

**IN THE COURT OF COMMON PLEAS FOR THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY**

CATHERINE M. GREGORY,)	
Plaintiff)	
)	
v.)	C.A. No: 2007-09-492
)	
BRANDON R. FRAZER,)	
Defendant, Third-Party Plaintiff)	
)	
v.)	
)	
NICOLE M. FRAZER,)	
Third-Party Defendant)	

Submitted: September 11, 2009
Decided: October 2, 2009

DECISION AFTER TRIAL

Thomas C. Marconi, Esquire, Wilmington, Delaware, Attorney for Plaintiff and Third-Party Defendant

Maggie Clausell, Esquire, Dover, Delaware and Robert M. Goode, Esquire, Tigard, Oregon, Attorneys for Defendant and Third-Party Plaintiff

ROCANELLI, J.

This is a breach of contract/debt action. Catherine M. Gregory (“Plaintiff”) contends she allowed Brandon R. Frazer (“Defendant”) to use her Reader’s Digest Credit Card (“Credit Card”) for his business expenses during a period when Defendant was married to Plaintiff’s daughter and he was starting a new business. Plaintiff seeks re-payments of amounts she paid on the Credit Card which Plaintiff attributes to Defendant’s business expenses. Although Defendant filed a third-party complaint against his ex-wife Nicole M. Frazer (“Third-Party Defendant”), no evidence was presented at trial regarding the third-party claim.

Trial was held on July 13, 2009, and the Court reserved decision. The parties submitted post-trial proposed findings of fact and conclusions of law. This is the Court’s decision granting relief to Plaintiff in the amount of \$22,750.41 plus post-judgment interest.

Pre-Trial Motions

At the start of the trial, Defendant moved for dismissal pursuant to Court of Common Pleas Civil Rule 12(b)(2) for a lack of personal jurisdiction and Court of Common Pleas Civil Rule 12(b)(3) for improper venue. Defendant lives in Wisconsin. Under the circumstances, the Court declined to dismiss Plaintiff’s lawsuit. Plaintiff also presented a Motion in Limine seeking to limit Defendant’s factual presentation.

First, pursuant to Court of Common Pleas Civil Rule 12(h), the Court held that the affirmative defense of lack of personal jurisdiction is waived if not presented in the responsive pleading or a timely amendment thereto, or prior to filing a responsive pleading. Since Defendant failed to assert the defense of lack of personal jurisdiction when he filed his answer to the complaint, and also because he participated in the litigation, he subjected himself to the jurisdiction of the Court without challenging said jurisdiction. The defense of lack of personal jurisdiction was therefore waived.

Second, the Court held that dismissal for improper venue is appropriate only when the moving party has demonstrated with particularity that being required to litigate in Delaware would subject the party to overwhelming hardship.¹ The Court found that Defendant did not meet this burden of proof to demonstrate hardship, as he participated fully in pre-trial proceedings including significant discovery.

Finally, the Court reserved judgment on Plaintiff's Motion in Limine. Plaintiff sought to preclude Defendant from offering testimony at trial indicating that someone other than himself was responsible for the charges set forth in the Reader's Digest Credit Card Statements ("Credit Card Statements"). According to Plaintiff, Defendant took the position during discovery that he didn't know who was responsible for certain charges reflected on the Credit Card Statements. Thus,

¹ *Candlewood Timber Group, LLC v. Pan Am. Energy, LLC*, 859 A. 2d 989 (Del. 2004).

Plaintiff requested the Court prohibit Defendant from taking a different position at trial regarding any of the charges on the Credit Card Statements. The Court noted that, in the absence of a jury, it would be appropriate to address admissibility of Defendant's evidence on an as-need basis during the presentation of Defendant's case. It was not necessary to address any such limitations on testimony because no such rulings were sought during trial.

Facts

Defendant and Third-Party Defendant were married in December 1999. In 2002, the couple moved from Wisconsin to Delaware. While in Delaware, Defendant was employed by a construction company but had ambitions to become self-employed. In March 2002 Defendant discussed his ambitions with Plaintiff, then his mother-in-law, at the Touchdown Lounge in Dover, Delaware. Defendant did not have the start-up capital or professional network to start his own business. Plaintiff had worked for the State of Delaware Housing Authority for 23 years. She was willing to support Defendant's start-up venture by introducing him to persons in the construction industry and helping finance the venture. Defendant quit his construction job after a year to start his own company.

Plaintiff and Defendant entered into an agreement whereby Plaintiff would loan funds to Defendant for his business expenses by granting him use of her Credit Card. The agreement was that Defendant would be added to the Credit Card

account as an authorized user and would be responsible to repay all charges he made on the Credit Card, as well as any applicable interest. Defendant does not dispute this was the agreement.

When Defendant and Third-Party Defendant filed for divorce in December 2006, Plaintiff terminated Defendant's use of the Credit Card. Plaintiff has since paid the entire account balance in full and seeks reimbursement from Defendant consistent with their agreement. Plaintiff testified at trial that she and her husband refinanced their family home in order to repay the debt accumulated on the account. Plaintiff further testified she paid the Credit Card debt in full on September 17, 2007.

Plaintiff's Allegations

Plaintiff seeks to be reimbursed for charges attributed to Defendant on the Credit Card for the period March 2005 through December 2006. After Defendant and Third-Party Defendant moved back to Wisconsin in 2003, Plaintiff alleges that Defendant charged \$22,493.93 on the Credit Card pursuant to the agreement. Plaintiff further alleges Defendant has made only \$900.00 in payments to her, through three money orders each worth \$300.00.² Plaintiff does not seek any of the charges made by Third-Party Defendant, or made jointly by Defendant and

² Plaintiff's Exhibit Three.

Third-Party Defendant.³ Plaintiff claims that Defendant owes her \$26,142.74: \$22,493.93 for Credit Card charges, plus \$3,648.81 in finance charges. Plaintiff also seeks prejudgment and post-judgment interest.

Defendant's Position

Defendant acknowledges he entered into an agreement with Plaintiff in which he would use the Credit Card for business expenditures and would repay her for any charges he made using the Credit Card for his business, as well as any applicable interest. On the other hand, Defendant denies he owes an outstanding debt to Plaintiff. Rather, according to Defendant, he has already made numerous payments to Plaintiff and has repaid her for his Credit Card charges. At trial, Defendant testified that after selling the house in Delaware which he and the Third-Party Defendant owned, he gave \$15,000.00 in cash to Third-Party Defendant to be paid to Plaintiff to repay the debt on the Credit Card in full. Defendant also testified he gave Third-Party Defendant \$400.00 in cash every month to give to Plaintiff as payment for the Credit Card debt between April of 2005 and December of 2006. Finally, Defendant testified that he disputed four separate charges on the Credit Card Statements, totaling \$288.90.⁴

³ It was stipulated that Plaintiff did not make any charges on the credit card.

⁴ Section I of the Appendix includes a detailed account of the charges disputed by Defendant on the Credit Card Statements.

Analysis

To establish a prima facie case of breach of contract, the Plaintiff must prove each of three elements by a preponderance of the evidence: (1) the plaintiff must show that a contract existed; (2) the plaintiff must establish that the defendant breached an obligation imposed by the contract; and (3) the plaintiff must prove damages as a result of the Defendant's breach.⁵ The first element is satisfied because Defendant concedes there was an agreement between himself and Plaintiff, whereby he was permitted to use the Credit Card and was responsible for re-payment of his charges plus interest. There is a dispute regarding the second and third elements, whether there was a breach and whether damages are due and owing.

As a threshold matter, the Court rejects Defendant's contention that the Delaware Statute of Frauds prevents recovery by Plaintiff because the contract was not reduced to writing. The Statute of Frauds requires that certain agreements be in writing, and acts to preclude recovery in certain situations where an oral agreement will not be enforceable as the risk of fraudulent conduct may exist. According to the Statute of Frauds, a contract that, by its terms, cannot be completed within one year of its making must be in writing. The Delaware Statute of Frauds states, in pertinent part,

⁵ *VLIW Technology, LLC v. Hewlett-Packard Co.*, 840 A.2d 606, 612 (Del. 2003).

No action shall be brought to charge any person... upon any agreement that is not to be performed within the space of one year from the making thereof... unless the contract is reduced to writing, or some memorandum, or notes thereof, are signed by the party to be charged therewith...⁶

The Delaware Statute of Frauds does not preclude Plaintiff from recovery of the charges made by Defendant on the Credit Card pursuant to the agreement. The agreement made between the two parties in March of 2002 could have been completed within one year. Thus, the Delaware Statute of Frauds does not act as a bar against recovery for Plaintiff.

On the other hand, the doctrine of judicial estoppel *is* applicable and *does* act as a bar to Defendant's position that he does not owe money to the Plaintiff under the contract. Judicial estoppel precludes a party from asserting a position that is inconsistent with a position previously taken in the same or an earlier legal proceeding.⁷ The doctrine is meant to protect the integrity of the judicial proceedings.⁸

Defendant filed a "Financial Disclosure Statement" in connection with his divorce proceedings with Third-Party Defendant in the Family Court of Wisconsin. ("Disclosure Statement")⁹ Under oath, Defendant acknowledged a debt of

⁶ 6 Del. C. §2714(a).

⁷ See generally, *Motorola Inc. v. Amkor Technology, Inc.*, 958 A.2d 852, 859-60 (Del. 2008)(Ridgley, J.).

⁸ *Id.*

⁹ Plaintiff's Exhibit Four.

\$17,000.00 to Plaintiff in the form of a loan under the subsection titled “Debts and Obligations.” Therefore, judicial estoppel operates to prevent Defendant from denying his debt to Plaintiff in this Court when he, in a prior legal proceeding, stated under oath to the Family Court of Wisconsin that he had an outstanding debt to Plaintiff.

Defendant is thus estopped from asserting a position on his debt to Plaintiff in this litigation that is inconsistent with the position he asserted under oath in the Wisconsin Family Court, as allowing him to take such an inconsistent position would undermine the integrity of the judicial process. Therefore, the second element of Plaintiff’s prima facie case has been established. The Defendant breached the contract by failing to repay the loan to Plaintiff, which he acknowledged in the Wisconsin Family Court as due and owing.

The third element in Plaintiff’s prima facie case is damages. How much does Defendant owe Plaintiff under the contract? Conflicting testimony was presented regarding the amounts charged on the Credit Card for which Defendant is responsible and whether Defendant made any payments to Plaintiff which should off-set the amount owed. In a non-jury trial, the Judge, acting as the sole trier of fact, determines the credibility of witnesses and resolves conflicting testimony.¹⁰ Assessing the credibility of witnesses is a matter of judicial discretion, and this

¹⁰ *Jamison v. State*, 1995 WL 716806 at *2 (Del. Super.) (Barron, J.).

Court does not abuse that discretion by choosing to give greater weight to the testimony of one party over the opposing party.¹¹

The Court finds incredible Defendant's testimony asserting that on numerous occasions he gave cash payments to Third-Party Defendant to repay the debt to Plaintiff, including the \$15,000.00 he claims he gave Third-Party Defendant in cash after their Delaware home was sold. The Court credits the evidence presented that Defendant made \$900.00 in payments by three separate money orders. The Court therefore finds Defendant made no payments other than the three \$300.00 money orders to Plaintiff.

The Court credits Defendant's testimony regarding the disputed credit card charges totaling \$288.90.¹² Defendant is judicially estoppel from claiming he owes less than \$16,100.00 (calculated at \$17,000.00/judicial estoppel minus \$900.00 paid in three money orders by Defendant to Plaintiff).

The next question to be addressed is whether Plaintiff proved by a preponderance of the evidence that Defendant owes her more than \$16,100.00. The Court relies upon Plaintiff's Exhibit One and the testimony of Plaintiff, Defendant, and Third-Party Defendant to conclude that the Credit Card charges made by Defendant on the Credit Card for his business expenses during the period

¹¹ *Romain v. State Farm Mutual Auto Ins. Co.*, 1999 WL 1427801 at *2-3 (Del. Super.) (Ridgley, J.).

¹² Appendix I.

March 2005 through December 2006 total \$21,404.95.¹³ Subtracting \$900.00 repaid by money order, the amount owed by the Defendant to Plaintiff is \$20,504.95.¹⁴ The Court also finds Plaintiff paid the Credit Card balance in full on September 17, 2007.

In addition to the amounts charged by Defendant on the Credit Card for business expenditures, Plaintiff seeks recovery for the applicable finance charges associated with those expenditures by Defendant. However, the Court finds Plaintiff did not meet her burden of proof to establish any finance charges on the Credit Card which are properly attributed to charges made by Defendant. Not only did Plaintiff fail to establish by credible evidence what finance charges should be attributed to Defendant but the evidence was undisputed that Plaintiff “flipped” the debt owed on the Credit Card several times to take advantage of favorable interest rates on other credit cards. Therefore, the Court finds Plaintiff failed to establish finance charges for which Defendant is responsible under the contract.

Plaintiff requests an award of prejudgment and post-judgment interest. Prejudgment interest accumulates from the date payment was due because full compensation requires an allowance for the detention of the compensation

¹³ Appendix II details the Credit Card charges attributed to Defendant’s business expenditures.

¹⁴ Appendix III.

awarded, and interest is used as a basis for measuring that allowance.¹⁵ Prejudgment interest is not self-executing; rather a plaintiff must request it, at least by way of a general allegation of damages in an amount sufficient to cover actual losses plus interest.¹⁶ Thus, prejudgment interest will be awarded only “if a plaintiff requests such an award in its pleadings or raises the issue at trial.”¹⁷ Post-judgment interest is awarded to the prevailing plaintiff in a civil suit.¹⁸ Interest on a judgment begins to accrue when the judgment is entered as final and determinative of a party's rights.¹⁹

Plaintiff has requested and is entitled to both prejudgment and post-judgment interest. Prejudgment interest of \$3.01 per diem on the principal balance of debt was requested in a timely manner and, as a matter of right, Plaintiff is entitled to post-judgment interest. Prejudgment interest is calculated from the date payment was due until the date judgment is entered.

September 17, 2007 was the date Plaintiff paid the account balance in full. The date of the entry of Order of judgment is October 2, 2009. Therefore,

¹⁵ *Metropolitan Mut. Fire Ins. Co. v. Carmen Holding Co.*, 220 A.2d 778 (Del. 1966).

¹⁶ *Collins v. Throckmorton*, 425 A.2d 146 (Del. 1980).

¹⁷ *Chrysler Corp. v. Chaplake Holdings, Ltd.*, 822 A.2d 1024,1037 (Del. 2003).

¹⁸ *Moskowitz v. Mayor & Council of Wilmington*, 391 A.2d 209 (Del. 1978).

¹⁹ *Moffitt v. Carroll*, 640 A.2d 169, 178 (Del. 1994).

prejudgment interest is \$2,245.46.²⁰ Post-judgment interest will begin to accrue from the date judgment is entered, at the legal rate.

Conclusion

Based on the findings of fact and conclusions of law, the Court concludes Defendant owes Plaintiff the total damages of \$20,504.95; prejudgment interest of \$2,245.46; and post-judgment interest at the legal rate. The Court concludes Third-Party Defendant is not liable to Defendant/Third-Party Plaintiff for Defendant's debt to Plaintiff.

Therefore, Judgment is hereby entered on behalf of the Plaintiff against the Defendant in the amount of \$22,750.41, plus post-judgment interest; and Judgment is entered against Third-Party Defendant and against Third-Party Plaintiff on the third-party claim.

IT IS SO ORDERED.

Andrea L. Rocanelli

The Honorable Andrea L. Rocanelli

²⁰ Appendix IV.

APPENDIX

I. DISPUTED CHARGES FROM THE READER'S DIGEST CREDIT CARD STATEMENTS

4/26/05 – 5/25/05

ClkBank.com Download 500-390-6035 ID..... \$29.95
Total: \$29.95

7/27/05 – 8/25/05

Alliance Process 1877- Montreal, QC \$67.00
Alliance Process 1877- Montreal, QC..... \$67.00
Total: \$134.00

8/26/06 – 9/25/06

University of Wisconsin, Madison, WI \$100.00
Transaction Fee \$10.00
Total: \$110.00

10/26/06 – 11/25/06

Epay Fee, Wilmington, DE..... \$14.95
Total: \$14.95

TOTAL DISPUTED CHARGES: \$288.90

II. DEFENDANT'S CHARGES ON THE READER'S DIGEST CREDIT CARD

3/26/05 – 4/25/05

Big O S Trailers Inc, Portage, WI..... \$2,694.41
All Wall Equipment Co., Kirkland, WA \$2,662.97
Two Rivers Signs, Portage, WI..... \$316.50
Menards Madison East, Madison WI \$161.34
Menards Madison East, Madison, WI \$168.75
Wisconsin Dry Wall Distributor, Monona, WI..... \$685.75
The Home Depot 4929, Lake Delton, WI..... \$427.79
Northside Auto Repair, Portage, WI..... \$662.88
Total: \$7,780.39

4/26/05 – 5/25/05

HomeTech Online, Allentown, PA.....	\$14.95
Waunakee Tribune LLC Waunakee, WI	\$69.60
Polnow Amoco LLC, Portage, WI.....	\$152.08
Total:	\$236.63

5/26/05 – 6/25/05

Amoco Oil 07775Q09, Portage, WI	\$30.06
HomeTech Online, Allentown, PA.....	\$14.95
Speedpay Fee - WI Power 800-2529638, NY	\$5.95
The Home Depot 4929, Lake Delton, WI.....	\$241.60
The Home Depot 4906, Madison, WI.....	\$63.24
Madison Newspapers, Madison, WI.....	\$198.30
The Home Depot 4906, Madison, WI.....	\$1,546.23
Madison Newspapers, Madison, WI.....	\$418.32
Total:	\$10,518.65

6/26/05 – 7/26/05

HomeTech Online, Allentown, PA.....	\$14.95
Total:	\$14.95

7/27/05 – 8/25/05

HomeTech Online, Allentown, PA.....	\$14.95
Total:	\$14.95

8/26/05 – 9/25/05

HomeTech Online, Allentown, PA.....	\$14.95
Credit Report 8004993292 San Luis Obi, CA.....	\$45.85
Total:	\$60.80

9/26/05 – 10/25/05

HomeTech Online, Allentown, PA.....	\$14.95
Total:	\$14.95

10/26/05 – 11/25/05

HomeTech Online, Allentown, PA.....	\$14.95
Total:	\$14.95

11/26/05 – 12/26/05

HomeTech Online, Allentown, PA.....	\$14.95
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Carpet Cushion & Supply, Madison, WI.....	\$235.73
HomeTech Online, Allentown, PA.....	\$14.95
Total:	\$265.63

12/27/05 – 1/25/06

Petro Travel Plaza, Portage, WI.....	\$25.00
Total:	\$25.00

1/26/06 – 2/25/06

HomeTech Online, Allentown, PA.....	\$14.95
Carpet Cushion & Suppl., Madison, WI.....	\$224.46
Total:	\$239.41

2/25/06-3/25/06

HomeTech Online, Allentown, PA.....	\$14.95
Total:	\$14.95

3/26/06 – 4/25/06

HomeTech Online, Allentown, PA.....	\$14.95
WI Dept. of Transportation, Madison, WI.....	\$66.50
Total:	\$81.45

4/26/06 – 5/25/06

HomeTech Online, Allentown, PA.....	\$14.95
Farm & Fleet of Barabo, Baraboo, WI	\$29.52
Autozone #1984, Portage, WI.....	\$41.13
Badgerland Supply Inc., Madison, WI	\$731.59
Overlimit Fee	\$35.00
Late Fee.....	\$39.00
1968 Portage Lumber, Portage, WI	\$26.04
Office Depot #147, Madison, WI	\$21.09
Total:	\$938.32

5/26/06 – 6/26/06

HomeTech Online, Allentown, PA.....	\$14.95
PDQ Stores #117, Madison, WI	\$26.50
Amoco Oil 06253579, Madison, WI	\$30.00
Amoco Oil 06253249, DE Forest, WI	\$30.00
McDonald's F473 Q17, Madison, WI	\$5.15
PDQ Stores #109, Madison, WI	\$51.00

Pinkus McBride MKT & D, Madison, WI	\$7.66
Pinkus McBride MKT & D, Madison, WI	\$7.66
Road Ranger 111 Q39, Madison, WI	\$30.00
Pomps Tire Service, DE Forest, WI.....	\$200.45
Total:	\$403.37

6/27/06 – 7/25/06

HomeTech Online, Allentown, PA.....	\$14.95
Speedway 4202 Q64, Windsor, WI	\$63.90
UOP- Internet, Phoenix, AZ	\$45.00
Open Pantry #1245 Q39, Madison, WI	\$25.00
Amoco Oil 06293237, Portage, WI	\$26.00
Russell’s Meats, Oxford, WI	\$193.10
Wal-Mart #1799, Portage, WI	\$137.02
Carpet Cushion & Suppl., Madison, WI.....	\$142.99
Total:	\$647.96

7/26/06 – 8/25/06

HomeTech Online, Allentown, PA.....	\$14.95
Total:	\$14.95

8/26/06 – 9/25/06

Kwik Trip 764000007Q99, Portage, WI	\$31.10
Total:	\$31.10

9/26/06 – 10/25/06

ExxonMobil26 09671371, Madison, WI	\$27.65
Speedway 4202 Q64, Windsor, WI	\$26.52
Speedway 4202 Q64, Windsor, WI	\$3.52
Total:	\$57.69

10/26/06 – 11/25/06

Speedway 4202 Q64, Windsor, WI	\$28.85
Total:	\$28.85

11/26/06 – 12/25/06

No Charges

TOTAL CHARGES ATTRIBUTED TO DEFENDANT'S BUSINESS EXPENDITURES: \$21,404.95

III. AMOUNT OWED TO PLAINTIFF BY DEFENDANT AS DAMAGES

Charges attributed to Defendant's Business Expenditures \$21,404.95
Money Order Payments - \$900.00
DAMAGES \$20,504.95

IV. PREJUDGMENT AND POST-JUDGMENT INTEREST

Prejudgment interest accumulates from the date payment is due, September 17, 2007. September 17, 2007 to October 2, 2009 is 746 days.

746 days x \$3.01 per diem = \$2,245.46 Prejudgment interest.

Post-judgment interest begins to accrue from the date judgment is entered, and also accumulates at a rate of \$3.01 per diem, as requested by the Plaintiff.