[Cite as *LVNV Funding, L.L.C. v. Takats*, 2015-Ohio-3082.]

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

LVNV Funding, LLC	Court of Appeals No. L-14-1129
Appellee	Trial Court No. CI0201204205
v.	
Mark Takats	**DECISION AND JUDGMENT**
Appellant	Decided: July 31, 2015

* * * * *

Yale R. Levy and Sean M. Winters, for appellee.

Mark Takats, pro se.

* * * * *

PIETRYKOWSKI, J.

{¶ 1} Mark Takats, appellant, appeals a June 6, 2014 judgment of the Lucas County Court of Common Pleas granting LVNV Funding, LLC ("LVNV"), appellee, summary judgment against him on both liability and damages in an action on an account. Appellant appears pro se.

{¶ 2} LVNV filed its civil complaint against appellant in the Lucas County Court of Common Pleas on July 10, 2012. In the complaint, LVNV alleged (1) that it is the assignee of Huntington Bank ("Huntington") of appellant's account with the bank, (2) that appellant breached the terms of the account agreement by failing to make payments owed on the account, and (3) that as a result of the breach appellee is entitled to recover from appellant the sum of $49,715.84. LVNV demanded judgment against appellant in the amount of $49,715.84 plus interest at 3 percent from June 28, 2010, costs, and all other proper relief.

{¶ 3} LVNV filed a notice of service of its first set of interrogatories, request for production of documents and request for admission on appellant on September 27, 2013, and again on November 18, 2013. Counsel for appellant filed three separate motions in the trial court for extensions of time to respond to the discovery requests. These three motions for extension of time to respond were filed on December 16, 2013, on January 13, 2014, and on February 10, 2014. The trial court granted all three requests. The last extension of time granted by the trial court to respond to the discovery requests (including the set of requests for admissions) required appellant to respond on or before March 10, 2014, to the requests. Appellant ultimately failed to respond to the requests for admissions despite the extensions of time granted by the trial court.

{¶ 4} With leave of court, appellee filed a motion for summary judgment against appellant with supporting materials on March 31, 2014. Facts deemed admitted by failure of appellant to respond to requests for admissions served by LVNV upon

appellant were central to the trial court's determination that there was no dispute of material fact and that LVNV was entitled to judgment on its claim against appellant in the amount of $49,715.84, plus interest at the rate of 3 percent annum from June 28, 2010, and court costs.

Assignment of Error

{¶ 5} Appellant appears pro se and has failed to provide a statement of assignments of error presented for review in his appeal, as required under App.R. 16(A)(3). Appellant argues in his appellate brief that the trial court erred in granting LVNV summary judgment. We treat that contention as appellant's assignment of error.

Summary Judgment

{¶ 6} The standard of review on motions for summary judgment is de novo; that is, an appellate court applies the same standard in determining whether summary judgment should be granted as the trial court. *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 671 N.E.2d 241 (1996).

{¶ 7} Under Civ.R. 56, to prevail on a motion for summary judgment the moving party must demonstrate:

> (1) that there is no genuine issue as to any material fact; (2) that the moving party is entitled to judgment as a matter of law; and (3) that reasonable minds can come to but one conclusion, and that conclusion is adverse to the party against whom the motion for summary judgment is made, who is entitled to have the evidence construed most strongly in his favor. *Harless*

v. Willis Day Warehousing Co., 54 Ohio St.2d 64, 66, 375 N.E.2d 46 (1978).

{¶ 8} The party moving for summary judgment bears the burden of showing that no genuine issue of fact exists. *Dresher v. Burt*, 75 Ohio St.3d 280, 294, 662 N.E.2d 264 (1996); *Harless* at 66. "If the moving party has satisfied its initial burden, the nonmoving party has a reciprocal burden" under Civ.R. 56(E). *Dresher* at 293. That burden is to set forth "specific facts" showing that there is a genuine issue of fact for trial. *Id.*; Civ.R. 56(E).

{¶ 9} Admissions by appellant arising from his failure to respond to LVNV's requests for admissions in this case provide the framework of LVNV's motion for summary judgment. We consider them first.

{¶ 10} In support of the motion for summary judgment, LVNV filed a copy of the unanswered requests for admissions previously served on appellant, the affidavit of Matthew Sowell, a copy of a bill of sale and assignment executed by Teri All-Klingbeil as vice president on behalf of both The Huntington National Bank and Huntington LT, assignors, a declaration of account transfer, and a military affidavit. LVNV argues that the trial court properly recognized the requests for admissions are deemed admitted and constitute facts upon which a motion for summary judgment was properly granted. The trial court relied only on appellant's admissions in its judgment.

Admissions

{¶ 11} Civ.R. 36 concerns requests for admissions. Civ.R. 36(A) provides in part:

> A party may serve upon any other party a written request for the admission, for purposes of the pending action only, of the truth of any matters within the scope of Civ.R. 26(B) set forth in the request, that relate to statements or opinions of fact or of the application of law to fact, including the genuineness of any documents described in the request.

{¶ 12} Requests for admissions are deemed admitted where they are not answered by the deadline set in the rule. *B & T Distributors v. CSK Constr., Inc.*, 6th Dist. No. L-07-1362, 2008-Ohio-1855, ¶ 12-13; *RKT Properties, L.L.C. v. Northwood*, 162 Ohio App.3d 590, 2005-Ohio-4178, 834 N.E.2d 393, ¶ 9 (6th Dist.). The rule states:

> The matter is admitted unless, within a period designated in the request, not less than twenty-eight days after service of the request or within such shorter or longer time as the court may allow, the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter, signed by the party or by the party's attorney. Civ.R. 36(A)(1).

{¶ 13} In this case appellant did not respond to LVNV's request for admissions within the time period established under Civ.R. 36 for a response, including three extensions of time granted by the trial court to respond to the request.

{¶ 14} The Ohio Supreme Court has recognized that where a party fails to respond to requests for admissions within the time provided under Civ.R. 36, the requested admissions become "facts of record which the court must recognize." *Cleveland Trust Co. v. Willis*, 20 Ohio St.3d 66, 67, 485 N.E.2d 1052 (1985). Such admissions "can be used to establish a fact, even if it goes to the heart of the case." *Id.*

{¶ 15} Accordingly, we conclude that the trial court properly deemed LVNV requests for admissions admitted under the rule and that the admissions constituted facts properly before the court on LVNV's motion for summary judgment. Accordingly the following facts are deemed admitted in this case: (1) that appellant applied for a credit card and/or charge account with Huntington Bank; (2) that appellant was issued a credit card/charge account by Huntington Bank; (3) that appellant received monthly statements from Huntington Bank indicating all of the charges appellant made on the account; (4) that appellant charged items on the account with Huntington Bank; (5) that appellant never notified Huntington Bank of any dispute concerning debits or credits to the account; (6) that appellant is not entitled to any credits, offsets, or deductions that have not already been granted by Huntington Bank and LVNV; (7) that LVNV is the owner of appellant's Huntington Bank Account; (8) that appellant owes LVNV the sum of $49,715.84 plus interest at the rate of 3 percent from June 28, 2010 on appellant's Huntington Bank account which is the subject of this action, (9) that LVNV Funding LLC has complete authority to sue, collect, settle, adjust, compromise and satisfy the account; and (10) that the balance herein sued for is due and owing by appellant to

appellee and the appellant has made no payments to either appellee or Huntington Bank to be applied against the balance on the credit card/charge account since July 5, 2012.

Action on Account

{¶ 16} "The elements of a breach of contract action are 'the existence of a contract, performance by the plaintiff, breach by the defendant, and damage or loss to the plaintiff.' (Citations omitted.) *Firelands Regional Med. Ctr. v. Jeavons*, 6th Dist. Erie No. E-07-068, 2008-Ohio-5031, ¶ 19." *Burroughs Framing Specialists, Inc. v. 505 W. Main St., L.L.C.*, 2014-Ohio-3961, 18 N.E.3d 1253, ¶ 32 (6th Dist.). An action on account is based on contract:

> An action on an account is founded upon contract, *Arthur v. Parenteau* (1995), 102 Ohio App.3d 302, 304, 657 N.E.2d 284, and "is appropriate where the parties have conducted a series of transactions for which a balance remains to be paid." *Blanchester Lumber & Supply, Inc. v. Coleman* (1990), 69 Ohio App.3d 263, 265, 590 N.E.2d 770. *Creditrust Corp v. Richard*, 2d Dist. Clark No. 99-CA-94, 2000 WL 896265, *3 (July 7, 2000).

{¶ 17} Appellant argues that the trial court erred in granting LVNV's motion for summary judgment on three grounds: (1) that the documents submitted in support of the motion failed to demonstrate an enforceable assignment of rights under the loan note, (2) that appellee failed to establish any clear chain of title of the note, and (3) that appellee suffered no financial loss.

{¶ 18} Appellee contends that it met its burden under Civ.R. 56 of demonstrating the absence of any dispute of material fact on each of these issues and that appellant failed to meet his reciprocal burden of showing specific fact demonstrating the existence of a genuine issue of fact for trial. We agree.

{¶ 19} Appellant admitted to facts demonstrating an enforceable right of LVNV to recover judgment for sums owing on the Huntington Bank charge account. Under the admissions, appellant admitted that he applied for and was issued the account and made charges on the account. Appellant admitted that LVNV now owns the account and that it "has complete authority to sue and collect on the account." LVNV's ownership of the account by assignment was also shown by the affidavit of Mathew Sowell.

{¶ 20} Accordingly, appellant's contention that the record fails to demonstrate an enforceable assignment of rights under the loan note to LVNV are without merit. On the same basis, appellant's contention that the record fails to establish a clear chain of title to the note is also without merit. Appellant expressly admitted that LVNV owns the account. The Sowell affidavit details the chain of title to the account.

{¶ 21} With respect to the claim that appellee has suffered no financial loss, this contention is also without merit because appellant admitted that there is a balance due and owing on the account to LVNV in the amount of $49,715.84, plus interest at the rate of 3 percent from June 28, 2010.

{¶ 22} Appellant argues further (1) that appellee is not the original mortgage lender, (2) that appellee lacks standing because appellee is not the holder of both the

mortgage and note, and (3) that the mortgage note is unsecured because of a separation between the mortgage and note. However, this is not an action for foreclosure. No mortgage is involved in the action. There is no claim that the loan debt is secured by any mortgage of real property.

{¶ 23} Finally, appellant argues that LVNV is not a holder in due course. However, appellant has not claimed or presented evidence on the motion for summary judgment that it has defenses against Huntington Bank that may be asserted against LVNV on claims for liability under the note that would place whether it is a holder in due course in issue in this case.

{¶ 24} In our view, the materials submitted by LVNV in support of its motion for summary judgment established the existence of a loan agreement between Huntington Bank and appellant in the nature of a running charge account, breach of the agreement by appellant in failing to pay sums due under the contract, and damages from the breach. The evidence on the motion for summary judgment also established assignment of contract to LVNV.

{¶ 25} We conclude that LVNV met its burden under Civ.R. 56 to demonstrate that there is no dispute of material fact and that, construing the evidence most favorably to appellant, reasonable minds can come to but one conclusion, that LVNV is entitled to judgment against appellant in the amount awarded by the trial court. We also find that appellant failed to meet his reciprocal burden of presenting competent evidence under

Civ.R. 56(E) setting forth specific facts showing that there is a genuine issue of fact for trial.

{¶ 26} Accordingly, we find appellant's assignment of error not well-taken.

{¶ 27} Justice having been afforded the party complaining, we affirm the judgment of the Lucas County Court of Common Pleas and order appellant to pay the costs of this appeal pursuant to App.R. 24.

Judgment affirmed.

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

Mark L. Pietrykowski, J. _____
JUDGE

Thomas J. Osowik, J. _____
JUDGE

James D. Jensen, J. _____
CONCUR.

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JUDGE