[Cite as *Discover Bank v. Paoletta*, 2010-Ohio-6031.]

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

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JOURNAL ENTRY AND OPINION
**No. 95223**

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**DISCOVER BANK**

PLAINTIFF-APPELLEE

vs.

**RAY PAOLETTA**

DEFENDANT-APPELLANT

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**JUDGMENT:**
**AFFIRMED**

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Civil Appeal from the
Cleveland Municipal Court
Case No. 2009 CVF 016573

**BEFORE:** McMonagle, J., Gallagher, A.J., and Celebrezze, J.

**RELEASED AND JOURNALIZED:** December 9, 2010

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CHRISTINE T. McMONAGLE, J.:

**{¶ 1}** Defendant-appellant, Ray Paoletta, appeals the trial court's granting of summary judgment in favor of plaintiff-appellee, Discover Bank, and denying summary judgment in his favor. We affirm.

I

{¶ 2} Discover issued Paoletta a credit card in 1986. Discover alleges that between 2002 and 2009, Paoletta failed to make some of the minium monthly payments due under the terms of the cardholder's agreement. On August 4, 2009, Discover filed a complaint against Paoletta, seeking damages in the amount of $13,049.10, plus interest.[1] Attached to Discover's complaint were a copy of a 2008 Discover card cardholder agreement and a copy of Paoletta's most recent credit card statement, dated June 19, 2009. Paoletta filed an answer which, in pertinent part, denied each and every allegation made by Discover "for want of knowledge."

{¶ 3} During discovery, Discover produced copies of Paoletta's statements dated October 2002 through June 2009, the month after the account was closed by Discover.[2] The first statement produced by Discover (October 2002) showed a balance of $843.96. Discover did not submit any documentation as to the origin of that charge. Paoletta argues herein that absent proof of the initial balance, as well as proof of the interest and penalty fees charged over the existence, Discover has not proven the account.

{¶ 4} On April 14, 2010, Paoletta filed a motion for summary judgment. On April 15, 2010, Discover filed its motion for summary judgment. Both

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[1]Discover's complaint alleged one count of money due on an account and one count of unjust enrichment.

[2]The June 2009 statement shows that an internal charge-off of the account was effective May 31, 2009.

parties filed briefs in opposition. The trial court denied Paoletta's motion, but granted Discover's motion. Paoletta raises four assignments of error for our review, all related to the trial court's decision granting summary judgment in favor of Discover, which we consider together.

II

**{¶ 5}** Summary judgment is appropriate when, looking at the evidence as a whole, (1) no genuine issue of material fact remains to be litigated, (2) the moving party is entitled to judgment as a matter of law, and (3) construing the evidence most strongly in favor of the nonmoving party, it appears that reasonable minds could only conclude in favor of the moving party. Civ.R. 56(C). The only evidence to be considered in deciding summary judgment is that found in the "pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action." Civ.R. 56(C).

**{¶ 6}** The party moving for summary judgment carries an initial burden of setting forth specific facts that demonstrate his or her entitlement to summary judgment. *Dresher v. Burt*, 75 Ohio St.3d 280, 292-293, 1996-Ohio-107, 662 N.E.2d 264. If the moving party fails to meet this burden, summary judgment is not appropriate; if the moving party does meet this burden, summary judgment will be appropriate only if the nonmoving party fails to establish the existence of a genuine issue of material fact. Id.

at 293. "Consequently, in order to avoid summary judgment * * *, [the nonmoving party] must provide more than a simple denial of the conduct * * *." *Wigglesworth v. Mettler Toledo Internatl., Inc.*, 10th Dist. No. 09AP-411, 2010-Ohio-1019, ¶19; *FCMP Inc. v. Alegre, Inc.,* 2nd Dist. No. 21457, 2007-Ohio-132. A simple denial, even in affidavit form, is not sufficient. "Civ.R. 56(E) requires not only a denial but also requires that the responding party '* * * set forth specific facts showing that there is a genuine issue for trial.'" *Med. Care Emp. Credit Union v. Morris* (July 13, 1987), 7th Dist. No. 85 C.A. 127, quoting *State ex rel. Garfield Hts. v. Nadratowski* (1976), 46 Ohio St.2d 441, 442, 349 N.E.2d 298.

III

{¶ 7} Attached to Discover's summary judgment motion was an affidavit of Stacey Holmes, a legal account manager for Discover's servicing agent. Holmes averred that the affidavit was made by her on the basis of her personal knowledge; that she has control over the records involved and that they were made in the ordinary course of business; that the statement of account was true and correct; and that the card member agreement attached was between Discover and the debtor in connection with the account. The total due on the account was $13,049.10.

{¶ 8} Nothing was attached to Paoletta's motion for summary judgment. The content of the motion simply stated that "[t]here are no

genuine issues of material fact, and reasonable minds can conclude that Paoletta is entitled to judgment as a matter of law." While the motion stated that a brief and exhibits "have been filed in support," no exhibits were attached. Paoletta's reply to Discover's motion for summary judgment attached only Discover's responses to Paoletta's interrogatories. In pertinent response to the issue raised by Paoletta, Discover produced account statements from September 12, 2002 through May 31, 2009, adding that "[p]laintiff will supplement this response upon receipt of any relevant documentation."

**{¶ 9}** Paoletta contends that the trial court erred in granting summary judgment to Discover because Discover "failed to provide a complete and accurate copy of the original agreement in effect when the defendant contracted with the plaintiff." He also contends that Discover "failed to adequately set forth a proper statement of account, including an itemized breakdown of charges and dates." In sum, Paoletta argues that a zero balance or a provable sum is necessary to be attached to a statement of an account when a complaint on that account is filed, and that Discover's attachment of an unexplained balance that is not zero should deprive Discover of a judgment.

**{¶ 10}** He cites in support of this proposition *Brown v. Columbus Stamping & Mfg. Co.* (1967), 9 Ohio App.2d 123, 223 N.E.2d 373, which found that to establish a prima facie case for money owed on an account, an account must

show the name of the party charged and contain: (1) a beginning balance (zero, a sum that can qualify as an account stated, or some other provable sum); (2) items representing charges, or debits and credits; and (3) summarization by means of a running or developing balance or an arrangement permitting the calculation of the balance due.

**{¶ 11}** Paoletta's argument based on *Brown* is without merit. Holmes's affidavit, filed in support of Discover's motion for summary judgment, stated that there was an agreement between Paoletta and Discover for the use of the Discover credit card and that the attached account statements from 2002 to 2009 accurately reflected the amount due on the account ($13,049.10). In addition, a copy of the agreement between Paoletta and Discover was attached to the complaint. This evidence was sufficient to establish a prima facie case for money owed on an account. See *Citibank (S. Dakota), N.A. v. Lesnick*, 11th Dist. No. 2005-L-013, 2006-Ohio-1448 (credit card statements attached to affidavit of credit card company employee submitted by company in support of its motion for summary judgment in its action on an account against customer were sufficient to establish existence of account and amount due).

**{¶ 12}** That the account balance did not start with zero is not dispositive. *Brown* requires a zero balance or "some other provable sum." Holmes's affidavit established the accuracy of the account, which included the beginning balance. Competent testimony predicated upon firsthand knowledge may be offered to prove facts contained in business records. *Am. Sec. Serv., Inc. v. Baumann*

(1972), 32 Ohio App.2d 237, 245, 289 N.E.2d 373. See, also, *Capital Poly Bag, Inc. v. The Walco Org., Inc.*, (Apr. 13, 1978), 8th Dist. No. 37272 (judgment for plaintiff on account affirmed, even where account began with more than zero balance, where oral testimony established accuracy of account). Furthermore, an account stated will be taken as correct until shown by the party to whom it was rendered to be incorrect. *Gabriele v. Reagan* (1988), 57 Ohio App.3d 84, 87, 566 N.E.2d 684.

**{¶ 13}** Paoletta's argument that Discover's action fails because each statement did not contain an itemized list of all the charges and the dates the charges were made likewise fails. The account statements attached to Discover's motion for summary judgment reflected the debits and credits to Paoletta's account, as required by *Brown*.

**{¶ 14}** The evidence proffered by Discover was sufficient to establish a prima facie case for money owed on an account. Thereupon, the burden shifted to Paoletta to affirmatively demonstrate the existence of genuine issues of material fact. *Dresher*, supra. But Paoletta failed to do so, claiming instead that Discover failed to meet its initial burden. Nowhere in the summary judgment motion practice did Paoletta deny he owes *any* of these sums, or proffer any evidence that this debt is not his. Neither did he deny nor offer any evidence that all interest was not appropriately and legally calculated. In sum, he presented no evidence whatsoever that the entirety of the claimed debt is not his, or that interest was not properly and legally calculated. Discover, however,

presented evidence, both direct and circumstantial, that it was. See *FCMP*, supra.

**{¶ 15}** Paoletta was required to come forth with some evidence, either in his motion for summary judgment or in his reply to Discover's motion, that judgment should not be granted against him. This he wholly failed to do and accordingly, summary judgment was appropriately granted to Discover and denied to Paoletta.

**{¶ 16}** Paoletta's assignments of error are therefore overruled and the trial court's judgment is affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

CHRISTINE T. McMONAGLE, JUDGE

FRANK D. CELEBREZZE, JR., J., CONCURS;
SEAN C. GALLAGHER, A.J., DISSENTS WITH SEPARATE OPINION.

SEAN C. GALLAGHER, A.J., DISSENTING:

**{¶ 17}** I respectfully dissent. I agree with the majority's holding that Paoletta is liable on the account, but I disagree that Discover has proved the total

amount of damages. On the October 2002 statement provided by Discover, the balance shown was $843.96. Absent documentation from Discover regarding the charges that constitute that initial balance or some other "provable sum," I would hold that Discover is not entitled to recover the $843.96.

**{¶ 18}** I am reminded of Justice Pfeifer's dissent in *Spiller v. Sky Bank-Ohio Bank Region*, 122 Ohio St.3d 279, 2009-Ohio-2682, 910 N.E.2d 1021, in which he writes: "Not everybody sits and counts his or her money every day. Mrs. Spiller has the certificate of deposit. The bank has nothing. The bank wins?" While I understand the law does not require a bank to retain its customers' records ad infinitum, it seems only fair that Discover should be required to retain records on Paoletta's account prior to 2002 and present them to the court if it wants to collect a past due balance incurred before that date.