**[Cite as *Discover Bank C/O DFS Servs. L.L.C. v. Lammers*, 2009-Ohio-3516.]**

**IN THE COURT OF APPEALS OF OHIO**
**SECOND APPELLATE DISTRICT**
**GREENE COUNTY**

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| DISCOVER BANK C/O DFS SERVICES, LLC | : | Appellate Case No. 08-CA-85 |
| Plaintiff-Appellee | : | Trial Court Case No. 08-CFV-112 |
| v. | : | |
| GRETCHEN LAMMERS | : | (Civil Appeal from Fairborn Municipal Court) |
| Defendant-Appellant | : | |

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O P I N I O N

Rendered on the 17th day of July, 2009.

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FAIN, J.

**{¶ 1}** Defendant-appellant Gretchen Lammers appeals from a summary judgment rendered in favor of plaintiff-appellee Discover Bank C/O DFS Services LLC (Discover). Lammers contends that the trial court erred in finding that Discover met its threshold burden of showing that Lammers had agreed to be contractually bound. Lammers also contends that the trial court erred in awarding post-judgment interest at

the rate of 19.8% per annum.

**{¶ 2}** We conclude that the trial court correctly rendered summary judgment in favor of Discover on the principal amount of the debt owed. Discover satisfied its initial burden on summary judgment of producing evidence affirmatively demonstrating the absence of genuine issues of material fact regarding the amount of the debt. Lammers then failed to meet her reciprocal burden of setting forth specific facts showing that there is a genuine issue for trial. In fact, Lammers did not submit any evidence at all.

**{¶ 3}** But we also conclude that the trial court erred in awarding interest on the judgment, because Discover failed to submit appropriate evidence of a contractual agreement for interest. Accordingly, the judgment is Affirmed as to the $10,220.25 judgment rendered in Discover's favor, and is Reversed as to the award of 19.8% interest on the judgment. This cause will be Remanded for further proceedings

I

**{¶ 4}** In January 2008, Discover filed a complaint against Lammers, alleging that Lammers had applied for a credit card account with Discover, had defaulted on payment, and now owed Discover $10,220.25. Discover asked for judgment in that amount, plus post-judgment interest on the principal balance at a rate of 19.8% per annum.

**{¶ 5}** Two exhibits were attached to the complaint. Exhibit A bore an April 11, 2007 notation, and was entitled "Your Discover Card Account." The exhibit contained twenty-five pages of a card-member agreement; it did not bear the name of any particular individual. Exhibit B was a "Discover Card Summary," which contained

Lammers's name and address, an account number, and a balance due of $10,220.25.

**{¶ 6}** Lammers filed an answer, motion to dismiss, and counterclaim. The answer denied all the allegations in the complaint, and raised various defenses, including failure to comply with requirements of suit on an account and failure to comply with the requirement of attaching a copy of the contract to the complaint (referring to Civ. R. 10(D), although the rule was not specifically mentioned in the answer). Lammers also asked for an order requiring a more definite statement.

**{¶ 7}** The motion to dismiss briefly asserted that Discover had failed to file anything indicating that Lammers was bound to Discover. And finally, the counterclaim alleged unspecified violations of the Fair Debt Collection Practices Act (FDCPA).

**{¶ 8}** In April 2008, the trial court denied the motion to dismiss, concluding that Discover had complied with the requirements of Civ. R. 8 and Civ. R. 10(D). Discover then filed a motion to dismiss the counterclaim and a motion for summary judgment. The motion to dismiss was based on the fact that Discover was a bank collecting its own debt and was not a lender under the FDCPA.

**{¶ 9}** Discover's motion for summary judgment was supported by the affidavit of Robert Adkins, who identified himself as an employee of DFS Services, LLC, the servicing affiliate of Discover Bank. Adkins stated that he was the duly authorized keeper of Discover's records, and had personal knowledge of the records. Without referring to specific exhibits or to the number or content of a particular exhibit, Adkins stated that all exhibits were incorporated and were true and accurate copies of the originals. Adkins also stated that Lammers had defaulted on payments under credit card account number * * * * * * * * * * * * 0094, and owed $10,220.25 on the principal

balance, plus interest at a rate of 19.8% per annum on the judgment.

**{¶ 10}** Two exhibits are attached to Adkins's affidavit. Exhibit A is the same April 2007 card-member agreement that was attached to the complaint. Exhibit B contains 34 credit card statements bearing Lammers's name, address, and two account numbers. One notation indicates that the bill refers to "Account number ending in 0094," and the other is a number that includes the same 16 numbers described in Adkins's affidavit, but adds 26 more digits and ends in 4700.

**{¶ 11}** The first statement contains a closing date of January 23, 2005, and reflects a previous balance of zero. This statement, as well as all the others, reflects entries for purchases, payments, and credits. The interest rate on the first statement is 14.99% for purchases, and 19.99% for cash advances. The last purchases on the account are reflected on a statement containing a closing date of March 23, 2007. This statement shows a balance due of $8,688.48 and an annual percentage rate of 27.24% for both purchases and cash advances. Thereafter, the remaining charges reflected on the statements are due to late fees ($39), "overlimit fees" ($39), and finance charges.

**{¶ 12}** Lammers responded to Discover's summary judgment motion, but did not submit an affidavit or evidentiary materials. Lammers argued that Discover failed to meet its threshold burden for summary judgment, because Discover did not supply copies of a contract signed by Lammers, and provided only a copy of a Discover Card Account agreement dated two years after the alleged contract. Lammers also argued that Discover failed to prove that she had defaulted, because Discover did not offer evidence as to the terms that applied in 2005, that Lammers had applied for a card, or that Lammers ever used the card.

**{¶ 13}** The trial court concluded that Discover had filed a complaint based on an account, not a contract, as Lammers had alleged. The court relied on Adkins's affidavit and the monthly statements in Exhibit B. In addition, the court noted that Lammers did not provide any documentation that the court could consider under Civ. R. 56. Finally, the court found that Discover was not subject to the FDCPA, because it was attempting to collect its own debt. Accordingly, the court dismissed the counterclaim, and rendered summary judgment in favor of Discover for $10,220.25, plus 19.8% interest per annum from the date of the judgment.

**{¶ 14}** Lammers now appeals from the judgment of the trial court.

II

**{¶ 15}** Lammers's First Assignment of Error is as follows:

**{¶ 16}** "THE TRIAL COURT ERRED TO THE PREJUDICE OF THE APPELLANT WHEN IT FOUND THAT THE APPELLEE HAD MET ITS THRESHOLD BURDEN OF ESTABLISHING ENTITLEMENT TO SUMMARY JUDGMENT WHERE THERE WAS NOTHING TO SHOW THAT LAMMERS HAD, EITHER EXPLICITLY OR IMPLICITLY, AGREED TO BE CONTRACTUALLY BOUND TO DISCOVER."

**{¶ 17}** Under this assignment of error, Lammers contends that the trial court erred, because it awarded summary judgment without first requiring Discover to prove the existence of a contract. In particular, Lammers contends that Discover failed to met the burden under *Dresher v. Burt*, 75 Ohio St.3d 280, 1996-Ohio-107, of producing evidence affirmatively demonstrating the absence of genuine issues of material fact. Id. at 293.

**{¶ 18}** "A trial court may grant a moving party summary judgment pursuant to Civ. R. 56 if there are no genuine issues of material fact remaining to be litigated, the moving party is entitled to judgment as a matter of law, and reasonable minds can come to only one conclusion, and that conclusion is adverse to the nonmoving party, who is entitled to have the evidence construed most strongly in his favor." *Smith v. Five Rivers MetroParks* (1999), 134 Ohio App.3d 754, 760. "We review summary judgment decisions de novo, which means that we apply the same standards as the trial court." *GNFH, Inc. v. W. Am. Ins. Co.*, 172 Ohio App.3d 127, 133, 2007-Ohio-2722, at ¶16.

**{¶ 19}** We recently addressed a similar situation in *Citibank (South Dakota) N.A. v. Ogunduyile*, Montgomery App. No. 21794, 2007-Ohio-5166. In *Citibank*, a bank had filed an action to recover money owed on a credit card account. We noted that:

**{¶ 20}** "In order to recover money due, ' "[a]n account must show the name of the party charged and contain: (1) a beginning balance (zero, or a sum that can qualify as an account stated, or some other provable sum); (2) listed items, or an item, dated and identifiable by number or otherwise, representing charges, or debits, and credits; and (3) summarization by means of a running or developing balance, or an arrangement of beginning balance and items which permits the calculation of the amount claimed to be due." ' " Id. at ¶7, quoting from *Gabriele v. Reagan* (1988), 57 Ohio App.3d 84, 87.

**{¶ 21}** In *Citibank,* the bank had submitted an affidavit to which was attached computer printouts of monthly statements sent to the defendant. 2007-Ohio-2722 at ¶8. We concluded that the evidence was sufficiently authenticated under Civ. R. 56(C) and (E), because the affiant testified that her position at the bank offered her access to all information about delinquent credit card accounts. She also stated that she had

personal knowledge of all relevant financial and account information about the defendant's account number. And finally, the affiant stated that the attached monthly statements were a hard-copy printout of the financial information in the defendant's account. Id. at ¶11.

**{¶ 22}** Based on these facts, we concluded that the affidavit and account statements were "sufficient to establish a prima facie case for money owned on an account." Id. at ¶12. Furthermore, since the "effect of an account stated is that the account will be taken as correct until shown by the party to whom it was rendered to be incorrect," we held that the burden shifted to the defendant to "affirmatively demonstrate the existence of genuine issues of material fact." Id., citing *Dresher*, 75 Ohio St.3d 280, 293.

**{¶ 23}** Although the defendant in *Citibank* had filed an affidavit disputing that he owed the debt, we concluded that his affidavit was too general and vague to create a material issue of fact. Id. at ¶14. We therefore affirmed the summary judgment rendered in the bank's favor. Id. at ¶18.

**{¶ 24}** The affidavit and monthly statements that Discover submitted in this case are consistent with the documentation we approved in *Citibank*. Accordingly, Discover met its initial burden under *Dresher*. When the moving party meets its initial burden under *Dresher*, the nonmoving party has a reciprocal burden "to set forth specific facts showing that there is a genuine issue for trial." *Dresher*, 75 Ohio St.3d at 293. Lammers failed to meet this burden, because she did not submit any evidence at all. Notably, we concluded in *Citibank* that a vague and general affidavit denying liability was inadequate to meet the defendant's burden on summary judgment. Lammers failed to

meet even that level of proof.

**{¶ 25}** Lammers has also argued that "analytically," the trial court should have dismissed the case for failure to comply with Civ. R. 10(D), because Discover attached only one monthly statement to the complaint. We disagree. Complete copies of the account do not have to be attached to the complaint. See, *e.g, Citibank v. Eckmeyer*, Portage App. No. 2008-P-0069, 2009-Ohio- 2435, at ¶19.

**{¶ 26}** Accordingly, the trial court did not err in rendering summary judgment in Discover's favor on the amount of the debt that was due. Lammers's First Assignment of Error is overruled.

III

**{¶ 27}** Lammers's Second Assignment of Error is as follows:

**{¶ 28}** "THE TRIAL COURT ERRED TO THE PREJUDICE OF APPELLANT BY GRANTING AN INTEREST RATE OF 19.8% ON THE AWARD."

**{¶ 29}** Under this assignment of error, Lammers contends that the trial court erred in awarding post-judgment interest at the rate of 19.8% per annum, because Discover did not establish the terms of any purported contract. Discover asked for an accelerated rate of interest pursuant to a 2007 agreement, without having submitted anything on which an interest rate could be based, other than the statutory rate of interest. Discover responds by noting that Lammers failed to submit any evidence indicating that she was not bound by the credit card agreement.

**{¶ 30}** "Credit card agreements are contracts whereby the issuance and use of a credit card creates a legally binding agreement. * * * More specifically, a bank credit

card * * * is a three-party, three-part agreement between the bank, the consumer and the merchant. * * * The agreement between the consumer/cardholder and the issuing bank usually contains a detailed description of each party's rights, duties and liabilities. * * * Of course, as in any contract, a party is not bound contractually to provisions which are not contained in the bank card agreement." *Bank One, Columbus, N.A. v. Palmer* (1989), 63 Ohio App.3d 491, 493 (citations omitted).

**{¶ 31}** In *Calvary SPV I, L.L.C. v. Furtado*, Franklin App. No. 05AP-361, 2005-Ohio-6884, the court determined an appropriate interest rate by relying on the card member agreement, which provided that the interest rate would fluctuate. Id. at ¶19. The court also considered evidence that the interest rate on unpaid amounts was 18.9%, as well as the absence of evidence that the rate had been improperly calculated. Id.

**{¶ 32}** The submitted evidence in the present case includes the following: (1) evidence that the parties entered into a contract in 2005; (2) a copy of a 2007 credit-card agreement; (3) rates reflected on the credit-card statements, which range from a low of 14.99% on the initial statement, to a high of 28.99% on the final statement in October 2007; and (4) the testimony of Adkins that the interest due should be 18.9% from the date of judgment.

**{¶ 33}** The reason for Discover's failure to submit the 2005 credit-card agreement is unclear. Compare *Discover Bank v. Poling*, Franklin App. No. 04AP-1117, 2005-Ohio-1543, where Discover provided the trial court with the application and with the card-member agreement that was sent to the defendant when his application for credit was accepted. Id. at ¶13. Because the terms of the 2005 agreement are not in

the record, there is no basis for concluding what the appropriate interest rate under that agreement would be. Furthermore, Discover could not unilaterally change the terms of the 2005 agreement without Lammers's assent and valid consideration for the change. *Palmer*, 63 Ohio App.3d 491, 494. Credit card companies sometimes accomplish this by sending the cardholder notice of a change in the terms of the agreement, with an indication that continued use of the card will be deemed to constitute assent to the change.

**{¶ 34}** Discover argues that the 2007 agreement supersedes prior agreements, because of its provisions, and because Lammers's credit card was used in 2007.

**{¶ 35}** The 2007 Agreement provides that:

**{¶ 36}** "CARDMEMBER AGREEMENT -

**{¶ 37}** "Please read this Agreement carefully before using your Discover Card Account. It contains the terms and conditions of your Account, some of which may have changed from earlier materials provided to you. In the event of any differences, this Agreement shall control." Ex. A., p. 1.

**{¶ 38}** The only date reflected on the 2007 Discover Card Account Agreement is a printed notation at the top, which bears the date of "April-11-2007." Id. However, there is no evidence as to when the Agreement may have been sent to Lammers. In fact, Adkins's affidavit does not even aver that the Agreement was sent. We cannot assume in the absence of some evidence in the record, that the 2007 card-member agreement was sent to Lammers, much less that she received it.

**{¶ 39}** The 2007 Agreement further states that:

**{¶ 40}** "USING YOUR ACCOUNT

**{¶ 41}** "Your Acceptance of this Agreement: The use of your Account or a Card by you or an Authorized User or your failure to cancel your Account within 30 days after receiving a Card means you accept this Agreement, including the Arbitration of Disputes section on page 10." Id. at p. 2.

**{¶ 42}** If Lammers used the Discover account after receiving the 2007 Agreement, one could argue that she accepted the agreement and its provisions, under a theory of novation. "A contract of novation is created where a previous valid obligation is extinguished by a new valid contract, accomplished by substitution of parties or of the undertaking, with the consent of all the parties, and based on valid consideration." *McGlothin v. Huffman* (1994), 94 Ohio App.3d 240, 244. The basis of novation is that a new contact is made, in which there is a complete meeting of the minds. *Citibank (South Dakota), N.A. v. Gierzak*, Butler App. No. CA2001-07-177, 2002-Ohio-800. Because a new contract is made, the parties must assent to the new or changed terms. Id. However, while consent may be implied from the circumstances and the conduct of the parties, "the evidence of such knowledge and consent must be clear and definite, since a novation is never presumed." *Bolling v. Clevepak Corp*. (1984), 20 Ohio App.3d 113, 125. Accord, *Moneywatch Cos. v. Wilbers* (1995), 106 Ohio App.3d 122, 125.

**{¶ 43}** Again, the record is silent on this point, because Discover failed to present evidence that it sent the 2007 Agreement to Lammers. Discover, therefore, did not present evidence sufficient to sustain its burden of affirmatively showing the absence of genuine issues of material fact on the applicable interest rate. *Dresher*, Ohio St.3d 280, 293. See, also, *Wooding v. Cinfed Emps. Fed. Credit Union,* 171 Ohio App.3d 665, 667-68, 2007-Ohio-728, at ¶12-15 (reversing a judgment in favor of a credit union on

unfair lending practices claims, where the credit union failed to submit evidence that it had sent the credit card agreement to the debtor). We note that Lammers did not submit an affidavit or evidence on this point. However, she was not required to do so, because Discover failed to satisfy its initial burden as a movant for summary judgment.

**{¶ 44}** Lammers's Second Assignment of Error is sustained. The judgment will be reversed, insofar as the interest due on the judgment is concerned, and this matter will be remanded for further proceedings.

IV

**{¶ 45}** Lammers's First Assignment of Error having been overruled, and the Second Assignment of Error having been sustained, the judgment of the trial court is Affirmed as to the $10,220.25 judgment rendered in favor of Discover, the judgment is Reversed as to the award of 19.8% interest to Discover, and this cause is Remanded for further proceedings consistent with this opinion.

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DONOVAN, P.J., and GRADY, J., concur.

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