[Cite as *Capital One Bank (USA), N.A. v. Heidebrink*, 2009-Ohio-2931.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
OTTAWA COUNTY

Capital One Bank (USA), N.A.

Appellant

v.

Jennifer Heidebrink

Appellee

Court of Appeals No. OT-08-049

Trial Court No. CVF0800484

DECISION AND JUDGMENT

Decided: June 19, 2009

* * * * *

James Y. Oh, for appellant.

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HANDWORK, J.

{¶ 1} Appellant, Capital One Bank (U.S.A.), N.A. ("Capital One"), filed a complaint on a credit card account against appellee, Jennifer Heidebrink. Heidebrink did not answer the complaint. The Ottawa County Municipal Court granted Capital One's motion for default judgment. Capital One was unsatisfied with the judgment and appealed. For the following reasons, we affirm.

{¶ 2} Capital One filed its complaint on June 11, 2007. Attached to the complaint were the following documents:

{¶ 3} (1) A computer-generated printout titled a "cycle facsimile report" showing a balance due of $895.25, dated through July 25, 2007.

{¶ 4} (2) Two photocopied pages titled "Customer Agreement."

{¶ 5} (3) A statement of the account dated through December 19, 2006, showing a balance of $559.37

{¶ 6} (4) A statement of the account dated through May 19, 2007, showing a balance of $820.01.

{¶ 7} (5) A document titled "Platinum Invitation" signed in the name of Jennifer Heidebrink.

{¶ 8} The top of the "Platinum Invitation" states in bold: "YES! I want the Platinum power of the Capital One Platinum MasterCard with a 0% introductory APR on all purchases!"

{¶ 9} Above the signature line, the "Platinum Invitation" states, in very small print: "I have read the IMPORTANT DISCLOSURES and Terms and Conditions enclosed, including the provision relating to Arbitration, and agree to be bound as specified therein. You are authorized to check my credit and employment history."

{¶ 10} Next to the signature line, the "Platinum Invitation" states: "Please see the Important Disclosures on the back of the letter for rate, fee and other cost information."

{¶ 11} The "Customer Agreement" relevantly provides for minimum finance charges of $0.50 and explains how finance charges are calculated and how they accrue.

{¶ 12} A section titled "Periodic Rates" relevantly states: "You were told the daily periodic rates when you opened your account. * * * If any other rate changes are made subsequent to your account opening, you will be advised of the new rate."

{¶ 13} A section titled "Variable Rates" states, "Where and when variable rates apply to your account," the rate varies according to the LIBOR rate.

{¶ 14} A section titled "Cash Advance Fee Finance Charge" states: "If a cash advance fee applies to your account, you were told the fee when you opened your account."

{¶ 15} A section titled "Membership Fee" states: "If your account has a membership fee, it was disclosed to you when you opened your account."

{¶ 16} A section titled "Other Charges" states: "The following charges may be billed to the purchase segment of your account late charge if we do not receive your payment in time for it to be credited to your account by the due date shown on your periodic statement * * * over limit charge if your account exceeds its assigned credit limit, even if we approved the over limit amount, returned check charge if a check is returned to us for any reason, or if we cannot honor your account access checks for any reason * * * . The fee amounts were disclosed to you when you opened your account. If any of these fees are changed subsequent to your account opening, you will be advised of the new fee."

{¶ 17} Neither the "IMPORTANT DISCLOSURES" nor the "Terms and Conditions" were attached to the complaint. No document attached to the complaint shows what "fees" and "rates" were disclosed to Heidebrink when she opened the account.

{¶ 18} The complaint alleged that Heidebrink owed the sum of $1,064.87, which consisted of "$895.25 as evidenced by the attached statement, plus accrued finance charges and/or interest at the contract rate of 20.40% in the sum of $169.62 through May 30, 2008 and an additional sum for interest accumulated from May 30, 2008 to the date of the judgment." It prayed for additional post-judgment interest at the "contract rate of 20.40% until paid."

{¶ 19} Capital One filed a motion for default judgment on the amount prayed for in the complaint. The trial court sua sponte ordered Capital One to file a complete itemized statement of the account within 14 days. Capital One complied and submitted Heidebrink's account statements from the opening of the account until the filing of the complaint.

{¶ 20} The trial court entered a judgment of default in favor of Capital One and ordered judgment in the amount of $559.37. This amount corresponds to the amount due and owing on the account as of January 19, 2007, when the account first showed the balance was "over limit" and first charged an "over limit fee." The trial court also ordered statutory post-judgment interest instead of the "contract rate" prayed for by Capital One.

{¶ 21} Capital One asserts two assignments of error for review:

{¶ 22} "Whether the trial court prejudicially erred when ordering plaintiff to produce accounting evidence when granting default judgment.

{¶ 23} "Whether the trial court prejudicially erred by refusing to grant contract interest, late fees, and over-limit fees in default judgment."

{¶ 24} In its first assigned error, Capital One argues that the trial court should have entered default judgment on the amount reflected in the "final computerized account balance" attached to the complaint instead of ordering it to produce all of the statements on the account.

{¶ 25} Civ.R. 55(A) provides the steps a trial court may take upon a request for default judgment, in relative part:

{¶ 26} "If, in order to enable the court to enter judgment or to carry it into effect, it is 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, the court may conduct such hearings or order such references as it deems necessary and proper and shall when applicable accord a right of trial by jury to the parties." (Emphasis added.)

{¶ 27} Civ.R. 10 governs the form of pleadings. With respect to claims founded on written contracts and accounts, the rule requires the written contract and account to be attached to the complaint. It provides: "(D)(1) Account or written instrument. When any claim or defense is founded on an account or other written instrument, a copy of the

account or written instrument must be attached to the pleading. If the account or written instrument is not attached, the reason for the omission must be stated in the pleading." Civ.R. 10(D)(1).

{¶ 28} "[A] suit concerning a credit card balance has been held to constitute an action on an account for purposes of Civ.R. 10(D)'s requirement that a copy of the account must be attached to the complaint." *Capital One Bank v. Toney*, 7th Dist. No. 06-JE-28, 2007-Ohio-1571, ¶ 34 (citations omitted).

{¶ 29} "An 'action on an account' is 'merely a pleading device used to consolidate several different claims one party has against another.' *AMF, Inc. v. Mravec* (1981), 2 Ohio App.3d 29, 31. Such action is 'founded upon contract and thus a plaintiff must prove the necessary elements of a contract action, and, in addition, must prove that the contract involves a transaction that usually forms the subject of a book account.' *Gabriele v. Reagan* (1988), 57 Ohio App.3d 84, 85." *Arthur v. Parenteau* (1995), 102 Ohio App.3d 302, 304.

{¶ 30} "It is elementary that in an action on an account, a plaintiff must set forth an actual copy of the recorded account. The records must show 'the name of the party charged' and must include the following:

{¶ 31} "(1) a beginning balance (zero, or a sum that can qualify as an account stated, or some other provable sum);

{¶ 32} "(2) listed items, or an item, dated and identifiable by number or otherwise, representing charges, or debits, and credits; and

{¶ 33} "(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 304-305, quoting *Brown v. Columbus Stamping & Mfg. Co.* (1967), 9 Ohio App.3d 123.

{¶ 34} Pursuant to Civ.R. 55(A) and 10(D), the trial court acted within its discretion in ordering Capital One Bank to submit evidence of the account from the time the account was opened. The first assignment of error is not well-taken.

{¶ 35} In its second assigned error, Capital One argues that the trial court should have entered default judgment for the amount prayed for in its complaint and the total amount its computerized printout showed due and owing. It specifically challenges the trial court's subtraction of late fees and over limit fees and the imposition of statutory interest pursuant to R.C. 1343.03(A), rather than what Capital One calls the "contractual rate" of 20.40 percent interest.

{¶ 36} Regarding the imposition of the statutory rate of interest, we have held:

{¶ 37} "'For entitlement to a rate different than the statutory rate of interest to be charged, R.C. 1343.03(A) sets forth two prerequisites: (1) there must be a written contract between the parties; and (2) the contract must provide a rate of interest with respect to money that becomes due and payable.' *Yager Materials v. Marietta Indus. Enters.* (1996), 116 Ohio App.3d 233, 235-236. For there to be a 'written contract' for the purpose of R.C. 1343.03(A), 'there must be a writing to which both parties have assented.' *Hobart Bros. Co. v. Welding Supply Service, Inc.* (1985), 21 Ohio App.3d 142, 144.

Only a written contract providing a rate of interest to be charged differing from the statutory rate permits the charging of interest at a rate greater than that provided by the statute. Id." *United Collections, L.L.C., v. Tucholski*, 6th Dist. No. L-04-1314, 2005-Ohio-2495, ¶ 7.

{¶ 38} The Ohio Supreme Court has also recently addressed this question. In *Minster Farmers Coop. Exchange Co., Inc. v. Meyer*, 117 Ohio St.3d 459, 2008-Ohio-1259, which Capital One Bank cites, it held:

{¶ 39} "R.C. 1343.03(A) specifically establishes how parties can agree to an interest rate higher than the maximum allowed under R.C. 5703.47. R.C. 1343.03(A) requires a written contract, not simply an additional term added to an invoice and met without resistance by another party, to establish an interest rate greater than that set forth in R.C. 5703.47.

{¶ 40} "* * * [W]e agree with the view put forth by the clear majority of Ohio appellate courts that have addressed the question [of] whether invoices can serve as the written contract required by R.C. 1343.03(A). Those courts have written that in order for a written contract to exist for purposes of R.C. 1343.03(A), there must be a writing to which both parties have assented. * * * An invoice or monthly statement does not constitute such a writing.

{¶ 41} "We agree that an invoice or account statement unilaterally stating interest terms does not meet R.C. 1343.03's requirement of a written contract. An invoice, as such, is no contract. An invoice is a mere detailed statement of the nature, quantity and

the cost or price of the things invoiced. * * * A contract is generally defined as a promise, or a set of promises, actionable upon breach. Essential elements of a contract include an offer, acceptance, contractual capacity, consideration (the bargained for legal benefit and/or detriment), a manifestation of mutual assent and legality of object and of consideration. A meeting of the minds as to the essential terms of the contract is a requirement to enforcing the contract." Id., ¶ 25, 27-28 (internal case citations and quotations omitted).[1]

{¶ 42} Since the interest rate the plaintiff in *Minster* sought was not a term of a written contract but was only written on the invoices, the result was the imposition of the statutory rate rather than the rate listed on the invoices. The "placement of an interest rate on invoices constituted no promise * * * and demonstrated no meeting of the minds between the parties." Id. at ¶ 28. Clearly, an interest rate showing on account statements does not constitute proof that the interest rate was a term of the underlying contract or agreement.

{¶ 43} The same result applies here. Capital One has not submitted any evidence of the interest rate to which Heidebrink assented. Because Capital One did not submit proof that its claimed interest rate of 20.40 percent was a term of an agreed-upon contract, the trial court did not abuse its discretion in imposing the statutory rate pursuant

[1]*Minster Farmers Coop. Exchange Co., Inc.*'s rule was explicitly made prospective in application only. Id. at ¶ 30. *Minster* was decided March 26, 2008, well before June 11, 2008, when Capital One Bank filed this complaint. Therefore, *Minster*'s rule – and our holding in *U.C.C. v. Tucholski*, supra – applies.

to R.C. 1343.03(A). The same rationale and result applies to Capital One's claimed over limit fees and late fees. Capital One has not shown specific fees which were terms of a contract between it and Heidebrink. The trial court did not abuse its discretion in subtracting these fees from the amount claimed.

{¶ 44} *Farmers & Merchants State & Sav. Bank v. Raymond G. Barr Enterprises* (1982), 6 Ohio App.3d 43, is distinguishable. There, the court awarded default judgment for the amount prayed for in the complaint, a balance due and owing on an account, where a promissory note was the basis of the action on the account. Capital One cites *Farmers* in support of its contention that the amount due on the account as claimed in the complaint is not "damages" pursuant to Civ.R. 8(D), and so is deemed admitted when the defendant fails to answer. This is due to the difference between credit card accounts and promissory notes. Where a promissory note is the claimed basis for the action on an account, and the note is attached to the complaint, the underlying contract has also been proved and submitted pursuant to Civ.R. 10(D). A promissory note is "an instrument that evidences a promise to pay a monetary obligation * * *." R.C. 1309.102(A)(65). It is a "negotiable instrument or any other writing that evidences a right to the payment of a monetary obligation * * *." R.C. 1309.102(A)(47)(a). A promissory note is a separate, enforceable contract. *Metropolitan Life Ins. v. Triskett Illinois, Inc*. (1994), 97 Ohio App.3d 228, 234. The class of instruments, including promissory notes, specifically excludes "writings that evidence a right to payment arising out of the use of a credit or charge card or information contained on or for use with the card." R.C.

1309.102(A)(47)(b). In contrast, monthly statements of credit card accounts do not demonstrate the underlying contract or agreed-upon terms. Thus, the amount prayed for in a complaint in an action on an account must be proved and is not covered by the rule of *Farmers*, as Capital One claims.

{¶ 45} Still, Capital One argues that it proved a contract, insofar as the documents submitted with the complaint show a "signed offer tendered by Heidebrink; acceptance by the Bank; and the mutual assent to the terms and conditions through use of the credit card." As reviewed supra, Capital One did not submit any evidence of the "terms and conditions" or "IMPORTANT DISCLOSURES" to which Heidebrink allegedly assented, or any of the terms which were "disclosed" to Heidebrink when the account was opened.

{¶ 46} Capital One also points to the "customer agreement" as evidence of a contract. As reviewed supra, the customer agreement does not state what the fees would be for over limit occurrences or late payments. Instead, each relevant section of the "customer agreement" refers to fees "disclosed" or "told to" the account holder when the account was opened. Capital One has submitted no evidence of what specific fees were disclosed to Heidebrink. The second assignment of error is, therefore, not well-taken.

{¶ 47} The judgment of the Ottawa County Municipal Court is affirmed. Appellant is to pay the costs of this action pursuant to App.R. 24.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J. _____
JUDGE

Mark L. Pietrykowski, J. _____
JUDGE

Arlene Singer, J. _____
CONCUR.
JUDGE