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No. 68609-7-I

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

CITIBANK, N.A.

Respondent

V.

MEHMET KAYMAZ

Appellant

APPEAL FROM KING CASE NO. 10-2-09716-3SEA

RESPONDENT'S BRIEF

CITIBANK, N.A.
c/o Suttell & Hammer, P.S.
Malisa L. Gurulé
PO BOX C-90006
Bellevue, WA 98009
425-455-8220
malisa@suttelllaw.com

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I. INTRODUCTION

This is a simple collection case in which the defendant Mehmet Kaymaz (hereafter “Kaymaz”), seeks to avoid paying a credit card debt that he incurred. Kaymaz has never denied the fact that he applied for, received, used, and made payments on a credit card account issued by plaintiff Citibank, N.A. (hereafter “Citibank”). Kaymaz did not submit a contravening affidavit to the trial court in response to Citibank’s Motion for Summary Judgment.

Kaymaz now claims that the trial court erred in determining whether genuine issues of material fact existed, and that the trial court erred in admitting evidence. As recognized by the trial court, Citibank’s evidence was admissible and clearly showed that Kaymaz entered into a credit card agreement with Citibank and that Kaymaz was liable for the debt that he incurred. The trial court found that Kaymaz’s admission of signing the check that made a payment on this account was enough for the plaintiff to make a prima facie case of liability. As a result, judgment was entered against the defendant. Citibank respectfully requests that this Court affirm the judgment that was entered on March 16, 2012.

II. STATEMENT OF THE CASE

Citibank issued Kaymaz a credit card account ending in 4502. CP 57. Kaymaz used the credit card to make purchases for goods and services. CP 57-243. Notably, Kaymaz made a balance transfer from

another credit card account to this Citibank account in the amount of \$10,000. CP 145. Kaymaz made consistent automatic monthly payments on the credit card account. CP 57-235. Kaymaz made only one payment by check, which was written on his business' bank account and signed by Kaymaz himself. CP 62-63, 111, and RP 8-10. Kaymaz defaulted by ceasing to make payments on the credit card account and was indebted to Citibank in the amount of \$26,585.26. CP 57.

On January 16, 2010, Kaymaz was served with a summons and complaint for the amount due and owing to Citibank. CP 1-7, 243. On March 9, 2010, Citibank filed the summons and complaint with the King County Superior Court. CP 1-7. On March 31, 2010, Citibank filed a motion for summary judgment to be heard on May 28, 2010. CP 8-44. On May 28, 2010, the Honorable Judge Suzanne Barnett denied the motion for summary judgment. CP 45.

On January 20, 2012, Citibank filed a second motion for summary judgment. CP 49-243. In the second motion for summary judgment, Citibank cured the defects in its previous motion for summary judgment by producing eight years of billing statements and a copy of a payment that was made on this account and signed by Kaymaz. CP 49-243. In response to Citibank's second motion for summary judgment, Kaymaz filed a pleading with the caption "Defendant (sic) Request to Dismiss the

Case.” CP 244-245. Instead of submitting an affidavit that was sworn to under penalty of perjury, as required by CR 56(e), Kaymaz filed his improper request to dismiss that contained nothing more than mere allegations. CP 244-245. Kaymaz did not provide any facts to contradict the evidence that was provided by Citibank. CP 244-245.

Citibank’s second motion for summary judgment was supported by the affidavit of Abbie Motley, an authorized agent of Citibank, who stated that Kaymaz owed a debt of \$26,585.26 to Citibank. CP 57. Also supporting the motion for summary judgment were more than eight years of billing statements with closing dates from January 3, 2002, through May 4, 2010. CP 65-235. In addition, Citibank provided a copy of a check for \$500 that was used to make a payment on this account. CP 62-63 and 111. The \$500 check was dated December 25, 2003, and was applied to this account on January 2, 2004. CP 62-63 and 111. Kaymaz stated on the record that this check was drawn on his business’ bank account and that he had signed the check. RP 8-10. Furthermore, the address on the check matches the address where the billing statements for this account were sent for more than eight years. CP 62-235.

The billing statements show detailed and itemized usage of the account by Kaymaz. CP 65-235. In particular, the billing statements show that Kaymaz made a balance transfer from another account to this

account in the amount of \$10,000. CP 145. The billing statements also show that throughout the life of the credit card account Kaymaz made monthly automatic payments on the credit card account using a designated bank account. CP 65-235. This is evident from the billing statements where the payments are posted as “AUTOPAY” and the disclaimer at the bottom of the billing statements reads “Your next Autopay automated payment of \$500.00 will be deducted from your designated bank account on XX/XX/XXXX.” CP 65-235. The billing statements also show international trips and corresponding purchases made in foreign currencies. CP 65-235. Kaymaz never submitted an affidavit stating that he did not make charges on the credit card account; Kaymaz never submitted an affidavit stating that he did not make payments on the credit card account; Kaymaz never submitted an affidavit denying that he was the holder of the credit card account. CP 244-245, 255-256.

As previously mentioned, Kaymaz filed a response to plaintiff’s second motion for summary judgment, captioned “Defendant (sic) Request to Dismiss the Case.” CP 244-245. Kaymaz’s response was improper under CR 56(e), as the response did not contain an affidavit that was sworn to under penalty of perjury. CP 244-245. Instead, Kaymaz’s response made mere allegations that there was no proof of a contract

between Kaymaz and Citibank because Citibank had not provided a copy of a signed agreement. CP 244-245.

Citibank filed a Reply in Support of Motion for Summary Judgment to address Kaymaz's pleading. CP 246-252. In its reply, Citibank argued that the Account Stated Doctrine allowed Citibank to show that Kaymaz assented to the terms of the credit card agreement by receiving billing statements for the credit card account and then making payments on the credit card account, and thus a signed agreement was not necessary. CP 246-252. Citibank also argued that it had shown detailed and itemized usage of the credit card account by Kaymaz, thus showing that Kaymaz had personally acknowledged the account and that it was not necessary to provide a copy of a signed agreement. CP 246-252. In response, Kaymaz filed an improper surreply in the form of an email that was captioned "Defendant's Reply to in (sic) Support of Motion to Dismiss the Case." CP 255-256. Again, Kaymaz failed to submit an affidavit that was sworn to under penalty of perjury, and instead his pleading consisted of mere allegations and general denials.

On March 16, 2012, the Honorable Judge Barnett heard argument on Citibank's second motion for summary judgment. RP 1-12. Judge Barnett granted Citibank's motion for summary judgment. CP 253-254.

Judge Barnett held that Citibank had met the Bridges and Ryan standards, and she made the following ruling:

The critical difference between this case and the Bridges and Ryan cases is the difference that Division II of the Court of Appeals noted in deciding the Bridges case, and it is what made Division II decide that a contract existed in the Ray case... in the Ray case, there were checks. There was some indication of back-and-forth, which is sufficient to establish the existence of the contract... In this case, we have that evidence. And Mr. Kaymaz has indicated that he signed that check. It is his signature. It is he authorized the withdrawal from his bank with respect to that draft, that check. And I don't have to go any further than that... that, together with the added weight of the ongoing charges and payments, which are circumstantial evidence, is sufficient to grant summary judgment in favor of [Citibank], and I will do so.

RP 11-12. Kaymaz subsequently filed this appeal on April 11, 2012. CP 257-260.

III. ARGUMENT

A. ISSUES ON APPEAL

1. Whether the trial court properly granted summary judgment.

B. STANDARD OF REVIEW

1. GRANTING OF SUMMARY JUDGMENT

An appellate court engages in a *de novo* review of a ruling granting summary judgment, engaging in the same inquiry as the trial court. Lybbert v. Grant County, 141 Wn.2d 29, 34 (2000). Summary judgment

is properly granted when the pleadings, affidavits, depositions, and admissions on file demonstrate that there is no genuine issue of material fact and that the moving party is entitled to summary judgment as a matter of law. CR 56(c), Hutchins v. 1001 Fourth Ave. Assocs., 116 Wn.2d 217 (1991). An appellate court may affirm an order granting summary judgment on any basis supported by the record. Truck Ins. Exchange v. Vanport Homes, Inc. 147 Wn.2d 751 (2002).

C. ANALYSIS

1. Summary Judgment was Appropriate as a Matter of Law Because There Were No Genuine Issues of Material Fact.

Summary Judgment is appropriate if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c). Pursuant to CR 56(e), an adverse party “may not rest upon the mere allegations or denials of his pleading, but his response, by *affidavits* or as otherwise provided in this Rule, must set forth *specific facts* showing that there is a genuine issue for trial.” CR 56(e) (emphasis added). Kaymaz failed to put forth any affidavits that set forth specific facts showing that there was a genuine issue for trial. Kaymaz did not submit an affidavit denying that he made purchases on the credit card account. CP 244-245, 255-256. Kaymaz did not submit an affidavit denying that he made payments on the credit card account. CP 244-245, 255-256. Kaymaz did

not submit an affidavit explaining that the amount owed is incorrect. CP 244-245, 255-256. Kaymaz did not submit an affidavit denying that he was the holder of the credit card account at issue. CP 244-245, 255-256.

Citibank's second motion for summary judgment was supported by the affidavit of Abbie Motley, an authorized agent of Citibank, who stated that Kaymaz applied for and was issued the Citibank credit card account, that Kaymaz used the credit card to purchase goods and services, that Kaymaz subsequently failed to make payments pursuant to the terms of that card agreement, and that as a result Kaymaz was in default of those terms and owed a debt of \$26,585.26 to Citibank. CP 57. Kaymaz failed to submit a contravening affidavit, as required by CR 56(e). Instead of submitting an Affidavit that was sworn to under penalty of perjury as required by CR 56(e), Kaymaz supplied the court with nothing more than mere allegations. Because Kaymaz did not provide any evidence in contradiction to that provided by Citibank, as required by CR 56, there were no issues of material fact and Summary Judgment was appropriate.

2. Under the Account Stated Doctrine, Citibank does Not have to Provide a Copy of the Original Credit Card Application.

Under the Account Stated Doctrine, the account stated is “a manifestation and assent by debtor and creditor to a stated sum as an accurate computation of an account due to the creditor.” Sunnyside Valley

Irrigation Dist. v. Roza Irrigation Dist., 124 Wn.2d 312, 315 (1994) (quoting 2 Restatement (Second) of Contracts § 282(1), at 386 (1981)). One of the purposes of the Account Stated Doctrine is to permit the court to impute an agreement in the absence of an explicit agreement about the amount. Sunnyside, 124 Wn.2d at 317. While there must be some form of assent to the account, that assent may be implied from the circumstances and acts of the parties. Id. at 316 (quoting Shaw v. Logue, 58 Wash. 219, 221 (1910)). An account stated is an admission of the facts asserted and a promise by the debtor to pay those sums that are indicated. Sunnyside, 124 Wn.2d at 315.

Citibank provided copies of more than eight years of billing statements with closing dates from January 3, 2002, through May 4, 2010. CP 65-235. In addition, Citibank provided a copy of a check for \$500 that was used to make a payment on this account. CP 62-63 and 111. The \$500 check was dated December 25, 2003, and was applied to this account on January 2, 2004. CP 62-63 and 111. The check was written on a bank account for Kaymaz's business and the check was signed by Kaymaz. RP 8-10. On the record, Kaymaz told the court that this check was from his business account and that he signed it:

Only-the only piece of evidence that offered here beyond that [inaudible] insufficient in the case cited about in single check dated December 25th, 2003 drawn on the-my

account-my business account and appropriated [sic] signed by the-by me.

RP 8. The address on the check matches the address where the billing statements were sent for more than eight years. CP 62-235. It is uncontroverted that this check was written by Kaymaz and that it was applied to the Citibank credit card account.

The billing statements also show that throughout the life of the credit card account Kaymaz made monthly automatic payments to Citibank using a designated bank account. CP 65-235. This is evident from the billing statements where the payments are posted as "AUTOPAY" and the disclaimer at the bottom of the billing statements reads, "Your next Autopay automated payment of \$500.00 will be deducted from your designated bank account on XX/XX/XXXX." CP 65-235. Kaymaz never objected to the amounts listed in the billing statements, but rather Kaymaz continued to make payments on the account. By not objecting to the amounts listed on the billing statements, and by making payments on the account as stated in the billing statements, Kaymaz assented to the stated sum in the billing statements as an amount due to Citibank. As such, the original credit card application was not necessary to prove that Kaymaz promised to pay Citibank.

3. Under Discover Bank v. Ray, Citibank does Not have to Provide a Copy of the Original Credit Card Application.

In Discover Bank v. Ray, 139 Wn. App. 723 (2007), the defendant claimed that without a copy of a signed agreement there was insufficient proof to show that the defendant assented to the credit card agreement. The Court of Appeals held that a credit cardholder accepted the terms of the cardmember agreement through the conduct of using the credit card, such that an enforceable contract was formed between the cardholder and the issuer, where the cardmember agreement stated that the use of the credit card constituted an acceptance of the agreement. Here, on page two of Citibank's credit card agreement, under the section titled *Your Account*, it states in the very first sentence, "You agree to use your account in accordance with this agreement." CP 238. It is axiomatic to credit card agreements that by use of a credit card, a cardholder incurs liability for the charges made.

Kaymaz has attempted to argue that there is no proof of a credit card agreement between himself and Citibank because Citibank has not shown a copy of a credit card application signed by Kaymaz. However, this argument fails under the Ray standard because Kaymaz used the credit card for numerous years and Kaymaz made payments on the credit card throughout the years, thus, Kaymaz accepted the terms of the credit card agreement.

4. Under Discover Bank v. Bridges and Citibank v. Ryan, Citibank does Not have to Provide a Copy of the Original Credit Card Application.

Kaymaz alleges that Citibank has not met the summary judgment standard as set forth in Bridges and Ryan. In Bridges, this Court ruled that the bank had to show that the Defendant had mutually assented to the credit card agreement and personally acknowledged the account. Discover Bank v. Bridges, 154 Wn. App. 722, 727 (2010). The Court ruled that personal acknowledgement of the account could be proven a variety of different ways, including a signed agreement between the parties, through copies of checks or electronic payments, through detailed itemized proof of the card's usage, or through other evidence of the Defendant's personal acknowledgement of the account. Id. at 727-728. In Citibank v. Ryan, the Court of Appeals Division I reiterated these ways that the bank can show the Defendant's personal acknowledgement of the credit card account. Citibank v. Ryan, 160 Wn. App. 286, 294 (2011).

Here, Citibank has provided all billing statements on the account from 2002 through 2009. CP 65-235. The billing statements show all purchases and payments made on the account during that eight year period. The billing statements clearly show detailed and itemized usage of the account by Kaymaz. CP 65-235. In particular, the billing statements show that Kaymaz made a balance transfer from another account to this

account in the amount of \$10,000. CP 145. In addition, Citibank provided a copy of a check for \$500 that was used to make a payment on this account. CP 62-63 and 111. The check was written on a bank account for Kaymaz's business and the check was signed by Kaymaz. RP 8-10. The address on the check matches the address where the billing statements were sent for more than eight years. CP 62-235. The \$500 check was dated December 25, 2003, and was applied to this account on January 2, 2004. CP 62-63 and 111. Furthermore, Kaymaz made continuous automatic monthly payments on the account throughout those eight years. CP 65-235.

Citibank clearly provided detailed and itemized usage of the account by showing years of purchases, by showing years of automatic payments, and by providing a copy of a payment that was signed by Kaymaz and applied to this account. CP 62-235. Both Bridges and Ryan allow assent to be proven by showing detailed and itemized usage of the account. Here, the Bridges and Ryan standards have been met because Citibank has provided the listing of every purchase and payment that was made on the account since 2002, along with a copy of a check that was signed by Kaymaz and applied to this account. Citibank has clearly provided a detailed and itemized usage of the account to show Kaymaz's personal acknowledgement. Furthermore, Citibank has shown Kaymaz's personal

acknowledgement of the account by providing a billing statement where Kaymaz made a balance transfer from another credit card account to this account. CP 145.

Citibank has proven assent to the credit card agreement pursuant to the summary judgment standard as set forth in Bridges and Ryan. Because Kaymaz did not provide any evidence in contradiction to that provided by Citibank, as required by CR 56, there were no issues of material fact and summary judgment was appropriate. Citibank's motion for summary judgment was proper and should be affirmed.

IV. CONCLUSION

The decision of the trial court in admitting evidence into the record and granting Summary Judgment on Citibank's claim should be affirmed. Citibank respectfully requests that this Court affirm the judgment that was entered on March 16, 2012.

Dated this 7 day of September, 2012

SUTTELL & HAMMER, P.S.
Attorneys for Respondent



Malisa L. Gurule
WSBA #40602
P.O. Box C-90006
Bellevue, WA 98009
Telephone: (425) 455-8220

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CITIBANK, N.A.

Respondent

vs.

APPELLATE COURT

No. 68609-7-I

CERTIFICATION OF MAILING

MEHMET KAYMAZ

Appellant

TO: Clerk of the Court

AND TO: Appellant

I certify that on 7 of September, 2012, I mailed, postage prepaid, a copy of

Respondent's Brief to:

David S. Mann
Gendler & Mann, LLP
1424 Fourth Avenue, Suite 715
Seattle, WA 98101



Malisa L. Gurulé, WSBA #40602
Attorney for Respondent