[Cite as *Citibank v. Eckmeyer*, 2009-Ohio-2435.]

THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

PORTAGE COUNTY, OHIO

CITIBANK (SOUTH DAKOTA), NA,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2008-P-0069**
- vs -	:	
KEITH W. ECKMEYER,	:	
Defendant-Appellant.	:	

Civil Appeal from the Court of Common Pleas, Case No. 2007 CV 0789.

Judgment: Affirmed.

Thomas L. Rosenberg and *Paul W. Lombardi*, Roetzel & Andress, L.P.A., 155 East Broad Street, 12th Floor, Columbus, OH 43215 (For Plaintiff-Appellee).

James E. Banas and *Paul R. Hoffer*, 3076 Wadsworth Road, Norton, OH 44203 (For Defendant-Appellant).

TIMOTHY P. CANNON, J.

{¶1} Appellant, Keith W. Eckmeyer, files this timely appeal from the judgment of the Portage County Court of Common Pleas granting summary judgment in favor of appellee, Citibank (South Dakota), NA. For the reasons discussed below, we affirm the judgment of the trial court.

{¶2} On June 13, 2007, Citibank filed a complaint against Eckmeyer alleging that Eckmeyer owed $19,448.29 as a result of defaulting on his credit card agreement. It attached to its complaint a copy of a statement demonstrating Eckmeyer's name, his

account number, the current balance, and interest rate. Eckmeyer filed a motion for more definite statement, pursuant to Civ.R. 12(E), claiming that Citibank failed to meet the requirements as set forth in Civ.R. 10(D). The trial court denied Eckmeyer's motion.

{¶3} Eckmeyer filed an answer instanter denying Citibank's allegations and raising affirmative defenses, including the following: (1) failure to comply with R.C. Chapter 1703, et seq., (2) improper account, (3) accord and satisfaction, and (4) recoupment/set off.

{¶4} Thereafter, Eckmeyer filed a motion to dismiss the complaint based upon Citibank's failure to prosecute claims as an unregistered foreign entity, pursuant to R.C. 1703.01 through R.C. 1703.31. The trial court denied said motion on January 28, 2008.

{¶5} On April 22, 2008, Citibank moved for summary judgment. In support of its motion, Citibank attached copies of the following: monthly accounting statements, detailing account activity from January 2000 through September 2007; the credit card agreement; an affidavit from Kathy Rizor, the records custodian, averring that there is an unpaid balance on Eckmeyer's account of $19,448.29 plus interest on the principle balance at the rate of 24.99% per annum from the date of judgment, and court costs; and a certificate of the merger between Universal Bank and Citibank, effective January 7, 2002.

{¶6} Eckmeyer filed a brief and affidavit in opposition to Citibank's motion for summary judgment. Eckmeyer argued that Citibank (1) failed to prove the terms of the contract, (2) failed to accept his compromised payment of $7,000, and (3) does not have standing to seek redress in the courts of Ohio, pursuant to R.C. Chapter 1703, et seq.

{¶7} The trial court entered judgment in favor of Citibank in the amount of $19,448.29, plus interest.

{¶8} Eckmeyer filed a timely appeal and, as his first assignment of error, alleges:

{¶9} "The trial [c]ourt erred to the prejudice of Defendant-Appellant in overruling his Civ.R. 12(E) Motion for a More Definite Statement in response to Plaintiff-Appellee's complaint."

{¶10} An action on an account, as in the instant case, is a suit claiming the balance of the account due to one of the parties "'as a result of (a) series of transactions,'" not to each item of the account. *Citibank (South Dakota), N.A. v. Lesnick*, 11th Dist. No. 2005-L-013, 2006-Ohio-1448, at ¶8. (Citation omitted.) "The purpose of an action on an account is 'to avoid the multiplicity of suits necessary if each transaction between the parties (or item on the account) would be construed as constituting a separate cause of action.'" Id. (Citation omitted.)

{¶11} Although Ohio is a notice-pleading state, Civ.R. 10(D)(1) provides, in relevant part:

{¶12} "(1) Account or written instrument. When 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."

{¶13} Eckmeyer argues that Citibank's complaint was vague and ambiguous, and the attached statement failed to comply with Civ.R. 10(D)(1).

{¶14} In denying Eckmeyer's motion for a more definite statement, the trial court, in essence, ruled that Citibank's complaint was sufficient. We agree and hold that Citibank's complaint and the attached account satisfied Civ.R. 10(D)(1) for pleading purposes.

{¶15} Eckmeyer alleges that Citibank failed to attach to its complaint a copy of the agreement upon which it relied. However, as previously stated, the instant case involves a suit concerning a credit card balance and, therefore, is an action on an account. *Capital One Bank v. Toney*, 7th Dist. No. 06 JE 28, 2007-Ohio-1571, at ¶34. (Citations omitted.) As a result, Citibank was required to comply with Civ.R. 10(D), which mandates that a copy of the *account* must be attached to the complaint. Id. (Citations omitted.)

{¶16} Although "account" is not defined in Civ.R. 10(D)(1), this court has recognized that in order to show a prima facie case for money owed on an account:

{¶17} "'[A]n account must show the name of the party charged and contain: (1) a beginning balance (zero, or a sum that can qualify as an account stated, or some other provable sum); (2) listed items, or an item, dated and identifiable by number or otherwise, representing charges, or debits, and credits; and (3) summarization by means of a running or developing balance, or an arrangement of beginning balance and items which permits the calculation of the amount claimed to be due.'" *Citibank (South Dakota), N.A. v. Lesnick*, 2006-Ohio-1448, at ¶9. (Citations omitted.)

{¶18} As noted by the Fourth Appellate District, "Rule 10(D)(1) does not require a plaintiff to attach 'a complete copy of the account' ***, nor does it require a creditor to

attach a copy of every statement issued to the borrower." *Capital One Bank v. Nolan*, 4th Dist. No. 06CA77, 2008-Ohio-1850, at ¶10.

{¶19} In the instant case, Citibank attached an account to its complaint that identified Eckmeyer's name, his account number, the interest rate, and the amount purported due. As such, contrary to Eckmeyer's assertion, he was presented with adequate information to put him on notice and to allow him to file a proper responsive pleading. See *Capital One Bank v. Nolan*, 2008-Ohio-1850, at ¶12.

{¶20} Additionally, while the attached account does not have a beginning balance of zero, it is a "provable sum." Furthermore, Eckmeyer did not dispute the existence of such account nor did he present evidence illustrating such account was incorrect.

{¶21} Therefore, Citibank satisfied the pleading requirements as set forth in Civ.R. 10(D)(1), and Eckmeyer's first assignment of error is without merit.

{¶22} Eckmeyer's second assignment of error maintains:

{¶23} "The trial [c]ourt erred to the prejudice of Defendant-Appellant in overruling his Civ.R. 12(B)(1) motion to dismiss Plaintiff-Appellee's complaint for lack of authority and standing to bring actions in the courts of Ohio for failing to comply with Ohio corporate law pursuant to O.R.C. 1703.01 through O.R.C. 1703.31."

{¶24} At the outset, we note that Eckmeyer filed a motion to dismiss pursuant to Civ.R. 12(B)(1), lack of subject matter jurisdiction; however, in his motion, he maintained only that Citibank lacked standing to initiate the instant lawsuit. Standing does not challenge the subject matter jurisdiction of a court; it "'challenges the capacity of a party to bring an action.'" *Washington Mut. Bank v. Beatley*, 10th Dist. No. 06AP-

1189, 2008-Ohio-1679, at ¶10. (Citation omitted.) Furthermore, Eckmeyer's 12(B)(1) motion to dismiss was not properly raised, as Civ.R. 12(B) permits the Civ.R. 12(B)(1)-(6) defenses to be raised in the responsive pleading or, at the option of the pleader, prior to the responsive pleading. This defense was not raised in Eckmeyer's answer or by prior motion.

{¶25} Even though Eckmeyer failed to properly raise the 12(B)(1) defense, we will address his claim that because Citibank is not properly licensed under R.C. Chapter 1703, et seq., it is precluded from bringing an action in Ohio pursuant to R.C. 1703.29(A), which prohibits a "foreign corporation" that is not properly registered by the secretary of state from maintaining any action in an Ohio court. While Eckmeyer does not dispute the fact that Citibank is a national bank, he does allege that a nationally chartered bank is not preempted from complying with a state notice requirement.

{¶26} "The doctrine of federal preemption is rooted in the Supremacy Clause, which provides that 'the Laws of the United States . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any thing in the Constitution or Laws of any State to the Contrary notwithstanding.' U.S. Const. art. VI, cl. 2. Federal statutes and the regulations adopted thereunder have equal preemptive effect. *** A federal statute or regulation may preempt a state regulatory scheme in three relevant ways. *** First, Congress can expressly preempt state law by explicit statutory language. *** Second, Congress can enact a regulatory scheme 'so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it,' ***, also known as 'field preemption'. In such cases, state regulation will be invalid even if it does not directly conflict with federal laws or

regulations. *** Third, 'federal law may be in "irreconcilable conflict" with state law,' ***, also known as 'conflict preemption.' This may occur when compliance with both state and federal statutes and regulations is a physical impossibility, or when compliance with the state statute would frustrate the purposes of the federal scheme. ***." *SPGGC, LLC v. Ayotte* (2007), 488 F.3d 525, 530-531. (Internal citations and footnotes omitted.)

{¶27} As stated in R.C. 1703.03, "[n]o foreign corporation not excepted from sections 1703.01 to 1703.31 of the Revised Code, shall transact business in this state unless it holds an unexpired and uncanceled license to do so issued by the secretary of state. ***." However, R.C. 1703.031(A) exempts a federally chartered bank, savings bank or savings and loan from the licensing requirement of R.C. 1703.01 to R.C. 1703.31; instead, "the bank, savings bank, or savings and loan association shall notify the secretary of state that it is transacting business in this state by submitting a notice in such form as the secretary of state prescribes[,]" which shall include the information as set forth in R.C. 1703.031.

{¶28} It is undisputed that Citibank is a national bank. "Business activities of national banks are controlled by the National Bank Act (NBA or Act), 12 U.S.C. § 1 *et seq*., and regulations promulgated thereunder by the Office of the Comptroller of the Currency (OCC)." *Watters v. Wachovia Bank, N.A.* (2007), 550 U.S. 1, 6.

{¶29} In determining that application of R.C. 1703.29(A) is preempted by federal law, the trial court recognized that the National Bank Act, Section 24, Title 12, U.S. Code, "allows such banks '(t)o sue in any court of law and equity, as fully as a natural person.'" (Sic.) As such, the trial court reasoned that application of R.C. 1703.29(A) would "infringe upon a federally chartered bank's ability to 'sue in any court' and appear

in Ohio courts to collect its debts 'as fully as a natural person.'" Therefore, the trial court concluded that under the facts and circumstances of the case sub judice application of R.C. 1703.29(A) is preempted by federal law. We agree.

{¶30} Eckmeyer argues that under R.C. 1703.031, Citibank is required, inter alia, to file a notice containing certain information, pay a $100 filing fee, appoint a designated agent, and file a certificate of good standing. However, "[e]ven the most limited aspects of state licensing requirements have been preempted because they created impermissible conditions upon the authority of a national bank to do business." *Wachovia Bank, N.A. v. Watters* (2004), 334 F.Supp. 2d 957, 965, citing *Assn. of Banks in Ins., Inc. v. Duryee* (S.D. Ohio 1999), 55 F.Supp. 2d 799.

{¶31} Further, we recognize that while R.C. 1703.031 outlines the requirements "that *** a bank, savings bank, or savings and loan association chartered under the laws of the United States, the main office of which is located in another state," *shall* include in the filed notice, the statute does not provide for any means of recourse for noncompliance nor does it state that the filing of the notice is a precondition for doing business in the state of Ohio. *Assn. of Banks in Ins., Inc. v. Duryee* (C.A.6, 2001), 270 F.3d 397, 412.

{¶32} In *MBNA Am. Bank, N.A. v. McArdle*, 6th Dist. No. L-06-1319, 2007-Ohio-2033, at ¶15-19, the Sixth Appellate District determined that since the issuer of a credit card was a national bank, the prohibitions against maintaining an action by a foreign corporation under R.C. 1703.03 and R.C. 1703.29(A) were inapplicable and, therefore, it could pursue an action for unpaid debt in Ohio. The *McArdle* court stated, "R.C. 1703.031 eliminates the registration requirements and penalties set forth in R.C.

1703.01 to 1703.31 'with respect to a corporation that is a bank, savings bank, or savings and loan association chartered under the laws of the United States, the main office of which is located in another state ***.'" Id. at ¶17.

{¶33} Additionally, Section 7.4008, Title 12, C.F.R., promulgated by Comptroller of the Currency, states, in pertinent part:

{¶34} "(a) Authority of national banks. A national bank may make, sell, purchase, participate in, or otherwise deal in loans and interests in loans that are not secured by liens on, or interests in, real estate, subject to such terms, conditions, and limitations prescribed by the Comptroller of the Currency and any other applicable Federal law.

{¶35} "***

{¶36} "(d) Applicability of state law. (1) Except where made applicable by Federal law, state laws that obstruct, impair, or condition a national bank's ability to fully exercise its Federally authorized non-real estate lending powers are not applicable to national banks.

{¶37} "(2) A national bank may make non-real estate loans without regard to state law limitations concerning:

{¶38} "(i) Licensing, *registration* (*except for purposes of service of process*), filings, or reports by creditors[.]" (Emphasis added.)

{¶39} Based on the foregoing, this court determines that under the Supremacy Clause a national bank is not required to comply with the licensing requirements as stated in R.C. 1703.01 through R.C. 1703.31.

{¶40} Eckmeyer's second assignment of error is without merit.

{¶41} As his third assignment of error, Eckmeyer alleges:

{¶42} "The trial court erred to the prejudice of Defendant-Appellant in granting Plaintiff-Appellee's Civ.R. 56(A) motion for summary judgment as there existed genuine issues of material fact."

{¶43} In order for a motion for summary judgment to be granted, the moving party must prove:

{¶44} "(1) [N]o genuine issue as to any material fact remains to be litigated, (2) the moving party is entitled to judgment as a matter of law, and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the nonmoving party, that conclusion is adverse to the party against whom the motion for summary judgment is made." *Mootispaw v. Eckstein* (1996), 76 Ohio St.3d 383, 385. (Citation omitted.)

{¶45} Summary judgment will be granted if "the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of facts, if any, *** show that there is no genuine issue as to any material fact ***." Civ.R. 56(C). Material facts are those that might affect the outcome of the suit under the governing law of the case. *Turner v. Turner* (1993), 67 Ohio St.3d 337, 340, quoting *Anderson v. Liberty Lobby, Inc*. (1986), 477 U.S. 242.

{¶46} If the moving party meets this burden, the nonmoving party must then provide evidence illustrating a genuine issue of material fact, pursuant to Civ.R. 56(E). *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 293. Civ.R. 56(E), provides:

{¶47} "When a motion for summary judgment is made *and supported as provided in this rule*, an adverse party may not rest upon the mere allegations or denials

of the party's pleadings, but the party's response, by affidavit or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the party does not so respond, summary judgment, if appropriate, shall be entered against the party." (Emphasis added.)

{¶48} Summary judgment is appropriate pursuant to Civ.R. 56(E), if the nonmoving party does not meet this burden.

{¶49} Appellate courts review a trial court's entry of summary judgment de novo. *Brown v. Scioto Cty. Bd. of Commrs*. (1993), 87 Ohio App.3d 704, 711. "*De novo* review means that this court uses the same standard that the trial court should have used, and we examine the evidence to determine whether as a matter of law no genuine issues exist for trial." *Brewer v. Cleveland Bd. of Edn*. (1997), 122 Ohio App.3d 378, 383, citing *Dupler v. Mansfield Journal* (1980), 64 Ohio St.2d 116, 119-120.

{¶50} First, Eckmeyer claims that Citibank failed to establish the terms of the contract and failed to establish "if there was a meeting of the minds." We disagree.

{¶51} As previously noted, Citibank attached to its motion for summary judgment a copy of the credit card agreement along with account statements demonstrating Eckmeyer's use of the issued card. This evidentiary material attached to Citibank's motion for summary judgment established a prima facie case on its account. See *Chase Bank USA, NA v. Lopez*, 8th Dist. No. 91480, 2008-Ohio-6000, at ¶12-13. In addition, Eckmeyer's use of the issued card created a legally binding contract. See *Calvary SPV I, LLC v. Furtado*, 10th Dist. No. 05AP-361, 2005-Ohio-6884, at ¶18. (Citation omitted.) In fact, the credit card agreement provides, in part:

{¶52} "You agree to use your account in accordance with this Agreement. This Agreement is binding on you unless you cancel your account within 30 days after receiving the card and you have not used or authorized use of the card."

{¶53} In addition, Eckmeyer failed to put forth evidence refuting that he made charges on the account or made payments on said account.

{¶54} Second, Eckmeyer argues that Citibank failed to comply with R.C. 1343.03(A) and, therefore, the trial court should have awarded statutory interest at the rate of 8% instead of 24.99%.

{¶55} R.C. 1343.03(A) provides that, "when money becomes due and payable upon any bond, bill, note, or other instrument of writing, upon any book account, upon any settlement between parties, upon all verbal contracts entered into, and upon all judgments, decrees, and orders of any judicial tribunal for the payment of money arising out of *** a contract or other transaction, the creditor is entitled to interest at the rate per annum determined pursuant to section 5703.47 of the Revised Code, *unless a written contract provides a different rate of interest in relation to the money that becomes due and payable, in which case the creditor is entitled to interest at the rate provided in that contract*." (Emphasis added.)

{¶56} As the trial court stated:

{¶57} "Eckmeyer also asserts that there was no mutual meeting of the minds between himself and Citibank on the interest charged. On the other hand, Eckmeyer offers no evidence of what those charges should be. The statements sent to Eckmeyer by MasterCard, which Eckmeyer's memorandum accepts largely undisputed, alter the interest charges, sometimes monthly. In June 2001, the interest rate was 10.900

percent. By January 2002, the interest charges were reduced to 8.400 percent, while the next month it was 8.150 percent. By March 2007, however, the interest charge was an outrageous 32.310 percent, and on September 14, the interest was a more outrageous 32.520 percent. The Civ.R. 56(C) evidence establishes the current rate is a reduced, though still grotesque, 24.99 percent. It is apparent that Eckmeyer's contract with MasterCard allowed for varying interest rate charges. Citibank, as successor by merger, has that same right to vary interest rate charges. Citibank has the contractual right to require the present interest charges be paid by Eckmeyer."

{¶58} Furthermore, a review of the credit card agreement reveals that the annual percentage rate (APR) "may automatically increase to the Default APR (which is the LIBOR Rate plus 26.99%) if you fail to make a payment to us when due, exceed your credit line, or make a payment to us that is not honored." As such, the evidence supports the trial court's decision of awarding contractual interest at a rate of 24.99% per annum since a written contract was in existence illustrating the "rate of interest in relation to the money that [became] due and payable." R.C. 1343.03(A).

{¶59} Eckmeyer further alleges that he contacted Citibank to negotiate settlement of the outstanding account, and Citibank agreed to settle said account for the amount of $7,000. To support this allegation, Eckmeyer attached a self-serving affidavit to his memorandum in opposition of summary judgment, which is insufficient to create a genuine issue of material fact. In addition, the affidavit failed to identify the individual whom Eckmeyer contacted and whether that individual had authority to settle a debt. Further, Eckmeyer conceded that he received a letter from Citibank rejecting his offer to settle the account.

{¶60} "This court has previously held that a nonmoving party may not avoid summary judgment by merely submitting a self-serving affidavit contradicting the evidence offered by the moving party. *** This rule is based upon judicial economy: Permitting a nonmoving party to avoid summary judgment by asserting nothing more than 'bald contradictions of the evidence offered by the moving party' would necessarily abrogate the utility of the summary judgment exercise. *** Courts would be unable to use Civ.R. 56 as a means of assessing the merits of a claim at an early state of the litigation and unnecessary dilate the civil process." *Greaney v. Ohio Turnpike Comm.*, 11th Dist. No. 2005-P-0012, 2005-Ohio-5284, at ¶16. (Internal citations omitted.)

{¶61} After reviewing the evidence in a light most favorable to Eckmeyer, we determine the trial court did not err in granting Citibank's motion for summary judgment. Therefore, Eckmeyer's third assignment of error is without merit.

{¶62} The judgment of the Portage County Court of Common Pleas is hereby affirmed.

CYNTHIA WESTCOTT RICE, J., concurs,

COLLEEN MARY O'TOOLE, J., concurs with Concurring Opinion.

COLLEEN MARY O'TOOLE, J., concurs with Concurring Opinion.

{¶63} I write separately from the majority, as I believe the trial court erred in failing to grant Mr. Eckmeyer's motion for definite statement. Civ.R. 12(E). This is the proper remedy when a party fails to attach an account or written instrument supporting

its claim or defense. Civ.R. 10(D)(1); *Point Rental Co. v. Posani* (1976), 52 Ohio App.2d 183, 186. I would not find the pro forma "account" attached by Citibank to its complaint sufficient to plead an account under the widely established rules in this state regarding actions on accounts. See, e.g., *Lesnick*, supra, at ¶9. I disagree with the reasoning of courts, such as that in *Nolan*, supra, which find virtually any statement of a balance allegedly owed sufficient to plead an account. In so doing, the plain dictates of Civ.R. 10(D)(1), and the pleading rules regarding accounts, are eviscerated.

{¶64} Nevertheless, the error was harmless, pursuant to Civ.R. 61, since attached to its motion for summary judgment, Citibank attached sufficient documentation to support the action fully, and make summary judgment appropriate. Which, of course, begs the question of why Citibank did not include this documentation in support of its complaint? The rules of pleading applicable to the particular cause of action, the civil rules, and common sense dictate that this is best practice. It is not too much to ask a large and powerful creditor, which actually has access to the documents it needs to plead an account properly, to do so.

{¶65} I concur.