[Cite as *Ohio Receivables, L.L.C. v. Dallariva*, 2012-Ohio-3165.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Ohio Receivables, LLC,	:	
Plaintiff-Appellee,	:	
		No. 11AP-951
v.	:	(M.C. No. 2010 CVF 38674)
Jdomenic Dallariva,	:	(REGULR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on July 12, 2012

Cheek Law Offices, LLC, Parri J. Hockenberry and *Jackson T. Moyer,* for appellee.

Bradley E. Sherman, for appellant.

APPEAL from the Franklin County Municipal Court.

BRYANT, J.

{¶ 1} Defendant-appellant, Jdomenic Dallariva, appeals from a judgment of the Franklin County Municipal Court granting the summary judgment motion of plaintiff-appellee, Ohio Receivables, LLC. Because (1) the documents submitted to support plaintiff's summary judgment motion satisfy the business records exception to the hearsay rule and reflect an account, (2) the cardmember agreement provided for a legal interest rate, and (3) defendant did not raise the issue of untimely service in the trial court, we affirm.

I. Facts and Procedural History

{¶ 2} Plaintiff filed a complaint against defendant on September 27, 2010. Alleging it was the legal owner of the account through purchase, plaintiff sought judgment

against defendant in the amount of $10,118.61 in credit card debt defendant allegedly owed to Chase Bank USA N.A. Defendant filed an answer to the complaint on April 22, 2011.

{¶ 3} Plaintiff responded with a Civ.R. 56(C) motion for summary judgment on July 25, 2011, supporting the motion with the affidavit of Gabriel S. Cheek, plaintiff's records custodian. Cheek's affidavit incorporated the following documents by reference: a bill of sale evidencing the sale of 31,215 delinquent credit card accounts from Chase Bank to Turtle Creek Assets, Ltd., a redacted Excel spreadsheet showing defendant's account was one of the delinquent accounts Chase Bank sold to Turtle Creek, a bill of sale evidencing the sale of 981 delinquent accounts from Turtle Creek to plaintiff, a redacted Excel spreadsheet indicating defendant's account was among the accounts Turtle Creek sold to plaintiff, nearly 5 years worth of credit card statements regarding defendant's account, a copy of an unsigned cardmember agreement, and copies of 6 checks drawn on defendant's personal checking account that made payments on the credit card account. (R. 26.)

{¶ 4} Plaintiff's motion for summary judgment alleged no genuine issue of material fact existed, as the evidence demonstrated Chase Bank issued defendant a credit card, defendant used the credit card to purchase goods and services, defendant failed to make payments to Chase Bank as agreed, and plaintiff owned the account through purchase. Plaintiff sought the outstanding balance on the account of $10,118.61, $6,366.67 in accrued interest through July 15, 2011, and further interest at the rate of 24 percent per annum since November 30, 2008.

{¶ 5} Defendant filed a combined memorandum opposing plaintiff's motion for summary judgment and cross-motion for summary judgment. Defendant alleged he was entitled to summary judgment because plaintiff failed to establish a contract between defendant and plaintiff, failed to present a proper accounting, and failed to authenticate the purported bills of sale. Defendant supported his summary judgment motion with plaintiff's responses and objections to defendant's interrogatories and requests for production of documents, as well as letters between plaintiff's counsel and defendant's attorneys during discovery.

{¶ 6} Plaintiff filed a combined memorandum opposing defendant's summary judgment motion and replying to defendant's memorandum opposing plaintiff's motion. Plaintiff asserted that it properly submitted all of the documents attached to Cheek's affidavit, as they fell within the Evid.R. 803(6) business records exception to the hearsay rule. Defendant responded with a reply supporting his summary judgment motion, contending the documents attached to Cheek's affidavit did not satisfy Evid.R. 803(6), as the documents were not plaintiff's business records but the business records of unaffiliated entities.

{¶ 7} On October 20, 2011, the trial court filed a decision and entry granting plaintiff's and denying defendant's respective motions for summary judgment. The trial court determined the credit card statements attached to plaintiff's motion established the existence of a contract between Chase Bank and defendant, and the bills of sale demonstrated plaintiff was the valid assignee of defendant's account. The court further concluded the bills of sale were admissible business records under Evid.R. 803(6) because not only did plaintiff rely on those documents in conducting its day-to-day business, but defendant failed to identify any particular circumstances which would undermine the trustworthiness of the documents. Finding no genuine issues of material fact for trial, the court entered judgment for plaintiff.

II. Assignments of Error

{¶ 8} Defendant appeals, assigning the following errors:

> [I.] The trial court erred by finding that the Plaintiff-Appellee's [sic] satisfied the requirements of Civil Rule 10(D)(1).
>
> [II.] The Trial Court erred in finding that there was a valid contract as the existence of a contract was disputed and this is an issue of fact.
>
> [III.] The Trial Court erred in considering the credit card statements provided by Plaintiff-Appellee as they are inadmissible hearsay and are not business records.
>
> [IV.] The Trial Court erred in considering the improper accounting provided by Plaintiff-Appellee. The accounting provided was not in accordance with Ohio law. The alleged balance owed is disputed by the Defendant-Appellant and this is an issue of fact.

> [V.] The Trial Court erred by finding that the Plaintiff-Appellee is a valid assignee of the alleged contract underlying the alleged account. To wit: the alleged account was not properly assigned and has not been authenticated as there were multiple assignments by multiple entities.
>
> [VI.] The Trial Court erred when it overruled Defendant-Appellant's Motion for Summary Judgment.
>
> [VII.] The Trial Court abused its discretion when it granted the Plaintiff-Appellee's Motion for Summary Judgment.
>
> [VIII.] The Trial Court erred in assessing interest as the interest charges were usurious, against the statutory limit and against public policy.
>
> [IX.] The Trial Court erred in failing to require Plaintiff-Appellee to show cause and dismiss Plaintiff-Appellee's Complaint due to failure to obtain service in 6 months pursuant to Civil Rule 4(E).

{¶ 9} Defendant fails to separately argue his assigned errors as App.R. 16(A)(7) requires. Pursuant to App.R. 12(A)(2), an appellate court " 'may disregard an assignment of error presented for review if the party raising it * * * fails to argue the assignment separately in the brief, as required under App.R. 16(A).' " *See Thorpe v. Collins*, 10th Dist. No. 08AP-429, 2008-Ohio-5620, ¶ 5, quoting App.R. 12(A)(2). In the interests of justice, however, we will attempt to address the assigned errors as they appear to be argued at various points in defendant's brief.

III. Second, Third, Fifth, Sixth, and Seventh Assignments of Error - Summary Judgment Properly Granted

{¶ 10} Defendant's second, third, fifth, sixth, and seventh assignments of error collectively assert the trial court erred both in granting plaintiff's summary judgment motion and denying defendant's summary judgment motion, as the documents plaintiff relied on to establish defendant's obligation on the delinquent credit card account are inadmissible hearsay.

A. *Standard of Review*

{¶ 11} An appellate court's review of summary judgment is conducted under a de novo standard. *Coventry Twp. v. Ecker*, 101 Ohio App.3d 38, 41 (9th Dist.1995); *Koos v. Cent. Ohio Cellular, Inc.*, 94 Ohio App.3d 579, 588 (8th Dist.1994). Summary judgment is

proper only when the party moving for summary judgment demonstrate: (1) no genuine issue of material fact exists, (2) the moving party is entitled to judgment as a matter of law, and (3) reasonable minds could come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, that party being entitled to have the evidence most strongly construed in its favor. Civ.R. 56; *State ex rel. Grady v. State Emp. Relations Bd.*, 78 Ohio St.3d 181 (1997).

{¶ 12} Pursuant to Civ.R. 56(C), the moving party bears the initial burden of informing the trial court of the basis for the motion and identifying those portions of the record demonstrating the absence of a genuine issue of material fact. *Dresher v. Burt*, 75 Ohio St.3d 280, 293 (1996). The moving party, however, cannot discharge its initial burden under this rule with a conclusory assertion that the non-moving party has no evidence to prove its case; the moving party must specifically point to evidence of a type listed in Civ.R. 56(C), affirmatively demonstrating that the non-moving party has no evidence to support the non-moving party's claims. *Id.*; *Vahila v. Hall*, 77 Ohio St.3d 421 (1997). Once the moving party discharges its initial burden, summary judgment is appropriate if the non-moving party does not respond, by affidavit or as otherwise provided in Civ.R. 56, with specific facts showing that a genuine issue exists for trial. *Dresher* at 293; *Vahila* at 430; Civ.R. 56(E).

B. *Business Records Under Evid.R. 803(6)*

{¶ 13} The trial court relied on the credit card statements attached to plaintiff's motion to find defendant used a credit card that Chase Bank issued so he could purchase goods and services, and so created a contract with the bank. The court further relied on the bills of sale attached to plaintiff's motion to find plaintiff was the valid assignee of the contract between defendant and Chase Bank. Defendant contends the credit card statements and bills of sale are inadmissible hearsay and thus improper Civ.R. 56(C) material.

{¶ 14} To prove a breach of contract claim, a plaintiff must demonstrate the existence of a contract, plaintiff's performance, defendant's breach, and damage or loss to the plaintiff. *Discover Bank v. Poling*, 10th Dist. No. 04AP-1117, 2005-Ohio-1543, ¶ 17 (internal quotations omitted). Pursuant to Ohio law, credit card agreements are contracts

in which issuing and using a credit card create a legally binding agreement. *Id.*, quoting *Bank One, Columbus, N.A. v. Palmer*, 63 Ohio App.3d 491, 493 (10th Dist.1989).

{¶ 15} Civ.R. 56(C) provides that a court, in ruling on a motion for summary judgment, may consider "pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact." When a party in summary judgment proceedings wishes to present the court with a document not of the type listed in Civ.R. 56(C), frequently " 'it may be introduced as proper evidentiary material if incorporated by reference in a properly framed affidavit.' " *Hart v. Columbus Dispatch/Dispatch Printing Co.*, 10th Dist. No. 02AP-506, 2002-Ohio-6963, ¶ 18, quoting *Buzzard v. Public Emp. Retirement Sys. of Ohio*, 139 Ohio App.3d 632, 636 (10th Dist.2000).

{¶ 16} Affidavits submitted to support or oppose a summary judgment motion "shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated in the affidavit." Civ.R. 56(E). "Information in affidavits that is not based on personal knowledge and does not fall under any of the permissible exceptions to the hearsay rule may be properly disregarded by the trial court when granting or denying summary judgment." *Cincinnati Ins. Co. v. Thompson & Ward Leasing Co.*, 158 Ohio App.3d 369, 2004-Ohio-3972, ¶ 13 (10th Dist.), citing *Pond v. Carey Corp.*, 34 Ohio App.3d 109, 111 (10th Dist.1986).

{¶ 17} Evid.R. 803(6), the business records exception to the hearsay rule, provides that the hearsay rule does not exclude a document, "made at or near the time by, or from information transmitted by, a person with knowledge," if the document is "kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the" document, "all as shown by the testimony of the custodian or other qualified witness." "The business-records exception 'is based on the assumption that the records, made in the regular course of business by those who have a competent knowledge of the facts recorded and a self-interest to be served through the accuracy of the entries made and kept with knowledge that they will be relied upon in a systematic conduct of such business, are accurate and trustworthy.' " *State Farm Mut. Auto. Ins. Co.*

v. Anders, 10th Dist. No. 11AP-511, 2012-Ohio-824, ¶ 11, quoting *Weis v. Weis*, 147 Ohio St. 416, 425-26 (1947).

{¶ 18} Defendant alleges that the documents attached to Cheek's affidavit are hearsay because Chase Bank and Turtle Creek created the documents, and plaintiff failed to present a qualified witness from Chase Bank or Turtle Creek to authenticate them. Defendant thus contends plaintiff failed to prove it was the valid assignee of a contract involving defendant. *See Hudson & Keyse, LLC v. Carson*, 10th Dist. No. 07AP-936, 2008-Ohio-2570, ¶ 11 (noting the appellee "could not prevail on the claims assigned by the bank without proving the existence of a valid assignment agreement").

{¶ 19} Pursuant to Evid.R. 901(B)(10), "authentication of business records * * * is governed by Evid.R. 803(6)." *Great Seneca Fin. v. Felty*, 170 Ohio App.3d 737, 2006-Ohio-6618, ¶ 9 (1st Dist.). "Evid.R. 803(6) ' "does not require the witness whose testimony establishes the foundation for a business record to have personal knowledge of the exact circumstances of preparation and production of the document" ' " or of the transaction giving rise to the record. *Anders* at ¶ 15, quoting *Jefferson v. CareWorks of Ohio, Ltd.*, 193 Ohio App.3d 615, 2011-Ohio-1940, ¶ 11 (10th Dist.), quoting *State v. Myers*, 153 Ohio App.3d 547, 2003-Ohio-4135, ¶ 60 (10th Dist.).

{¶ 20} Rather, Evid.R. 803(6) "permits exhibits to be admitted as business records of an entity even when the entity was not the maker of the records, so long as the other requirements of [Evid.R. 803(6)] are met and circumstances indicate the records are trustworthy." *Shawnee Assocs., L.P. v. Shawnee Hills*, 5th Dist. No. 09-CAE-05 0051, 2010-Ohio-1183, ¶ 50, citing *Great Seneca*. "Records need not be actually prepared by the business offering them if they are received, maintained, and relied upon in the ordinary course of business" and "incorporated into the business records of the testifying entity." *Id.; Great Seneca* at ¶ 15 (determining assignee of delinquent credit card account, GSF, properly introduced documents from original creditor as its own business records, where GSF's records custodian averred the assigned documents "were kept in its regular course of business, that they had been 'certified' by an intermediary of First USA Visa, and that GSF was relying on the documents to arrive at the sum of $7,405.79"); *cf. Chase Bank, USA v. Curren*, 191 Ohio App.3d 507, 2010-Ohio-6596, ¶ 22 (4th Dist.) (concluding account statements did not qualify for business records exception to hearsay rule where

agent of Chase Bank failed to lay a proper foundation to admit documents as he "did not aver that he had personal knowledge of the creation of these records or of Chase's record-keeping system, and that knowledge [could not] be inferred from the affidavit").

{¶ 21} "Numerous federal courts have addressed whether documents may be admitted as business records of an entity other than the maker" and "have permitted admission of documents incorporated into a business's records, although prepared by third parties." *Anders* at ¶ 17-24, citing *United States v. Ullrich*, 580 F.2d 765, 771-72 (5th Cir.1978) (deciding automobile dealership could introduce documents originating from financier of dealership and automobile manufacturer as dealership's business records, since the documents were "transmitted by persons with knowledge and then confirmed and used in the regular course of the dealership's business"); *United States v. Jakobetz*, 955 F.2d 786, 801 (2d Cir.1992) (concluding documents that another entity originally created may constitute the business record of a subsequent entity if "the document ha[d] been incorporated into the business records of the testifying entity"); *Air Land Forwarders, Inc. v. United States*, 172 F.3d 1338, 1343 (Fed.Cir.1999). Such courts have reaffirmed "the adoptive-business-records doctrine and its rejection of the 'anarchronistic rule' that once required foundational testimony to be given by the preparer of a business record." *Anders* at ¶ 19, quoting *United States v. Irvin*, 656 F.3d 1151, 1161 (10th Cir.2011), citing *United States v. Carranco*, 551 F.2d 1197, 1200 (10th Cir.1977).

{¶ 22} Defendant responds with *Royse v. Dayton*, 195 Ohio App.3d 81, 2011-Ohio-3509 (2d Dist.) to refute the adoptive business records doctrine. In *Royse*, the court determined the city of Dayton could not introduce a report from a medical-review officer, working for the company ASTS, as its own business record since the " 'information in reports that a business receives from outside sources is not part of its business records for the purposes of Evid.R. 803(6).' " *Id.* at ¶ 26, quoting *Babb v. Ford Motor Co.*, 41 Ohio App.3d 174, 177 (8th Dist.1987). In *Anders*, this court addressed *Royse* and its reliance on *Babb*, determining neither case to be persuasive to the circumstances at issue. *Anders* at ¶ 26.

{¶ 23} In *Babb*, the Eighth District concluded "that consumers' unsolicited letters to a car manufacturer, complaining of defects, were not business records of the manufacturer." *Anders* at ¶ 26, citing *Babb* at 177. The court decided the unsolicited

letters lacked the trustworthiness of a document that another business produced, as the authors did not derive the information contained in the letters from any regularly conducted business activity and were under no duty to accurately report the information contained in the letters. *Anders* at ¶ 26. Further, the manufacturer in *Babb* did not incorporate the letters into its own business records, and no evidence indicated the manufacturer relied on those letters in the ordinary course of its business. *Anders* at ¶ 26. Since *Babb*, the Eighth District decided *RBS Citizens, N.A. v. Zigdon*, 8th Dist. No. 93945, 2010-Ohio-3511, which followed *Great Seneca* to conclude that documents Charter One created, but were under the possession and control of RBS, qualified as RBS' business records and were proper summary judgment material when incorporated by reference into the affidavit of RBS' legal specialist. *RBS Citizens* at ¶ 10-17.

{¶ 24} Here, Cheek explained in his affidavit that he was the custodian of plaintiff's records, and he based the affidavit on personal knowledge "gained from a review of business records kept under his care, custody and control," which reflected "business transactions kept in the ordinary and regular course of business of Plaintiff or its predecessor(s) in interest." (Cheek Affidavit, at ¶ 1.) Cheek averred that plaintiff received the rights and title to defendant's debt by purchase and assignment, referencing and explaining the bills of sale dated and signed by representatives of Chase Bank and Turtle Creek, and accompanying Excel spreadsheets. (Cheek Affidavit, at ¶ 4, 6.) The redacted Excel spreadsheets attached to the bills of sale contain defendant's name, account number, address, the date defendant opened the account, and the date Chase Bank charged off the account.

{¶ 25} Cheek indicated that, pursuant to the sales contract with Turtle Creek, Turtle Creek provided plaintiff with 18 months worth of credit card statements, which plaintiff incorporated "into Plaintiff's business records" and relied on "in Plaintiff's day-to-day business." (Cheek Affidavit, at ¶ 7.) Cheek stated that plaintiff then subpoenaed additional documentation regarding defendant's account from Chase Bank, Chase Bank provided plaintiff with more credit card statements, a copy of the cardmember agreement for defendant's account, and copies of defendant's checks making payments on the account, all of which plaintiff reviewed, incorporated into its business records, and relied

upon. The credit card statements reflect purchases and payments made during the particular month indicated in each statement.

{¶ 26} Cheek's affidavit thus discloses that plaintiff acquired these documents as an assignee, through its contract with Turtle Creek and from subpoenas sent to Chase Bank; Chase Bank and Turtle Creek operated under respective business duties in creating the documents and sending them to plaintiff; and plaintiff relied on the documents in the ordinary course of its own business, incorporating them into its own business records. Defendant responded with no evidence to indicate the documents are not trustworthy. Accordingly, the trial court did not err in finding that the documents satisfied Evid.R. 803(6).

{¶ 27} By virtue of its Evid.R. 803(6) evidentiary material submitted with its motion for summary judgment, plaintiff established defendant's default and plaintiff's ownership of the account, but defendant again failed to respond to plaintiff's motion for summary judgment with evidentiary material establishing a genuine issue of material fact for trial. Although defendant denied plaintiff's evidence was sufficient, defendant did not submit evidence to reflect that either he did not use the credit card in question or the alleged sums were incorrect. *See Discover Bank v. Doran*, 10th Dist. No. 10AP-496, 2011-Ohio-205, ¶ 13 (concluding defendant failed to demonstrate a genuine issue of material fact for trial where defendant "did not even include an affidavit denying that she owed the sums, [or] alleging that such sums were incorrect").

{¶ 28} Based on the foregoing, defendant's second, third, fifth, sixth, and seventh assignments of error are overruled.

IV. First and Fourth Assignments of Error – Proper Accounting

{¶ 29} Defendant's first and fourth assignments of error assert the trial court erred in granting plaintiff summary judgment, as plaintiff failed to present a proper accounting. Defendant alleges that, in order to constitute a proper account, "[t]he balance should begin at zero and show all charges and credits in chronological order." (Appellant's brief, at 8.) Because the first credit card statement attached to plaintiff's motion for summary judgment does not start at zero, defendant asserts that he may only be found liable for $2,672.70: the difference between $7,445.91, the beginning balance of the credit card statements, and $10,118.61, the final balance. (Appellant's brief, at 9.)

{¶ 30} In order to adequately plead and prove an account, the " 'account must show the name of the party charged.' " *Asset Acceptance Corp. v. Proctor*, 156 Ohio App.3d 60, 2004-Ohio-623 (4th Dist.), ¶ 12, quoting *Brown v. Columbus Stamping & Mfg. Co.*, 9 Ohio App.2d 123, 126 (10th Dist.1967). Although "[i]t begins with a balance preferably at zero, or with a sum recited that can qualify as an account stated," the balance "at least * * * should be a provable sum. Following the balance, the item or items, dated and identifiable by number or otherwise, representing charges, or debits, and credits, should appear." *Brown*. A summary "is necessary showing a running or developing balance or an arrangement which permits the calculation of the balance claimed to be due." *Id.* To constitute an account, "it is not necessary that every transaction that has transpired between the parties be included during the entire existence of their business relationship." *Wolf Automotive v. Rally Auto Parts, Inc.*, 95 Ohio App.3d 130, 134 (10th Dist.1994). *See Am. Express Travel Related Servs. v. Silverman*, 10th Dist. No. 06AP-338, 2006-Ohio-6374, ¶ 9-10 (concluding four years worth of credit card statements and copy of the cardmember agreement constituted sufficient evidence of an account, as requiring American Express to produce 30 years worth of statements constituted "an unreasonable burden").

{¶ 31} " 'An account rendered by one person to another and not objected to by the latter within a reasonable time becomes an account stated.' " *Creditrust Corp. v. Richard*, 2d Dist. No. 99-CA-94 (July 7, 2000), quoting 1 Ohio Jurisprudence 3d, Accounts and Accounting, Section 27, at 204 (1998). It is "the duty of the one to whom the account is thus rendered to examine the same within a reasonable time and object if he or she disputes its correctness." *Id.* (concluding the plaintiff pled a proper account, even though the credit card statement attached to the complaint showed no debits or credits, where the debtor did not timely object to the final balance within 60 days after receiving the statement, as the cardholder agreement required).

{¶ 32} The credit card statements attached to plaintiff's motion for summary judgment begin with a statement reflecting a due date of February 13, 2004 and a balance on the account of $7,447.17. The statement shows the previous balance was $7,445.91, that defendant charged $183.07 in goods and services, paid $253.08, and incurred $71.27 in finance charges. The statements continue, reflecting almost five years worth of

purchases and payments, until the last statement reflecting a December 12, 2008 due date and a balance of $10,118.61.

{¶ 33} As the credit card statements reflect, defendant used the credit card and thus subjected himself to the cardmember agreement. *See, e.g., Calvary SPV I, L.L.C. v. Furtado*, 10th Dist. No. 05AP-361, 2005-Ohio-6884, ¶ 18 (concluding that although the "cardholder agreement [did] not bear defendant's signature, the bank's issuance of the card and defendant's use of the card create[d] a binding contract"). Moreover, the cardmember agreement required defendant to notify Chase Bank in writing within 60 days after defendant received a bill with any error or problem on it. Defendant failed to submit evidence in his summary judgment motion demonstrating that he at any time objected to the $7,447.17 balance in February 2004. After the February 2004 statement, the statements reflect defendant continued to incur expenses and make payments on the account, indicating his assent to the $7,447.17 balance as an account stated. *See Crown Asset Mgt., L.L.C. v. Gaul*, 4th Dist. No. 08CA30, 2009-Ohio-2167, ¶ 10, fn. 1 (determining that a party's assent to an account stated may be express or "implied when an account is rendered by the creditor to the debtor and the debtor fails to object within a reasonable amount of time").

{¶ 34} The trial court thus properly concluded the billing statements, spanning nearly five years, qualify as an account. The documents reflect defendant's name, a sum recited to which defendant did not object, and itemized debits and credits which permit calculation of the final amount due.

{¶ 35} Defendant alternatively contends the trial court erred in failing to dismiss plaintiff's complaint for failure to comply with Civ.R. 10(D)(1). Civ.R. 10(D)(1) instructs that "[w]hen any claim or defense is founded on an account * * * a copy of the account * * * must be attached to the pleading. If the account * * * is not attached, the reason for the omission must be stated in the pleading." *See Equable Ascent Fin., L.L.C. v. Christian*, 196 Ohio App.3d 34, 2011-Ohio-3791, ¶ 17 (10th Dist.). Failure to comply with Civ.R. 10(D), however, does not require dismissal of the complaint. "Courts have repeatedly held that when a plaintiff fails to attach a copy of a written instrument to his complaint, the proper method to challenge such failure is by filing a Civ.R. 12(E) motion for a more

definite statement." *Castle Hill Holdings, LLC v. Al Hut, Inc.*, 8th Dist. No. 86442, 2006-Ohio-1353, ¶ 26.

{¶ 36} Although defendant's answer to the complaint alleged as a defense that plaintiff "failed to provide a copy of a contract signed by the Defendant pursuant to Civil Rule 10(D)," defendant did not file a Civ.R. 12(E) motion for a more definite statement. Defendant's failure to file a Civ.R. 12(E) motion waived defendant's objection regarding Civ.R. 10(D)(1). *Columbus v. Kahrl*, 10th Dist. No. 95APG09-1204 (Mar. 12, 1996), citing *Point Rental Co. v. Posani*, 52 Ohio App.2d 183, 186 (10th Dist.1976); *Castle Hill* at ¶ 29.

{¶ 37} Accordingly, defendant's first and fourth assignments of error are overruled.

V. Eighth Assignment of Error - Usurious Interest

{¶ 38} Defendant's eighth assignment of error alleges the interest charges on the credit card account were usurious, against the statutory limit, and against public policy. Defendant fails to separately argue this error, making a single conclusory statement that the charges on the credit card statements "are primarily late fees and usurious interest charges." (Appellant's brief, at 9.) App.R. 16(A)(7) required appellant to separately argue his eighth assignment of error, including "the reasons in support of the contentions, with citations to the authorities, statutes, and parts of the record on which appellant relies." Defendant provides no reason to support his contention.

{¶ 39} The cardmember agreement provided that upon default, defendant could be required to pay "two percent (2%) a month on the unpaid balance." (R. 26, Cheek Affidavit, Exhibit F, at ¶ 21.) R.C. 1343.03(A) states that when money becomes due and payable upon a contract, "the creditor is entitled to interest at the rate per annum determined pursuant to section 5703.47 of the Revised Code, unless a written contract provides a different rate of interest * * * in which case the creditor is entitled to interest at the rate provided in that contract." Although R.C. 1343.01 provides that parties may not stipulate to interest beyond 8 percent per annum unless one of the exceptions in R.C. 1343.01(B) applies, R.C. 1343.03 "applies to transactions that are not covered by R.C. 1343.01" and extends to transactions involving accounts. *WC Milling, LLC v. Grooms*, 164 Ohio App.3d 45, 2005-Ohio-5420, ¶ 19, 20 (4th Dist.) (internal citations omitted) (concluding that for an interest rate in excess of the statutory rate to be valid, the parties must have a written contract, and the contract must provide a rate of interest with respect

to money that becomes due and payable); *John Soliday Fin. Group, L.L.C. v. Wetzl*, 7th Dist. No. 09-MA-04, 2010-Ohio-756, ¶ 12 (noting that "Ohio courts have held that interest rates higher than the statutory rates are permissible when provided for in the contract"). Accordingly, the interest rate of 2 percent per month, or 24 percent per annum, applied to the balance on defendant's account on default pursuant to the cardmember agreement.

{¶ 40} Defendant's eighth assignment of error is overruled.

VI. Ninth Assignment of Error – Civ.R. 4(E)

{¶ 41} Defendant's ninth assignment of error asserts the trial court erred in failing to dismiss plaintiff's complaint for failure to obtain service within six months. Civ.R. 4(E) provides that "[i]f a service of the summons and complaint is not made upon a defendant within six months after the filing of the complaint," and the plaintiff cannot show good cause why service was not made within the six-month period, "the action shall be dismissed as to that defendant without prejudice upon the court's own initiative with notice to such party or upon motion." Plaintiff filed the complaint on September 27, 2010; plaintiff did not achieve service on defendant until March 31, 2011. (R. 1, 13-14.)

{¶ 42} Defendant did not raise any issue regarding the timeliness of service in the trial court and thus waived any argument he may have had regarding untimely service. *Gentile v. Ristas*, 160 Ohio App.3d 765, 2005-Ohio-2197, ¶ 74 (10th Dist.), citing *Estate of Hood v. Rose*, 153 Ohio App.3d 199, 2003-Ohio-3268, ¶ 10 (4th Dist.); *Everhome Mtge. Co. v. Baker*, 10th Dist. No. 10AP-534, 2011-Ohio-3303, ¶ 24.

{¶ 43} Defendant's ninth assignment of error is overruled.

VII. Disposition

{¶ 44} Having overruled all of defendant's assignments of errors, we affirm the judgment of the Franklin County Municipal Court.

Judgment affirmed.

KLATT and CONNOR, JJ., concur.
