[Cite as *Discover Bank v. Damico*, 2012-Ohio-3022.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

LAKE COUNTY, OHIO

DISCOVER BANK c/o DISCOVER PRODUCTS INC.,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2011-L-108**
- vs -	:	
CHRIS M. DAMICO,	:	
Defendant-Appellant.	:	

Civil Appeal from the Painesville Municipal Court, Case No. CVF1100123.

Judgment: Affirmed.

David A. Head, *Sharon Pietras*, and *Matthew G. Burg*, Weltman, Weinberg & Reis Co., L.P.A., 323 West Lakeside Avenue, Suite 200, Cleveland, OH 44113 (For Plaintiff-Appellee).

Chris M. Damico, pro se, 139 Garfield Drive, Painesville, OH 44077 (Defendant-Appellant).

TIMOTHY P. CANNON, P.J.

{¶1} Appellant, Chris M. Damico, appeals the summary judgment entered by the Painesville Municipal Court in favor of appellee, Discover Bank ("Discover"), on its complaint to collect a balance owed on a credit card. For the reasons that follow, the judgment is affirmed.

{¶2} On January 18, 2011, Discover filed a complaint against appellant alleging that he owed the principle sum of $6,654.28 as a result of defaulting on his credit card

agreement. Discover attached to its complaint a copy of a statement demonstrating appellant's name, address, account number, outstanding balance, and interest rate, as well as a copy of the cardholder agreement. In his answer, appellant denied all allegations in the complaint. Appellant denied that he applied for a Discover charge card and that he became bound by the terms of the Discover agreement. Appellant denied "for want of knowledge" that he defaulted under the terms, that he owed the principle sum of $6,654.28, and that a demand for the outstanding balance was made and refused.

{¶3} On May 10, 2011, Discover moved for summary judgment. In support of its motion, Discover Bank attached (1) a copy of the cardholder agreement; (2) twelve sequential billing statements with appellant's name, address, account number, and expanding balance; (3) the electronic credit card application completed by appellant; and (4) an affidavit from Discover's Legal Placement Account Manager affirming the amount due to be $6,652.28, plus accrued interest at 11.24 percent and court costs. In response, appellant argued that Discover did not properly answer his request for discovery and that a genuine issue of material fact still existed because Discover did not provide complete statements starting with a zero balance.

{¶4} On June 2, 2011, the magistrate concluded that no genuine issue of material fact existed and granted Discover's motion for summary judgment. Appellant immediately filed objections to the magistrate's decision, arguing that summary judgment was inappropriate because Discover did not provide statements from a zero balance. The municipal court overruled appellant's objections and affirmed the magistrate's decision.

{¶5} Appellant now timely appeals and asserts the following assignment of error:

{¶6} "The trial court erred in granting Plaintiff-Appellee Discover Bank C/O Discover Products Inc's Motion for Summary Judgment on Defendant-Appellant Christopher M. Damico [sic]."

{¶7} Pursuant to Civil Rule 56(C), summary judgment is proper if:

{¶8} (1) No 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 party against whom the motion for summary judgment is made, that conclusion is adverse to that party. *Temple v. Wean United, Inc*., 50 Ohio St.2d 317, 327 (1977).

{¶9} To prevail on a motion for summary judgment, the moving party has the initial burden to affirmatively demonstrate that there is no genuine issue of material fact to be resolved in the case, relying on evidence in the record pursuant to Civ.R. 56(C). *Dresher v. Burt*, 75 Ohio St.3d 280, 292 (1996). If this initial burden is met, the nonmoving party then bears the reciprocal burden to set forth specific facts which prove there remains a genuine issue to be litigated, pursuant to Civ.R. 56(E). *Id*.

{¶10} An appellate court reviews an award of summary judgment de novo. *Grafton v. Ohio Edison Co*., 77 Ohio St.3d 102, 105 (1996). Thus, we apply the same standard as the trial court and view the facts in the case in a light most favorable to appellant, resolving any doubt in his favor. *Id.*

{¶11} The underlying case is an action on an account. Pursuant to Civ.R. 10(D)(1), a "copy of the account" must be attached. *Citibank, NA v. Eckmeyer*, 11th Dist. 2008-P-0069, 2009-Ohio-2435, ¶15. This court has previously outlined what must be affirmatively demonstrated to establish a prima facie case for an action on an account:

> **{¶12}** '[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 (S.D.), N.A. v. Lesnick*, 11th Dist. No. 2005-L-013, 2006-Ohio-1448, ¶9, quoting *Gabriele v. Reagan*, 57 Ohio App.3d 84, 87 (12th Dist.1988).

{¶13} Subsequent to filing his answer, appellant conceded that he applied for a Discover card. In fact, appellant expressly indicated he had knowledge of the card activity because he claims to have previously contacted Discover and disputed some of the charges. Appellant additionally does not challenge receiving monthly statements. Appellant does challenge, however, the principle sum of $6,652.28, arguing that summary judgment was improper due to the inaccurate and incomplete nature of Discover's evidence.

{¶14} First, appellant argues the trial court erred in relying on an affidavit attached to Discover's motion in support of summary judgment because the affidavit

failed to comply with the requirements set forth in Civ.R. 56(E). The affidavit, from Discover's Legal Placement Account Manager, affirmed that appellant had defaulted and did, in fact, owe the principle sum of $6,652.28. Civ.R. 56(E) provides, in relevant part: "Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated in the affidavit." In support of his contention, appellant correctly notes that a nearly identical form affidavit (with different names and numbers inserted) from the same affiant was recently struck down by the Fifth Appellate District in *Discover Bank v. Peters*, 5th Dist. No. 2010CA00309, 2011-Ohio-3480, ¶23. Indeed, the Fifth District explained that the affidavit "fails to establish the affiant's personal knowledge and fails to affirmatively show the affiant is competent to testify to those matters." *Id.* The court stated that the affiant's position as Legal Placement Account Manager, without further description, "does not establish the affiant has personal knowledge or is competent to testify as to Appellant's account." *Id.* at fn.1. Thus, the Fifth District concluded that the court erred in denying appellant's motion to strike the affidavit and therefore summary judgment was not proper. *Id.* at ¶25.

{¶15} However, the court in *Peters* was addressing a claim that the trial court erred because it denied appellant's motion to strike Discover's affidavit. *Id.* at ¶7. Here, appellant did *not* file a motion to strike the affidavit. In addition, he did not raise any objection to the affidavit in his brief opposing summary judgment *or* in his objections to

the magistrate's decision.[1] In fact, Discover's affidavit was never challenged by appellant until this appeal was initiated. It is well founded that "a party's failure to object to the propriety of evidence submitted in support of a motion for summary judgment constitutes a waiver of any alleged error in the consideration of such evidence." *Abbott v. Sears, Roebuck & Co.*, 11th Dist. No. 2003-T-0085, 2004-Ohio-5106, ¶15. As appellant did not object to this affidavit in the lower court, he is precluded from doing so now. *See also Chase Bank USA, NA v. Lopez*, 8th Dist. No. 91480, 2008-Ohio-6000, ¶16 (where appellant raised for the first time on appeal that an affidavit attached to a summary judgment motion did not meet the requirements of Civ.R. 56(E), the court held, "because this issue was not raised in the trial court, [appellant] cannot raise it for the first time on appeal"). Without such an objection, the trial court was well within its discretion to consider the affidavit in evaluating Discover's summary judgment motion. *See Geier v. Ace Lakefront Props*., 11th Dist. No. 2007-L-068, 2007-Ohio-7121, ¶4, fn.1. ("A trial court may, in its discretion, consider improperly introduced evidentiary materials during the summary judgment exercise where the opposing party fails to object.") Appellant's failure to object to this affidavit waived any error.

{¶16} Second, appellant argues the trial court erred in entering summary judgment because Discover failed to affirmatively demonstrate how it reached the $6,654.28 principle sum. That is, Discover did not provide statements from a zero balance, but instead provided statements from a balance of $4,943.40. Appellant explains that this is especially problematic because he vigorously contests the

1. Appellant did raise this argument in a Civ.R. 60(B) motion which was filed after the notice of appeal to the present case. The court dismissed the Civ.R. 60(B) motion. We express no opinion on the trial court's Civ.R. 60(B) ruling, as it is not before this court.

outstanding balance. In support of his argument, appellant points to *Brown v. Columbus Stamping & Mfg. Co.*, 9 Ohio App.2d 123 (10th Dist.1967) and subsequent appellate court decisions applying *Brown* (i.e., *Great Seneca Fin. v. Felty*, 1st Dist No. C-050929, 2006-Ohio-6618), for the proposition that Discover should have included a complete "accounting summary" starting from a zero balance to be entitled to summary judgment.

{¶17} This court has noted that a creditor need not attach all billing statements to meet its evidentiary burden in a summary judgment exercise. *Citibank, NA v. Eckmeyer*, 2009-Ohio-2435, ¶18, citing *Capital One Bank v. Nolan*, 4th Dist. 06CA77, 2008-Ohio-1850, ¶10. Further, while the attached account does not have a beginning balance reflecting zero, it is nonetheless a provable sum. *Id.* at ¶20; *see also Discover Bank v. Paoletta*, 8th Dist. No. 95223, 2010-Ohio-6031, ¶12. ("That the account balance did not start with zero is not dispositive.") As explained above, Discover attached to its motion for summary judgment a copy of the application establishing how the account was originated. This included appellant's name, address, home phone, social security number, date of birth, employer, and annual income. Appellant did not challenge the authenticity of this application. The application illustrates that the card applied for was ultimately issued to appellant, subject to the terms set forth in the credit card agreement, a copy of which was attached.

{¶18} Additionally, the statements attached to Discover's motion for summary judgment reflect purchases and payments on the account, not merely an end amount owed. *See Equable Ascent Fin., L.L.C. v. Christian*, 196 Ohio App.3d 34, 2011-Ohio-3791, ¶16-17 (10th Dist.). Discover attached 12 account statements, dated October 2009 to October 2010, with appellant's name, account number, and address,

demonstrating his continued use of the card and his developing balance. Appellant did not challenge the authenticity of these statements. The first account statement attached to Discover's motion illustrates a previous balance of $4,943.40 and a new balance of $5,037.43. Subsequent, sequential billing statements show continued use and activity on the card, with a running outstanding balance. Activity on the card ceased, as evidenced by an April 2010 statement, when appellant exhausted his $6,000 credit limit. Statements after April 2010 document the continuing imposition of accruing interest and late fees.

{¶19} Further, Discover's affidavit from its Legal Placement Account Manager verifies appellant's account and affirms the amount due to be $6,654.28, plus accrued interest at 11.24 percent and court costs. The affiant identifies appellant and his account number, explaining that he has defaulted under the terms and conditions of the card agreement. As explained above, appellant did not object to the affidavit, which established the accuracy of the account.

{¶20} Thus, the evidentiary materials attached to Discover's motion established a prima facie case for an action on the account.

{¶21} As Discover met its evidentiary burden by attaching the account, appellant then had the reciprocal burden to point to evidentiary material which suggested that a genuine issue of material fact remained to be litigated. However, appellant argues that it was impossible to meet this burden because, as Discover did not attach earlier statements, there was no evidence to contradict. To this end, appellant merely made unsubstantiated assertions by way of a self-serving affidavit that the balance was incorrect because there were previous card transactions which he objected to or questioned. In a case of this nature, appellant's assertions in his own affidavit, with no

supporting statements or evidentiary material, are insufficient to establish that a genuine issue exists. *Citibank, NA v. Eckmeyer*, 2009-Ohio-2435, ¶59. In this case, where appellant does not deny the existence of the account or any issues with the address of the billing statements, it was incumbent on him to demonstrate some *genuine* evidence of a discrepancy. At the very least, appellant needed to show some prior challenge to the initial statement balance of $4,943.40 provided by the moving party.

{¶22} "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." G*reaney v. Ohio Turnpike Comm.*, 11th Dist. No. 2005-P-0012, 2005-Ohio-5284, ¶16, quoting *C.R. Withem Enterprises v. Maley*, 5th Dist. No. 01 CA 54, 2002-Ohio-5056, ¶24. "Courts would be unable to use Civ.R. 56 as a means of assessing the merits of a claim at an early stage of the litigation and unnecessary dilate the civil process." *Id*., citing *Belknap v. Vigorito*, 11th Dist. No. 2003-T-0147, 2004-Ohio-7232.

{¶23} Appellant was required to place evidence before the trial court to establish there was a *genuine* issue concerning the balance claimed. Though appellant insists that he found previous mistakes on his statement and he was dissatisfied with prior credit card purchases, such that the balance is incorrect, he did not produce any evidentiary materials to support this claim. Appellant states that he attempted to contact Discover, but he was ignored.

{¶24} Appellant's monthly account statements contained detailed steps a cardholder could take to challenge a mistake on the statement. The instructions explain:

{¶25} If you think there is an error on your statement, write to us at * * *. In your letter, give us the following information:

{¶26} Account information: Your name and account number.

{¶27} Dollar amount: The dollar amount of the suspected error.

{¶28} Description of problem: If you think there is an error on your bill, describe what you believe is wrong and why you believe it is a mistake.

{¶29} You must contact us within 60 days after the error appeared on your statement.

{¶30} You must notify us of any potential errors in writing. You may call us, but if you do we are not required to investigate any potential errors and you may have to pay the amount in question.

{¶31} Appellant did not submit any evidentiary material that suggests he ever asserted his account balance contained an error, that an investigation into a purported error was pending, or that an error had been acknowledged, but not yet rectified.

{¶32} Further, appellant's monthly account statements also contained a full explanation of the cardholder's rights to challenge a purchase he or she disputed. To exercise the right *not* to pay the amount due for a specific purchase, the cardholder must have met three criteria and must have contacted Discover in writing so that an investigation could be initiated. Again, appellant did not submit any evidentiary material that suggests he ever challenged a specific purchase, that an investigation into a purchase was pending, or that a successfully challenged purchase had yet to be deducted from the outstanding balance.

{¶33} Thus, in its motion for summary judgment, Discover submitted sufficient evidentiary material to shift the burden to establish a factual issue to appellant. In his response, appellant did not present sufficient evidentiary material that there remained a genuine issue of material fact to be litigated. Reasonable minds can come to but one conclusion in this case: that appellant owes the outstanding balance set forth in the complaint. Appellant's sole assignment of error is without merit.

{¶34} The judgment of the Painesville Municipal Court is hereby affirmed.

THOMAS R. WRIGHT, J., concurs,

MARY JANE TRAPP, J., concurs with Concurring Opinion.

MARY JANE TRAPP, J., concurs with Concurring Opinion.

{¶35} While I concur in the judgment and opinion, I write separately to expand upon the discussion of "provable sum" and to clarify the distinction between an "account" and an "account stated."

{¶36} Discover Bank's complaint alleged both a breach of contract and money due on account, attaching to its complaint both the cardholder agreement and billing statements. The billing statements began with a balance brought forward and not a zero balance.

{¶37} Because Mr. Damico failed to provide any evidentiary quality material to support his assertion that he contested the accuracy of the monthly statements, we may conclude the $6,654.28 figure noted on the final statement constitutes an "account stated" and thus a "provable sum."

{¶38} The distinction between an account and an account stated is well described in *Creditrust Corp. v. Richard*, 2d Dist. No. 99-CA-94, 2000 Ohio App. LEXIS 3027 (July 7, 2000).

{¶39} "An action on an account is founded upon contract, and 'is appropriate where the parties have conducted a series of transactions for which a balance remains to be paid.' The 'cause of action does not exist with reference to each item of the account, but only as to the balance that may be due to one or the other parties[.]'" (Internal citations omitted). *Id*. at *6-7.

{¶40} To properly plead an action on account and to comply with Civ.R. 10(D), the creditor must attach a copy of the account to the complaint. The account must begin with a "balance, preferably at zero, *or with a sum recited that can qualify as an account stated, but at least the balance should be a provable sum*." (Emphasis added.) *Brown v. Columbus Stamping & Mfg. Co.,* 9 Ohio App.2d 123, 126 (10th Dist.1967) (discussing R.C. 2309.32, which has been replaced by Civ.R. 10(D)).

{¶41} As the Second District noted, "Civ.R. 10(D) uses the word 'account' in its narrow sense: '[a] detailed statement of the mutual demands in the nature of debit and credit between parties, arising out of contracts or some fiduciary relationship.' Black's Law Dictionary (6th Ed.1990) 18. However, with respect to the phrase, 'action on an account,' the word 'account' refers to the type of relationship between the parties and not to a particular book or record." *Creditrust* at *8, citing *American Sec. Ser. Inc. v. Baumann*, 32 Ohio App.2d 237 (10th Dist.1972).

{¶42} An "account stated" is "an agreed balance of accounts, expressed or implied, after admission of certain sums due or an adjustment of the accounts between the parties, striking a balance, and assent, express or implied. It has also been defined

as an agreement between parties, express or implied, based upon an account balanced and rendered, and as an agreement between parties between whom there has been an account. An account stated is predicated upon prior transactions which create a debtor-creditor relationship between the parties to the account." *Creditrust* at *11-12, quoting 1 Ohio Jurisprudence 3d 199-200, Accounts and Accounting, Section 24 (1998).

{¶43} "An account stated exists: only where accounts have been examined and the balance admitted as the true balance between the parties, without having been paid. In other words, an account stated is based upon an assent to its correctness. This assent may be expressed or implied from the circumstances." *Id*. at *12, quoting 1 Ohio Jurisprudence, *supra*, at 202, Section 26. "[A]n account rendered by one person to another and not objected to by the latter within a reasonable time becomes an account stated." *Id.*

{¶44} *Creditrust* is factually similar to the case before this court inasmuch as the creditor did not present a starting zero balance but rather a starting balance due of $6,065.73. The Second District determined that a beginning balance that was actually a balance brought forward could not qualify as an account stated based upon a provable sum established by the monthly statements, because the creditor failed to produce all of the monthly statements showing all charges and payments totaling the balance due. But, the court concluded that the balance stated on the final statement sent to the debtor constituted an "account stated" and, therefore, qualified as a "provable sum."

{¶45} The court's rationale was simple – the summary "Customer Account Statement" attached to the complaint complied with the requirements of Civ.R. 10(D), and, when supplemented by the monthly statements for a period of time, the creditor had established the necessary elements of an action on account. By failing to object to

the amount set forth on the monthly statements, the debtor impliedly expressed his assent to the amount stated. This failure transformed the "account" into an "account stated," and thus, a "provable sum."

{¶46} Such transformation and resultant outcome equally applies to Mr. Damico's failure to offer evidentiary quality material supporting his claim that he had attempted to dispute the charges or the balance due.