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IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

No. A-1-CA-39800

CITIBANK, N.A.,

Plaintiff-Appellee,

v.

DANIEL J. BERGMAN,

Defendant-Appellant.

**APPEAL FROM THE DISTRICT COURT OF SANTA FE COUNTY
Raymond Z. Ortiz, District Judge**

The Moore Law Group, APC
Michael S. Rumac
Jaclyn M.H. Page
Robert Gandra
Jarrod A. Greth
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for Appellee

Daniel J. Bergman
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Pro Se Appellant

MEMORANDUM OPINION

DUFFY, Judge.

{1} Defendant appealed following the entry of a final judgment. We previously issued a notice of proposed summary disposition in which we proposed to affirm. Plaintiff has filed a memorandum in support, and Defendant has filed a memorandum in opposition. After due consideration, we affirm.

{2} Defendant has raised two issues, contending that the district court erred in awarding summary judgment to Plaintiff and challenging the dismissal of Defendant's counterclaim(s). For the reasons previously stated, we perceive no merit to the assertions of error. Although we understand Defendant to dispute our appraisal, the memorandum in opposition is almost entirely unresponsive to our notice of proposed summary disposition. As a result, we adhere to our initial assessment.

{3} Relative to the award of summary judgment, we note that the memorandum in opposition simply duplicates a response that Defendant filed in district court. [MIO 1-6; RP 235-41] This is unpersuasive. As we explained in the notice of proposed summary disposition, [CN 2-3] Plaintiff duly substantiated its motion for summary judgment with extensive documentary support and affidavits, demonstrating its entitlement to recovery on its claim. [RP 85-234, 246-55] Defendant's response was largely unresponsive, and unsupported by anything apart from Defendant's own assertions. This was insufficient to create a genuine issue of material fact. *See generally Deutsche Bank Nat'l Tr. Co. v. MacLaurin*, 2015-NMCA-061, ¶ 12, 350 P.3d 1201 (rejecting an argument advanced on appeal in opposition to an award of summary judgment, where the only factual support in the record was the defendants' own assertion). In light of Defendant's failure to respond in a manner that appropriately and effectively demonstrated the existence of any genuine issue of material fact, we conclude that the award of summary judgment was proper.

{4} Relative to the dismissal of Defendant's counterclaim(s), as we briefly observed in the notice of proposed summary disposition, [CN 4-5] the district court's stated rationale supplies ample support for the disposition. [RP 82-84] Once again, the memorandum in opposition is fundamentally unresponsive. Instead, Defendant offers a series of conclusory assertions, [MIO 6] which are belied by the record before us. We therefore remain unpersuaded.

{5} Finally, we note that Defendant has attached a recently executed affidavit in an apparent attempt to supply support for his positions. [MIO 8] However, "[r]eference to exhibits not in the record proper and not presented to the district court for consideration is improper and a violation of the Rules of Appellate Procedure." *Durham v. Guest*, 2009-NMSC-007, ¶ 9, 145 N.M. 694, 204 P.3d 19. As a result, we cannot consider it. *See, e.g., Thomasson v. Johnson*, 1995-NMCA-109, ¶ 6, 120 N.M. 512, 903 P.2d 254 (declining to consider an affidavit submitted on appeal which was not of record, and therefore, could not be reviewed on appeal).

{6} Accordingly, for the reasons stated in our notice of proposed summary disposition and above, we affirm.

{7} IT IS SO ORDERED.

MEGAN P. DUFFY, Judge

WE CONCUR:

JENNIFER L. ATTREP, Judge

SHAMMARA H. HENDERSON, Judge