

# **SUMMARY JUDGMENT IN COLLECTION CASES**

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**CHAPTER 9**

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## SUMMARY JUDGMENT IN COLLECTION CASES

Summary judgments are frequently used procedures for accelerated final judgments in collection cases. They are second to default judgments in the disposition of collection cases. Often, the amount of the debt is easily provable by documents; and defenses or counterclaims, if any, are illusory, sometimes disingenuous, and surmountable. This article discusses collection actions most amenable to summary judgment.

### I. COLLECTION ACTIONS MOST AMENABLE TO SUMMARY JUDGMENT.

The genres of collection actions most amenable to summary judgment are: (a) suit on account under Tex. R. Civ. P. 185 (sworn account); and (b) suit on written instrument (contracts, promissory notes, leases, or guarantys).

### II. SUIT ON ACCOUNT

A suit on account under Rule 185 is commonly referred to as a suit on sworn account. Rule 185 is a procedural tool that limits the evidence necessary to establish a prima facie right to recovery on certain types of accounts. The rule provides that an open account or other claim for goods, wares or merchandise or for personal services rendered or labor done or labor or materials furnished within the scope of the rule, properly verified under the rule, operates to create a prima facie case (right to recover on the account as pleaded) which, if not countered by sworn denial of the adversary, authorizes a judgment on the pleadings for the party filing the account. For rule 185 to apply the claim must be for a liquidated money amount.<sup>1</sup> Where a proper sworn denial is filed against the account under the requirements of said rule, the party pleading the account is put to proof of same.<sup>2</sup> The suit on sworn account may be brought by the seller of the goods or provider material or services for which payment in full was

not made; there must be a sale on one side and a purchase on the other, whereby title to personal property passes from one to the other; a suit on sworn account may not brought by a debt buyer. For example, a suit to collect an unpaid credit card account derived from credit extended by a financial institution that was not the seller of the goods or services purchased with the credit card does not come within the actions described in Rule 185.<sup>3</sup>

Summary judgment is appropriate when a defendant fails to file a sworn denial which meets the requirements of Rules 185 and 93(10) or files a sworn general denial.<sup>4</sup> An answer to a suit on sworn account can be amended and the

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3. See *Unifund CCR Partners v. Laco*, \_\_\_ S.W.3d \_\_\_ (Tex. App. - Dallas, 2009), 2009 Tex. App. LEXIS 9642 (Plaintiff in suit on sworn account was not the original creditor. There was no proof the debt buyer was an assignee of the original creditor.); *Williams v. Unifund CCR Partners Assignee of Citibank*, 264 S.W.3d 231, 234 (Tex. App. - Houston 2008, no pet.) (A credit card issued by a financial institution is a special contract that does not create the sort of debtor-creditor relationship to bring a claim within the scope of Rule 185.); *Tully v. Citibank (S.D.), N.A.*, 173 S.W.3d 212, 216 (Tex. App - Texarkana 2005, no pet.) (A bank cannot collect credit card debt through suit on a sworn account. Because no title to personal property passes from the bank to the cardholder, a credit card debt is not a sworn account as contemplated by Rule 185.); *Bird v. First Deposit Nat'l Bank*, 994 S.W.2d 280, 282 (Tex. App. - El Paso 1999, pet. denied) (A credit card issued by a financial institution does not create the sort of debtor-creditor relationship required to bring suit under Rule 185.).

4. TEX. R. CIV. P. 185 requires "... a written denial, under oath ..."; Tex. R. Civ. P. 93.10 provides that certain matters should be verified by affidavit, including: "A denial of an account which is the foundation of the plaintiff's action, and supported by affidavit." Summary judgment may be entered in a suit on sworn account when the respondent fails to file a Rule 185 or Rule 93(2) verified denial to plaintiff's account. *Wimmer v. Hanna Prime, Inc.*, \_\_\_ S.W.3d \_\_\_ (Tex. App. - Dallas, 2009), 2009 Tex. App. LEXIS 8866 (The statement "to the best of my knowledge" in a corporate officer's affidavit attached to the amended original answer did not attest to the truthfulness of the facts alleged, and is not legally effective as a verification.); *Cooper v. Scott Irrigation Construction, Inc.*, 838 S.W.2d 743, 746 (Tex. App. - El Paso 1992, no writ) (A defendant who fails to file a proper sworn denial is not entitled to dispute the receipt of items or services or the accuracy of the stated charges. A sworn general denial is insufficient to remove the evidentiary presumption created by a properly worded and verified suit on an account.).

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1. TEX. R. CIV. P. 185; *Pine Trail Shore Owner's Ass'n v. Allen*, 160 S.W.3d 139, 144 (Tex. App. - Tyler 2005, no pet.) (Rule 185 action must be supported by sworn testimony and prove liquidated damages.

2. TEX. R. CIV. P. 185.

failure to comply with rules 185 and 93(10) can be cured. Therefore, it is advisable to include two bases for summary judgment, one that can survive a curative amended answer. The two bases should be: (1) there is no proper sworn denial; and (2) the admissible evidence accompanying the motion proves movant's claim.<sup>5</sup> Editors of the Texas Collections Manual state "Motions for summary judgment will help ferret out those who file answers to buy time from those with genuine defenses and are also great discovery tools. Well drawn summary judgments often require the debtors' attorneys to have serious talks with their clients about fees, resulting in serious settlement negotiations."<sup>6</sup>

In a collection case, a no-evidence motion for summary judgment has utility when the debtor defendant files a counterclaim, thereby raising issues for which the debtor defendant has the burden of proof at trial. Should the trial court grant the creditor plaintiff's traditional motion for summary judgment on the creditor's collection claim(s) and a debtor defendant's counterclaim is undisposed, the resulting summary judgment is partial and the creditor cannot pursue execution thereon.<sup>7</sup> The successful creditor plaintiff may move to sever the party, cause or action, or issue, as appropriate, so that the otherwise interlocutory summary judgment may become separate, final and enforceable.<sup>8</sup>

Texas Rule of Civil Procedure 185 provides that a suit on account may be proper:

When any action or defense is founded upon an open account or other claim for goods, wares

and merchandise including any claim for a liquidated money demand based upon written contract or founded on business dealings between the parties, or is for personal service rendered, or labor done or labor or materials furnished, on which a systematic record has been kept....<sup>9</sup>

An action brought under Rule 185 is procedural and concerns the evidence necessary to establish a prima facie case of the right to recover.<sup>10</sup> In a suit on account, when a defendant debtor fails to file a proper answer under Rules 185 and 93(10)<sup>11</sup> the plaintiff creditor may secure what is essentially a summary judgment on the pleadings. In effect, noncompliance with these rules concedes that there is no defense.<sup>12</sup>

If the defendant in a suit on account fails to file a written denial under oath, it will not be permitted at trial to dispute the receipt of the items or services or the correctness of the stated charges.<sup>13</sup> As a general rule, a sworn account is prima facie evidence of a debt and the account need not be formally introduced into evidence unless the account's existence or correctness has been denied in writing under oath.<sup>14</sup>

9. TEX. R. CIV. P. 185.

10. *Rizk v. For. Guardian Ins. Agency, Inc.*, 584 S.W.2d 860, 862 (Tex. 1979); *Meaders v. Biskamp*, 316 S.W.2d 75, 78 (Tex. 1958); *Hou-Tex Printers, Inc. v. Marbach*, 862 S.W.2d 188, 190 (Tex. App. - Houston [14th Dist.] 1993, no writ); *Achimov v. J.I. Case Credit Corp.*, 715 S.W.2d 73, 76 (Tex. App. - Dallas 1986, writ ref'd n.r.e.) (noting that assignee of retail installment contract failed to state a sworn account).

11. TEX. R. CIV. P. 93(10) (requiring a denial of an account be verified by affidavit).

12. *International Corp. v. Exploitation Eng'rs, Inc.*, 705 S.W.2d 749, 750 (Tex. App. - Houston [1st Dist.] 1986, writ ref'd n.r.e.); see *Hidalgo v. Sur. Sav. & Loan Ass'n*, 462 S.W.2d 540, 543 n.1 (Tex. 1971); *Waggoner's Home Lumber Co. v. Bendix Forest Prods. Corp.*, 639 S.W.2d 327, 328 (Tex. App. - Texarkana 1982, no writ); see also *infra* Para. V.B. (discussing pleadings as evidence).

13. *Fancee v. Holloway*, 689 S.W.2d 403, 404 (Tex. 1985) (per curiam) (citing Tex. R. Civ. P. 185); *Arbome Freight Corp. v. CRB Mktg., Inc.*, 566 S.W.2d 573, 574 (Tex. 1978) (per curiam) (calling the rule "settled"); *Murphy v. Cintas Corp.*, 923 S.W.2d 663, 665 (Tex. App. - Tyler 1996, writ denied).

14. See 566 S.W.2d at 575.

5. See *infra* II B, Para. VI.

6. Donna Brown, *Anatomy of the Collection Process: Nuts & Bolts of Collections 2009*, State Bar of Texas (May 6, 2009); see generally, Daniel J. Goldberg, *Texas Collections Manual*, sec. 12.31-12.34 (3d ed. 2004).

7. *North East Indep. Sch. Dist. v. Aldridge*, 400 S.W.2d 893, 895 (Tex. 1966) (final judgment required).

8. TEX. R. CIV. P. 41 (Any claim against a party may be severed and proceeded with separately); *Guar. Fed. Sav. Bank v. Horseshoe Op. Co.*, 793 S.W.2d 652, 658 (Tex. 1990) (A claim is properly severable if: (1) the controversy involves more than one cause of action; (2) the severed claim is one that would be the proper subject of a lawsuit if independently asserted; and (3) the severed claim is not so interwoven with the remaining action that they involve the same facts and issues).