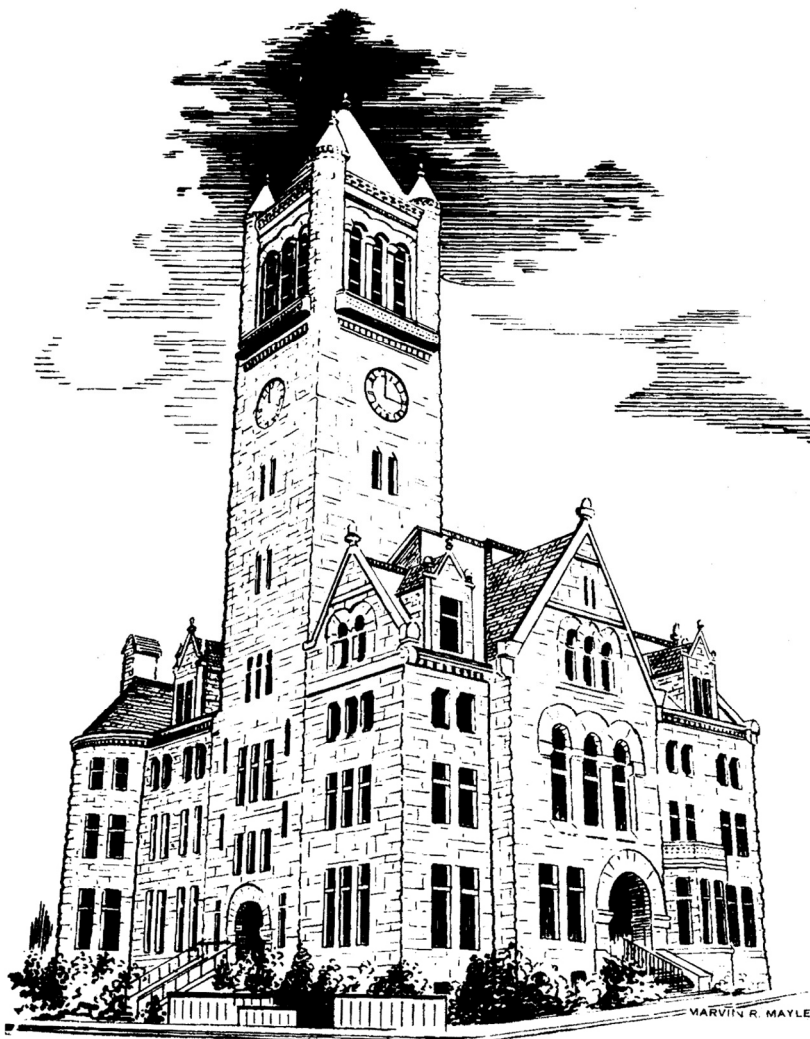


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Third Publication

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JUDICIAL OPINION

IN THE COURT OF COMMON PLEAS OF FAYETTE COUNTY, PENNSYLVANIA
CIVIL DIVISION

CAVALRY SPV I, LLC,	:	
Plaintiff,	:	
	:	
vs.	:	
	:	
JASON T. BURKHOLDER,	:	No. 2231 of 2014, G.D.
Defendant.	:	

OPINION AND ORDER

VERNON, J. October 27, 2022

Before the Court is a Motion for Summary Judgment filed by Defendant Jason T. Burkholder in a credit card collection action filed by Plaintiff Cavalry SPV I, LLC. Plaintiff initiated this action by a one count Complaint filed October 24, 2014, no exhibits were attached to the Complaint, and service was made on “Robert Burkholder” on November 3, 2014. Robert Burkholder was the name of Defendant’s father and his brother. Default judgment was entered December 2014.

In 2015, Plaintiff made some attempts to garnish Defendant’s bank account but the same appeared unsuccessful. In October 2021, Plaintiff filed a Praecipe for Writ of Execution. According to Defendant, this was his first knowledge of the action. Defendant filed a Petition to Open Default Judgment which this Court granted in November 2021. Defendant then answered the Complaint denying that he accrued this debt or that he possessed the credit card in question. Defendant pled that his father and brother were found deceased in the father’s residence and that his brother, who had a history of drug usage and died of overdose, had access to Defendant’s personal information including his social security number.

The parties engaged in discovery. Thereafter, Defendant moved for summary judgment requesting the Court dismiss the action for Plaintiff’s failure to produce admissible evidence that he incurred the credit card debt. Defendant attached portions of Plaintiff’s response to interrogatories to its Motion for Summary Judgment. Plaintiff filed no response to the Motion for Summary Judgment, but instead untimely filed a Brief in Opposition. The Court notes that litigants’ briefs are not part of the official record. *Scopel v. Donegal Mut. Ins. Co.*, 698 A.2d 602, 606 (Pa.Super.1997). Plaintiff failed to supplement the record with any documentation.

Defendant moves for summary judgment pursuant to Rule 1035.3(2) arguing that Plaintiff has presented insufficient evidence to support a prima facie cause of action for collection of the credit card debt. The Court has reviewed the Complaint and is unable to determine Plaintiff’s purported cause of action, specifically whether it is proceeding

on a breach of contract or some other means to attempt to collect this alleged debt. Summary judgment is governed by Rule 1035.2 of the Pennsylvania Rules of Civil Procedure, which provides:

After the relevant pleadings are closed, but within such time as not to unreasonably delay trial, any party may move for summary judgment in whole or in part as a matter of law

[...]

(2) if, after the completion of discovery relevant to the motion, including the production of expert reports, an adverse party who will bear the burden of proof at trial has failed to produce evidence of facts essential to the cause of action or defense which in a jury trial would require the issues to be submitted to a jury.

Pa.R.C.P. No. 1035.2(2).

The comment to Rule 1035.2 provides,

Under subdivision (2), the record contains insufficient evidence of facts to make out a prima facie cause of action or defense and, therefore, there is no issue to be submitted to a jury. The motion in this instance is made by a party who does not have the burden of proof at trial and who does not have access to the evidence to make a record which affirmatively supports the motion. To defeat this motion, the adverse party must come forth with evidence showing the existence of the facts essential to the cause of action or defense.

Pa.R.C.P. No. 1035.2.

Under Pa.R.C.P. No. 1035.2(2), the ultimate inquiry in deciding a motion for summary judgment is whether the admissible evidence in the record, considered in the light most favorable to the respondent, fails to establish a prima facie case. *Johnson v. Harris*, 615 A.2d 771 (Pa.Super. 1992). Rule of Civil Procedure 1035.1 provides a definition for the term “record” to include any:

(1) pleadings,

(2) depositions, answers to interrogatories, admissions and affidavits, and

(3) reports signed by an expert witness that would, if filed, comply with Rule 4003.5(a)(1), whether or not the reports have been produced in response to interrogatories.

Pa.R.C.P. No. 1035.1.

Rule 1035.3 governs the response to a motion for summary judgment and provides the adverse party may not rest upon the mere allegations or denials of the pleadings but must file a response within thirty days after service of the motion and identify:

(1) one or more issues of fact arising from evidence in the record controverting the evidence cited in support of the motion or from a challenge to the credibility of one or more witnesses testifying in support of the motion, or

(2) evidence in the record establishing the facts essential to the cause of action or defense which the motion cites as not having been produced.

The failure of a non-moving party, in response to a summary judgment motion, to adduce sufficient evidence on an issue essential to his case and on which he bears the burden of proof establishes the entitlement of the moving party to judgment as a matter of law. *Shepard v. Temple University*, 948 A.2d 852, 233 (Pa.Super. 2008). In ruling on a motion for summary judgment, the court will consider uncontroverted allegations in the pleadings but ignore controverted facts appearing in the pleadings. *Nationwide Mut. Ins. Co. v. Nixon*, 682 A.2d 1310 (1996).

Plaintiff has failed to produce any documentation that it is the holder of the alleged credit card debt, and that Defendant is the debtor. The record is devoid of any credit card agreement, any statements of the account, any evidence of assignment to Plaintiff, or any charges by Defendant. Plaintiff failed to file a response to the Motion for Summary Judgment. Plaintiff wholly failed to supplement the record in any way. Evidence not filed of record may not be considered in determining a summary judgment motion. *Thorsen v. Iron & Glass Bank*, 476 A.2d 928 (Pa.Super. 1984). The Court can find no evidence of record that would support a prima facie case for Plaintiff's attempt to collect on this alleged credit card debt.

Accordingly, the Motion for Summary Judgment filed by Jason T. Burkholder must be GRANTED and the Amended Complaint of Plaintiff Cavalry SPV I, LLC is DISMISSED. Wherefore, we will enter the following Order.

ORDER

AND NOW, this 27th day of October, 2022, the Motion for Summary Judgment filed by Defendant Jason T. Burkholder, and the record, it is hereby ORDERED and DECREED that the Motion is GRANTED and the Complaint of Plaintiff Cavalry SPV I, LLC is DISMISSED.

BY THE COURT,
NANCY D. VERNON, JUDGE

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