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NO. COA11-711
NORTH CAROLINA COURT OF APPEALS

Filed: 21 February 2012

FIA CARD SERVICES, N.A., F/K/A
MBNA AMERICA BANK, N.A.,
Plaintiff

v.

Gaston County
No. 10 CVD 5564

RICKY W. CAMPBELL,
Defendant

Appeal by defendant from order entered 14 March 2011 by Judge Richard B. Abernethy in Gaston County District Court. Heard in the Court of Appeals 8 November 2011.

Sessoms & Rogers, P.A., by Amber K. Kauffman and Mitchell A. Meyers, for plaintiff-appellee.

Ricky W. Campbell, pro se, for defendant-appellant.

CALABRIA, Judge.

Ricky W. Campbell ("defendant") appeals from an order granting summary judgment in favor of FIA Card Services, N.A., f/k/a MBNA America Bank, N.A. ("plaintiff"). We reverse and remand.

According to the record, on 19 May 2006 a credit account was opened in defendant's name with Bank of America. Plaintiff

is a subsidiary of Bank of America. The credit card was used and payments were made on the account. It appears that payments were made, checks were returned and return check fees were assessed. In addition, plaintiffs assessed late fees and fees for exceeding the credit limit amount of \$44,500.00. On both the August and September statements, plaintiff indicated that defendant could call to discuss payment plans to avoid having the account written off as a bad debt. However, when the account was in default, plaintiff declared the outstanding balance of \$46,311.81 due and payable. On 30 September 2008, when it appeared that the outstanding balance on the statement would not be paid, the debt was written off as bad debt.

On 24 November 2010, plaintiff filed a complaint seeking recovery of the outstanding balance of \$46,311.81. Defendant timely filed a "Response and Motion to Dismiss." On 19 January 2011, plaintiff sent defendant a letter offering defendant an opportunity to avoid court by signing a consent judgment and working out a payment plan. Nothing in the record suggests defendant responded to plaintiff's offer. On 7 February 2011, plaintiff made a motion for summary judgment. Defendant did not respond to plaintiff's motion in writing, but participated in

the hearing. On 14 March 2011, the court granted plaintiff's motion. Defendant appeals.

Defendant argues that the trial court erred in granting plaintiff's motion for summary judgment since there was no evidence presented that an account existed between defendant and plaintiff or its predecessor. We agree.

Summary judgment is only appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2011). A genuine issue is one "supported by substantial evidence" and "an issue is material if the facts alleged would constitute a legal defense...." *DeWitt v. Eveready Battery Co.*, 355 N.C. 672, 681, 565 S.E.2d 140, 146 (2002). "Our standard of review of an appeal from summary judgment is de novo." *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008). "When considering a motion for summary judgment, the trial judge must view the presented evidence in a light most favorable to the nonmoving party." *Id.* (citation omitted).

Our statutes provide some situations where a verified itemized statement can be used to prove the existence of an account:

In any actions instituted in any court of this State upon an account for goods sold and delivered, for rents, for services rendered, or labor performed, or upon any oral contract for money loaned, a verified itemized statement of such account shall be received in evidence, and shall be deemed prima facie evidence of its correctness.

N.C. Gen. Stat. § 8-45 (2011).

In the instant case, defendant argues that plaintiff has failed to prove the existence of an account and therefore, summary judgment was not appropriate. Here, the record on appeal does not include verified itemized statements of the account. The only documents plaintiff offered as evidence that the account existed were three statements from the months of August, September and October in 2008.

There is also no evidence in the record on appeal that the three statements were verified. "The account must be sworn to by some person who would be a competent witness to testify to the correctness of the account." *Service Co. v. Curry*, 29 N.C. App. 166, 167, 223 S.E.2d 565, 567 (1976). Plaintiff discusses an affidavit in their brief as verification of the debt. However, the affidavit was not included in the record. Plaintiff's

motion to amend the record to include the affidavit was denied by this Court. Therefore, it cannot be considered on appeal. See N.C.R. App. P. 9(a) (2011). Since the statements were not verified or itemized, plaintiff failed to comply with the requirements of the statute to prove the existence of an account.

Based on the available evidence, there are genuine issues of material fact that an account exists for purposes of summary judgment. In the light most favorable to defendant, plaintiff failed to provide sufficient information to show that plaintiff was entitled to judgment as a matter of law. Since a genuine issue of material fact existed, whether defendant entered into an agreement with plaintiff or incurred the charges alleged, summary judgment was inappropriate. We reverse and remand to the trial court.

Reversed and remanded.

Judges MCGEE and HUNTER, Robert C. concur.

Report per Rule 30(e).