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STATE OF NEW YORK
SUPREME COURT COUNTY OF WAYNE

CITIBANK (SOUTH DAKOTA), N.A.
Plaintiff,

-vs-

MARY E. HAMBLET,
Defendant

DECISION

Index No. 72736

2011

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WAYNE COUNTY
SUPREME AND COUNTY COURT

Forster & Garbus, LLP
Edward C. Klein, Esq., of counsel
Attorneys for Plaintiff

Mary E. Hamblet, Pro Se
Defendant

The Plaintiff ("Citibank") has moved for an Order granting summary judgment against the Defendant Mary E. Hamblet, in the amount of $8,876.75, together with interest, costs and disbursements. The Defendant mailed a response to counsel for the Plaintiff, which the Plaintiff has treated as a *pro se* "Answer" for the purposes of this motion. The Defendant has subsequently submitted a notarized affidavit with attachments, seeking denial of the motion and dismissal of the action.

Before reaching the merits of the action, the Court must first address a procedural issue which arose at the time of the initial return date, and again on the adjourned date. On both occasions, the Defendant

"appeared" by her husband Harold W. Hamblet; the Defendant did not personally appear before the Court on either date. At the first appearance Mr. Hamblet, who is not a lawyer, produced a document entitled "Appointment of Special Representative" signed by the Defendant. Mr. Hamblet was advised by the Court that he did not have the authority to appear on behalf of his wife. At the second appearance, Mr. Hamblet submitted a Power of Attorney executed by his wife which, he maintained, enabled him to appear on his wife's behalf, based upon the "claims and litigation" boiler plate language set forth in the statutory short form.

Mr. Hamblet was permitted to submit documents which had been prepared by the Defendant, but he was not allowed to present oral argument. The reason for this preclusion is based upon two sections of New York statutory law, which were summarized by the court in *Parkchester Preservation Company, LP v Feldeine*, 31 Misc 3d 859 (Bronx County, 2011) as follows:

> "CPLR 321(a) provides in pertinent part 'A party ... may prosecute or defend a civil action in person or by attorney ...'. §478 of the Judiciary Law provides in pertinent part 'It shall be unlawful for any natural person to practice or appear as an attorney-at-law or

as an attorney and counselor-at-law for a person other than himself in a court of record in this state ...'."

Thus, reading these two sections of law together, a layman is not authorized to represent a party in an actual court proceeding.

In *Blunt v Northern Oneida County Landfill*, 145 AD2d 913 (4th Dept, 1988), the Fourth Department specifically held that "... the trial court erred in permitting (plaintiff) to appear on his wife's behalf because he is not duly licensed to practice law in New York." More recently, the Second Department held in *Whitehead v Town House Equities Limited*, 8 AD3d 369 (2nd Dept, 2004), as follows:

"A person not licensed to practice law in the State of New York pursuant to the Judiciary Law may not appear pro se in court on behalf of a litigant as an attorney-in-fact pursuant to a power of attorney. A person who does so has unlawfully engaged in the unauthorized practice of law."

Thus, decisional law is clear in establishing that Mr. Hamblet was not permitted to represent the Defendant in regard to this motion.

Turning to the merits of this summary judgment motion, this Court will address the issues raised in the Defendant's *pro se* affidavit in opposition

to the relief requested:

1) The Defendant maintains that the affidavit of service submitted by the Plaintiff is false. However, counsel for Plaintiff is correct in asserting that, pursuant to CPLR §3211(e), any alleged defect in personal jurisdiction must be the subject of a motion to dismiss within sixty (60) days of service of the Defendant's Answer. Here the Defendant's letter dated May 10, 2011 has been treated by the Plaintiff as an Answer, even though it does not comply with the statutory formalities. Therefore, the defense of lack of personal jurisdiction is deemed waived.

2) The Defendant asserts that Foster & Garbus has failed to demonstrate that they represent the Plaintiff. The law firm is clearly identified as counsel for the Plaintiff in the filed Summons and Complaint, as well as the supporting affidavit of Edward C. Klein, Esq. There is no merit to the Defendant's claim.

3) The Defendant maintains that the Plaintiff has failed to prove the existence of a contractual relationship between herself and the Plaintiff. While the Agreement attached to the motion papers is not signed by the Defendant, the Plaintiff has submitted with its Reply Affirmation by Mr. Klein an application for a Sears Gold MasterCard signed by the

Defendant. Moreover, New York courts have consistently held that the use of a credit card constitutes the user's acceptance of the contractual terms.

4) The Defendant's argument regarding timeliness as to the Plaintiff's response to her inquiry does not constitute a defense to this motion.

5) The Defendant's claim that she did not sign up for "Accountcare" services is directly contradicted by her signature on the credit card application. Moreover, the charge appears on the monthly statements she was issued, and there is no proof that she ever disputed the amount.

6) Finally, the Defendant argues at length that the Plaintiff failed to abide by New York State usury laws. The Defendant acknowledges that the United States Supreme Court has held that the interest charged by a national bank is governed by federal law, and that such a bank may charge interest "on any loan" at the rate allowed by the laws of the State where the bank is "located". Every bill mailed to the Defendant contains the statement that "(t)his account is issued by Citibank (South Dakota), N.A." South Dakota law clearly states that "there is no maximum interest rate or charge or usury rate restriction...." While the Defendant makes

numerous attempts to remove the Sears MasterCard account from the ambit of federal law, her argument that Sears somehow "dictates" conditions to the bank regarding the use of the card, thereby altering the contractual relationship, is not supported by any legal authority, and therefore, it does not affect the applicability of federal law, nor does it invalidate the debt.

The Plaintiff does not deny that she used the credit card; by using it she accepted the terms of its use. She made payments on the debt. She never utilized the specific procedures set forth in federal law to dispute any bill. Her efforts to distinguish the Sears MasterCard from other credit cards issued by national banks are without merit.

Therefore, the Plaintiff's motion for summary judgment in granted. The Court has signed the proposed Order as submitted by the Plaintiff.

Dated: January 27, 2012
Lyons, New York

Honorable Dennis M. Kehoe
Acting Supreme Court Justice