[Cite as *Harvest Credit Mgt. VII v. Ryan*, 2010-Ohio-5260.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Harvest Credit Mgmt. VII,	:	
Plaintiff-Appellee,	:	
v.	:	No. 09AP-1163 (M.C. No. 2009 CVF 023797)
Carolyn P. Ryan,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on October 28, 2010

Weltman, Weinberg & Reis Co., L.P.A., *Rosemary Taft Milby* and *Matthew G. Burg*, for appellee.

Carolyn P. Ryan, pro se.

APPEAL from the Franklin County Municipal Court

CONNOR, J.

{¶1} Defendant-appellant, Carolyn P. Ryan ("appellant"), appeals the decision of the Franklin County Municipal Court granting summary judgment in favor of Plaintiff-appellee, Harvest Credit Mgmt. VII ("appellee"). For the reasons that follow, we reverse the judgment of the trial court.

{¶2} On June 2, 2009, appellee filed its complaint to collect on a credit card account apparently entered between appellant and Chase Manhattan Bank USA, N.A. ("Chase"). According to the allegations of the complaint, Chase allegedly transferred its

interests to appellee. In response to appellee's complaint, appellant filed a Civ.R. 12(B)(6) motion to dismiss. The trial court denied appellant's motion on August 19, 2009.

{¶3} On October 26, 2009, appellee requested leave to file a motion for summary judgment. The trial court granted leave and accepted appellee's motion for summary judgment as being filed. On November 11, 2009, appellant filed her memorandum in response. This same date, she filed a renewed Civ.R. 12(B)(6) motion to dismiss appellant's complaint. On December 9, 2009, the trial court granted appellee's motion for summary judgment. This timely appeal followed and presents two assignments of error. Appellant's first assignment of error challenges the trial court's decision to deny her motion to dismiss, while her second assignment of error challenges the trial court's decision to grant summary judgment to appellee.

{¶4} In the first assignment of error, appellant argues that the trial court erred by denying her Civ.R. 12(B)(6) motion to dismiss appellant's complaint. It is well-settled that a motion filed under Civ.R. 12(B)(6) tests the sufficiency of the complaint. *State ex rel. Hanson v. Guernsey Cty. Bd. of Commrs.*, 65 Ohio St.3d 545, 548, 1992-Ohio-73. To dismiss a complaint under Civ.R. 12(B)(6), it must appear beyond doubt that a plaintiff can prove no set of facts warranting relief. *O'Brien v. Univ. Community Tenants Union, Inc.* (1975), 42 Ohio St.2d 242, syllabus. Therefore, when presented with such a motion, a court must presume that the facts alleged in the complaint are true and all reasonable inferences must be made in favor of the non-moving party. *Perez v. Cleveland* (1993), 66 Ohio St.3d 397, 399. Appellate courts review dispositions of Civ.R. 12(B)(6) motions under a de novo standard of review.

{¶5} In this assignment of error, appellant argues that appellee failed to attach a copy of the credit card agreement. She therefore argues that a dismissal was required under Civ.R. 10(D)(1) and Ohio's Statute of Frauds.

{¶6} "When any claim * * * is founded on an account or other written instrument, a copy of the account or written instrument must be attached to the pleading." Civ.R. 10(D)(1). Ohio courts apply Civ.R. 10(D)(1) to collection actions on credit card accounts. See *Unifund CCR Partners Assignee of Palisades Collection, LLC v. Hemm*, 2d Dist. No. 08-CA-36, 2009-Ohio-3522.

{¶7} In *Hemm*, the court considered the same arguments appellant presents herein. That case presented a collection action brought by an assignee against a credit card holder. Id. at ¶1. The card holder in *Hemm* argued that Civ.R. 10(D)(1) required a dismissal because the assignee had not attached a copy of the credit card agreement to its complaint. Id. at ¶33. In considering this argument, the *Hemm* court noted that the assignee had attached monthly statements, which "could be used to prove the existence of an account." Id. at ¶35. It further held that the allegations of the complaint would entitle the assignee to relief if proven. Id. at ¶35. Accordingly, the *Hemm* court upheld the trial court's decision to deny the card holder's motion to dismiss. Id. at ¶36.

{¶8} In the instant matter, the status of the record and arguments presented are nearly identical to those from *Hemm*. Attached to appellee's complaint was a document entitled "last statement details," which referenced: (1) appellant's name; (2) the last four digits of appellant's social security number; (3) the last four digits of the account number; (4) September 22, 1995 as the date the account was opened; (5) October 19, 2005 as the date of appellant's last payment; (6) a balance due of $12,707.83 as of May 31, 2006;

and (7) an interest rate of eight percent. Also attached to appellee's complaint were various bills of sale, which purportedly transferred the account from Chase to appellee.

{¶9} Further, upon our review of the factual allegations of the complaint and the reasonable inferences drawn therefrom, it is clear that appellee alleged it was the purchaser or assignee of the right to collect upon a debt owed by appellant to a prior creditor. Appellee chose to accelerate the debt and demanded appellant liquidate it. Appellant failed or refused to do so. After assuming the allegations of the complaint are true and after drawing reasonable inferences in favor of appellee, we find that the trial court did not err when it rejected appellant's Civ.R. 10(D)(1) argument.

{¶10} Appellant's next argument is that the statute of frauds warrants a reversal of the trial court's decision to deny her motion to dismiss. The statute of frauds is an affirmative defense. See generally *Marion Prod. Credit Assn. v. Cochran* (1988), 40 Ohio St.3d 265, 270. The statute provides:

> No action shall be brought * * * upon an agreement that is not to be performed within one year from the making thereof; unless the agreement upon which such action is brought, or some memorandum or note thereof, is in writing and signed by the party to be charged therewith * * *.

Therefore, the issue presented by appellant is whether the parties' contract was unable to be performed within one year.

{¶11} The "not to be performed within one year" provision of the statute of frauds is given a narrow and literal interpretation. *Sherman v. Haines*, 73 Ohio St.3d 125, 127, 1995-Ohio-222.

> The provision applies only to agreements which, by their terms, cannot be fully performed within a year; and not to agreements which may possibly be performed within a year, thus, where the time for performance under an agreement is

> indefinite, or is dependent upon a contingency which may or may not happen within a year, the agreement does not fall within the Statute of Frauds.

(Internal citations omitted.) Id.

{¶12} In the instant matter, appellant notes that her credit card account existed for more than one year. She then references the one-year provision of the statute of frauds and claims that the statute warrants a dismissal. She makes no mention of how the statute applies. Further, she fails to explain how or why the credit card agreement was incapable of being performed within one year. Further, there is nothing in the record that suggests that the purported promises could not be performed within one year. Accordingly, we find that appellant's statute of frauds argument is without merit. See *Cummings v. Groszko* (1992), 76 Ohio App.3d 812, 817.

{¶13} Based upon the foregoing, we find that the trial court did not err in denying appellant's motion to dismiss. We accordingly overrule appellant's first assignment of error.

{¶14} In her second assignment of error, appellant argues the trial court erred in granting summary judgment to appellee. Appellate courts review decisions on summary judgment motions de novo. *Helton v. Scioto Cty. Bd. Of Commrs*. (1997), 123 Ohio App.3d 158, 162. "When reviewing a trial court's ruling on summary judgment, the court of appeals conducts an independent review of the record and stands in the shoes of the trial court." *Mergenthal v. Star Banc Corp.* (1997), 122 Ohio App.3d 100, 103.

{¶15} Summary judgment is proper only when the party moving for summary judgment demonstrates that (1) no genuine issue of material fact exists, (2) the moving party is entitled to judgment as a matter of law, and (3) reasonable minds could come to

but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, that party being entitled to have the evidence most strongly construed in that party's favor. Civ.R. 56(C); *State ex rel. Grady v. State Emp. Relations Bd.* (1997), 78 Ohio St.3d 181, 183. Additionally, a moving party cannot discharge its burden under Civ.R. 56 by simply making a conclusory allegation that the non-moving party has no evidence to prove its case. *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 293. Rather, the moving party must affirmatively demonstrate by affidavit or other evidence allowed by Civ.R. 56(C) that the non-moving party has no evidence to support its claims. Id. If the moving party meets this initial burden, then the non-moving party has a reciprocal burden outlined in Civ.R. 56(E) to set forth specific facts showing that there is a genuine issue for trial and, if the non-moving party does not so respond, summary judgment, if appropriate, shall be entered against the non-moving party. Id.

{¶16} In her second assignment of error, appellant challenges the evidentiary support for appellee's motion for summary judgment and argues that it is impossible to determine what accounts were transferred to what entity and which party is responsible for the debt owed. In advancing this argument, appellant is essentially arguing that the evidence failed to demonstrate a chain of title transferring appellant's account from Chase to appellee. Based upon our de novo review, we agree.

{¶17} In support of its motion for summary judgment, appellee attached the affidavit of David Ravin, whose function it was to keep appellee's books and records. (Ravin affidavit, at ¶3.) In this affidavit, Mr. Ravin averred that an account ending in 5802 had a balance due of $12,707.83 as of April 17, 2009. (Ravin affidavit, at ¶4.) He further averred that interest continues to accrue at a rate of eight percent. Id. According to his

affidavit, this information was gathered from the records provided to appellee by "the original creditor or its assignee." (Ravin affidavit, at ¶4.) Finally, Mr. Ravin indicated that a series of attached documents were "true and exact photocopies of documents reflecting the transfer of ownership of this account from Chase Manhattan to [appellee]." (Ravin affidavit, at ¶5.) The supporting documentation primarily consists of bills of sale, which purportedly transfer the rights, title and interest in certain accounts. Each of the bills of sale references a supporting exhibit that purportedly identifies the accounts that were the subject of each transfer. Importantly, however, these supporting exhibits are nowhere in our record.

{¶18} Based upon our review of the evidentiary materials, it appears as though appellee has provided documentation that potentially sets forth two separate chains of title. First, there was apparently a transfer of accounts from Chase to MidCoast Credit Corp. to appellee. Second, there was a transfer of accounts from Chase to CreditMax LLC to appellee. There is no indication from the record whether appellant's specific account was in either one of these chains of title. The fact that appellee has provided documentation evidencing two separate chains of title is quite telling. Indeed, it appears as though appellee itself is unsure as to which transfer contained appellant's specific account.

{¶19} Ohio appellate courts have reversed collection actions in similar circumstances. See *Natl. Check Bureau, Inc. v. Ruth*, 9th Dist. No. 24241, 2009-Ohio-4171; see also *Hemm*, supra; see also *Retail Recovery Serv. of NJ v. Conley*, 3d Dist. No. 10-09-15, 2010-Ohio-1256. In these cases, the bills of sale referenced accounts generally, without referencing the specific account underlying the collection action. *Ruth*

at ¶7; *Hemm* at ¶13; and *Conley* at ¶22. These cases also cited exhibits that were purportedly attached to the bills of sale. However, these exhibits were never made a part of the courts' records. Id. In these circumstances, the Second, Third, and Ninth Appellate Districts all held that summary judgment was improperly granted. *Ruth* at ¶8; *Hemm* at ¶13; and *Conley* at ¶22.

{¶20} We follow the well-reasoned case law set forth in *Ruth*, *Hemm*, and *Conley*. Accordingly, we find that there are genuine issues of material fact with regard to appellee's chain of title and whether it is the assignee or purchaser entitled to collect upon appellant's specific account. The trial court erred when it granted appellee's motion for summary judgment.

{¶21} Based upon the foregoing, we overrule appellant's first assignment of error and sustain her second assignment of error. We therefore affirm in part and reverse in part the judgment rendered by the Franklin County Municipal Court. We therefore reverse and remand this matter for proceedings consistent with law and this decision.

Judgment affirmed in part, reversed in part; cause remanded.

KLATT and McGRATH, JJ., concur.