

Reversed and Remanded and Opinion filed February 7, 2002.



In The

Fourteenth Court of Appeals

NO. 14-01-00027-CV

JERALD D. DUNHAM, Appellant

V.

PROVIDIAN NATIONAL BANK, Appellee

**On Appeal from the County Court at Law No. 1
Brazoria County, Texas
Trial Court Cause No. 25,750M**

OPINION

In this credit card account collection case, Jerald D. Dunham appeals a summary judgment in favor of Providian National Bank (“Providian”) on the grounds that: (1) an action for a sworn account does not apply to credit card debt; (2) the summary judgment was not supported by adequate proof; (3) there was a material fact issue as to attorney’s fees; and (4) the trial court abused its discretion by denying appellant’s amended motion to compel and for sanctions. We reverse and remand.

Background

Providian sued appellant on an unpaid credit card account balance and filed a motion for summary judgment based on: (1) Dunham's failure to file a verified denial to Providian's sworn account claim; and (2) proof of the breach of contract claim in the form of deemed admissions, *i.e.*, requests for admissions which Dunham failed to timely deny (discussed further below). The trial court granted Providian's motion and entered a summary judgment which ordered Dunham to pay \$8,473.11 in damages; \$3,001.00 in prejudgment interest; and \$2,118.28 in attorney's fees.

Standard of Review

A summary judgment may be granted if the motion and summary judgment evidence show that, except as to the amount of damages, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law on those issues expressly set out in the motion or response. TEX. R. CIV. P. 166a(c).

Sworn Account Claim

Dunham's first issue contends that the trial court erred in granting Providian's motion for summary judgment because a credit card account provided by a financial institution does not create the type of debtor-creditor relationship required to bring suit on a sworn account.

Under certain circumstances, a petition reflecting a verified account ("sworn account") is prima facie evidence of the amount owed on the account if a sworn written denial is not filed in response. *See* TEX. R. CIV. P. 185. However, this rule does not apply to a credit card account which involves only an advance of money by a financial institution that was not the seller of the goods or services purchased with the credit card. *See Bird v. First Deposit Nat'l Bank*, 994 S.W.2d 280, 282 (Tex. App.—El Paso 1999, pet. denied). This is because a sworn account claim does not apply to a loan or advance of money, as contrasted from a sale of goods or services, and it applies to a sale of goods or services only as between the actual buyer and seller, not a third party. *See id.*; *Hou-Tex Printers, Inc. v. Marbach*, 862 S.W.2d 188, 190 (Tex. App.—Houston [14th Dist.] 1993, no writ). Because

the credit card debt in this case was merely an advance of money, rather than a transaction for goods and services, and because Providian was not a party to the underlying purchases for which the credit card debt was incurred, a sworn account action could not be used to collect that debt. Therefore, the summary judgment cannot be affirmed on the sworn account claim, and Dunham's first issue is sustained.

Breach of Contract Claim

Dunham's second issue argues that the trial court erred in granting the summary judgment on Providian's breach of contract claim (as contrasted from its sworn account claim) because Providian did not prove when Dunham received the requests for admissions so as to establish that they were deemed admitted.

Generally, when a party to a lawsuit serves written requests for admissions, and the responding party fails to serve a written response within 30 days, the requests are considered admitted, and the admitted facts are conclusively established against the responding party. *See* TEX. R. CIV. P. 198.1, 198.2(c). In this case, Providian's motion for summary judgment alleged that it served Dunham with requests for admissions, Dunham had failed to timely respond, and the requests for admissions were thereby deemed admitted. However, attached to Providian's motion are not its requests for admissions but Dunham's answers to them, which are all denials and are not accompanied by a certificate of service. Neither Providian's summary judgment motion, the attached copy of Dunham's answers, nor any other materials in our record, show when the requests were served on Dunham or when his answers were served on Providian. Because Providian's summary judgment evidence thus fails to show that the requests for admission were not timely answered so as to be deemed admitted, and no other evidence is attached to its motion to prove the breach of contract claim, the summary judgment cannot be affirmed on that ground. Therefore, we sustain Dunham's second issue.

Motion to Compel Discovery Request and for Sanctions

Dunham's third issue asserts that the trial court erred by denying his motion to compel and for sanctions. However, Dunham's brief fails to state what discovery responses he sought to compel, why or how the trial court erred in denying his motion, or how it affected the summary judgment issues. Thus, this issue presents nothing for our review and is overruled.¹ Accordingly, we reverse the judgment of the trial court² and remand the case to the trial court for further proceedings.

/s/ Richard H. Edelman
Justice

Judgment rendered and Opinion filed February 7, 2002.

Panel consists of Justices Yates, Edelman, and Wittig.³

Do Not Publish — TEX. R. APP. P. 47.3(b).

¹ See TEX. R. APP. P. 38.1(h) (The brief must contain a clear and concise argument for the contentions made, with appropriate citations to authorities and to the record.).

² Because we are reversing the trial court's judgment, including the award of attorney's fees, we need not separately address appellant's challenge to the award of attorney's fees.

³ Senior Justice Don Wittig sitting by assignment.