

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

NO. COA11-77
NORTH CAROLINA COURT OF APPEALS

Filed: 18 October 2011

CITIBANK, SOUTH DAKOTA, N.A.,
Plaintiff-Appellee,

v.

Nash County
No. 08 CVD 1834

THOMAS A. GRAUDIN
Defendant-Appellant.

Appeal by Defendant from judgment entered 29 September 2010
by Judge Pell C. Cooper in District Court, Nash County. Heard
in the Court of Appeals 16 August 2011.

*Smith Debnam Narron Drake Saintsing & Myers, L.L.P., by
Samuel D. Fleder, for Plaintiff-Appellee.*

Thomas A. Graudin, Defendant-Appellant, pro se.

McGEE, Judge.

Citibank, South Dakota, N.A. (Plaintiff) filed a complaint
against Thomas A. Graudin (Defendant) seeking to recover
\$5,108.89 in credit card debt. The trial court entered summary
judgment in favor of Plaintiff on 29 September 2010. Defendant
appeals.

The undisputed evidence in the record tends to show that Defendant opened a credit card account in 1995 with AT&T Universal Bank, Plaintiff's predecessor in interest. Plaintiff acquired Defendant's credit card account in 2002. Defendant used his credit card and made payments on his credit card account until October 2007.

Plaintiff filed its complaint, dated 8 August 2008, seeking to recover \$5,108.89 for charges Plaintiff alleged Defendant made on his credit card account, along with a request for attorney's fees. Defendant filed an answer and affirmative defenses on 18 September 2008. Defendant alleged, *inter alia*, that: "Plaintiff altered the applicable interest rate to be charged beyond the range of the originally bargained rates[.]" The record on appeal contains a copy of "Plaintiff's responses to Defendant's first set of interrogatories and request for production of documents[,]" in which Defendant requested that Plaintiff produce a copy of the original credit card agreement effective when Defendant obtained his credit card from AT&T Universal Bank in 1995 (the 1995 Agreement). Plaintiff objected to Defendant's request, arguing that the request sought "documents previously provided to . . . Defendant and, further, . . . is irrelevant, unduly burdensome, overly broad and costly given the needs of the case, the amount in controversy, and the

issues before the [c]ourt." The record does not contain a copy of the 1995 Agreement.

Plaintiff filed a motion for summary judgment, dated 30 April 2009. Plaintiff included an affidavit with its motion, along with a copy of Defendant's responses to Plaintiff's requests for admissions. In his responses, Defendant admitted the following: (1) Defendant applied for a credit card in 1995; (2) Defendant received a credit card and used the card; and (3) Defendant made his last payment on his credit card account on 3 October 2007. However, Defendant denied owing the amount alleged by Plaintiff in its complaint, and denied having received updated copies of his credit card account agreements allegedly prepared by Plaintiff.

Plaintiff's request for admissions also contained the following request and Defendant's response:

33. On pages 8 and 9, the card agreement for your account provides that the Bank "may change the rates, fees, and terms of this Agreement at any time. These reasons may be based on information in your credit report, such as your failure to make payments to another creditor when due, amounts owed to other creditors, the number of credit accounts outstanding, or the number of credit inquiries. These reasons may also include competitive or market-related factors. Changing terms includes adding, replacing, or deleting provisions of the rights and obligations you or we have relating to this Agreement. These changes are binding on you. However, if the change

will cause a fee, rate or minimum payment to increase, we will mail you written notice at least 15 days before the beginning of the billing period in which the change becomes effective. If you do not agree to the change, you must notify us in writing within 25 days after the effective date of the change and pay us the total balance, either at once or under the terms of the unchanged Agreement. Unless we notify you otherwise, use of the card after the effective date of the change shall be deemed acceptance of the new terms, even if the 25 days have not expired."

RESPONSE:

ADMITTED THAT PAGE 8 AND 9 OF PLAINTIFF'S EXHIBIT "A" CONTAINS SUCH STATEMENT. DENIED AS TO [SIC] THIS EXHIBIT CONSTITUTES THE AGREEMENT BETWEEN THE PARTIES, AS THIS DOCUMENT WAS NEVER RECEIVED BY DEFENDANT.

The credit card agreement quoted above was allegedly provided to Defendant in 2007 (the 2007 Agreement).

In Defendant's argument that the trial court erred in granting Plaintiff's motion for summary judgment, Defendant raises several issues. While many of Defendant's arguments may be irrelevant, we do find the following issue to be relevant: in determining what amount Defendant owes on his credit card account, the trial court must determine whether the 1995 Agreement or the 2007 Agreement controls the interest rates Plaintiff charged on Defendant's credit card account.

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file,

together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." Furthermore, when considering a summary judgment motion, "all inferences of fact . . . must be drawn against the movant and in favor of the party opposing the motion." We review a trial court's order granting or denying summary judgment *de novo*.

Craig v. New Hanover Cty. Bd. of Educ., 363 N.C. 334, 337, 678 S.E.2d 351, 353-54 (2009) (citations omitted).

"An open account results where the parties intend that the individual transactions are to be considered as a connected series rather than as independent of each other, a balance is kept by adjustments of debits and credits, and further dealings between the parties are contemplated." *Hudson v. Game World, Inc.*, 126 N.C. App. 139, 144, 484 S.E.2d 435, 439 (1997). An account stated arises where a plaintiff submits to a defendant a request for an amount to settle an account, and the defendant agrees to pay that amount. See *Franklin Grading Co. v. Parham*, 104 N.C. App. 708, 712-13, 411 S.E.2d 389, 392 (1991) (noting that the distinction between an action on an open account and an action for an account stated is that an action for an account stated arises where the parties agree to the amount owed). Unlike an account stated, an open account does not require an

agreement as to the amount owed; the amount owed remains a determination to be made by the trier of fact. *Id.*

In this case, Defendant has, at every stage, challenged the amount owed pursuant to his credit card agreement. Particularly, Defendant asserts that he never received a copy of the 2007 Agreement that Plaintiff submitted as the "agreement in effect on the date of default[.]" Defendant argues the amount Plaintiff alleges Defendant owes is incorrect because the amount includes interest calculated at a rate higher than that allowed under the 1995 Agreement. In Defendant's responses to Plaintiff's requests for admissions, Defendant conceded that he did not notify Plaintiff of his disapproval of the 2007 Agreement. Defendant also admitted that he used the credit card after the time when the 2007 Agreement was allegedly sent to him. However, Defendant contends he never received a copy of the 2007 Agreement and, therefore, neither his failure to notify Plaintiff of his disapproval, nor his use of the credit card, amount to Defendant's acceptance of the 2007 Agreement.

Plaintiff argues that summary judgment was proper in this case, and cites an unpublished opinion from this Court, *Citibank, S.D., N.A. v. Bowen*, 194 N.C. App. 371, 671 S.E.2d 596, 2008 WL 5225857 (2008) (unpublished opinion). Plaintiff contends that *Bowen* "affirm[ed] [the] trial court's entry of

summary judgment for [p]laintiff credit card issuer, where [p]laintiff presented [d]efendant's credit card statements, card agreement, and affidavit from [p]laintiff's custodian of records establishing the amount owed and [d]efendant failed to present affidavits or supporting documentation showing" a genuine issue of material fact. *Bowen* is distinguishable from the present case in several key ways. First, Defendant challenges the validity of the 2007 Agreement and has presented his own affidavits that tend to show that Defendant never received a copy of the 2007 Agreement. Further, a review of *Bowen* reveals the following reasoning in support of its holding as to that issue:

The pleadings show that defendant did not dispute the amount owed to plaintiff and he made no arguments concerning his duty to pay the money. Plaintiff presented the court with all credit card statements for defendant dating back to March 2004, as well as the card agreement and an affidavit from plaintiff's custodian of records stating the amount owed. Defendant presented no affidavits or supporting documentation for any theory he may have had, and made no arguments that were appropriate for summary judgment review. Therefore, the trial court did not err in denying defendant's motion for summary judgment.

Bowen, 194 N.C. App. 371, 671 S.E.2d 596, 2008 WL 5225857 at *3 (emphasis added). Defendant, by specifically arguing that the interest rates exceeded those authorized by the 1995 Agreement

with Plaintiff's predecessor in interest, *has* disputed the amount owed to Plaintiff.

Thus, we find that there is a genuine issue of material fact that a trier of fact must determine: whether Defendant received notice of the changed terms in his credit card agreement in order for the interest rates to be proper. It is possible that the interest rate provision included in the 2007 Agreement was also present in the 1995 Agreement. However, the record does not contain the 1995 Agreement. Therefore, we are unable to make a determination regarding this issue. Thus, we reverse the trial court's order granting summary judgment to Plaintiff and remand to the trial court for additional proceedings, including a determination of: (1) which agreement is applicable to Defendant's use of his credit card and (2) whether the interest rates charged by Plaintiff are proper under the applicable agreement.

Reversed and remanded.

Judges ERVIN and McCULLOUGH concur.

Report per Rule 30(e).