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DEBRA VAN PELT
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STATE OF WASHINGTON

IN THE COURT OF APPEALS, DIVISION I

Court of Appeal Case Number 68573-2

AMERICAN EXPRESS BANK, FSB)
Plaintiff-Respondent/Appellee)
)
v.)
)
DIANA J. BURLINGTON,)
Defendant-Appellant.)
)

APPELLANT'S REPLY BRIEF

Filed by:

DIANA J. BURLINGTON, Appellant *In Pro Se*
1148 Lisa St.
Oak Harbor, WA 98277
(360) 678-8856

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DEBRA VAN PELT
ISLAND COUNTY CLERK

Appeal from the Superior Court for Island County
Case Number 09-2-00292-9
the Honorable Alan R. Hancock, Presiding

III. APPELLEE HAS COMPLETELY FAILED TO ADDRESS THE ASSIGNED THE THIRD ASSIGNED ERROR, NAMELY, THAT TRIAL COURT ERRED IN GRANTING A SUMMARY JUDGMENT WHEN THE AFFIDAVITS SHOWED THAT MORE THAN A TRIABLE MATERIAL ISSUE OF FACT EXISTED AS TO THE AMOUNT OF DAMAGES.....15-16

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I.

RCW §23B.15.010 DOES NOT “EXEMPT” ANY FOREIGN CORPORATION FROM A REQUIREMENT TO REGISTER; IT MERELY EXCLUDES CERTAIN ACTIVITIES FROM THE CRITERIA WHICH CAUSE A FOREIGN CORPORATION TO NEED TO REGISTER.

Like every other *state-corporate-income-tax-cheating* credit card company during a summary judgment hearing, or in an appeal thereupon, the Appellee-Plaintiff has attempted to argue that the Uniform Corporation Code’s “Door-Closing Statute” does not apply to it, and that it need not be registered as a foreign corporation, because it is only in the state to collect debts.

Appellee makes the very odd statement that “the statute exempts certain types of activities”, and then quotes the language of RCW §23B.15.010, which lists particular activities that “do not constitute transacting business within the meaning of subsection (1) etc.” From what, exactly, are “the activities” exempted? The Appellee apparently intended to say that it, a foreign corporation, was “exempted” from having to register, merely because it was engaged in the activities which are recited at RCW §23B.15.010(a)-(b).

Washington's Court has repeatedly addressed this issue:

The former statutes disqualified a foreign corporation from bringing suit in Washington only if it was "doing business" in this state without having paid its fees.

A nonresident corporation, which is not engaged in business within the state, or which is engaged in interstate commerce, may maintain an action without alleging and proving that it has qualified to do business and has paid its license fees. Rawleigh Co. v. Harper, 173 Wash. 233, 22 P. (2d) 665; Rawleigh Co. v. Graham, 4 Wn. (2d) 407, 103 P. (2d) 1076; 129 A.L.R. 596; Procter & Gamble Co. v. King County, 9 Wn. (2d) 655, 115 P. (2d) 962; Seavey Hop Corp. of Portland v. Pollock, 20 Wn. (2d) 337, 147 P. (2d) 310. However, if the foreign corporation is doing business within the state, then it must qualify and pay its license fee in order to maintain an action. Dalton Adding Mach. Sales Co. v. Lindquist, 137 Wash. 375, 242 Pac. 643, and cases cited.

Portland Ass'n of Credit Men, Inc. v. Earley, 42 Wn.2d 273, 278, 254 P.2d 758 (1953). Moreover, "[t]he mere bringing of an action in this state does not constitute doing business in the state, so as to require a foreign corporation to pay an annual license fee." Lilly-Brackett Co. v. Sonnemann, 50 Wash. 487, 489, 97 P. 505 (1908).

Top Line Equipment Co. v. National Auction Service, Inc., 32

Wn.App. 685, 687-688, 649 P.2d 165, (App.Wash. 1982).

In this case, Defendant BURLINGTON never, ever, stated that Plaintiff AMERICAN EXPRESS, F.S.B. was, merely because it was a foreign corporation and it was suing her, required to register. She is not that ignorant of the law. Rather, she provided competent evidence in her Declaration in the trial court below, that she had personally witnessed the Plaintiff corporation's *systematic marketing efforts* and its *statewide use of local third-party merchants as part of its business system*. [CP 56-62.]

Unlike the majority of states, Washington's Court has placed the burden of proof, as to the foreign corporate plaintiff's lack of capacity to sue, upon defendants:

There is no presumption that, because a foreign corporation commences an action in the courts of this state ..., it is doing business within this state. The burden to show the necessity for payment of license fee in such a case is upon the defendant....

...

[The plaintiff] alleged that it was a foreign corporation, which [the defendant] admitted. While, unnecessarily, [the plaintiff] alleged that it was not engaged in business within this state, that allegation of a negative, which was a matter of defense, did not impose upon [the plaintiff]

the burden of proving that it was not engaged in business within this state.

In the present case, Top Line alleged that it "is an Oregon Corporation and has satisfied all conditions precedent to the maintenance of this action." National Auction denied the allegation because of "insufficient information and belief on which to form an opinion." National Auction, which had the burden of proof, produced no evidence that Top Line was doing business in Washington, so as to require Top Line to obtain a certificate of authority before bringing this action. The trial court properly found that "[b]oth parties are corporations in good standing."

Procter & Gamble Co. v. King Cy., 9 Wn.2d 655, 659-60, 115 P.2d 962 (1941).

This is not a situation where the defendant BURLINGTON simply denied the Plaintiff's capacity "on lack of information and belief." As noted, she adduced personal, percipient knowledge about the Plaintiff's intrastate activities. Not only did this "create a material issue of fact," the truth is that, had the trial court actually sat as a trier of fact, it would have been compelled to render judgment in favor of Appellant BURLINGTON, since her evidence was unrebutted by the Plaintiff-Appellee AMERICAN EXPRESS, F.S.B.!

There was a triable issue of fact about the plaintiff corporation's capacity to sue, because it was a foreign corporation that defendant would have proved was one that was required to be registered. The trial court inappropriately granted summary judgment. Reversal with directions is appropriate, for this error alone.

II.

APPELLEE HAS ATTEMPTED TO MISLEAD THE COURT, BY CONFUSING THE NOTIONS OF "EXPRESS" AND "IMPLIED" CONTRACT, AND BY CONFUSING "APPLICATION" AND THE "WRITTEN AGREEMENT" WHICH IS SOUGHT TO BE ENFORCED.

IIA. APPELLANT BURLINGTON NEVER MENTIONED ANY "APPLICATION" IN HER OPENING BRIEF, NOR DID SHE EVER DENY AN IMPLIED AGREEMENT THAT AROSE FROM INCURRING CHARGES ON THE ACCOUNT.

In its Respondent's Brief, Appellee states that "Burlington has attempted to argue that there is no proof of a credit card agreement between herself and AMEX." [RB, page 9, first full paragraph.] That is a lie. At every stage in this litigation, Defendant-Appellant BURLINGTON has contended that she did have a credit card account,

that she used the account and incurred charges, but that the transactions and maintenance of the account was governed by an implied agreement, and not by the unsigned, preprinted “terms document” which was urged by Plaintiff at the trial level. [OB, page 6, third paragraph; page 10, first paragraph, first sentence.]

At its Point #3, Appellee AMEX asserts that “AMEX does not have to Provide a Copy of the Original Credit Card Application.” This is a dirty attempt to mislead the Court about the issues on appeal: Appellant BURLINGTON never, ever, talked about “the original credit card application”, or any other application for the account, in her Opening Brief. It is an irrelevancy.

With that being said, it should also be noted that the case cited by Appellee, namely *Discover Bank v. Ray*, 139 Wn.App. 723,162 Pac.3d 1131, (App.Wash. 2007) never mentions any “original credit card application”, either. Quite to the contrary: it characterizes the preprinted terms document as an “offer”, and comments that “[t]he offeror is the master of the offer. [Citation.] Therefore, the offeror

may propose acceptance by conduct, and the buyer may accept by performing those acts proposed by the offeror.” 162 Pac.3d, at 1133; Opinion at its ¶10.

The *Ray* case cited by Appellee is readily distinguished from this case. In *Ray*, the defendant did not deny that he had received the preprinted terms-document either prior to, or contemporaneous with, the credit card. He did not deny that he had received the terms-document (or “offer”, as the Court in that case characterized it) at any time *before he began to use the card*.

That is not the case here. Appellant BURLINGTON has squarely denied, in her Declaration in Opposition to Motion for Summary Judgment, that she had received such a document *before she began to receive the card*. Needless to say, one cannot “accept an offer” that has not been communicated. The most that the sending of a card, absent anything else, could connote, would be the offer of a charge account *on the terms of an implied contract*.

It is important to note that nowhere has Appellee-Plaintiff contended, much less adduced any evidence for, the proposition that AMEX sent such a terms-document or “*Ray* offer” to Appellant BURLINGTON, at the same time, or prior in time, to when it sent her the subject credit card. Had it done so, and also factually demonstrated it, then *Ray, supra*, might apply. But it does not. In blunt terms: If you don’t plead an offer, then you cannot plead an acceptance. That is the end of it.

IIB. NEITHER THE *BRIDGES* CASE NOR THE *RYAN* CASE HAS ADDED ANYTHING TO THE LAW WHICH CONCERNS PROOF OF THE CARD USER’S ASSENT TO THE WRITTEN TERMS-DOCUMENT.

Appellee AMEX states, at its Point #4, that “Under *Discover Bank v. Bridges* and *Citibank v. Ryan*, AMEX Does Not Have to Provide a Copy of the Original Credit Card Application.” Once more, Appellee has sought to mislead the Court. Neither of those two cases cited by Appellee concerns any rule about providing a copy of any application. In fact, neither of those two cases even *mentions* the “application for the account.”

What these cases *did* concern, was a new requirement, that the credit card plaintiff not only “show that the Bridges mutually assented [with Plaintiff] to a contract by accepting the cardmember agreement”, but also that the defendant “personally acknowledged [his or her] account.” *Discover Bank v. Bridges*, 226 Pac.3d, at page 194; *Citibank v. Ryan*, 247 Pac.3d, at pages 780-781. But Appellant BURLINGTON has nowhere contended that the Appellee-Plaintiff has failed to “provide[] any evidence of personalized acknowledgement of the account, similar to the cancelled checks in *Ray*.” *Citibank v. Ryan*, *supra*, *ibid*. In short, the issue of “acknowledgement of the account” is irrelevant to this appeal, and therefore so are the Appellee’s misleading citations to these cases.

It is true that the Court in *Bridges*, *supra*, observed, concerning the requirement for proof “that the Bridges had mutually assented to a contract” with them, that “Discover Bank’s pleadings disclose neither a signed agreement between Discover Bank and the Bridges no detailed, itemized proof of the Bridges’ card usage.” 226 Pac.3d, at page 194, Opinion at ¶13. But the Court in that case was also clear

that its statement about the availability of “itemized proof of the Bridges’ card usage” for proof of assent was based upon *Discover Bank v. Ray, supra*. Ibid., Opinion at ¶14. The statement in *Bridges* is distinguishable from the same rule as announced in *Ray, supra*, for the same reason: there was no denial that the written agreement had been received by the account-holder, before the account-holder began to use the card. In this case, there is such a denial, and the denial, if true, absolutely precludes the possibility of “acceptance of an offer of a credit card, through starting to use it.”

It is therefore hogwash, for Appellee AMEX to contend that “AMEX has proven assent to the credit card agreement pursuant to the summary judgment standard as set forth in *Bridges* and *Ryan*.” [RB, page 11, first full paragraph.] There is only a principle that was announced in *Ray, supra*, and that case is readily distinguishable.

In summary, the Court should be mindful of this statement: “The manifestation of mutual assent to an exchange ordinarily takes the form of an offer or proposal **followed by** an acceptance by the

other party or parties.” 1 Restatement of Contracts (Second) §22(1).
[**Emboldened font** added for emphasis.] Under this universally-accepted rule, the acceptance does NOT come before the offer! Appellant BURLINGTON did NOT “accept the offer *qua* printed terms-document” before she received it! [CP 10-16 “Defendant’s Affidavit in Rebuttal to Plaintiff’s Reply Brief re: Second Motion for Summary Judgment”, pages 2-3, at ¶2.]

III.

APPELLEE HAS COMPLETELY FAILED TO ADDRESS THE ASSIGNED THE THIRD ASSIGNED ERROR, NAMELY, THAT TRIAL COURT ERRED IN GRANTING A SUMMARY JUDGMENT WHEN THE AFFIDAVITS SHOWED THAT MORE THAN A TRIABLE MATERIAL ISSUE OF FACT EXISTED AS TO THE AMOUNT OF DAMAGES.

Appellant will again say it: the trial court’s judgment did not make it clear, the factual *theory* upon which it granted the judgment: was it express contract? Was it implied (restitutionary) contract? Was it “account stated”, which is a kind of implied *novating* contract?

Proceeding upon an assumption that the trial court may have awarded summary judgment upon an *implied* contract, then

Appellant's Third Assignment of Error becomes relevant. And the Appellee has not disputed it, at all, upon this appeal. Thus, if *implied* contract is the basis, then the Appellee has automatically conceded the Third Assignment of Error, since it did not raise any resistance to it.

IV.

IF, INDEED, THE TRIAL COURT GRANTED SUMMARY JUDGMENT UPON A THEORY OF "ACCOUNT STATED", THEN NECESSARILY IT ERRED, BECAUSE THERE REMAINED A TRIABLE ISSUE OF FACT.

In her Opening Brief, Appellant BURLINGTON noted that "[a]side from the recent language of clarification, the Summary Judgment is devoid of any findings of fact or law that would support the Summary Judgment." [OB, page 8.] From the state of the Judgment, it is impossible to state with certainty that the trial court based its decision, because it found that summary judgment could be granted on the basis of a theory of "account stated".

Assuming *arguendo* that the trial court did, in fact, grant summary judgment based upon a theory of "account stated", then it necessarily erred. Appellee has argued, citing to a case that quotes

2 Restatement (Second) of Contracts, at §282(1), that her failure to timely object to the proffered statements was an admission of the balances contained thereon.

This contention is easily disposed of. The same passage states, at Comment b: “How long a time is unreasonable is a **question of fact** to be answered in the light of all the circumstances.” [**Emboldened font** added for emphasis.] Accordingly, the alternative theory of “account stated” necessarily involved a **question of fact** as to whether or not the time which passed, before BURLINGTON’s objection to the proffered balance, was “unreasonable”.

If there were a material “question of fact”, then of course summary judgment could not have been granted. Frankly, this “question of fact” is not only “material”, it is just about downright “dispositive”. One thing is for sure: a trial court cannot make “findings of fact” based upon conflicting evidence; it cannot “weigh the credibility of evidence”; it cannot act as a “trier of fact”, period.

Further, on February 23, 2012, Appellant preserved her objection that the whole issue of “account stated” could not even be properly in front of the trial court, upon the Plaintiff’s Motion for Summary Judgment:

Defendant DIANA J. BURLINGTON hereby OBJECTS to a portion of PLAINTIFF’S REPLY IN SUPPORT OF [ITS SECOND] MOTION FOR SUMMARY JUDGMENT”. Specifically, she objects to the court’s consideration of any argument grounded upon, or pertaining to, “Account Stated”, because this issue was never raised in the moving papers, and its consideration now would prejudice defendant BURLINGTON’s procedural rights.

The caption for point 2, at page 3 of the Reply brief, reads: “Under the Account Stated Doctrine, the Plaintiff is Not Required to Provide a Copy of the Signed Credit Card Application.” The apparent Plaintiff then proceeds, in the next two paragraphs appearing on page 3 of its Reply brief, to argue that recovery is available against defendant BURLINGTON under the theory of Account Stated.

The matter is not only objectionable because it appears for the first time in the instant motion in the Reply brief. In fact, this is the first appearance of this issue *in the entire case!* The language of “account stated” is utterly missing from the Complaint in this case.

It must be kept in mind that “account stated” is a *cause of action*, and is NOT a mere alternative remedy that is available for some violated “primary right”. *Pine Mountain Lumber Co. v. U.S.*, 139 Ct.Cl. 164, 153 F.Supp. 411 (1957); *Ayers v. Cavalry SVP I, LLC*, 876

So.2d 474 (Ala. Civ.App. 2003); *Johnson v. Gammill*, 231 Ark. 1, 328 S.W.2d 127 (Ark. 1959); *Truestone, Inc. v. Simi West Industrial Park II*, 163 Cal.App.3d 715, 209 Cal.Rptr. 757 (App.Cal. 1984). The essence of an “account stated” is that a new contract has superseded a former contract, and the assent or agreement to the “account as stated” provides the consideration for the new contract. *Gleason v. Klamer*, 103 Cal.App.3d 782, 163 Cal.Rptr. 483 (App.Cal. 1980). It is distinct from any original agreement. *M.T. Deaton & Co. v. Leibrock*, 114 Idaho 614, 759 P.2d 905 (Ct.App.Idaho 1988).

It therefore involves a substantial number of factual issues that are rarely held in common with the issues which surround the underlying contract that is superseded. Needless to say, with so many *unpleaded* new factual issues, it is completely inappropriate to consider it as a basis for recovery, at the reply-phase of a motion for summary judgment.

Defendant BURLINGTON therefore OBJECTS to the court’s consideration of any part of the Reply brief which is grounded upon, or pertains to, the cause of action for “Account Stated.”

[CP 167-171] Thus, even though “account stated” necessarily had to fail on the merits as a theory for the Plaintiff’s motion for summary judgment, it was also *procedurally barred* because it was not mentioned in the Plaintiff’s moving papers below.

Accordingly, Appellee's contention at its Point #2 must be rejected, irrespective of its connection to the issue of the Plaintiff's proof of the existence of an express contract.

CONCLUSION

The trial court erroneously permitted summary judgment in this case, for at least two, if not three, separate reasons. The judgment should be reversed, with directions upon remand.

Respectfully submitted,

DATED: December 4, 2012



DIANA J. BURLINGTON

Appellant-Defendant *In Pro Se*

CERTIFICATE OF SERVICE BY MAIL

I, Todd Burlington, declare:

I am not a party to this action. I am employed for this service in the County of Island in the State of Washington. I placed a copy of the foregoing document entitled "APPELLANT'S REPLY BRIEF" into sealed envelope that had sufficient prepaid postage attached to them, and that were addressed to:

Isaac Hammer, Esq.
SUTTELL & ASSOCIATES, P.S.
P. O. Box C-90006
Bellevue, WA 98009

Honorable Alan R. Hancock
Superior Court for County of Island
P.O. Box 5000
Coupeville, WA 98239

I then deposited the sealed envelope into the United States mail at Coupeville, State of Washington, on December 4, 2012.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED: December 4, 2012

A handwritten signature in black ink, appearing to read "Todd Burlington", is written over a horizontal line.

TODD BURLINGTON