

[Cite as *Natl. Check Bur., Inc. v. Cody*, 2005-Ohio-283.]

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NATIONAL CHECK BUREAU, INC.	:	COURT OF APPEALS NO. 84208
	:	
Plaintiff-Appellee	:	LOWER COURT NO. 03CVF12787
	:	
vs.	:	MOTION NO. 368419
	:	
	:	
BARBARA L. CODY	:	
	:	
Defendant-Appellant	:	
	:	
	:	

DATE: February 2, 2005

JOURNAL ENTRY

{¶ 1} The Journal Entry and Opinion of this court in this case, released on January 27, 2005, contained a clerical error on the second page, first paragraph. In the first sentence "Cuyahoga County Court of Common Pleas" is hereby corrected to read "Cleveland Municipal Court" as follows:

{¶ 2} "Defendant-appellant Barbara L. Cody ("Cody") appeals from the decision of the Cleveland Municipal Court that granted plaintiff-appellee National Check Bureau, Inc.'s ("NCB") motion for summary judgment. For the reasons stated below, we affirm."

{¶ 3} It is hereby ordered that said Journal Entry and Opinion

of January 27, 2005 be amended nunc pro tunc to correct the error in this opinion as stated above.

{¶ 4} It is further ordered that, as so amended, said Journal Entry and Opinion of January 27, 2005 shall stand in full force and effect in all its particulars.

{¶ 5} The corrected entry is attached.

ANTHONY O. CALABRESE, JR.
JUDGE

PATRICIA ANN BLACKMON, A.J., and
DIANE KARPINSKI, J., CONCUR.

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NO. 84208

NATIONAL CHECK BUREAU, INC.	:	
	:	
Plaintiff-Appellee	:	
	:	JOURNAL ENTRY
	:	
vs.	:	and
	:	
	:	OPINION
BARBARA L. CODY	:	
	:	
Defendant-Appellant	:	

DATE OF ANNOUNCEMENT
OF DECISION:

January 27, 2005

CHARACTER OF PROCEEDING:

Civil appeal from
Cleveland Municipal Court

Case No. 03 CVF 12787

JUDGMENT:

AFFIRMED

DATE OF JOURNALIZATION:

APPEARANCES:

For Plaintiff-Appellee:

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For Defendant-Appellant:

KATHRYN HARLOW
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ANTHONY O. CALABRESE, JR., J.:

{¶ 1} Defendant-appellant Barbara L. Cody ("Cody") appeals from the decision of the Cleveland Municipal Court that granted plaintiff-appellee National Check Bureau, Inc.'s ("NCB") motion for summary judgment. For the reasons stated below, we affirm.

{¶ 2} Cody owed a balance of \$1,465.33 on a credit card issued by Providian National Bank ("Providian"). Providian then sold her account to Unifund CCR Partners ("Unifund") who sold it to NCB. On May 29, 2003, NCB filed a collection suit in the Cleveland Municipal Court and was later awarded summary judgment. Cody did not dispute that she owed on the account; rather, she argued that NCB failed to establish any right to payment under the account.

{¶ 3} Cody timely appealed and advances two assignments of error for our review.

1. I.

{¶ 4} In her first assignment of error, Cody argues that "the trial court erred in granting summary judgment when there is a dispute as to questions of fact and the evidence contradicts itself, thus not meeting the requirements of Rule 56 of the Ohio Rules of Civil Procedure." We disagree.

{¶ 5} Civ.R. 56 provides that summary judgment may be granted only after the trial court determines: 1) no genuine issues as to any material fact remain to be litigated; 2) the moving party is entitled to judgment as a matter of law; and 3) it appears from the evidence that reasonable minds can come to but one conclusion and viewing such evidence most strongly in favor of the party against whom the motion for summary judgment is made, that conclusion is adverse to that party. *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317.

{¶ 6} It is well established that the party seeking summary judgment bears the burden of demonstrating that no issues of material fact exist for trial. *Celotex Corp. v. Catrett* (1987), 477 U.S. 317, 330. The record on summary judgment must be viewed in the light most favorable to the opposing party. *Williams v. First United Church of Christ* (1974), 37 Ohio St.2d 150.

{¶ 7} In moving for summary judgment, the "moving party bears the initial responsibility of informing the trial court of the basis for the motion, and identifying those portions of the record

which demonstrate the absence of a genuine issue of fact or material element of the nonmoving party's claim." *Dresher v. Burt* (1996), 75 Ohio St.3d 280. Thereafter, the nonmoving party must set forth specific facts by the means listed in Civ.R. 56(C) showing a genuine issue for trial exists. *Id.* A motion for summary judgment forces the plaintiff to produce probative evidence on all essential elements of his case for which he has the burden of production at trial. *Celotex Corp. v. Catrett* (1987), 477 U.S. 317, 330. Plaintiff's evidence must be such that a reasonable jury might return a verdict in his favor. *Seredick v. Karnok* (1994), 99 Ohio App.3d 502. This court reviews the lower court's granting of summary judgment de novo. *Ekstrom v. Cuyahoga County Community College*, Cuyahoga App. No. 81501, 2002-Ohio-6228.

{¶ 8} Civ.R. 10(D) requires that "when any claim or defense is founded on an account or other written instrument, a copy thereof must be attached to the pleading. If not so attached, the reason for the omission must be stated in the pleading." When an assignee is attempting to collect on an account in filing a complaint, it must "allege and prove the assignment." *Zwick v. Zwick* (1956), 103 Ohio App. 83, 84.

{¶ 9} In the case sub judice, NCB submitted seven credit card statements issued by Providian to Cody, each with account number

4465-6705-0076-7629, as evidence that she owes on the account.¹ NCB also submitted a bill of sale evidencing the transfer of accounts from Providian to Unifund on November 25, 2000. Therefore, there is no question that Providian accounts were sold to Unifund. While Cody is correct that the bill of sale fails to specifically list the accounts sold to Unifund, the remaining evidence submitted by NCB clearly establishes its chain of title.

{¶ 10} The sworn and notarized "Affidavit and Assignment" by Jessica Bergholz² establishes that Unifund transferred the account of Barbara L. Cody, account number 4465-6705-0076-7629, to NCB on December 12, 2000. This account bears the same name and account number that Providian originally held. Such evidence demonstrates the absence of a genuine issue of fact or material element of Cody's claim that NCB lacks ownership of her account. Cody failed to produce an affidavit or other evidence contra NCB's position. The trial court did not err in granting summary judgment.

{¶ 11} Cody's first assignment of error is overruled.

II.

{¶ 12} In her second assignment of error, Cody argues that "the trial court erred in relying on plaintiff's affidavit which does not show personal knowledge to which the affiant can affirmatively

¹The last statement submitted was December 11, 2000.

²Bergholz is the media supervisor at Unifund.

swear or competently testify." We disagree.

{¶ 13} In her appellate brief, Cody elected not to address the affidavit filed by Bergholz; rather, she argues that the affidavit of Morgan J. Smith,³ which was attached to NCB's motion for summary judgment, was not based on personal knowledge and was not certified. Despite Cody's assumption that the trial court relied on this affidavit, the trial court's judgment entry makes no mention of it. Therefore, and irregardless of any possible deficiencies in Smith's affidavit, Bergholz's affidavit testimony that Cody's account was transferred by Unifund to NCB remains uncontested.

{¶ 14} We find that there is sufficient evidence in the record such that a reasonable juror would find in favor of NCB. The record, taken as a whole, logically leads us to the conclusion that the chain of title to Cody's account clearly ends with NCB.

{¶ 15} Cody's second assignment of error is overruled.

Judgment affirmed.

It is ordered that appellee recover of appellant its costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court

³Smith is the keeper of records at NCB.

directing the Cleveland Municipal Court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

ANTHONY O. CALABRESE, JR.
JUDGE

PATRICIA ANN BLACKMON, P.J., CONCURS;

DIANE KARPINSKI, J., DISSENTS WITH SEPARATE
DISSENTING OPINION.

N.B. This entry is an announcement of the court's decision. See App.R. 22(B), 22(D) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(E) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(E). See, also, S.Ct.Prac.R. II, Section 2(A)(1).

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NO. 84208

NATIONAL CHECK BUREAU, INC.	:	
	:	
Plaintiff-appellee	:	
	:	DISSENTING OPINION
vs.	:	
	:	
BARBARA L. CODY	:	
	:	
Defendant-appellant	:	

DATE: January 27, 2005

DIANE KARPINSKI, J., DISSENTING:

{¶ 16} I respectfully dissent because I do not believe that NCB sufficiently proved the chain of title of the debt allegedly assigned for it.

{¶ 17} The evidence before this court consists of (1) unauthenticated account statements for a credit card issued to Cody by Providian; (2) an unsigned, unauthenticated portion of a cardholder agreement; (3) an unauthenticated copy of a bill of sale of **unspecified accounts** from Providian to Unifund; (4) an affidavit from an agent of **Unifund** stating that it transferred Cody's account to NCB; and (5) an affidavit from an agent of NCB stating that NCB currently owns the account.

{¶ 18} The two affidavits, while they would be sufficient to document the chain of title from Unifund to NCB, do not provide proof of the assignment of the account from **Providian to Unifund**. Despite NCB's claim that it owns the account, therefore, NCB has failed to provide documentation to prove that Providian transferred this specific account to Unifund. A general bill of sale, without specifically indicating the item transferred, is insufficient to prove that title of the account transferred to the alleged assignee.

{¶ 19} Not only did NCB fail to establish the chain of title in its summary judgment motion, in its complaint it inaccurately describes the assignment as if it involved only Providian and NCB.

"The general rule is that an assignee of a claim must allege and prove the assignment." *Zwick & Zwick v. Suburban Construction Co.* (1956), 103 Ohio App. 83. Here, NCB makes no mention whatsoever of Unifund in its complaint. Rather, it merely states: "Providian National Bank assigned all its rights to Plaintiff in the matter herein including but not limited to those rights associated with this action." Complaint, ¶3. Unifund is never mentioned in the complaint.

{¶ 20} Thus proof of the chain of title is incomplete and the complaint is inaccurate concerning this chain. Proof that Providian assigned some unnamed accounts to Unifund is too general to establish chain of title from Providian. Although the bill of sale from Providian to Unifund references an Appendix A, which specifies the accounts sold, the record does not contain that document. The failure to prove Cody's account specifically was one of the accounts assigned to Unifund leaves a hole in the chain of title.

{¶ 21} The affidavit supporting the assertion that Unifund in turn transferred the account to NCB also does not satisfy the necessary proof for the first transfer: that is, that the account was transferred from Providian to Unifund. By analogy, if A

transfers his car to B, but fails to document this transfer, the transfer of that car by B to C does not legally vest title of the car in C, even with affidavits from B and C that the second transfer took place and that C is now in possession of the car. NCB either needed to put into the record a copy of the list of accounts which Providian transferred to Unifund, or it needed to provide an affidavit from an agent of Providian stating that Cody's account had been assigned to Unifund.

{¶ 22} I note a second problem: not all the attached documents were properly authenticated for the court to consider them in a summary judgment motion.

Civ.R. 56(C) provides an exclusive list of materials that a trial court may consider when deciding a motion for summary judgment. Those materials are affidavits, depositions, transcripts of hearings in the proceedings, written admissions, answers to interrogatories, written stipulations, and the pleadings, if timely filed. Civ.R. 56(C). Other types of documents may be introduced as evidentiary material only through incorporation by reference in a properly framed affidavit. *Martin v. Cent. Ohio Transit Auth.* (1990), 70 Ohio App.3d 83, 89, 590 N.E.2d 411. **Documents that have not been sworn, certified, or authenticated by way of affidavit "have no evidentiary value."** *Mitchell v. Ross* (1984), 14 Ohio App.3d 75, 14 Ohio B. 87, 470 N.E.2d 245. (Emphasis added.)

{¶ 23} *Moreland v. Ksiazek*, Cuyahoga App. No. 83509, 2004-Ohio-2974, ¶25.

{¶ 24} Even though the bill of sale was signed by a vice president of Providian, his signature was not notarized.

[W]here supporting documentary evidence falls outside this rule, the correct method for introducing such evidence is to incorporate it by reference into a properly framed affidavit.*** Documents not properly incorporated are not to be considered by the trial court in deciding a motion for summary judgment.

{¶ 25} *Blanton v. Cuyahoga County Bd. of Elections* (2002), 150 Ohio App.3d 61, ¶13, internal citations omitted. No affidavit was presented to authenticate the bill of sale or the credit card statements. If we follow the Eighth District decisions in *Blanton* or *Moreland*, which was decided more recently, we should rule that the trial court could not consider either the credit card statements or the bill of sale as a basis for summary judgment. Thus there is a second reason to conclude that NCB did not provide sufficient evidence to support its right as assignee to this account.¹

¹I am aware that some courts have required an objection at the trial level. The Ninth Appellate District has stated:

“***[I]f the opposing party fails to object to improperly introduced evidentiary materials, the trial court may, in its sound discretion, consider those materials in ruling on the summary judgment motion.” *Lance Acceptance Corp. v. Claudio*, Lorain App. No. 02CA008201, 2003-Ohio-3503, ¶17, quoting *Christe v. G.M.S. Mgt. Co., Inc.* (1997), 124 Ohio App.3d 84, 90, reversed on other grounds (2000), 88 Ohio St.3d 376.

In her opposition to the motion for summary judgment, Cody objected, first, to the lack of proof that NCB was the owner of the account when she pointed to the failure of the bill of sale to reference her account and, second, to the affidavit from NCB’s manager

{¶ 26} Nonetheless, even accepting the unauthenticated documents, I find that NCB failed to prove sufficient chain of title to satisfy the burden required for summary judgment. Without the document showing the specific assignment of Cody's account from Providian to Unifund, the chain of title does not lead to NCB. The trial court erred, therefore, in granting summary judgment. Because of the failure to establish the chain of title, I would reverse the trial court's judgment.

stating that NCB had bought the account from Citibank. Cody did not, however, specifically object to NCB's failure to authenticate these documents.

First, I note that Civ.R. 56(C) does not specify that an objection must be made. Moreover, I am not certain that much purpose is served by multiple objections to the same document, especially here where the fundamental problem is the gap in the chain, even if we ignore the lack of authentication.