

On October 31, 2022, appellee filed a complaint that alleged appellants defaulted under the terms of a commercial equipment lease and owe appellee \$102,124.29 as a result of their default. Appellee attached to its complaint (1) a copy of the equipment lease and personal guaranty, (2) an affidavit from its legal counsel attesting that appellants owe \$102,124.29, and (3) a statement showing an account deficiency in the amount of \$102,124.29.

{¶3} The equipment lease obligated appellants to make 66 payments in the amount of \$3,995, and they paid a \$7,990 security deposit. Appellee calculated the "account deficiency" as follows:

\$248,264.58	Default Notice Amount
	since adjusted as:
\$33,558.00	remaining payments increased 15% per contract terms if equipment returned
	less tax
\$(19,850.00)	less purchase option/residual (on leases)
	Credit Security Deposit
\$36,141.71	Total Expenses
\$(188,000.00)	Proceeds from Sales/Release
\$102,124.29	Account Deficiency

{¶4} Appellants denied the allegations in the complaint, and filed a counterclaim. Appellants alleged that they surrendered the equipment to appellee and that appellee liquidated the equipment "for more than enough money to satisfy

all debts.” Appellants further asserted that appellee “offered to refund the excess money” to them. They thus requested the court to award them money damages in excess of \$25,000.

{¶15} On June 9, 2023, appellee requested summary judgment and asserted that no genuine issues of material fact remain to be litigated and it is entitled to judgment as a matter of law. Appellee argued that the evidence shows that (1) appellants entered into the lease agreement, (2) they breached the agreement by failing to make payments, and (3) they owe appellee \$102,124.29. Appellee additionally contended that appellants failed to present any evidence to dispute the amount of the account deficiency. Thus, appellee thus requested the court to award it \$102,124.29 in damages and dismiss appellants’ counterclaims. To support its motion, appellee submitted a copy of the agreement and an affidavit from its legal counsel attesting that appellants owe \$102,124.29, as indicated on the statement of account deficiency.

{¶16} In response, appellants argued that appellee failed to explain how it calculated the “default notice amount” or what provisions of the agreement authorized the charges. Appellants asserted that genuine issues of material fact remain regarding appellee’s calculation of the “default notice amount,” and the numbers “make no sense.” Appellants additionally claimed that

the parties agreed that, after appellants returned the equipment, appellee would sell the equipment and deliver to appellants any proceeds that remained after the loan payoff. Appellants alleged that appellee sold the equipment for \$188,000 and did not pay any of the remaining balance to appellants.

{¶7} To support their argument, appellants attached a copy of a "Notice of Acceleration" that appellee sent on August 6, 2021. This notice states that "events of default have occurred." As a result, appellee notified appellants that it terminated the lease and declared "the entire amount thereunder immediately due and payable." The notice demanded that appellants immediately pay the amount due under the lease, which it calculated to be \$248,264.58, as shown below:

Pro-rated Charge	\$3,196.08
NSF Fees	\$300.00
Contractual Charge	\$11,985.00
Late Fees	\$1,198.50
53 payments @ \$3,995.00	\$211,735.00
Residual	\$19,850.00
Balance Due	\$248,264.58

{¶8} Appellants also submitted an affidavit from John Crowe. In his affidavit, Crowe stated that after entering into the agreement and taking delivery of the equipment, "several issues became apparent." He stated that he "had several conversations with [appellee] about resolving those issues," and "the parties agreed that CV Transportation would return the vehicle" and appellee "agreed to find CV Transportation a replacement truck when one became available." Crowe asserted that the parties also "agreed that once [appellee] sold the returned truck, CV Transportation would receive any balance that remained after the loan was satisfied" and that they "expected there to be approximately \$8,000.00 left after the loan was paid off." Crowe "believes that the sale of the truck was more than enough to pay any deficiency that may have existed."

{¶9} On August 14, 2023, the trial court granted appellee summary judgment, awarded it \$102,124.29 in damages, and dismissed appellants' counterclaim. This appeal followed.

{¶10} In their sole assignment of error, appellants assert that the trial court erred by awarding appellee summary judgment. They contend that genuine issues of material fact remain regarding the amount of damages, if any, appellee is entitled to collect under the terms of the contract. Appellants argue that appellee did not explain how it calculated the

amounts listed on the account deficiency notice and that the numbers “ma[k]e no sense.” Appellants additionally claim that the affidavit they submitted contradicts appellee’s evidence and, thus, creates a genuine issue of material fact.

{¶11} Appellee, however, contends that (1) it properly supported its summary judgment motion “with a lease guaranty, a statement of deficiency, and an affidavit,” (2) appellants did not offer any evidence to establish the existence of a genuine issue of material fact because the self-serving affidavit is insufficient to create a genuine issue of material fact, and (3) the lease terms specify the measure of damages and it provided an itemized list of its damages, along with a supporting affidavit. Appellee argues that appellants’ claim that the calculations “are wrong, without more, does not create a genuine issue of material fact.”

A

{¶12} Appellate courts conduct a de novo review of trial court summary judgment decisions. *E.g.*, *State ex rel. Novak, L.L.P. v. Ambrose*, 156 Ohio St.3d 425, 2019-Ohio-1329, 128 N.E.3d 209, ¶ 8; *Pelletier v. Campbell*, 153 Ohio St.3d 611, 2018-Ohio-2121, 109 N.E.3d 1210, ¶ 13; *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 671 N.E.2d 241 (1996).

Accordingly, an appellate court need not defer to a trial

court's decision, but instead must independently review the record to determine if summary judgment is appropriate.

Grafton, 77 Ohio St.3d at 105.

Civ.R. 56(C) provides in relevant part:

* * * * Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, 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. No evidence or stipulation may be considered except as stated in this rule. A summary judgment shall not be rendered unless 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 the party against whom the motion for summary judgment is made, that party being entitled to have the evidence or stipulation construed most strongly in the party's favor.

{¶13} Therefore, pursuant to Civ.R. 56 a trial court may not award summary judgment unless the evidence demonstrates that (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) after viewing the evidence most strongly in favor of the nonmoving party, reasonable minds can come to but one conclusion, and that conclusion is adverse to the nonmoving party. *E.g., State ex rel. Whittaker v. Lucas Cty. Prosecutor's Office*, 164 Ohio St.3d 151, 2021-Ohio-1241, 172

N.E.3d 143, ¶ 8; *Pelletier* at ¶ 13; *Temple v. Wean United, Inc.*, 50 Ohio St.2d 317, 327, 364 N.E.2d 267 (1977).

{¶14} Under Civ.R. 56, the moving party bears the initial burden to inform the trial court of the basis for the motion and to identify those portions of the record that demonstrate the absence of a material fact. *E.g.*, *Dresher v. Burt*, 75 Ohio St.3d 280, 293, 662 N.E.2d 264 (1996). The moving party cannot discharge its initial burden with a conclusory assertion that the nonmoving party has no evidence to prove its case. *E.g.*, *Kulch v. Structural Fibers, Inc.*, 78 Ohio St.3d 134, 147, 677 N.E.2d 308 (1997); *Dresher, supra*. Rather, the moving party must specifically refer to the "pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence in the pending case, and written stipulations of fact, if any," that affirmatively demonstrate that the nonmoving party has no evidence to support the nonmoving party's claims. Civ.R. 56(C); *Dresher, supra*.

[U]nless a movant meets its initial burden of establishing that the nonmovant has either a complete lack of evidence or has an insufficient showing of evidence to establish the existence of an essential element of its case upon which the nonmovant will have the burden of proof at trial, a trial court shall not grant a summary judgment.

Pennsylvania Lumbermens Ins. Corp. v. Landmark Elec., Inc., 110 Ohio App.3d 732, 742, 675 N.E.2d 65 (2nd Dist.1996). Once the

moving party satisfies its burden, the nonmoving party bears a corresponding duty to set forth specific facts to show that a genuine issue exists. Civ.R. 56(E); *Dresher, supra*. More specifically, Civ.R. 56(E) states:

* * * * When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the party's pleadings, but the party's response, by affidavit or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the party does not so respond, summary judgment, if appropriate, shall be entered against the party.

{¶15} Moreover, "conclusory affidavits that merely provide legal conclusions or unsupported factual assertions are not proper under Civ.R. 56(E)" and are insufficient to establish a genuine issue of material fact. *Moore v. Smith*, 4th Dist. Washington No. 07CA61, 2008-Ohio-7004, ¶ 15 (citations omitted); *Wertz v. Cooper*, 4th Dist. Scioto No. 06CA3077, 2006-Ohio-6844, ¶ 13, citing and quoting *Evans v. Jay Instrument & Specialty Co.*, 889 F.Supp. 302, 310 (S.D. Ohio 1995) (" 'bald self-serving and conclusory allegations are insufficient to withstand a motion for summary judgment' "); accord *McCartney v. Oblates of St. Francis deSales*, 80 Ohio App.3d 345, 357-358, 609 N.E.2d 216 (6th Dist.1992) (trial court considering a summary judgment motion is not required to accept conclusory allegations that are devoid of any evidence to create an issue of material fact).

Indeed, “[i]t is axiomatic that ‘[a] self-serving affidavit that is not corroborated by any evidence is insufficient to establish the existence of an issue of material fact.’ ” *National Collegiate Student Loan Trust 2005-3 v. Dunlap*, 2018-Ohio-2701, 115 N.E.3d 689, ¶ 37 (4th Dist.), quoting *U.S. Bank Natl. Assn. v. Bobo*, 4th Dist. Athens No. 14CA35, 2014-Ohio-4975, ¶ 16.

{¶16} In the case at bar, as we explain below, we do not believe that the record establishes the existence of a material fact regarding appellee’s breach of contract claim.

B

{¶17} To establish a breach of contract, a plaintiff must prove (1) the existence of a contract, (2) performance by the plaintiff, (3) breach by the defendant, and (4) damages or loss resulting from the breach. *Lucarell v. Nationwide Mut. Ins. Co.*, 152 Ohio St.3d 453, 2018-Ohio-15, 97 N.E.3d 458, ¶ 41.

{¶18} In the case sub judice, appellants claim that genuine issues of material fact remain regarding the amount of appellee’s damages and have not challenged any of the other elements necessary to establish breach of contract. We limit our review accordingly.

{¶19} We do not agree with appellants that genuine issues of material fact remain regarding the amount of appellee’s damages. Appellee presented evidence to establish that appellants

defaulted under the terms of the equipment lease and, as a result, owe appellee the amount stated. Specifically, appellee presented a copy of the equipment lease and an affidavit from its legal counsel that attested to the amount owed. Appellee additionally presented an account deficiency statement showing the amount appellants owe as a result of their breach of the equipment lease. Thus, appellee satisfied its burden to demonstrate the absence of a material fact.

{¶20} Appellants did not challenge the admissibility of appellee's evidence, but rather, only the amount due. Appellants have not, however, pointed to any evidence to create a genuine issue of material fact regarding appellee's damage calculation. Other than the conclusory allegation in Crowe's affidavit, they did not point to any evidence to suggest that appellee's damage calculation is incorrect or that the lease agreement does not permit the remedies appellee seeks. Instead, they argue that appellee is required to explain the calculations listed on the account deficiency statement. However, they do not cite any authority that requires appellee to explain each calculation. For summary judgment purposes, appellee has the burden to establish the absence of a genuine issue of material fact. Here, appellee did so by submitting (1) an affidavit that attested to the amount due, (2) an account deficiency statement

that itemized the amount due, and (3) the underlying lease agreement that contains the remedies to which appellee is entitled for appellants' breach (see Appendix).

{¶21} Appellants did not respond with any evidentiary materials to demonstrate that the stated amount is incorrect or that the lease agreement does not provide the remedies appellee seeks. Rather, they submitted conclusory allegations to challenge the amount owed, and they question appellee's calculation of the amount owed. We reiterate that appellants did not, however, point to any evidence to suggest that appellee's calculation is incorrect. See generally *Discover Bank v. Paoletta*, 8th Dist. Cuyahoga No. 95223, 2010-Ohio-6031, ¶ 12 ("an account stated will be taken as correct until shown by the party to whom it was rendered to be incorrect"). We also observe that both the notice of acceleration and the account deficiency statement include explanatory text for each amount listed. Furthermore, as we stated earlier, conclusory allegations are insufficient to overcome a properly supported summary judgment motion. *Moore* at ¶ 15. Consequently, we agree with the trial court's conclusion that no genuine issues of material fact remain to be litigated at trial and the trial court properly granted appellee summary judgment.

{¶22} Accordingly, based upon the foregoing reasons, we overrule appellants' sole assignments of error and affirm the trial court's judgment.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the judgment be affirmed and that appellee recover of appellants the costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Ross County Common Pleas Court to carry this judgment into execution.

A certified copy of this entry shall constitute that mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

Smith, P.J. & Hess, J.: Concur in Judgment & Opinion

For the Court

BY: _____

Peter B. Abele, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.

Appendix

The agreement provided the following remedies for default.

13. REMEDIES. Lessor and Lessee agree that Lessor's damages suffered by reason of an Event of Default are uncertain and not capable of exact measurement at the time this Lease is executed because the value of the Equipment at the expiration of this Lease is uncertain, and therefore they agree that for purposes of this paragraph 13 "Lessor's Loss" as of any date shall be the sum of the following: (1) the amount of all rent and other amounts payable by Lessee hereunder due but unpaid as of such date plus (2) the amount of all Basic Rental Payments from the date of Event of Default to the end of the initial Term or extended term as provided in paragraph 14. Upon the occurrence of an Event of Default and at any time thereafter, Lessor may exercise any one or more of the remedies listed below as Lessor in its sole discretion may lawfully elect; provided, however, that upon the occurrence of an Event of Default specified in paragraph 12(e), an amount equal to Lessor's Loss as of the date of such occurrence shall automatically become and be immediately due and payable without notice or demand of any kind. The exercise of any one remedy shall not be deemed an election of such remedy or preclude the exercise of any other remedy, and such remedies may be exercised concurrently or separately but only to the extent necessary to permit Lessor to recover amounts for which Lessee is liable hereunder.

(a) Lessor may, by written notice to Lessee, terminate this Lease as to any or all of the Equipment subject hereto and declare an amount equal to Lessor's Loss as of the date of such notice to be immediately due and payable, as liquidated damages and not as a penalty, and the same shall thereupon be and become immediately due and payable without further notice or demand, and all rights of Lessee to use the Equipment shall terminate but Lessee shall be and remain liable as provided in this paragraph 13. Lessee shall at its expense promptly deliver the Equipment to Lessor at a location or locations within the continental United States designated by Lessor. Lessor may also enter the premises

where the equipment is located and take immediate possession of and remove or disable any equipment without demand or notice or without instituting legal proceedings.

(b) Lessor may proceed by appropriate court action to enforce performance by Lessee of the applicable covenants of this Lease or to recover, for breach of this Lease, Lessor's Loss as of the date Lessor's Loss is declared due and payable hereunder; provided, however, that upon recovery of Lessor's Loss from Lessee in any such action without having to repossess and dispose of the Equipment, Lessor shall transfer the Equipment to Lessee at its then location upon payment of any additional amount due under clauses (d), (e) and (f) below.

(c) In the event Lessor repossesses the Equipment, Lessor shall either retain the Equipment in full satisfaction of Lessee's obligation hereunder or sell or lease each item of Equipment in such manner and upon such terms as Lessor may in its sole discretion determine. The proceeds of any such sale or lease shall be applied to reimburse Lessor for Lessor's Loss and any additional amount due under clauses (d), (e) and (f) below. Lessee shall be entitled to any surplus and shall remain liable for any deficiency.

(d) Lessor may recover interest on the unpaid balance of Lessor's Loss plus any amounts recoverable under clauses (f) and (g) of this paragraph 13 from the date it becomes payable until fully paid at the rate of the lesser of 12% per annum or the highest rate permitted by law.

(e) Lessor may increase the amount of each remaining Basic Rental Payment by 15% (fifteen percent).

(f) In addition to any other recovery permitted hereunder or under applicable law, Lessor may recover from Lessee an amount that will fully compensate Lessor for any loss of or damage to Lessor's residual interest in the Equipment.

(g) Lessor may exercise any other right or remedy available to it by law or by agreement, and may in any event recover legal fees and other costs and expenses incurred by reason of an Event of Default or the exercise of any remedy hereunder, including expenses of repossession, repair, storage, transportation, and disposition of the Equipment. Any payment received by

Lessor may be applied to unpaid obligations as Lessor in its sole discretion determines.

Lessee agrees that upon the occurrence of an Event of Default, in addition to all of the other rights and remedies available to Lessor hereunder, Lessor shall have all of the rights and remedies of a secured party under the Uniform Commercial Code. No express or implied waiver by Lessor of any breach of Lessee's obligations hereunder shall constitute a waiver of any other breach of Lessee's obligations hereunder.

Additionally, the agreement recited that it is a "non-cancellable net lease."

14. NON-CANCELLABLE NET LEASE AND END OF TERM OPTIONS.

This Lease is a completely net lease and Lessee's obligation to pay rent and amounts payable by Lessee hereunder is unconditional and irrevocable and shall be paid without any abatement, reduction, setoff or defense of any kind. This Lease cannot be canceled, prepaid or terminated except as expressly provided herein.