

63354-6

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COURT OF APPEALS OF THE STATE OF WASHINGTON,
DIVISION I

Federated Financial, Appellee,

v.

David Bonk, Appellant,

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COURT OF APPEALS
STATE OF WASHINGTON
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APPELLANT'S OPENING BRIEF

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INTRODUCTION

Mr. Bonk filed this appeal because the trial court entered a judgment against him without introducing any admissible evidence about assignment, contract and amount of the debt and refused to allow the defendant the opportunity to pursue his defenses and to consider defendant's cross motion for summary judgment.

ASSIGNMENT OF ERROR

The trial court erred when it granted plaintiff's motion for summary judgment awarding a money judgment against Mr. Bonk.

ISSUES PERTAINING TO ASSIGNMENT OF ERROR

Issue No. 1. MOTION FOR SUMMARY JUDGMENT STANDARDS

a. Did the trial court err when it granted summary judgment based on inadmissible hearsay and conclusory remarks in violation of CR 56(e)?

b. Did the trial court err when it granted summary judgment when Federated neither alleged

nor proved a written assignment of a debt as required by RCW § 4.08.080 and CR 17(d)?

c. Did the trial court err in granting a motion for summary judgment when Federated was required under 15 U.S.C. § 1642; Reg. Z § 226.12(a) of the Truth In Lending Act (TILA) to allege and prove that Mr. Bonk requested the credit card?

ISSUE NO. 2. Does a defendant have the right to conduct discovery when he submits an affidavit under CR 56(f) which outlines issues of fact for the following issues:

a. The underlying contract, amount of debt and assignment;

b. Whether plaintiff has standing to sue when it is doing business in Washington State as an out of state collection agency and is not registered with the Washington State Department of Licensing, nor the Washington State Department of

Revenue¹?

STATEMENT OF THE CASE

The plaintiff, Federated Financial (Federated), initiated the instant lawsuit under CR 3(a) when it had Mr. Bonk served with a summons and complaint before it had filed its lawsuit. The complaint alleged that Mr. Bonk owed money on a credit card debt, but did not name the credit card company. It alleged that Federated is a "legal entity having paid all licenses and fees due and is authorized to bring this action." (RP 131). It did not allege that it was an assignee of the credit card debt. (RP 131-132). It did not allege that the defendant had requested the credit card as required by 15 U.S.C. §

1. Since this appeal was filed, defendant has learned more (not of record) about the identity of the plaintiff. "Federated Financial" is a fictitious company. The affidavit attached to the summary judgment motion was signed by Mr. Patrick David on behalf of a company entitled "Federated Financial Corporation of America" declaring it to be a Michigan Corporation. It is not a Michigan Corporation. A review of the Washington State Department of Licensing website indicates that Federated Financial Corporation of America is a registered trade name of a Michigan Corporation entitled "Federated Capital Corporation."

1642; Reg. Z § 226.12(a) of the Truth In Lending Act (TILA). As such, it failed to state a claim upon which relief could be granted under CR 12(b)(6). The summons and complaint are dated November 7, 2008, (RP 132, RP 134). The summons and complaint were filed with Whatcom County Superior Court on November, 26, 2008 (RP 131, RP 133). Federated did not file a declaration of original service for the summons and complaint as required by CR 4. Also there is nothing of record indicating it sent Mr. Bonk notice that it had filed the lawsuit under CR 5. Bonk sent Federated an answer, dated November 25, 2008. (RP 35). Bonk did not file his answer with the Court until February 13, 2009. (RP 34). Even though Federated had filed the lawsuit and received Mr. Bonk's answer shortly after November 25, 2008, when it was mailed (RP 35), it did not file the answer again as required by CR 5. The first indication of record that Federated let Mr. Bonk know that it had

filed the lawsuit is the Declaration of Mailing dated December 11, 2008, indicating that Federated mailed a motion for summary judgment to Mr. Bonk (RP 107-108). Mr. Bonk received it on December 23, 2008 (TR 3). It set the motion for summary judgment on January 16, 2009. (RP 109). Attached to the motion for summary judgment was a document entitled "Affidavit Of Account Stated" dated July 9, 2008, signed by Patrick David (David Affidavit) (RP 114). It is inadmissible hearsay. It states that the "Original Creditor" is Advanta. Attached to the Affidavit were a series of purported Advanta credit card statements from Advanta starting with March 31, 2006, (RP 115) and going backwards in months to May 12, 2005. (RP 126). Also attached to the affidavit (RP 127-130) was a purported document entitled "Advanta Business Card Agreement." The amount due on the March 31, 2009, credit card statement (RP 115) is \$9,509.80. The amount claimed in the

affidavit is \$15,215.87 (RP 114). Nowhere in the record is there an assignment of the credit card debt from Advanta to Federated as required by CR17(d) and RCW 4.08.080 (RP 114).

DAVID AFFIDAVIT

It is filled with hearsay and conclusory statements. Federated's Affidavit does not meet the criteria of ER 602 which states that a person cannot testify "unless evidence is introduced sufficient to support a finding that (he) has personal knowledge of the matter." David's affidavit is devoid of evidence that he has "personal knowledge" of the contents of the affidavit, much less the attachments to the affidavit (RP-115-130). He states that he is "authorized to make the statements herein pursuant to authority granted by the Corporation." But being authorized to make a statement by the Corporation does not create personal knowledge. He twice states that he has "knowledge, information and belief" about his

statements in the affidavit, but he does not state the who, what, where, when, why and how he acquired his "knowledge, information and belief" of this Advanta credit card account. David's affidavit does not meet the criteria of ER 1002 which requires that originals of the documents attached to the affidavit (RP 115-130) be produced to prove their content. It does not authenticate the documents (RP 115-130) as required by ER 901, *et seq.* And even assuming that he produced originals under ER 1001, *et seq.* and authenticated them under ER 901 *et seq.* he does not lay the foundation which might make them admissible as an exception to the hearsay rule under ER 803(6) and RCW 5.45.

Mr. Bonk appeared on January 16, 2009. (TR-3). The trial court continued the motion for summary judgment hearing until February 13, 2009. (RP 105).

Mr. Bonk then located an attorney who noted

an appearance on February 4, 2009. (RP 99-100). Mr. Bonk filed his Opposition To Plaintiff's Motion For Summary Judgment, Cross Motion For Summary Judgment and Motion To Dismiss under CR 12(b)(6) (Opposition) (RP 42-60). He filed also Attorney's Declaration I In Support of Defendant's Opposition To Motion For Summary Judgment and in Support of Cross Motion For Summary Judgment and To Dismiss under CR 12(b) Notice of Appearance (sic) (Attorney Declaration) (RP 61-98).

In his opposition Mr. Bonk asked for the following:

1. Time to conduct discovery (RP 43-44);
2. He argued there was no written assignment of the debt (RP 44-48);
3. He argued that under 15 U.S.C. § 1642; Reg. Z § 226.12(a) of the Truth In Lending Act (TILA) before Federated could collect a credit card debt, it had to allege and prove that Mr. Bonk requested the credit card;

4. He argued that Federated had no standing to sue for it was an unlicensed collection agency (RP 48-53);

5. He argued that Federated had no standing to sue for it was committing a gross misdemeanor for it was not registered with the Washington State Department of Revenue (RP 48-53);

6. He finally argued the summary judgment standard of *Celotex v. Catrett*, 477 U.S. 317, 91 L.Ed. 2d 265, 106 S. Ct. 2548 (1986). Under it Mr. Bonk had no obligation to introduce any evidence until Federated has made out a prima facie case under CR 56(e) with evidence admissible under the Wash. R. of Evid. (RP 53-57)

The Attorney Declaration was submitted pursuant to CR 56(f) to indicate what Mr. Bonk intended to show if given the opportunity to conduct discovery (RP 61-98).

The trial court granted Federated summary judgment (RP 32-33).

Mr. Bonk filed his motion for reconsideration. (RP 27-31). In it he argued that Federated had not proved assignment and that the David Affidavit was inadmissible hearsay. The trial court denied Mr. Bonk's motion to reconsider on March 20, 2009 (RP15-16). Mr. Bonk then filed this instant appeal.

ARGUMENT

No. 1: MOTION FOR SUMMARY JUDGMENT STANDARDS

Should the trial court have granted summary judgment when:

- a. Federated produced no written assignment of the debt signed by a person authorized to make the assignment under RCW 4.08.080 and CR 17(d);
- b. Federated introduced no evidence to support the judgment?

STANDARD OF REVIEW

The standard of review on a summary judgment motion is de novo. *York v. Whakiakum Sch.Dis.* No. 200, 163 Wn.2d 297, 178 P.3d 995 (2008).

SUMMARY JUDGMENT STANDARDS

Summary judgment is appropriate under the following circumstances:

1. The Court can only consider admissible evidence, CR 56(e);
2. "The moving party bears the initial burden of showing the absence of material fact. (Citation omitted)." *Right-Price Recreation, LLC v. Connells Prairie Cmty. Council*, 146 Wn.2d 370,381, 46 P.3d 789, 795;
3. If the moving party meets its initial burden, then the burden shifts to the other party. *Right-Price Recreation, LLC, supra*, 381, 382, 795;
4. The court must consider the facts and all reasonable inferences from those facts in the light most favorable to the nonmoving party. *Right-Price Recreation, LLC, supra*, 381, 795.

Only after consideration of the four criteria above is summary judgment appropriate. *Right-*

Price Recreation, LLC, supra, 381, 795. Federated met none of the four criteria. .

No. 1(a): FEDERATED INTRODUCED NO EVIDENCE OF ANY ASSIGNMENT

Federated's evidence in support of its summary judgment is the David affidavit (RP 114) and its attachments. (RP 115-130). The affidavit states that the debt is one the defendant owes to Advanta (RP 114). But it makes no reference to an assignment and no reference to a written assignment signed by a person authorized to make the assignment as required by Wash. Rev. Code Ann. § 4.08.080, (2009), CR 17(d) and *MRC Receivables Corp. v. Zion*, 151 Wash. App. 1023, 218 P.3d 621 (2009). As such it has no standing to sue under CR 17(d). Because Federated has established no standing to sue under CR 17(d), the trial court judgment should be vacated. Mr. Bonk raised this issue both in his opposition to the motion for summary judgment (RP 48-50) and in his motion to

reconsider (RP 27-28)

No. 1(b): FEDERATED INTRODUCED NO EVIDENCE IN
SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT

The "evidence" in support of the motion for summary judgment consists of the David affidavit (RP 114) and its attachments (RP 115-130). The affidavit does not state how David knows that the purported Advanta account no. "5584189701035689" is that of David Bonk/Pel' Meni, Inc. and how he knows that Mr. Bonk owes \$15,215.87. ER 602 requires that he testify from personal knowledge. And personal knowledge consists of the who, what, where, why and how that David acquired through the use of his senses. And stating as he does that he is is the "Portfolio Supervisor of Federated Financial Corporation of America" and that he is "authorized to make the statements herein pursuant to authority granted by the Corporation" (but not the rules of evidence) and stating twice "to the best of his knowledge, information and

belief," does not explain the who, what, where, when, why and how he obtained this intimate knowledge of the \$15,215.87 he alleges that Mr. Bonk owes on Advanta account no. "5584189701035689." Such statements are conclusory and ER 602 with the "unless" places the burden on the proponent of the evidence to prove the "personal knowledge." Moreover, he again does not lay the foundation for "personal knowledge" under ER602 that would be required to introduce the originals of the documents attached to his affidavit (RP 115-130) under ER 1002, authenticate them under ER 901, *et seq.* and lay the foundation for their introduction under the exception to the hearsay rule of ER 803(6) and Wash. Rev. Code Ann. § 5.45 (2009). Bonk objected to their admission both in his opposition to plaintiff's summary judgment motion (RP 56-58) and in his motion to reconsider (RP 28-31).

No. 1(c): FEDERATED FAILED TO STATE A CLAIM UPON

WHICH RELIEF COULD BE GRANTED FOR IT DID NOT AL-
LEGE THAT MR. BONK REQUESTED THE CREDIT CARD

Under 15 U.S.C. § 1642; Reg. Z § 226.12(a)
of the Truth In Lending Act (TILA) before Feder-
ated could collect a credit card debt, it had to
allege in its complaint that Mr. Bonk requested
the credit card. It did not. Because it did
not, it failed to state a claim upon which relief
could be granted under CR 12(b)(6).

No. 2: DID THE TRIAL COURT ABUSE ITS DISCRETION
WHEN IT DENIED DEFENDANT THE RIGHT TO CONDUCT
DISCOVERY WHEN HE SUBMITTED AN AFFIDAVIT UNDER
CR56(f) OUTLINING ISSUES OF MATERIAL FACT?

Should the trial court have granted Bonk ad-
ditional time under CR 56(f) in which to under-
take discovery on the issues outlined below?

STANDARD OF REVIEW

The standard of review is "abuse of discre-
tion." *Pitzer v. Union Bank*, 141 Wn. 2d 539,
556, 9 P.3d 805, 814 (2000).

No. 2(a) BONK IS ENTITLED TO REASONABLE TIME TO
CONDUCT DISCOVERY INCLUDING CROSS EXAMINATION OF
FEDERATED'S WITNESSES

Bonk submitted his Attorney's Declaration (RP 61-98) under CR 56(f) which outlined issues of fact which if proved would establish a defense to the Federated claim. Bonk in his opposition asked for additional time for discovery on the issues of real party in interest, whether Federated Financial is doing business in the state, assignment and proof of the account, including cross examining witnesses. It outlined what he expected to prove (RP 43-44).

Bonk has the right to a reasonable amount of time to conduct discovery of Federated's claim. *In re Marriage of Langham*, 153 Wn.2d 553, 106 P.3d 212 (2005), *Olivine Corp. v. United Capitol Ins. Co.*, 147 Wn.2d 148, 52 P.23d 773 (2004). Bonk also has the right to cross-examine Federated's witnesses, *In re Dependency of A.K.* 162 Wn.2d 632, 174 P.3d 11 (2007), *Nguyen v. Dep't of Health*, 144 Wn.2d 516, 29 P.3d 689 (2001) Cert. denied 535 U.S. 904, 152 L.Ed. 2d 141, 122

S.Ct. 1203 (2002), *Weyerhaeuser v. Pierce County*,
124 Wn.2d 26, 873 P.2d 498, (1994).

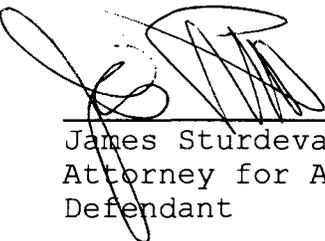
No. 2(b): DOING BUSINESS IN STATE

As indicated in footnote one, Bonk has since learned that Federated Financial does not exist. The company named in the David affidavit, (RP 114), Federated Financial Corporation of America does not exist. It is a registered name with the Washington State Department of Licensing for the company Federated Capital Corporation which is a Michigan Corporation. Since Federated Financial does not exist, it is not registered with the Washington State Department of Revenue under RCW §§ 82.04, *et seq.*, RCW §§ 82.04.030, 140, 150, 220, RCW 82.32, *et seq.*, RCW § 82.32.290 which is a crime under RCW § 9A.20, nor with the Washington State Department of Licensing under RCW § 19.16.100(2), 110, 260 nor with the Washington State Secretary of State.

CONCLUSION

This Court should reverse the summary judgment and remand the case to the trial court to allow Bonk to proceed with his discovery and to set the case for trial.

DATED this 15th day of December, 2009.

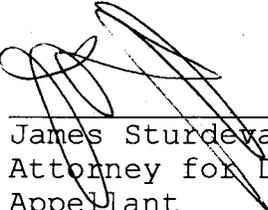


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CERTIFICATE OF MAILING

I hereby certify that I mailed a copy of the above and foregoing APPELLANT'S OPENING BRIEF to Patrick Layman, of Suttell & Associates, 1450 - 114th Avenue SE #240, Conifer Building, Bellevue, Washington, 98004 U.S. First Class postage prepaid on December 15th, 2009.

DATED this 15th day of December, 2009.



James Sturdevant #8016
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