[Cite as *Premier Capital, L.L.C. v. Baker*, 2012-Ohio-2834.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

PORTAGE COUNTY, OHIO

PREMIER CAPITAL, LLC,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2011-P-0041**
- vs -	:	
KEITH BAKER a.k.a. KEITH A. BAKER,	:	
Defendant-Appellant.	:	

Civil Appeal from the Portage County Court of Common Pleas, Case No. 2010 CV 0929.

Judgment: Affirmed in part; reversed in part and remanded.

Premiere Capital, LLC c/o John Cummings, pro se, 226 Lowell Street, Wilmington, MA 01887 (Plaintiff-Appellee).

Karl R. Rissland, 9442 State Route 43, Streetsboro, OH 44241; and *James A. Zaffiro*, 4200 Rockside Road, Suite 101, Independence, OH 44131 (For Defendant-Appellant).

MARY JANE TRAPP, J.

{¶1} Keith A. Baker appeals from a judgment of the Portage County Court of Common Pleas granting summary judgment in favor of Premier Capital, LLC ("Premier") in a breach of contract action filed by Premier to collect on a note Mr. Baker entered into with City Loan Financial Inc. ("City Loan") in 1995, which was subsequently assigned to Premier. For the following reasons, we reverse the summary judgment the trial court granted in favor of Premier on Premier's breach of contract claim against Mr. Baker, but affirm its judgment in favor of Premier on Mr. Baker's counterclaim.

Substantive Facts and Procedural History

{¶2} In April 1995, Mr. Baker entered into a finance agreement with City Loan to obtain a $1,000 loan secured by some household goods. In conjunction with the consumer loan, Mr. Baker, who has an eighth grade education, was sold four different kinds of credit insurance products underwritten by American Health & Life Insurance Company ("American Health"): credit life insurance, credit disability insurance, involuntary unemployment insurance, and property insurance.[1]

{¶3} Adding $91.34 of the insurance premiums, $30 for "origination fee," $30 for a "prepaid finance charge," and $83.89 for unspecified charges, the total amount financed under the finance contract came to $1,235.29. The agreed interest rate was 27.61 percent, with an annual percentage rate of 30.21. Mr. Baker would pay a total of $1,665.43, including the interest cost and $1,235.29 in amount financed, over a two-year period: $73.83 for the first month, September 1995, and $69.20 monthly for the remaining 23 months.

{¶4} According to Mr. Baker's testimony (in a hearing on a subsequent Civ.R 60(B) motion to vacate judgment), the following events occurred regarding the loan. He made the payments as scheduled until January 1996, when he injured his back on the job as a truck driver. As a result, he became disabled and was out of work on disability until 2002. He contacted City Loan and notified it of his disability, believing his notification was sufficient for the insurance to become effective. However, he never

1. The section titled "insurance" in the loan contract had the following disclosure in small print:

"* * * Borrower understands and acknowledges that (1) the Insurance company may be affiliated with Lender, (2) Lender's employee(s) may be an agent for the Insurance company, (3) such employee(s) is not acting as agent, broker or fiduciary for Borrower on this loan, but may be the agent of the Insurance company, and (4) Lender or the Insurance Company may realize some benefit from the sale of that insurance. * * *."

heard from City Loan regarding the matter and City Loan never attempted to collect the debt from him.

{¶5} In 2004, in an effort to pay off the debts he accumulated during his unemployment, he obtained a credit report. City Loan was not listed as a creditor. Unbeknownst to him, in February 1997, Mr. Baker's note was sold to RMA Partners, L.P. ("RMA"). In January 2001, RMA sold the note to Premier.

The Complaint, Default Judgment, and Attempted Settlement

{¶6} The instant matter commenced on May 8, 2008, when Shapiro & Felty, on behalf of Premier, filed a complaint in Ravenna Municipal Court, alleging Mr. Baker breached a contract and seeking $4,861.49, plus interest at the rate of 30.21 percent. Attached to the complaint was a document titled "Disclosure Statement, Note and Security Agreement," dated August 10, 1995. The document showed Mr. Baker as the borrower and City Loan as the lender, the financed amount was $1,235.29, with 30.21 percent as the annual percentage rate ("APR").

{¶7} Upon receiving the complaint, Mr. Baker telephoned Shapiro & Felty, informing the law firm that he believed the debt has been paid under the disability insurance. After this initial communication, Mr. Baker never heard from the law firm regarding the matter. Mr. Baker did not file an answer.

{¶8} On July 11, 2008, Shapiro & Felty filed a motion for default judgment.[2] The trial court granted default judgment in the amount of $4,861.49, plus interest at 25 percent from April 2008. After receiving the default judgment, Mr. Baker, again,

2. Attached to the motion was an affidavit by a Thomas DiFrancesco, who stated he was an agent for the plaintiff, had personal knowledge of the history of the loan, and was the custodian of the records pertaining to the finance contract, and that the records had been maintained in the ordinary course of business.

contacted Shapiro & Felty, in an effort to settle. He was told Premier Capital would settle the debt for $1,700.

{¶9} Mr. Baker borrowed the funds from his parents. His father, James Baker, signed a check dated October 3, 2008, made out to "Shapiro & Felty," in the amount of $1,700. The words "settlement agreement" was written on the memo line. The check was cashed by the law firm.

{¶10} Mr. Baker did not hear from the law firm or Premier Capital, until eight months later, in July 2009, when he was informed by his employer that Premier filed paperwork to garnish his wages. Mr. Baker called Shapiro & Felty and was told that the settlement amount had actually been $1,799, and his settlement payment was $99 short. Mr. Baker offered to pay the additional $99 but was told, "No. My client's going for the full amount now."

{¶11} For the first time, Mr. Baker retained counsel, who filed the Civ.R 60(B) motion to set aside the default judgment. The trial court held a hearing on the Civ.R 60(B) motion and vacated the default judgment, which was not appealed. Thereafter, Shapiro & Felty, now called Felty & Lembright Co., L.P.A., withdrew as counsel.

{¶12} Mr. Baker, with the assistance of his counsel, filed an answer, including a counterclaim against Premier. After the case was transferred to the Portage County Court of Common Pleas, Mr. Baker amended his answer. He admitted entering into the 1995 note and finance agreement with City Loan, but denied owing the amount of money alleged. He raised a variety of affirmative defenses, including accord and satisfaction. He also filed a third-party complaint against City Loan and American Health for breach of contract, negligence, bad faith, and violation of Ohio Consumer Sales Practices Act. In addition, Mr. Baker raised a counterclaim against Premier for

breach of contract, based on American Health's failure to provide coverage of the disability credit insurance.

{¶13} Subsequently, the third-party defendants, City Loan and American Health, settled with Mr. Baker and were dismissed from the lawsuit. The settlement terms were not reflected in the record.

Premier Moved for Summary Judgment

{¶14} Premier then moved for summary judgment upon the remaining claims: Premier's claim against Mr. Baker for breach of contract under the note and Mr. Baker's counterclaim against Premier based on American Health's failure to provide him with disability insurance benefits. Mr. Baker filed a memorandum opposing summary judgment, and the trial court granted summary judgment in favor of Premier on both its claims against Mr. Baker and his counterclaim against Premier, awarding Premier $3,616.41, with eight percent interest from the date of judgment. The trial court provided no analysis or explanation for its judgment.

{¶15} Mr. Baker now appeals from that judgment, assigning the following errors for our review:

{¶16} "[1.] The trial court erred when it allowed a limited liability company that was not registered to do business in the state of Ohio to bring any action in the state of Ohio until it complied with section 1703.29 of the Ohio Revised Code."

{¶17} "[2.] The trial court erred in granting Premier Capital LLC's motion for summary judgment where it failed to establish it owned the loan and had the right to enforce it."

{¶18} "[3.] The trial court erred in granting summary judgment where Premier Capital LLC relied on hearsay evidence for alleged balance due."

{¶19} "[4.] The trial court erred in granting summary judgment where the record contains evidence of a settlement agreement with Premier Capital LLC's prior counsel."

{¶20} "[5.] The trial court erred in dismissing Baker's claims against Premier Capital LLC.

{¶21} "[6.] The trial court erred in granting summary judgment where the delay of plaintiff in prosecuting the claim has prejudiced Baker's defense and claims."[3]

Standard of Review for Summary Judgment

{¶22} We review de novo a trial court's order granting summary judgment. *Hapgood v. Conrad*, 11th Dist. No. 2000-T-0058, 2002-Ohio-3363, ¶13, citing *Cole v. Am. Industries and Resources Corp*., 128 Ohio App.3d 546 (7th Dist.1998). "A reviewing court will apply the same standard a trial court is required to apply, which is to determine whether any genuine issues of material fact exist and whether the moving party is entitled to judgment as a matter of law." *Id*., citing *Parenti v. Goodyear Tire & Rubber Co*., 66 Ohio App.3d 826, 829 (9th Dist.1990).

{¶23} "Since summary judgment denies the party his or her 'day in court' it is not to be viewed lightly as docket control or as a 'little trial'. The jurisprudence of summary judgment standards has placed burdens on both the moving and the nonmoving party. In *Dresher v. Burt* [75 Ohio St.3d 280 (1996)], the Supreme Court of Ohio held that the moving party seeking summary judgment bears the initial burden of informing the trial court of the basis for the motion and identifying those portions of the record before the trial court that demonstrate the absence of a genuine issue of fact on a material element of the nonmoving party's claim. The evidence must be in the record or the motion cannot succeed. The moving party cannot discharge its initial burden under Civ.R. 56

3. Premier did not file an appellee brief on appeal.

simply by making a conclusory assertion that the nonmoving party has no evidence to prove its case but must be able to specifically point to some evidence of the type listed in Civ.R. 56(C) that affirmatively demonstrates that the nonmoving party has no evidence to support the nonmoving party's claims. If the moving party fails to satisfy its initial burden, the motion for summary judgment must be denied. If the moving party has satisfied its initial burden, the nonmoving party has a reciprocal burden outlined in the last sentence of Civ.R. 56(E) to set forth specific facts showing there is a genuine issue for trial. If the nonmoving party fails to do so, summary judgment, if appropriate shall be entered against the nonmoving party based on the principles that have been firmly established in Ohio for quite some time in *Mitseff v. Wheeler* (1988), 38 Ohio St.3d 112." *Welch v. Ziccarelli*, 11th Dist. No. 2006-L-229, 2007-Ohio-4374, ¶40.

Whether Foreign Limited Liability Company Must Be Registered to Bring an Action in Ohio Courts

{¶24} Under the first assignment of error, Mr. Baker claims Premier, a Massachusetts limited liability company, is not registered with the Ohio Secretary of State, and therefore, may not bring suit in an Ohio court, pursuant to R.C. 1705.58(A).

{¶25} R.C. 1705.58(A) ("Effect of transacting business in Ohio without registration") states that "[a] foreign limited liability company transacting business in this state may not maintain any action or proceeding in any court of this state until it has registered in this state."

{¶26} "In general, foreign corporations must be licensed to do business in the state of Ohio if they 'transact business in this state.' A foreign corporation that 'should have obtained' a license to do business in Ohio may not 'maintain any action in any court until it has obtained such license to do business.'" (Citations omitted.) *Bosl v. First*

Financial Statement Fund I, 8th Dist. No. 95464, 2011-Ohio-1938, ¶16. Similarly, a foreign limited liability company must register before transacting business in Ohio. *Id.*, citing R.C. 1705.54(A). A foreign limited liability company transacting business in this state may not maintain an action in the courts of this state until it has registered. *Bosl* at ¶17, citing *CACV of Colorado, L.L.C. v. Hillman*, 3d Dist. No. 14-09-18, 2009-Ohio-6235 and R.C. 1705.58.

{¶27} Furthermore, a foreign corporation is deemed "transacting business" within the state when "it has entered the state by its agents and is therefore engaged in carrying on and transacting through them some substantial part of its ordinary or customary business, usually continuous in the sense that it may be distinguished from merely casual, sporadic, or occasional transactions and isolated acts.'" *Bosl* at ¶18, quoting *State ex rel. Physicians Commt. for Responsible Medicine v. Ohio State Univ. Bd. of Trustees,* 108 Ohio St.3d 288, 2006-Ohio-903, ¶21, quoting *Auto Driveaway Co. v. Auto Logistics of Columbus,* 188 F.R.D. 262, 265 (S.D.Ohio 1999). "A foreign corporation's activities must be permanent, continuous, and regular to constitute 'doing business'" in Ohio. *Bosl* at ¶18, citing *Physicians Commt*.

{¶28} In *Bosl*, the court concluded that an assignee of a credit card debt who filed a complaint to recover money owed was not "transacting business" in the state of Ohio, therefore, the assignee was not required to register with the Ohio Secretary of State before filing the action.

{¶29} Similarly here, Premier acquired Mr. Baker's account and retained a law firm to take legal action to collect the debt. It could not be said to engage in activities that would be customarily considered "transacting business" as the notion is defined. Because it was not "transacting business," but merely attempting to collect a debt,

Premier was not required to register with the Ohio Secretary of State before filing the suit. The first assignment of error is without merit.

Evidence Regarding Premier's Ownership of the Note

{¶30} Mr. Baker argues summary judgment is improper because there is a genuine issue of material fact regarding Premier's ownership of the note he entered into with City Loan.

{¶31} An assignment of a debt must be must be alleged and proved. *Hudson & Keyse, LLC v. Carson*, 10th Dist. No. 07AP-936, 2008-Ohio-2570, ¶11; *Zwick & Zwick v. Suburban Constr. Co.*, 103 Ohio App. 83, 84 (8th Dist.1956).

{¶32} To establish its ownership of the note, Premier attached to its motion for summary judgment an affidavit by John D. Cummings, Jr., the Vice President of Premier. Mr. Cummings stated that the affidavit was based upon his "personal knowledge and belief and review of certain business records of" Premier.

{¶33} Mr. Cummings stated that "[o]n or about February 18, 1997, [Mr. Baker's] Note was sold to RMA Partners, L.P. ("RMA"). On or about January 12, 2001, RMA sold and/or assigned the Note to Plaintiff as part of a bulk transfer of assets. A true and accurate copy of the Bill of Sale and Assignment of Assets is attached hereto as Exhibit 3. As a result of said assignment, Plaintiff is the current holder of the Note."

{¶34} Exhibit 3 referenced in Mr. Cummings' affidavit was a document titled "Bill of Sale and Assignment of Assets," signed by a Roger Miller, President and Treasurer of Creme, Inc., RMA's general partner. It stated RMA transferred certain promissory notes and line of credit agreements, identified in an exhibit, to Premier. There was no similar document showing the transfer or assignment of the note from City Loan to RMA.

{¶35} Furthermore, the exhibit referred to in the RMA-Premier Bill of Sale was not attached. Rather, attached to the Bill of Sale was a sheet of paper containing a single entry on its top, which consisted of Mr. Baker's surname and a series of reference numbers.

{¶36} Premier relied on Mr. Cummings' affidavit to demonstrate that there was no genuine issue of material fact regarding its ownership of the note. Civ.R.56(E) governs affidavits. It states,

{¶37} "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 the 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."

{¶38} Here, the evidence purporting to establish Premier's ownership of the note consists of: (1) a copy of the note and finance agreement between City Loan and Mr. Baker; (2) an affidavit of Premier's agent stating City Loan assigned the note to RMA, which in turn assigned the note to Premier; (3) an uncertified copy of a Bill of Sale, which reflected a transfer from RMA to Premier certain promissory notes; and (4) a sheet of paper consisting of a single entry showing Mr. Baker's surname and some reference codes. As we explain in the following, this evidence falls short of the requisite demonstration of an absence of any genuine issue of material fact regarding Premier's ownership of the note.

1. Incomplete Chain of Title

{¶39} First, every assignment in the chain must be proved. *National Check Bureau v. Ruth*, 9th Dist. No. CA24241, 2009-Ohio-4171, ¶10; *Ohio Kwik v. O'Brien*, 10th Dist. No. 92AP-494, 1992 Ohio App. LEXIS 4785.

{¶40} The proof of the chain of title presented by Premier was incomplete. There was no evidence regarding the transfer of the note from the original note holder, City Loan, to RMA, other than Mr. Cummings' assertion that such a transfer occurred. Although he stated that his affidavit was "based upon my personal knowledge and belief and review of certain business records of Plaintiff," such a statement was insufficient to demonstrate he had any actual personal knowledge of the facts asserted in the affidavit. His position as the Vice President of the company, standing alone, failed to provide a basis for his assertion that through his position he gained the required personal knowledge regarding the matter. *TPI Asset Mgt., LLC v. Conrad-Eiford*, 193 Ohio App.3d 38, 2011-Ohio-1405, ¶22-23 (2d Dist. 2011). Mr. Cummings' statement in the affidavit, without any documentary support, is insufficient to show the initial assignment of the note from City Loan to RMA.

2. Documents regarding Assignment of the Note From RMA to Premier Not Properly Authenticated

{¶41} Second, regarding the transfer of Mr. Baker's note from RMA to Premier, although Mr. Cummings attached to his affidavit certain documents purporting to evince that assignment, those documents were not properly authenticated.

{¶42} Pursuant to Evid.R. 801 and Evid.R. 802, the Bill of Sale attached to the affidavit, being an out-of-court statement, would be hearsay and inadmissible evidence, unless it qualified under the "business records" exception to the hearsay rule. Evid.R 803(6). The "business records" exception allows "[a] memorandum, report, record, or

data compilation, in any form, of acts, events, or conditions, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness or as provided by Rule 901(B)(10), unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness."

{¶43} Evid.R. 901 governs authentication or identification of evidence. It states, "The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." "Authentication and identification are terms which apply to the process of laying a foundation for the admissibility of such nontestimonial evidence as documents and objects." *TPI Asset Mgt.* at ¶13, quoting Weissenberger's Ohio Evidence Treatise (2010 Ed.), §901.1.

{¶44} Evid.R.901(B) provides that "any competent witness who has knowledge that a matter is what its proponent claims may testify to such pertinent facts, thereby establishing, in whole or in part, the foundation for identification." *TPI Asset* at ¶15, citing Weissenberger at §901.2. "Conclusive evidence is not required, but the witness's testimony must be sufficient to satisfy the requirement of Evid.R. 602 that '[a] witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter.'" *Id*., citing Weissenberger.

{¶45} Mr. Cummings asserted in his affidavit that Mr. Baker's note was transferred as part of a bulk transfer from RMA to Premier, making reference to an attached Bill of Sale. The attached Bill of Sale itself referenced an Exhibit A, which

presumably specified the accounts sold; the record, however, does not contain Exhibit A, but only a sheet of paper with a single entry with Mr. Baker's surname and some unexplained reference codes.

{¶46} These documents – an uncertified Bill of Sale and an unconnected sheet of paper consisting of a single entry which purported to show the specific note was transferred from RMA to Premier, were not properly authenticated under Evid.R.901. The evidence submitted by Premier was insufficient to support a finding that Mr. Cummings, in his position as Premier's Vice President, had personal knowledge, as required by Evid.R. 602, that Mr. Baker's note was part of the assets transferred from RMA to Premier. No showing was made that the affiant, who was not sufficiently established as the records custodian, was "in the position to know the facts stated in the affidavit." *Olverson v. Butler*, 45 Ohio App.2d 9, 12 (10th Dist.1975). *See also*, *Discover Bank v. Peters*, 5th Dist. No. 2010CA00309, 2011-Ohio-3480, ¶23, fn.1 (affiant's position as Legal Placement Accounts Manager, without further description, does not establish the affiant has personal knowledge or is competent to testify as to Appellant's account).

{¶47} Mr. Cummings' affidavit regarding the assignment of Mr. Baker's account from RMA to Premier does not comply with Civ. R. 56(E), because it fails to establish the affiant's personal knowledge on this matter, and thus fails to show the affiant is competent to testify regarding the assignment. Because the evidence was not properly authenticated, summary judgment was not proper. *Capital One Bank (USA), N.A. v. Tenney*, 11th Dist. No. 03CA39, 2011-Ohio-4305, ¶27 (a trial court commits prejudicial error in considering documents in conjunction with a motion for summary judgment if the authenticity of the documents is disputed).

3. Account Number Missing in Assignment Document

{¶48} Third, even if the documentation were deemed properly authenticated, courts have required that the assignment documents reference the specific account number of the debtor's account. *Harvest Credit Mgt. VII v. Ryan*, 10th Dist. No. 09AP-1163, 2010-Ohio-5260; *Unifund CCR Partners v. Hemm*, 2nd Dist. No. 08-CA-36, 2009-Ohio-3552, ¶13. Here, the entry bearing Mr. Baker's name in the paper attached to the Bill of Sale contained a series of numerical codes, none of which matched the account number reflected in the original finance agreement Mr. Baker entered into with City Loan.

{¶49} For all these reasons, Premier, the moving party, failed to carry its initial burden demonstrating the absence of any genuine issue of material fact regarding its ownership of the note and a right to enforce the note. The second assignment of error is sustained.

{¶50} The trial court's summary judgment was improper on other grounds, as we explain in the following.

Whether There was a Genuine Issue of Material Fact Regarding Amount Due

{¶51} Although this case is not an action on an account, the necessary proof for the amount owed would be analogous to the proof required for an account. In order to adequately plead and prove an account, "an account must show the name of the party charged. It begins with a balance, preferably at zero, or with a sum recited that can qualify as an account stated, but at least the balance should be a provable sum. Following the balance, the item or items, dated and identifiable by number or otherwise, representing charges, or debits, and credits, should appear. Summarization is

necessary showing a running or developing balance or an arrangement which permits the calculation of the balance claimed to be due." *Asset Acceptance Corp. v. Proctor*, 156 Ohio App.3d 60, 2004-Ohio-623, ¶12 (4th Dist.), quoting *Brown v. Columbus Stamping & Mfg. Co.*, 9 Ohio App.2d 123, 126 (10th Dist.1967).

{¶52} Here, regarding the amount owed, Premier's evidence consisted of Mr. Cummings' statement that the amount owed was $3,616,41, which was purportedly supported by a "statement of account." The "statement of account" consisted of a computer printout which bore Mr. Baker's name with no discernible account number. The "statement of account" did not reflect the payments Mr. Baker alleged he made from September 1995 to December 1995 before becoming disabled in January 1996. Moreover, it began with a balance of $1,122.20 on April 9, 1996, without any indication as to how the beginning balance was determined. It showed a running monthly balance from April 9, 1996 at $1,122.20, to June 15, 2011 at $3,666.92, at an interest rate of eight percent, including a five-dollar late charge every month.

{¶53} The "account statement" began at a date when City Loan still owned the note and there was no explanation for where or how the document was generated. More importantly, the purported "account statement" began with $1,222.20, an amount which is not a "provable sum," and, as a result, it did not permit the calculation of the balance of $3,616.41 Premier claimed to be due. Consequently, the evidence submitted by Premier failed to demonstrate a lack of genuine issue of material fact regarding the amount owed entitling Premier to summary judgment.

{¶54} We note, additionally, that Mr. Baker also points to certain evidence on the record showing there is a genuine issue for trial regarding the amount owed. Specifically, City Loan produced a computer screen print in response to the discovery

request, which appeared to show Mr. Baker's account had been sold to two different entities. The screen print showed two accounts with Mr. Baker's name, both of which were identified by his social security number: one account with a balance of $873.84 was sold to "RMA INC" on February 18, 1997; the other with a balance of $785.56, to "NCS" on April 10, 1997. According to the screen print, the balance on Mr. Baker's account sold to RMA would be $873.94 on February 18, 1997, inconsistent with the "statement of account" attached to Mr. Cummings' affidavit, which showed a balance of $1,263.96 on the date of February 15, 1997. Thus, this evidence also created an issue of fact regarding the amount owed to Premier, making summary judgment improper. The third assignment of error is sustained.

{¶55} Under the fourth and sixth assignments of error, Mr. Baker asserts that the trial court improperly granted summary judgment because the evidence he presented established the defenses of accord and satisfaction and laches, thus precluding summary judgment in favor of Premier. We note that the record contains evidence supporting these defenses; however, because these assignments of error are rendered moot by our disposition of the second and third assignments of error, we exercise the discretion conferred by App.R. 12(A)(1)(c) not to address them.

Defendant's Claim against Premier

{¶56} In his counterclaim against Premier, Mr. Baker claimed Premier was also subject to the breach of contract claim he asserted against City Loan and American Health, based on the latter two entities' failure to provide insurance benefits in breach of the disability insurance policy.

{¶57} Citing only the authority of R.C. 1303.32, the holder-in-due-course statute, Mr. Baker argued that because Premier was not a holder-in-due-course, it would be

subject to all claims he had against its predecessor in interest. Mr. Baker's reliance on holder-in-due-course statute for Premier's liability is misplaced.

{¶58} Chapter 1303 of the Revised Code confers certain rights and protections upon a holder-in-due-course for holders of negotiable instruments: a holder-in-due-course takes an instrument free from all claims and defenses with certain limited exceptions. *See All American Finance Co. v. Pugh Shows, Inc.*, 30 Ohio St.3d 130, 131-132 (1987). "Five criteria must be satisfied to establish holder in due course status: (1) one must be a holder, (2) of a negotiable instrument, (3) taken for value, (4) in good faith, and (5) without notice that it is overdue or has been dishonored or of any defense against or claim to it on the part of any person." *All American Finance* at 132, citing White & Summers, Uniform Commercial Code (2 Ed. 1980) 551-552, Section 14-2; R.C. 1303.31 (UCC 3-302).

{¶59} A negotiable instrument is defined in 1303.03(A) as "an unconditional promise to pay a fixed amount of money, with or without interest or other charges, if it meets all of the following requirements: (1) it is payable to bearer or to order; (2) it is payable on demand or at a definite time; and (3) it does not state any other undertaking or instruction by the person promising or ordering payment to do any act in addition to the payment of money. *See*, *e.g.*, *Gallwitz v. Novel*, 5th Dist. No. 10-CA-10, 2011-Ohio-297. Our review of the subject note shows it was not a negotiable instrument. Therefore, the holder-in-due-course statute has no application here.

{¶60} "It is well settled that an assignment does not cast any affirmative liability upon the assignee of the contract unless the assignee assumes those obligations." *County Sav. Assn. v. Wesley P. Shank, Inc.*, 9th Dist. No. 1891, 1984 Ohio App. LEXIS 9980 (May 2, 1984), citing *Litton v. Cab Co.*, 64 Ohio App.2d 111 (6th Dist.1978). To

defeat summary judgment, therefore, Mr. Baker must come forward with evidence showing that Premier, as an assignee of the note, assumed obligations that the assignor, City Loan, may have, if any, under the insurance policy provided by American Health. Mr. Baker failed to come forward with any such evidence. Therefore, the trial court's summary judgment on his counterclaim against Premier for a breach of contract was proper. The sixth assignment of error is without merit.

{¶61} For the foregoing reasons, we reverse the summary judgment regarding Premier's breach of contract claim against Mr. Baker, but affirm the summary judgment regarding Mr. Baker's counterclaim for a breach of contract against Premier.

{¶62} The judgment of the Portage County Court of Common Pleas is affirmed in part, reversed in part, and matter remanded to the trial court for further proceedings consistent with this opinion.

TIMOTHY P. CANNON, P.J.,

CYNTHIA WESTCOTT RICE, J.,

concur.