[Cite as *Palmer Bros. Concrete, Inc. v. Kuntry Haven Constr., L.L.C.*, 2012-Ohio-1875.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
WOOD COUNTY

Palmer Brothers Concrete, Inc.	Court of Appeals No. WD-11-033
Appellee	Trial Court No. 2010CV0857
v.	
Kuntry Haven Construction, LLC, et al.	**DECISION AND JUDGMENT**
Appellants	Decided: April 27, 2012

* * * * *

Max E. Rayle, for appellee.

Harold Hanna, for appellants.

YARBROUGH, J.

I. INTRODUCTION

{¶ 1} Appellants, Kuntry Haven Construction, LLC ("Kuntry Haven") and its principal owner, Jestin Shank ("Shank"), appeal the judgments of the Wood County Court of Common Pleas which deny appellants' motion to amend their answer instanter,

and award summary judgment to appellee, Palmer Brothers Concrete, Inc. ("Palmer Brothers").

{¶ 2} For the reasons that follow, we reverse.

A. Facts and Procedural Background

{¶ 3} On September 9, 2010, Palmer Brothers filed a complaint alleging that it supplied Kuntry Haven with concrete and other building materials from 2005 through August 2010. The complaint went on to allege that Kuntry Haven made an application for credit with Palmer Brothers in 2005, in which Kuntry Haven certified that it was eligible for tax exempt status. Palmer Brothers asserts that Kuntry Haven has failed to pay for the materials supplied by Palmer Brothers and now owes Palmer Brothers $81,056.98 plus two percent interest. Further, Palmer Brothers asserts that Kuntry Haven is not tax exempt, and it has a "potential liability" to Palmer Brothers for uncollected taxes amounting to $17,214. Attached to the complaint was a copy of Kuntry Haven's account with handwritten notations regarding interest due, a copy of Kuntry Haven's credit application, and a copy of a personal guarantee. The credit application and personal guarantee were purportedly executed by Shank.

{¶ 4} After being granted an extension to file an answer on October 19, 2010, Kuntry Haven and Shank eventually filed an answer on November 15, 2010. Thereafter, a settlement pretrial conference was scheduled by the court for August 15, 2011. In the interim, appellants made a motion for the trial court to refer the case to mediation, and the motion was subsequently granted by the trial court and journalized on January 27, 2011.

The record does not reflect that the parties actually attended a mediation. Rather, the next entry in the record is Palmer Brothers' motion for summary judgment, filed February 16, 2011. Attached to its motion for summary judgment were the following exhibits: (1) Kuntry Haven's credit application signed by Shank which was also attached to the complaint, (2) the personal guarantee signed by Shank which was also attached to the complaint, (3) an invoice dated July 27, 2007, which shows a calculation of Kuntry Haven's initial balance with Palmer Brothers, (4) a "detail aged trial balance," (5) a copy of Kuntry Haven's account with the handwritten interest notes which was also attached to the complaint, (6) a letter from Bernard Schneider ("Schneider"), a purported vice president of human resources for Palmer Brothers, which shows the unpaid interest calculation, (7) a letter dated Feb. 9, 2011, from Schneider, the purported internal bookkeeper and accounts receivable manager for Palmer Brothers, to Kuntry Haven, which is titled "STATEMENT OF INTEREST DUE AS OF DECEMBER 31, 2010," and finally, (8) an affidavit of Bernard Schneider. Following Palmer Brothers' motion for summary judgment, an order from the trial court directed appellants to file a response by March 2, 2011. Appellants, on March 1, 2011, requested an extension of 14 days to file a response. The trial court granted appellants' request, and gave appellants until March 16, 2011, to file a response. Thereafter, a response was filed on March 16, 2011. On the same day, appellants filed a motion for leave to file an amended answer instanter pursuant to Civ.R. 15. In their motion, the appellants stated,

> In the case at bar, [appellants] realized, based on [Palmer Brothers'] filings that [appellants'] answer to [Palmer Brothers'] complaint required amending. [Palmer Brothers] has alleged that [appellants] had an agreement with [Palmer Brothers] regarding providing concrete. [Palmer Brothers] also alleged that [appellants] had personally guaranteed by written document, goods provided [to] [appellants] by [Palmer Brothers]. [Palmer Brothers'] own documents which were attached and made part of [Palmer Brothers'] motion for summary judgment, suggest otherwise. As a result, it is incumbent on [appellants] to amend the answer to [Palmer Brothers'] complaint.

The record does not contain any such proposed amended answer.

{¶ 5} On April 13, 2011, the trial court made two separate judgments. In its first judgment, the trial court denied appellants' motion to amend their answer. The trial court, relying on *Turner v. Cent. Local School Dist.*, 85 Ohio St.3d, 706 N.E.2d 1261 (1999), denied appellants' motion because "[t]he procedural posture of the case and the substance of the proposed amendments 'create[d] an aura of bad faith' and raise[d] the spectre of prejudice'. [sic]" The trial court also stated, "In this case, [appellants] previously admitted that [Palmer Brothers] provided [appellant] Kuntry Haven Construction with concrete and building supplies; that they applied for credit; and that [appellant] Shank executed a personal guarantee to cover all unpaid expenses. But now, after [Palmer Brothers] has filed its Motion for Summary Judgment, the proposed

amended answer seeks to deny the allegations in the Complaint that were previously admitted." The trial court then determined, "[Appellants] should not be allowed to change their answer from an admission to a denial in order to create an issue of fact."

{¶ 6} In its second judgment, the trial court awarded summary judgment to Palmer Brothers. The trial court specifically found that "[Appellant] Kuntry Haven Construction, LLC breached its contract with [Palmer Brothers] and is liable to [Palmer Brothers] for the unpaid balance on an account, plus statutory interest, and sales tax. Further, individual Jestin Shank personally guaranteed the account." The trial court entered judgment in favor of Palmer Brothers in the amount of $97,703.39, plus court costs. This appeal followed.

B. Assignments of Error

{¶ 7} Appellants now assert three assignments of error:

> I. The trial court erred when it failed to grant the Appellant's [sic] Motion For Leave To File An Amended Answer Instanter By Defendant Pursuant to Civ.R. 15.
>
> II. The trial court erred when it admitted statements contained in affidavits attached to Appellee's motion for summary judgment.
>
> III. The trial court erred by granting Appellee's motion for summary judgment because issues of material fact existed which make the granting of summary judgment improper.

II. ANALYSIS

{¶ 8} We initially address appellants' second and third assignments of error. Because they are interrelated, they will be addressed together.

A. Summary Judgment

{¶ 9} Our review of the decision granting summary judgment is de novo. *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 671 N.E.2d 241 (1996). A trial court shall grant summary judgment only where (1) no genuine issue of material fact remains to be litigated, (2) the moving party is entitled to judgment as a matter of law, and (3) viewing the evidence most strongly in favor of the nonmoving party, reasonable minds can come to but one conclusion and that conclusion is adverse to the nonmoving party. *Harless v. Willis Day Warehousing Co.*, 54 Ohio St.2d 64, 66, 375 N.E.2d 46, 47 (1978).

{¶ 10} On a motion for summary judgment, the moving party has the burden of demonstrating that no genuine issue of material fact exists. *Dresher v. Burt*, 75 Ohio St.3d 280, 292, 662 N.E.2d 264 (1996). The moving party must point to some evidence in the record of the type listed in Civ.R. 56(C). *Id.* at 292-293. The evidence permitted to be considered is limited to the "pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action * * *." Civ.R. 56(C). The burden then shifts to the nonmoving party to provide evidence showing that a genuine issue of material fact does exist. *Dresher* at 293. *See also* Civ.R. 56(E).

{¶ 11} Appellants' second assignment of error is that the trial court erred by admitting statements contained within Schneider's affidavit which was attached to Palmer Brothers' motion for summary judgment. Specifically, appellants argue that Schneider failed to aver that the exhibits attached to his affidavit were "true copies or reproductions" of the originals. Appellants therefore conclude that the attachments, which they argue were the "sole evidence in support of the motion for summary judgment," are inadmissible as evidence for the determination of summary judgment. We agree.

{¶ 12} In determining the sufficiency of Schneider's affidavit, we turn to the requirements set forth by Civ.R. 56(E), which states that 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." Furthermore, the affidavit must be notarized. *E.g., Wachovia Bank of Delaware, N.A. v. Jackson,* 5th Dist. No. 2010-CA-00291, 2011-Ohio-3202, ¶ 50.

{¶ 13} After reviewing the submitted evidence, we find that none of the attached exhibits constitute proper evidentiary material upon which the court could rely in determining Palmer Brothers' motion for summary judgment. Schneider does not aver that the exhibits are being kept in Palmer Brothers' records, or that he has personal

knowledge of the exhibits.[1] Furthermore, the exhibits are not certified copies, and Schneider does not swear that the exhibits are true copies of the originals. We also note that Palmer Brothers admits this in its brief:

> To the extent that case law is to be read as requiring that a magical incantation such as "true and accurate copy is attached hereto as Ex._____" (as opposed [sic] what was stated here as "a copy of the _____ is attached hereto as Ex. _____") for every paper attached to a motion for summary judgment affidavit, the documents attached to the Schneider affidavit would not qualify under this rule.

{¶ 14} Thus, Schneider's affidavit does not comport with the requirements of Civ.R. 56(E), and the attached exhibits were not properly before the court as evidence sufficient to support a motion for summary judgment.

{¶ 15} Therefore, we must determine, based upon the remaining evidence, whether summary judgment was improper as raised by appellants' third assignment of error.

1. Breach of contract claim

{¶ 16} In deciding a motion for summary judgment, Civ.R. 56(C) only allows the trial court to consider "pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence in the pending case, and written

[1] We note that Schneider executed two of the documents which purport to show the interest rate calculations on both the account balance as well as the interest rate on any sales tax, in which case Schneider's personal knowledge of the documents could be implied.

stipulations of fact." The failure to authenticate a document submitted on summary judgment renders the document void of evidentiary value. *E.g., Citizens Ins. Co. v. Burkes*, 56 Ohio App.2d 88, 95-96, 381 N.E.2d 963 (8th Dist.1978). Here, after considering the Schneider affidavit and the attached exhibits, the trial court ruled that Kuntry Haven breached its contract with Palmer Brothers and that Kuntry Haven along with Shank, as a personal guarantor on the account, are liable to Palmer Brothers for the unpaid balance.

{¶ 17} An action on an account is a pleading device "used to consolidate several claims which one party has against another." *AMF, Inc. v. Mravec*, 2 Ohio App.3d 29, 440 N.E.2d 600 (8th Dist.1981), paragraph one of the syllabus. "[A]n action on an account is appropriate where the parties have conducted a series of transactions, for which a balance remains to be paid." *Id.* at 31.

{¶ 18} To prevail in an action on an account, a plaintiff must establish the existence of an account in the name of the party charged, as well as "(1) a beginning balance (zero, or a sum that can qualify as an account stated, or some other provable sum); (2) listed items, dated and identifiable by number or otherwise, representing charges, or debits, and credit; and (3) a summarization by means of a running or developing balance, or an arrangement of beginning balance and items that permits the calculation of the amount claimed to be due." *Gabriele v. Reagan*, 57 Ohio App.3d 84, 87, 566 N.E.2d 684 (12th Dist.1988), quoting *Brown v. Columbus Stamping & Mfg. Co.*, 9 Ohio App.2d 123, 223 N.E.2d 373 (10th Dist.1967), paragraph three of the syllabus.

{¶ 19} Palmer Brothers relies on the Schneider affidavit with its unauthenticated attachments to prove the existence of Kuntry Haven's account, the beginning balance, the listed items representing charges, and the summarization of the account showing a balance owed. Specifically, in its motion for summary judgment, Palmer Brothers points to "Exhibit 4" of the Schneider affidavit to show an "itemization of each purchase with a balance due." This document is a copy of Kuntry Haven's account from July 27, 2009, through August 5, 2010. However, as previously discussed, this document was not authenticated, and cannot be considered as evidence in support of Palmer Brothers' motion for summary judgment. Furthermore, because Kuntry Haven's account did not begin with a zero balance, Palmer Brothers included "Exhibit 3" with the Schneider affidavit in an attempt to show a provable sum as the starting point for Kuntry Haven's account. Again, this document, an invoice dated July 27, 2009, was also not properly authenticated and cannot be relied upon as evidence for Palmer Brother's motion for summary judgment. Without these exhibits, Palmer Brothers has failed to meet its initial burden of demonstrating that no genuine issue of material fact exists as it pertains to its action on an account against Kuntry Haven.

{¶ 20} Palmer Brothers alternatively argues that it can still succeed in its motion for summary judgment without the Schneider affidavit exhibits. Its argument is that "the testimonial portion of the affidavit on those areas suffice to support the summary judgment entered." We disagree. In his affidavit, Schneider relies on the attached exhibits to show the beginning balance of Kuntry Haven's account, the listed items

representing charges, and the summarization of the account showing a balance owed. Therefore, without the attached exhibits, Palmer Brothers fails to meet its initial burden of showing that there are no genuine issues of material fact in its action on Kuntry Haven's account.

2. Jestin Shank as personal guarantor for Kuntry Haven

{¶ 21} In its complaint, Palmer Brothers asserted that "3. Defendant Jestin Shank is, upon knowledge and information, an officer of Defendant Kuntry Haven Construction LLC and acted as a personal guarantor in all matters raised in this complaint." To this, appellants answered in the affirmative. Nevertheless, we note that,

> "a party seeking summary judgment always bears the initial responsibility of informing the [trial] court of the basis for its motion, and identifying those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any," which it believes demonstrate the absence of a genuine issue of material fact. *Dresher,* 75 Ohio St.3d at 288, 662 N.E.2d 264, quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).

{¶ 22} "[T]he the burden on the moving party may be discharged by 'showing'-that is, pointing out to the [trial] court-that there is an absence" of a genuine issue of material fact. *Dresher* at 289-290, quoting *Celotex* at 325. Palmer Brothers made no mention of appellants' admissions in its motion for summary judgment, therefore the question of whether appellants' admission proves this claim is not before us. With

respect to Palmer Brothers' motion for summary judgment, Palmer Brothers pointed only to the Schneider affidavit and the attached "Exhibit 2" as evidence for this claim. Because Exhibit 2, a personal guarantee signed by Shank, was not properly authenticated as previously described, Palmer Brothers failed to meet its initial *Dresher* burden of pointing to portions of the record that show the absence of a genuine issue of material fact.

{¶ 23} Because there remain genuine issues of material fact as to both Palmer Brothers' action on the account as well as Shank's personal liability, Palmer Brothers is not entitled to summary judgment as a matter of law.

{¶ 24} Accordingly, appellants' second and third assignments of error are well-taken.

B. Motion for leave to file amended answer

{¶ 25} Pursuant to Civ.R. 15(A), a party may amend an answer once "as a matter of course" within 28 days after it is served, provided that the trial court has not placed the action on the trial calendar. Thereafter, the party may only amend the answer with the adverse party's written consent or after obtaining leave of court. *Id*. In this case, appellants needed leave of court because they did not amend the answer within the requisite 28 days. Under Civ.R. 15(A), "[l]eave of court shall be freely given when justice so requires." Nevertheless, "[t]he decision of whether to grant a motion for leave to amend a pleading is within the discretion of the trial court." *Turner*, 85 Ohio St.3d at 99, 706 N.E.2d 1261. "The granting of a motion for leave to amend a pleading shall not

be disturbed on appeal absent a showing of bad faith, undue delay or undue prejudice to the opposing party." *Hoover v. Sumlin*, 12 Ohio St.3d 1, 465 N.E.2d 377 (1984), paragraph two of the syllabus, *modified on other grounds, Jim's Steak House, Inc. v. City of Cleveland*, 81 Ohio St.3d 18, 20, 688 N.E.2d 506 (1998). An abuse of discretion will be found where a judgment is unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

{¶ 26} The basis for appellants' request to amend the answer is that the credit application and personal guarantee executed by Shank, which were both attached to the complaint and Palmer Brothers' motion for summary judgment, contain the name "Palmer Bros. Concrete/Precision Aggregates" at the top of the form. Appellants believe that Palmer Brothers Concrete, Inc. is not the same legal entity as "Palmer Bros. Concrete/Precision Aggregates." Appellants argue that they should be permitted to amend their answer, despite the fact that, in their initial answer, appellants admitted that Shank acted as a personal guarantor on behalf of Kuntry Haven.

{¶ 27} In their motion to amend their answer, appellants asserted, "[Palmer Brothers] also alleged that [appellants] had personally guaranteed by written document, goods provided [to] [appellants] by [Palmer Brothers]. [Palmer Brothers'] own documents which were attached and made part of [Palmer Brothers'] motion for summary judgment, suggest otherwise."

{¶ 28} The proposed amended answer, if filed, was not made part of the record on appeal. Nevertheless, we must determine whether the trial court abused its discretion in denying appellants' motion to amend their answer. In denying appellants' motion, the trial court stated, "The procedural posture of the case and the substance of the proposed amendments 'create an aura of bad faith' and 'raise the spectre of prejudice.' [Appellants] should not be allowed to change their answer from an admission to a denial in order to create an issue of fact." While the decision is a close one, we find that the trial court abused its discretion in denying appellants' motion.

{¶ 29} The trial court, in making its decision, relied on *White v. Stotts*, 3d Dist. No. 1-10-44, 2010-Ohio-4827, ¶ 56. In *Stotts*, the plaintiff attempted to amend his complaint ten months after his complaint was initially filed, after a pretrial was held, and after the defendant had filed a motion for summary judgment. The plaintiff also failed to attach an affidavit or other evidence in support of his motion to amend the complaint, and also failed to explain his delay in amending his complaint. *Id*. at ¶ 55. The *Stotts* court, in determining that the trial court did not abuse its discretion in denying the plaintiff's motion, relied on various cases relating to a plaintiff's attempt to amend a complaint following a motion for summary judgment.

{¶ 30} The instant case is factually distinguishable from *Stotts*. Here, the record does not indicate that a discovery deadline had been scheduled. In addition, the complaint was filed in October 2010, appellants' answer was filed in December 2010, and an initial pretrial was not scheduled until August 2011. Appellee filed its motion for

summary judgment in early February 2011, and appellants filed their motion to amend on March 16, 2011. Thus, the case had only been pending for approximately five months at the time appellants' filed the motion to amend. These events all occurred well before the initial pretrial date scheduled by the court. Given the infancy of this litigation, and the purpose of Civ.R. 15, we find that the trial court abused its discretion by denying appellants' motion to amend their answer.

{¶ 31} Accordingly, appellants' first assignment of error is well-taken.

III. CONCLUSION

{¶ 32} Wherefore, we find that substantial justice was not done. Appellants' second and third assignments of error are well-taken, and the decision of the trial court granting summary judgment to Palmer Brothers is reversed. Furthermore, appellants' first assignment of error is well-taken and the judgment of the trial court denying appellants' motion for leave to file an amended answer is reversed and this case is remanded to the trial court for further proceedings.

{¶ 33} Pursuant to App.R. 24, Palmer Brothers is ordered to pay the costs of this appeal.

Judgment reversed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J. _____
JUDGE

Arlene Singer, P.J. _____
JUDGE

Stephen A. Yarbrough, J. _____
CONCUR.
JUDGE