

FILED

APR 22 2013

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 31080-9-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

DISCOVER BANK, ISSUER OF THE DISCOVER CARD, Appellant,

vs.

MAURIE L. LEMLEY and Doe I, and their marital community composed
thereof, Respondents.

BRIEF OF RESPONDENTS

KIRK D. MILLER
WSBA #40025
Kirk D. Miller, P.S.
211 E. Sprague Ave.
Spokane, WA 99202

MICHAEL D. KINKLEY
WSBA # 11624
Michael D. Kinkley, P.S.
4407 N. Division, Ste 914
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I. FACTS

On March 9, 2012, the Spokane County Superior Court entered the final “Civil Case Scheduling Order”. CP 978. According to that Court Order, the “Last day for *Hearing* Dispositive Pretrial Motions” was June 25, 2012. *Id* (emp. added). Spokane County Superior Court Local Rule 56(a) requires that Motions for Summary Judgment be filed and served 28 days before the hearing. *Spokane County LCR 56(a)*. Spokane Superior Court Local Rules [hereafter SSCLR] indicates that the Summary Judgment Hearing “shall be heard on Friday each week by the assigned judge” SSCLR 40(1). The hearing is also subject to the availability of the court. Therefore, on May 17, 2012 the defendants filed a Motion for Summary Judgment of Dismissal, to be heard on Friday, June 15, 2012- the last day a Summary Judgment was allowed to be heard based upon the scheduling Order, the Spokane County Superior Court Local Rules and Washington Court Rules, and the availability of the court. CP 979, SSCLR 40(1).

This was the Defendant’s second Summary Judgment. CP 127. The Court previously determined that the affidavit and supporting documents produced by the Plaintiff in support of its Summary Judgment Motion and in response to Defendant’s motion were insufficient to support summary judgment in favor of the Plaintiff. CP 95. At hearing on the

defendants' first Motion for Summary Judgment, he Court denied the motion, finding that questions of material fact existed but not elaborating on what those questions were. CP 127.

Following the Court's denial of the defendants' motion for summary judgment, the defendants sent discovery requests to the Plaintiff. CP 269. Plaintiff refused to produce any more information in response to the written discovery propounded by the Defendant. CP 881-905. The parties held a CR 26(i) conference and Plaintiff's attorney responded to the lack of information (about contracts, monthly statements, etc. produced by stating: "I gave you what I have". CP 892; CP 890-891. Defendant's counsel, Mr. Kinkley, pressed for a definite statement of what information the Plaintiff could produce in the future or what had not yet been produced. Defendant's counsel asked Plaintiff's counsel "...then you've done a reasonable effort to respond to these [Defendant's Request for Production]"? CP 892. Plaintiff's counsel, Mr. Osterman, replied "right, yes". *Id.*

Prior to the CR 26(i) conference, the court had ordered the Plaintiff to produce a CR 30(b)(6) witness for deposition. In discussing the date of the deposition, the defendant wanted to be sure that it had received before the deposition all documentary evidence the Plaintiff would rely upon. CP 899. To that end, Defense counsel asked Plaintiff's counsel during the CR

26(i) conference: “Are you planning to produce any further documents?”. CP 899. Mr. Osterman replied “No, I am not planning to produce any further documents.” CP 899.

The documents produced by the Plaintiff were insufficient to support summary judgment. CP 95, 711-715. Plaintiff had failed or refused to produce any further documents in response to written discovery. CP 881-905. Plaintiff’s counsel also stated that “I am not planning to produce any further documents”. CP 899. Based on these facts and representations by plaintiff’s counsel, Defendant filed a motion for Summary Judgment. CP 259-268. It was only after the discovery cutoff, after Plaintiff’s counsel’s repeated assurance that no other evidence would be produced, after the Defendant filed its motion for summary judgment, and after the Summary Judgment deadline, that Plaintiff produced the documents it seeks to rely upon to defeat Defendant’s Motion for Summary Judgment. CP 317-349, 978-979.

On October 18, 2010, the Plaintiff served Mr. Lemley with an unfiled Summons and Complaint. CP 5. Mr. Lemley timely appeared, requested an opportunity to be heard by the court, and disputed the debt claimed owed. CP 8. The Summons and Complaint were filed in Spokane County Superior Court on December 16, 2010. CP 1. On July 28, 2011, the Plaintiff filed a motion for summary judgment, along with supporting

documentation. *CP 11-94*. The "card member agreement" submitted in support of summary judgment was a recreation of some sort that contained a copyright date years after the Plaintiff claimed the account had been opened with no explanation was provided for the discrepancy. *CP 18*. Alleged account statements were submitted that also contain copyright dates on advertisements dated years after statements were allegedly sent to Mr. Lemley. *CP 61-62*. Again the discrepancy was not addressed by the Plaintiff. The "cardmember agreement" produced in support of the Plaintiff's Motion for Summary Judgment referenced a "pricing schedule" that was alleged to contain the finance charge rates. *CP 20*. No such "pricing schedule" was ever produced by the Plaintiff in the course of the trial court proceedings or otherwise. *See generally CP 1-978*. Finding the material issues of fact remained, the court denied the Plaintiff's Motion for Summary Judgment. *CP 95*.

On November 30, 2011, Defendant filed his first motion for summary judgment based primarily on the Plaintiff's inability to produce admissible evidence in support of its claim. *CP 96-103*. In response to the Defendant's motion for summary judgment, Plaintiff produced no new admissible evidence or any declaration from the Plaintiff in opposition. *CP 104-119*. The court denied the Defendant's motion for summary judgment stating only "questions of material fact exist." *CP 127*. The

Court did not address the holding in *Young vs. Key Pharmaceuticals, Inc.* 112 Wn.2d 216, 226, 770 P.2d 182 (1989) placing the burden on the Plaintiff to show the existence of the elements central to its case. *Id.* Following the court's denial of the Defendant's motion for summary judgment and reconsideration, the Defendant conducted discovery.

The Defendant attempted to take a 30(b)(6) deposition of the Plaintiff corporation and conducted written discovery in the form interrogatories, and requests for production. *CP 269-291*. On March 28, 2012, the Plaintiff moved for protective order to quash the deposition. *CP 151*. On April 25, 2012 Defendant moved the court to compel the 30(b)(6) deposition. *CP 222*. The court granted the Defendant's motion to compel the Plaintiff 30(b)(6) deposition. *CP 254*.

In response to the court order and immediately following the hearing on the Defendant's motion to compel, the Plaintiff filed a hand written demand for arbitration. *CP 227*. Defendant objected to the arbitration. *CP 255*. The matter was set for hearing on June 20, 2012 but not heard before the Plaintiff's claim was dismissed. *CP 308*.

On May 2, 2012, counsel for the parties conferred telephonically pursuant to CR 26(i) regarding the lack of admissible evidence produced by the Plaintiff and its failure to respond properly to the Defendant's discovery requests. *CP 881-905*. See also *CP 547-551* (Plaintiff's

Responses to Defendant's Request for Production). Plaintiff's counsel insisted on recording the CR 26(i) conference and agreed to provide a copy of the recording to Defendants counsel. *CP 905*.

Throughout the CR 26(i) conference, Plaintiff's counsel stood by the Plaintiff's refusal to directly answer any of the Defendant's written discovery requests and affirmatively stated that he was not aware of any additional documentary evidence that would support the Plaintiff's claim. *CP 884-905*. Every Request was answered: Plaintiff responds to each request for production by providing the "attached, relevant, non-privileged documents, if any, as they come into its possession, custody and/or control". *CP 895*. Plaintiff refused to identify any documents it consider irrelevant, or privileged or not in its control. Following the CR 26(i) conference, Plaintiff's counsel refused to produce a copy of the recording as he agreed. *Id.* The Defendant moved to compel its production. *CP 294-295*. On June 13, 2012, the Court heard Defendant's motion to compel production of the CR 26(i) conference. *CP 689*. Court found that Plaintiff's counsel's refusal to produce the May 2, 2012 recording violated Washington's criminal statute RCW 9.73.030 and that the Court would grant a motion to compel. *Id.* Following the court's ruling, Plaintiff's counsel voluntarily produced a copy of the recording. *CP 689-690*.

On May 17, 2012, relying on the lack of admissible documentation filed by the Plaintiff after nearly a year and a half of litigation and Plaintiff's counsel's representation that no additional documents existed, Defendant filed its second motion for summary judgment. *CP 259-291*.

On May 24, 2012, after the court-ordered May 21, 2012 discovery cutoff date expired, the Plaintiff filed its own motion for summary judgment. *CP 316*. In support of its motion for summary judgment, Plaintiff produced a different, incomplete, "cardholder agreement" that it claimed governed the Defendant's account. *CP 317-349*. The Plaintiff provided no explanation regarding why the newly submitted agreement, as opposed to the previous version was applicable to the Defendant or when and how the agreement changed. *CP 354 – 363*. No complete cardholder agreement, containing essential terms such as the rate of interest, was ever produced.

On June 15, 2012, the court heard Defendant's Motion for Summary Judgment. *CP 709*. In its ruling, the court stated in relevant part that "the affidavits and supporting documents that were submitted by the plaintiff in opposition to defendant's motion for summary judgment and in support of its own motion do not contain a reliable foundation, pursuant to court rule 56e, to establish that the affiant had personal knowledge about the alleged obligation in the amount of \$5729.78 on

October 12, 2010, December 16, 2010, or any other date.” *CP 716 – 720* (emphasis added). The Court further ruled that the Plaintiff failed to establish "a connection between the terms of the computer-generated reproduction presented to the court in the party being sued on those terms." *Id.* "The plaintiff has failed to provide a sufficient evidentiary foundation to support this court allowing the matter to move forward to a finder of fact on the merits of this case." *Id.* On June 27, 2012, the Court signed its order granting defendants' Motion for Summary Judgment and dismissing the Plaintiff's case with prejudice. *CP 716.*

II. ARGUMENT

A. Plaintiff's Burden on Defendant's Motion for Summary Judgment

“[A] defendant can move for summary judgment by... pointing out to the trial court that the plaintiff lacks *competent evidence* to support his or her case.” *Guile v. Ballard Cmty. Hosp.*, 70 Wash. App. 18, 21-22, 851 P.2d 689, 691 (1993) (Citing: *Young v. Key Pharmaceuticals, Inc.*, 112 Wash.2d 216, 225 n. 1, 770 P.2d 182 (1989) (Citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 106 S.Ct. 2548, 2553, 91 L.Ed.2d 265 (1986))).

The Defendant is not required to support its summary judgment motion with affidavits. *Id.* (citing: *Young*, 112 Wash.2d at 226, 770 P.2d 182). It must only “identify those portions of the record... which he or

she believes demonstrate the absence of a genuine issue of material fact.”
Id. (citing: *White v. Kent Medical Center, Inc.*, 61 Wash.App. 163, 170, 810 P.2d 4, 9 (1991)) (citing *Celotex*, 477 U.S. at 323, 106 S.Ct. at 2553; *Baldwin v. Sisters of Providence in Washington, Inc.*, 112 Wash.2d 127, 132, 769 P.2d 298 (1989)).

This approach is commonly known as the “put up or shut up” approach to Defendant’s motions for summary judgment. *See Nissan Fire & Marine Ins. Co. v. Fritz Cos.*, 210 F.3d 1099, 1102 (9th Cir.2000); *Fairbank v. Wunderman Cato Johnson*, 212 F.3d 528, 531 (9th Cir.2000); *Adler v. Wal-Mart Stores, Inc.*, 144 F.3d 664, 671 (10th Cir.1998); *Russ v. Int’l Paper Co.*, 943 F.2d 589, 592 (5th Cir.1991); *Clark v. Coats & Clark, Inc.*, 929 F.2d 604, 608 (11th Cir.1991); *Whetstine v. Gates Rubber Co.*, 895 F.2d 388, 394–95 (7th Cir.1990); *Kauffman v. P.R. Tel. Co.*, 841 F.2d 1169, 1172–73 (1st Cir.1988). It requires nothing more than a demonstration to the Court that, at the time of Defendant’s motion, the Plaintiff cannot produce competent evidence of the essential element of its case. *See Guile*, *Supra*.

In applying the “put up or shut up” approach, the only “genuine issue of material fact” that is relevant to the Court in a Defendant’s summary judgment motion is whether, after the Plaintiff has produced competent evidence to support each essential element of its claim, there

are still fact issues remaining. *Id.* “The nonmoving party ‘may not rely on ... having its affidavits considered at face value.’” *Cent. Park W. LLC v. Unigard Ins. Co.*, 42542-4-II, 2012 WL 6212635 (Wash. Ct. App. Dec. 11, 2012)(citing: *Seven Gables*, 106 Wn.2d at 13). “Mere allegations or conclusory statements of facts unsupported by evidence do not sufficiently establish such a genuine issue.” *Id.* (citing: *Baldwin v. Sisters of Providence in Wash., Inc.*, 112 Wn.2d 127, 132, 769 P.2d 298 (1989)).

Here, the Court considered all of the affidavits and supporting documents submitted by the Plaintiff in support of its motion for summary judgment and in opposition to the Defendant’s motion. CP 716-720. The court found the documents to be unreliable and inadmissible given the discrepancies in dates, lack of reliable connection to the Defendant, and complete lack of evidence necessary to support the damages claimed by the Plaintiff. *Id.* The fact that the Plaintiff submitted multiple affidavits, each more or less parroting the last and alleging legal conclusions does not create an obligation for the Court to consider them at face value.

B. Mr. Lemley Never Admitted Owning "the Debt"

Throughout the Brief of Appellant, counsel repeatedly states that the Defendant admitted that he owes "the debt". *Brief of Appellant* pg. 3, 6, 14, 16, 17, 19, 20, and 34. These repeated allegations are false and

wholly unsupported by the record. Rather, a document titled by the plaintiff as "Defendants Response to Complaint," was filed by the Defendant on January 18, 2011. In his "response," the Defendant disputed the interest rate and expressed his intent to defend the matter in court. *CP 10*. Nowhere does the Defendant admit to an obligation under a particular contract, admit that the interest rate or amount of interest claimed by the Plaintiff is correct, or admit to any particular balance owed. *Id.*

The fact that the Plaintiff never produced a complete contract or "cardholder agreement" distinguishes the facts of this case from *Discover v. Ray* 139 Wash.App. 723, 162 P.3d 1131. In that case, the question was whether the Defendant had agreed to the terms of the cardholder agreement. Here, the Plaintiff failed to ever provide a complete copy of any agreement or establish a connection between the partial agreement produced and these defendants. *CP 710-715*.

Nothing in the Defendant's "Response" constituted an admission that would preclude entry of summary judgment in favor of the Defendant. Nothing in the Defendant's "response" obviated the Plaintiff's requirement to respond to the Defendant's summary judgment motion with evidence to support the essential elements of its breach of contract claim. Defendants' response stated that the contract case was for double what he had borrowed and that he did not owe the claim. *CP 14*.

III. CONCLUSION

The discovery cutoff was May 21, 2013. CP 978. All of the information that Plaintiff requests this court rely upon was not produced until *after* the discovery cutoff. See CP 366 filed May 25, 2012. Plaintiff had specifically denied it had any additional information to produce at the CR 26(i) conference to discuss the failure of the Plaintiff to respond to the Defendant's Request for Production. CP 899. The Plaintiff had multiple opportunities to properly prepare its case: prefilling following the dictates of CR 11, in support of its own motion for Summary Judgment early in the case, in response to Defendant's earlier motion for Summary Judgment, and in response to defendant's Request for Production, in the CR 26(i) compel conference. At none of those five occasions did Plaintiff bother to attempt to meet its burden to prepare a contract case. It is only when the defendant made a motion on the failure of the Plaintiff to "put up" did Plaintiff even begin to try to make any effort to produce information related to the account it claims is owed. Then, the Motion for Summary Judgment filed by the Plaintiff with the new information was not timely since it could not be heard within the time allowed by the scheduling order. A judge must have control of her courtroom and cases before her. The Plaintiff ignored its obligations to the case and orders of the Court for

over a year and a half and then asks for relief from this court for the Plaintiff's own negligence or unfair trial tactics.

IV. ATTORNEY FEES FOR DEFENDANT ON APPEAL

Pursuant to RAP 18.1, the respondent requests the award of reasonable attorney fees and costs. The amount claimed by the Plaintiff was less than \$10,000. CP4. The Plaintiff "recovered nothing". The Defendant is entitled to reasonable attorney fees pursuant to RCW 4.84.250 and .270. RCW 4.84.290 makes the attorney's fees award mandatory for the appeal as well.

The case was dismissed with prejudice. The Plaintiff claimed attorney fees pursuant to a unilateral contract provision that Plaintiff claimed applied. Therefore, an award of fees is mandatory pursuant to RCW 4.84.330, as well.

Respectfully submitted this 22nd day of April, 2013.

Kirk D. Miller, P.S.



Kirk D. Miller
WSBA # 40025
Attorney for Respondents

CERTIFICATE OF SERVICE

I certify that on the 22nd day of April, 2013, I caused a true and correct copy of this Brief of Respondents to be served on the following in the manner indicated below:

Counsel for Appellant	(X) U.S. Mail
Krista L. White	
Bishop, White, Marshall & Weibel, P.S.	() Hand Delivery
720 Olive Way, Suite 1201	
Seattle, WA 98101	() E-mail
Scott Kinkley	() U.S. Mail
NW Justice Project	
1702 W. Broadway	() Hand Delivery
Spokane, WA 99201	
ScottK@nwjustice.org	(X) E-mail per agreement
Michael D. Kinkley, P.S.	() U.S. Mail
4407 N. Division St. Suite 914	
Spokane, WA 99207	() Hand Delivery
	(X) E-mail per agreement

By: 
Rachel Elston