[Cite as *Matrix Acquisitions, L.L.C. v. Swope,* 2011-Ohio-111.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94943

MATRIX ACQUISITIONS, LLC

PLAINTIFF-APPELLEE

vs.

MATTHEW SWOPE

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-680220

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

RELEASED AND JOURNALIZED: January 13, 2011

ATTORNEYS FOR APPELLANT

Anand N. Misra
The Misra Law Firm LLC
3659 Green Road, Suite 100
Beachwood, Ohio 44122

Robert S. Belovich
9100 South Hills Blvd.
Suite 300
Broadview Heights, Ohio 44147

ATTORNEYS FOR APPELLEE

Parri J. Hockenberry
Jackson T. Moyer
Cheek Law Offices, LCC
471 E. Broad St.
12th Floor
Columbus, Ohio 43215

Jeffrey C. Turner
Surdyk, Dowd & Turner, Co., LPA
One Prestige Place
Suite 700
Miamisburg, Ohio 45342

COLLEEN CONWAY COONEY, J.:

{¶ 1} Defendant-appellant Matthew Swope ("Swope") appeals the trial court's granting summary judgment in favor of plaintiff-appellee Matrix Acquisitions, LLC ("Matrix"). We find no merit to the appeal and affirm.

{¶ 2} In December 2008, Matrix filed a complaint to recover the outstanding balance Swope owed on a credit card issued by Chase Bank USA N.A. ("Chase"). Chase had issued the credit card to Swope in November 2005 and Swope defaulted on his payments shortly thereafter. When Chase "charged-off" his account on November 30, 2006, Chase's records indicated he had an unpaid balance of $853.35 plus interest.

{¶ 3} In its complaint, Matrix alleged that Swope owed the sum of $853.35, plus accrued interest of $433.71, for a total amount of $1,287.06, plus future interest at a rate of 25%. Swope answered and filed a counterclaim alleging violations of the Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C. 1692, et seq. and the Ohio Consumer Sales Practices Act ("OCSPA"), R.C. 1345.01 et seq. Swope alleged that Matrix "impermissibly demanded future interest at 25%" and that Matrix "has falsely stated the amounts due."

{¶ 4} Prior to trial, Matrix filed two motions for summary judgment. One motion sought summary judgment on Swope's liability to Matrix on its complaint for money damages. The other sought a judgment finding that Matrix did not violate the FDCPA and/or the OCSPA and that Matrix was not liable on Swope's counterclaims. The trial court granted summary judgment in favor of Matrix on Swope's counterclaims and granted partial summary judgment in favor of Matrix on Swope's liability to Matrix on Swope's debt. In partially granting the motion, the court stated in its judgment entry:

> "Plaintiff Matrix Acquisitions LLC's motion for summary judgment is granted in part. Judgment is hereby entered in favor of the plaintiff and against the defendant Matthew J. Swope in the total amount of $853.35, interest beginning November 30, 2006, and court costs. However, there is a genuine issue of material fact about the appropriate interest rate, so trial will proceed as scheduled to determine the interest rate only."

{¶ 5} On the day of trial, the court held a hearing on the record, at which counsel for Matrix advised the court:

> "Today, your Honor, my client has decided to go ahead and ask for the statutory interest rate pursuant to [R.C.] 1343.03, and I believe the current rate as of today is four percent. We have decided to not go forward with the expense of trial in this matter."

{¶ 6} The following dialogue subsequently took place:

> "THE COURT: * * * Can you articulate any reason under the facts in this case why they would be entitled to no interest whatsoever?"
>
> "MR. BELOVICH [Swope's counsel]: I don't think this Court has the power to issue a judgment on an amount that this court has found liquidated and not award interest.
>
> "THE COURT: All right. Well, what I'm going to do then is, based upon your representation that you're, more or less, abandoning the claim for any other rate of interest, is the rate will be the statutory rate. And it seems to me then that there's nothing left to try. Agree or disagree, Ms. Hockenberry?
>
> "MS. HOCKENBERRY: I agree, your Honor.
>
> "THE COURT: Agree or disagree, Mr. Belovich?
>
> "MR. BELOVICH: Your Honor, in view of the plaintiff's admission, there's nothing left to try.
>
> "THE COURT: All right. Is there something else we should be putting on the record, as long as we're gathered here this morning, as far as the plaintiff is concerned?

"MS. HOCKENBERRY: Nothing for the plaintiff, Your Honor.

"THE COURT: And the defendant?

"MR. BELOVICH: Nothing, Your Honor."

{¶ 7} The court subsequently ordered interest on the previously entered judgment of $853.35 in favor of Matrix to be calculated "at the statutory rate." Swope now appeals, raising two assignments of error.

Conflicting Summary Judgments

{¶ 8} In the first assignment of error, Swope argues the trial court erred in granting summary judgment to Matrix on Swope's interest rate-based counterclaim while simultaneously determining that material issues of fact existed as to the interest rate applicable to Matrix's claims. Swope contends that because these rulings contradict each other, the trial court committed reversible error. Swope also argues the court erred in granting Matrix's motion for summary judgment because it was not supported by admissible evidence as required by Civ.R. 56(C). We disagree.

{¶ 9} An appellate court reviews a trial court's decision on a motion for summary judgment de novo. *Grafton v. Ohio Edison Co.* (1996), 77 Ohio St.3d 102, 105, 671 N.E.2d 241. Summary judgment is appropriate when, construing the evidence most strongly in favor of the nonmoving party, (1) there is no genuine issue of material fact; (2) the moving party is entitled to judgment as a

matter of law; and (3) reasonable minds can come to but one conclusion, that conclusion being adverse to the nonmoving party. *Zivich v. Mentor Soccer Club, Inc.* (1998), 82 Ohio St.3d 367, 369-370, 696 N.E.2d 201, citing *Horton v. Harwick Chem. Corp.* (1995), 73 Ohio St.3d 679, 653 N.E.2d 1196, paragraph three of the syllabus.

{¶ 10} Civ.R. 56(C) requires the moving party produce certain types of evidence in support of summary judgment. That evidence may include depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence in the pending case, and written stipulations of fact. With regard to affidavits, Civ.R. 56(E) provides:

> "Supporting and opposing 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 therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions or by further affidavits. * * * "

{¶ 11} With this standard in mind, we now turn to Swope's argument that Matrix failed to provide sufficient evidence to support summary judgment in its favor. Swope claims Matrix submitted only two affidavits and that both affidavits failed to identify the affiant, contained no assertion that the affiant was testifying on "personal knowledge," and failed to establish a chain of title from Chase to Matrix. Swope also claims the affidavits contained inadmissible hearsay.

{¶ 12} Swope references the affidavits of Jana A. Meyer, an authorized representative of Dodeka, L.L.C. and Gabriel Cheek, Matrix's custodian of records. The record also contains affidavits from Michelle Edmonds ("Edmonds") on behalf of Chase, and Elaine North ("North") on behalf of Matrix. Each of these witnesses stated that their affidavits were based on personal knowledge. Together, they establish a chain of ownership originating with Chase, which assigned Swope's obligation to Dodeka L.L.C., which in turn assigned it to Matrix. Although the identities of the affiants are not listed at the top of the affidavits, the names of each witness can be found on the signature line at the end of each document.

{¶ 13} Swope contends the affiants' reference to "reviewed" documents constitutes inadmissible hearsay. The only documents reviewed for purposes of these affidavits were business records pertaining to Swope's credit card agreement with Chase. This court has recently held that these documents are excepted from the hearsay rule under Evid.R. 803(6). *RBS Citizens, N.A. v. Zigdon*, Cuyahoga App. No. 93945, 2010-Ohio-3511, ¶12-16.

{¶ 14} In *Zigdon*, RBS, a successor mortgagee, filed suit against Benjamin Zigdon, seeking to collect a balance due on a line of credit the predecessor bank had extended to him. RBS filed a motion for summary judgment, which was supported by an affidavit from one of its representatives. Zigdon moved to strike the affidavit, claiming it contained inadmissible hearsay and was not based on

personal knowledge. The trial court denied the motion to strike and granted summary judgment in favor of RBS.

{¶ 15} On appeal, Zigdon argued the trial court erroneously relied on hearsay contained in the affidavit in which the RBS representative testified as to documents she reviewed relating to Zigdon's line-of-credit account. This court held that the affidavit was admissible under the business records exception to the hearsay rule because the documents were business records created by the initial lender and the successor institution taking over the lender's accounts, and, as part of representative's job duties, she was the custodian of the documents pertaining to Zigdon's line of credit, such that she had personal knowledge of the documents. Id. at ¶12-16.

{¶ 16} The affidavits at issue here meet all the requirements set forth in *Zigdon*. Each witness testified that she had personal knowledge of Swope's account records because they were generated in the regular course of business at Chase, Dodeka, or Matrix, and each witness was a custodian of those records at one of these institutions. Therefore, because the affidavits demonstrate that each of these witnesses had personal knowledge of the records in their custody and control as custodians of records, their statements are excepted from the hearsay rule under Evid.R. 803(6) and were admissible in support of summary judgment under Civ.R. 56(E).

{¶ 17} We now turn to Swope's claim that the trial court's rulings on the two summary judgments are contradictory. Initially, we note that Swope does not provide any argument supported by legal authority to challenge the propriety of the 25% interest.[1] Rather, Swope baldly asserts the 25% interest rate is unlawful. Thus, the propriety of the alleged 25% interest rate is not an issue in this appeal.

{¶ 18} Swope's interest rate-based counterclaim was based on Swope's allegation that Matrix "impermissibly demanded 'future interest at 25%.'" The court did not find that Matrix was entitled to 25% interest, but rather determined there was a genuine issue of material fact as to the interest rate. The court's ruling suggests the interest rate could be less than 25%, or that 25% might be a permissible interest rate. Even if a 25% interest rate is "impermissible," as Swope claims, the court's ruling does not conflict with its finding that Matrix did not violate the FDCPA or the OCSPA because the court was to determine the proper interest rate at trial.

{¶ 19} Moreover, the summary judgment on Swope's counterclaim was interlocutory since it was not a final judgment as to all claims. At the hearing on

---

[1] Pursuant to App.R. 16(A)(7), the appellant must present his contentions with respect to each assignment of error presented for review and the reasons in support of the contentions, with citations to the authorities, statutes, and parts of the record upon which he relies. Absent citations to legal authorities and applicable parts of the record, unsubstantiated assertions cannot be considered on appeal. *Keating v. Keating*, Cuyahoga App. No. 90611, 2008-Ohio-5345.

the day of trial, Swope's counsel conceded that Matrix was entitled to some interest on the liquidated amount and did not object to Matrix's proposal to apply the statutory interest rate of 4%. As such, any claim for damages arising from an alleged usurious interest rate, ceased to exist when Matrix accepted the statutory rate. Therefore, even if the court's granting of summary judgment in favor of Matrix on Swope's counterclaim was erroneous, such issue is now moot.

{¶ 20} Accordingly, the first assignment of error is overruled.

Interest and Charge-Off

{¶ 21} In the second assignment of error, Swope argues the trial court erred in granting summary judgment to Matrix in the amount of $853.35 because this amount included interest, which the court determined was an issue of material fact. Swope claims that "[b]ecause the court conclusively determined that Matrix was only entitled to the statutory interest rate, the court was obligated to examine Matrix's claim to ensure that the judgment was rendered only for interest corresponding to the determined interest rate."

{¶ 22} The court's order granted judgment in favor of Matrix in the amount of $853.35 and stated that the only issue for trial would be the interest rate "beginning November 30, 2006." The court's ruling did not find genuine issues of material fact as to the late fees and penalties that had accrued prior to November 30, 2006, but only as to the interest rate to be applied after the charge-off date of November 30, 2006. Thus, Swope is mistaken in asserting that the statutory

4% interest rate applies to the charge-off amount, which accrued prior to November 30, 2006.

{¶ 23} In its complaint, Matrix alleges that it "is owed the charged off sum of $853.35." Swope claims the trial court was "misled" into concluding that this amount did not include interest "when it fact it did." In support of its claims, Matrix submitted verified copies of credit card statements attached to affidavits in support of summary judgment as required by Civ.R. 56(E). These statements begin with a zero balance and show all the transactions through the charge-off date in November 2006, including charges, credits, payments, late fees, overlimit fees, and finance charges. Thus, the record contains the entire account history, without any omissions, and shows how the balance went from zero to $853.35. With this information, the trial court could not have been misled as to how Matrix reached the $853.35 figure.

{¶ 24} Furthermore, the record also contains a verified copy of Swope's credit card agreement that delineates when and how fees and finance charges were applied to his account. Swope offers no evidence or legal authority to dispute Matrix's claimed charge-off amount. Accordingly, we find the trial court properly entered judgment in favor of Matrix in the amount of $853.35.

{¶ 25} The second assignment of error is overruled.

Judgment affirmed.

It is ordered that appellee recover of appellant 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 common pleas 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.

_____

COLLEEN CONWAY COONEY, JUDGE

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