

STATE OF OHIO)
)ss:
COUNTY OF SUMMIT)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

TARGET NATIONAL BANK

C. A. No. 25268

Appellee

v.

ROSEMARY P. ENOS

Appellant

APPEAL FROM JUDGMENT
ENTERED IN THE
STOW MUNICIPAL COURT
COUNTY OF SUMMIT, OHIO
CASE No. 2009 CVF 1625

DECISION AND JOURNAL ENTRY

Dated: December 22, 2010

WHITMORE, Judge.

{¶1} Defendant-Appellant, Rosemary Enos, appeals from the judgment of the Stow Municipal Court, awarding \$11,112.80, plus interest, in favor of Plaintiff-Appellant, Target National Bank (“Target Bank”). This Court reverses.

I

{¶2} On May 1, 2009, Target Bank filed suit against Enos because she defaulted on her Target Visa credit card and her delinquent account had an outstanding balance of over \$11,000. Enos filed an answer in which she admitted that she applied for a Target credit card, but denied the remainder of Target Bank’s allegations. Subsequently, Target Bank filed a motion for summary judgment, and Enos filed a memorandum in opposition. A magistrate held a hearing on Target Bank’s motion. On December 22, 2009, the magistrate issued a decision, recommending summary judgment in Target Bank’s favor. Enos filed objections to the magistrate’s decision on January 4, 2010. The court set the matter for a hearing on the

objections on February 2, 2010. On February 4, 2010, the court overruled Enos' objections and entered judgment in Target Bank's favor.

{¶3} Enos now appeals from the trial court's judgment and raises one assignment of error for our review.

II

Assignment of Error

"THE TRIAL COURT IMPROPERLY GRANTED TARGET'S MOTION FOR SUMMARY JUDGMENT."

{¶4} In her sole assignment of error, Enos argues that the trial court erred by awarding summary judgment in favor of Target Bank. Specifically, she argues that Target Bank failed to support its motion with a properly-framed affidavit, incorporating the items it relied upon as business records. We agree.

{¶5} This Court reviews an award of summary judgment de novo. *Grafton v. Ohio Edison Co.* (1996), 77 Ohio St.3d 102, 105. See, also, *Tabatabai v. Tabatabai*, 9th Dist. No. 08CA0049-M, 2009-Ohio-3139, at ¶18 (providing that, in considering a trial court's action with respect to a magistrate's decision, this Court looks "to the nature of the underlying matter"). We apply the same standard as the trial court, viewing the facts of the case in the light most favorable to the non-moving party and resolving any doubt in favor of the non-moving party. *Viock v. Stowe-Woodward Co.* (1983), 13 Ohio App.3d 7, 12.

{¶6} Pursuant to Civ.R. 56(C), summary judgment is proper if:

"(1) No genuine issue as to any material fact remains 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, 327.

The party moving for summary judgment bears the initial burden of informing the trial court of the basis for the motion and pointing to parts of the record that show the absence of a genuine issue of material fact. *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 292-93. Specifically, the moving party must support the motion by pointing to some evidence in the record of the type listed in Civ.R. 56(C). *Id.* Once this burden is satisfied, the non-moving party bears the burden of offering specific facts to show a genuine issue for trial. *Id.* at 293. The non-moving party may not rest upon the mere allegations and denials in the pleadings but instead must point to or submit some evidentiary material that demonstrates a genuine dispute over a material fact. *Henkle v. Henkle* (1991), 75 Ohio App.3d 732, 735.

{¶7} Target Bank attached the following items to its motion for summary judgment: (1) a copy of a Target Visa credit card agreement; (2) copies of two years' worth of statements for a Target Visa credit card account in Enos' name; and (3) an affidavit from Adam Grim, incorporating the aforementioned copies and specifying the amount due and owing from Enos. Enos challenged Grim's affidavit and argued that, because the affidavit was defective, Target Bank failed to present any Civ.R. 56(C) evidence in support of its motion. In particular, Enos argued that Grim's affidavit was not based on personal knowledge and was insufficient to create a foundation for the introduction of Target Bank's exhibits. Because Target Bank bore the initial burden in this instance as the moving party, we first consider the evidence it presented in support of its motion. *Dresher*, 75 Ohio St.3d at 292-93.

{¶8} The copies that Target Bank filed in support of its motion fell outside the scope of Civ.R. 56(C) and had to be incorporated by reference through a properly-framed affidavit. See Civ.R. 56(C) (limiting summary judgment evidence to "pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of

fact”); *Skidmore & Assoc. Co. v. Southerland* (1993), 89 Ohio App.3d 177, 179 (“The proper procedure for introducing evidentiary matter not specifically authorized by Civ.R. 56(C) is to incorporate it by reference in a properly framed affidavit pursuant to Civ.R. 56(E).”). Because Enos objected to Target Bank’s materials on the basis that they were not proper Civ.R. 56(C) evidence, the trial court did not have the discretion to consider them in the absence of a proper affidavit. Compare *Wolford v. Sanchez*, 9th Dist. No. 05CA008674, 2005-Ohio-6992, at ¶20, quoting *Christe v. GMS Mgt. Co., Inc.* (1997), 124 Ohio App.3d 84, 90 (“[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.”). Thus, Target Bank’s affidavit was crucial to the success of its motion. Unless the affidavit was proper, the trial court erred by awarding Target Bank summary judgment. See *U.S. Bank, N.A. v. Richards*, 9th Dist. No. 25052, 2010-Ohio-3981, at ¶17-20 (reversing summary judgment award where defendant objected to plaintiff’s bank affidavit, affidavit was insufficient to incorporate exhibits by reference, and none of the bank’s appended exhibits were Civ.R. 56(C) evidence).

{¶9} The affidavit Target Bank submitted in support of its motion reads as follows:

“Now comes Adam Grim, who first being duly sworn, according to law, deposes and states as follows:

“1. Affiant states that (s)he has the custody and control of the records herein and makes the within Affidavit based upon his/her review of said records maintained in the ordinary course of business.

“2. Affiant further states that the within Affidavit is being made in support of the Motion for Summary Judgment being filed by the Plaintiff against the Defendant, Rosemary P. Enos, in the case captioned, “Target National Bank vs. Rosemary P. Enos.”

“3. Affiant further states that there is due from the Defendant, Rosemary P. Enos, in this matter, the principal sum of \$11,112.80 plus accrued interest at 18.9 percent and court costs.

“4. Affiant further states that the Defendant, Rosemary P. Enos, has defaulted under the terms and conditions of the Charge Account by failing to make the required payments as they became due and owing.

“5. Affiant further states that (s)he has read the Brief in Support of the Plaintiff’s Motion for Summary Judgment and states to the best of his/her knowledge that the facts contained herein are accurate.

“6. Affiant further states that (s)he has review (sic) all Exhibits attached to the Plaintiff’s Brief in Support of its Motion for Summary Judgment and states to the best of his/her knowledge and belief that those Exhibits are true and accurate copies of the purported documents.”

The notary who signed and sealed the affidavit did so on September 30, 2009.

{¶10} “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 in the affidavit.” Civ.R. 56(E). “‘Personal knowledge’ has been defined as ‘knowledge of factual truth which does not depend on outside information or hearsay.’” *Countrywide Home Loans, Inc. v. Rodriguez*, 9th Dist. Nos. 03CA008345 & 03CA008417, 2004-Ohio-4723, at ¶10, quoting *Wall v. Firelands Radiology, Inc.* (1995), 106 Ohio App.3d 313, 334. “[The] mere assertion of personal knowledge satisfies the personal knowledge requirement of Civ.R. 56(E) if the nature of the facts in the affidavit combined with the identity of the affiant creates a reasonable inference that the affiant has personal knowledge of the facts in the affidavit.” *Bank One, N.A. v. Lytle*, 9th Dist. No. 04CA008463, 2004-Ohio-6547, at ¶13. “If particular averments contained in an affidavit suggest that it is unlikely that the affiant has personal knowledge of those facts, [however,] then *** something more than a conclusory averment that the affiant has knowledge of the facts would be required.” *Bank One, N.A. v. Swartz*, 9th Dist. No. 03CA008308, 2004-Ohio-1986, at ¶14, quoting *Merchants Natl. Bank v. Leslie* (Jan. 21, 1994), 2d Dist. No 3072, at *2.

{¶11} In *Huntington Natl. Bank v. Legard*, 9th Dist. No. 03CA008285, 2004-Ohio-323, this Court concluded that a trial court erred by awarding summary judgment to a plaintiff bank based, in part, upon an affidavit with language virtually identical to the one upon which Target Bank relied here. *Legard* at ¶9-12. Much like the affidavit in *Legard*, Target Bank’s affidavit “does not identify how many documents are attached, nor does it specifically identify any documents by exhibit letter or number.” *Id.* at ¶9. See, also, *DaimlerChrysler Servs. N. Am. v. Lennington*, 9th Dist. No. 05CA0055, 2006-Ohio-1546, at ¶16. The affiant, Adam Grim, also does not identify his position or title at Target Bank or assert that he has personal knowledge of any of the matters contained in the affidavit. It would appear from a review of the affidavit that Grim gained any knowledge he had in this matter solely from reviewing the summary judgment motion itself. In fact, Grim apparently did not even review the entire, finished motion, as his sworn affidavit pre-dated at least two of the monthly account statements that Target Bank attached as evidence. It is wholly unclear from the facts in the affidavit whether Grim had independent, personal knowledge of any of Target Bank’s business practices and records, much less of any account that Enos might have with Target Bank. As such, this Court cannot even infer that Grim had personal knowledge of the matters set forth in his affidavit. See *Lytle* at ¶13 (permitting inference of personal knowledge based on the combination of the facts in the affidavit and the identity of the affiant). Instead, we must conclude that the affidavit was improper summary judgment evidence. See Civ.R. 56(E). Compare *Rodriguez* at ¶16 (affidavit based on personal knowledge where it contained affiant’s position, assertion that she personally supervised defendant’s account, and specific reference to the amount due and owing, promissory note, and mortgage deed); *Charter One Mortg. Corp. v. Keselica*, 9th Dist. No. 04CA008426, 2004-Ohio-4333, at ¶14-15 (upholding two affidavits containing assertions of personal

knowledge, references to the specific documents in the complaint, and specific information regarding the positions of the affiants and the plaintiff bank's regularly-conducted business activities); *Swartz* at ¶16 (affidavit based on personal knowledge where it contained affiant's position, assertion that he immediately supervised the loan file, and specific reference to the amount due and owing and items attached to the complaint).

{¶12} Because the affidavit that Target Bank introduced did not comply with Civ.R. 56, the other materials attached to Target Bank's motion also were improper Civ.R. 56 evidence, as they had to be incorporated by reference through the affidavit. See Civ.R. 56(C); *Skidmore & Assoc. Co.*, 89 Ohio App.3d at 179. Further, because Enos objected to the foregoing materials on the basis that they were improper Civ.R. 56 evidence, the trial court did not have the discretion to consider them. See *Richards* at ¶17-20. Target Bank did not supply the trial court with any proper Civ.R. 56 evidence in support of its motion for summary judgment. Accordingly, Target Bank did not satisfy its initial *Dresher* burden, and the trial court erred by overruling Enos' objections to the magistrate's decision and awarding Target Bank summary judgment. Enos' sole assignment of error is sustained.

III

{¶13} Enos' sole assignment of error is sustained. The judgment of the Stow Municipal Court is reversed, and the matter is remanded for further proceedings consistent with the foregoing opinion.

Judgment reversed,
and cause remanded.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Stow Municipal Court, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellee.

BETH WHITMORE
FOR THE COURT

CARR, J.
BELFANCE, P. J.
CONCUR

APPEARANCES:

NATHANIEL HAWTHORNE, Attorney at Law, for Appellant.

ROSEMARY TAFT MILBY, and MATTHEW G. BURG, Attorneys at Law, for Appellee.