

**ORIGINAL**

**IN THE SUPREME COURT OF OHIO**

**CENTRO MIDWAY LLC**

**Plaintiff-Appellee**

**v.**

**DENNIS BLECHSCHMID**

**and**

**MARILU BLECHSCHMID**

**Defendants-Appellants**

**Ohio Supreme Court**

**Case No. 11-1432**

**On Appeal from the  
Lorain County Court  
of Appeals, Ninth Judicial  
District Case No. 10CA009857**

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**JOINT MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANTS'  
DENNIS BLECHSCHMID AND MARILU BLECHSCHMID**

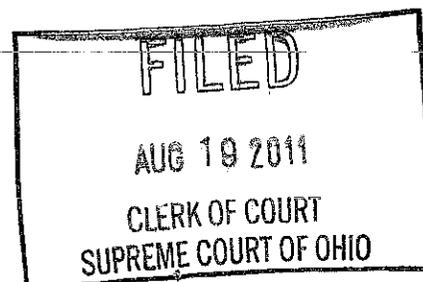
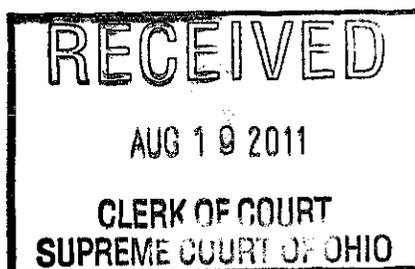
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**EXPLANATION OF WHY THIS CASE IS OF PUBLIC OR GREAT INTEREST AND INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION**

In Ohio a party's due process rights are prejudiced by the court's granting of summary judgment "where all relevant evidence is not before the court, where genuine issues as to any material fact exists, and the non-moving party is not entitled to judgment as a matter of law." Houk v. Ross (1973), 34 Ohio St. 2d 77, paragraph one of the syllabus, 206 N.E. 2d 266. Moreover, under good case law established by this court and other Ohio courts, there is no "default" summary judgment in Ohio. Indeed, there is no default summary judgment under Ohio law. Maust v. Palmer (1994), 94 Ohio App. 3d 764, 759, 641 N.E. 2d 818. The granting of a "Default Summary Judgment" in the case at bar constitutes a significant constitutional question worthy of review by this court, because it deprived Appellants of their right to due process of law guaranteed by Article I Section 16 of the Ohio Constitution, and the Fifth and Fourteenth Amendments to the United States Constitution.

It is axiomatic then that the moving party, carries the burden of establishing that no genuine issue of material fact exists and that they are entitled to judgment as a matter of law. In doing so, the moving party is not required to produce any affirmative evidence, but must identify those portions of the record which affirmatively support his argument. Dresher v. Burt, 75 Ohio St 3d 280- 293, 1996-Ohio-107 Id. Put another way, it is never the nonmoving parties duty to prove its case on summary judgment; it is always the moving party's responsibility to establish the requirements of Civ. R. 56. See, Smith v. Doctors Hosp. North (Mar. 22, 1994), Franklin App. No. 93APE08-1157, 1994 WL 97188, unreported; O'Brien v. Citicorp Mtge. (Feb. 24, 1994), Franklin App. No. 93AP-1074, 1994 WL 57675. If any doubts exist, the issue must be

resolved in favor of the nonmoving party. Murphy v. Reynoldsburg, 65 Ohio St. 3d 356, 358-59, 1992-Ohio-95.

It is well established that the right to redress in courts cannot be deprived without being granted due process of law, which requires the opportunity to be heard. At the core of these protections is the acknowledgment that due process also protects, "Those fundamental principals of liberty and justice which lie at the base of our civil and political institutions \* \* \* and to guarantee those procedures which are required for the \* \* \* protection of ultimate decency in a civilized society." Id. citing Hurtado v. California, (1884), 110 U.S. 516, 535; and Adamson v. California, (1947), 332 U.S. 46,61.

The Ninth District's holding undermines the public's interest and potentially affects every litigant seeking judicial review of their cases. The right to present possible errors and omissions at the trial level are deeply rooted in Ohio's history and judicial tradition and essential to an equitable judicial process. The Ninth District's decision also sets dangerous precedent because it allows rights that are guarded by due process protections to be simply extinguished through rule-making. Usurping protected rights erodes the public's faith in the justice system and undercuts perceptions of fairness in the justice process. Such a precedent creates potentially disastrous inroads into protected rights, which could be used as a platform to deprive other fundamental rights protected through due process or by the Constitution, for that matter.

In summary, the Ninth District's holding carries significant implications regarding Ohio citizens' due process rights and the proper application of future changes in law that affect the right to an appeal. The protection of due process rights is an issue of constitutional magnitude, and the proper characterization of the right to an appeal is of great public and general interest to

Ohio's citizens. Finally, the Ninth District's decision is not in accord with this Court's precedents and warrants reversal by this Court. For these reasons, this Court should grant jurisdiction to review this case.

### **STATEMENT OF THE CASE AND FACTS**

On August 24, 2010 A Complaint was filed by the Appellee, Centro Midway LLC , (Appellee) in the Lorain County Court of Common Pleas against Appellants, Xanadu Group Inc., Dennis Blechschmid and Marilu Blechschmid. (Appellants) On October 19, 2009 Appellee's Motion for Default Judgment was filed. On November 5, 2009 Defendant's Motion to File Answer Instanter was filed. Appellee filed a Brief in Opposition to Defendant's Motion for Leave to File Answer Instanter on November 10, 2009.

On December 1, 2009 Appellants' Motion for Leave was granted and the Answer of Xanadu Group Incorporated, and Dennis Blechschmid was filed on December 15, 2009. The Answer of Defendant's Xanadu Group Incorporated, and Marilu Blechschmid was filed on December 17, 2009. A Motion for Summary Judgment against Appellants was filed by Appellee on March 18, 2010. On April 23, 2010 Appellants filed a Motion for Extension of Time to respond to Appellee's Motion for Summary Judgment. On June 21, 2010 Appellee was granted Summary Judgment against Appellants, Xanadu Group Incorporated, Dennis Blechschmid and Marilu Blechschmid .in the amount of \$1,046,661.75. Appellants appealed the court's decision to the Ninth District of Court of

Appeals on July 27, 2010. The Ninth District Court of Appeals affirmed the trial court's decision in its holding issued on July 5, 2011.

This matter involves a relatively simple breach of contract case involving a commercial lease and a personal guaranty. Appellants entered into a Lease and Rider dated March 13, 2009 with Appellee, Centro Midway LLC, for Store No. E1A at Midway Mall, with the term of the Lease to run through May of 2019. Appellants' executed a Guaranty whereby they unconditionally guaranteed all of Xanadu's obligations under the Lease to Appellee.

Appellants' rent obligation was to commence in July, 2009 when the store would be open for business. Defendants were unable to open for business on July 1, 2009 due to construction delays and overrides. Appellants were required to maintain the premises in good condition and repair, and return possession of the premises to Plaintiff, in as good as condition as when they received possession. Appellants were not permitted to complete the renovation of the premises before the Lease was terminated by Appellee on August 18, 2009.

Appellee then filed a Complaint in the Lorain County Court of Common Pleas on August 24, 2010 against Appellants. A Motion for Summary Judgment against Appellants was filed by Appellee on March 18, 2010. On June 21, 2010 Appellee was granted Summary Judgment against Appellants in the amount of \$1,046,661.75.

Appellants appealed the court's decision to the Ninth District of Court of Appeals on July

27, 2010. The Ninth District Court of Appeals affirmed the trial court's decision in its holding issued on July 5, 2011. It is from the Ninth District's decision affirming the trial court judgment that Appellants appeal to this court.

**ARGUMENT IN SUPPORT OF PROPOSITION OF LAW**

**Proposition of Law No. 1.**

**THE NINTH DISTRICT VIOLATED APPELLANTS' DUE  
PROCESS RIGHTS WHEN IT AFFIRMED THE TRIAL COURT  
JUDGMENT GRANTING SUMMARY JUDGMENT**

In the case before this court Appellants challenge the trial court's judgment granting Summary Judgment in the amount of \$1,046,661.75 plus interest on grounds that the trial court relied on material not listed under Civ. R. 56(C) for consideration. Specifically, Appellants challenge the relied upon unauthenticated and unqualified Affidavits as not supporting the judgment of the court.

On a motion for summary judgment, the moving party has the burden of demonstrating that no genuine issues of material fact exist, Dresher v. Burt (1996), 75 Ohio St. 3d 280, 292. The moving party must point to some evidence in the record of the type listed in Civ. R. 56(C). Id. at 292-293.

"Pursuant to Civ. R. 56(C) , summary judgment is appropriately rendered when, "(1) [n]o genuine issue as to any material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such

evidence most strongly in favor of the party against whom the motion for summary judgment is made, that conclusion is adverse to that party.” Turner v. Turner (1993), 67 Ohio St. 3d 337, 339-340, quoting Temple v. Wean United Inc. (1977), 50 Ohio St. 2d 317, 327.

Moreover, Civ. R. 56(C) limits the evidence that may be considered in support of or in opposition to a motion for summary judgment to “pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action.”

Pursuant to Civ. R. 56(C):

“[s]ummary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations, of fact, as 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. No evidence or stipulation may be considered except as stated in this rule.”

Further, Civ. R. 56(E) provides that, Affidavits submitted under Civ. R. 56 shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated in the affidavit:

“[s]upporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated in the affidavit. Sworn or certified copies of all papers or parts of papers referred to in an affidavit shall be attached to or served with the affidavit.” Unauthenticated documents and affidavits not based on personal knowledge “have no evidentiary value and should not be considered by the court in deciding whether summary judgment is appropriate.” Modon v. Cleveland (Dec. 22,

1990), 9<sup>th</sup> Dist. No. 2945-M, at \*3.

Moreover, expert affidavits and related documentation must comply with both Civ. R. 56(E) and Evid. R. 702 in order to be properly considered in opposition to a motion for summary judgment. See, e.g. Douglass v. Salem Community Hosp., 153 Ohio App.3d 350, 2003- Ohio-4006. “In order to comply with Civ. R. 56(E) and Evid. R. 702, an expert affidavit must set forth the facts supporting the expert’s opinion which would be admissible into evidence. “Ohio’s standards regarding the admissibility of expert opinions are relatively lenient as to a determination of who is an expert but relatively strict in governing the admissibility of the expert testimony.

It is a given that, “To qualify as an expert, the witness must have some ‘specialized knowledge, skill, experience, training, or education regarding the subject matter of the testimony’. An expert’s testimony must either relate to matters beyond the knowledge or experience possessed by lay persons or dispel a misconception common among lay persons. “Neither special education nor certification is necessary to confer expert status upon a witness. The individual offered as an expert need not have complete knowledge of the field in question, as long as the knowledge he or she possesses will aid the trier of fact in performing its fact-finding function.’ Finally, the witness is an expert only if his or her testimony ‘is based on reliable scientific, technical, or other specialized information.’ When applying this prong of Evid. R. 702, the trial court acts as a ‘gatekeeper’ to ensure that the proffered information is sufficiently reliable.” Id. at 21,

31-32.

Further, Evidence R. 801(C) defines hearsay as a “statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” A “statement,” as included in the definition of hearsay, is an oral or written assertion or nonverbal conduct of a person if that conduct is intended by him as an assertion. Evid. R. 801(A). “Evid. R.802 mandates the exclusion of hearsay unless any exceptions apply.” In re Lane, Washington App. No. 02CA61, 2003-Ohio-3755, at 11. Certain statements are excluded from the definition of hearsay, including statements of a party-opponent where the statement is offered against that party. Evid. R. 801(D)(2)(a).

Hearsay, is generally inadmissible, unless it falls within the scope of an exception within the Rules of Evidence. Evid. R. 802; State v. DeMarco (1987), 31 Ohio St. 3d 181, 195, 509 N.E.2d 1256. One such exception applies to “records of regularly conducted activity.” See Evid. R. 803(6), the rationale behind Evid. R. 803(6) is that if information is sufficiently trustworthy that a business is willing to rely on it in making business decisions, the courts should be willing to as well. See Staff Note to Evid. R. 803(6).

“To qualify for admission under Rule 803(6), a business record must manifest four essential elements: (i) the record must be one regularly recorded in a regularly conducted activity; (ii) it must have been entered by a person with knowledge of the act, event or

condition; (iii) it must have been recorded at or near the time of the transaction; and (iv) a foundation must be laid by the ‘custodian’ of the record or by some ‘other qualified witness’. State v. Davis, 116 Ohio St.3d 404, 880 N.E.2d 31, 2008-Ohio-2, 171 quoting Weissenberger, Ohio Evidence Treatise (2007) 600, Section 803.73. See also McCormick v. Mirrored Image, Inc. (1982), 7 Ohio App.3d 233; 454 N.E.2d 1363,” Even after these elements are established, however, a business record may be excluded from evidence if ‘the source of information or the method or circumstances of preparation indicate lack of trustworthiness.’” Davis at 171, quoting Evid. R. 803(6): When a party offers a record into evidence, the record must be properly identified or authenticated “by evidence sufficient to support a finding that the matter in question is what its proponent claims.” Evid. R. 901(A).

In this case, Appellee supported its motion for summary judgment by referencing certain provisions of the lease agreement. The lease agreement was not attached because, in Affaint’s view the agreement “ is voluminous, contains confidential information, and in Defendant’s (Appellant’s ) possession”. Affaint goes on to further aver that Appellee will produce a copy of the Lease upon request of the court for an in camera review and or an appropriate protective order. Nothing in the record, however, indicates that a copy of the Lease agreement was presented to the court for its review, nor does the record indicate that the court reviewed the Lease. To further support its motion for summary judgment Plaintiff-Appellee presented the unauthenticated and unqualified Affidavit of James

Ottobre, and Alan Digriolamo before the trial court.

Civ.R. 56(E) requires affidavits “shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated in the affidavit.”

In Appellee’s Motion affiant Ottobre does not state the basis for his assertion that he has personal knowledge regarding any aspect of the transactions between Appellee and Appellant. He is the Operations Manager of the Midway Mall. The Mall is owned by Appellee. His function as an Operations Manager is to “oversee tenant accounts, maintenance and repair issues”. Nowhere in his affidavit does he demonstrate the necessary personal knowledge, or state the basis for his ability to explain and discern the legal obligations, and or duties of either party regarding any aspect of the transaction between Appellee and Appellant. Likewise, nowhere in his affidavit does Affiant Ottobre demonstrate the necessary personal knowledge, or state the basis for his ability to assert that Appellants “failed to maintain the premises in good condition and repair” and because Appellants failed to do so caused an estimated \$75,000.00 in damages. Ottobre does not aver that he is an Contractor, Engineer, Mechanic, Architect, or even a Plumber. He attaches no invoices, receipts, statements from workers who either estimated or performed the alleged repairs in support of his request for \$75,000.00. This figure seem to be pulled out of thin air and in many ways is nothing more than an unsupported sham. Affiant’s representations are no more than speculative assertions concerning matters

which he is not demonstrated the competence to testify to. As such they do not satisfy the evidentiary requirements of Civ. R.56(E).

Appellee also presented Affidavits by persons purporting to be experts. It is a given that expert affidavits and related documentation must comply with both Civ. R. 56(E) and Evid. R. 702 in order to be properly considered in opposition to a motion for summary judgment. See, e.g. Douglass v. Salem Community Hosp., 153 Ohio App.3d 350, 2003- Ohio-4006. “In order to comply with Civ. R. 56(E) and Evid. R. 702, an expert affidavit must set forth the facts supporting the expert’s opinion which would be admissible into evidence. Here, Affiant’s affidavit lacks the necessary proper foundation regarding professional skill and expertise to qualify as an opinion of an expert witness.

Affiant avers in his affidavit that Appellee delivered a Notice of Default by certified mail to Appellants as required by the lease, and that Appellants failed to cure said default. Copies of both notices were attached to the Complaint as Exhibit “C” and Exhibit “D” and referenced by Affiant in the Motion for Summary Judgment. The notices were drafted by Appellee’s counsel, and is clearly hearsay that does not come in under any exception.

Evid. R. 801(C) defines hearsay as a “statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” A “statement,” as included in the definition of hearsay, is an oral or

written assertion or nonverbal conduct of a person if that conduct is intended by him as an assertion. Evid. R. 801(A). “Evid. R.802 mandates the exclusion of hearsay unless any exceptions apply.” In re Lane, Washington App. No. 02CA61, 2003-Ohio-3755, at 11

“To qualify for admission under Rule 803(6), a business record must manifest four essential elements: (i) the record must be one regularly recorded in a regularly conducted activity; (ii) it must have been entered by a person with knowledge of the act, event or condition; (iii) it must have been recorded at or near the time of the transaction; and (iv) a foundation must be laid by the ‘custodian’ of the record or by some ‘other qualified witness’.” State v. Davis, 116 Ohio St.3d 404, 880 N.E.2d 31, 2008-Ohio-2, 171. ” Even after these elements are established, however, a business record may be excluded from evidence if ‘the source of information or the method or circumstances of preparation indicate lack of trustworthiness.’“ Davis at 171, quoting Evid. R. 803(6).

In this case Affiant presented no credible evidence that Appellants received such notice, which could have been easily satisfied by return receipt. As Appellee failed to demonstrate a requisite condition precedent to recovery the court erred in granting judgment for Appellee.

The affidavit also incorrectly references “invoices attached to the Complaint” which purport to reflect “numerous transactions”. No “invoices” were attached. The exhibit attached to the complaint is a single billing statement which summarizes some type of amounts charged. Likewise Affiant in his affidavit references Exhibit 1, and 2.

The affidavit does not even contain the basic averments for admission of the account as a business record under Evid. Rule 803(6).

Moreover, the account appears to contain multiple charges. The actual rate and calculation of these charges are thus unclear. To receive interest at a rate in excess of the default rate of R.C. 1343.03(A), a defendant's written assent must be shown. Hobart Bros. Co. v. Welding Supply Service, Inc. (Franklin 1985), 21 Ohio App.3d 142, 144. If this is the rule even in a default proceeding, see Yager Materials Inc. v. Marietta Indus. Ent. Inc., (Washington 1996), 116 Ohio App. 3d 233,235-236, or when judgment is entered by confession, Ohio Savings Bank v. Repco Electronics, Inc. (Cuyahoga App. 08/13/98). No. 73218, 1998 WL 474180, fn. 3., summary judgment should not be entered for such amounts until Plaintiff's contractual basis for this recovery is shown factually and Plaintiff's entitlement appears "as a matter of law.

In further support of its motion for summary judgment Appellee presented the unauthenticated and unqualified Affidavit of Alan Digriolamo as an expert witness to support an award of Attorney fees in the sum of \$12, 528.36.

In his affidavit Digirolamo avers that he is a licensed attorney, one of the Attorneys of record, and that he has personal knowledge of the attorney fees and disbursements that were incurred by Appellee in this matter. Further, Affiant avers that Appellants are obligated to reimburse Plaintiff for its reasonable expenses, including attorneys' fees and disbursements incurred as a result of Defendants' breach of the

subject Lease and Guaranty pursuant to Article XXVII, Section 27.22 of the subject Lease. Affiant then references and attaches copies of the “Invoices and Time Inquiry” for professional services rendered from August 1, 2009 through March 10, 2010.

Civ.R. 56(E) requires affidavits “shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated in the affidavit.” In this case the affiant does not state the basis for his personal specialized knowledge regarding any aspect of the transactions between Plaintiff and Defendant. In fact, the affidavit does not even comply with the section of the lease relied upon by affiant in seeking fees, specifically paragraph D states in pertinent part:

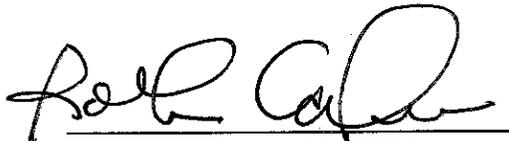
“(D) A commitment to pay attorney fees is enforceable only to the extent that it obligates payment of a reasonable amount. In determining the amount of attorneys’ fees that is reasonable, all relevant factors shall be considered , including ... value of the property affected, and the professional skill and expertise of the attorneys or attorneys rendering the services”.

It is a given that expert affidavits and related documentation must comply with both Civ. R. 56(E) and Evid. R. 702 in order to be properly considered in opposition to a motion for summary judgment. See, e.g. Douglass v. Salem Community Hosp., 153 Ohio App.3d 350, 2003- Ohio-4006. “In order to comply with Civ. R. 56(E) and Evid. R. 702, an expert affidavit must set forth the facts supporting the expert’s opinion which would be admissible into evidence. Here, affiant’s affidavit lacks the necessary proper foundation regarding professional skill and expertise to qualify as an opinion of an expert

641 N.E. 2d 818. Moreover both disputed facts and any inference drawn from undisputed facts are to be construed most favorably to the nonmoving party. Putka v. First Catholic Slovak Union 75 Ohio App. 3d 741, 747 (Cuyahoga 1919).

**CONCLUSION**

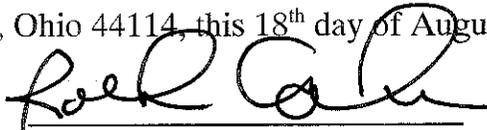
For the reasons discussed above, this Court should vacate the decision of Ninth District Trial and court remand this case to the trial court for proceedings in accordance with this courts ruling.



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**CERTIFICATE OF OF SERVICE**

I certify that a copy of this Appellant's Brief was mailed by Ordinary U.S. Mail to Alan P. Digrolamo, Attorney for Appellee, Buckingham, Doolittle & Burroughs, LLP, 1375 East Ninth Street, Suite 1700, Cleveland, Ohio 44114, this 18<sup>th</sup> day of August, 2011.



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**IN THE SUPREME COURT OF OHIO**

**CENTRO MIDWAY LLC**

**Plaintiff-Appellee**

**v.**

**DENNIS BLECHSCHMID**

**and**

**MARILU BLECHSCHMID**

**Defendants-Appellants**

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**APPENDIX TO THE  
MEMORANDUM IN SUPPORT OF JURISDICTION OF DEFENDANT'S-  
APPELLANT'S DENNIS BLECHSCHMID AND MARILU BLECHSCHMID**

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CENTRO MIDWAY LLC**



NEW

2010 JUN 21 A 7:07

LORAIN COUNTY COURT OF COMMON PLEAS  
LORAIN COUNTY, OHIO

CLERK OF COURT  
COURT HOUSE  
100 N. HIGHWAY 161  
LORAIN, OHIO 44131

RON NABASKOWSK, Clerk  
JUDICIAL ENTRY  
Edward M. Zaleski, Judge

Date 6/21/10 Case No. 09CV163614

CENTRO MIDWAY LLC  
Plaintiff

MICHAEL J. MATASICH  
Plaintiff's Attorney (216)621-5300

VS

XANADU GROUP INCORPORATED  
Defendant

ROBERT C. ALDRIDGE  
Defendant's Attorney (-)

This cause came before the Court upon Plaintiff's unopposed Motion for Summary Judgment against Defendants. In this case the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence in the pending case, and written stipulations of fact, if any, show that there is no genuine issue as to any material fact and that Plaintiff is entitled to judgment as a matter of law. It appears from the evidence or stipulation and only from the evidence or stipulation, that reasonable minds can come to but one conclusion, and that conclusion is adverse to Defendants, that party being entitled to have the evidence or stipulation construed most strongly in the party's favor.

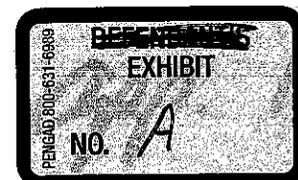
Accordingly, Plaintiff's Motion for Summary Judgment is granted. Plaintiff is granted judgment against Defendant Xanadu Group Incorporated, Dennis Blechschmid and Marie Blechschmid in the amount of \$1,046,661.75, plus interest at the statutory rate, plus costs of this action.

VOL 107 PAGE 2511

Dated 6/21/2010

*E. Zaleski*  
Edward M. Zaleski, Judge

cc All Parties



STATE OF OHIO )  
 )ss: )  
COUNTY OF LORAIN )

FILED IN THE COURT OF APPEALS  
LORAIN COUNTY NINTH JUDICIAL DISTRICT

CENTRO MIDWAY LLC

2011 JUL - 5 P.M. #2 10CA009857

Appellee

CLERK OF COMMON PLEAS  
RON NABAKOWSKI  
9th APPELLATE DISTRICT

v.

XANADU GROUP INCORPORATED

APPEAL FROM JUDGMENT  
ENTERED IN THE  
COURT OF COMMON PLEAS  
COUNTY OF LORAIN, OHIO  
CASE No. 09CV163614

Defendant

v.

DENNIS BLECHSCHMID, et al.

Appellants

DECISION AND JOURNAL ENTRY

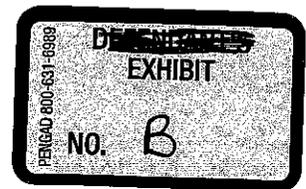
Dated: July 5, 2011

BELFANCE, Presiding Judge.

{¶1} Defendants-Appellants Dennis and Marilu Blechschnid appeal pro se from the judgment of the Lorain County Court of Common Pleas. For the reasons set forth below, we affirm.

I.

{¶2} On March 13, 2009, Plaintiff-Appellee Centro Midway LLC (“Centro”) entered into a commercial lease agreement with Defendant Xanadu Group Incorporated (“Xanadu”) for a store in Midway Mall. The terms of the lease were to extend through



May 2019. Mr. and Ms. Blechschmid signed a guaranty agreeing to guaranty all of Xanadu's obligations under the lease.

{¶3} On August 6, 2009, Centro sent Xanadu and Mr. and Ms. Blechschmid a notice of default based upon the failure to open the store. The default was not cured. On August 18, 2009, Centro sent another notice of default, a termination of the lease, abandonment of personal property, and acceleration of rent. On August 24, 2009, Centro filed a complaint for monetary damages alleging that Xanadu and Mr. and Ms. Blechschmid breached the lease and guaranty causing Centro damages. Subsequently, Xanadu and Mr. and Ms. Blechschmid filed an answer. Centro moved for summary judgment. Xanadu and Mr. and Ms. Blechschmid moved for an extension of time to file a brief in opposition, which was granted. Nonetheless, Xanadu and Mr. and Ms. Blechschmid failed to file a brief in opposition and thus, Centro's motion for summary judgment went unopposed. The trial court granted summary judgment against Xanadu and Mr. and Ms. Blechschmid in the amount of \$1,046,661.75, plus interest at the statutory rate, and costs. Mr. and Ms. Blechschmid have appealed pro se raising a single assignment of error for our review.

## II.

### ASSIGNMENT OF ERROR

~~“THE TRIAL COURT’S DECISION GRANTING APPELLEE’S  
MOTION FOR SUMMARY JUDGMENT WAS AGAINST THE  
MANIFEST WEIGHT OF THE EVIDENCE.”~~

{¶4} Mr. and Ms. Blechschmid raise the same assignment of error and assert identical arguments. They assert that the trial court erred in granting summary judgment as it relied on improper summary judgment evidence. We disagree.

{¶5} This Court reviews an award of summary judgment de novo. *Grafton v. Ohio Edison Co.* (1996), 77 Ohio St.3d 102, 105. We apply the same standard as the trial court, viewing the facts in the case in the light most favorable to the non-moving party and resolving any doubt in favor of the non-moving party. *Viock v. Stowe-Woodward Co.* (1983), 13 Ohio App.3d 7, 12.

{¶6} Pursuant to Civ.R. 56(C), summary judgment is appropriate when:

“(1) No genuine issue as to any material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the party against whom the motion for summary judgment is made, that conclusion is adverse to that party.” *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 327.

To succeed on a summary judgment motion, the movant “bears the initial burden of *demonstrating* that there are no genuine issues of material fact concerning an essential element of the opponent’s case.” (Emphasis sic). *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 292. If the movant satisfies this burden, the non-moving party ““must set forth specific facts showing that there is a genuine issue for trial.”” *Id.* at 293, quoting Civ.R. 56(E). Nonetheless, “~~as the burden is upon the moving party to establish the non-~~existence of any material factual issues, the lack of a response by the opposing party cannot, of itself, mandate the granting of summary judgment.” *Morris v. Ohio Cas. Ins. Co.* (1988), 35 Ohio St.3d 45, 47.

{¶7} The heart of Mr. and Ms. Blechschmid’s argument is that the trial court erred by relying on improper summary judgment evidence in violation of Civ.R. 56 in granting Centro’s motion. Civ.R. 56(C) limits the evidence that may be considered in support of or in opposition to a motion for summary judgment to “pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action[.]” Civ.R. 56(E) provides in pertinent part that:

“[s]upporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated in the affidavit. Sworn or certified copies of all papers or parts of papers referred to in an affidavit shall be attached to or served with the affidavit.”

“Unauthenticated documents and affidavits not based on personal knowledge have no evidentiary value and should not be considered by the court in deciding whether summary judgment is appropriate.” (Internal quotations and citation omitted.) *Cheriki v. Black River Industries, Inc.* 9th Dist. No. 07CA009230, 2008-Ohio-2602, at ¶6. “Nonetheless, this Court has held that unless the opposing party objects to the admissibility of improper evidence, the trial court may, but need not consider the evidence.” (Internal quotations and citation omitted.) *Id.*

{¶8} In the instant matter, even assuming without deciding that all the evidence Mr. and Ms. Blechschmid point to was improper summary judgment evidence, Mr. and Ms. Blechschmid did not object to its admissibility, and, in fact, even failed to file a brief in opposition. Thus, the trial court was free to consider all the evidence before it in

making its ruling. See *id.* Accordingly, Mr. and Ms. Blechschmid's argument presented on appeal is without merit.

{¶9} Further, Mr. and Ms. Blechschmid have not pointed to any disputed issues of material fact. We conclude that viewing the evidence in a light most favorable to Mr. and Ms. Blechschmid, Centro presented evidence to establish that Xanadu "entered into a [l]ease and [r]ider dated March 13, 2009, with [Centro,]" that Mr. and Ms. Blechschmid entered into a guaranty whereby they "unconditionally guaranteed to [Centro] all of the obligations of Xanadu under the [l]ease[,]" that there was a failure to perform the obligations under the lease and guaranty resulting in the issuance of notices of default, that Centro "satisfied all of its obligations and promises under the [l]ease and [g]uaranty[,]" and that Centro's resulting damages exceeded one million dollars. That evidence was unchallenged in the trial court. Thus, as Mr. and Ms. Blechschmid were unconditional guarantors of the lease, which was in default, and there was no evidence presented that would lead to the conclusion that they were not liable, we cannot say that the trial court erred in awarding judgment against Mr. and Ms. Blechschmid. See *Mihalca v. Malita* (Apr. 12, 2000), 9th Dist. No. 19395, at \*4 (noting that "the guarantor is only liable on the absolute guaranty upon the default of the primary debtor[ ]"); see, also, *Comstock Homes Inc. v. Smith Family Trust*, 9th Dist. No. 24627, 2009-Ohio-4864, at ¶14. Accordingly, we cannot say the trial court erred in granting summary judgment to Centro. Mr. and Ms. Blechschmid's assignment of error is overruled.

## III.

{¶10} In light of the foregoing, we affirm the judgment of the Lorain County Court of Common Pleas.

Judgment affirmed.

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There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Lorain, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellants.



EVE V. BELFANCE  
FOR THE COURT

CARR, J.  
DICKINSON, J.  
CONCUR

APPEARANCES:

DENNIS BLECHSCHMID, pro se, Appellant.

MARILU BLECHSCHMID, pro se, Appellant.

ALAN P. DIGIROLAMO and MICHAEL J. MATASICH, Attorneys at Law, for Appellee.

ROBERT CABRERA, Attorney at Law.