

FILED _____

AT _____ O'Clock _____ M
CLERK OF DISTRICT COURT

Deputy

**IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO IN AND FOR THE COUNTY OF KOOTENAI**

XPRESS COLLECTORS AGENCY, LLC,)
)
)
Plaintiffs,)
)
)
vs.)
)
HERBERT GWIN.)
)
Defendants.)
)
_____)

Case No. **CV 2010 1118**

ORDER

Attorneys:

For the Plaintiff - William R. Dalling
For the Defendant - *Pro Se*

I. PROCEDURAL HISTORY AND BACKGROUND.

In October 1994, Defendant Herbert Gwin (Gwin) opened a credit card account with Chase Manhattan Bank (Chase). Gwin's last payment on the account was made in August 2007. As of the filing of the Complaint, Gwin's account had an amount due and owing of \$16,464.24. The account was purchased by Cardez Credit Affiliates and later assigned to Plaintiffs, Xpress Collectors Agency (Xpress). Gwin filed his Answer *pro se* on March 10, 2010, denying the allegations in Xpress' Complaint and stating I.C. § 15-3-801 *et seq.* bar Xpress' claim as the account was opened by his deceased spouse and Chase never contacted the probate estate attorney in Bonner County case CV 2007 1125 (*In the Matter of the Estate of Ethel C. Gwin*) with a creditor's claim. Answer, pp. 2-3, ¶ 4.

Xpress filed its motion for summary judgment and its affidavit in support of summary judgment on April 19, 2010. Gwin did not appear at the hearing set for the motion, on May 19, 2010. The instant matter was rescheduled for July 26, 2010 at 3:00 p.m. Gwin still has not replied to Xpress' motion. This matter is currently set for a 2-day Court trial commencing on October 25, 2010.

II. STANDARD OF REVIEW.

In considering a motion for summary judgment, the Court is mindful that summary judgment may properly be granted only where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. I.R.C.P. 56(c). In determining whether any issue of material fact exists, this court must construe all facts and inferences contained in the pleadings, depositions, and admissions, together with the affidavits, if any, in the light most favorable to the non-moving party. I.R.C.P. 56(c); *Sewell v. Neilson, Monroe Inc.*, 109 Idaho 192, 194, 706 P.2d 81, 83 (Ct. App. 1985). A mere scintilla of evidence or only slight doubt as to the facts is not sufficient to create a genuine issue for purposes of summary judgment. *Samuel v. Hepworth, Nungester & Lezamiz, Inc.*, 134, Idaho 84, 87, 996 P.2d 303, 306 (2002). Summary judgment must be denied if reasonable persons could reach differing conclusions or draw conflicting inferences from the evidence. *Smith v. Meridian Joint School District No. 2*, 128 Idaho 714, 718, 918 P.2d 583, 587 (1996); *Riverside Dev. Co. v. Ritchie*, 103 Idaho 515, 519, 650 P.2d 657, 662 (1982). In a case such as this, where the action will be tried before a court without a jury, the judge is not constrained to draw inferences in favor of the party opposing a motion for summary judgment, rather, the judge is free to arrive at the most probable inferences to be drawn from uncontroverted evidentiary facts. *Riverside Development Co., v. Ritchie*, 103 Idaho 515, 650 P.2d 657

(1982).

III. ANALYSIS.

With its Motion for Summary Judgment, Xpress submits the Affidavit of Laurie Dalling and Exhibit A thereto, consisting of the account summary for various months between October 2006 and March 2008. Exhibit A to Affidavit in Support of Motion for Summary Judgment. The affiant states Gwin opened the account, made purchases, ceased paying in August 2007, and the account was later turned over to Xpress for collection. Affidavit in Support of Motion for Summary Judgment, pp. 1-2.

Gwin has not set forth any objections or assertions of disputed, material facts for this Court in response to the motion for summary judgment. However, in his Answer, he alleges I.C. § 15-3-801 *et seq.* bar Xpress' claim as the account was opened by his deceased spouse and Chase never contacted the probate estate attorney in Bonner County case CV 2007 1125 (*In the Matter of the Estate of Ethel C. Gwin*) with a creditor's claim. Answer, pp. 2-3, ¶ 4. Contrary to his allegation, the letter written by his attorney in the estate matter identifies the account as being in Herbert L. Gwin's name and states only:

It is my understanding that this account was used by both Mr. Gwin and his deceased spouse, Ethel C. Gwin, prior to Mrs. Gwin's death on December 4, 2005. As such, at least part of any balance owed as of that date is a debt of the decedent's estate.

Exhibit A to Answer. Gwin's Answer, and Exhibit A attached to that Answer, shows Gwin's wife died December 4, 2005. The Affidavit of Laurie Dalling in support of Motion for Summary Judgment shows that Gwin himself incurred a great deal of charges after that date.

Given that Gwin has submitted no evidence in support of his claim that the account was that of his deceased spouse, and that Gwin has not created any issues of

material fact for purposes of summary judgment, it is proper for this Court to grant summary judgment in favor of Xpress. See *Samuel v. Hepworth, Nungester & Lezamiz, Inc.*, 134, Idaho 84, 87, 996 P.2d 303, 306 (2002). There are no conflicting inferences regarding the debt to be drawn from the evidence before the Court and Xpress is likely entitled to judgment as a matter of law.

IV. CONCLUSION AND ORDER.

For the reasons stated above, this Court must grant Xpress' Summary Judgment motion.

IT IS HEREBY ORDERED defendant Xpress' Motion for Summary Judgment is GRANTED.

Entered this 26th day of July, 2010.

John T. Mitchell, District Judge

Certificate of Service

I certify that on the _____ day of July, 2010, a true copy of the foregoing was mailed postage prepaid or was sent by interoffice mail or facsimile to each of the following:

Lawyer
William R. Dalling

Fax #

|
Herbert Gwin, Pro Se
706 E. Autumn Crest Loop
Post Falls, ID 83854

Jeanne Clausen, Deputy Clerk