

Judge Eaton

STATE OF VERMONT
WINDSOR COUNTY

AMERICAN EXPRESS BANK, FSB)
)
v.)
)
STEPHANY PIPPIN)

Windsor Superior Court
Docket No. 753-11-07 Wrev

DECISION

Plaintiff's Motion for Summary Judgment, filed Mar. 5, 2009

The present matter before the court is a motion for summary judgment filed by plaintiff American Express Bank, FSB. American Express contends that it is entitled to judgment as a matter of law because it is undisputed that defendant Stephany Pippin incurred expenses on a credit card account and failed to repay the charges. American Express is represented by attorney Timothy Wells, Esq. Ms. Pippin represents herself pro se.

The following procedural facts appear from the record. The complaint was originally filed by attorney Jessica Ellicott in November 2007. Attorney Ellicott then withdrew, and was replaced as counsel by attorney Gwendolyn Harris in February 2008. The parties thereafter submitted an alternative dispute resolution and discovery stipulation that called for completion of discovery and mediation by July 2008. However, there are no discovery certificates in the file from the summer of 2008. The only sign of progress in the case during 2008 is a notice that mediation was scheduled for October 21, 2008.

The scheduled mediation did not occur. One week prior the session, Attorney Harris withdrew as counsel and was replaced by attorney Timothy Wells, who filed a notice of appearance and a motion to amend the complaint pursuant to Vermont Civil Procedure Rule 15. The parties then submitted another alternative dispute resolution and discovery schedule with a new timeline: the completion of written discovery and mediation by mid-April 2009, the completion of depositions and any other discovery by the end of May 2009, and the filing of any dispositive pretrial motions by June 15, 2009.

Consistent with this schedule, Attorney Wells filed a discovery certificate on March 5th indicating that he had served written interrogatories, requests for production, and requests for admission upon Ms. Pippin by mail two days earlier. However, on the same day, Attorney Wells also filed the present motion for summary judgment, in which he asserted that there were no genuinely disputed issues of material fact for trial, and that American Express was entitled to judgment as a matter of law. The motion was supported exclusively by the affidavit of a custodian of records for American Express, and was not supported by citation to any discovery responses obtained from Ms. Pippin.

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Ms. Pippin filed her opposition to the summary judgment motion on April 13th.¹ She did not respond to the merits of the motion, but rather expressed confusion because she had expected to participate in a mediation session prior to the filing of any motions seeking dispositive rulings from the court. She therefore requested that the matter be set for mediation, and in the alternative for additional time to complete discovery in the event that the matter did not resolve during mediation.

Attorney Wells then filed a reply brief on April 17th in which he contended, for the first time, that summary judgment should be granted because Ms. Pippin did not respond to the requests for admission within the 30 days provided for by Vermont Civil Procedure Rule 36(a). The deadline had passed in early April. Attorney Wells therefore argued that the court should deem the facts asserted in the request to be admitted, and consider them for purposes of summary judgment, even though the requests were not cited in the statement of material facts filed pursuant to Rule 56(c)(2).

Ms. Pippin then filed her answers to the requests for admission on May 4th, approximately one month late. In her response, she admitted that she used the credit card account at issue, but denied that she failed to make all the required payments on the account.

On this record, it appears to the court that the matter is not presently ripe for summary judgment. *Doe v. Doe*, 172 Vt. 533, 534 (2001) (mem.). American Express asserts that there are no genuinely disputed factual issues in this case, but its summary-judgment motion was filed at the same time that American Express was seeking, by propounding written discovery requests upon Ms. Pippin, to determine whether or not any genuine issues existed for trial. See, e.g., *Plaintiff's Requests for Admission* (asking Ms. Pippin to admit that she used the credit card account in question and that she is indebted for the balance currently due).

In addition, the motion for summary judgment was filed well before the end of the discovery period contemplated by the parties' own stipulation, and also before the parties had an opportunity to engage in mediation. For these reasons, the court is not persuaded that the present factual record supports a fair and accurate determination as to whether the material issues in the case are genuinely undisputed. The motion for summary judgment is therefore denied as premature. *Doe*, 172 Vt. at 534; see also *Poplaski v. Lamphere*, 152 Vt. 251, 254–55 (1989) (explaining that summary judgment is appropriate where, "after an adequate time for discovery, a party fails to make a showing sufficient to establish the existence of an element essential to his case and on which he has the burden of proof at trial") (internal quotations omitted).

¹ This was approximately one week late under the applicable rules. See V.R.C.P. 56(c)(1) (providing that a party may file affidavits and memoranda in opposition to a motion for summary judgment within 30 days after service of the motion upon the party); V.R.C.P. 5(a) (service of motions by mail is complete upon mailing).

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Although it is not necessary to the resolution of the present motion, the court also addresses the effect to be given Ms. Pippin's untimely responses to the requests for admission, since the issue is likely to linger if not resolved now. The general rule is that the factual matters asserted in a request for admission are deemed "admitted unless, within 30 days after service of the request, or within such shorter or longer time as a Superior Judge may allow, the party to whom the request is directed serves upon the party requesting the admission a written answer . . . signed by the party." V.R.C.P. 36(a). Ms. Pippin did not answer the requests for admission within 30 days.

Requests for admission under Rule 36 are meant to expedite discovery and trial practice by identifying discrete components of the case that are not in dispute, thereby relieving the parties from the expense and burden of proving genuinely undisputed facts at trial. 8A Wright, Miller & Marcus, *Federal Practice and Procedure: Civil 2d* § 2252. Towards this purpose, the sanction for failure to respond to a request for admission is normally a determination that the facts asserted therein are conclusively established for the remainder of the litigation. This sanction was not meant, however, to establish default liability in cases where the request for admission is directed at the central disputed facts in the case. Cf. *Desjarlais v. Gilman*, 143 Vt. 154, 158-59 (1983) (explaining generally the "desirability of resolving litigation on the merits, to the end that fairness and justice are served").

Accordingly, Rule 36(b) permits responses to requests for admission to be amended and withdrawn "when the presentation of the merits of the action will be subserved thereby and the party who obtained the admission fails to satisfy the court that withdrawal or amendment will prejudice that party in maintaining the action . . . on the merits." Under this provision, which expressly does not require a showing of excusable neglect, *Record v. Kempe*, 2007 VT 39, ¶ 10, 182 Vt. 17, courts may allow litigants to file untimely answers, and therefore avoid the sanction of admission, when doing so promotes the resolution of the matter on the merits and is not prejudicial to the party who obtained the admission. 8A *Federal Practice and Procedure*, *supra*, at § 2257.

In this case, the requests for admission were directed to a pro se litigant, and essentially asked her to admit that she was liable for the balance due on the credit card account. Imposing the sanction of admission for failure to respond would therefore foreclose any determination of liability on the merits of this collection action, even though Ms. Pippin has appeared and is contesting the extent of her liability. Rule 36 should not be construed as requiring this result. *985 Assocs., Ltd. v. Daewoo Electronics America, Inc.*, 2008 VT 14, ¶ 17, 183 Vt. 208; *Record*, 2007 VT 39, ¶ 10; see also *Local Union No. 38 v. Tripodi*, 913 F. Supp. 290, 293-94 (S.D.N.Y. 1996) (explaining that requests for admission should not be used to preclude pro se litigants from contesting central issues of fact). Furthermore, American Express has not relied on the admission (since the motion for summary judgment was filed before the answer was due), and the court discerns no prejudice to American Express in having to prove, on the merits and by means other than a default admission, whether or not all of the required payments have been made on the account. For these reasons, the court accepts Ms. Pippin's untimely answers as amendments under Rule 36(b), and will not impose the sanction of admission.

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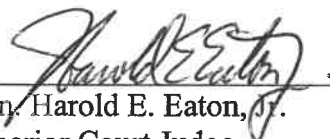
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Finally, although this ruling does not preclude the filing of another motion for summary judgment in the future, the parties must complete mediation *before* any further dispositive motions are filed. This requirement is consistent with the alternative dispute resolution and discovery stipulation that the parties previously filed with the court.

ORDER

For the foregoing reasons, Plaintiff's Motion for Summary Judgment (MPR #2), filed Mar. 5, 2009, is *denied*. The parties shall complete mediation before any future motion for summary judgment is filed.

Dated at Woodstock, Vermont this 22 day of May, 2009.



Hon. Harold E. Eaton, J.
Superior Court Judge

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