

RECEIVED

AUG 09 2023

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas
Edward W. Miller, Circuit Court Judge

Appellate Case No.: 2023-000281

LVNV Funding LLC,

Respondent,

v.

Jennifer Lorick

Appellant.

INITIAL BRIEF OF APPELLANT

Susan Ingles, S.C. Bar # 004577
Attorney for Appellant
701 South Main Street
Greenville, SC 29601
susaningles@sclegal.org
P: 864-679-3260
F: 864-679-3260

Table of Contents

TABLE OF AUTHORITIES	ii
QUESTION PRESENTED	1
STATEMENT OF THE CASE	1
STATEMENT OF FACTS	2
STANDARD OF REVIEW	4
INTRODUCTION TO ARGUMENT	5
ARGUMENT	6
I. The Trial Court Failed to Liberally Construe the Documents and Pleadings.....	7
A. Exhibits that were filed simultaneously with the Complaint but not referred to or incorporated therein:.....	8
B. Documents filed by Respondent as attachments to its Motion for Summary Judgment.....	9
C. Respondent’s Affidavit	9
D. Appellant’s Affidavit	11
II. Respondent Failed to Meet its Burden of Proof	11
III. Respondent’s Evidence Did Not Demonstrate Absence of a Genuine Issue of Material Fact 14	
IV. The Court Failed to Resolve Inferences in Favor of the Appellant.....	15
VI. The Respondent Disregarded the Representation and Even the Existence of Opposing Counsel Representing the Appellant.....	16
A. In the Preparation of the Order.....	17
B. In the Submission of the Order to Opposing Counsel prior to Submission to the Trial Judge 17	
CONCLUSION	18

TABLE OF AUTHORITIES

Cases

<i>Bates v. City of Columbia</i> , 301 S.C. 320, 391 S.E.2d 733 (Ct. App. 1990).....	4, 6
<i>Baughman v. American Tel. & Tel. Co.</i> , 306 S.C. 101, 410 S.E.2d 537 (1991).....	12
<i>Baugus v. Wessinger</i> , 303 S.C. 412, 415, 401 S.E. 2d 169, 171 (1991).....	15
<i>Fleming v. Rose</i> , 350 S.C. 488, 493, 567 S.E.2d 857, 860 (2002).....	4
<i>Folkens v. Hunt</i> , 290 S.C. 194, 196, 348 S.E.2d 839, 441 (Ct. App. 1986)	6, 12
<i>Folkens v. Hunt</i> , 290 S.C. 194, 196, 348 S.E.2d 839, 841 (Ct. App. 1986)	12
<i>Froneberger v. Smith</i> , 406 S.C. 37,748 S.E.2d 625 (S.C. App. 2013)	13
<i>Hall v. Fedor</i> , 349 S.C. 169, 175, 561 S.E.2d 654, 657 (Ct. App. 2002)	12
<i>Hancock v. Mid-S. Mgmt. Co.</i> , 381 S.C. 326, 329-30, 673 S.E.2d 801, 802 (2009).....	13
<i>Moon v. Jordan</i> , 301 S.C. 161, 390 S.E.2d 488 (Ct.App.1990)	12
<i>Moss v. Porter Bros., Inc.</i> , 292 S.C. 444, 357 S.E.2d 25 (Ct.App.1987).....	12
<i>Pee Dee Stores, Inc. v. Doyle</i> , 381 S.C. at 240, 672 S.E.2d at 802.....	4
<i>Peterson v. W. Am. Ins. Co.</i> , 336 S.C. 89, 94, 518 S.E.2d 608, 610 (Ct. App. 1999).....	12
<i>Sauner v. Pub. Serv. Auth.</i> , 354 S.C. 397, 404, 581 S.E.2d 161, 165 (2003).....	15
<i>Spencer v. Miller</i> , 259 S.C. 453, 192 S.E.2d 863 (1972).....	6, 12
<i>Standard Fire Ins. Co. v. Marine Contracting & Towing Co.</i> , 301 S.C. 418, 422, 92 S.E.2d 460, 462 (1990) (citations omitted)	14
<i>Summer v. Carpenter</i> , 328 S.C. 36, 492 S.E.2d 55 (1997)	6

Other Authorities

Tom Ervin’s South Carolina Request to Charge-Civil Section 22-13, 2 at 181 (1994).....	2
--	---

Rules

Rule 56 SCRCP.....	4, 13, 14
Rule 56(e).....	6, 12
Rule 59(e) SCRCP	1, 5, 12, 15

Treatises

17A Am.Jur. 2d Contracts Section 716.....	2
---	---

QUESTION PRESENTED

In this debt buyer case, did the trial court err in granting summary judgment to Respondent where Respondent failed to establish there was a debt that it owned that Appellant was obligated to pay to Respondent? Specifically, was summary judgment granted in error where:

1. Respondent failed to demonstrate the absence of a genuine issue of material fact;
2. The trial court failed to liberally construe the documents and pleadings in favor of Appellant; and
3. The trial court failed to draw all inferences in a light most favorable to Appellant.

STATEMENT OF THE CASE

On August 10, 2022, Respondent LVNV Funding, LLC (LVNV) filed a Summons and Complaint in the Greenville County Court of Common Pleas against Appellant Jennifer Lorick (Lorick) for “recovery of indebtedness”. (Compl, Aug. 10, 2020). On September 10, 2022, Lorick filed a pro se Answer denying the allegations of the complaint and asserting affirmative defenses. (Ans., Sep. 15, 2022). LVNV filed a Motion for Summary Judgment on September 22, 2022. (Mot. For SJ and Memo in Support). On December 6, 2022, Lorick filed her opposing Affidavit (Lorick Aff.).

On December 8, 2022, the trial court conducted a hearing on LVNV’s motion for summary judgment. Following the hearing, the trial court issued an Order Granting Summary Judgment in favor of the Respondent in the amount of \$3,335.95. (Or. Dec. 9, 2022).

On December 19, 2022, Lorick filed a Motion to Alter or Amend the summary judgment order, pursuant to Rule 59(e) SCRPC. (Rule 59(e) Mot.,). The trial court issued its Order denying the Motion on January 18, 2023 without a hearing. (Or. Jan. 18, 2023). On February 17, 2023,

Lorick filed and served a Notice of Appeal of the trial court's summary judgment and Rule 59 (e) orders (NOA Feb. 17, 2023). This appeal followed.

STATEMENT OF FACTS

Respondent LVNV is a debt buyer. (Tr. at 3). Its Complaint makes a claim against Lorick for "recovery of indebtedness", alleging that Lorick owed LVNV a debt of \$3,113.89. (Compl. at 1). According to LVNV, Lorick's indebtedness to it arose from the opening of a Mastercard Credit Account in Lorick's name by Citibank, N.A., on or around November 6, 2017. (Compl. at 1). In its Complaint, LVNV asserted:

"The issuance of the Mastercard Credit Account created a revolving line of credit on an open account, allowing the Defendant to obtain cash advances and/or to make purchases at certain authorized retail establishments. These purchases and/or advances were to be charged to the Account, which the Defendant agreed to pay." (Compl. at 1, 2).

Respondent further contended said agreement between Lorick and Citibank, N.A. resulted in a debt transferred to LVNV who was now the owner and holder of all claims related to the Account (Compl. at 2).

In her pro se Answer, Lorick either denied or stated she did "not have enough information to answer" each of the Complaint's averments. She also asserted affirmative defenses including, but not limited to, failure to mitigate damages, expiration of the statute of limitations, improper service, request for accounting and documentation, vagueness and ambiguity of the claims, laches, equitable estoppel, and unclean hands. (Ans. at 1,2).

Respondent's motion for summary judgment cited Tom Ervin's South Carolina Request to Charge-Civil Section 22-13, 2 at 181 (1994) and 17A Am.Jur. 2d Contracts Section 716 stating the elements required to prove breach of contract are simply contract formation, breach, and damages.

(MSJ at 1). While the complaint claimed the cause of action as “recovery of indebtedness” of a debt to an original creditor Citibank, N.A., the Respondent’s motion for summary judgment antithetically alleged a contract between the Respondent and Appellant. (MSJ at 1). This was specifically denied in the Appellant’s pro se Answer, Affidavit and on the record at the summary judgment hearing. (Ans; Aff.; Tr. at 4). This belied Respondent’s claim that it had demanded payment from Appellant. (Compl. at 2)

LVNV asserted that Lorick had not responded to the allegations against her (MSJ at 1) but admitted at the hearing that Lorick had indeed responded with her opposing Affidavit. (Tr. p. 3). Lorick’s Affidavit attested, *inter alia*, : “I specifically deny that I owe Plaintiff the amount of \$3,113.89, as alleged in the Complaint and have never heard of or from the Plaintiff until this lawsuit.” (Aff. Lorick).

Respondent did not provide admissible proof of the debt or that Lorick was obligated on the debt. The documentation submitted by Respondent with its motion for summary judgment was not verified nor authenticated. (Tr. at 4, 5). Specifically, the Respondent’s sole supporting Affidavit made no reference to said documents and merely stated that unspecified documents she reviewed were *represented* to include accurate information provided by the original creditor and/or subsequent owners. (Yocum Aff; Tr. at 4, l. 9-18). The documentation is ambiguous and does not link Respondent with the alleged original creditor, nor does it provide the entire chain of ownership. Yocum Aff.; Tr. at 4,5).

After the trial court granted summary judgment, Appellant filed a Motion pursuant to Rule 59(e) contending the trial court had erred in granting summary judgment because LVNV failed to meet its burden of demonstrating the absence of a genuine issue of material fact. (Rule 59(e) Mot. at 9). As to the claim against Appellant, the motion pointed out: “when viewed in a light most

favorable to the Defendant, her Affidavit raises genuine issues of material fact”. (Rule 59(e) Mot. at 13). Specifically, Lorick asserted that Respondent’s documents “did not satisfy the burden of proof” required of the Respondent (Rule 59(e) Mot. at 9) stating the documentation presented by LVNV was “not sufficient to demonstrate the absence of a genuine issue of material fact.” (Rule 59(e) Mot. at 10). Moreover, Lorick contended that the Respondent:

“failed to provide any legally sufficient evidence to demonstrate the elements of breach of contract and its entitlement to summary judgment. The only indication that there may have been a contract is the unauthenticated documents attached to the Plaintiff’s Complaint and Motion for Summary Judgment which the Defendant denied in her Pro Se Answer and her Affidavit.”

(Rule 59(e) Mot. at 10).

Appellant therefore requested that the Court alter or amend its Order and deny summary judgment. Rule 59(e) Mot. P. 14). The trial court denied the motion stating there was “nothing in it that would require reconsideration”. (Ord. Rule 59(e) at 1).

STANDARD OF REVIEW

When reviewing the trial court’s grant of summary judgment, the appellate court applies the same standard that governs the trial court under Rule 56(c), SCRCP. *Fleming v. Rose*, 350 S.C. 488, 493, 567 S.E.2d 857, 860 (2002):

... The judgment sought shall be rendered forthwith 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 the moving party is entitled to a judgment as a matter of law. . .

"In determining whether any triable issues of fact exist, the evidence and all inferences must be viewed in the light most favorable to the nonmoving party." *Pee Dee Stores, Inc. v. Doyle*, 381

S.C. at 240, 672 S.E.2d at 802. Documents and pleadings must also be liberally construed in favor of the non-moving party. *Bates v. City of Columbia*, 301 S.C. 320, 391 S.E.2d 733 (Ct. App. 1990).

INTRODUCTION TO ARGUMENT

This case demonstrates the problems that arise when lawsuits are processed in an assembly line fashion where only names, dates and numbers are replaced in standard pleadings and their supporting affidavits. (**Compl; Yocum Aff.**). Here, the model of Respondent's process of handling debt collection litigation led to inconsistencies in the relief requested and a vague supporting Affidavit containing only hearsay statements. (**Yocum Aff.**). One example is that the complaint was for the "recovery of indebtedness" on a debt to Citibank, N.A. while the motion for summary judgment referred to this as a "breach of contract" case between the Respondent and Appellant.

Such inconsistencies occur when transfers, assignments, and sales of debt in the chain of ownership are electronic in nature and litigation is processed in this fashion. Consequently, the summary judgment order in this case is not supported by admissible evidence and does not specify the evidence upon which relief was granted. Respondent's use of a contract attorney at the hearing, who was not involved in the case either before or after the hearing, compounded the problem.

The lack of attention to detail on the part of Respondent is evident throughout its filings. Even in the submission of the proposed order granting summary judgment, Respondent failed to include the fact that Appellant was represented by counsel in the case who appeared at the hearing on her behalf. (**JS Ord.**) Yet, the trial court declined to even correct that careless mistake in response to Appellant's Rule 59(e) SCRC motion. The trial court responded that nothing in its Order required reconsideration (**Rule 59(e) Ord. at 1**).

The trial court did not follow the tenets of summary judgment. Summary judgment may be rendered by a trial court only when 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 the moving party is entitled to judgment as a matter of law. *Folkens v. Hunt*, 290 S.C. 194, 196, 348 S.E.2d 839, 441 (Ct. App. 1986) (citing *Spencer v. Miller*, 259 S.C. 453, 192 S.E.2d 863 (1972)); Rule 56(e).

All inferences must be drawn in a light most favorable to the non-moving party. *Summer v. Carpenter*, 328 S.C. 36, 492 S.E.2d 55 (1997). Documents and pleadings must be liberally construed in favor of the non-moving party. *Bates v. City of Columbia*, 301 S.C. 320, 391 S.E.2d 733 (Ct. App. 1990). In determining whether any triable issue of fact exists that precludes summary judgment, the court must follow these tenets. If triable issues exist, those issues must go to a trial on the merits.

The argument hereinafter sets forth that the only documents that were proper for the trial court's consideration beyond the complaint and pro se answer, were the Affidavits of Dianna Yocum and Jennifer Lorick. The Yocum Affidavit contained inadmissible hearsay, so even parts of it were not admissible. Drawing all inferences in favor of Appellant and liberally construing the pleadings and documents in her favor, summary judgment should have been denied. Not only did Appellant's Affidavit provide more than a scintilla of evidence to demonstrate genuine issues of material fact, but Yocum's Affidavit did not even meet Respondent's burden of proof showing the *absence* of a genuine issue of material fact.

The trial court committed reversible error in awarding summary judgment to Respondent.

ARGUMENT

Appellant respectfully submits that the order granting summary judgment had numerous deficiencies in the form of incorrect and insufficient statements and was mistakenly decided by the trial court. These deficiencies warranted reconsideration, correction and amendment of the order for the reasons given in Appellant's Rule 59(e) motion. The order should have been vacated. Specifically, Appellant's motion stated that the order:

1. did not sufficiently state any specific reasons for the conclusion that there are no genuine issues of material fact,
2. may have relied on inadmissible evidence,
3. did not even state that the Defendant was represented by counsel at the hearing and counsel made specific arguments on Defendant's behalf at the hearing.

(Ord at 1; Tr. at 6)

Summary judgment may be granted only when the moving party demonstrates that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. The summary judgment order herein simply found there were no genuine issues of material fact. **(SJ Order at 1)**. It made no mention of whether the trial court liberally construed the documents and pleadings in favor of Appellant, found inferences in favor of Appellant, or even considered those arguments made by Appellant's counsel at the summary judgment hearing. **(Tr. at 3 l.16-25, 4, 5 l. 1-18; SJ Ord. at 1)**. It clearly did not. The Respondent failed to provide any legally sufficient evidence to demonstrate the elements of breach of a contract and its entitlement to summary judgment.

For these reasons, the Rule 59(e) motion should have been granted and the summary judgment order vacated.

I. The Trial Court Failed to Liberally Construe the Documents and Pleadings

The Court failed to construe the documents and pleadings of this case at all, much less construe them in favor of the Appellant. Through her answer and affidavit, the Appellant denied the allegations of the complaint, and raised questions of material fact, including as to the

Respondent's ownership of this debt as well as any contract between herself and Respondent. Respondent's Affidavit on the other hand was vague and contained hearsay statements of reliance on unreliable records.

Instead of liberally construing this sworn testimony in favor of Appellant, the Court determined that this information was too insignificant to be construed at all, much less construed in favor of the Appellant. **(Rule 59 (e) Ord. at 1)**. A liberal construction would have been that the insufficiency of the documents and pleadings submitted to the court favor the Appellant, who stated under oath that she does not owe the debt. This exceeded the requirement of a scintilla of evidence. Another liberal construction of Respondent's complaint and affidavit would have been that they did not establish facts to meet the Respondent's burden of proof in this case.

The only document provided by the Respondent with any information proper for the Court to consider was the Affidavit of Dianna Yocum. **(Yocum Aff.)**. However, it did not meet the Respondent's burden of proof nor establish the absence of a genuine issue of material fact with admissible evidence. It contained mostly hearsay and was contradicted by Appellant's Affidavit **(Lorick Aff.)**. Other documents were filed simultaneously with the complaint and the motion for summary judgment. These documents, listed below, were unauthenticated by affidavit or otherwise and should not have been considered by the trial court. Because the trial court did not indicate what evidence it relied on in granting summary judgment, Appellant addresses these documents and affidavits here in the event the trial court did erroneously rely on them.

A. Exhibits that were filed simultaneously with the Complaint but not referred to or incorporated therein:

1. Exhibit 1: an Affidavit of Account signed prior to the filing of this action by Dianna Yocum on June 8, 2022;
2. Exhibit 2 included the following unauthenticated documents dated February 22, 2022 and it is unknown whether the Court relied on them in granting summary judgment:

- a) Bill of Sale and Assignment from Citibank, N.A. to Resurgent Acquisitions, LLC referring to unspecified “accounts” that are stated to be described in an Exhibit 1 to the document, but there is no Exhibit 1 attached to it (*therefore no evidence that an account of Appellant was included*); further, this document refers to a Master Purchase and Sale Agreement dated April 20, 2020 and Addendum No. 18 dated February 18, 2022 between Resurgent Acquisitions, LLC and Citibank, N.A. and Department Stores National Bank; that Agreement is not included or attached;
 - b) Transfer and Assignment from Resurgent Acquisitions, LLC to LVNV Funding, LLC referring to a list of receivables and other assets identified on Exhibit A; there are no account details included in Exhibit A;
 - c) 8 pages of a mostly redacted list that is not referred to in the other documents contained in Exhibit 2; this document references the Appellant’s name on page 7.
3. Exhibit 3: Contains copies of 2 periodic statements from “Citi Cards” to Jennifer L. Lorick dated November 19, 2019 and February 19, 2020; none of the documents connect the account to the Respondent in this case LVNV, LLC;
(Compl. Exhibits)

B. Documents filed by Respondent as attachments to its Motion for Summary Judgment

1. Exhibit 1 The Summons and Complaint including Affidavit of Dianna Yocum mentioned above;
2. Exhibit 2 containing the Appellant’s Pro Se Answer filed September 15, 2022, denying the allegations of the Complaint and asserting affirmative defenses.
3. Exhibit 3 containing copies of 2 periodic statements from “Citi Cards” to Jennifer L. Lorick dated November 19, 2019 and February 19, 2020 and what appears to be an unsigned Cardmember Agreement with no information connecting it to Lorick; none of the documents demonstrate any connection to Respondent LVNV, LLC;
(MSJ Docs)
4. NOTE: The other documents listed in Section A(2) above (which were not part of the Yocum Affidavit and never authenticated in any way) were not included with the documents attached to the Motion for Summary Judgment and should not have been considered by the Court even if they were attached.

C. Respondent’s Affidavit

The single affidavit filed in the case by Respondent contained chiefly inadmissible hearsay statements and did not demonstrate personal knowledge of any matter related to the “recovery of indebtedness” alleged in the Complaint. Further, that Affidavit merely conclusively alleged that affiant Yocum had reviewed records of only the Respondent, but did not specify what those records

were or which records of the alleged original creditor Citibank, N.A., if any, were reviewed. The Affidavit was apparently offered to demonstrate the amount due claimed by Respondent but had no information about the alleged contract itself.

The affidavit attached to the Complaint as Exhibit 1 was signed by Dianna Yocom.

According to the Affidavit:

1. An account was originated on 11/06/2017 by Citibank, N.A.
2. This is a valid obligation of Lorick.
3. She is an Authorized Representative for LVNV and has personal knowledge of Plaintiff's creation and maintenance of its normal business records (not those of Citibank, N.A.).
4. The records provided to Plaintiff by others in connection with its account acquisitions were:
 - a. **REPRESENTED** (*emphasis added*) to include accurate information provided by the original creditor and/or subsequent owners;
 - b. **INCORPORATED INTO** (*emphasis added*) Respondent's business records
 - c. **INCLUDE** (*emphasis added*) the debtor's name and social security number, the account balance, the identity of the original creditor and the account number.

They are thus unreliable and inconclusive when determining whether there is an absence of a genuine issue of material fact. Notably, the affidavit does not include an account transaction history of any kind, simply a total amount due. Furthermore, Yocom states that her affidavit is based on unspecified business records maintained in regard to the Account.

Finally, Yocom affirms that her statements are not only merely made to the "best of my knowledge" but that they are based on LVNV's business records – which clearly are hearsay because they were merely "represented" by the transferor to be accurate. The Master Purchase and Sale Agreement, the operative document for the transfer, is nowhere to be found in the documents. Therefore, no connection between the alleged debt and LVNV's alleged ownership of it was demonstrated by admissible evidence.

The summary judgment motion stated that the Respondent had proven all the necessary elements of a breach of contract action, and there were no genuine issues of material fact. It further stated that Lorick failed to provide any evidence or documentation whatsoever to overcome summary judgment or to substantiate her general denial of the Complaint. A review of the record shows this statement is false and it was improper for the trial court to draw such a conclusion.

D. Appellant's Affidavit

The Appellant filed her Affidavit denying the essential elements of the complaint in response to the motion for summary judgment. This was in addition to the denial of essential facts and elements that are necessary to establish the alleged liability for damages sustained as a result of an alleged breach of contract.

The Respondent's Affidavit, its single document containing any admissible evidence, was mostly hearsay and was not sufficient to overcome Appellant's Affidavit. It did not meet the burden of proof for breach of contract, even if it were not hearsay. Though there was a lack of evidence on the part of the Respondent, Appellant provided the required opposing evidence sufficiently by filing her affidavit in opposition to the motion. Her affidavit is uncontroverted. The Respondent's Affidavit, on the other hand, contains primarily hearsay and is not based on personal knowledge or authority demonstrated therein.

The affidavits, when viewed in a light most favorable to the Appellant, raise genuine issues of material fact and the trial court should have so found. The motion for summary judgment should have been denied. For the reasons set forth herein, the Respondent respectfully requests that this Court reverse the trial court's grant of summary judgment and remand the case to the trial court for a hearing on the merits.

II. Respondent Failed to Meet its Burden of Proof

Respondent's burden of proof was to demonstrate with admissible evidence that there was no genuine issue as to any material fact and that as the moving party it was entitled to judgment as a matter of law. *Folkens v. Hunt*, 290 S.C. 194, 196, 348 S.E.2d 839, 841 (Ct. App. 1986) (citing *Spencer v. Miller*, 259 S.C. 453, 192 S.E.2d 863 (1972)); Rule 56(e) SCRPC.

The Court did not point to evidence of a prima facie case on the part of the Respondent. The Order, which was not provided to Appellant's counsel prior to its submission to the trial court, contained no findings of fact. It did not specify any basis for its conclusion that there was no genuine issue of material fact and the trial court declined to so specify pursuant to Rule 59(e). Had Appellant's counsel been privy to the Order prior to its submission, the deficiencies later pointed out in Respondent's Rule 59(e) motion might have been addressed.

The summary judgment order does not reflect that the trial court drew inferences or liberally construed documents and pleadings in favor of Lorick as required. Neither does it reflect that the trial court considered the arguments that Appellant's counsel made against summary judgment at the hearing. The trial court likely was not aware Appellant's counsel had not been allowed to review the order prior to its submission as instructed. Therefore, it is equally likely the trial court thought there was no objection to the deficiencies.

When considering a motion for summary judgment by the Respondent, the court begins with analysis of whether the Respondent's initial burden of proof has been met. *Peterson v. W. Am. Ins. Co.*, 336 S.C. 89, 94, 518 S.E.2d 608, 610 (Ct. App. 1999) ("Under Rule 56(c), SCRPC, the party seeking summary judgment has the initial burden of demonstrating the absence of a genuine issue of material fact."). The evidence upon which the Respondent relies to make this showing must be admissible evidence. *Hall v. Fedor*, 349 S.C. 169, 175, 561 S.E.2d 654, 657 (Ct. App. 2002) ("Our appellate courts have interpreted Rule 56(e) to mean materials used to support

or refute a motion for summary judgment must be those [that] would be admissible in evidence.”). See also *Baughman v. American Tel. & Tel. Co.*, 306 S.C. 101, 410 S.E.2d 537 (1991); *Moon v. Jordan*, 301 S.C. 161, 390 S.E.2d 488 (Ct.App.1990); *Moss v. Porter Bros., Inc.*, 292 S.C. 444, 357 S.E.2d 25 (Ct.App.1987). Appellant met her burden of proof by demonstrating genuine issues of material fact.

If the Respondent does not meet its burden of proof, the trial court should deny summary judgment. Even if the Respondent does meet its initial burden of proof, the Appellant may avoid summary judgment by providing a scintilla of evidence showing the presence of a genuine issue of material fact. “[I]n cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment. *Hancock v. Mid-S. Mgmt. Co.*, 381 S.C. 326, 329-30, 673 S.E.2d 801, 802 (2009); *Froneberger v. Smith*, 406 S.C. 37,748 S.E.2d 625 (S.C. App. 2013) “A scintilla of evidence is defined as a perceptible amount.

The burden of proof was on Respondent as the moving party to demonstrate the absence of a genuine issue of material fact. As Appellant argued in her Rule 59(e) motion, Respondent did not meet its burden of proof with admissible evidence and its “proof” was not uncontroverted by Appellant. In fact, it *WAS* controverted by her Affidavit, thus providing at least the necessary scintilla of evidence.

Respondent’s submission to the trial court contained documents not properly before the court for its consideration of the summary judgment motion. Rule 56 SCRPC requires that documents can only be considered if they are sworn to or otherwise certified or authenticated. The documents were not authenticated in any way as is required.

The sole Affidavit by the Respondent did not refer to the filed documents at all, either generally or specifically. The statements therein were hearsay and did not fall under any exception, most significantly including the business records exception.

III. Respondent's Evidence Did Not Demonstrate Absence of a Genuine Issue of Material Fact

A party who fails to show the absence of a genuine issue of material fact is not entitled to summary judgment. *Standard Fire Ins. Co. v. Marine Contracting & Towing Co.*, 301 S.C. 418, 422, 92 S.E.2d 460, 462 (1990) (citations omitted).

The record does not support the trial court's award of summary judgment. The order granting summary judgment does not reflect what, if any, documents the Court considered. The Respondent failed to provide any legally sufficient evidence to demonstrate the elements of breach of contract and its entitlement to summary judgment. The only indication that there may have been a contract is the unauthenticated documents attached to the complaint and filed simultaneously with the motion for summary judgment. The Appellant demonstrated genuine issues of material fact as to those and denied any connection, contractual or otherwise, to LVNV in her Pro Se Answer and her Affidavit.

Not only do those documents fail to demonstrate a connection, none of them were attached as exhibits to the complaint nor to the Respondent's single affidavit in the case. Therefore, any reliance on them by the trial court or consideration of them as support of summary judgment was misplaced. The only sworn statement addressing them is the Appellant's denial.

If the Court relied on documents merely simultaneously submitted with the motion for summary judgment and not authenticated, such reliance was improper. The documents were not connected to Appellant. Respondent did not submit the documents with an affidavit verifying them and did not otherwise authenticate or provide any verification of the authenticity or relevance of

the documents attached to its motion for summary judgment. The documents filed at the same time as the motion were disjointed, incomplete and not specific to an account of the Appellant. Because the Court's decision is not supported by admissible evidence as required by Rule 56, the motion should have been denied.

Even if the documents attached to the complaint and motion for summary judgment were properly before the trial court and relied on in rendering its decision, they did not demonstrate indisputable facts as required for summary judgment. Indeed, the facts were genuinely disputed by the only affidavit that addressed them -- that of the Appellant.

As pointed out in Appellant's Rule 59(e) motion, the trial court failed to:

1. Draw any inferences in favor of the Appellant as Rule 56 requires.
2. Identify the documents relied on by the Court in making its decision, how they support the breach of contract claim, and how they were authenticated by Respondent in order to be properly considered under SCRCRCP Rule 56.
3. Identify the contract that was allegedly breached.
4. Identify the Respondent's proof of ownership of the debt that the Court relied on.
5. Address the specific elements of breach of contract and make findings of fact thereon, including as to admissibility of documents.
6. Specify the conclusions of law supported by those findings of fact.
7. Outline how the Respondent met its burden of proof for breach of contract and the Court's basis for shifting the burden to the Appellant.

The trial court failed to address any of these requests in its decision on the Rule 59 motion in which it said there was nothing in the motion that would require reconsideration. Because the trial court was given the opportunity to detail its findings of fact and conclusions of law, Appellant was entitled to a more detailed decision. For the reasons set forth in the motion, the summary judgment order should have been vacated.

IV. The Court Failed to Resolve Inferences in Favor of the Appellant

In determining whether a triable issue of fact exists, the evidence and all factual inferences drawn from it must be viewed in a light most favorable to the nonmoving party. *Sauner v. Pub.*

Serv. Auth., 354 S.C. 397, 404, 581 S.E.2d 161, 165 (2003). Even if there is no dispute as to evidentiary facts, but only as to the conclusions or inferences to be drawn from them, summary judgment should be denied. *Baugus v. Wessinger*, 303 S.C. 412, 415, 401 S.E. 2d 169, 171 (1991). The nonmoving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment. *Hancock v. Mid-South Mgmt. Co.*, 381 S.C. 326, 330, 673 S.E. 2d 801, 802 (2009).

The trial court failed to resolve inferences in favor of the Appellant by failing to consider that her pro se Answer and her Affidavit sufficiently contradicted Respondent's claim. It can be inferred from these documents, contradictory to the allegations in the complaint, that they were not mere contradictions but facts from which it can be inferred the Appellant is not liable to this Respondent for this debt. From the Respondent's failure to authenticate or verify the documents it filed, the trial court could also have inferred that Respondent was unable to authenticate them.

Because of this, the Court should have viewed such inferences of the evidence in this case in a light most favorable to the Appellant, the non-moving party and denied summary judgment. Instead, the court failed to resolve inferences in favor of the Appellant and granted summary judgment. The order should be reversed and remanded for a trial on the merits.

VI. The Respondent Disregarded the Representation and Even the Existence of Opposing Counsel Representing the Appellant

Capping off its carelessness and lack of preciseness in this case, Respondent failed to acknowledge counsel of record for Appellant who was present at the hearing and, despite the trial court's instruction, Respondent failed to share the proposed order with counsel for the Appellant before submitting it. (Tr. at 6).

A. In the Preparation of the Order

At the conclusion of the summary judgment hearing, the Court instructed Respondent's independent contractor acting as local counsel to draft and send the proposed order to Appellant's attorney before submitting it to the Court. (Tr. at 6). This was not done. (Rule 59(e) Mot. at 3). The Order indicates the Respondent's local counsel was present but failed to indicate that Appellant's counsel was present and argued against the summary judgment motion, which she did. (SJ Ord. at 3).

B. In the Submission of the Order to Opposing Counsel prior to Submission to the Trial Judge

Had the Appellant been provided a copy of the Order prior to submission as the Court instructed, Appellant's counsel could have alerted the trial court and Respondent's counsel to the deficiencies outlined herein and they might have been more fully reviewed by the trial court. At a minimum, the order could have been corrected to reflect that Appellant was represented by an attorney at the hearing.

Once again, the Respondent's lack of attention to facts and details affected the outcome. The order resembled that of a default hearing which could have given the trial court the false impression that the Appellant had been unrepresented at the summary judgment hearing when it was considering the Rule 59 (e) motion.

As it is, both orders in this case make a single conclusion of law and make no specific findings, giving the appearance that the order granting summary judgment arose out of a default hearing. The order denying reconsideration was similarly dismissive. Respondent's participation in the litigation and the evidence she presented was essentially disregarded. The rules of summary judgment require more. This was error that highlights the overall carelessness of Respondent in pursuing this debt collection litigation.

CONCLUSION

Appellant was entitled to have the complaint, answer and affidavits liberally construed and all inferences drawn in her favor. Had the court done so, it could only have found that there were genuine issues of material fact rather than the absence of them. Appellant respectfully requests that this Court reverse the trial court's grant of summary judgment to LVNV Funding LLC and remand this case for a trial on the merits.

Respectfully Submitted,

July 31, 2023

s/ Susan Ingles

Susan Ingles, SC Bar #4577

Attorney for Appellant Jennifer L. Lorick

South Carolina Legal Services

701 South Main Street

Greenville, SC 29601

(864) 679-3244 (telephone)

(864) 679-3260 (fax)

susaningles@sclegal.org

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

RECEIVED

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

AUG 09 2023
SC Court of Appeals

Edward W. Miller, Circuit Court Judge

Appellate Case No. 2023-000281

LVNV Funding LLC,

Respondent,

v.

Jennifer Lorick

Appellant.

PROOF OF SERVICE

I certify that I have served the Initial Brief of Appellant and Designation of Matter to be included in the Record on Appeal in this case on the parties listed below by depositing a copy in the United States Mail, postage prepaid, on August 4, 2023, addressed to its attorney of record as follows:

Britt Travis
Scott & Associates, P.C.
1744 Sam Rittenberg Drive, Ste. D
Charleston, SC 29416-0416
Attorney for Respondent

August 4, 2023

/s/Susan Ingles
Susan Ingles, S.C. Bar # 004577
Attorney for Appellant
701 South Main Street
Greenville, SC 29601
susaningles@sclegal.org
P: 864-679-3260
F: 864-679-3260



701 South Main Street | Greenville, South Carolina 29601
Phone: (864) 679-3232 | Fax: (864) 679-3260
www.sclegal.org | www.lawhelp.org/sc | www.probono.net/sc

August 4, 2023

Honorable Jenny Abbott Kitchings
Clerk, S.C. Court of Appeals
Post Office Box 11629
Columbia, SC 29211

RECEIVED

AUG 09 2023
SC Court of Appeals

RE: LVNV Funding LLC v. Jennifer Lorick
Appellate Case No. 2023-000281

Madame Clerk:

Enclosed for filing in your office are the following:

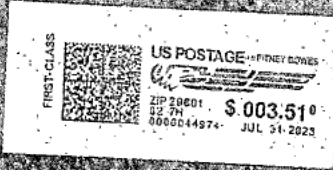
1. Initial Brief of Appellant;
2. Designation of Matter to be Included in the Record on Appeal;
3. Proof of Service

Thank you,

Susan Ingles
Attorney for Appellant

C: Michael Brittain Travis, Esquire






South Carolina
Legal Services
Member of the State Bar of South Carolina
701 South Main Street
Greenville, SC 29601

RECEIVED

AUG 09 2023

SC Court of Appeals

Honorable Jenny Abbott Kitchener
S.C. Court of Appeals
P.O. Box 11629
Columbia, S.C. 29211

