2857.44, without any detail as to how the balance was reduced to this amount.

{¶8} We note that, while Capital One argued that the 12 statements it submitted “show that Defendant used the card to purchase goods and/or services,” other than the one charge for \$200 noted above, the statements do not document any transactions or substantiate the balance allegedly owed by appellant.

{¶9} Significantly, Capital One did not submit an affidavit of an authorized representative of the bank or any other evidence attesting to any of the facts alleged in its motion; authenticating the partial records Capital One submitted; or confirming the correct amount of the principal or interest due.

{¶10} While Capital One argued in its motion for summary judgment that appellant admitted in his responses to the bank’s request for admissions that he completed and signed the instant credit card application, Capital One only attached its *request for admissions* proposed to appellant as an exhibit, but failed to attach appellant’s alleged responses.

{¶11} On August 11, 2010, appellant filed a motion for reconsideration regarding his motion for leave to file a motion for summary judgment, and the trial court granted his motion for leave. On that date, appellant also filed his brief in opposition to Capital One’s motion for summary judgment.

{¶12} In appellant’s motion for summary judgment, he argued Capital One’s complaint should be dismissed because the bank had failed to provide any detail in support of the “source or legitimacy” of the balance allegedly owed on the account. Capital One’s counsel argued in Capital One’s motion for summary judgment that it does not have copies of the charge slips for the individual transactions because they are only retained by the merchant and the customer. However, because Capital One failed to submit any affidavit in support of its motion for summary judgment, the bank

failed to provide any evidentiary material in support of such argument. In any event, appellant does not argue on appeal that charge slips were required to prove the balance owed; rather, he simply argues that Capital One failed to provide any evidence for the alleged balance.

{¶13} In the trial court's judgment entry, dated September 9, 2010, the court found there were no genuine issues of material fact, and entered summary judgment in favor of Capital One in the amount of \$3,399.54 plus interest. Appellant timely appeals the trial court's summary judgment, asserting two assignments of error. For his first assigned error, appellant alleges:

{¶14} "The trial court abused [its] discretion in denying defendant-appellant's motion for leave to file his motion for summary [judgment]."

{¶15} Appellant argues the trial court abused its discretion by denying his motion for leave to file his motion for summary judgment.

{¶16} Summary judgment motions may be filed after the matter is set for pretrial or trial only with leave of court. Civ.R. 56(A). It is well settled that the grant or denial of leave to file an untimely motion for summary judgment is within the discretion of the trial court. *City Loan & Savings Co. v. Howard* (1984), 16 Ohio App.3d 185, 189, accord *Brinkman v. Toledo* (1992), 81 Ohio App.3d 429, 432. This court has recently stated that the term "abuse of discretion" is one of art, connoting judgment exercised by a court, which does not comport with reason or the record. *Gaul v. Gaul*, 11th Dist. No. 2009-A-0011, 2010-Ohio-2156, at ¶24, citing *State v. Ferranto* (1925), 112 Ohio St. 667, 676-678. The Second Appellate District recently adopted this definition of the abuse of discretion standard in *State v. Beechler*, 2d Dist. No. 09-CA-54, 2010-Ohio-

1900, at ¶165, citing Black's Law Dictionary (4 Ed.Rev.1968) 25 ("A discretion exercised to an end or purpose not justified by and clearly against reason and evidence").

{¶17} Appellant fails to mention that, after the trial court initially denied his motion for leave to file his motion for summary judgment, he filed a motion to reconsider this ruling and the court granted that motion. Consequently, any error which might have resulted from the court's initial denial of his motion for leave was harmless, pursuant to Civ.R. 61.

{¶18} We note that, while the Civil Rules do not expressly authorize the filing of a motion for reconsideration, the trial court has the authority to grant such motion in the absence of a final order. Civ.R. 54(B) provides that, until the trial court enters final judgment, its interlocutory orders are "subject to revision at any time before the entry of judgment adjudicating all the claims and rights and liabilities of all the parties." Since the trial court's initial order denying appellant's motion for leave to file his motion for summary judgment was interlocutory in that it did not adjudicate all claims in this case, it was not a final order and was subject to revision at any time. The trial court therefore had the authority to revise its initial order and to grant appellant's motion for reconsideration granting him leave to file his motion for summary judgment.

{¶19} Moreover, because the trial court ultimately granted appellant's motion for leave to file his motion for summary judgment, the assignment of error is moot.

{¶20} Appellant's first assignment of error is overruled.

{¶21} For his second assigned error, appellant contends:

{¶22} "The trial court committed prejudicial error when it granted plaintiff-appellee's motion for summary [judgment] when there were genuine issues as to

material facts, and it appeared from the evidence that reasonable minds could come to only one conclusion that being in favor of defendant-appellant.”

{¶23} Summary judgment is a procedural device intended to terminate litigation and to avoid trial when there is nothing to try. *Frano v. Red Robin Internatl., Inc.*, 181 Ohio App.3d 13, 17, 2009-Ohio-685, at ¶12, citing *Murphy v. Reynoldsburg*, 65 Ohio St.3d 356, 358, 1992-Ohio-95. Summary judgment is proper 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) reasonable minds can come to but one conclusion, and that conclusion is adverse to the nonmoving party, that party being entitled to have the evidence construed most strongly in his favor. Civ.R. 56(C); *Leibreich v. A.J. Refrigeration, Inc.*, 67 Ohio St.3d 266, 268, 1993-Ohio-12.

{¶24} The party seeking summary judgment on the ground that the nonmoving party cannot prove his case bears the initial burden of informing the trial court of the basis for the motion and of *identifying those portions of the record* that demonstrate the absence of a genuine issue of material fact. *Dresher v. Burt*, 75 Ohio St.3d 280, 292, 1996-Ohio-107. Material facts are those relevant to the substantive law applicable in a particular case. *Needham v. Provident Bank* (1996), 110 Ohio App.3d 817, 827, citing *Anderson v. Liberty Lobby, Inc.* (1986), 477 U.S. 242, 248.

{¶25} The moving party must point to *some evidence of the type listed in Civ.R. 56(C)* that affirmatively demonstrates that there is no genuine issue of material fact. *Dresher*, supra, at 293. Such evidence includes depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact. Civ.R. 56(C).

{¶26} *If this initial burden is not met, the motion for summary judgment must be denied.* Id. However, if the moving party has satisfied his initial burden, the nonmoving party then has a reciprocal burden, as outlined in Civ.R. 56(E), to set forth specific facts showing that there is a genuine issue for trial and, if the nonmovant does not so respond, summary judgment, if appropriate, shall be entered against him. Id.

{¶27} It is well settled that a trial court commits prejudicial error in considering unverified documents in conjunction with a motion for summary judgment if the authenticity of the documents is disputed. *Cty. Treasurer v. Parcels of Land Encumbered With Delinquent Tax Liens* (Feb. 9, 2000), 7th Dist. No. 96-489-CA, 2000 Ohio App. LEXIS 496, *6; *Knowlton Co. v. Knowlton* (1983) 10 Ohio App.3d 82, 87; *Logsdon v. Ohio Northern Univ.* (1990), 68 Ohio App.3d 190, 194.

{¶28} Since a trial court's decision whether or not to grant summary judgment involves only questions of law, we conduct a de novo review of the trial court's judgment. *DiSanto v. Safeco Ins. of Am.*, 168 Ohio App.3d 649, 655, 2006-Ohio-4940. A de novo review requires the appellate court to conduct an independent review of the evidence before the trial court without deference to the trial court's decision. *Brown v. Cty. Commrs. of Scioto Cty.* (1993), 87 Ohio App.3d 704, 711.

{¶29} As a preliminary matter, we note that Capital One, in its appellate brief, has failed to reference the record in support of its statement of facts. App.R. 16(A)(6) and (B) require an appellee in its statement of facts to make "appropriate references to the record in accordance with" App.R. 16(D). For this reason alone, appellee's argument is not well taken.

{¶30} Moreover, Capital One has failed to point to any evidentiary material of the type listed in Civ.R. 56(C) that demonstrates the lack of a genuine issue of material fact.

While the bank argues that its partial statements demonstrate appellant's liability and the amount he owes, these statements are not authenticated by affidavit or otherwise. There is simply no evidentiary material before us demonstrating that Capital One's statements are authentic or confirming the amount of appellant's alleged liability. Consequently, Capital One failed to meet its initial burden under Civ.R. 56, and the burden never shifted to appellant to demonstrate the existence of a disputed material fact. The trial court therefore erred in granting Capital One's motion for summary judgment.

{¶31} Moreover, appellant did not concede in the trial court the authenticity of Capital One's exhibits. In fact, appellant has consistently disputed the accuracy and completeness of Capital One's partial statements since he filed his answer. The bank was therefore on notice that appellant disputed the balance owed under the account as reflected in the partial statements.

{¶32} The court cannot accept the argument of Capital One's counsel concerning the accuracy of the bank's statements as a substitute for evidence that the bank was legally obligated to submit, especially in light of appellant's objection.

{¶33} We note that in Capital One's motion for summary judgment, it referenced various answers appellant allegedly gave in response to certain requests for admission that the bank propounded to appellant. Yet, in reviewing this discovery, Capital One only attached its *requests* as an exhibit to its motion for summary judgment; it failed to attach appellant's responses. The bank therefore made it impossible for us to consider any responses to its request for admissions that appellant may have made.

{¶34} Capital One argues that appellant failed to produce any evidence that the alleged balance is not due. However, in making this argument, Capital One misses the

point. As noted above, because the bank failed to produce any Civ.R. 56(C) evidence regarding the lack of a genuine issue of material fact, the burden to produce never shifted to appellant.

{¶35} While we recognize the valuable role summary judgment can play when there are no genuine issues of material fact, we cannot ignore Capital One's failure to submit the minimal amount of evidence required to shift the burden to appellant.

{¶36} Despite the foregoing, the fact that Capital One failed to meet its initial burden under Civ.R. 56 does not imply that appellant is entitled to a dismissal of the bank's claim. It merely indicates that the bank was not entitled to judgment using the summary procedure provided for at Civil Rule 56.

{¶37} For purposes of remand, we note that, while the entry signed by the Acting Judge indicates that summary judgment was appropriate based on the "evidence and briefs submitted," we found no evidentiary material in the record to support this finding.

{¶38} Appellant's second assignment of error is sustained.

{¶39} For the reasons stated in the opinion of this court, it is the judgment and order of this court that the judgment of the Niles Municipal Court is reversed, and this matter is remanded to the trial court for further proceedings consistent with this opinion.

DIANE V. GRENDALL, J.,

THOMAS R. WRIGHT, J.,

concur.