[Cite as *Capital One Bank (USA), N.A. v. Rodgers,* 2010-Ohio-4421.]

COURT OF APPEALS
MUSKINGUM COUNTY, OHIO
FIFTH APPELLATE DISTRICT

CAPITAL ONE BANK (USA), N.A.	:	JUDGES:
	:	
	:	Hon. Julie A. Edwards, P.J.
Plaintiff-Appellee	:	Hon. John W. Wise, J.
	:	Hon. Patricia A. Delaney, J.
-vs-	:	
	:	Case No. CT2009-0049
FREDERICK J. RODGERS	:	
	:	
	:	
Defendant-Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Muskingum County Court, Case No. CVF 0900667
JUDGMENT:	AFFIRMED
DATE OF JUDGMENT ENTRY:	September 14, 2010

APPEARANCES:

For Defendant-Appellant:	For Plaintiff-Appellee:
FREDERICK J. RODGERS, Pro Se 605 Cass St. Dresden, OH 43821	YALE R. LEVY 4645 Executive Dr. Columbus, OH 43220

Delaney, J.

{¶1} Defendant-Appellant Frederick J. Rodgers appeals the October 13, 2009 decision of the Muskingum County Court to grant summary judgment in favor of Plaintiff-Appellee, Capital One Bank (USA), N.A.

STATEMENT OF THE FACTS AND CASE

{¶2} Appellant opened a charge account with Capital One, which Appellant used to purchase goods and/or services. Appellant failed to make timely payments pursuant to the Customer Agreement and Appellee charged-off the account on January 12, 2007. Appellee states that its records show that the last date of payment from Appellant was on April 11, 2006.

{¶3} On July 8, 2009, Appellee filed a lawsuit in the Muskingum County Court against Appellant to recover the balance due and owing in the amount of $1,419.51 with 25% interest from April 14, 2009. Appellant filed an Answer and Motion to Dismiss on August 6, 2009. Appellee filed a response to the Motion to Dismiss, but the trial court never ruled on the motion.

{¶4} Appellee filed its Notice of Service of Plaintiff's First Set of Interrogatories, Request for Production of Documents, and Requests for Admissions. The discovery requests were mailed to Appellant on September 1, 2009.

{¶5} Appellee filed its Motion for Summary Judgment on October 6, 2009. Appellant did not file a response to the motion by the time the trial court granted the motion on October 13, 2009.

{¶6} It is from this judgment Appellant now appeals.

ASSIGNMENTS OF ERROR

{¶7} Appellant raises four Assignments of Error:

{¶8} "I. MUSKINGUM COUNTY COURT ERRED IN NOT DISMISSING THE CASE WHEN THE CASE WAS BARRED DUE TO THE VIRGINIA STATUTE OF LIMITATIONS OF THREE YEARS AND DID NOT HAVE JURISDICTION OVER THE BARRED CLAIM. THIS ERROR IS FOUND IN THE TIME STAMP ON THE COMPLAINT AND ON THE SETTING OF THE CASE FOR A PRE-TRIAL WHEN THE COURT WAS WITHOUT JURISDICTION. THIS RESULTED IN AN ERRONEOUS GRANTING OF A MOTION FOR SUMMARY JUDGMENT.

{¶9} "II. MUSKINGUM COUNTY COURT ERRED IN THAT PLAINTIFF HAD NOT PROVEN THE AMOUNT SUPPOSEDLY OWED ($1419.51) LIKE IN THE GAUL CASE. NO PROOF OF THE APRIL 11, 2009 PAYMENT. (PART II, ARGUMENT IN "PLAINTIFF'S MEMORANDUM CONTRA TO DEFENDANT'S MOTION TO DISMISS" FILED AUGUST 2009. JUDGMENT ENTRY SHOWS AMOUNT NOT PROVEN.)

{¶10} "III. MUSKINGUM COUNTY COURT SHOULD HAVE SCREENED THE COMPLAINT AND REJECTED IT BECAUSE PLAINTIFF OMITTED THE 'CUSTOMER AGREEMENT' WHICH SHOWS VIRGINIA LAW APPLIES OR THAT 25% INTEREST WAS AGREED TO. BY LETTING THIS ACCOUNT SIT FOR OVER THREE YEARS, PLAINTIFF HOPES TO BENEFIT MORE THAN IF HE WOULD HAVE FILED HIS CASE IN A TIMELY MANNER.

{¶11} "IV. PLAINTIFF NEVER SERVED A 'COPY' OF THE 'PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT' BECAUSE SOMEONE ALTERED PAGE ONE

OF EXHIBIT A'S CERTIFICATE OF SERVICE, SO THAT IT DID NOT MATCH THE ACTUAL DOCUMENT IT WAS SUPPOSED TO BE A COPY OF."

I.

{¶12} Appellant argues in his first Assignment of Error that the trial court erred in failing to dismiss the case because it filed beyond the applicable statute of limitations. We disagree.

{¶13} Appellant raised his statute of limitations argument in a motion to dismiss filed with his answer to the complaint. The trial court did not rule on Appellant's motion to dismiss. A trial court's failure to rule on a motion is normally deemed to be a denial of that motion for purposes of appellate review. *Sabbatis v. Burkey,* 166 Ohio App.3d 739, 853 N.E.2d 329, 2006-Ohio-2395, ¶ 33, citing *State v. Olah* (2001), 146 Ohio App.3d 586, 767 N.E.2d 755, fn. 2.

{¶14} Our standard of review on a Civ.R. 12(B)(6) motion to dismiss is de novo. *Greely v. Miami Valley Maintenance Contrs., Inc.* (1990), 49 Ohio St.3d 228, 551 N.E.2d 981. A motion to dismiss for failure to state a claim upon which relief can be granted is procedural and tests the sufficiency of the complaint. *State ex rel. Hanson v. Guernsey Cty. Bd. of Commrs.,* 65 Ohio St.3d 545, 605 N.E.2d 378, 1992-Ohio-73. Under a de novo analysis, we must accept all factual allegations of the complaint as true and all reasonable inferences must be drawn in favor of the nonmoving party. *Byrd v. Faber* (1991), 57 Ohio St.3d 56, 565 N.E.2d 584. As provided in Civ.R. 12(B), in reviewing such a motion, this Court can only consider the four corners of the complaint.

{¶15} Appellant contends that the customer agreement governing the account stated that the agreement was governed by Virginia law and Federal law. Neither

Appellant or Appellee filed a copy of the customer agreement with their pleadings in this case. Appellant points to Virginia Code Ann. § 8.01-246(4) to argue that actions on an unwritten contract must be brought within three years of the accrual of the action. Appellant states that if his last payment was on April 11, 2006, Appellee's complaint was untimely filed on July 8, 2009.

{¶16} Appellant's argument raises a choice of law issue. In *Unifund CCS Partners v. Childs*, Montgomery App. No. 23161, 2010-Ohio-746, the Second District Court of Appeals recently addressed the issue where a conflict arises between the statute of limitations of different states. It stated:

{¶17} "'In choice-of-law situations, the procedural laws of the forum state, including applicable statutes of limitations, are generally applied.' *Lawson v. Valve Trol. Co.* (1991), 81 Ohio App.3d 1, 4, citing *Howard v. Allen* (1972), 30 Ohio St.2d 130.

{¶18} "'The Ohio Supreme Court has adopted the Restatement (Second) of Conflict Laws as the governing law for Ohio conflicts issues. *Lewis v. Steinrich* (1995), 73 Ohio St.3d 299; *Morgan v. Biro Mfg. Co., Inc.* (1984), 15 Ohio St.3d 339. When a conflict arises between two states' statutes of limitations, the Restatement provides: An action will be maintained if it is not barred by the statute of limitations of the forum, even though it would be barred by the statute of limitations of another state. Restatement (Second) of Conflict Laws § 142(2). Section 142(2) thus requires Ohio courts to apply Ohio's statute of limitations to breach of contract actions brought in Ohio, even if the action would be time-barred in another state. See *Males v. W.E. Gates & Associates* (1985), 29 Ohio Misc.2d 13 (applying Ohio's fifteen year statute of limitations to a breach of contract action that would have been barred by Virginia's five-year statute)[.]'

Cole v. Mileti (C.A.6, 1998), 133 F.3d 433, 437. 'Absent an express statement that the parties intended another state's statute of limitations to apply, the procedural law of the forum governs time restrictions on an action for breach[.]' Id.*"* See also *Midland Funding, LLC v. Paras*, Cuyahoga App. No. 93442, 2010-Ohio-264.

{¶19} Pursuant to the above, we find that Ohio law governs in deciding the correct statute of limitations to apply in the instant case.

{¶20} We have no evidence of a written customer agreement in this case. Ohio recognizes that the issuance and use of a credit card can create a legally binding agreement. *Bank One, Columbus, N.A. v. Palmer* (1989), 63 Ohio App.3d 491. R.C. 2305.07 provides that " * * * an action upon a contract not in writing, express or implied, or upon a liability created by statute other than a forfeiture or penalty, shall be brought within six years after the cause thereof accrued." Thus, we conclude that even without an agreement reduced to writing, the claim would not be barred.

{¶21} Appellant's last payment was made on April 11, 2006. Appellee closed the account on January 12, 2007. Appellee filed its complaint on July 8, 2009. We find Appellee's complaint was filed within the applicable statute of limitations.

{¶22} Appellant's first Assignment of Error is overruled.

II., III.

{¶23} Appellant next argues the trial court erred in granting summary judgment in favor of Appellee. We disagree.

{¶24} Summary judgment motions are to be resolved in light of the dictates of Civ.R. 56. Said rule was reaffirmed by the Supreme Court of Ohio in *State ex rel. Zimmerman v. Tompkins,* 75 Ohio St.3d 447, 448, 1996-Ohio-211:

{¶25} "Civ.R. 56(C) provides that before summary judgment may be granted, it must be determined that (1) no genuine issue as to any material fact remains to be litigated, (2) the moving party is entitled to judgment as a matter of law, and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the nonmoving party, that conclusion is adverse to the party against whom the motion for summary judgment is made. *State ex. rel. Parsons v. Fleming* (1994), 68 Ohio St.3d 509, 511, 628 N.E.2d 1377, 1379, citing *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 327, 4 O.O.3d 466, 472, 364 N.E.2d 267, 274."

{¶26} As an appellate court reviewing summary judgment motions, we must stand in the shoes of the trial court and review summary judgments on the same standard and evidence as the trial court. *Smiddy v. The Wedding Party, Inc.* (1987), 30 Ohio St.3d 35.

{¶27} In this case, Appellee moved for summary judgment based upon the Requests for Admissions originally served to Appellant on September 1, 2009. Appellant did not respond to Appellee's Requests for Admissions.

{¶28} Civ. R. 36(A) states in pertinent part:

{¶29} "A party may serve upon any other party a written request for the admission, for purposes of the pending action only, of the truth of any matters within the scope of Rule 26(B) set forth in the request that relate to statements or opinions of fact or of the application of law to fact * * *. The matter is admitted unless, within a period designated in the request, not less than twenty-eight days after service thereof * * * the

party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter * * *."

{¶30} "It is * * * settled law in Ohio that unanswered requests for admission render the matter requested conclusively established for the purpose of the suit." *Cleveland Trust Co. v. Willis* (1985), 20 Ohio St.3d 66, 67. Moreover, a motion for summary judgment may be based on such admitted matter. *St. Paul Fire & Marine Ins. Co. v. Battle* (1975), 44 Ohio App.2d 261. "Failure to answer is not excused because the matters requested to be admitted are central or non-central to the case or must be proven by the requesting party at trial. See *Youssef v. Jones* (1991), 77 Ohio App.3d 500." *Klesch v. Reid* (1994), 95 Ohio App.3d 664, 674. "[W]here a party files a written request for admission, a failure of the opposing party to timely answer the request constitutes a conclusive admission pursuant to Civ. R. 36 and also satisfies the written answer requirement of Civ. R. 56(C) in the case of summary judgment." Id. at 675.

{¶31} Litigants who choose to proceed pro se are presumed to know the law and correct procedure, and are held to the same standards as other litigants. A pro se litigant cannot expect or demand special treatment from the judge, who must be impartial. *Frew v. Frew*, Coshocton App. No. 2007-CA-17, 2008-Ohio-4203, ¶11.

{¶32} When Appellant failed to respond to Appellee's requests for admission, he conclusively admitted liability for the credit card account at issue. By failing to respond, Appellant specifically admitted the following: 1) that Appellant obtained a credit card from Appellee and he received monthly statements from Appellee indicating charges made; 2) that Appellant charged items on the credit card account; 3) that Appellant never notified Appellee of any disputes concerning the debits or credits to the credit

card account; 4) that Appellant is the owner of the credit card account; and 5) that Appellant owes Appellee $1,419.51 plus interest at the rate of 25% from April 14, 2009 on the credit card account which is the subject of the action.

{¶33} Because Appellant is deemed to have admitted responsibility for nonpayment of the credit card account and the amount due and owing on the credit card by virtue of having failed to provide responses to Appellee's requests for admissions, Appellant cannot now argue he is not liable for the credit card account.

{¶34} We find the trial court did not err in granting summary judgment in favor of Appellee.

{¶35} Appellant's second and third Assignments of Error are overruled.

IV.

{¶36} Appellant argues in his fourth Assignment of Error that he was never served a copy of Appellee's motion for summary judgment.

{¶37} In Appellant's brief, however, he states, "Plaintiff made a motion for summary judgment. Plaintiff served Defendant a version of the Motion, but not a copy of the actual motion." (Appellant's Brief, January 12, 2010, p. 7). Appellant appears to argue that the certificate of service attached to the service copy he received did not match the certificate of service attached to the motion filed with the trial court, and alludes it was improperly altered.

{¶38} We note a review of the court file discloses that Appellee's motion for summary judgment has a signed but undated certificate of service. However, we have no means of determining from the record what supposed alteration occurred as

Appellant has not provided in the record the copy he received; nor has Appellant demonstrated how he was prejudiced by any discrepancy in the certificate of service.

{¶39} Appellant's fourth Assignment of Error is overruled.

{¶40} The judgment of the Muskingum County Court is affirmed.

By: Delaney, J.

Edwards, P.J. and

Wise, J. concur.

HON. PATRICIA A. DELANEY

HON. JULIE A. EDWARDS

HON. JOHN W. WISE

PAD:kgb

[Cite as *Capital One Bank (USA), N.A. v. Rodgers,* 2010-Ohio-4421.]

IN THE COURT OF APPEALS FOR MUSKINGUM COUNTY, OHIO

FIFTH APPELLATE DISTRICT

CAPITAL ONE BANK (USA), N.A.	:	
	:	
Plaintiff-Appellee	:	
	:	
-vs-	:	JUDGMENT ENTRY
	:	
FREDERICK J. RODGERS	:	
	:	
	:	Case No. CT2009-0049
Defendant-Appellant	:	

For the reasons stated in our accompanying Opinion on file, the judgment of the Muskingum County Court is affirmed. Costs assessed to Appellant.

HON. PATRICIA A. DELANEY

HON. JULIE A. EDWARDS

HON. JOHN W. WISE