

[Cite as *Walnut Creek Foods v. Johnny Apple Cheese*, 2010-Ohio-4860.]

COURT OF APPEALS  
HOLMES COUNTY, OHIO  
FIFTH APPELLATE DISTRICT

WALNUT CREEK FOODS

Plaintiff-Appellee

-vs-

JOHNNY APPLE CHEESE, et al.

Defendants-Appellants

JUDGES:

Hon. Julie A. Edwards, P. J.

Hon. Sheila G. Farmer, J.

Hon. John W. Wise, J.

Case No. 09 CA 16

O P I N I O N

CHARACTER OF PROCEEDING:

Civil Appeal from the Municipal Court, Case  
No. CVF 0900189

JUDGMENT:

Affirmed

DATE OF JUDGMENT ENTRY:

September 21, 2010

APPEARANCES:

For Plaintiff-Appellee

For Defendant-Appellant

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*Wise, J.*

{¶1} Appellants Johnny Apple Cheese and Mark T. Baker appeal the November 10, 2009, decision of the Holmes County Municipal Court granting Appellee Walnut Creek Foods' Motion for Summary Judgment.

#### STATEMENT OF THE FACTS AND CASE

{¶2} In April, 2009, Plaintiff-Appellee Walnut Creek Foods filed a Complaint against Appellants Johnny Apple Cheese and Mark T. Baker for goods supplied to Johnny Apple Cheese between January and April, 2008.

{¶3} On May 26, 2009, Appellants filed an Answer.

{¶4} On September 3, 2009, Plaintiff-Appellee filed a Motion for Summary Judgment wherein it claimed that it entered into an agreement with Appellant Mark T. Baker, doing business as Johnny Apple Cheese, to purchase goods on account from January 22, 2008, through April 15, 2008. Attached to such motion was an affidavit signed with Appellee's accounts receivable clerk swearing to the existence of such contract.

{¶5} On September 23, 2009, Defendants-Appellants filed its own Motion for Summary Judgment wherein they alleged that Mark T. Baker no longer owned and/or operated Johnny Apple Cheese at the time of the contract with Walnut Creek Foods because he had entered into an agreement of sale with Sunny Corner Deli, LLC on or about October 26, 2007. Attached to the motion were photocopies of an Agreement of Sale (Asset-Only Purchase Agreement) between Mark T. Baker, dba Johnny Apple Cheese Place and Sunny Corner Deli, LLC and the Bill of Sale. No affidavit was attached to said Motion.

{¶16} By Judgment Entry dated November 10, 2009, the trial court granted Plaintiff-Appellee's motion.

{¶17} It is from this judgment entry that Appellant now appeals, assigning the following error for review:

ASSIGNMENT OF ERROR

{¶18} "I. THE TRIAL COURT ERRED BY GRANTING THE PLAINTIFF/APPELLEE A SUMMARY JUDGMENT."

I.

{¶19} In the instant case, the trial court granted summary judgment in favor of Plaintiff-Appellee Walnut Creek Foods and against Defendants-Appellants Johnny Apple Cheese and Mark T. Baker, jointly and severally, in the amount of \$4,100.50 with 8% interest per annum from April 15, 2008.

{¶10} Summary judgment proceedings present the appellate court with the unique opportunity of reviewing the evidence in the same manner as the trial court. *Smiddy v. The Wedding Party, Inc.* (1987), 30 Ohio St.3d 35, 36. Civ.R. 56(C) provides, in pertinent part:

{¶11} "Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence in the pending case, and written stipulations of fact, if any, timely filed in the action, 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. \* \* \* A summary judgment shall not be rendered unless it appears from such evidence or stipulation and only therefrom, that reasonable minds can come to but one conclusion and that conclusion is adverse to the

party against whom the motion for summary judgment is made, such party being entitled to have the evidence or stipulation construed most strongly in his favor.”

{¶12} Pursuant to the above rule, a trial court may not enter a summary judgment if it appears a material fact is genuinely disputed. The party moving for summary judgment bears the initial burden of informing the trial court of the basis for its motion and identifying those portions of the record that demonstrate the absence of a genuine issue of material fact. The moving party may not make a conclusory assertion that the non-moving party has no evidence to prove its case. The moving party must specifically point to some evidence which demonstrates the non-moving party cannot support its claim. If the moving party satisfies this requirement, the burden shifts to the non-moving party to set forth specific facts demonstrating there is a genuine issue of material fact for trial. *Vahila v. Hall*, 77 Ohio St.3d 421, 429, 1997-Ohio-259, citing *Dresher v. Burt*, 75 Ohio St.3d 280, 1996-Ohio-107.

{¶13} It is based upon this standard that we review Appellant’s assignments of error.

{¶14} Specifically, Appellant Mark T. Baker argues that summary judgment should not have been granted against him because he sold his interest in Johnny Apple Cheese prior to the subject debt in this case.

{¶15} When a party moves for summary judgment and supports its motion with sufficient evidentiary materials, the party opposing has a reciprocal burden of responding with evidentiary materials which set forth specific facts, demonstrating that a “genuine triable issue” exists to be litigated for trial. *State ex rel. Zimmerman v.*

*Tompkins* (1996), 75 Ohio St.3d 447, 449; *Jackson v. Alert Fire & Safety Equip., Inc.* (1991), 58 Ohio St.3d 48, 51-52, 567 N.E.2d 1027.

{¶16} Civ.R. 56(C) provides an exclusive list of materials a trial court may consider when deciding a motion for summary judgment including pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact. Civ.R. 56; *Spier v. American Univ. of the Caribbean* (1981), 3 Ohio App 3d 28, 443 N.E.2d 1021. “If a document does not fall within one of these categories, it can be introduced as evidentiary material only through incorporation by reference in a properly framed affidavit.” *Martin v. Central Ohio Transit Auth.* (1990), 70 Ohio App.3d 83, 89, 590 N.E.2d 411. “Documents which are not sworn, certified or authenticated by way of affidavit have no evidentiary value and shall not be considered by the trial court.” *Mitchell v. Ross* (1984), 14 Ohio App.3d 75, 470 N.E.2d 245; *Wolford v. Sanchez*, Lorain App. No. 05CA008674, 2005-Ohio-6992, (holding, a police incident report attached to a motion for summary judgment, without being incorporated by affidavit, did not fall into one of the categories of evidentiary materials listed in Civ.R. 56(C); *Pattyson v. Dave Phillips Masonry Inc.*, Summit App. No. 24161, 2008-Ohio-4078, (trial court properly declined to consider a building inspector's report attached to a summary judgment response which was not properly incorporated by affidavit.) Also, see *Venger v. Davis*, Summit App. No. 16567, (June 29, 1994), 1994 WL 286269, in which the court found that Civ.R. 56(C) did not permit a certified copy of a police report, attached to appellant's brief in opposition to appellee's summary judgment motion, without an affidavit.

{¶17} In the case sub judice, even if we were to consider Appellant's Motion for Summary Judgment as a proper response to Appellee's Motion for Summary Judgment, the "Agreement of Sale" and "Bill of Sale", which were attached thereto as exhibits, do not fall within one of the categories of evidentiary material listed in Civ.R. 56(C). Furthermore, neither of these documents were incorporated into a properly framed affidavit. As such, these documents had no evidentiary value and could not be considered by the court.

{¶18} For these reasons, we find that summary judgment in favor of Appellee was appropriate. Accordingly, Appellant's sole assignment of error is hereby overruled.

{¶19} The judgment of the Municipal Court of Holmes County, Ohio, is hereby affirmed.

By: Wise, J.

Edwards, P. J., and

Farmer, J., concur.

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JUDGES

