STATE OF MINNESOTA
IN COURT OF APPEALS
A13-0804

Midland Funding, LLC,
Respondent,

vs.

Marvin H. Schlick,
Appellant.

Filed December 2, 2013
Affirmed in part, reversed in part, and remanded
Rodenberg, Judge

Clay County District Court
File No. 14-CV-12-2924

Jennifer M. Zwilling, Derrick N. Weberg, Messerli & Kramer, PA, Plymouth, Minnesota (for respondent)

Bruce A. Schoenwald, Stefanson Law, Moorhead, Minnesota (for appellant)

Considered and decided by Rodenberg, Presiding Judge; Chutich, Judge; and Klaphake, Judge.*

U N P U B L I S H E D O P I N I O N

RODENBERG, Judge

Appellant Marvin H. Schlick appeals from a grant of summary judgment in favor of respondent Midland Funding, LLC on its claims arising under a credit card agreement.

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

Because there are genuine issues of material fact regarding appellant's statute-of-limitations defense which preclude summary judgment, we affirm in part, reverse in part, and remand for further proceedings.

FACTS

Appellant opened a credit card account with Providian National Bank (Providian) in 1998. Appellant used the account for several years, but eventually stopped making new purchases with the credit card and stopped making payments on the account. Nonpayment is an event of default under the credit card agreement. After default, Providian assigned its rights on the account to respondent.

Two clauses in the credit card contract are at issue in this lawsuit. First, the contract contains the following choice-of-law provision: "No matter where you live, this Agreement and your Account are governed by federal law and by New Hampshire law." The contract also contains this provision regarding attorney fees: "You promise to pay us . . . all collection costs we incur including, but not limited to, reasonable attorney's fees and court costs. (If you win the suit, we will pay your reasonable attorney's fees and court costs.)"

Respondent commenced this action on April 8, 2009. In its complaint, respondent alleged that it was entitled to reasonable attorney fees based on the credit card agreement. The complaint set forth $4,100.84 as reasonable attorney fees, based on a contingency fee agreement between respondent and its counsel representing a percentage of the total debt allegedly owed by appellant.

The parties dispute the exact date of default on the account. Respondent contends that the last payment on the account was May 27, 2003, and that the default date would therefore have been 30 days after the last payment, or approximately June 26, 2003. Minnesota's six-year statute of limitations would have expired on June 26, 2009 if these contentions are true. Appellant asserts in his responses to interrogatories that he has not made any payments "since at least 2002" and that respondent falsified its records reflecting a later default date. If appellant's assertion is true, the six-year statute of limitations would have expired, at the latest, on December 31, 2008, and before respondent began this lawsuit.

Appellant admits (1) that he was issued a credit card account by Providian, (2) that he received periodic billing statements from Providian, (3) that he made payments to Providian toward the balance of the account, and (4) that he did not settle the account with Providian. Appellant did not produce any documents in his response to document demands, claiming that any documents he had relating to this account were destroyed in a flood.

Respondent moved for summary judgment on November 13, 2012,[1] arguing theories of breach of contract, account stated, quasi-contract, and unjust enrichment. Respondent submitted several affidavits in support of its motion. One affidavit relevant

[1] Although the complaint was served on April 8, 2009, the lawsuit was not filed in district court until August 14, 2012. Minn. R. Civ. P. 5.04 was recently amended with an effective date of July 1, 2013 to state: "Any action that is not filed with the court within one year of commencement against any party is deemed dismissed with prejudice against all parties unless the parties within that year sign a stipulation to extend the filing period." But at the times applicable to this case, the rule only provided that the complaint "shall be filed within a reasonable time after service . . . ." *Id.*

to this appeal was signed by an employee of Midland Credit Management, Inc. (MCM) and stated:

> I am employed as a Legal Specialist and have access to pertinent account records for Midland Credit Management, Inc. ("MCM"), servicer of this account on behalf of plaintiff. I am a competent person over eighteen years of age, and make the statements herein based upon personal knowledge of those account records maintained on plaintiff's behalf.
>
> . . . . I have access to and have reviewed the records pertaining to the account and am authorized to make this affidavit on plaintiff's behalf.

It went on to state that "MCM's records state that the last payment on [appellant's account] occurred on May 27, 2003."

Appellant filed a responsive memorandum opposing summary judgment. Based on his sworn discovery responses, he argued that the debt was barred by the applicable statute of limitations and that there is a genuine issue of material fact as to when respondent's claims accrued. He also alleged several violations of the Fair Debt Collection Practices Act (FDCPA). Appellant did not argue to the district court that respondent's claimed attorney fees were unreasonable.

The district court ordered entry of judgment in favor of respondent. It held that there were no genuine issues of material fact on respondent's claims,[2] that the Minnesota statute of limitations applies, that the FDCPA is not a defense to the underlying debt, and that the attorney fees claimed by respondent are reasonable. This appeal followed.

[2] In the district court, appellant did not argue that respondent had failed to meet its evidentiary burden on its claims of breach of contract, account stated, quasi-contract, and unjust enrichment. Appellant likewise does not raise this issue on appeal. We therefore decline to address this issue. *Melina v. Chaplin*, 327 N.W.2d 19, 20 (Minn. 1982).

D E C I S I O N

"We review a district court's summary judgment decision de novo. In doing so, we determine whether the district court properly applied the law and whether there are genuine issues of material fact that preclude summary judgment." *Riverview Muir Doran, LLC v. JADT Dev. Grp., LLC*, 790 N.W.2d 167, 170 (Minn. 2010) (citation omitted). "[T]he reviewing court must view the evidence in the light most favorable to the party against whom judgment was granted." *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993).

"[T]here is no genuine issue of material fact for trial when the nonmoving party presents evidence which merely creates a metaphysical doubt as to a factual issue and which is not sufficiently probative with respect to an essential element of the nonmoving party's case to permit reasonable persons to draw different conclusions." *DLH, Inc. v. Russ*, 566 N.W.2d 60, 71 (Minn. 1997). However, "the party resisting summary judgment must do more than rest on mere averments." *Id.* No genuine issue for trial exists "[w]here the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party." *Id.* at 69 (quotation omitted). Affidavits submitted supporting or opposing a summary judgment motion must "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." Minn. R. Civ. P. 56.05; *see Murphy v. Country House, Inc.*, 307 Minn. 344, 349, 240 N.W.2d 507, 511 (1976) (disallowing evidentiary affidavit at summary judgment because it was based upon hearsay that would not be admissible at trial).

I.

Appellant challenges both the factual and legal bases for the district court's summary judgment on statute-of-limitations grounds. "The construction and application of a statute of limitations, including the law governing the accrual of a cause of action, is a question of law and is reviewed de novo." *MacRae v. Grp. Health Plan, Inc.*, 753 N.W.2d 711, 716 (Minn. 2008). However, "a statute of limitations issue, which is traditionally a question of law, can also be a question of fact." *Costilla v. State*, 571 N.W.2d 587, 593 (Minn. App. 1997), *review denied* (Minn. Jan. 28, 1998); *see also Grondahl v. Bulluck*, 318 N.W.2d 240, 242-43 (Minn. 1982) (allowing jury to determine when medical treatment ceased as a factual question in the context of a statute-of-limitations defense).

Appellant raises two purely legal arguments in support of his contention that the district court erred in determining the applicable statute of limitations. First, he argues that New Hampshire's three-year statute of limitations should apply pursuant to a choice-of-law clause in the credit card contract. N.H. Rev. Stat. § 508:4 (2012). Second, he argues that Minnesota's borrowing statute applies and requires application of the limitations period from New Hampshire. Minn. Stat. § 541.31 (2012). The district court correctly rejected these arguments.

Appellant's first argument fails because the contract's choice-of-law clause does not expressly include New Hampshire's remedial law. Under Minnesota law, parties to a contract may choose which state's law will apply to the agreement. *U.S. Leasing Corp. v. Biba Info. Processing Servs., Inc.*, 436 N.W.2d 823, 826 (Minn. App. 1989), *review*

denied (Minn. May 24, 1989). Additionally, the parties may agree that a certain state's law will provide the applicable statute of limitations, so long as the agreement expressly states that it applies to procedure and remedies. *Id.* at 825-26. In the absence of such an express statement, Minnesota courts will only apply the substantive law of the state identified by the choice-of-law provision of a contract. *Id.* Because the statute of limitations of New Hampshire was not expressly agreed upon in the credit card contract, Minnesota's six-year statute of limitation applies. *Id.*

Appellant argues that the choice-of-law clause is ambiguous as to whether it includes New Hampshire's limitations period, and we should therefore construe the contract against respondent, the drafter of the contract, and thereby find that New Hampshire's statute of limitations applies. First, while "construction against the drafter" is a general rule for interpreting adhesion contracts, it does not apply here, as the contract is not ambiguous. *Rusthoven v. Commercial Standard Ins. Co.*, 387 N.W.2d 642, 645 (Minn. 1986). Second, Minnesota precedent regarding the treatment of statutes of limitations in a choice-of-law clause is both clear and more specific: absent an express agreement to incorporate another state's remedial law, the statute of limitations of the forum applies. *U.S. Leasing Corp.*, 436 N.W.2d at 825-26. The general argument that ambiguous contracts are construed against the drafter cannot properly be used to swallow this rule.

Appellant's second argument is that the Minnesota borrowing statute applies to this action and requires application of New Hampshire's three-year statute of limitations. Minn. Stat. § 541.31. The borrowing statute abrogated the Minnesota common law on

issues of statutes of limitations in conflict-of-laws analysis. *Id.*, subd. 1 ("[I]f a claim is substantively based . . . upon the law of one other state, the limitation period of that state applies . . . ."). However, this statute applies to "claims arising from incidents occurring on or after August 1, 2004. Minn. Stat. § 541.34 (2012). Appellant argues that an account statement sent on June 28, 2005 by Providian regarding the account should count as the last "incident" for purposes of applying this statute. However, "[a] cause of action accrues when all of the elements of the action have occurred . . . ." *Park Nicollet Clinic v. Hamann*, 808 N.W.2d 828, 832 (Minn. 2011). The event of default here was appellant's nonpayment; this event was all that was needed for the cause of action to accrue. The fact that a statement was sent in 2005 does not affect the statute-of-limitations analysis. Because the cause of action arose prior to August 1, 2004, the borrowing statute does not apply. Minn. Stat. § 541.34.

The district court correctly concluded that, as a matter of law, Minnesota's six-year statute of limitations applies to this action. However, appellant also argues that the district court erred in determining that there is no genuine issue of material fact as to when the cause of action accrued for purposes of applying the six-year statute of limitations. The district court explained that appellant made a bare assertion that he had not made any payments or charged any items since at least 2002, but did not have any access to documents or other evidence explaining this date. Therefore, the district court granted summary judgment in favor of respondent on the statute-of-limitations question. We disagree with the district court's analysis.

Appellant has the burden of establishing that respondent's claims are time-barred, as the expiration of the limitations period is an affirmative defense. *MacRae*, 753 N.W.2d at 716. The nonmoving party has the burden of producing evidence as to all material facts for which it bears the burden of proof at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23, 106 S. Ct. 2548, 2552-53 (1986); *Carlisle v. City of Minneapolis*, 437 N.W.2d 712, 715 (Minn. App. 1989). Appellant must "do more than rest on mere averments" to avoid summary dismissal. *DLH, Inc.*, 566 N.W.2d at 71. Affidavits must be based on competent evidence which would be admissible at trial. Minn. R. Civ. P. 56.05; *Murphy*, 307 Minn. at 349, 240 N.W.2d at 511.

Appellant argues that the district court believed respondent's evidence and disbelieved appellant's sworn assertion that his last payment on the account was sometime in 2002. He argues that "[w]eighing the evidence and assessing credibility on summary judgment is error." *Hoyt Props., Inc. v. Prod. Res. Grp., LLC*, 736 N.W.2d 313, 320 (Minn. 2007). Respondent counters by asserting that appellant's evidence is a mere averment, and is therefore not concrete enough to survive a summary judgment motion regarding an affirmative defense on which appellant will bear the burden of proof at trial. While respondent is correct that appellant bears the burden of proving his statute-of-limitations defense, we conclude that the district court erred in determining that appellant failed to meet his evidentiary burden for purposes of surviving a summary judgment motion, and erred in relying on respondent's inadmissible affidavit as establishing when a default occurred on the credit card account.

Appellant presented a sworn response to interrogatories that he has not made a payment on the account "since at least 2002." This statement is based on personal knowledge and would be admissible trial testimony. Although the statement is vague, that is an issue of weight and not of admissibility. A reasonable finder-of-fact could accept it as true and therefore find that the last payment on the account occurred in 2002. *DLH, Inc.*, 566 N.W.2d at 69. We conclude that appellant met his burden of providing some admissible evidence on this issue sufficient to survive a motion for summary judgment.

Respondent's affidavit purporting to refute appellant's contention that the last payment was sometime in 2002, on the other hand, is not based upon evidence that would be admissible at trial. It therefore should not have been considered in deciding the summary judgment motion. Minn. R. Civ. P. 56.05. It is contained in an affidavit of an employee of a servicer of respondent's accounts, regarding the contents of business records that were kept by Providian, the predecessor-in-interest to respondent. The statement that the business records of MCM contain a last-payment-date entry is hearsay. Minn. R. Evid. 801. It also fails to fall within any exception to the hearsay rules, most notably the exception for business records, as the affidavit is not signed by a Providian employee and does not attach a copy of the record in question. Minn. R. Evid. 803(6).[3] Because respondent failed to refute appellant's sworn statement that the last payment on

[3] The assertion that "MCM's records state that the last payment on [appellant's account] occurred on May 27, 2003" may also be subject to an objection under the best-evidence rule, as respondent has not provided any document indicating this was the date of the last payment on the account. Minn. R. Evid. 1002.

the account was sometime in 2002 by any admissible evidence, there remains a genuine issue of material fact regarding appellant's statute-of-limitations defense. Minn. R. Civ. P. 56.05; *Carlisle*, 437 N.W.2d at 715. We therefore reverse the district court's grant of summary judgment in favor of respondent on this ground and remand to the district court for further proceedings on this defense, noting that Minnesota's six-year statute of limitations applies to this lawsuit.

II.

Appellant argued before the district court that respondent violated the FDCPA in three ways: (1) by falsely representing that the claim is viable when it is barred by the applicable statute of limitations, (2) by asserting a claim for liquidated contingent attorney fees, and (3) by asserting a claim for duplicative interest charges. The district court held that FDCPA claims are not a defense to the underlying debt, and that, in any event, they would be barred by the one-year statute of limitations in the FDCPA because the "infractions have been apparent since 2009." Additionally, the district court held that appellant made no counterclaim under the FDCPA, nor did he raise the FDCPA as an affirmative defense. Appellant now challenges these determinations on appeal.

We agree with the district court's analysis of appellant's FDCPA claims. Most significantly, the FDCPA does not provide a defense to the underlying debt, but rather provides specific causes of action as redress for debt collection practices that violate the statute. 15 U.S.C. § 1692k (2012); *Picht v. Hawks*, 77 F. Supp. 2d 1041, 1043 (D. Minn. 1999), *aff'd*, 236 F.3d 446 (8th Cir. 2001). To date, appellant has made no counterclaims in the proceedings below, or otherwise sued respondent for purported violations of the

FDCPA. We affirm the district court's summary dismissal of appellant's claims for relief under the FDCPA.

III.

Appellant argues that the district court erred in determining that attorney fees in the amount of $4,100.84 are reasonable. Appellant argues in his appeal brief that the attorney fees amount is unreasonable because respondent violated the FDCPA in asserting that amount in its initial complaint. Because we reverse the grant of summary judgment in favor of respondent based upon the existence of genuine and material fact issues, we do not reach the question of whether the district court's award of attorney fees within the judgment was proper.

In sum, we affirm the district court's grant of summary judgment respecting appellant's claims under the FDCPA. We reverse the grant of respondent's motion for summary judgment and remand for further proceedings.

Affirmed in part, reversed in part, and remanded.