[Cite as *Unifund CCR Partners v. Hall*, 2009-Ohio-4215.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Unifund CCR Partners,	:	
Plaintiff-Appellee,	:	
		No. 09AP-37
v.	:	(M.C. No. 2007-CVF-060575)
Nalita Hall,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on August 20, 2009

Barhorst & Associates, P.C., and *Stacie E. Barhorst*, for appellee.

Nalita Hall, pro se.

APPEAL from the Franklin County Municipal Court

KLATT, J.

{¶1} Defendant-appellant, Nalita Hall, appeals from a judgment of the Franklin County Municipal Court in favor of plaintiff-appellee, Unifund CCR Partners ("Unifund"). For the following reasons, we affirm.

{¶2} In August 2001, Firstar issued Hall a Visa credit card with a $5,000 limit. The September 2001 statement for the credit card shows that on August 30, 2001, Hall took a $4,900 cash advance on the card. Hall subsequently charged purchases to and made payments on the credit card account.

{¶3} Sometime before June 2002, US Bank ND ("US Bank") assumed Firstar's position as creditor, and it issued Hall a US Bank credit card and cardholder agreement. In the cardholder agreement, Hall agreed to "pay to [US Bank] the amount of all credit extended on the basis of * * * the Credit Account," as well as finance charges, late charges, annual fees, over-limit charges, and attorney fees.

{¶4} On May 25, 2005, Hall sent a letter to US Bank disputing the $4,561.71 balance listed in her April 28, 2005 statement. In the letter, Hall claimed that US Bank had failed to credit her account with payments she had made. Hall asked US Bank to investigate and explain the alleged billing error. US Bank replied in a June 24, 2005 letter wherein it admonished Hall for breaking her promise to pay US Bank for any credit extended and any associated fees. US Bank attached to the letter copies of the statement ledgers from Hall's account, but it did not specifically address Hall's allegation that she did not receive credit for payments she had made. In response, Hall sent another letter to US Bank reiterating her claim that US Bank did not properly apply payments to her account. When Hall received no reply, she followed with a third letter.

{¶5} On November 3, 2005, Hall sent a final letter to US Bank regarding her dispute over the $4,561.71 balance. In that letter, Hall stated that she had discovered that US Bank had closed her account and reported an incorrect outstanding balance to a credit reporting agency. Relying upon 12 C.F.R. 226.13(d)(1), Hall informed US Bank that she was "exercising her right to 'withhold disputed amount[s] * * *.['] " Hall demanded that US Bank change her credit report to read "account in dispute," remove any references to late payments from her credit report, and report the balance due without the late fees and interest added to the account after she had initiated the dispute.

{¶6} Apparently, US Bank did not comply with Hall's demands. Instead, on November 29, 2005, US Bank charged off Hall's account and assigned to Unifund the right to collect on that account.[1] On the charge-off date, Hall owed US Bank $5,455.37.

{¶7} On December 31, 2007, Unifund filed suit against Hall asserting claims for breach of contract, promissory estoppel, and unjust enrichment. Unifund alleged that with the addition of accrued interest, Hall owed $6,577.56 on the account. Hall answered the complaint and denied liability for the amount stated in the complaint.

{¶8} After conducting discovery, Unifund moved for summary judgment. In support of its motion, Unifund attached copies of Hall's responses to Unifund's interrogatories, requests for admission, and requests for the production of documents. Additionally, Unifund relied upon the affidavit of Craig Wortman, custodian of the records for Unifund, who testified that US Bank had charged off Hall's account and that Hall owed $5,455.37 on the date of the charge-off. Wortman also verified the account ledger attached to his affidavit, stating that the ledger accurately reflected the interest accrued since Unifund's acquisition of the account.

{¶9} Hall filed a memorandum in opposition to Unifund's motion for summary judgment and attached her own affidavit in which she asserted that she did not owe the amount stated in Unifund's complaint. Hall also urged the trial court to disregard Wortman's affidavit. Hall asserted that because Wortman was an agent of Unifund—not US Bank—he could not have personal knowledge regarding Hall's credit card account with US Bank and he could not lay the necessary foundation for admission of the account

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[1] According to the assignment documents contained in the record, US Bank actually assigned the right to collect to Unifund Portfolio A, LLC, who assigned the right to Cliffs Portfolio Acquisition I, LLC, who assigned the right to Palisades Collection, LLC, who assigned the right to Unifund.

ledger. Absent Wortman's affidavit, Hall contended that Unifund could not prove her liability.

{¶10} Rejecting Hall's argument, the trial court found sufficient evidence in Hall's admissions to prove that she, in fact, breached her contract with US Bank. The trial court, however, found that a question of fact remained regarding the amount of damages sustained. Consequently, the trial court ordered a damages hearing.

{¶11} At the December 10, 2008 damages hearing, Wortman testified that Hall owed $5,455.37 when US Bank charged off her account and that, with the accrual of interest and the addition of fees, Hall currently owed $7,031.69. Unifund introduced its ledger for Hall's account to substantiate Wortman's testimony. Hall neither objected to Wortman's testimony nor the introduction of the account ledger.

{¶12} At the conclusion of the damages hearing, the trial court announced judgment in Unifund's favor in the amount of $7,031.69, plus court costs and interest. On December 18, 2008, the trial court reduced its ruling to a written judgment.

{¶13} Hall now appeals from the December 18, 2008 judgment and assigns the following errors:

> [1.] The Court erred to the prejudice of Defendant-Appellant (hereinafter Appellant) by admitting into evidence documents for which Plaintiff-Appellee (hereinafter Appellee) laid no proper business records foundation. Appellee was not the originator of the documents and Appellee offered no testimony to establish a proper foundation for the documents.
>
> [2.] The Court erred to the prejudice of Appellant by finding no material facts in dispute at summary judgment, when Appellant's testimony of the only balance owed on the account was ignored.

{¶14} We will first address Hall's second assignment of error. By that assignment of error, Hall argues that the trial court erred in granting Unifund summary judgment. We disagree.

{¶15} Appellate review of summary judgment motions is de novo. *Andersen v. Highland House Co.*, 93 Ohio St.3d 547, 548, 2001-Ohio-1607. " 'When reviewing a trial court's ruling on summary judgment, the court of appeals conducts an independent review of the record and stands in the shoes of the trial court.' " *Abrams v. Worthington*, 169 Ohio App.3d 94, 2006-Ohio-5516, ¶11, quoting *Mergenthal v. Star Banc Corp.* (1997), 122 Ohio App.3d 100, 103. Civ.R. 56(C) provides that a trial court must grant summary judgment when the moving party demonstrates that: (1) there is no genuine issue of material fact, (2) the moving party is entitled to judgment as a matter of law, and (3) 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. *Gilbert v. Summit Cty.*, 104 Ohio St.3d 660, 2004-Ohio-7108, ¶6.

{¶16} In order to recover on a breach of contract claim, a plaintiff must prove the existence of a contract, performance by the plaintiff, breach by the defendant, and damage to the plaintiff. *Jarupan v. Hanna*, 173 Ohio App.3d 284, 2007-Ohio-5081, ¶18. In the case at bar, Hall admitted that she received a credit card, with the accompanying cardholder agreement, from US Bank. Hall also admitted that she used her credit card to purchase goods and/or services, draw cash advances, and/or transfer an existing balance from another credit card. In her November 3, 2005 letter to US Bank, Hall stated that she was withholding payment from US Bank. Given Hall's admissions, Unifund presented evidence that a contract existed between US Bank and Hall, and that US Bank performed under the contract by extending credit when Hall used her card. Hall's concession that she stopped making payments proved a breach of the contract and damage in the amount of the withheld payments. Therefore, based upon the undisputed evidence, Unifund established that Hall was liable for breach of contract.

{¶17} Hall, however, argues that the trial court erred in granting Unifund summary judgment because she denied that she owed $5,455.37—the amount that Unifund claimed was unpaid on the date US Bank charged off Hall's account. We find that this argument fails in light of the limited scope of the trial court's summary judgment decision. In granting Unifund summary judgment, the trial court held that Unifund had only proved Hall's liability, not the amount of damages owed. Consequently, the trial court did not grant summary judgment as to Unifund's entire breach of contract claim; rather, it ordered an evidentiary hearing to determine the amount of damages. The question of fact that Hall raises on appeal solely impacts the amount of damages. Thus, that question of fact cannot preclude summary judgment as to liability.

{¶18} Additionally, Hall suggests that she is not liable for nonpayment because US Bank never resolved her billing dispute. We recognize that the facts of this case might have given rise to an affirmative defense based upon 15 U.S.C. 1666, a part of the Truth in Lending Act. *Citibank (South Dakota), N.A. v. Kessler*, 10th Dist. No. 03AP-580, 2004-Ohio-1899, ¶15. Pursuant to 12 C.F.R. 226.13(d)(1), the implementing regulation for Section 1666, if a consumer properly asserts a billing error, "[t]he consumer need not pay (and the creditor may not try to collect) any portion of any required payment that the consumer believes is related to the disputed amount" until the creditor resolves the alleged billing error. However, a party waives affirmative defenses other than those listed in Civ.R. 12(B) if she does not raise them in the pleadings or in an amendment to the pleadings. *Jim's Steak House, Inc. v. City of Cleveland*, 81 Ohio St.3d 18, 20, 1998-Ohio-440. Here, Hall did not assert an affirmative defense based upon the Truth in Lending Act in her answer, so she waived it.

{¶19} Because Hall's own admissions established that she breached her contract with US Bank, we conclude that the trial court properly granted Unifund summary judgment. Accordingly, we overrule Hall's second assignment of error.

{¶20} By Hall's first assignment of error, she argues that the trial court erred in admitting into evidence the ledger of her account. We find this argument unavailing.

{¶21} When deciding Unifund's motion for summary judgment, the trial court relied exclusively upon Hall's own admissions. As the trial court did not depend upon the account ledger, its presence in the record did not prejudice Hall and cannot serve as a basis for reversal of the trial court's summary judgment decision. *Theobald v. Univ. of Cincinnati*, 160 Ohio App.3d 342, 2005-Ohio-1510, ¶17 ("A reviewing court will not disturb a judgment unless the error contained within is materially prejudicial to the complaining party.").

{¶22} Unifund also introduced the account ledger during the damages hearing. Hall, however, did not then object to the admission of the ledger. Generally, the failure to object to possible error results in a waiver of the issue on appeal. *Goldfuss v. Davidson*, 79 Ohio St.3d 116, 121, 1997-Ohio-401. In the absence of an objection, an appellate court may review the record for plain error but will only find plain error "in extremely rare circumstances" where the error seriously affects the basic fairness, integrity, or public reputation of the judicial process itself. Id.

{¶23} Here, Hall challenges Wortman's competency to lay a foundation for the introduction of the account ledger. Examination of the account ledger reveals that it details the interest and fees assessed *after* Unifund acquired Hall's account. Thus, Unifund—not US Bank—created the account ledger, and Wortman, as the Unifund records custodian, could properly identify this Unifund document. However, even assuming the admission of the account ledger constituted error, this case does not contain those exceptional circumstances that justify the recognition of plain error. Accordingly, we overrule Hall's second assignment of error.

{¶24} Finally, we note that in the argument underlying the first assignment of error, Hall contends that Unifund failed to prove the series of assignments leading from US Bank to Unifund. This argument is not related to the first assignment of error. As this court rules upon assignments of error, not mere arguments, we need not address it. *Williams v. Barrick*, 10th Dist. No. 08AP-133, 2008-Ohio-4592, ¶28, citing *In the Matter of Taris*, 10th Dist. No. 04AP-1264, 2005-Ohio-1516, ¶5. Rather, we merely direct Hall to footnote one of this opinion, where we summarize the contents of the various assignment documents contained in the record.

{¶25} For the foregoing reasons, we overrule Hall's first and second assignments of error, and we affirm the judgment of the Franklin County Municipal Court.

Judgment affirmed.

BRYANT and CONNOR, JJ., concur.