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COURT OF APPEALS  
STATE OF WASHINGTON  
2012 JUN -9 PM 2:02

No. 68609-7-1

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IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON  
DIVISION I

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MEHMET KAYMAZ,

Appellant,

v.

CITIBANK, N.A.

Respondent.

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BRIEF OF APPELLANT MEHMET KAYMAZ

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David S. Mann  
Gendler & Mann, LLP  
1424 Fourth Avenue, Suite 715  
Seattle, WA 98101  
(206) 621-8868

Attorneys for Mehmet Kaymaz

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## I. INTRODUCTION

In order to establish a claim for credit card debt a bank must show that the parties mutually assented to the contract by accepting the cardmember agreement thereby acknowledging the account. In order to show that there is a valid contract established through mutual assent, the bank must present evidence of such assent through cancelled checks evincing payment on the account or documentation evincing online payments. Self-generated monthly statements summarizing alleged account balances and payments thereon are insufficient to make a showing of mutual assent. *Citibank v. Ryan*, 160 Wn. App. 286, 291, 247 P.3d 778 (2011); *Discover Bank v. Bridges*, 154 Wn. App. 722, 727, 226 P.3d 191 (2010).

Citibank failed to meet its burden of proof to establish the existence of a mutually assented to contract between the parties. The overwhelming bulk of evidence presented in support of Citibank's Second Motion for Summary Judgment was self-generated account statements. Citibank presented only a single check from a different entity, that was over eight years old, was made out simply to "Citi Bank," and lacked any identifying account information. This evidence is insufficient to show the existence of a valid enforceable contract. The trial court's entry of summary judgment was erroneous and should be reversed.

## **II. ASSIGNMENT OF ERROR**

The trial court erred in issuing its February 17, 2012, “Order of Summary Judgment” in favor of Respondent Citibank, N.A. and entering a total money judgment of \$27,104.76 against Appellant Mehmet Kaymaz.

## **III. ISSUE ON APPEAL**

Is a single eight-year-old cancelled check from a different entity, an unsigned credit card agreement, and self-generated statements from a bank sufficient to establish a contract between the bank and an alleged cardholder? (Assignment of Error 1).

## **IV. STATEMENT OF THE CASE**

On March 9, 2010, Respondent Citibank, N.A. (“Citibank”) filed a complaint in King County Superior Court alleging monies due under a certain credit card contract between Citibank and Appellant Mehmet Kaymaz (“Kaymaz” ). CP 1-7. After an unsuccessful arbitration, Citibank requested a trial de novo. CP 48.

On February 17, 2012, Citibank brought Plaintiff’s Second Motion for Summary Judgment and attached the following:

- (1) Several years of self-generated account statements dated from January, 2002 until May, 2009;
- (2) One single cancelled check dated December 25, 2003 drawn on the account of Alhambra, for \$500.00 made out simply to “Citi” along with a single unsigned payment slip with a payment due date of November 28, 2003;

- (3) An affidavit from records custodian for Respondent evincing the alleged balance owing from Mr. Kaymaz to Respondent; and
- (4) An unsigned credit card agreement.

CP 49-243

Kaymaz responded that he “did not open an account with Citibank” and requested dismissal. CP 255-256.

On February 17, 2012, the trial court, Judge Suzanne Barnett, granted summary judgment in favor of Citibank and entered judgment against Kaymaz for \$26,585.26 plus interest of 29.99% interest. CP 253-254.

This appeal followed. CP 257-260.

## **V. ARGUMENT**

### **A. Standard of Review**

Kaymaz seeks review of an order granting summary judgment. This Court reviews an order granting summary judgment *de novo*, engaging in the same inquiry as the trial court. *Weden v. San Juan County*, 135 Wash. 2d 678, 689-90, 958 P.2d 273(1998). An order granting summary judgment is appropriate only if “the pleadings, affidavits, depositions, admissions and all reasonable inferences drawn therefrom in favor of the nonmoving party” demonstrate there is no genuine issue of material fact and the moving party is entitled to judgment

as a matter of law. *Id.*, quoting *Higgins v. Stafford*, 123 Wash.2d 160, 169, 866 P.2d 31 (1994).

**B. Citibank Fails To Establish the Existence of a Contract with Kaymaz**

The burden of proving a contract, whether express or implied, is on the party asserting it, and he must prove each essential fact, including the existence of a mutual intention. *Bogle & Gates, P.L.L.C. v. Holly Mountain Res.*, 108 Wash. App. 557, 560-61, 32 P.3d 1002 (2001). Whether there is mutual assent is a question of fact and is reviewed for substantial evidence. *Citibank v. Ryan*, 160 Wn. App. 286, 291, 247 P.3d 778 (2011). In order to establish its claim, Citibank was required to demonstrate that Kaymaz mutually assented to the contract by accepting the cardmember agreement and personally acknowledging the account. *Discovery Bank v. Bridges*, 154 Wn.App. 722, 727, 226 P.3d 191 (2010).

**1. Self-generated account statements and an unsigned agreement are insufficient to establish the existence of a contract**

In *Discover Bank v. Bridges*, Division 2 of the Court of Appeals reversed a grant of summary judgment in a case very similar to the present one. *Discover Bank v. Bridges*, 154 Wn. App. 722, 727-28, 226 P.3d 191 (Div. 2, 2010). In *Bridges*, the bank had provided only self-generated account statements and an unsigned agreement which was not sufficient to show mutual assent. *Id.*

The Court reversed and remanded the case for further proceedings,

holding that:

[t]o establish a claim, Discover Bank had to show that the Bridges mutually assented to a contract by accepting the cardmember agreement and personally acknowledged their account. Discover Bank's pleadings disclose neither a signed agreement between Discover Bank and the Bridges nor detailed, itemized proof of the Bridges' card usage. Nor do they show that the Bridges acknowledged the debt, for example, through evidence of cancelled checks or online payment documentation. The record contains only monthly statements summarizing the Bridges' alleged account balance and payments purportedly made thereon and affidavits from [bank] employees, who were familiar with the Bridges' purported account records.

154 Wn. App. at 727.

Similarly, in *Citibank v. Ryan*, an appeal by a debtor from an order granting summary judgment in favor of Citibank, Division 1 agreed with Division II's decision in *Bridges* that a bank needs to provide more than an unsigned agreement and self-generated account statements:

The *Bridges* court concluded that the cancelled check evidence was critical to the conclusion that the bank had provided sufficient proof of assent to the unsigned cardholder agreement. Because, as here, the bank in *Bridges* provided only self-generated account statements and an unsigned agreement, and had not provided any evidence of personalized

acknowledgment of the account similar to the cancelled checks in *Ray*, the *Bridges* court reversed and remanded for further proceedings.

*Ryan*, 160 Wn. App. at 921.

In the present case, the evidence offered to the Court in support of Respondent's Motion for Summary Judgment was nearly identical to that offered in both the *Bridges* and *Ryan* cases. The only difference between the evidence presented by Respondent in the present case and the banks in both *Bridges* and *Ryan* is one ambiguous eight year old check which is not sufficient to satisfy Respondent's burden of proof.

**2. The single check presented by Citibank does not demonstrate mutual assent**

In support of its Second Motion for Summary Judgment Citibank relied heavily on Division III's decision in *Discover Bank v. Ray* which held that an unsigned credit card agreement, several self-generated statements and several cancelled checks that were payments on the credit card account was sufficient evidence to make a finding of mutual assent between the parties such that the credit card contract was enforceable. *Discover Bank v. Ray*, 139 Wn. App. 723, 725-27, 162 P.3d 1131 (2007). In support of its claim Citibank provided the trial court with a single check from December 25, 2003, drawn on an account named "Alhambra" and

made out to Citi Bank. CP 63 (attached). This single check fails to demonstrate mutual assent for several reasons.

First, a single cancelled check is insufficient to demonstrate mutual assent. The *Ray* Court based its finding of mutual assent on copies of “*several* cancelled checks that Mr. Ray had sent as payment on the debt.” *Ray*, 139 Wn. App. at 725. (emphasis added). In clarifying the rule set forth in *Ray*, the court in *Bridges* concluded that the cancelled checks were critical to the conclusion of mutual assent reached in *Ray*. *Bridges*, 154 Wn. App. at 727-28. The *Bridges* court pointed out in particular that, “in *Ray*, Discover Bank introduced copies of *several cancelled checks* that Ray had sent as payment on his credit card account. Thus, the present case is distinguishable from *Ray* because Discover Bank did not produce any similar evidence of the Bridges’ personal acknowledgement of the account.” *Bridges*, 154 Wn. App. at 728. (emphasis added) (internal citations omitted).

In the present case there is only one single check written on a business account that contains no indication whatsoever to be a payment on the disputed account. This single check is simply not sufficient to meet Citibank’s burden of proof.

Second, in *Ray*, the cancelled checks presented as evidence were “checks that Mr. Ray had sent *as payment on the debt*.” *Ray*, 139 Wn.

App. at 725. (emphasis added). Here, there is no indication or notation on the cancelled check regarding what account it is to be credited to. The credit card in dispute is Mr. Kaymaz's personal credit card yet the check is drawn on the account of a business, "Alhambra." Additionally, the corresponding payment slip which Citibank attached to its memorandum indicates a payment due date of November 28, 2003 while this check was written on December 25, 2003. CP 62. Finally, the payment slip has no payment amount indicated in the "Please Enter Amount Of Payment Enclosed." Citibank cannot demonstrate that this single check establishes payment on Mr. Kaymaz's alleged debt.

Finally, the single cancelled check was written long before the applicable statute of limitations and should not be considered. Under RCW 4.16.040 the statute of limitations for contract is six years. But where, as here, Citibank must rely on parol evidence to establish the essential element of mutual assent, "then the contract is partly oral and the 3 year statute of limitations applies." *Cahn v. Foster & Marshall, Inc.*, 33 Wash.App. 838, 840-41, 658 P.2d 42 (1983). Thus, Citibank's claim reaches back, at best, to March, 2004. It should not be able to rely on a single check written in 2003 to support its claim.

## VI. CONCLUSION

For the reasons set forth above, Mr. Kaymaz respectfully requests that the Court of Appeals find that the trial court erred in granting Respondent's Second Motion for Summary Judgment and remand the case back to the trial court for further proceedings.

Respectfully submitted this 6<sup>th</sup> day of July, 2012.

GENDLER & MANN, LLP

By:   
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David S. Mann, WSBA #21068  
Attorneys for Mehmet Kaymaz

BANK OF AMERICA  
Westside Park 00007  
Washington

2733

ALHAMBRA  
101 PINE ST.  
SEATTLE, WA 98101  
PH. (206) 421-9371

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MEHMET KAYMAZ,  
  
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NO. 68609-7-I  
  
DECLARATION OF SERVICE

STATE OF WASHINGTON     )  
  )  
COUNTY OF KING         )     ss.

I, MARY BARBER, under penalty of perjury under the laws of the State of Washington, declare as follows:

I am the legal assistant for Gendler & Mann, LLP, attorneys for plaintiff herein. On the date and in the manner indicated below, I caused Brief of Appellant Mehmet Kaymaz be served by U.S. Mail on:

1 Malisa L. Gurule  
2 Suttell & Hammer, P.S.  
3 P.O. Box C-90006  
4 Bellevue, WA 98009  
5 (Attorneys for Plaintiff)

6 DATED this 6<sup>th</sup> day of July, 2012, at Seattle, Washington.

7 Mary Barber  
8 MARY BARBER

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