STATE OF MICHIGAN

COURT OF APPEALS

UNIFUND CCR PARTNERS,

Plaintiff-Appellee,

v

NISHAWN RILEY,

Defendant-Appellant.

UNPUBLISHED
February 18, 2010

No. 287599
Wayne Circuit Court
LC No. 07-732916-AV

Before: Sawyer, P.J., and Saad and Shapiro, JJ.

PER CURIAM.

In this action to recover a credit card debt, defendant, proceeding in propria persona, appeals by delayed leave granted from a circuit court order affirming a district court's judgment for plaintiff after the court granted plaintiff's motion for summary disposition pursuant to MCR 2.116(C)(9) and (10). We affirm in part, vacate in part, reverse in part, and remand for additional proceedings consistent with this opinion.

Plaintiff's complaint, filed in April 2007, alleges that defendant is liable for an unpaid credit card debt on a credit card issued by Citibank, which allegedly assigned the debt to plaintiff. On May 29, 2007, defendant filed a response to the complaint labeled "Response to Introduction" in which she denied liability for the debt. Later, on September 7, 2007, defendant filed an "Answer and Cross Complaint" in which she again denied liability for the debt and sought recovery of $15,000 from plaintiff for filing a false complaint. Defendant subsequently filed an amended counterclaim on October 24, 2007. The district court granted plaintiff's motion to strike defendant's counterclaim and amended counterclaim on the ground that neither was filed in conformity with the court rules, granted plaintiff's motion for summary disposition pursuant to MCR 2.116(C)(9) and (10), and awarded plaintiff a judgment in the amount of $8,920.48. Defendant appealed that judgment to the circuit court, which affirmed the district court's decisions.

I. Plaintiff's Motion to Strike

Defendant first argues that the district court erred in granting plaintiff's motion to strike defendant's counterclaim and amended counterclaim. We disagree. MCR 2.115(B) allows a court to strike a pleading that has not been filed in accordance with the court rules. "This Court reviews a trial court's decision regarding a motion to strike a pleading pursuant to MCR 2.115

for an abuse of discretion." *Belle Isle Grill Corp v Detroit*, 256 Mich App 463, 469; 666 NW2d 271 (2003).

MCR 2.203(E) provides that "a counterclaim or a cross-claim must be filed with the answer or filed as an amendment in the manner provided by MCR 2.118." Under MCR 2.118(A)(1) and (2), defendant was permitted to amend her answer and file a counterclaim as a matter of course within 14 days after serving her answer, and after that time could file a counterclaim only by leave of the court or with plaintiff's written consent. It is undisputed that defendant did not file her counterclaim or amended counterclaim within 14 days after she served her original response to plaintiff's complaint, and that defendant did not obtain either leave of the court or plaintiff's written consent to file either pleading. Thus, the district court properly concluded that neither pleading was filed in accordance with the court rules.

Defendant's reliance on the relation-back rule in MCR 2.118(D) to argue that the pleadings were timely filed is misplaced. "The doctrine of relation back was invented by the courts to associate the amended matter with the original pleading so that it would not be barred by a statute of limitation." *Smith v Henry Ford Hosp*, 219 Mich App 555, 558; 557 NW2d 154 (1996). Although the relation-back rule would allow a properly amended claim or defense to relate back to the date of the original pleading, the rule does not govern the time limits for filing an amended pleading, or eliminate the necessity of obtaining leave of the court if an amended pleading is not filed as a matter of course within the period specified in MCR 2.118(A)(1). Because defendant never filed a proper counterclaim or amended counterclaim, the relation-back rule does not apply.

Defendant also argues for the first time on appeal that plaintiff 's motion to strike was not timely brought under MCR 2.108(B). Because defendant did not raise this issue below, it is not preserved and this Court could decline to consider it. *ISB Sales Co v Dave's Cakes*, 258 Mich App 520, 532-533; 672 NW2d 181 (2003). Even if this issue is considered, however, it lacks merit. This Court rejected a similar argument in *Belle Isle Grill*, 256 Mich App at 469-471, in which it held that MCR 2.108(B) should not be interpreted as a limitation on a motion to strike under MCR 2.115(B), and that such a motion may be brought at any reasonable time. In this case, there is no basis for concluding that plaintiff 's motion to strike was not filed within a reasonable time.

Although defendant also argues that her counterclaim properly stated a claim for fraud, the district court did not dismiss the counterclaim or amended counterclaim on the merits, but rather struck those pleadings because they were not filed in accordance with MCR 2.118(A). For the reasons indicated, the district court did not abuse its discretion in striking both pleadings.

II. Plaintiff's Motion for Summary Disposition

Defendant next argues that the district court erred in granting plaintiff's motion for summary disposition. We agree. The district court granted plaintiff 's motion under both MCR 2.116(C)(9) and (10). However, a motion under MCR 2.116(C)(9) is limited to the pleadings alone, *Slater v Ann Arbor Pub Schools Bd of Ed*, 250 Mich App 419, 425-426; 648 NW2d 205 (2002), and the district court here considered evidence beyond the pleadings when granting plaintiff's motion. Therefore, we confine our review to MCR 2.116(C)(10).

A motion under MCR 2.116(C)(10) tests the factual support for a claim. The court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence. MCR 2.116(G)(5). The party responding to the motion must present evidentiary proofs showing that there is a genuine issue of material fact for trial. If such proofs are not presented, summary disposition is proper. *Smith v Globe Life Ins Co*, 460 Mich 446, 455-456 n 2; 597 NW2d 28 (1999). Summary disposition is properly granted if, except as to the amount of damages, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Babula v Robertson*, 212 Mich App 45, 48; 536 NW2d 834 (1995).

Initially, contrary to what defendant argues, MCR 2.113(F)(1) did not require plaintiff to attach a copy of a *signed* credit card agreement to its complaint. As the circuit court noted in its decision, MCL 445.862(a) provides:

> A retail charge agreement shall be in writing and signed by the buyer or the authorized representative of the buyer. *A retail charge agreement shall be considered signed and accepted by the buyer if after a request for a retail charge account the agreement or application for a retail charge account is in fact signed by the buyer or if the retail charge account is used by the buyer or by another person authorized by the buyer. . . .* [Emphasis added.]

In this case, plaintiff's claim was premised on the existence of a retail charge agreement that arose from defendant's use of the credit card. Thus, a signed agreement was not required. Moreover, plaintiff attached a copy of the "Citibank Card Agreement" to its complaint, thereby satisfying MCR 2.113(F)(1).

Turning to the merits of plaintiff's claim, we first note that plaintiff abandoned its breach of contract theory and instead proceeded only under a theory of account stated. As explained in *Echelon Homes, LLC v Carter Lumber Co*, 261 Mich App 424, 429-430; 683 NW2d 171 (2004), rev'd on other grounds 472 Mich 192 (2005):

> An account stated consists of a "'balance struck between the parties on a settlement . . . .'" *Keywell & Rosenfeld v Bithell*, 254 Mich App 300, 331; 657 NW2d 759 (2002), quoting *Watkins v Ford*, 69 Mich 357, 361; 37 NW 300 (1888). "'[W]here a plaintiff is able to show that the mutual dealings which have occurred between two parties have been adjusted, settled, and a balance struck, the law implies a promise to pay that balance.'" *Id.* In *Kaunitz v Wheeler*, 344 Mich 181, 185; 73 NW2d 263 (1955), quoting from *White v Campbell*, 25 Mich 463, 468 (1872), the Michigan Supreme Court explained as follows:
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> "The conversion of an open account into an account stated, is an operation by which the parties *assent* to the sum as the correct balance due from one to the other; and whether this operation has been performed or not, in any instance, must depend upon the facts. That it has taken place, may appear by evidence of an express understanding, or of words and acts, and the necessary and proper inferences from them. When accomplished, it does not necessarily exclude all inquiry into the rectitude of the account." [Emphasis in original.]

In *Hawley v Professional Credit Bureau, Inc*, 345 Mich 500, 506-507; 76 NW2d 835 (1956), our Supreme Court, quoting *White v Campbell*, 25 Mich 463, 468 (1872), observed:

> "The conversion of an open account into an account stated, is an operation by which the parties *assent* to a sum as the correct balance due from one to the other. . . . The parties may still impeach it for fraud or mistake. But so long as it is not impeached, the agreed statement serves in place of the original account, as the foundation of an action." [Emphasis in original.]

"Accounts stated may be attacked upon the ground of fraud or mistake, but the burden in such cases is upon the attacking party." *Wilson v White*, 223 Mich 497, 509-510; 194 NW 593 (1923).

In *Keywell & Rosenfeld*, 254 Mich App at 331, this Court followed *Corey v Jaroch*, 229 Mich 313, 315; 200 NW 957 (1924), for the rule that an account stated may be established where the debtor has expressly accepted the bills by paying them or failed to object to them within a reasonable time. In *Corey*, the Court held that "[w]hen an account is stated in writing by the creditor and accepted as correct by the debtor, either by payments thereon without demur or by failure within a reasonable time to question the state of the account as presented, it becomes an account stated . . . ." Thus, by making payments on an account, a debtor admits to the correctness of the account or debt. *Id*. at 314-315.

In this case, the submitted evidence shows that defendant originally had an open account based on the credit card issued by Citibank. Plaintiff also presented evidence that payments were made on the account, thereby establishing that the debt was owed. However, this is insufficient to transform the open account into an account stated without evidence that defendant was the one who made the payments. The district court's assertion that people who fraudulently obtain credit in someone else's name do not make payments notwithstanding, there is no *evidence* that defendant made the asserted payments. Furthermore, the fact that defendant did not question the accuracy of the charges in insufficient to transform the open account into an account stated absent proof that defendant was aware of the account and the charges being made thereon. Defendant submitted evidence that indicated her lack of awareness of the account and her dispute of its validity by submitting dispute inquiry through a credit reporting agency. All of these actions indicate someone who disputes, rather than assents, to a debt. Accordingly, we conclude that there is no evidence at this time that transformed the open account into an account stated. Obviously, if after further discovery it is determined that defendant did, in fact, make those payments, then plaintiff may be entitled to summary disposition on this claim. However, on the record as it existed at the time of the district court's grant of summary disposition, there was no account stated.

Plaintiff supported its motion for summary disposition by submitting an affidavit that (1) set forth the debt allegedly owed by defendant to Citibank, and (2) indicated that the debt was assigned to plaintiff. Plaintiff also presented copies of the statements issued on the account, which showed that defendant's former address was the address used for the account. The statements showed that the account was used and that payments were made on the account in 2001 and 2002. Because plaintiff presented affidavits and documentary evidence in support of its motion, defendant had the burden of responding to plaintiff's motion with documentary

evidence or other evidentiary proofs showing that there was a genuine issue of material fact for trial. *Smith*, 460 Mich at 455-456 n 2.

Defendant claimed that she was the victim of identity theft and submitted her credit report indicating that she had disputed the debt and that it had been deleted from her credit report pursuant to her dispute. The report also indicated that defendant had placed a fraud alert on the account, which supported her assertion that she had been the victim of fraud. Although the fraud alert and deletion of the debt from her credit report did not definitively prove that this account was fraudulent, the inference created by the evidence, taken in the light most favorable to defendant, created a fact question as to whether she did, in fact, open and use or authorize the use of this account. Accordingly, there were outstanding questions of fact which precluded summary disposition.

Accordingly, the district court erred in granting plaintiff's motion for summary disposition pursuant to MCR 2.116(C)(10) and the circuit court erred in affirming the district court's order.

III. Competency of Plaintiff's Evidence

In her final issue, defendant challenges the competency of the evidence on which plaintiff relied in support of its motion for summary disposition. Affidavits and other documentary evidence submitted in support of a motion under MCR 2.116(C)(10) may "only be considered to the extent that the content or substance would be admissible as evidence." MCR 2.116(G)(6).

Contrary to what defendant argues, the affidavit submitted by plaintiff was signed and notarized. Further, as explained previously, plaintiff was not required to produce a signed credit card agreement. Rather, use of the credit card alone may be sufficient to establish acceptance of the terms of the retail charge agreement. However, because defendant disputes that she used the card, the mere fact that the account was used is insufficient. Defendant can only be deemed to have accepted the terms of use if she or someone she authorized used the card. Therefore, plaintiff must show defendant used, authorized the use of,[1] or paid on the account to show that she accepted the terms of the agreement. Absent such evidence, plaintiff has not shown defendant's acceptance of the terms of the account through use and a signed agreement will be necessary.

[1] We note that in her original answer, defendant claimed that "[t]his debt belongs to Bukeka Riley" and that "the card holder [is] Bukeka Riley." It is unclear the relationship, if any, between defendant and Bukeka Riley or how defendant came to know who had opened this account. It is certainly possible that defendant agreed to permit someone to use her credit to obtain the card. However, it is also possible that defendant found out this person had fraudulently obtained credit in defendant's name and did not authorize it. Given that these facts give rise to at least two possible inferences, one of which is favorable to defendant, there is clearly a material issue of fact that precluded summary disposition based on the record at this time.

Defendant argues that the district court calculated the interest at a rate higher than that set forth in the agreement. We disagree. The district court calculated the amount owed for interest in accordance with the interest rates set forth on the billing statements and defendant has not shown that the court's reliance on those specified rates was improper.

Defendant also argues that plaintiff failed to show that it legally acquired defendant's account from Citibank. We agree. Although plaintiff submitted a copy of a bill of sale executed by Citibank, it did not provide the portion of the assignment that indicated that this specific account was one of the accounts being assigned. Because the assignment occurred through the contract, absent evidence of the contract showing the specific assignment, the affidavit containing plaintiff's employee's bare assertion of the assignment is insufficient to establish factual support for plaintiff's claim that it acquired defendant's account by assignment. However, plaintiff did present evidence that defendant was notified by letter of the assignment. Thus, if on remand plaintiff submits sufficient proof of the assignment, we conclude that plaintiff has submitted sufficient proof of notice of the assignment to defendant.

We reject defendant's argument that plaintiff was required to present the original monthly statements, not copies. Documentary evidence submitted in support of or opposition to a motion for summary disposition may be considered to the extent that its content or substance would be admissible. MCR 2.116(G)(6). Thus, original documents are not required. Moreover, as plaintiff argued in the district court, the original billing statements were mailed out, allegedly to defendant, and thus were not in the possession of Citibank or plaintiff. Given defendant's assertion that she never received the statements, the only statements that could be provided would be copies. Accordingly, there is no error.

Finally, defendant argues that plaintiff failed to obtain the billing statements from the original creditor, Citibank, which defendant maintains is a violation of federal law.[2] The record does not support this claim. Plaintiff's affidavit indicates that the billing records for defendant's account were obtained from Citibank.

IV. Conclusion

We affirm the district court's granting plaintiff's motion to strike defendant's counterclaim and amended counterclaim, but vacate the circuit court's affirmance of the district court's grant of summary disposition, reverse the district court's grant of summary disposition, and remand for additional proceedings consistent with this opinion.

/s/ David H. Sawyer
/s/ Henry William Saad
/s/ Douglas B. Shapiro

[2] Defendant appears to rely on the Fair Debt Collection Practices Act, 15 USC 1692 *et seq*.