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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENWOOD COUNTY
Court of Common Pleas
Frank R. Addy, Jr., Circuit Court Judge.

Appellate Case No.: 2021-000286

Rock Creek Capital, LLC.....Respondent,

v.

Tynisha Brown.....Appellant.

INITIAL BRIEF OF APPELLANT

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QUESTION PRESENTED

In this debt collection case, did the trial court err in granting summary judgment to Respondent where Respondent failed to establish the alleged debt at issue and/or failed to demonstrate ownership thereof? 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, the non-moving party; and
3. The trial court failed to draw all inferences in a light most favorable to Appellant?

STATEMENT OF THE CASE

On August 27, 2019, Plaintiff Rock Creek Capital LLC¹ (**Rock Creek**) filed a Summons and Complaint in Greenwood County Circuit Court against Defendant Tynisha Brown (**Brown**). (**Summons and Complaint, Aug. 27, 2019**). Rock Creek's Complaint set forth an action against Brown for "non-jury collection," asserting Brown owed Rock Creek an alleged debt of \$4,951.61. According to

¹Rock Creek Capital LLC is a corporation located in Fort Worth, Texas. (**Compl., Aug. 27, 2019; Welch Aff., July 15, 2019**).

Rock Creek, Brown's indebtedness to Rock Creek arose from an educational loan made by the South Carolina Student Loan Corporation (SCSLC) to Brown on September 1, 2005. (**Compl.**) In its Complaint, Rock Creek asserted generally: "[F]or good and valuable consideration the account(s) was (were) subsequently assigned to the Plaintiff making the Plaintiff the holder of the account(s)." (**Compl.**) Attached to the Complaint was an Affidavit of Account whereby Chad Welch, a Rock Creek manager, attested: "Plaintiff is the current owner of, and/or successor to, the obligation sued upon, and was assigned all the rights, title, and interest to defendant's SC STUDENT LOAN CORPORATION (herein after 'the account')." (**Welch Aff.**)

On October 28, 2019, Brown filed an Answer in which she either denied or stated she did "not have enough information to answer" each of the Complaint's averments. (**Ans., Oct. 28, 2019**). Thereafter, Rock Creek submitted a First Request for Admissions, attaching several SCSLC documents; however, no documents indicated Rock Creek was the owner of Brown's alleged debt. (**Pl's 1st Req. for Adm., Jan. 28, 2020**.) On March 3, 2020, Brown submitted a Response in which she denied the Request for Admissions, asserting she could not respond to these requests "without production of the original documents." (**Def's Resp. to Pl's 1st Req. for Adm., March 3, 2020**.) Thereafter, on April 25, 2020, Rock Creek submitted a Second Request for Admissions; a ledger of alleged payments made by

Brown to SCSLC was attached to this Request. The final entry on the ledger stated only: “Account Transferred,” June 30, 2017. (**Pl’s 2nd Req. for Adm., Apr. 25, 2020.**) On May 27, 2020, Brown submitted a Response to Rock Creek’s Second Request in which she denied the Request, again asserting she could not respond without access to the original documents. (**Def’s Resp. to Pl’s 2nd Req. for Adm., Apr. 25, 2020.**)

On September 3, 2020, Rock Creek filed a Motion for Summary Judgment and a Memorandum in Support of Summary Judgment. (**Mot. For SJ & Memo in Support, Sept. 3, 2020.**) In its Memo in Support of Summary Judgment, Rock Creek alleged a Breach of Contract by Brown and concluded: “The evidence provided by the Plaintiff in this case has clearly shown that the Defendant entered into the agreement with the Plaintiff” (**Memo in Support of SJ at 2.**) On January 22, 2021, Brown filed an Affidavit in Support of Defendant’s Response to Plaintiff’s Motion for Summary Judgment. (**Aff. In Support of Def’s Resp. to Pl’s Mot. For SJ, Jan. 21, 2021.**) In this Affidavit, Brown attested: “I have never even heard of Rock Creek Capital, other than recently receiving some notices from them saying I owed them money.” (*Id.*)

On January 26, 2021, the Circuit Court conducted a virtual Hearing on Rock Creek’s Motion for Summary Judgment; no exhibits were admitted into evidence at the Hearing. (**Transcript of Record, Jan. 26, 2021 at 3.**) Following the Hearing,

the Court issued two Orders; these Orders granted Summary Judgment to Rock Creek (**Order #1**) and entered judgment against Brown in the amount of \$5,178.67 (**Order #2**). (**Or. #1, Jan. 27, 2021; Or. #2, Feb. 5, 2021.**)

On February 8, 2021, Brown filed a Motion to Alter or Amend the Judgment, pursuant to Rule 59(e), SCRCF. (**Rule 59(e) Mot., Feb. 5, 2021.**) Brown's Rule 59(e) Motion contended the Court had erred in granting Summary Judgment because Rock Creek had failed to meet its burden of "demonstrating the absence of a genuine issue of material fact." (**Rule 59(e) Mot. at 4.**) Specifically, Brown asserted the documents presented to the Court "did not include specific documentation to directly link a pool of debts assigned to [Rock Creek] to include the alleged debt of [Brown]." (**Rule 59(e) Mot. at 5.**) Furthermore, Brown's Motion stated that the documents Rock Creek produced to prove its ownership of Brown's alleged debt "were incomplete as they did not include documentation that addressed assignability of the loan to the entities [Rock Creek] claims it obtained ownership from." (**Rule 59(e) Mot. at 6.**) Moreover, Brown contended "the facts were genuinely disputed" by her Affidavit. (**Rule 59(e) Mot. at 7.**) Brown's Motion asked the Court to alter or amend its Orders and to "identify [Rock Creek's] proof of ownership the Court relied on." (**Rule 59(e) Mot. at 8.**)

On February 10, 2021, without a hearing, the Court denied Brown's Rule 59(e) Motion and "reaffirm[ed] its findings in the prior Orders." (**Order #3, Feb. 10, 2021.**) This appeal followed.

STATEMENT OF FACTS

Rock Creek filed a Summons and Complaint contending Brown had entered into a loan agreement with SCSLC and that Rock Creek now has a legal right to collect the debt resulting from the original SCSLC loan. (**Compl.**) The Complaint, along with the affidavit attached thereto, alleged an agreement between Brown and SCSLC that resulted in a debt allegedly transferred to Rock Creek. (**Compl; Welch Aff.**).²

The Welch Affidavit contained vague statements regarding Welch's review of Rock Creek's financial records. (**Welch Aff.**). However, there was no reference to a review of records of SCSLC, the alleged assignor of the account.

At the hearing on Rock Creek's Motion for Summary Judgment, Rock Creek's counsel admitted to using basically the same generic affidavit in each case it files:

We found (sic) file many suits and we're basically using the same affidavit and there's never a problem there.

(**Tr. p. 11**)

² There was no contract attached to this initial filing, nor any assignment or other documentation of transfer from SCSLC to Rock Creek. (**Compl.**)

The Affidavit had no attachments, did not specify an account number or otherwise identify the records that affiant stated he had reviewed. (**Welch Aff.**).

Brown's counsel pointed out the documentation submitted by Rock Creek with its Motion for Summary Judgment had not been verified or authenticated. To the contrary, Rock Creek took the position that such verification or authentication was not required:

The business records that were relied upon in reviewing the affidavit are attached to our motion for summary judgment. There is no requirement that those be attached to the affidavit itself in the suit.

(Tr. p. 11)

In its Memorandum in Support of Summary Judgment, Rock Creek stated its cause of action against Brown as "breach of contract" and described the essential elements as follows:

- A. The existence of the contract between the parties, the essential terms of the contract upon which the Plaintiff relies upon for recovery under its cause of action;
- B. The Defendant's default on one of more terms of the contract and subsequent breach of the contract;
- C. The actions taken by the Plaintiff as a result of the Defendant's default and breach of the contract; and
- D. The direct and consequential damages suffered by the Plaintiff as a result of the Defendant's breach of the contract.

(Memo in Supp of SJ)

Rock Creek states its Requests for Admissions and Second Request for Admissions sought admission of the elements A-D above as the essential elements

necessary to establish Brown's liability and stated: "Defendant failed to provide sufficient responses to its discovery requests." (**Memo in Supp of SJ**).

The Record does not contain a motion to compel more sufficient responses prior to Rock Creek filing its Motion for summary judgment. Furthermore, there were no admissions by Brown for the trial court to rely upon, as the requests were denied for the reasons given in Brown's responses. (**Resp to Pl. 1st and 2nd RFA**).

In its Memorandum, Rock Creek states that Brown "failed to provide any evidence in support of her claim(s) and/or defense(s)." (**Memo in Supp of SJ**). Even though the initial burden was on Rock Creek to demonstrate the absence of a genuine issue of material fact, Brown submitted her own sworn affidavit denying the averments of the Complaint and offering additional facts. (**Brown Aff.**)

Rock Creek's Memorandum stated it "provided ample evidence in support of its claims" and had relied on "documentation, affidavit and Defendant's admissions." (**Memo in Supp of SJ**). The Welch Affidavit stated:

Business records show this action is based upon a student loan agreement entered into between defendant(s) and the original credit grantor. Upon information and belief pursuant to the agreement and business records, defendant(s) agreed to pay monthly installments to the original credit grantor for all goods and/or services and/or cash advances. Business records show that, defendant(s) used or authorized the use of the student loan account to obtain loans from the original credit grantor for the purpose of obtaining goods and/or services and/or cash advances but failed to make the payments due pursuant to the agreement.

(**Welch Aff. Par. 4**)

At the summary judgment hearing, the court asked Brown's counsel to state whether Brown ever took out a student loan with SCSLC. Her counsel declined to testify on the subject:

THE COURT: Okay. I assume you've had a chance to show the underlying documents that were provided to your client Ms. Brown. She -- what was her response? I mean, I think most people would remember taking out a student loan.

MR. FAULK: I'm sorry Your Honor. I'm not in the position to testify for my client.

THE COURT: Right, but does she -- I'm trying to get to the meat of this. If she didn't take out a loan I'll deny the -- if she doesn't -- if she's provided an affidavit that absolutely says she never took out a loan from Student Loan Corporation or whoever and that this is a case of stolen identity or mistaken identity or whatever the case then that's one thing. But if she recalls actually having incurred the loan and it's due and it's within the statute of limitations and it was sold -- Mr. Clarkson, do you want to respond? I'll probably need to just take a look at the affidavit that was filed with your materials, but happy to hear anything you may want to say in response.

(Tr. p. 10)

After taking the case under advisement, the court issued a Form 4 Order finding as follows:

Having reviewed the pleadings and exhibits in greater detail, the Court finds that Defendant's objections are without merit. It is axiomatic that a party opposing a motion for summary judgment may not merely rely solely upon their pleadings. Instead, they must provide some evidence that a material fact exists warranting denial of summary judgment. **In the present case and from the material on file, the Plaintiff clearly purchased this debt from the original lender,** and Defendant in her answer simply denies doing business with Plaintiff.

Significantly, Defendant did not file any affidavit contesting that she took out a student loan, averring that she was the victim of identity theft, or otherwise disputing the validity of the debt. Accordingly, the Court grants Plaintiff's motion for summary judgment. Counsel for Plaintiff shall submit a form 4 order outlining the total judgment amount sought including for the underlying debt, costs, and attorney's fees.

(Order #1) (emphasis added).

Pursuant to Order #1, the Respondent submitted and the court signed the requested Form 4 order outlining the total judgment amount on February 5, 2021. **(Order #2)**. That order found as follows:

After consideration of the pleadings, motions, and arguments of counsel for the Plaintiff, I find that there are no genuine issues as to any material fact and that the Plaintiff is entitled to judgment as a matter of law.

NOW, THEREFORE, FOR GOOD CAUSE HAVING BEEN SHOWN, IT IS ORDERED, ADJUDGED AND DECREED that the Plaintiff's Motion for Summary Judgment shall be granted and judgment be entered against the Defendant as follows:

Amount of Debt:.....	\$4,951.61
Costs of Action.....	\$227.06
TOTAL JUDGMENT:.....	\$5,178.67

AND IT IS SO ORDERED.

(Order #2)

Brown filed a timely Motion pursuant to Rule 59(e), SCRCF requesting substantiation of the trial court's finding of no genuine issue of material fact and asking the court to identify the evidence the court had relied on in granting summary judgment to Rock Creek. Brown requested that the court make specific findings of fact and conclusions of law on the points set forth in her motion. Although the

Complaint had no documents attached to it, other than the Affidavit of Chad Welch, and the Welch Affidavit included no documents, the Court stated it had relied on “documents” filed with the Summons and Complaint. In its third Order, the court stated:

Having reconsidered the matter, the Court concludes that no hearing is necessary and finds as follows: Again, Defendant never denied taking out a student loan. **The documents filed with the summons and complaint verify that Plaintiff is the owner of her debt.** In her affidavit, Defendant merely denies knowing who Plaintiff is. When pressed on the matter at oral argument on the motion, counsel for Defendant stated, in effect, that he had not conversed with his client as to whether she had incurred such a debt so he could not speak to that question. Although the Court applauds defense counsel for his zeal, this is a civil case, not a criminal one, and the 5th amendment does not shield a civil defendant from having to answer a basic question: Did she take out a student loan at some point in the past, or does any of this even sound familiar? The fact that Defendant does not wish to, or chooses not to, answer this question is telling. As previously stated, a defendant may not rest upon a mere general denial or a token challenge to the authentication of Plaintiff's documentation to defeat summary judgment. Rule 56 (e), SCRCP. Put another way, if Defendant, or even Defendant's counsel, had denied that Defendant ever took out and/or defaulted on any student loan, summary judgment would have been denied. No issue of material fact exists in this case; accordingly, summary judgement is warranted. Based upon a full reconsideration of the record, the Court reaffirms its findings in the prior orders.
(Order #3) (emphasis added).

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), SCRPC. *Fleming v. Rose*, 350 S.C. 488, 493, 567 S.E.2d 857, 860 (2002).

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, 841 (Ct. App. 1986) (citing *Spencer v. Miller*, 259 S.C. 453, 192 S.E.2d 863 (1972)); Rule 56(e), SCRPC.

ARGUMENT

The trial court erred in granting summary judgment to Rock Creek where Rock Creek failed to prove the absence of genuine issues as to the material facts required to establish its right to collect Brown's alleged debt to SCSLC. On a motion for summary judgment, the moving party carries the burden of proof even when the nonmoving party does not submit any evidence in opposition. *Beneficial Fin. I, Inc. v. Windham*, 431 S.C. 256, 847 S.E. 2d 793 (Ct. App. 2020)

Three issues control the question presented in this case. These issues share the common question of whether a dispute as to a genuine issue of material fact exists.

Accordingly, the trial court committed reversible error in granting summary judgment to Rock Creek. These issues of material fact include: 1) the lack of admissible evidence to establish ownership of a debt allegedly owned by the moving party, Rock Creek, or the existence of a contract allegedly breached by the non-moving party, Brown; 2) failure of the court to liberally construe pleadings and documents in favor of the non-moving party, Brown; and 3) failure of the court to draw inferences in favor of the non-moving party, Brown.

To prevail in a Motion for Summary Judgment, Rock Creek, as the Plaintiff and moving party, must establish the absence of any genuine issue of material fact by introducing evidence that is both legally sufficient and admissible. If this burden of proof is met, the non-moving party must then provide a mere scintilla of evidence to show a genuine issue of material fact exists. *Hancock v. Mid-S. Mgmt. Co.*, 381 S.C. 326, 673 S.E.2d 801 (2009) 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, as will preclude summary judgment, the court must follow these tenets of summary judgment. If triable issues exist, those issues must go to a trial on the merits. *Rothrock v. Copeland*, 305 S.C. 402, 409 S.E.2d 366 (1991).

Here, the trial court failed to draw all inferences in the light most favorable to Brown, the non-moving party. The court also failed to liberally construe the pleadings and documents offered by Rock Creek in a light most favorable to Brown. If triable issues of material fact exist, summary judgment is precluded and those issues must go to a trial on the merits. *Id.*

In the present case, Rock Creek was the moving party and, therefore, it had the burden of proof. *Beneficial*, 431 S.C. 256, 847 S.E. 2d 793. Rock Creek failed to establish each aspect of its claim with admissible evidence. It failed to establish an original contract between Brown and SCSLC or that it had the legal right to collect on such a contract. The documents the trial court relied on were inadmissible because they were not supported by affidavit nor authenticated in any other way. When conducting its analysis, the court must liberally construe documents and pleadings in favor of the non-moving party. *Bates*, 301 S.C. 320, 391 S.E.2d 733. The court in this case failed to liberally construe documents and pleadings in favor of the non moving party Brown.

The court must also construe all ambiguities, conclusions, and inferences arising from the evidence most strongly against Rock Creek. *True v. Monteith*, 327 S.C. 116, 489 S.E.2d 615 (1997). Contrary to these requirements, the court in this case construed all ambiguities, conclusions, and inferences arising from the evidence

most strongly **against Brown**, the non-moving party. As set forth below, this was reversible error.

I. Rock Creek failed to establish the absence of a genuine issue of material fact as to the existence of a valid contract and Rock Creek's right to collect a debt allegedly owed by Brown to SCSLC.

Rock Creek alleged it owned a student loan debt that Brown failed to pay and that Rock Creek is, therefore, entitled to damages. Because Rock Creek failed to submit admissible evidence on all elements of its claim, the trial court granted summary judgment in error.

When considering a motion for summary judgment by the Plaintiff, the court begins with analysis of whether the Plaintiff'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), SCRCP, 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 plaintiff 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. Am. Tel. & Tel. Co.*, 306 S.C. 101, 410 S.E.2d 537 (1991). Accordingly, if the plaintiff does not meet its initial burden of proof, summary judgment must be denied.

Even if the plaintiff does meet its initial burden of proof, the defendant 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*, 381 S.C. at 329-30, 673 S.E.2d at 802; *Froneberger v. Smith*, 406 S.C. 37,748 S.E.2d 625 (Ct. App. 2013) "A scintilla of evidence is defined as a perceptible amount."

A. Rock Creek failed to provide admissible evidence to support its Motion for Summary Judgment

In this case Rock Creek failed to meet its initial burden of proof because it did not offer admissible evidence to support each element of its claim, nor did it offer any documentation of ownership of Brown's debt. In support of its Motion for Summary Judgment, Rock Creek offered the following attachments to its Memorandum in Support of Summary Judgment:

1. Affidavit of Chad Welch that was filed with the original Summons and Complaint for "non-jury collection." This Affidavit had no documents attached.
2. Rock Creek's Memorandum in Support of the Motion for Summary Judgment with the following unverified, unauthenticated attachments:

1. Page 1 of a document entitled Palmetto Assistance Loan Application and Promissory Note.
2. A document entitled Loan Settlement Agreement.
3. A series of Notices from SCSLC to Brown.
4. Plaintiff's Second Request for Admissions that included a request to admit a Payment history and an alleged account report.
5. Defendant's Responses to Plaintiff's First set of Interrogatories.
6. Defendant's Response to Plaintiff's First Request for Production.
7. Defendant's Response to Plaintiff's First Request for Admissions, in which all requests were denied by Brown.

Defendant's Response to Plaintiff's Second Request for Admissions, in which all requests were denied by Brown.

Notably absent from these unverified, unauthenticated and incomplete documents was any documentation to demonstrate a transfer of debt ownership from the original owner, or subsequent owners, to Rock Creek.

The rule regarding summary judgment evidence, Rule 56(c), SCRCF, provides that the judgment sought shall be rendered forthwith only where 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. (Rule 56(c),

SCRCP). Further, Rule 56(e), SCRCP, provides that affidavits shall be made on personal knowledge and must set forth facts that would be admissible into evidence:

(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall 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. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

Our appellate courts have interpreted Rule 56(e) to require that materials used to support or refute a motion for summary judgment must be those which would be admissible into evidence. *Hall*, 349 S.C. at 175, 561 S.E.2d at 657 ("A genuine issue of fact ... can be created only by evidence which would be admissible at trial.").

Attached to Rock Creek's Summons and Complaint was the single Affidavit of Chad Welch. Like the Complaint, this Affidavit is plagued by vague statements and the use of alternative language. Welch stated that he had access to and had reviewed business records related to the alleged account, but failed to identify any records or documents with particularity. There were no documents attached to the

Affidavit. Although Welch stated that he was familiar with the manner and method of Rock Creek's record keeping, he did not mention a familiarity with the business records of SCSLC or any other entity that may have been in the chain of title to the debt. The Affidavit was inadmissible hearsay.

Welch merely stated: "Upon information and belief," there was an agreement between Brown and SCSLC. Statements made on information and belief do not meet the standard for summary judgment. *Dawkins v. Fields*, 354 S.C. 58, 68, 580 S.E.2d 433, 438 (2003) ("Allegations made upon information and belief do not meet the 'personal knowledge' requirements of Rule 56(e).").

B. Rock Creek failed to prove an assignment of the alleged debt

Three elements constitute an assignment: (1) an assignor; (2) an assignee; and (3) transfer of control of the thing assigned from the assignor to the assignee. *Moore v. Weinberg*, 373 S.C. 209, 219, 644 S.E.2d 740, 745 (Ct. App. 2007).

Welch did not identify, attach, or affirm the existence of an agreement between Brown and SCSLC or any assignment thereof to Rock Creek. In addition, Rock Creek did not include additional Affidavits to verify the documents that were included with the exhibits attached to its Memorandum in Support of the Motion for Summary Judgment. At the hearing, Rock Creek's counsel incorrectly claimed such verification was not required. (Tr. at 11, l. 13-18). In fact, Rule 56(e),

SCRCP requires that “Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith.”

In order to establish its prima facie case for breach of contract, Rock Creek would have to provide admissible evidence of a valid contract and the assignment of that contract to Rock Creek. It failed to produce such evidence. Rock Creek did not produce evidence of purchase, assignment, or other transfer of the alleged contract between SCLSC and Brown.

Brown’s own affidavit in opposition to summary judgment sufficiently controverts Rock Creek’s claim of a legal right to collect the alleged debt, and thus Brown raised a genuine dispute as to that material fact.

II. The trial court failed to liberally construe the pleadings and documents in favor of the non-moving party, Brown.

Even if the Court finds that Rock Creek offered admissible evidence to meet its burden of proof, the trial court’s grant of summary judgment should be reversed because the pleadings and documents offered were not liberally construed in favor of Brown, the non-moving party.

In granting summary judgment, the court found: “Plaintiff clearly purchased this debt from the original lender.” (**Order #1**). The court gave no basis for this finding. When Appellant filed a Rule 59(e) Motion seeking specific findings of facts and conclusions of law in support of the court’s decision, the court erred in finding

the “documents filed with the summons and complaint verify that Plaintiff is the owner of her debt.” (**Order #3**). The only document filed with the Summons and Complaint was the Affidavit of Account, which mainly addressed an amount claimed to be due, had no documents attached to it, and did not demonstrate personal knowledge on that issue. (**Compl, Welch Aff**).

A. Responses by Brown to Rock Creek’s 1st and 2nd Requests for Admission

In support of its Motion for Summary Judgment, Rock Creek relied in part on Brown’s response to its Requests for Admission, in which it essentially sought Brown’s admission to the allegations of the Complaint. However, none of the requests were admitted in Brown’s responses, and she declined to authenticate the documents that Rock Creek had not itself authenticated. Therefore, Rock Creek could not rely on Brown’s responses to meet its burden of proof. Thus, these material issues of fact were unresolved.

In *Hatchell v. Jackson*, the moving party had relied on requests to admit that were deemed to be admitted simply due to the other party’s failure to respond. 290 S.C. 256, 349 S.E. 2d 407 (Ct. App. 1986). On appeal, the court reversed the grant of summary judgment to defendant Jackson, stating the pleadings and admissions on file left unresolved material issues of fact raised by Hatchell. The court in *Hatchell* held, "When viewed in the light most favorable to Hatchell, none of the matters deemed admitted by Hatchell negates his allegations that Jackson had falsely

represented to him that she owned a six-month lease and that the lease was renewable." *Id.* at 408.

In this case, Brown declined to admit Rock Creek's Requests for Admission seeking her authentication of documents, and Rock Creek did not itself verify the documents to the court. Even if this Court finds it was proper for the trial court to consider the documents attached to the Requests for Admission, none of them negates the affirmative statement in Brown's Affidavit or proves assignment or other transfer of the alleged debt to Rock Creek.

A liberal construction of Brown's Responses to Rock Creek's 1st and 2nd Requests for Admissions would be that there were no admissions and, therefore, the documents attached thereto do not prove the alleged debt or Rock Creek's right to collect it.

B. Brown Affidavit

In her Affidavit in Opposition to Summary Judgment, Brown disputed Rock Creek's right to collect the alleged debt with the following statements:

Prior to being sued by the Plaintiff in this case, I have never even heard of Rock Creek Capital, other than recently receiving some notices from them saying I owed them money.

I have never entered into any agreement for credit with the Plaintiff in this case and do not owe them the money they claim in their Affidavit.

I specifically deny that I owe Plaintiff the amount of \$4951.61 as alleged in the Complaint.

(Brown Aff.).

These statements were not simply denials, but stated specific facts disputing the claims made in Rock Creek's Complaint. In ruling that Rock Creek demonstrated the absence of a genuine issue of material fact, the trial court focused on the origination of the alleged student loan debt rather than on whether Rock Creek had demonstrated a right to collect it. Where a debt buyer such as Rock Creek sues on an alleged debt, the court must determine whether a valid contract is proven to exist and, more importantly, whether that debt buyer has the right to collect the alleged debt.

The rule governing summary judgment provides that "[s]upporting and opposing affidavits shall 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." Rule 56(e), SCRCP . If the court here had construed the affidavit liberally in Brown's favor, it could only conclude that reasonable minds could differ on whether a genuine issue of material fact existed as to Rock Creek's right to collect the debt.

A liberal construction of both parties' Affidavits, the Complaint and Answer and even the documents merely attached to Rock Creek's Memorandum with no authentication yields genuine issues of material fact regarding the alleged debt and Rock Creek's right to collect it. The court did not liberally construe the pleadings

and documents in Brown's favor as the non-moving party and this entitles her to reversal and remand to the trial court.

III. The court failed to draw inferences in favor of Brown, the non-moving party.

The court also failed to draw inferences in favor of Brown as the non-moving party. Rock Creek's Affidavit of Account stated it was made upon information and belief on several points and overall constituted hearsay. Allegations made upon information and belief do not meet the "personal knowledge" requirements of Rule 56(e). *Dawkins*, 354 S.C. at 68, 580 S.E. 2d at 443.

It could be inferred from Rock Creek's failure to offer authenticated documentary evidence that it did not have the right to collect the debt. Rather than offering its own proof, Rock Creek sought proof by requesting that Brown admit its right to collect the debt. The resulting inference to be drawn is that Rock Creek had no legally sufficient proof of its right to collect the debt.

The only documents that Rock Creek possessed did not show that Rock Creek had acquired Brown's alleged SCSLC debt, and more tellingly, Rock Creek chose not to rely on its documents to substantiate its claim. Brown's attorney laid out for the court the deficiencies in the alleged ownership documents provided in response to Brown's discovery requests, stating:

In addition, we were provided with bills of sale. These bills of sale there are two separate occasions allegedly; one bill of sale

from Student Loan Corporation and then one from Student Loan Corporation to — one from Student Loan Corporation to BZA and then one from BZA to Rock Creek Capital. These bills of sale would be business records of Student Loan Corporation or BZA, but not of Rock Creek Capital. And Rock Creek Capital and Mr. Welch has no knowledge of how the manner and method that these documents were made. In addition, these bills of sale on both occasions it states that the accounts are defined and described in the agreement, but we have no evidence of agreement. We don't know what kind of agreement that is. There is no account specific and there is no specific connection between this bill of sale or this pool of accounts to the Defendant. And Rock Creek Capital cannot prove that they know this — that they have this information. And in the — well, it claims to be an affidavit, but Exhibit E claims to be an affidavit, but it's not notarized. And it just refers generally to a pool of accounts. Again, nothing specific. It's not specific to any particular account, let alone the Defendant in this case.

(Tr. at 6)

Because Rock Creek failed to present the above mentioned “bills of sale” to the court in support of its motion for summary judgment, an inference can be drawn that Rock Creek could not prove its right to collect the debt by way of documentation. The court should have drawn that inference in favor of Brown.

Rock Creek had no legally sufficient proof of ownership and rested its case on Brown's refusal to authenticate documents it now claims proved its ownership. When viewed in the light most favorable to Brown, none of the matters upon which Rock Creek sought authentication were admitted by Brown or authenticated by Rock Creek itself, and Brown's affidavit negates any allegations of ownership necessary to grant summary judgment. After submitting her affidavit in opposition to summary

judgment and demonstrating Rock Creek's failure of proof, Brown was entitled to have these inferences drawn in her favor.

Even if the moving party carries its initial burden, which Rock Creek failed to do, the opposing party must, by affidavit or otherwise, set forth specific facts to show that there is a genuine issue for trial. Rule 56(e), SCRCF. Here, Brown did more than rest upon mere allegations or denials of her pleadings. Brown's Affidavit directly addressed Rock Creek's allegations set forth in its Complaint and, therefore, was not limited to information and belief. (**Brown Aff**). Conversely, the Rock Creek Affidavit of Account offered little specific **information**, if any, and then only vague statements in a "fill in the blank" manner. (**Welch Aff.**). Rather than acknowledging that multiple inferences could be drawn, the court asked Brown's counsel to contradict the contents of his client's affidavit. (**Tr.p.10**).

Brown's Motion to Reconsider addressed the lack of admissible evidence in support of Rock Creek's Motion for Summary Judgment. In its order on Brown's Rule 59(e) Motion, the court did not point to any specific evidence from Rock Creek that demonstrated the absence of a genuine issue of material fact. Instead, the court focused on its view of the shortcomings of Brown's evidence, and it improperly ruled on the motion in a light most favorable to the **moving** party:

Having reconsidered the matter, the Court concludes that no hearing is necessary and finds as follows: Again, Defendant never denied taking out a student loan. The documents filed with the summons and complaint verify that Plaintiff is the

owner of her debt. In her affidavit, Defendant merely denies knowing who Plaintiff is. When pressed on the matter at oral argument on the motion, counsel for Defendant stated, in effect, that he had not conversed with his client as to whether she had incurred such a debt so he could not speak to that question. Although the Court applauds defense counsel for his zeal, this is a civil case, not a criminal one, and the 5th amendment does not shield a civil defendant from having to answer a basic question: Did she take out a student loan at some point in the past, or does any of this even sound familiar? The fact that Defendant does not wish to, or chooses not to, answer this question is telling. As previously stated, a defendant may not rest upon a mere general denial or a token challenge to the authentication of Plaintiff's documentation to defeat summary judgment. Rule 56 (e), SCRCF. Put another way, if Defendant, or even Defendant's counsel, had denied that Defendant ever took out and/or defaulted on any student loan, summary judgment would have been denied. No issue of material fact exists in this case; accordingly, summary judgment is warranted. Based upon a full reconsideration of the record, the Court reaffirms its findings in the prior orders.

(Order #3).

The court did not, as requested, specify the basis for its decision finding that Rock Creek had met its burden of proof. In its Order, the trial court simply termed Brown's motion and related arguments a "token challenge," stating [A] defendant may not rest upon a mere general denial or a token challenge to the authentication of Plaintiff's documentation to defeat summary judgment" **(Order #3).**

In granting Summary Judgment to Rock Creek, the trial court focused only on whether Brown ever took out a student loan, rather than if Rock Creek demonstrated the debt and its right to collect it. Not only did the court improperly place the burden

of that proof on Brown, the non-moving party, it drew all inferences from the evidence against her, rather than in her favor. "In determining whether any triable issues of fact exist, the evidence and all inferences which can be reasonably drawn from the evidence must be viewed in the light most favorable to the nonmoving party." *Hancock*, 381 S.C at 329-30, 673 S.E.2d at 802. Because the trial court drew all inferences against Brown rather than in her favor, this Court should reverse the grant of summary judgment and remand the case to the trial court.

Finally, because summary judgment is a drastic remedy, it should be cautiously invoked to ensure a litigant is not improperly deprived of a trial on disputed factual issues. *Lord v. D & J Enters.*, 407 S.C. 544, 552-53, 757 S.E.2d 695, 699 (2014). From the beginning, Rock Creek's presentation of this case has been vague and unpersuasive. Beginning with the initial complaint, Rock Creek described its claim as a debt collection action and attached an Affidavit to the Complaint that was vague and had no documents attached to it. (**Compl; Welch Aff.**) Without specifying or offering admissible evidence of a contract, Rock Creek alleged in its Memorandum in Support of Summary Judgment that its claim was one for breach of contract between Brown and Rock Creek, outlining therein the "essential" and "necessary" elements thereof. There was no evidence of a contract between Brown and Rock Creek. Also, as outlined herein, Rock Creek offered various, incomplete documents in support of its Motion for Summary Judgment that were not verified. Rule 56,

SCRCP requires that documents offered in support of summary judgment be verified in order to be considered. In its final decision, the trial court when asked to be specific about the evidence it had relied upon, stated it had relied solely on the “documents attached to the summons and complaint”—the sole attachment being a vague Affidavit with no attached documents.. (**Order #3**). For this reason and those outlined above, it was reversible error for the trial court to grant the drastic remedy of summary judgment to Rock Creek.

CONCLUSION

Brown respectfully requests that this Court reverse the trial court’s grant of summary judgment to Rock Creek and remand for a trial on the merits.

Respectfully submitted,

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