STATE OF MICHIGAN

COURT OF APPEALS

VELARDO & ASSOCIATES, Plaintiff-Appellee,	UNPUBLISHED October 7, 2008
v	No. 279801 Oakland Circuit Court
LATIF Z. ORAM, a/k/a RANDY ORAM, Defendant-Appellant.	LC No. 2007-080498-CK

Before: O'Connell, P.J., and Smolenski and Gleicher, JJ.

PER CURIAM.

In this attorney fee dispute, defendant Latif Z. Oram appeals as of right the trial court's order granting plaintiff Velardo & Associates' (Velardo) motion for summary disposition under MCR 2.116(C)(9). The primary issue on appeal is whether, in a suit to recover money due on an account stated, a defendant's failure to file the affidavit required by MCL 600.2145 after the plaintiff has complied with the statutory requirements conclusively establishes the existence of the account stated and the amount owed. We conclude that it does not. For that reason, we reverse the trial court's grant of summary disposition and remand for further proceedings. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

I. Facts and Procedural History

In January 2007, Velardo sued Oram for $103,079.68 in outstanding legal fees. Velardo's complaint included a claim founded on an account stated. See MCL 600.2145. Velardo filed an affidavit of amount due on an account stated and an itemized account of services and costs from 1999 to 2001 with its complaint. In his answer, Oram acknowledged that Velardo had demanded payment for services rendered, but stated that payment had been made under the terms of the contract, which was based on the value of services. Indeed, Oram contended that he had overpaid Velardo. Oram did not file an affidavit with his answer.

In April 2007, Velardo moved for summary disposition. In its motion, Velardo argued that Oram's failure to file the affidavit required by MCL 600.2145 constituted a conclusive admission of the indebtedness. For this reason, Velardo argued that it was entitled to a judgment in its favor.

Oram responded to the motion and filed a counter affidavit. In the affidavit, Oram averred that Velardo had been fully compensated in accordance with the parties' agreement on

fees. In his response, Oram also argued that the failure to file the affidavit required by MCL 600.2145 does not amount to an admission of the indebtedness, but creates a rebuttable presumption that shifts the burden of proof to the defendant. Further, Oram argued that his affidavit created an issue of fact regarding the indebtedness that precluded summary disposition.

The trial court granted the motion with little explanation, but apparently adopted Velardo's argument. This appeal followed.

II. Jurisdiction

As a preliminary matter, we note that Velardo suggests that this court lacks jurisdiction to consider Oram's appeal because Oram did not file the appeal within 21 days of the final opinion and order. See MCR 7.204(A). However, we conclude that the order of July 18, 2007 constituted the final order for purposes of this appeal. See MCR 7.202(6)(a); MCR 7.203(A). Therefore, Oram's appeal was timely.

III. Prima Facie Evidence of an Account Stated

Oram argues that the trial court erred when it treated prima facie evidence under MCL 600.2145 as conclusive proof and granted summary disposition in favor of Velardo on that basis. Specifically, Oram contends that the trial court should have concluded that Velardo's prima facie evidence remained rebuttable. Oram further contends that his belated affidavit was sufficient to rebut Velardo's prima facie case and create a question of fact on the issues of the existence and amount of the account stated.

A. Standard of Review

This Court reviews a trial court's decision on a motion for summary disposition de novo. *Glass v Goeckel*, 473 Mich 667, 676; 703 NW2d 58 (2005). Likewise, we review the proper interpretation and application of a statute de novo. *Danse Corp v City of Madison Heights*, 466 Mich 175, 178; 644 NW2d 721 (2002).

B. MCL 600.2145

An account stated is a "'a balance struck between the parties on a settlement . . . .'" *Keywell & Rosenfeld v Bithell*, 254 Mich App 300, 331; 657 NW2d 759 (2002), quoting *Watkins v Ford*, 69 Mich 357, 361; 37 NW 300 (1888). In order to prove the existence of an account stated, a plaintiff must present proof that the defendant either expressly accepted the bills by paying them or by failing to object within a reasonable time. *Id.* Hence, proof of an account stated will typically depend on the specific facts of the case. *Id.*, citing *Kaunitz v Wheeler*, 344 Mich 181, 185; 73 NW2d 263 (1955). However, if a party bringing an action on an account stated "makes an affidavit of the amount due . . . and annexes thereto a copy of [the] account," and serves a copy of the affidavit and account on the defendant with a copy of the complaint, "[the] affidavit shall be deemed prima facie evidence of [the] indebtedness," unless the defendant makes an affidavit denying the account stated and serves a copy on the plaintiff with his answer. MCL 600.2145.

In the present case, Velardo complied with the affidavit requirements of MCL 600.2145, but Oram did not. Hence, Velardo's affidavit—by itself—constituted "prima facie evidence" of the indebtedness under MCL 600.2145. However, as the Court in *American Casualty Co v Costello*, 174 Mich App 1, 7; 435 NW2d 760 (1989) explained, prima facie evidence is not irrefutable:

> Prima facie evidence is evidence which, if not rebutted, is sufficient by itself to establish the truth of a legal conclusion asserted by a party. *People v Licavoli*, 264 Mich 643, 653; 250 NW 520 (1933). Statutory language making proof of one fact prima facie evidence of another fact is analogous to a statutory rebuttable presumption. See, e.g., *Raptis v Safeguard Ins Co*, 13 Mich App 193, 199; 163 NW2d 835 (1968).
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> In civil matters, a presumption operates to shift the burden of going forward with the evidence. *McKinstry v Valley Obstetrics-Gynecology Clinic, PC*, 428 Mich 167, 180; 405 NW2d 88 (1987). In *Widmayer v Leonard*, 422 Mich 280, 289; 373 NW2d 538 (1985), our Supreme Court stated:
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> "It is a procedural device which allows a person relying on the presumption to avoid a directed verdict, and it permits that person a directed verdict if the opposing party fails to introduce evidence rebutting the presumption."
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> "Almost all presumptions are made up of permissible inferences. Thus, while the presumption may be overcome by evidence introduced, the inference itself remains and may provide evidence sufficient to persuade the trier of fact even though the rebutting evidence is introduced. But always it is the inference and not the presumption that must be weighed against the rebutting evidence."

Because Oram failed to submit an affidavit denying the statement of account, Velardo's affidavit became prima facie evidence of the existence of an account stated and the balance of that account. MCL 600.2145. And, for that reason, the burden of going forward with the evidence shifted to Oram. *American Casualty Co*, *supra* at 7; see also *Lipa v Asset Acceptance, LLC*, ___ F Supp 2d ___ (ED Mich, 2008) (noting that an uncontested affidavit filed under MCL 600.2145 merely shifts the burden of going forward with proof to the defendant). Hence, on the basis of the prima facie evidence alone, Velardo would be entitled to summary disposition or, at trial, a directed verdict, unless Oram presented evidence sufficient to rebut Velardo's prima facie evidence. *American Casualty Co*, *supra* at 7. However, because Oram could present evidence to rebut Velardo's prima facie case, the trial court erred when it gave Velardo's prima facie evidence conclusive weight and granted summary disposition in favor of Velardo under MCR 2.116(C)(9). See *Slater v Ann Arbor Bd of Ed*, 250 Mich App 419, 425-426; 648 Nw2d 205 (2002) (noting that summary disposition under MCR 2.116(C)(9) is appropriate only "when the defendant's pleadings are so clearly untenable that as a matter of law no factual development could possibly deny the plaintiff's right to recovery."). Likewise, Velardo was not entitled to summary disposition under MCR 2.116(C)(10).

In his affidavit submitted in response to Velardo's motion for summary disposition, Oram averred that he never received itemized bills from Velardo, but "paid bills under protest after an

oral explanation and promise I would receive detailed bills." He further asserted that the parties had agreed the legal bill would be reduced if Velardo's efforts were not successful, and that he had always objected to the fees. These proofs establish an issue of fact regarding whether the parties' actually agreed to a sum certain and, if they did, what the amount was. And absent assent and a balance struck on the amount due, there is no account stated. *Keywell & Rosenfeld*, *supra* at 331. Accordingly, Velardo would not alternatively be entitled to summary disposition under MCR 2.116(C)(10). *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999).

On appeal, Velardo argues that permitting a defendant an opportunity to rebut the prima facie evidence even after the defendant failed to submit the affidavit required by MCL 600.2145 would render the statute "a useless act that does nothing to advance the litigation of an account stated," and would add "nothing to summary disposition proceedings that does not already exist by virtue of the court rules and the case law." For this reason, Velardo urges this Court to reject an interpretation of MCL 600.2145 that would permit a defendant to rebut the prima facie evidence during summary disposition or at trial. Initially, we note that there is no language within MCL 600.2145 that would suggest that the Legislature intended the presumption to be conclusive. Rather, the Legislature's use of the legal term of art "prima facie evidence" indicates an intent to create a rebuttable presumption. See *American Casualty*, *supra* at 8. Hence, our application of this statute is consistent with the Legislature's intent as expressed by the words actually used in the statute. MCL 8.3a; *Mayberry v Gen Orthopedics, PC*, 474 Mich 1, 7; 704 Nw2d 69 (2005). Nevertheless, we also do not agree that interpreting prima facie evidence in this way renders the statute "useless."

MCL 600.2145 creates a valuable and, in many cases, dispositive presumption. Absent the presumption, a party might have to engage in extensive discovery in order to accumulate the evidence necessary to support a motion for summary disposition, survive a motion for summary disposition, or proceed to trial. Hence, the presumption can serve to expedite summary proceedings and preparation for trial. Further, a plaintiff that has the benefit of the presumption has established factual support sufficient to survive a motion for a summary disposition or directed verdict by the defendant. Indeed, as already noted, the existence of the prima facie evidence shifts the burden of going forward with the evidence to the defendant and forces the defendant to carefully prepare proofs to rebut the plaintiff's case at every stage of the litigation. The plaintiff could even elect to rely solely on the prima facie evidence at trial and a jury could find for the plaintiff on that basis alone. See *American Casualty Co*, *supra* at 7. Consequently, there are definite and substantial penalties to a defendant who ignores the requirements of MCL 600.2145.

The trial court erred when it treated Velardo's prima facie evidence as conclusive proof of its claim for an account stated. Further, because Oram presented evidence that, if believed, would rebut Velardo's prima facie evidence, the trial court erred when it granted summary disposition in favor of Velardo. Because of our resolution of this issue, we need not consider

Oram's alternate bases for relief.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Peter D. O'Connell
/s/ Michael R. Smolenski
/s/ Elizabeth L. Gleicher