[Cite as *Unifund CCR Partners Assignee of Palisades Collection, L.L.C. v. Hemm*, 2009-Ohio-3522.]

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MIAMI COUNTY

UNIFUND CCR PARTNERS ASSIGNEE: OF PALISADES COLLECTION, LLC	:	
	:	Appellate Case No. 08-CA-36
Plaintiff-Appellee	:	
	:	Trial Court Case No. 08-478
v.	:	
	:	(Civil Appeal from
ROXANNE HEMM	:	Common Pleas Court)
	:	
Defendant-Appellant	:	
	:	

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O P I N I O N

Rendered on the 17th day of July, 2009.

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FAIN, J.

{¶ 1} Defendant-appellant Roxanne Hemm appeals from a summary judgment rendered against her on a complaint for collection of a credit-card account filed by plaintiff-appellee Unifund CCR Partners. Hemm contends that the record demonstrates the existence of material issues of fact with regard to whether Unifund proved there was

an account upon which it could collect. She further claims that the claims were barred by the applicable statute of limitations. Thus, she contends that the trial court erred by rendering summary judgment against her. Finally, Hemm contends that the trial court erred by overruling her motion to dismiss.

{¶ 2} We conclude that the record demonstrates genuine issues of fact; to wit: whether Unifund actually owns the account upon which it seeks to collect, as well as the amount of the debt and the amount of the interest charged thereon. Thus, we conclude that the trial court erred by rendering summary judgment against Hemm. We further conclude that the complaint was filed within the applicable statute of limitations. Finally, we conclude that the trial court did not err by overruling Hemm's motion to dismiss. The judgment of the trial court is Reversed, and this cause is Remanded for further proceedings.

I

{¶ 3} In 2002, Hemm opened a Hilton Signature VISA credit-card account through Citibank (South Dakota), N.A.[1] At some point, Citibank considered the account in default and wrote it off.

{¶ 4} Unifund, claiming that it had purchased the account from Citibank, brought this action against Hemm. The complaint made claims for breach of contract, promissory estoppel and unjust enrichment, and alleged that Hemm owed a principal sum of $10,112.71, plus accrued interest in the amount of $8,305.64, for a total sum of

[1] The number of the account involved in this appeal ends with the numbers 8262.

$18,418.35.

{¶ 5} Unifund filed a motion for summary judgment, which Hemm opposed. Hemm filed a motion to dismiss the complaint. In an entry filed September 25, 2008, the trial court denied Hemm's motion to dismiss. The next day the trial court rendered summary judgment against Hemm in the amount of $19,615.39. The judgment entry does not set forth any findings of fact, and neither party filed a motion seeking findings.

{¶ 6} From the summary judgment rendered against her, Hemm appeals.

II

{¶ 7} At the outset, we note that Unifund has asserted, in its appellate brief, that Hemm's appeal is not timely filed, because the judgment was entered on September 26, 2008, and the notice of appeal was not filed until November 10, 2008. Unifund did not move to dismiss this appeal on that ground, but, of course, lack of a timely-filed notice of appeal is jurisdictional, and we are obliged to consider whether we have jurisdiction to consider this appeal.

{¶ 8} From the record, it appears that the final judgment was not served on the parties in accordance with Civ.R. 58(B). In her notice of appeal, counsel for Hemm stated that he did not become aware of the entry of the judgment until November 3, 2008, which is corroborated by the fact that both parties continued to file pleadings in the trial court after the date of the judgment entry. App.R. 4(A) requires that a notice of appeal be filed within thirty days of the later of: (1) entry of judgment; or (2) service of notice of judgment in accordance with Civ. R. 58(B). Since the record reflects that no notice of judgment was ever served upon the parties, the date for the filing of the notice

of appeal was extended indefinitely. From our review of the record, we are satisfied that Hemm's notice of appeal was timely filed.

III

{¶ 9} Hemm's First Assignment of Error states as follows:

{¶ 10} "THE TRIAL COURT ERRED IN GRANTING PLAINTIFF JUDGMENT ON ITS MOTION FOR SUMMARY JUDGMENT."

{¶ 11} Hemm contends that the trial court erred in rendering summary judgment against her. In support, she claims that Unifund failed to show a "chain of title" with regard to its acquisition of the account. Hemm further argues that Unifund failed to prove the existence of an account upon which it could collect. Hemm also contends that the default interest rate on the account violates the usury law codified at R.C. 1343.04. Finally, Hemm claims that she made payments on the account that satisfied the account in full.

{¶ 12} Trial courts "may grant a moving party summary judgment pursuant to Civ. R. 56 if there are no genuine issues of material fact remaining to be litigated, the moving party is entitled to judgment as a matter of law, and reasonable minds can come to only one conclusion, and that conclusion is adverse to the nonmoving party, who is entitled to have the evidence construed most strongly in his favor." *Smith v. Five Rivers MetroParks* (1999), 134 Ohio App.3d 754, 760. "We review summary judgment decisions de novo, which means that we apply the same standards as the trial court." *GNFH, Inc. v. W. Am. Ins. Co.,* 172 Ohio App.3d 127, 133, 2007-Ohio-2722, at ¶ 16.

{¶ 13} We begin with the claim that Unifund failed to show a "chain of title" regarding its acquisition of the account and that it thus did not have standing to bring this

action. We note that the record substantiates a finding that Hemm originally opened her Hilton Honors VISA, with an account number ending in "8262," through Citibank. However, it is not clear from the record how, or whether, Unifund obtained the assignment of that specific account. Although Unifund submitted the affidavit of its employee, Craig Wortman, who avers that Citibank sold and assigned Hemm's account to Unifund, the affidavit does not set forth the subject account number; a fact that is significant because it appears that Hemm had more than one Hilton Honors VISA account with Citibank. Furthermore, the documents attached to the affidavit in support thereof do not specifically refer to Hemm's account. For example, one document purporting to be a bill of sale and assignment made between Citibank and "Unifund Portfolio A, LLC" states only that Citibank conveys "all of [its] right, title and interest in and to the Accounts described in Section 1.2 of the [Sales] Agreement."[2] But the record does not include a copy of Section 1.2 of the bill of sale. In short, Unifund has failed to present evidence, other than a conclusory, non-specific averment in Wortman's affidavit, that it is the rightful owner of Hemm's delinquent account that is the subject of this lawsuit. Therefore, we find that a material issue of fact remains whether Unifund is entitled to collect thereon.

{¶ 14} Next, Hemm contends that Unifund failed to "prove the account upon which it bases its claim." Specifically, she contends that Unifund was required to submit, but failed to submit, documents showing a "running or developing balance or an arrangement [that] permits the calculation of the balance claimed to be due."

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[2] The record does not exemplify the relationship, if any, between Unifund Portfolio A, LLC and plaintiff Unifund CCR Partners.

{¶ 15} Unifund contends that Citibank charged off the account when it had a balance of $10,112.71, and that Unifund purchased the account. However, the record is devoid of any supporting documentation. While there are copies of credit card statements reflecting that Hemm accrued debt on the account in an amount exceeding $10,000, none of these statements, nor any other document in the record, demonstrates how Unifund or Citibank arrived at the sum of $10,112.71 as the principal amount of Hemm's obligation. Furthermore, Hemm submitted her own, equally conclusory, affidavit disputing that she owes anything on the account. Thus, we conclude that the actual amount of the debt is a genuine issue of material fact.

{¶ 16} We next turn to Hemm's claim that R.C. 1343.03 and 1343.04 limit the interest rate on the subject credit card to the legal rate of 8.0%, as set by Ohio law. The National Bank Act of 1864, codified at 12 U.S.C. §1 et seq., permits a national bank to charge nonresident customers the interest rate allowed by the laws of the State where the bank is located. 12 U.S.C. §85; *Marquette Nat'l Bank of Minneapolis v. First of Ohama Service Corp.* (1978), 439 U.S. 299, 301. The provisions of 12 U.S.C. §85 pre-empt state law. *Smiley v. Citibank (South Dakota), N.A.* (1996) 517 U.S. 735, 744. Citibank is a national bank located in South Dakota. *Citibank v. Eckmeyer*, Portage App. No. 2008-P-0069, 2009-Ohio-2435, ¶ 28; *Smiley* at 737, 738. Thus, we conclude that for so long as the credit card account was owned by Citibank, it was subject to the interest laws of South Dakota, not Ohio.

{¶ 17} However, we also note that there is a discrepancy in the record regarding the amount of interest due. It is undisputed that the account carried an introductory interest rate of 0.0% on purchases and 1.99% on balance transfers and creditline

checks. Furthermore, the evidence reflects that the introductory rate expired in 2003, and that a default interest rate became effective. It also appears that Hemm was, or should have been, aware of the expiration of the introductory rate and that a default rate would take effect.

{¶ 18} It is the amount of the default interest rate that appears to be the subject of a genuine issue of material fact. Wortman's affidavit avers that the default interest rate is 24.99%. Another document submitted into the record corroborates this amount. However, some of the monthly account statements in the record show that the default interest rate was 25.490%. Since the complaint sought interest payments based upon the lower default rate, we presume that Unifund does not intend to seek interest at the higher default rate. But we nevertheless find that there is a genuine issue of material fact with regard to the amount of interest charged to Hemm after the expiration of the introductory rate. Thus, we find that this precluded summary judgment on the amount of interest owed.

{¶ 19} We conclude that the trial court erred by rendering summary judgment because there are genuine issues of material fact to be resolved. Therefore, the First Assignment of Error is sustained.

IV

{¶ 20} Hemm's Second Assignment of Error is as follows:

{¶ 21} "THE TRIAL COURT ERRED IN REFUSING TO DISMISS PLAINTIFF'S COMPLAINT AS BEING BARRED BY THE STATUTE OF LIMITATIONS."

{¶ 22} Hemm contends that Unifund failed to file this action within the applicable

four-year statute of limitations set forth in R.C. 1302.98, and that the trial court thus erred in failing to dismiss the action.

{¶ 23} R.C. 1302.98 provides in pertinent part that "[a]n action for breach of any contract for sale must be commenced within four years after the cause of action has accrued." Citibank provided the financing for purchases made by Hemm. Citibank did not sell the goods purchased by Hemm. Therefore, this case is not governed by R.C. 1302.98. *Asset Acceptance L.L.C. v. Witten*, Cuyahoga App. No. 90297, 2008-Ohio-3659, ¶ 16, fn. 1, citing *BancOhio Nat'l Bank v. Freeland* (1984), 130 Ohio App. 3d 245.

{¶ 24} Unifund argues that the fifteen-year statute of limitations contained in R.C. 2305.06 should control. That statute, however, is limited to contracts or agreements in writing. While Hemm acknowledges applying for the Hilton Honors VISA, which the evidence shows was issued by Citibank, she disputes the claim that a written contract exists. Unifund failed to submit evidence of Hemm's signature on an application for the subject credit card. Thus, we find that there is an issue of fact whether the contract was reduced to writing, so that it is not clear, as a matter of law, that the fifteen-year statute of limitations applies.

{¶ 25} However, we note that Ohio recognizes that the issuance and use of a credit card can create a legally binding agreement. *Bank One, Columbus, N.A. v. Palmer* (1989), 63 Ohio App.3d 491. R.C. 2305.07 provides that " *** an action upon a contract not in writing, express or implied, or upon a liability created by statute other than a forfeiture or penalty, shall be brought within six years after the cause thereof accrued." Thus, we conclude that even without an agreement reduced to writing, the claim would

not be barred.

{¶ 26} Likewise, Unifund's claims for equitable estoppel and unjust enrichment are governed by the six-year statute of limitations of R.C. 2305.07, since they arise out of a claim regarding an implied contract. *LeCrone v. LeCrone*, Franklin App. No. 04AP-312, 2004-Ohio-6526, ¶20; *Cully v. St. Augustine Manor* (Apr. 20, 1995), Cuyahoga App. No. 67601, *4.

{¶ 27} Hemm acknowledges that the cause of action in this case arose sometime in 2003. Since the suit was filed in May 2008, it falls within the six-year limitations period. Therefore, we conclude that the trial court did not err in overruling Hemm's motion to dismiss based upon the statute of limitations.

{¶ 28} The Second Assignment of Error is overruled.

V

{¶ 29} Hemm's Third Assignment of Error provides:

{¶ 30} "THE TRIAL COURT ERRED IN REFUSING TO DISMISS PLAINTIFF'S COMPLAINT FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED AND FAILURE TO PROVIDE DISCOVERY."

{¶ 31} Hemm contends that the trial court should have dismissed Unifund's complaint pursuant to Civ.R. 12(B).

{¶ 32} A motion to dismiss for failure to state a claim upon which relief can be granted is procedural and tests the sufficiency of the complaint. *State ex rel. Hanson v. Guernsey Cty. Bd. of Commrs.,* 65 Ohio St.3d 545, 548, 1992-Ohio-73. Such a motion should be granted "only where the allegations in the complaint show the court to a

certainty that the plaintiff can prove no set of facts upon which he might recover." *Slife v. Kundtz Properties* (1974), 40 Ohio App.2d 179, 186. Further, all factual allegations of the complaint must be accepted as true and all reasonable inferences must be drawn in favor of the plaintiff. *Byrd v. Faber* (1991), 57 Ohio St.3d 56, 60.

{¶ 33} Hemm's motion to dismiss claimed that Unifund failed to attach copies of the account or written contract to its complaint, in violation of Civ.R. 10(D). She further claimed that Unifund failed to provide these items pursuant to a request for discovery. Thus, she contends that the trial court was required to dismiss the complaint.

{¶ 34} Civ.R. 10(D) provides that "[w]hen any claim *** 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."

{¶ 35} As previously noted, we agree that Unifund failed to attach any document that would support a finding of a written contract. It further failed to attach any document that would prove the existence of an account. However, prior to the filing of the motion to dismiss, Unifund did submit copies of some of the account monthly statements, which could be used to prove the existence of an account.

{¶ 36} Furthermore, the complaint raises factual allegations that would entitle Unifund to relief if proven. Specifically, the complaint contains statements of fact upon which the trial court could conclude that Unifund intended to assert the existence of accrued debt arising from an implied contract. Additionally, the complaint includes factual allegations that would support the alternate theories of recovery of breach of the implied contract, unjust enrichment and estoppel. We cannot say that the trial court

erred by overruling the motion on this basis. Accordingly, the Third Assignment of Error is overruled.

VI

{¶ 37} Hemm's First Assignment of Error having been sustained, and her other assignments of error having been overruled, the judgment of the trial court is Reversed, and this cause is Remanded for further proceedings consistent with this opinion.

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BROGAN and FROELICH, JJ., concur.

Copies mailed to:

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Hon. Jeffrey M. Welbaum