**STATE OF MINNESOTA**
**IN COURT OF APPEALS**
**A09-1035**

Portfolio Recovery Associates, LLC,
Respondent,

vs.

Thomas J. Neska,
Appellant.

**Filed March 2, 2010**
**Affirmed**
**Wright, Judge**

Wright County District Court
File No. 86-CV-08-7982

Joel Boon, Johnson, Rodenburg & Lauinger, Bismarck, North Dakota (for respondent)

Thomas J. Neska, Maple Lake, Minnesota (pro se appellant)

Considered and decided by Wright, Presiding Judge; Worke, Judge; and Larkin, Judge.

**U N P U B L I S H E D  O P I N I O N**

**WRIGHT**, Judge

Appellant challenges the district court's grant of summary judgment in favor of respondent, arguing that (1) the statute of limitations bars respondent's claim; (2) the district court committed prejudicial procedural errors; and (3) genuine issues of material fact remain in dispute. We affirm.

## FACTS

Appellant Thomas Neska applied for and received a credit card through Providian National Bank in November 1998. Neska made purchases and received cash advances on the account. He defaulted on the credit-card debt in 2000, and the last day that he made a payment on the outstanding balance of the credit card was November 17, 2003. Respondent Portfolio Recovery Associates LLC (Portfolio) purchased the debt from Providian National Bank in November 2005. Portfolio served a complaint on Neska in June 2008 for the outstanding amount owed on the account, plus interest. Neska answered by generally denying "each and every allegation contained in the Complaint," including the allegation that he owes Providian $2,165.92, and arguing that Portfolio did not initiate the action within the applicable statute of limitations.

On July 23, 2008, Portfolio served a request for admissions on Neska by mail. Neska responded to the request for admissions on August 25, 2008, stating that he "is objecting to [Portfolio's] Request for Admissions and Interrogatories on the basis that there is no pending action with the court as required by Minn. Rule 36.01." Portfolio moved for summary judgment, arguing that there were no genuine issues of material fact in dispute because (1) Neska's failure to timely respond to the interrogatories caused the requests to be deemed admitted under Minn. R. Civ. P. 36.01 and (2) Portfolio's affidavits and exhibits supported summary judgment. Portfolio submitted sworn copies of Neska's account statements from November and December 2003, an affidavit from the designated agent of Providian, and an affidavit from an authorized representative of Portfolio.

Neska responded to the motion for summary judgment, arguing that (1) from 2001 to "sometime in 2003," he and his wife paid the debt to Providian through Family Means Consumer Credit Counseling Services; (2) he did not receive any information regarding the alleged outstanding Providian debt until Portfolio contacted Neska about the debt in 2006; (3) his general objection to the interrogatories was valid and prevented the district court from considering the interrogatories deemed admitted; and (4) Portfolio was not entitled to summary judgment because Portfolio did not bring the action within the required statute-of-limitations period.

At oral argument, the district court asked Neska if he had submitted any affidavits in support of his claim that he had paid Providian the total outstanding balance through Family Means. Neska responded that he submitted a sworn affidavit, but he did not do so until just before the hearing. Neska then requested the opportunity to call his wife as a witness to testify that the payments were made. The district court denied Neska's request. The district court examined an affidavit that Neska claimed he submitted to the district court and then examined the district court file. The district court stated, "I don't believe this is in my file, number one. Number two, it is not notarized, so it's not an affidavit. . . . [A]ffidavits have to be signed under oath." When Neska attempted to hand the district court additional documents, the district court declined to accept them and advised that the documents should have been submitted 14 days before the hearing. The district court granted summary judgment in favor of Portfolio on the ground that Neska "failed to adduce competent evidence establishing a material fact dispute." The district

court awarded Portfolio a judgment against Neska in the amount of $2,165.92 plus $436.66 in interest, costs, and disbursement. This appeal followed.

**D E C I S I O N**

The district court shall grant summary judgment if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact." Minn. R. Civ. P. 56.03. We review a grant of summary judgment de novo to determine (1) whether there are any genuine issues of material fact and (2) whether the district court erred in its application of the law. *STAR Ctrs., Inc. v. Faegre & Benson, L.L.P.*, 644 N.W.2d 72, 77 (Minn. 2002); *State by Cooper v. French*, 460 N.W.2d 2, 4 (Minn. 1990).

**I.**

Neska first argues that summary judgment was erroneously granted because Portfolio's claim was barred by the statute of limitations. A breach-of-contract action is subject to a six-year statute of limitations. Minn. Stat. § 541.05 (2008). The date on which a claim accrues from which the statute of limitations begins to run presents a question of law, which we review de novo. *Benigni v. County of St. Louis*, 585 N.W.2d 51, 54 (Minn. 1998).

"[A]n acknowledgment of a debt tolls the statute of limitations on the debt and starts it running anew on the date of the acknowledgment." *Windschilt v. Windschilt*, 579 N.W.2d 499, 501-02 (Minn. App. 1998). Partial payment of a debt constitutes an acknowledgment of the debt's existence. *Id*. at 499; *see also Troup v. Rozman*, 286 Minn. 88, 90, 174 N.W.2d 694, 696 (1970) (holding that a "voluntary part payment of a

subsisting debt sets the statute of limitations running afresh as to the balance"); *Bernloehr v. Fredrickson*, 213 Minn. 505, 507, 7 N.W.2d 328, 329 (1942) (holding that partial payment on a promissory note "tolls the running of the statute, upon the theory that it amounts to a voluntary acknowledgment of the existence of the debt from which a promise to pay the balance is implied"). Payment on a debt by a third party that is authorized by the debtor also is deemed to be an acknowledgment of the debt. *Bernloehr*, 213 Minn. at 507, 7 N.W.2d at 329.

Neska argues that the action is barred by the statute of limitations because he defaulted on his credit card in December 2000, more than eight years prior to the commencement of this action. But Neska admits that he made partial payments on his debt to Providian until November or December 2003. Under *Windschilt*, *Troup*, and *Bernloehr*, a partial payment of the underlying debt tolls the running of the statute of limitations because it is a voluntary acknowledgment of the debt's existence; and a promise to pay the balance is implied. Thus, Neska's argument that Portfolio's claim was barred by the statute of limitations fails.

**II.**

Neska argues that the district court committed reversible error by preventing him and his wife from testifying at the summary-judgment hearing. A summary-judgment hearing is a hearing on a dispositive motion. Rule 115.08 of the Minnesota Rules of General Practice provides:

> No testimony will be taken at motion hearings except under unusual circumstances. Any party seeking to present witnesses at a motion hearing shall obtain prior consent of the

> court and shall notify the adverse party in the motion papers of the names and addresses of the witnesses which that party intends to call at the motion.

Neska did not give advance notice that he intended to call himself or his wife as a witness, and he did not request or receive the prior consent of the district court. In addition, Neska has not identified the unusual circumstance that would require taking oral testimony as opposed to submitting testimony in the form of an affidavit before the motion hearing. Accordingly, the district court's refusal to permit Neska and his wife to testify was in conformity with the governing rules and within the district court's sound exercise of discretion.[1]

**III.**

Neska next argues that summary judgment was erroneously granted because genuine issues of material fact remain in dispute. But "there is no genuine issue of material fact for trial when the nonmoving party presents evidence which merely creates a metaphysical doubt as to a factual issue and which is not sufficiently probative with

[1] Neska also argues that the district court committed reversible error when it determined that Neska's sole affidavit was not timely submitted. Under Rule 112.03(b) of the Minnesota Rules of General Practice, the party responding to a motion must serve a copy of its memorandum of law and supplementary affidavits and exhibits "on opposing counsel, and file the originals with the Court Administrator at least nine days prior to the hearing." According to the date stamp on the affidavit submitted by Neska, the affidavit was filed with the district court on April 8, 2009, just two days before the hearing. Neska's affidavit was not timely submitted. Neska also assigns error to the district court's denial of his submission as untimely because the district court incorrectly stated that materials must be submitted by the responding party 14 days prior to the motion hearing. Neska is correct that the governing rule required him to file the documents nine, rather than 14, days before the hearing. But any error in the district court's use of the 14-day standard was harmless because the submission was nevertheless untimely. *See* Minn. R. Civ. P. 61 (requiring harmless error to be ignored).

respect to an essential element of the nonmoving party's case to permit reasonable persons to draw different conclusions." *DLH, Inc. v. Russ*, 566 N.W.2d 60, 71 (Minn. 1997). "[T]he party resisting summary judgment must do more than rest on mere averments." *Id.*; Minn. R. Civ. P. 56.05.

At oral argument, the district court observed that Neska had put forward unsworn statements amounting to mere averments. Unsworn statements and unsworn or uncertified copies of papers are not competent evidence to defeat a summary-judgment motion. *See* Minn. R. Civ. P. 56.05 (setting forth requirements for affidavits in summary-judgment motions); *Boyer v. KRS Computer & Bus. Sch.*, 171 F. Supp. 2d 950, 960 (D. Minn. 2001) ("A document that purports to be an 'affidavit' but is not in fact sworn to and subscribed before a notary is not competent evidence on summary judgment."). Neska's unsworn statements in his written arguments and the unsworn and uncertified documents were properly rejected as incompetent evidence by the district court.

In support of its motion for summary judgment, Portfolio provided the district court with competent evidence of the debt Neska owed and of Portfolio's assignment rights. Portfolio also submitted an affidavit attesting that Portfolio purchased Neska's bank credit-card account from Providian for "valuable consideration" and attached supporting bank-account statements establishing Neska's outstanding debt to Providian in 2003. Portfolio also submitted an affidavit containing the sworn statement of an agent from Providian which states that Providian "sold, assigned and conveyed to [Portfolio] all right, title and interest in the Account and its unpaid balance." The Providian agent's affidavit confirmed that Neska's outstanding debt to Providian in 2003 was $2,165.92.

In the absence of contrary affidavits or sworn documents creating a genuine issue of material fact, Portfolio's affidavits and sworn supporting documents provide a sound legal basis for the district court's decision. Summary judgment in favor of Portfolio was properly granted.

**IV.**

In his reply brief, Neska argues for the first time that the alleged failure of Portfolio to provide an accounting of the debt requires remand. Because Neska failed to raise the issue before the district court and in his principal brief, he has waived the issue on appeal. *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988); *see also Fontaine v. Steen*, 759 N.W.2d 672, 679 (Minn. App. 2009) (declining to consider an issue raised in a reply brief that was not raised or argued in appellant's principal brief).

**Affirmed.**