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SUPREME COURT OF ALABAMA

OCTOBER TERM, 2020-2021

1190997

Cadence Bank, N.A.

v.

Steven Dodd Robertson and Mary Garling-Robertson

Appeal from Madison Circuit Court
(CV-18-902299)

SELLERS, Justice.

Cadence Bank, N.A. ("Cadence"), sued Steven Dodd Robertson and Mary Garling-Robertson, seeking to recover a debt the Robertsons allegedly owe Cadence. The Madison Circuit Court ruled that Cadence's claim is barred by the statute of limitations and, thus, granted the

Robertsons' motion for a summary judgment. We reverse the trial court's judgment and remand the cause for further proceedings.

In November 2003, the Robertsons executed a loan agreement with a lender called "The Bank" to acquire a home-equity line of credit. To secure repayment, the Robertsons granted The Bank a mortgage on their house. In February 2005, the Robertsons sent The Bank a check in the approximate amount of $61,000, which was accompanied by a notice of "satisfaction of loan/estoppel/cancellation of credit line." The parties refer to the notice as a "kill letter."

The kill letter provided that the Robertsons' payment was in full satisfaction of their debt incurred under the home-equity line of credit and was being paid under the condition that The Bank release the mortgage and "cancel the note or loan agreement as well as any right to obtain future advances under the note or loan agreement." The kill letter also provided that The Bank's endorsement of the check constituted assent to the terms provided in the letter. Cadence does not dispute that The Bank endorsed and deposited the check. There is no signature line on the kill letter for a representative of The Bank.

Notwithstanding the language in the kill letter indicating that the home-equity line of credit should be canceled, bank records produced by Cadence suggest that, beginning in June 2005, four months after sending the kill letter, the Robertsons began borrowing additional funds against the home-equity line of credit. The parties do not point to any new written loan agreement or other document indicating that, when the Robertsons allegedly began drawing additional advances, a new account or line of credit was opened on their behalf or a new loan number was assigned to them.

An affidavit submitted by an officer of Cadence indicates that, in January 2006, The Bank changed its name to Superior Bank; that, in April 2011, Superior Bank was placed into receivership by the Federal Deposit Insurance Corporation; that, shortly thereafter, Superior Bank, N.A., obtained Superior Bank's assets and liabilities; and that, in November 2011, Superior Bank, N.A., was merged into Cadence. Thus, Cadence asserts, it became the owner of the assets and liabilities formerly held by The Bank and its successors.

Records produced by Cadence suggest that, for approximately eight years after submitting the kill letter, the Robertsons took additional advances from, and made partial payments to, The Bank and its successors, as if the initial home-equity line of credit was still active after submission of the kill letter. The records indicate that the Robertsons' final draw on the home-equity line of credit was made in August 2012 and that their last payment was made in September 2013. Cadence suggests that the Robertsons' alleged actions are inconsistent with one or more of the terms of the kill letter and could be construed as a waiver thereof.

In December 2018, Cadence sued the Robertsons, seeking a judicial foreclosure pursuant to the terms of the mortgage the Robertsons had granted The Bank. Cadence also sought a money judgment for funds the Robertsons allegedly owed pursuant to the above-referenced transactions. After the lawsuit was initiated, Cadence learned of the kill letter, which, as noted, contained language indicating that the Robertsons' mortgage should have been released, their home-equity line of credit closed, and further advances stopped. Thereafter, at Cadence's request, the trial

court dismissed the judicial-foreclosure count, leaving only Cadence's count seeking a money judgment.

The Robertsons failed to respond to discovery requests propounded by Cadence and, instead, filed a motion for a summary judgment. In support, the Robertsons argued that Cadence's count seeking a money judgment was based on a theory of "open account," which, as the Robertsons asserted, is governed by a three-year statute of limitations. See § 6-2-37, Ala. Code 1975 ("The following must be commenced within three years: ... Actions to recover money due by open or unliquidated account, the time to be computed from the date of the last item of the account or from the time when, by contract or usage, the account is due ...."). The Robertsons argued that, because Cadence's records indicate that advances to, and payments by, the Robertsons ended no later than September 2013, the statute-of-limitations period on Cadence's count seeking a money judgment expired in September 2016, more than two years before Cadence commenced this action.

In its response to the Robertsons' summary-judgment motion, Cadence asserted that, in its count seeking a money judgment against the

Robertsons, Cadence had not limited itself to an open-account theory of liability. Specifically, Cadence asserted that it would pursue recovery of the alleged debt pursuant to a theory alleging "account stated," which, generally speaking, relies on the existence of a post-transaction agreement whereby the parties to an original account agree that a particular amount is owed. Stacey v. Peed, 142 So. 3d 529, 532 (Ala. 2013). Cadence pointed out that account-stated claims are subject to a six-year statute of limitations under § 6-2-24(5), Ala. Code 1975, and asserted that the Robertsons cannot "recast" Cadence's cause of action in order to take advantage of a shorter limitations period. The trial court, however, concluded that Cadence had asserted an open-account claim and granted the Robertsons' summary-judgment motion based on the expiration of the three-year limitations period applicable to such a claim. Cadence filed a postjudgment motion to alter, amend, or vacate the summary judgment, which was denied by operation of law pursuant to Rule 59.1, Ala. R. Civ. P. Cadence timely appealed. This Court applies a de novo standard when reviewing a summary judgment. Nettles v. Pettway, 306 So. 3d 873, 875 (Ala. 2020).

Cadence, as the plaintiff, is the master of its complaint and is entitled to choose the theory of liability on which it will rely in pursuit of the Robertsons' alleged debt. See Ex parte J.E. Estes Wood Co., 42 So. 3d 104, 111 (Ala. 2010) (acknowledging that a plaintiff is the "master" of his or her complaint); Cook v. Midland Funding, LLC, 208 So. 3d 1153, 1158 (Ala. Civ. App. 2016) ("[The defendant] does not have the ability to recast [the plaintiff's] account-stated claim as an open-account claim so as to benefit from the shorter statute-of-limitations period applicable to such a claim ...."). Thus, Cadence asserts that it may seek to recover pursuant to a theory other than open account.[1]

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[1]In addition to alleging the existence of an agreement between the Robertsons and Cadence or its predecessors based on an account-stated theory, Cadence suggests in its brief to this Court that it may seek relief based on theories other than account stated. The Court notes that Cadence, in its response to the Robertsons' summary-judgment motion, expressly represented that its count seeking a money judgment was based on an account-stated theory. Cadence did not assert that it was pursuing any other cause of action. In its postjudgment motion to alter, amend, or vacate the summary judgment, Cadence did suggest that it could pursue a cause of action alleging breach of contract based on theories other than account stated. It also asserted for the first time that the Robertsons had waived their statute-of-limitations defense by failing to plead it in their answer to Cadence's complaint. However, in Green Tree Acceptance, Inc. v. Blalock, 525 So. 2d 1366, 1369 (Ala. 1988), this Court held that "a trial

Count two of Cadence's complaint alleges that the Robertsons "presently owe [Cadence] the sum of $60,166.25, along with interest in the sum of $19,596.06 as of December 5, 2018, and late fees in the sum of $14.69, ... along with reasonable attorney fees for the cost of collection." Count two requests that the trial court enter a judgment finding that the Robertsons "owe" Cadence the referenced amounts and attorney fees, but it does not specify a particular theory of recovery, such as open account, account stated, breach of contract, or any other theory.

In support of their argument that Cadence seeks to recover pursuant to an open-account theory, the Robertsons relied on a statement made in Cadence's motion to dismiss its judicial-foreclosure count. Specifically, Cadence stated in that motion that, after dismissal of the judicial-

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court has the discretion to consider a new legal argument in a post-judgment motion, but is not required to do so." Cadence's postjudgment motion was denied by operation of law pursuant to Rule 59.1, Ala. R. Civ. P. Thus, there is no indication that the trial court considered the arguments made therein. On appeal, Cadence provides no discussion as to why this Court should consider arguments that were made for the first time in Cadence's postjudgment motion.

foreclosure count, its remaining claim would be "for a money judgment against [the Robertsons] for default upon repayment of money lent to them." (Emphasis added.) The Robertsons then pointed to a single sentence from Stacey v. Peed, supra, in which this Court said: "[W]hat could be stated as a money-lent claim is perhaps more accurately stated as a claim of 'money due on an open account.'" 142 So. 3d at 533. According to the Robertsons, because Cadence represented in its motion to dismiss that it sought to recover money that was "lent" to the Robertsons, Cadence's claim is necessarily based on an open-account theory and is subject to a three-year limitations period.

In Stacey, the plaintiffs claimed that they had loaned the defendant money that he failed to repay. They "alleged that [the defendant] owed them $161,365.78 plus interest based upon three claims asserted in the complaint -- breach of contract, account stated, and money lent." 142 So. 3d at 530. The trial court in Stacey entered a summary judgment in favor of the defendant based on an apparent conclusion that the plaintiffs had not presented substantial evidence establishing each element of their causes of action.

On appeal, this Court held that the plaintiffs had indeed presented substantial evidence establishing the elements of their breach-of-contract claim, namely, offer and acceptance, consideration, and mutual assent to the essential terms of the agreement. 142 So. 3d at 531-32. Accordingly, the Court reversed the summary judgment on the plaintiffs' breach-of-contract claim. As for the "money-lent" claim, the Court stated as follows:

> " 'An action for money lent is an action at law which lies whenever there has been a payment of money from the plaintiff to the defendant as a loan.
>
> " 'An action for money lent is an action at law for the recovery of money, based on an allegation that there was money lent to the defendant. The three elements of a claim on money lent are that the money was delivered to the defendant, the money was intended as a loan, and the loan has not been repaid.'

> "42 C.J.S. Implied Contracts § 2 (2007). A review of Alabama law reveals that what could be stated as a money-lent claim is perhaps more accurately stated as a claim of 'money due on an open account,' which contains identical factors.

> " 'A plaintiff establishes a prima facie case in an action for money due on [an] open account by presenting evidence that money was delivered to the defendant, that it was a loan, and that it has not been repaid. 58 C.J.S. Money Lent § 7 (1948).'

> "Livingston v. Tapscott, 585 So. 2d 839, 841 (Ala. 1991); see also [Mantiply v.] Mantiply, 951 So. 2d [638,] 649 [(Ala. 2006)]."

142 So. 3d at 532-33. The Court in Stacey held that the plaintiffs could pursue a claim alleging open account because they had presented sufficient evidence indicating that they had loaned the defendant money and that the defendant failed to repay the loan.[2]

In the present case, the Robertsons' summary-judgment motion, which was based solely on the statute of limitations, relies on a conclusion that Cadence necessarily is pursuing a claim alleging open account. But nothing in Cadence's complaint limits Cadence to that theory of liability. And, we are not convinced that Cadence's use of the phrase "money lent to [the Robertsons]" in its motion to dismiss the judicial-foreclosure count was a concession that Cadence was pursuing only an open-account cause of action. The primary business activity of Cadence and its predecessors is the lending of money, and the allegation that Cadence or its

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[2]The Court affirmed the summary judgment on the plaintiffs' account-stated claim because the plaintiffs had not presented sufficient evidence of "a 'new agreement' to an original account." 142 So. 3d at 532.

predecessors "lent" money to the Robertsons is consistent with theories of liability other than open account. Certainly nothing in Stacey suggests that a plaintiff's allegation that he or she lent money to a defendant necessarily limits the plaintiff to a cause of action alleging open account. To the contrary, the opinion in Stacey suggests that an unpaid loan might, depending on the circumstances, support theories alleging open account, breach of contract, and account stated.[3]

The Robertsons argue in their brief to this Court that Cadence cannot present substantial evidence in support of an account-stated claim

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[3]As noted, this Court has stated that "[a] plaintiff establishes a prima facie case in an action for money due on open account by presenting evidence that money was delivered to the defendant, that it was a loan, and that it has not been repaid." Livingston v. Tapscott, 585 So. 2d 839, 841 (Ala. 1991) (citing 58 C.J.S. Money Lent § 7 (1948)). Black's Law Dictionary defines "open account" as "[a]n unpaid or unsettled account" and "[a]n account that is left open for ongoing debit and credit entries by two parties and that has a fluctuating balance until either party finds it convenient to settle and close, at which time there is a single liability." Black's Law Dictionary 23 (11th ed. 2019). Traditionally, open accounts arise in situations in which credit is extended ancillary to the creditor's primary business and is provided to customers as part of a transaction for the purchase of goods or services. See 1 C.J.S. Account, Action on § 1 (2016) (describing an open account in part as "an unsettled debt arising from items of work and labor, or goods sold and delivered, with the expectation of further transactions subject to further settlement").

or a breach-of-contract claim.[4] The Robertsons' summary-judgment motion, fairly read, was based only on the statute of limitations and relied on the unconvincing assertion that, because Cadence had used the phrase "money lent to [the Robertsons]" in its motion to dismiss the judicial-foreclosure count, Cadence had conceded that it was pursuing only a time-barred open-account claim. The Robertsons did not argue that Cadence could not present substantial evidence establishing the elements of another theory of liability.[5] This Court will not affirm a summary judgment based on the alleged lack of substantial evidence "where a summary-judgment movant has not asserted before the trial court a

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[4]Yet, before filing their motion for a summary judgment, the Robertsons failed to respond to the discovery requests propounded by Cadence. Thus, Cadence did not have an opportunity to fully obtain relevant documents, interrogatory responses, or responses to requests for admission that might support theories other than open account.

[5]In their summary-judgment motion, the Robertsons made the factual averment that "[a]ny subsequent advances from Cadence or its predecessor to [the Robertsons after submission of the kill letter and check] were made with a lack of any written note or loan agreement between the parties." The Robertsons, however, did not assert that the alleged lack of a new written note or loan agreement negated essential elements of causes of action on which Cadence might rely as alternatives to an open-account theory.

failure of the nonmovant's evidence on an element of a claim or defense and therefore has not shifted the burden of producing substantial evidence in support of that element." Liberty Nat'l Life Ins. Co. v. University of Alabama Health Servs. Found., P.C., 881 So. 2d 1013, 1020 (Ala. 2003).

Based on the above-stated reasoning, we reverse the trial court's judgment and remand the matter for further proceedings. Our holding is based on the conclusion that the Robertsons' summary-judgment motion did not establish that Cadence seeks to recover only pursuant to an open-account theory subject to a three-year limitations period. The Robertsons did not assert any basis in support of their summary-judgment motion other than the statute of limitations. We express no opinion on the ultimate merits of Cadence's action.

REVERSED AND REMANDED.

Bolin, Bryan, Mendheim, Stewart, and Mitchell, JJ., concur.

Parker, C.J., and Shaw and Wise, JJ., dissent.

SHAW, Justice (dissenting).

The plaintiff below, Cadence Bank, N.A. ("Cadence"), has not demonstrated on appeal that the trial court erred in entering a summary judgment in favor of the defendants, Steven Dodd Robertson and Mary Garling-Robertson. Therefore, I respectfully dissent.

Cadence's complaint alleged that it was a mortgagee of the Robertsons' property, that it gave the Robertsons a notice of default, and that it declared the balance due and payable in full. Count one of the complaint sought judicial foreclosure on the property. Count two alleged that the Robertsons "presently owe [Cadence] ... $79,777.00." Cadence later moved to dismiss its judicial-foreclosure count. In its motion, it also stated: "[Cadence's] remaining claim is Count Two for a money judgment against [the Robertsons] for default upon repayment of money lent to them by [Cadence]." In their motion for a summary judgment, the Robertsons noted that Cadence's characterization of its "remaining claim" in count two as seeking a judgment for failure to repay "money lent to them" indicated that the count sought damages on a claim of an open

account. They cited Stacey v. Peed, 142 So. 3d 529 (Ala. 2013), which states:

> "'An action for money lent is an action at law which lies whenever there has been a payment of money from the plaintiff to the defendant as a loan.
>
> "'An action for money lent is an action at law for the recovery of money, based on an allegation that there was money lent to the defendant. The three elements of a claim on money lent are that the money was delivered to the defendant, the money was intended as a loan, and the loan has not been repaid.'
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> "42 C.J.S. Implied Contracts § 2 (2007). A review of Alabama law reveals that what could be stated as a money-lent claim is perhaps more accurately stated as a claim of 'money due on an open account,' which contains identical factors.
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> > "'A plaintiff establishes a prima facie case in an action for money due on [an] open account by presenting evidence that money was delivered to the defendant, that it was a loan, and that it has not been repaid. 58 C.J.S. Money Lent § 7 (1948).'
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> "Livingston v. Tapscott, 585 So. 2d 839, 841 (Ala. 1991); see also Mantiply [v. Mantiply], 951 So. 2d [638,] 649 [(Ala. 2006)]."

Stacey, 142 So. 3d at 532-33.

Cadence's statement in its motion to dismiss that it had "lent" money to the Robertsons does not operate to limit count two of the

complaint to a "money-lent" or open-account claim. Instead, it appears to simply be a recitation of what factually occurred and was not an attempt by Cadence to define its claim under a specific legal theory. Nevertheless, the allegations and evidence in this case indicate that money was delivered to the Robertsons, that the transaction was in the nature of a loan, and that the loan had not been repaid. It seems clear to me that, based on the Robertsons' summary-judgment motion alone, the trial court could have determined that Cadence's claim could be deemed as seeking damages on a theory of an open account; the facts suggest that every element of such a claim might exist. Cadence appears to acknowledge this, but it argues that, to the extent that count two alleged a claim on an open account, the trial court should have granted only a partial summary judgment limited to such a claim. Thus, to the extent that the complaint alleged an open-account claim, the trial court properly entered a summary judgment on that claim on the basis that it is barred by the applicable statute of limitations. See Ala. Code 1975, § 6-2-37.

On appeal, Cadence criticizes the Robertsons' and the trial court's reliance on Stacey, supra, as supporting the argument that count two

alleged solely a claim of an open account. Cadence notes that, in Stacey, the plaintiffs alleged that the defendant "owed" a certain amount and "asserted in the complaint" claims of breach of contract, account stated, and money lent. Cadence then quotes large portions of the analysis in Stacey regarding all three claims and argues that claims of breach of contract[6] and account stated are separate claims from a claim on an open account. In sum, Cadence appears to argue that Stacey does not support the trial court's decision because Stacey also recognizes that the scenario in that case, in which one party was alleged to "owe" money, could encompass both an open account-claim and an account-stated claim.

The distinction, however, is that the plaintiffs in Stacey explicitly alleged an account-stated claim in their complaint. Cadence appears to be arguing that Stacey stands for the proposition that an open-account claim can exist in conjunction with an account-stated claim, that is, that the existence of an open-account claim does not foreclose an account-

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[6]As noted in the main opinion, Cadence did not argue in the trial court that count two alleged a claim of breach of contract; therefore, any argument on appeal on that issue was waived.

stated claim. Although that might be true, these two types of claims were addressed in Stacey not because they both might exist as a matter of law under the facts of that case, but because both were actually alleged in the complaint.

Although a general allegation that one is "owed" money could encompass both an open-account claim and an account-stated claim, Cadence does not specifically discuss how count two alleges an account-stated claim and does not address how the facts in this case might demonstrate the existence of such a claim. Instead, it simply contends that Stacey does not support the argument that the only claim Cadence alleged was one based on an open account. Further, in its brief, Cadence argues:

> "To have been entitled to a summary judgment dismissing this case entirely, [the Robertsons] would have needed to have demonstrated as a matter of law that [Cadence] could not prevail on a claim of ... Account Stated for purposes of collecting on the debt that was the subject of Count Two in the Complaint."

However, on appeal the burden is now on Cadence to show that it alleged an account-stated claim in the first place. It is not enough to simply note that in Stacey, a factually distinguishable case, both claims existed.

In an alternate argument, Cadence contends that the Robertsons did not establish that they were entitled to a summary judgment on an account-stated claim because a letter from Cadence to the Robertsons dated December 1, 2017, contained a "full Statement of Account"; in other words, according to Cadence, the letter was substantial evidence of a rendering of a statement of the account. See Gilbert v. Armstrong Oil Co., 561 So. 2d 1078, 1081 (Ala. 1990) ("When an account is rendered or presented to the debtor and the debtor does not object to it within a reasonable time, the failure to object is regarded as an admission that the account is correct, and it becomes an account stated."). However, Cadence's response to the motion for a summary judgment did not mention the December 1 letter or otherwise show that a statement of an account had been rendered or presented to the Robertsons. This argument cannot be raised for the first time on appeal. See Dunlap v. Regions Fin. Corp., 983 So. 2d 374, 377 (Ala. 2007) ("Because the

arguments Dunlap now advances in opposition to Regions' summary-judgment motion were not presented to the trial court, they are not properly before this Court ....")

Cadence also argues that it was hampered in responding to the motion for a summary judgment because the Robertsons failed to respond to discovery. Cadence cites Parr v. Goodyear Tire & Rubber Co., 641 So. 2d 769, 771 (Ala. 1994), which states:

> "The [appellants] correctly state that if it can be ascertained that the information sought by pending interrogatories and requests for production of documents is crucial to the nonmoving party's case, it is error to enter a summary judgment before the party moving for summary judgment has produced the documents and answers to the interrogatories."

Cadence raised this issue in opposition to the motion for a summary judgment, but it did not explain to the trial court what the discovery would reveal or why it was crucial. Cf. Unger v. Wal-Mart Stores E., L.P., 279 So. 3d 546, 552 (Ala. 2018) ("The plaintiff apparently filed three motions to compel discovery, yet she does not disclose to this Court the specific discovery that she requested, nor does she argue that she was unable to adequately respond to the ... defendants' summary-judgment

motion in the absence of the requested discovery."). Further, it does not appear that Cadence invoked Rule 56(f), Ala. R. Civ. P. See Vick v. Sawyer, 936 So. 2d 517, 521 (Ala. 2006) ("'Rule 56(f) protects a party opposing a motion for summary judgment if the party states reasons why he cannot present essential facts.' Starks v. Commercial Union Ins. Co., 501 So. 2d 1214, 1216 (Ala. 1987). Proper application of Rule 56(f) requires the nonmoving party to demonstrate by affidavit ... 'that matters it seeks by further discovery are "crucial" to its case.' Smith v. Yanmar Diesel Engine Co., 855 So. 2d 1039, 1042 (Ala. 2003)."). Therefore, I do not discern reversible error with respect to this issue.