[Cite as *Vanderhorst v. 6105 N. Dixie Drive, L.L.C.*, 2009-Ohio-6687.]

IN THE COURT OF APPEALS OF MONTGOMERY COUNTY, OHIO

RONALD VANDERHORST :

Plaintiff-Appellee : C.A. CASE NO. 23491

vs. : T.C. CASE NO. 06-5741

6105 N. DIXIE DRIVE, LLC, et al. : (Civil Appeal from Common Pleas Court)

Defendants-Appellees :

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SAMUEL K. SCHINDLER :

Intervening Plaintiff-Appellant

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O P I N I O N

Rendered on the 18th day of December, 2009.

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GRADY, J.:

{¶ 1} This is an appeal from a judgment of the court of common pleas that overruled objections to a magistrate's decision and adopted that decision as the court's final judgment in the action.

{¶ 2} The underlying action was commenced on June 27, 2006 by Ronald C. Vanderhorst, who asked the court to order the sale of an accountancy firm operated by Vanderhorst and John Manning, 6105 N. Dixie Drive, LLC ("6105"), and to determine and order distribution of Vanderhorst's interest in 6105. The matter was referred to a magistrate.

{¶ 3} Jeffrey Byroade and General Electric Capital Corporation ("GE") moved to intervene in the action as creditors of Vanderhorst in order to enforce rights each acquired pursuant to R.C. 1705.19. That section permits creditors of a member of a limited liability company to apply to a court to charge the member's interest in the LLC with payment of an unsatisfied debt.

If allowed by the court, the creditor who obtains a "charging order" thereafter has the rights of an assignee of the membership interest.

{¶ 4} The magistrate permitted Byroade and GE to intervene, and further ordered that any other creditor of Vanderhorst could move to intervene during a specified period of time. Samuel K. Schindler moved to intervene on the basis of an alleged assignment to him by Vanderhorst in 2005 of Vanderhorst's interest in 6105. The magistrate granted Schindler's motion to intervene. Schindler then filed a complaint and jury demand.

{¶ 5} The assignment from Vanderhorst alleged in Schindler's complaint is contained in a "Line of Credit Agreement" that Vanderhorst executed on September 6, 2005. Schindler had made a series of loans to Vanderhorst. The agreement states that Vanderhorst "provides Sam with Secured Collateral to protect Sam from any potential loss under this Agreement by assigning 100% of his interest to Sam in the specifically described entities shown below . . ." Among those entities is "6105 N. Dixie Drive, LLC." Because that alleged assignment was prior in time to the charging orders Byroade and GE obtained, the interests they acquired are unenforceable if the assignment is valid.

{¶ 6} Schindler asked the magistrate for an evidentiary hearing to determine the validity of the alleged assignment by

Vanderhorst. The magistrate denied Schindler's request, finding that the writing is clear and unambiguous, and that any evidence Schindler might offer is therefore barred by the parol evidence rule.

{¶ 7} Schindler moved for summary judgment on his claim regarding the September 6, 2005 Line of Credit Agreement and the alleged assignment it contains. (Dkt. 75, 76). His motion further alleged that, on August 10, 2005, Vanderhorst had signed and delivered a promissory note to Schindler, which states: "I, Ronald C. Vanderhorst, for value received, do hereby assign my interest in the following so listed to Samuel K. Schindler." Among the properties thereafter listed is "6105 N. Dixie Drive, LLC, Dayton, Ohio." Schindler's motion was supported by copies of the relevant documents and his own affidavit attesting to them. Byroade and GE asked for additional time for discovery pursuant Civ.R. 56(F) in order to oppose Schindler's motion.

{¶ 8} The magistrate denied the parties' motions. The magistrate instead granted summary judgment for Byroade and GE, finding that September 6, 2005 Line of Credit Agreement on which Schindler relied is not an assignment but a conveyance of a security interest in 6105 by Vanderhorst to Schindler. Further, because Schindler had not perfected his interest by making the necessary filing with the Secretary of State, the charging orders

that Byroade and GE obtained are entitled to priority over any rights in 6105 that Schindler acquired. Regarding the August 10, 2005 Promissory Note, the magistrate refused to consider it because Schindler had not pleaded it as grounds for relief in the complaint he filed.

{¶ 9} Schindler filed objections to the magistrate's decision. But, apparently unaware of those objections, the court adopted the magistrate's decision. Schindler filed a notice of appeal. While that appeal was pending, the trial court vacated its judgment, and it thereafter considered Schindler's objections and Byroade's and GE's opposition to them. On June 10, 2009, the court overruled Schindler's objections and adopted the magistrate's decision. We dismissed the prior appeal for lack of a final order on June 15, 2009, and on that same date Schindler filed a notice of appeal from the court's June 10, 2009 judgment.

ASSIGNMENT OF ERROR

{¶ 10} "THE TRIAL COURT ERRED IN OVERRULING MR. SCHINDLER'S OBJECTIONS TO THE MAGISTRATE'S DECISION OF SEPTEMBER 26, 2008."

{¶ 11} Civ.R. 56 authorizes motions for summary judgment, supported by affidavits, filed by a party to an action, with notice of the motion and its grounds for relief served on the adverse party, who may serve and file opposing affidavits. A summary judgment ordered by the court, sua sponte, denies the

party against whose claim or defense summary judgment is ordered the notice to which the party is entitled by Civ.R. 56. Therefore, summary judgment granted to a nonmoving party is appropriate only where all relevant evidence is before the court, no genuine issue as to any material facts exists, and the nonmoving party is entitled to judgment as a matter of law. *State ex rel. Moyer v. Montgomery County Board of Commissioners* (1995), 102 Ohio App.3d 257.

{¶ 12} Schindler had filed a motion for summary judgment, supported by copies of the writings on which he relied and his own affidavit. If with respect to Byroade and GE's claims for relief, that motion demonstrated the state of the record *Moyer* contemplates, then the summary judgment the court granted in favor of Byroade and GE sua sponte, is not inappropriate. *Gibbs v. Ohio Adult Parole Authority*, Ross App. No. 01CA2622, 2002-Ohio-2311. In overruling Schindler's objections and adopting the magistrate's decision, the trial court reasoned:

{¶ 13} "Here, the Magistrate properly used the summary judgment standard to determine Schindler's Motion for Summary Judgment and properly applied the law to determine the priority of the creditors. The summary judgment was not sua sponte. It was filed by Schindler and at the time of filing Schindler should have provided all the evidence needed for a decision." (Dkt. 23,

p.2).

{¶ 14} The summary judgment for Byroade and GE was sua sponte, being one ordered on the court's own application instead of a motion filed by Byroade and GE. Further, even if the evidentiary record was insufficient to support summary judgment for Schindler on the motion he filed, that insufficiency does not necessarily warrant summary judgment for those adverse parties, as the trial court suggested. Summary judgment may only be granted on their claims if the requirements of Civ.R. 56 are satisfied with respect to them. *Moyer*.

{¶ 15} The magistrate refused to consider the August 10, 2005 Promissory Note from Vanderhorst as a basis for the relief Schindler sought in his motion for summary judgment because the motion to intervene and complaint Schindler filed pleaded a claim based on the September 6, 2005 Line of Credit Agreement only. The magistrate relied on Civ.R. 15(B), which permits issues not raised in the pleadings to be treated as though they were when they are tried by the express or implied consent of the parties and so long as substantial prejudice does not result.

{¶ 16} A Civ.R. 56 summary judgment proceeding is not a trial. Even so, Civ.R.15(B) is not self-executing. The amendment it permits must be requested by motion, *Mahan v. Bethesda Hospital, Inc.* (1992), 84 Ohio App.3d 520, though the motion may be made

any time. *Schmidt v. Lanz* (July 1, 1982), Cuyahoga App. Nos. 44248, 44249, 44666, 44672. A motion for summary judgment is not a proper vehicle for the amendment Civ.R. 15(B) permits. *Taylor v. Meridia Huron Hospital of Cleveland Clinic Health Systems*, 81 Ohio St.3d 18, 1998-Ohio-440. Indeed, Civ.R. 56 is limited to the pleadings that were filed. Because Schindler did not seek or obtain leave of court to amend his complaint to add a claim arising from the August 10, 2005 Promissory Note, the trial court did not abuse its discretion when it refused to consider the note in relation to the motion for summary judgment Schindler filed on that same account. Neither was the Promissory Note before the court with respect to the summary judgments granted to Byroade and GE.

{¶ 17} Regarding the September 6, 2005 Line of Credit Agreement, the magistrate wrote:

{¶ 18} "As discussed previously in the April 2008 Magistrate's Decision, and reiterated above, the document entitled 'Line of Credit Agreement' is not an Assignment. While the term 'assignment' is sprinkled through the document, factually there is no assignment. Vanderhorst retained the rights to the listed collateral at all times, unless there was a default by him on repayment of the underlying obligation to Schindler. He refers to the property he allegedly assigns to Schindler as 'collateral'

on numerous occasions. Additionally, in the event that Vanderhorst repays the obligation, then Schindler 'releases' the collateral. Schindler is referred to as the 'secured party' not as the 'assignee.' In subsection 2 and paragraph 2, Vanderhorst states, 'Ron represents to Sam as to the *security interest* granted to Sam in this Agreement specifically related to the named Secured Collateral, that Ron has an interest in said Secured Collateral, and shall, as to the said Secured Collateral arising or to be acquired after the date hereof, shall continue his interest in same and shall keep said Secured Collateral free from any and all liens, security interests, encumberances (sic), claims and interests . . .' (Emphasis added). Elsewhere in the document, Vanderhorst states that he is '*assigning 100% of his interest* to Sam in the specifically described entities shown below . . .' (Emphasis added). While the terms, 'assignment' and 'security interest,' appear to be used interchangeably throughout the document, the content of the Line of Credit Agreement clearly and unequivocably (sic) establishes the intent of the parties was to give Schindler a secured interest in the entities described as collateral.

{¶ 19} "In addition, the parties never acted in conformance with the idea that the document was an assignment. It was Vanderhorst who brought the original Complaint. Vanderhorst

averred that he was a 50% owner of 6105 N. Dixie Drive LLC, that he made demands for his partner, John Manning to buy his interest and sought partition of the property. Further, Vanderhorst averred that he was claiming an interest in funds received by the partnership for billings to client received or received to date and sought a determination of *his interest* in funds received during 2005 and 2006. At no time did Vanderhorst claim that he no longer had an interest in the partnership and that he had assigned that interest to Schindler almost a year before the filing of the Complaint in July 2006, much less that he had allegedly assigned it on two occasions. It was not until February 2008 that Schindler presented himself to the Court and parties as the purported real party in interest.

{¶ 20} "Therefore, the undersigned finds that the September 6, 2005 Line of Credit Agreement does not assign Vanderhorst's interest to Schindler, but rather, gives a security interest in the described collateral to Schindler." (Dkt. 81, pp. 8-9).

{¶ 21} The magistrate's analysis suffers from at least two defects. First, though whether a genuine issue of material fact exists presents an issue of law, the court may not resolve that issue by making findings of fact and then concluding that no conflict exists. The magistrate made findings of fact. Furthermore, in doing so she failed to construe the evidence most

strongly in favor of the party against whom the motion was made, Schindler, which Civ.R. 56(C) expressly requires.

{¶ 22} The second defect in the magistrate's analysis is that she found that no genuine issue of fact exists. The Line of Credit Agreement contains elements and characteristics of both an assignment and a security interest. That, alone, presents a factual conflict concerning the nature of the rights Schindler acquired. By the same token, those ambiguities concerning the intentions of the parties permit resort to parol evidence to determine that issue. Schindler was entitled to a trial in order for the court to determine his rights with respect to Vanderhorst's interests in 6105, as against the assignments Byroade and GE acquired pursuant to the R.C. 1705.19 charging instruments they obtained with respect to Vanderhorst's interest in 6105.

{¶ 23} The assignment of error is sustained. The judgment from which the appeal was taken will be reversed and the matter remanded for further proceedings consistent with our opinion. Those proceedings may permit Schindler to move to amend his complaint pursuant to Civ.R. 15(A) in order to add a claim regarding the August 10, 2005 Promissory Note and the alleged assignment it contains.

DONOVAN, P.J. And FAIN, J., concur.

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