**[Cite as *Discover Bank v. Hicks*, 2007-Ohio-4448.]**

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
WASHINGTON COUNTY

| | | |
|---|---|---|
| DISCOVER BANK, | : | |
| | : | |
| Plaintiff-Appellant, | : | Case No. 06CA55 |
| | : | |
| vs. | : | **Released: August 22, 2007** |
| | : | |
| CHRISTOPHER G. HICKS, | : | DECISION AND JUDGMENT |
| | : | ENTRY |
| Defendant-Appellee. | : | |

APPEARANCES:

Joseph M. McCandlish, Columbus, Ohio, for the Appellant.

Christopher G. Hicks, pro se.

McFarland, P.J.:

**{¶1}** Discover Bank ("Appellant") appeals the judgment of the Washington County Court of Common Pleas denying its motion for default judgment. The Appellant contends the trial court erred in denying its motion for default judgment because Christopher Hicks ("Appellee") admitted he owed the debt when he failed to answer the initial complaint or otherwise appear in the action. Because we find Civ.R. 8(D) is controlling in this matter, and the debt owed to the Appellant is not a damage provision within

the context of that rule, we reverse the trial court's judgment and remand for proceedings consistent with this opinion.

**{¶2}** On June 12, 2006, the Appellant filed a complaint against the Appellee for monies owed on a Discover Bank credit card account. The Appellant attached a recent credit card statement and terms and conditions of the agreement to its complaint. Although he was properly served with the Appellant's complaint, the Appellee did not file an answer. The Appellant then moved for default judgment, attaching an affidavit to its motion.

**{¶3}** On September 5, 2006, the trial court held a case management conference and motion for default hearing. At that hearing, the court noted there was nothing in the court file with the Appellee's signature indicating that he agreed to have an account. At the conclusion of the hearing, the trial court entered judgment for the Appellee. An entry granting judgment for the Appellee was likewise filed on September 7, 2006. The Appellant now appeals this decision, asserting the following assignments of error:

**{¶4}** 1. THE LOWER COURT ERRED AS A MATTER OF LAW TO THE PREJUDICE OF APPELLANT IN FAILING TO GRANT JUDGMENT IN FAVOR OF APPELLANT.

**{¶5}** 2. IN THE ALTERNATIVE, JUDGMENT SHOULD BE VACATED AND THE CASE REMANDED TO THE LOWER COURT FOR FURTHER PROCEEDINGS, BECAUSE THE LOWER COURT ERRED BY ENTERING JUDGMENT IN FAVOR OF A NON-APPEARING, NON-MOVING DEFENDANT AT A DEFAULT HEARING.

**{¶6}** In its first assignment of error, the Appellant argues the trial court erred as a matter of law when it failed to enter judgment in its favor. In its original complaint, the Appellant requested the trial court to enter a default judgment under Ohio Civ.R. 55 against the Appellee. Motions for default judgment under Civ.R. 55 are relegated to the sound discretion of the trial court. See generally *Huffer v. Cicero* (1995), 77 Ohio App.3d 65, 74, 667 N.E.2d 1031. We will not overturn a trial court's decision on a motion for default judgment absent an abuse of discretion. Id. The term "abuse of discretion" connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 450 N.E.2d 1140.

**{¶7}** The Appellant contends that because the Appellee did not file an answer to its complaint, or make an appearance in the action at any point, he has admitted the amount due and owing in the complaint. Civ.R. 8(D) provides, in pertinent part, "[a]verments in a pleading to which a responsive pleading is required, other than those as to the amount of damage, are admitted when not denied in the responsive pleading." When an action is brought on an account, the allegation of the amount due is not "an allegation of value or damage, but is a specific allegation on the amount due on the account * * * and must be controverted by answer." *Farmers & Merchants*

*State and Savings Bank v. Raymond G. Barr Ent., Inc.* (1982), 6 Ohio App.3d 43, 44, 452 N.E.2d 521. Applying this rule to the case sub judice, the Appellee failed to deny that he owed $4,317.58 on his Discover credit card account, either by answer or appearance. Because a responsive pleading is required in a case of this nature, and the Appellant's allegation of the amount due by the Appellee is not an allegation of damage under Civ.R. 8(D), the averments set forth in the Appellant's complaint are admitted. Thus, the Appellant admitted that he owes $4,317.58 to Discover Bank.

**{¶8}** At the hearing on the Appellant's motion for default judgment, the trial court took exception to what it perceived as a lack of evidence showing that the Appellee had an account with Discover Bank. The following exchange took place between the trial judge and the Appellant's counsel:

> **The Court: "**What we have in the file is a Discover card information (sic). We do not have anything signed by Mr. Hicks. And – and I need something to show that he actually has an account with Discover Bank and the – the balance.
>
> **Mr. Vessels:** Your Honor, I – I have the account, the most recent account information statement, the account summary, showing a $4,317.58 debt for Christopher Hicks, with that card number. I do not have anything with his signature on it.
>
> **The Court:** Yeah, okay. Well, I would need something to – to show that he signed and agreed to have an account.
>
> So you don't have anything else to offer, then?

**Mr. Vessels:** That's all I have, Your Honor.

**The Court:** Okay. The Court will grant judgment for Mr. Hicks."

**{¶9}** The trial court bases its judgment upon the lack of evidence in the record that the Appellee signed and agreed to have an account. Pursuant to the fact that the Appellee has admitted that he owes the Appellant $4,317.58 under Civ.R. 8, however, it was an abuse of discretion for the trial court to deny the Appellant's motion for a default judgment under Civ.R. 55.

**{¶10}** As such, we sustain the Appellant's first assignment of error. In light of our disposition of Appellant's first assignment of error, the second assignment of error is arguably mooted. However, we parenthetically note that the trial court could not grant judgment to the defendant below at a hearing on plaintiff's motion for default. It could do so if it were addressing the merits of the case, but that is not purpose of a default hearing. Accordingly, we reverse the trial court's judgment and remand for proceedings consistent with this opinion.

**JUDGMENT REVERSED AND CAUSE REMANDED.**

Kline, J., dissenting:

**{¶11}** I respectfully dissent.

**{¶12}** Civ.R. 55(A) provides that the trial court has discretion to conduct a hearing if it deems a hearing "necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter." Thus, it is "discretionary with the trial court to decide if a hearing is necessary." *Buckeye Supply Co.* (1985), 24 Ohio App.3d 134, 136. In fact, "[i]t has always been within the discretion of the trial court to determine whether further evidence is required to support a claim against a defaulting defendant." *Id*., citing *Dallas*, 25 Ohio St. 635, and *Streeton v. Roehm* (1948), 83 Ohio App. 148. Hence, "a judge has discretion to require a party seeking default judgment to substantiate its claims with evidence prior to entering judgment." *Mercury Fin. Co., L.L.C. v. Smith*, Cuyahoga App. No. 87562, 2006-Ohio-5730, ¶11, citing *X-Technology v. MJ Techs.* Cuyahoga App. No. 80126, 2002-Ohio-2259.

**{¶13}** Here, the trial court's reason for denying Discover's motion for default judgment was because Discover failed to provide any signed document evidencing Hicks' assent "to have an account." R.C. 1319.01 provides that "[a] cardholder who receives a credit card from an issuer, which such cardholder has not requested nor used, shall not be liable for any use made of such credit card which has not been authorized by such

cardholder[.]" This language means "that a cardholder wishing to avoid liability for charges incurred on an unsolicited credit card must not use the unsolicited credit card." *Society Bank & Trust v. Niggemyer* (May 21, 1993), Sandusky App. No. S-92-5. Use of a credit card by the cardholder results in the cardholder's "liability for the charges made." *Id*. Thus, "[t]he key factor in this case * * * is not how the card was issued or obtained, but is whether the card was used by [the cardholder], thereby making [the cardholder] responsible for payment[.]" *Id*.

**{¶14}** Discover alleged that Hicks applied for a Discover card in its complaint, but failed to produce a copy of the application. While Discover presented no formal application or other evidence documenting Hicks' assent to a Discover account, it did provide an account statement with a balance, indicating use of the card. Discover also attached an affidavit of a Discover account manager essentially stating that he has control over Discover's records and that the documents attached to the affidavit were true and accurate. However, no documents were attached to the affidavit in the record before this court.

**{¶15}** The affidavit does state, in the caption, the credit card account number, the account balance and that Hicks is a "cardmember." However, nowhere in the affidavit does it state that Hicks assented to an account and

made purchases totaling the balance owed, or that Hicks otherwise authorized the use of the card. The trial court apparently believed that the mere fact that the account has an outstanding balance does not necessarily indicate that Hicks requested the card or authorized its use.[1] I do not believe that this is an abuse of discretion.

**{¶16}** The court sought evidence, such as the application, receipt or anything evidencing Hicks' request for the account or his assent to the use of the card. Aside from mere allegations and facts showing only the amount of the balance and the fact that Hicks was the cardholder, no evidence of Hicks' request for the card or *his* use was presented. Therefore, I do not believe that the trial court's denial of the motion for default judgment amounts to an abuse of discretion.

**{¶17}** Accordingly, I would overrule the first assignment of error and proceed to address the second assignment of error.

**{¶18}** In the second assignment of error, Discover contends that the trial court erred when it entered judgment in favor of Hicks. I would sustain this assignment of error. On remand, I would instruct the trial court to

[1] However, if the court accepted the allegations in the complaint as true, there is prima facie evidence that Hicks applied for the card and used the card. Paragraph one of the complaint states that Hicks "applied for a credit card account with the Plaintiff." Further, paragraph two of the complaint states that "[b]y use of the account, the defendant [Hicks] became bound by the terms in the agreement." Therefore, if the trial court had not exercised its discretion under Civ.R. 55, it could have entered judgment in favor of Discover. See *Farmers & Merchants State & Savings Bank v. Raymond Barr Enterprises, Inc.* (1982), 6 Ohio App.3d 43.

replace the judgment for Hicks with "a judgment dismissing the action[.]"

*Steiner v. Roberts* (1955), 72 Ohio Law Abs. 391, 131 N.E.2d 238, 241.

**{¶19}** Thus, I dissent.

**JUDGMENT ENTRY**

It is ordered that the JUDGMENT BE REVERSED AND THE CAUSE REMANDED and that the Appellant recover of Appellee costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Washington County Common Pleas Court to carry this judgment into execution.

Any stay previously granted by this Court is hereby terminated as of the date of this entry.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.
Exceptions.

Harsha, J.: Concurs in Judgment Only.
Kline, J.: Dissents with Dissenting Opinion.

For the Court,

BY: _____
Matthew W. McFarland
Presiding Judge

**NOTICE TO COUNSEL**

**Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.**