

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

WILMINGTON TRUST COMPANY, a :
banking corporation organized and existing :
under the laws of the United States, :

Plaintiff, :

v. :

C.A. No. 00C-07-025 FSS

PAUL C. THIELEMANN, JR., and :
MARGARET M. THIELEMANN, :

Defendants. :

Submitted October 22, 2002
Decided November 27, 2002

OPINION

*Upon Consideration of Defendants' Motion to Dismiss -- **DENIED**. Upon Plaintiff's Motion for Summary Judgment -- **GRANTED** in part, **DENIED** in part.*

From Defendants' Motion to Dismiss, Plaintiff's Motion for Summary Judgment, all responses, and the record it appears:

(1) Wilmington Trust Company, Inc. brought this action to recover the accelerated balance owed by Paul C. Thielemann, Jr., and Margaret M. Thielemann under a cross-default provision in the parties' Stand-By Credit Agreement.

(2) The issue is whether either the 1991 or 1999 increase in the Thielemanns' credit line and their subsequent use of that credit line signified the Thielemanns' assent to new terms, in particular, a cross-default provision entitling Wilmington Trust to cancel the Thielemanns' Stand-By Credit after the Thielemanns defaulted on their Wilmington Trust Master Card. Ultimately, the court must decide whether Wilmington Trust was permitted to cancel the Thielemanns' Stand-By Credit account after their default on the Master Card. This involves an issue of fact that cannot be determined through summary judgment. As discussed below, however, Wilmington Trust is entitled to pretrial summary judgment covering the Thielemanns' default on their Stand-By Credit account itself.

(3) On October 8, 1970, the Thielemanns established the Stand-By Credit Account with Wilmington Trust. The agreement, which provided a \$1,500.00 line of credit, was by current standards, bare bones. Additionally, in 1970 the Thielemanns opened the Wilmington Trust Master Card account.

(4) In 1991, the Thielemanns requested and received an increase in their Stand-By Credit line. The Thielemanns also requested, and were granted an increase in their credit line in March 1999, bringing the available credit to \$10,000.00. In December 1999, the Thielemanns were over their Stand-By

account limit by \$84.15. Prior to 1999, the Thielemanns maintained both their Master Card and Stand-By Credit accounts scrupulously.

(5) On October 1, 1999, Wilmington Trust properly sent the Thielemanns a letter informing them that their Master Card payment was past due and the account was over its limit. The Thielemanns contested certain charges and ATM withdraws demanding proof by the bank in the form of ATM surveillance photographs. After attempts to remedy the delinquency, Wilmington Trust notified the Thielemanns on November 16, 1999, that their account had been terminated and their credit card privileges had been revoked. Wilmington Trust immediately requested full payment on the Master Card account.

(6) The Thielemanns balked and from October 1999 through July 2000 when litigation began, they quarreled with the collection department and employees at Wilmington Trust.

(7) Meanwhile, in December 1999, the Thielemanns decided to deposit a \$200.00 check, drawn on their Wilmington Trust Stand-By Credit account, into an account with another bank. To that end, they phoned an automated Wilmington Trust number to establish that a balance was available. It was. The Thielemanns issued the check, but it was dishonored. Dismayed, the Thielemanns learned that the bank had revoked their Stand-By Credit account and accelerated the balance.

(8) Through inquiry and correspondence, the Thielemanns determined that the revocation was under the cross-default provision in the Stand-By Credit agreement. That is, the Stand-By Credit account was cancelled because the contract allowed the bank to cancel all of the Thielemanns' credit accounts and accelerate the balances if any other credit account was in default. In a letter, the Thielemanns voiced their displeasure with Wilmington Trust.

(9) Next, the Thielemanns demanded that Wilmington Trust accept their customary payment on the Stand-By Credit account, \$380.00. In January 2000, the Thielemanns sent \$342.00 (\$380.00 less charges attributable to the dishonored check) to the bank, along with a letter. The Thielemanns letter characterized their \$342.00 check and previous overpayments for the allegedly fraudulent charges on the Master Card, as an accord and satisfaction for the entire Stand-By Credit account. Wilmington Trust refused to accept the accord and satisfaction, returned the check and demanded the entire \$10,084.15 Stand-By Credit account balance. The Thielemanns made no further offer of payment and it is undisputed that the Thielemanns have paid nothing on the Stand-By Credit account since November 1999.

(10) Continued negotiation between the parties was to no avail. In July 2000, Wilmington Trust filed this action to recover the entire balance owed under the 1991 Stand-By Credit Agreement.¹

(11) After Rule 16.1 arbitration, the Thielemanns appealed *de novo*. Thereafter, the parties embarked upon protracted discovery; circumstances of the delay were addressed by the court's Order of September 12, 2002, and those issues are in the past.

(12) Now, Wilmington Trust claims that it was entitled to accelerate the Stand-By Credit account balance because the Thielemanns defaulted on their Master Card. The Thielemanns, acting *pro se* and relying on the original Stand-By Credit contract established in 1970, deny the 1991 cross-default provision and further deny that they agreed to any new terms, including the cross-default provision. Therefore, by closing their Stand-By Credit account before they had defaulted on that loan, Wilmington Trust is allegedly in breach of contract.

(13) By separate affidavits attached as exhibits to its motion, Wilmington Trust asserts that all Stand-By Credit agreements are sent to customers

¹ This action is a companion action to that filed by Wilmington Trust to recover under the Master Card Agreement. *See Wilmington Trust Co. v. Paul T. Thielemann, Jr., and Margaret M. Thielemann*, C.A. No. 00C-07-023. The court recognizes that certain charges on the Thielemanns' Master Card were in dispute. The dispute, however, was addressed in the companion case and ultimately, the Thielemanns paid the entire balance due. *See id.* The dispute here concerns only the Stand-By Credit account.

annually and new terms are considered accepted once customers use their accounts. Specifically, Wilmington Trust asserts that the contract containing the disputed terms was expressly agreed to in 1991 when the Thielemanns requested and received an increase in their Stand-By Credit line. Basically, Wilmington Trust contends that the 1991 contract is controlling. It is the same contract that the bank has distributed annually to all Stand-By Credit account customers since 1991. It is in force and is the current contract between it and the Thielemanns.² Further, Wilmington Trust states that the Thielemanns' assent to this agreement is evidenced amply by the Thielemanns' use of this account for eight years from 1991 to 1999.

(14) Conversely, in affidavits attached to their motion, the Thielemanns assert that they never consented to terms outside those provided in the original 1970 contract. They further contend that their using the increased credit line was not assent to new terms. To that end, Wilmington Trust's refusal to

² Much, has been made by plaintiff of defendants' failure to deny by affidavit, allegations in the complaint. To the extent this court addresses the argument, it does so here. "In all actions upon bills, notes, bonds or other instruments of writing for the payment of money... the plaintiff may specifically require the defendant or defendants to answer... by an affidavit..." outlining the precise nature of the defenses to such claims and allegations. DEL. CODE ANN. tit. §3901(a) (1999). It is well settled that the purpose of the pleading practice outlined in §3901 is to dispose of legally uncontested matters quickly. *See e.g. First Fed. Sav. & Loan Ass'n of Philadelphia v. Damnco Corp.*, 310 A.2d 880, 882 (Del. Super. 1973). A defendant, however, "need not file an affidavit to answer any allegation... unless the plaintiff files with the complaint a copy of the instrument..." DEL. CODE ANN. tit. 10 §3901(c).

accept their monthly payment in January 2000 was a breach of the 1970 Stand-By Credit contract. The Thielemanns believe that their default under the Master Card agreement is irrelevant to their continued use of their Stand-By Credit agreement. For the Thielemanns, the *coup de grâce* to Wilmington Trust's argument is that they cannot be in breach of contract because the bank breached the contract first when "[b]y their documented actions...[Wilmington Trust] prevented the [Thielemanns] from making any monthly Stand-By Credit Account payments...." This contention is founded upon Wilmington Trust's having refused the proposed accord and satisfaction, the \$342.00 check in January 2000.

(15) The only factual dispute in this controversy is whether the Thielemanns were on notice of, and agreed to new terms in their Stand-By Credit Agreement starting in 1991. There is no dispute, however, that the Thielemanns borrowed over \$10,000.00 on their Stand-By Credit account. Further, it is undisputed that since the bank rejected their offered accord and satisfaction in January 2000, the Thielemanns have paid nothing on the Stand-By Credit balance.

(16) Defendants filed a motion to dismiss that included affidavits, and proffered additional facts not previously presented in their pleadings.³ It is

³ Attached to defendants' motion to dismiss is their Amended Answer to Original Complaint. This amendment substantively adds to the factual averments in their original answer. As the complaint was filed on July 7, 2000, and absent leave from the court all responses were to be filed within 20 days, defendants' July 12, 2002 amendment is

well settled that a motion to dismiss relying upon factual assertions outside the pleadings is considered under Superior Court Civil Rule 56 as a motion for summary judgment.⁴ Therefore, the Thielemanns' motion to dismiss has been converted into a motion for summary judgment. Wilmington Trust also has filed a motion for summary judgment.⁵ Consequently, the court is deciding the parties' cross motions for summary judgment.

(17) A motion for summary judgment may only be granted where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law.⁶ If a material fact is in dispute, or if it seems desirable to inquire more thoroughly into the facts to clarify an application of law, summary judgment is improper.⁷ Moreover, if it appears that there is some reasonable theory or position under which the opponent might recover, the motion

untimely. Therefore, defendants' amendment will be treated simply as a substantive exhibit to their motion to dismiss.

⁴ See *Schultz v. Delaware Trust Co.*, 360 A.2d 576, 578 (Del. Super. 1976); *Rose v. Cadillac Fairview Shopping*, 668 A.2d 782 (Del. Super. 1995); see also Super. Ct. Civ. R. 12(b) and (c).

⁵ It should be noted that defendants' response to plaintiff's motion for summary judgment is almost wholly comprised of argument about the perceived inadequacies of discovery, an issue previously addressed and remedied by the court.

⁶ See *Schueler v. martin*, 674 A.2d 883, 885 (Del. Super. 1996); *Pierce v. International Ins. Co. of Ill.*, 671 A.2d 1361, 1363 (Del. 1996); *Moore v. Sizemore*, 405 A.2d 679, 680 (Del. 1979).

⁷ See *Kysor Industrial Corp. v. Margaux*, 674 A.2d 889, 894 (Del. Super. 1996).

must be denied.⁸ In evaluating motions for summary judgment, the court must examine all pleadings, affidavits and discovery material.⁹

(18) The required elements for an accord and satisfaction in Delaware are well settled in that (i) a bona fide dispute among the parties as to the amount of the debt must honestly exist, (ii) the debtor tendered an amount to the creditor in honest belief that such would constitute satisfaction of the debt, and (iii) the creditor accepts such payment.¹⁰ Therefore, an undisputed liquidated debt, is not an ideal candidate for an accord and satisfaction.¹¹

(19) Neither party disputes that the Stand-By Credit account is a liquidated balance. There was no bona fide reason that the Thielemanns should have anticipated that their tender of \$342.00 would satisfy the \$10,000.00 debt. Certainly, Wilmington Trust was under no obligation to accept the Thielemanns' proffer. Meanwhile, the Thielemanns undeniably knew that they owed at least \$380.00 monthly. Therefore, the Thielemanns' argument that plaintiff breached the Stand-By Credit agreement, whatever agreement that was, is beside the point.

⁸ See *Vanaman v. Milford Memorial Hospital, Inc.*, 272 A.2d 718, 720 (Del. 1970).

⁹ See *Oliver B. Cannon & Sons, Inc. v. Dorr-Oliver, Inc.*, 312 A.2d 322 (Del. Super. 1973).

¹⁰ See *Acierno v. Worthy Bros. Pipeline Corp.*, 693 A.2d 1066, 1068-69 (Del. 1997); *CitiSteel USA, Inc. v. Connell Ltd. P'ship*, 758 A.2d 928 (Del. 2000).

¹¹ See *e.g. Trader v. Wilson*, 2002 WL 499888, *3-4 (Del. Super.).

The bank's refusal to accept the Thielemanns' check in January 2000 under the Thielemanns' terms, did not excuse the Thielemanns from further payments, much less make further payments impossible. Thus, Wilmington Trust is entitled to partial summary judgment.

(20) Even if Wilmington Trust were wrong for attempting to accelerate their loan, that does not excuse the Thielemanns from continuing to pay off their acknowledged debt. Therefore, the Thielemanns at least were required to continue paying on the existing balance in monthly installments, regardless of the alleged improper acceleration. The minimum payment due as of December 8, 1999, was \$380.00. It has been 37 months since the Thielemanns have made a payment. In December 1999, the balance on the account was \$10,084.15, plus applicable interest charges. The bank is entitled to partial summary judgment in the amount necessary to account for the Thielemanns' failure to make monthly payments since December 1999.

(21) Defendants' motion for summary judgment on the other hand, must be denied because the Thielemanns, themselves, assert that a material issue of fact exists with respect to notice of any amendments to the Stand-By Credit agreement. Further, they have not presented any affirmative defenses or permissible counterclaims that can be decided as a matter of law. Instead, their

motion, and the response to plaintiff's motion, simply are complaints about discovery that have already been addressed.

(22) The only issue for trial remains whether the Thielemanns were on notice of an amendment to the Stand-By Credit Agreement. Simply, a jury must determine whether the Thielemanns, who admittedly neglected to read their statements regularly, received notice of any kind regarding changed terms in the Stand-By Credit Agreement. If the jury determines that the Thielemanns were on notice of the amendment that included the cross-default provision, then the Thielemanns, by their use of the Stand-By account, accepted the new terms.¹² That means that the bank would be entitled to judgment in the amount of the outstanding balance as of the date of acceleration, plus all interest, penalties, costs, and plaintiff's attorneys' fees as permitted by the 1991 contract. Alternatively, if a trial is necessary, the jury may find that Wilmington Trust breached the Stand-By Credit contract by improperly revoking credit and failing to pay a check that was properly payable.¹³ Either situation relates only to damages. Neither result

¹² A credit agreement may be amended by notice to, and subsequent conduct by, the debtor. *See Grasso v. First USA Bank*, 713 A.2d 304, 308-09 (Del. Super. 1998). The statutes cited by defendants were not in effect during periods relevant to the disposition of this matter, nor otherwise controlling. Further, the court must inform the Thielemanns that notice and knowledge are not legally synonymous.

¹³ *See* DEL. CODE ANN. tit. 6 §4-101 *et. seq.* (1999).

changes the fact that the Thielemanns must bring the Stand-By Credit account current.

THEREFORE, defendants' motion for summary judgment is DENIED. Plaintiff Wilmington Trust's motion for summary judgment is GRANTED in part, and DENIED in part. Wilmington Trust shall submit an order reflecting this decision after approval as to form, and after mediation.

Judge

oc: Prothonotary
pc: Garvin McDaniel, Esquire
Paul T. Thielemann, Jr., *pro se*
Margaret M. Thielemann, *pro se*