

[Cite as *Capital One Bank (USA) v. Rhoades*, 2010-Ohio-5127.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93968

CAPITAL ONE BANK (USA), N.A.

PLAINTIFF-APPELLEE

vs.

MAURICE RHOADES

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-670699

BEFORE: Jones, J., Rocco, P.J., and Stewart, J.

RELEASED AND JOURNALIZED: October 21, 2010

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LARRY A. JONES, J.:

Defendant-appellant, Maurice Rhoades ("Rhoades"), appeals the trial court's granting of judgment in favor of plaintiff-appellee, Capital One Bank ("Capital One"), in the amount of \$1,625.00 for his default on payment of a Capital One credit card. Having reviewed the arguments of the parties and the pertinent law, we hereby affirm the trial court.

STATEMENT OF THE CASE

On September 16, 2008, Capital One filed its complaint to collect a deficiency credit card balance from Rhoades. On October 2, 2008, Rhoades filed a motion for extension of time to file an answer, and the motion was granted. Rhoades filed a second motion for extension of time to file an answer on October 23, 2008. The trial court again granted Rhoades's motion for an extension of

time and gave Rhoades until November 30, 2008 to file his answer. On November 21, 2008, Rhoades filed a motion for leave to file instant his motion for extension of time to answer plaintiff's discovery. The motion was granted in part and denied in part.

Rhoades then filed a motion for extension of time to file answer and counterclaim on November 25, 2008. The trial court denied this motion on December 12, 2008 after receiving, on December 1, 2008, plaintiff's brief in opposition to defendant's motion. The trial court ordered Rhoades to file an answer complying with the Ohio Civil Rules of Procedure by December 22, 2008. Rhoades was also ordered to respond to plaintiff's discovery requests by December 22, 2008.

Rhoades filed an answer and counterclaim on December 11, 2008. In his answer, Rhoades asserted a general denial. He claimed in his counterclaim that Capital One violated R.C. 1345.02, 1345.03, and 1345.09, as well as the Fair Debt Collection Practices Act ("FDCPA"). Further, Rhoades failed to respond to the first three requests for admissions and therefore, pursuant to Civ.R 36, he admitted to applying for, receiving, and using the Capital One credit card.

The trial court held a pretrial conference on December 23, 2008, and Rhoades failed to appear. The court dismissed Rhoades's counterclaims for failure to appear. The trial court set the matter for a bench trial on February 19, 2009, and deemed it to be an ex parte proceeding whereby Capital One was permitted to produce evidence, but Rhoades, pursuant to *Natl. Check Bur., Inc. v.*

Preibe, Cuyahoga App. No. 86350, 2005-Ohio-5564,¹ was not permitted to produce evidence to rebut Capital One's claims.

Capital One filed a motion to compel discovery, motion for leave to file motion for summary judgment, and motion for summary judgment on December 26, 2008. The lower court granted Capital One's motion to compel, denied the motion for leave to file motion for summary judgment, and deemed the motion for summary judgment moot. Rhoades was ordered by the court to respond to Capital One's discovery by February 12, 2009. Rhoades then filed a notice of appeal on January 20, 2009. As a result of Rhoades's pending appeal, Capital One filed a motion to continue the February 19, 2009 bench trial. The motion was granted on January 27, 2009. On January 28, 2009, Rhoades filed a motion for relief from judgment that was denied on February 17, 2009. Rhoades also filed an objection to plaintiff's discovery requests and a motion to strike all of plaintiff's discovery requests on February 6, 2009.

Rhoades's appeal was dismissed on February 6, 2009 pursuant to Civ.R. 54(B). On February 17, 2009, the trial court ordered Rhoades to respond to all of Capital One's discovery requests by March 2, 2009, and set a compliance hearing

¹In *National*, the plaintiff brought a civil action against the defendant and the defendant filed an answer. After the defendant failed to appear at two consecutive case management conferences, the court of common pleas entered default judgment for plaintiff, and denied defendant's motion for relief from default judgment. The defendant appealed and this court held that the appeal was timely; the trial court should have required plaintiff to proceed ex parte in defendant's absence; and the trial court's error warranted the granting of relief from judgment.

for March 6, 2009 to determine if Rhoades complied with the court's order. The trial court held a pretrial conference on March 6, 2009; Rhoades appeared, and did not dispute liability on the account, but disputed the damages. The trial court set a dispositive motion deadline for March 20, 2009.

On March 11, 2009, Capital One filed a motion to deem unanswered admissions admitted. The trial court granted Capital One's motion and deemed the unanswered admissions admitted on April 10, 2009. The court vacated its January 12, 2009 order that mooted Capital One's motion for summary judgment and reconsidered the motion. Rhoades filed a motion for leave to file motion for summary judgment on April 1, 2009. The court denied Rhoades's motion for leave for being past the dispositive motion deadline and for not requesting same on a timely basis.

On May 14, 2009, the trial court denied both parties' motions for summary judgment and referred the case to arbitration. On May 28, 2009, Rhoades filed a motion with the Ohio Supreme Court to disqualify the trial court judge. The motion to disqualify was denied on June 8, 2009. An arbitration hearing was held on August 26, 2009. Capital One presented evidence and was granted judgment against Rhoades in the sum of \$1,625.00 plus statutory interest from the date of judgment. Costs were also assessed to Rhoades. Rhoades now appeals.

STATEMENT OF THE FACTS

Rhoades opened an account with Capital One for the purpose of obtaining an extension of credit. Capital One issued a Capital One credit card to Rhoades.

Rhoades used the card to purchase goods and services, transfer balances and/or obtain cash advances. Capital One issued monthly statements to Rhoades. The monthly statements showed Rhoades's use of the card as well as any credits due to him.

Rhoades did not dispute the charges at the time he received the statements. His last payment in the amount of \$22.00 against the balance on the account forms the basis of Capital One's complaint. After making that payment, Rhoades failed and refused to make any additional payments. Capital One made numerous demands upon Rhoades to make payment on the past due account. However, Rhoades refused to respond or cooperate in any way with respect to satisfaction of the debt.

ASSIGNMENTS OF ERROR

Rhoades assigns three assignment of error on appeal:

"1. The trial court erred by deciding that the following federal statutes of the Consumer Credit Protection Act, §807 et seq., as amended, 15 U.S.C.A. §1692 et seq., or the Fair Debt Collection Practices Act, specifically, 15 U.S.C.A. §1692(a), 15 U.S.C.A. §1692g(a)(3), 15 U.S.C.A. §1692e(11), and finally 15 U.S.C.A. §1692k(a), did not constitutionally apply to this defendant or this case.

"2. The trial court erred by finding that the submitted evidence that appellant gave to the CVS pharmacy drug store to purchase a money order for \$22.00 did not constitutionally apply to this defendant. Contrary to Ohio Rules of Evidence 801(A), 801(B), 803(1), 803(6), 901(A), 1001, 1003, 1004 and 1004(2).

“3. The trial court erred in violation of the Ohio Rules of Evidence 801(A), 801(B), 803(1), 803(6), 901(A), 1001, 1003, 1004 and 1004(2) as they relate to appellant's submitted exhibit-A evidence and appellant's CVS Pharmacy drug store money order, No. 5617308576, dated, 6/4/2007 for \$22.00.”

LEGAL ANALYSIS

Due to the substantial interrelation and repetitious arguments in Rhoades's three assignments of error we shall address them together. Rhoades argues that the trial court erred regarding 1) summary judgment, 2) dismissal of his counterclaim, and 3) reviewing the evidence. We find no merit in his claims.

Rhoades spends a great deal of time alleging and arguing that debt collector, Thomas & Thomas, used false and misleading representations in connection with collecting on this debt. However, Thomas & Thomas is not the plaintiff in this action. Moreover, Capital One is the original creditor, and as such, is not a “debt collector” as defined by the Fair Debt Collections Practices Act, 15 U.S.C.A. 1692. Accordingly, Capital One cannot be in violation of the FDCPA.

In addition, Rhoades argues that his motion for summary judgment should have been granted against Capital One. However, review of the evidence in the case at bar demonstrates that Rhoades failed to satisfy the debt. Moreover, review of the evidence further demonstrates that contrary to Rhoades's assertions, the trial court's actions were proper.

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. *Norris v. Ohio Std. Oil Co.* (1982), 70 Ohio St.2d 1, 433 N.E.2d 615; *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 364 N.E.2d 267.

In *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 662 N.E.2d 264, the Ohio Supreme Court modified and/or clarified the summary judgment standard as applied in *Wing v. Anchor Media, Ltd. of Texas* (1991), 59 Ohio St.3d 108, 570 N.E.2d 1095. Under *Dresher*, “ * * * 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.” *Id.* at 296, 662 N.E.2d 264. The nonmoving party has a reciprocal burden of specificity and cannot rest on mere allegations or denials in the pleadings. *Id.* at 293, 662 N.E.2d 264. 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.*

This court reviews the lower court’s granting of summary judgment de novo. *Brown v. Scioto Bd. of Commrs.* (1993), 87 Ohio App.3d 704, 622 N.E.2d 1153. An appellate court reviewing the grant of summary judgment must follow the standards set forth in Civ.R. 56(C). “The reviewing court evaluates the record * * * in a light most favorable to the nonmoving party * * *.”

In the case at bar, Rhoades submitted a \$22.00 money order in an attempt to demonstrate that he did not breach the agreement between the parties. The money order was dated June 4, 2007. This was more than an entire year before Capital One charged off Rhoades's account for failure to provide payment on the debt. It was Rhoades's responsibility to ensure that payment is received by Capital One in a timely fashion. It is not Capital One's responsibility to contact Rhoades and find out why he has not provided payment. The record demonstrates that no payments were made on the account for 6 months before Capital One turned the account over to Thomas & Thomas for collection.

Moreover, even if Rhoades had submitted the \$22.00 payment to Capital One, Capital One received it, and then applied it to Rhoades's account, Rhoades still owed a balance of \$1,195.78 as of December 28, 2007. The single \$22.00 payment Rhoades consistently mentions fails to demonstrate that Rhoades did not breach the parties' agreement. It is only a single payment and does not demonstrate satisfaction of Rhoades's duties under the agreement. Rhoades failed to provide any other evidence that he made any payments on the account after the \$22.00 money order payment on June 4, 2007.

Moreover, review of the evidence in the case at bar fails to demonstrate any error on the part of the lower court in regard to its application of the Ohio Rules of Evidence. Rhoades's mere assertions are not supported by the evidence, nor do they have any merit.

We find that the lower court did not err in dismissing Rhoades's

counterclaim. In addition, we find no error on the part of the lower court regarding its ruling on Rhoades's summary judgment. Finally, we find no error on the part of the trial court concerning the Ohio Rules of Evidence.

Accordingly, we find the trial court's decision to be proper and further find Rhoades's first, second, and third assignments of error to be without merit. Rhoades's three assignments of error are 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 directing the Cuyahoga County Court of Common Pleas 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.

LARRY A. JONES, JUDGE

KENNETH A. ROCCO, P.J., and
MELODY J. STEWART, J., CONCUR