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CALEDONIA COURTS

STATE OF VERMONT
CALEDONIA COUNTY

Citibank (S. Dakota), N.A.,
Plaintiff

v.

Teresa M. Cooper,
Defendant

SUPERIOR COURT
Docket No. 305-10-08 Cacv

DECISION ON MOTION FOR SUMMARY JUDGMENT

This case is before the Court on Plaintiff Citibank's Motion for Summary Judgment, filed on November 14, 2008. Plaintiff is represented by Attorney Timothy Wells; Defendant Teresa Cooper is represented by Attorney Devon Green of Vermont Legal Aid. On December 15, 2008, Defendant filed a Response and supporting memorandum opposing summary judgment and a Statement of Contested Material Facts. On December 16, 2008, Defendant submitted an affidavit. These documents were not received by the Court so they were resubmitted on January 14, 2009. Plaintiff filed a Response to Defendant's Objection to Plaintiff's Motion for Summary Judgment on January 5, 2009. On February 12, 2009, Plaintiff filed a Supplement to Motion for Summary Judgment, all Ms. Cooper's monthly credit card statements from 1/8/04 to 7/21/08, and Requests to Admit along with Ms. Cooper's answers to those requests. Ms. Cooper responded with a legal memorandum opposing summary judgment. After a hearing on April 13, 2009, both parties submitted legal memoranda on the doctrine of Account Stated as it applies in this case.

Plaintiff Citibank is attempting to recover money from Teresa Cooper because Citibank claims she used a credit card issued by them and defaulted on her payments. Citibank is attempting to recover charges and interest totaling \$7,195.60 on the theory of breach of contract or account stated. For the following reasons, the Motion for Summary Judgment is granted on liability but damages are limited to the charges that Ms. Cooper actually made using the card. The case is set for hearing on damages exceeding the principal amount, including interest payments, late fees and other charges or fees to the account. The hearing will also cover how to credit the payments already made by Ms. Cooper.

UNCONTESTED FACTS

1. Defendant Teresa Cooper lives in Barnet, Vermont in Caledonia County.
2. Citibank (South Dakota) is a National Association with a principal place of business in Sioux Falls, South Dakota.
3. Teresa Cooper applied for and was issued a Citi Platinum Select Card by Citibank with the account number [REDACTED]. She transferred a balance of \$1,100.17 to the Citi Platinum Select Card and began using the card in December of 2003.
4. Ms. Cooper's last charge to the account was a \$2,000 cash advance made in February of 2008.
4. Citibank has repeatedly demanded that Ms. Cooper pay the amount it claims she owes (\$7,195.60).

DISCUSSION

Standard of Review

Summary judgment is appropriate when “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any . . . show that there is no genuine issue as to any material fact and that any party is entitled to judgment as a matter of law.” V.R.C.P. 56(c)(3). The Court may also render summary judgment “on the issue of liability alone although there is a genuine issue as to the amount of damages.” *Id.* The party opposing summary judgment gets “the benefit of all reasonable doubts and inferences in determining whether a genuine issue of material fact exists.” *Kremer v. Lawyers Title Ins. Corp.*, 2004 VT 91, ¶ 7, 177 Vt. 553, 554. “[s]ummary judgment is mandated . . . [only] where . . . a party ‘fails to make a showing sufficient to establish the existence of an element’ essential to his case and on which he has the burden of proof at trial.” *Poplaski v. Lamphere*, 152 Vt. 251, 254-255 (1989) (citing *Celotex Corp v. Catrett*, 477 U.S. 317, 322 (1986)). In deciding whether there are any disputed issues of material fact, the Court will look to the statements of disputed and undisputed facts submitted by the plaintiff and defendant and the pleadings and affidavits submitted by each party. V.R.C.P. 56(c).

Analysis

Citibank is moving for summary judgment on two main theories of liability – account stated and breach of contract.¹ The Court will address each of Citibank's arguments in turn.

¹ Since Citibank has not specified on which theory it is proceeding, the Court will only address the theories of account stated and breach of contract. Quantum meruit/unjust enrichment is a quasi-contractual claim and there is a contract in this case.

Citibank has the burden of proof with respect to all elements of its claim, regardless of whether it proceeds on the theory of breach of contract or account stated.

Account Stated

An "account stated is a manifestation of assent by debtor and creditor to a stated sum as an accurate computation of an amount due the creditor." Restatement (Second) of Contracts, Account Stated § 282. A claim for account stated may lie when there is a pre-existing debt between two parties and both parties have expressly or impliedly agreed to the amount of the debt. See *Sodoro, Daly & Sodoro, P.C. v. Kramer*, 679 N.W.2d 213 (Neb.2004). "The account stated operates as a new contract; a promise to pay a pre-existing debt being binding without new consideration." J. Calamari & J. Perillo, Contracts § 21-9, at 875-877 (3d ed.1987). Vermont law does recognize the doctrine of account stated but the Court has not seen it applied in a case post-1940. see: *Sweat v. Johnson*, 97 Vt. 177 (1923) And in none of the Vermont cases did the creditor-debtor relationship have the character of the relationship between a credit cardholder and a distantly located bank or other financial institution where no personal relationship exists.

Although this court is dubious that the account stated doctrine should apply in credit card cases where the computations of payments and shifts in interest rates appear arcane and are not clearly explained on the face of the billing, Citibank has not presented evidence on all elements of its account stated claim – it has failed to show that Ms. Cooper assented to the amount of debt. Assent under the account stated theory can be express or implied, but there is insufficient evidence to show either.

Citibank claims that because Ms. Cooper received monthly statements and did not object to them, she impliedly assented to the amount of debt. There may be instances when failing to object to a statement of the debt within a reasonable period of time is tantamount to assenting that the amount is correct. See *American Druggists Ins. v. Thompson Lumber Co.*, 349 N.W.2d 569, 573 (Minn.App.1984); *Home Federal Savings & Loan Ass'n v. Williams*, 158 So.2d 678 (Ala.1963); see also Restatement (Second) of Contracts, Account Stated § 282. However, the Court is not convinced that silence should be considered assent under the circumstances of this case. "Even if there are situations in which this position [failing to contest the accuracy of a bill] may have merit, it is without merit in credit card transactions because it is based on the assumption that the recipient, upon review of an invoice, can readily determine whether this is an amount that he or she owes." *Target Nat'l Bank/Target VISA v. Samanez*, No. AR07-00977 (Pa. C.P. Allegheny County Dec. 19, 2007). This assumption does not usually hold true with credit card agreements and transactions. Credit card statements often contain multiple interest rates, interest rates which fluctuate from billing period to billing period, and a myriad of other kinds of fees and penalties. See U.S. Gov't Accountability Office, *Credit Cards – Increased Complexity*



→ Unreasonable to assume debtor has the

in *Rates and Fees Heighten Need for More Effective Disclosures to Consumers*, GAO-06-929 (2006). Ms. Cooper's monthly credit card statements are no different. "While the credit cardholder, looking at the statement, can see the amount of the charges that were imposed, he or she is unlikely to know whether the charges are consistent with the writings governing the cardholder's obligations." *Target Nat'l Bank/Target VISA* at 11. Since credit cardholder member agreements are potentially confusing because of the format and complexity of the language, the average cardholder likely has difficulty understanding them and determining whether the charges and fees comply with the agreement. See *Credit Cards*, GAO-06-929. Because the Court does not agree that Ms. Cooper's silence was tantamount to assent to the accuracy of the monthly statements, the Court finds that Citibank has not proved an essential element of its account stated claim. The Court denies Citibank's Motion for Summary Judgment on the account stated theory.

Breach of Contract

Citibank also brought a claim under a breach of contract theory. A contract consists of an offer and an acceptance – in this case, the credit card offer made by Citibank and the acceptance form signed and returned by Ms. Cooper. Ms. Cooper does not actually contest the existence of the contract between her and Citibank. In its complaint, Citibank claimed that "defendant applied for and was issued a credit card" and "defendant was provided with a credit card having account number [REDACTED]." (Citibank Compl. at 1). In her response, Ms. Cooper admitted the truth of both of these statements. It is undisputed by both parties that Ms. Cooper had and used a Citibank credit card with that particular account number. Subsequent use of the credit card was an acceptance of the terms of the Cardmember Agreement. *Grasso v. First USA Bank*, 713 A.2d 304, 308-309 (Del. Super. Ct. 1998). The existence of a contractual agreement between the two parties is established, but the terms of the contract and whether Citibank abided by those terms is unclear.

Citibank submitted all of Ms. Cooper's statements from the date of her balance transfer and initial transaction (December 2003) through July 2008. These statements show the charges Ms. Cooper made to the card and the Court considers these documents to be credible evidence of her actual charges during that time. Ms. Cooper has not specifically contested any of the charges shown on the statements. This Court finds that there is no dispute as to the amount Ms. Cooper charged to the card.

However, the amount Citibank claims is due and owing includes interest and fees. Since its claim is based on the contract and the applicable terms and conditions, Citibank must prove that the fluctuating interest rates, fees, and changing credit limit complied with the Cardmember Agreement received by Ms. Cooper. Citibank has not produced the Agreement in effect when Ms. Cooper began using the card. The credit card statements submitted to the Court show an



interest rate which fluctuated wildly, a balance transfer amount which was treated differently during the first few months of the contract, a lowered credit limit with no apparent notice and other fees and penalties. Ms. Cooper disputes the amount of the debt, and whether the amount claimed by Citibank is accurate is not obvious from the documents submitted to the Court.

Without knowing how the amount was calculated and if it was done validly, the Court cannot grant summary judgment on damages above the amount Ms. Cooper actually charged. Summary judgment is granted on the issue of liability and on damages for the principal of the debt but set for a hearing on the issue of damages above and beyond the principal and on how the payments made should be applied to the debt.

So ordered.

Dated at St. Johnsbury, Vermont, this 10 day of July 2009



Hon. Robert R. Bent
Presiding Judge