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MAY 21 2012

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

APPEAL NO. : 305961

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON

DIVISION III

DISCOVER BANK, ISSUER OF THE DISCOVER CARD,

Respondent,

v.

ALAINE GARDNER, et ux,

Appellants.

BRIEF OF RESPONDENT

APPEAL FROM YAKIMA COUNTY SUPERIOR COURT
Honorable Michael G. McCarthy

BISHOP, WHITE, MARSHALL &
WEIBEL, P.S.
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A. RESTATEMENT OF ISSUES

1. Whether the Trial Court Correctly Considered the Affidavit of Natasha Szczygiel, and the Exhibits Attached Thereto, Filed in Support of Discover Bank's Motion for Summary Judgment.

2. Whether the Trial Court Correctly Granted Discover Bank's Motion for Summary Judgment.

B. RESTATEMENT OF THE CASE

1. Statement of Facts

Alaine Gardner ("Gardner") opened a credit card account with Discover Bank ("Discover") on or about June 9, 2000, which subsequently fell into default. CP 36. Discover Bank then began legal proceedings to collect on the debt based on Gardner's breach of contract. CP 1-5. Ultimately, Discover moved for Summary Judgment against Alaine Gardner and "DOE I." CP 31-34. In support of its motion, Discover also filed an Affidavit in Support of Judgment, signed by Natasha Szczygiel ("Szczygiel Affidavit"). CP 35-36. Attached to the Szczygiel Affidavit was a "Pre-Approved Discover Platinum America Acceptance Form," copies of over thirty cancelled checks showing payments made on Ms. Gardner's account, account statements with closing dates from May 13,

2005 (at which time the statements reflect a zero balance) to November 13, 2010, and the Cardmember Agreement. CP 37-203.

2. Procedural History

This case was filed in the Yakima Superior Court on July 1, 2011. CP 1. Having received an answer from the Defendants, Discover filed a Motion for Summary Judgment on October 14, 2011. CP 31-32.

On November 2, 2011, Tom Gardner filed a lengthy opposition to Discover's Motion for Summary Judgment. CP 206-228. Attached as Exhibits to his Opposition, were an Affidavit in Support of his Opposition, Motions to Strike the Plaintiff's documentary evidence, and a Motion to Strike the Affidavit of Natasha Szczygiel. CP 229-254. On November 14, 2011, Discover filed an equally lengthy reply. CP 255-278. Attached thereto was a Declaration of Marisa A. Bender, as well as a Supplemental Affidavit, signed by Robert Adkins, and a copy of the cardmember agreement that governed the account at the time it was opened. CP 280-303. On January 4, 2012, the court granted Discover Bank's motions for summary judgment against Gardner, noting on its order that it had "reviewed all of the pleadings on file." CP 305-306.

Gardner filed a Notice of Appeal on February 2, 2012. CP 309. On March 2, 2012, Defendant's Designation of Clerk's Papers was filed with the Court. CP 316.

A. ARGUMENT

On Appeal, Gardner raises three assignments of error. First, Gardner argues that the trial court erred by considering the exhibits submitted by Discover because they were attached to a "third party affidavit," an affidavit which Gardner argues is deficient. Gardner's second and third assignments of error can be characterized as, essentially, one argument: that the trial court erred in granting summary judgment in Discover's favor when issues of material fact allegedly remained due to the insufficiency of the affidavit. These arguments are unpersuasive in light of the substantial record properly before the trial court and the trial court's ruling should be upheld.

1. THE TRIAL COURT PROPERLY CONSIDERED AND ADMITTED INTO EVIDENCE DISCOVER BANK'S AFFIDAVIT IN SUPPORT OF JUDGMENT UNDER CR 56(A) AND CR 56(E), AND THE EXHIBITS ATTACHED THERETO.

This Court reviews a trial court's decision on the admissibility of evidence in a summary judgment proceeding de novo. *State v. Lee*, 144 Wn.App. 462, 466, 182 P.3d 1008 (2008). In the present case, the trial

court properly considered Discover Bank's affidavits under the requirements of CR 56(a) and CR 56(e), as well as all of the exhibits attached thereto under RCW 5.45.020 and Washington's Rules of Evidence.

A. The trial court properly considered the affidavit under CR 56(a) and (e).

Under CR 56(a), a party seeking summary judgment may move, "with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof." CR 56(a). In the present case, Discover Bank filed with the court the Szczygiel Affidavit. CP 35-36. The affidavit complied with CR 56(e), which provides in pertinent 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 therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith.

CR 56(e). Ms. Szczygiel's statement is sworn. CP 35. In that sworn statement, she states that she makes the affidavit "on the basis of [her] personal knowledge." CP 35. She further shows that she is competent to testify to the matters stated therein by explaining that the affidavit is made upon her "review of the records maintained by Discover with respect to the account at issue," CP 35, and that in her job as an "account manager in

the Attorney Placement Department,” she is responsible for “managing and overseeing Discover accounts that have resulted in contested litigation;” and that “included within the scope of [her] responsibilities includes the performance of collection and recovery services.” CP 35. Ms. Szczygiel also states that she is a “Designated Agent and a Custodian of the records.” CP 35. She further swears that the documents referred to in the affidavit and attached thereto are true and correct copies. CP 36.

The description of Ms. Szczygiel’s job, the scope of her responsibilities, the basis upon which she makes the affidavit, as well as her sworn statement that it is made upon her personal knowledge; render the affidavit admissible under CR 56(e).

b. The Affidavit is not hearsay.

Gardner mistakenly argues that, because “Discover Bank” is the plaintiff and Ms. Szczygiel is an employee of “DB Servicing Corporation,” Ms. Szczygiel lacks personal knowledge upon which to base her affidavit. This issue is addressed within the affidavit where Natasha Szczygiel explains in that DB Servicing Corporation is the servicing affiliate of Discover Bank. CP 35. The issue is also addressed in the Supplemental Affidavit, signed by Robert Adkins, which further

explains all of the duties that DB Servicing Corporation performs in its capacity as servicing affiliate. CP 283-284.

Based on Gardner's argument that the Szczygiel affidavit is made by a "third party" Gardner further argues that the affidavit is therefore made on the basis "mere information and belief at best." This is simply an inaccurate reading of the language contained in the affidavit. The Appellant characterizes the "information and belief" language contained in the Szczygiel affidavit as providing the basis for all of the substantive statements contained therein. *Appellant's Brief* at p. 4. The Affidavit actually states:

"The Undersigned is informed and believes, and therefore alleges, that at the time of the service and filing of the summons and Complaint herein, and at all times since, said Defendant(s) is not a person in the military service of the United States, as defined in the Servicemembers Civil Relief Act, and that the Defendants are not infants or incompetent persons."

The Appellant's characterization of the "information and belief" language as providing the basis for the entire affidavit does not comport with the verbiage contained in the first paragraph of the affidavit, which specifically states that the affidavit is made upon the basis of Ms. Szczygiel's "personal knowledge and a review of the records..." Furthermore, while the first page of the affidavit, at line 21, states that the

affidavit is based on a “review of the records maintained by **Discover** with respect to the account at issue,” (**emphasis added**), the affiant makes it clear that she refers to both “DB Servicing Corporation” and “Discover Bank” collectively as “Discover” at the outset of the affidavit. CP 35, at line 17. On that basis, the Court should not be persuaded by this mischaracterization of the facts contained in the record before it.

In *Discover Bank v. Bridges*, 154 Wn.App. 722, 226 P.3d 191 (2010), Discover Bank filed a summary judgment motion seeking payment on a credit card account in default. The Bridges unsuccessfully argued, as Gardner does here, that the affidavit was insufficient. *Id.* at 725. The Affidavit presented in *Bridges* was strikingly similar to the one before the court in this case. The Court upheld the sufficiency of the affidavit, noting that the affiant stated in his affidavit that 1) he worked for an affiliate of Discover Bank; 2) he had access to the defendant’s account records in the course of his employment; 3) he made his statement on the basis of his personal knowledge and a review of the records under penalty of perjury; and 4) the attached account records were true and correct copies made in the ordinary course of business. *Id.*

Similarly, in this case, Ms. Szczygiel swears that she works for DB Servicing Corporation, “the servicing affiliate of Discover Bank;” that her

statement is made on the basis of her personal knowledge and a review of the records; that she is responsible for managing and overseeing Discover Bank accounts that have resulted in contested litigation; and that the records attached to his affidavit are true and correct copies. CP 35-36. Finally, she states that the records are maintained in the regular course of business at or near the time of the events recorded. CP 35. As in *Bridges*, the Court should find that the trial court did not abuse its discretion in considering the affidavit. *Id.* at 726.

- c. The records attached to the Affidavit in Support of Judgment are admissible.
 - i. The records attached to the Szczygiel Affidavit as admissible under the business records exception to the hearsay rule.

The Uniform Business Records as Evidence Act (UBRA), ch. 5.45 RCW, makes evidence that would otherwise be hearsay competent testimony. *State v. Ziegler*, 114 Wash.2d 533, 537, 789 P.2d 79 (1990). As paraphrased in *Zeigler*, to be admissible under the business records exception, the business record must (1) be in record form; (2) be of an act, condition, or event; (3) be made in the regular course of business; (4) be made at or near the time of the fact, condition, or event; and (5) the court must be satisfied that the sources of information, method, and time of preparation justify admitting the evidence. *Ziegler*, 114 Wash.2d at 538,

789 P.2d 79 (citing RCW 5.45.020). Business records are presumptively reliable if made in the regular course of business and there was no apparent motive to falsify. *Ziegler*, 114 Wash.2d at 538, 789 P.2d 79 (citing *State v. Rutherford*, 66 Wash.2d 851, 405 P.2d 719 (1965)). The trial court is not required to examine the person who actually made a record to admit the record under the business record exception. *State v. Iverson*, 126 Wash.App. 329, 337–38, 108 P.3d 799 (2005) (citing *Cantrill v. Am. Mail Line, Ltd.*, 42 Wash.2d 590, 607–08, 257 P.2d 179 (1953)). Rather, testimony by one who has custody of the record as a regular part of his work or who has supervision of its creation will be sufficient to introduce the record. *Iverson*, 126 Wash.App. at 338, 108 P.3d 799 (citing *Cantrill*, 42 Wash.2d at 608, 257 P.2d 179). Finally, a trial judge is presumed to know the rules of evidence and is presumed to have considered only admissible evidence. *In re Harbert*, 85 Wn.2d 719, 729, 538 P.2d 1212 (1975).

Gardner incorrectly argues on appeal that, because Ms. Szczygiel never states that she took part in the drafting or creation of the records upon which her sworn affidavit relies, she cannot claim that they were “really created in the regular course of business,” and therefore there is an insufficient foundation for admission. *Appellant’s Brief* at 5-6. However, Washington courts have held that business records are admissible through

the testimony of a person who relies on those records in the course of their daily business activities, but did not create them. *State v. Iverson*, 126 Wash.App. 329, 108 P.3d 799 (2005).

In *Iverson*, jail officers were permitted to lay an evidentiary foundation for the admission of jail booking records under the business records exception to the hearsay rule, even though they did not actually enter the relevant record themselves, but where they were “familiar with the booking system and used it to enter data and pictures of other persons booked into jail, in their regular course of business... [and they] also routinely relied on the information prepared by fellow officers in their ordinary course of business to identify persons who previously had been booked into jail.” *Id.* at 339, 108 P.3d 799, 803 – 804.

In her affidavit, Mr. Szczygiel explains that as an Account Manager in the Attorney Placement Department, she is responsible for Discover accounts that have resulted in contested litigation, and that she makes the affidavit on the basis of a review of Gardner's account records, which are maintained in the regular course of business at or near the time of the events recorded. CP 35. As such, under RCW 5.45.020, the account records are admissible in that it is clear that Ms. Szczygiel regularly works with Discover account records and is a custodian of

records, as well as her sworn statement that those records are maintained in the regular course of business at or near the time of the recorded event.

ii. There is no “Chain of Custody” deficiency in the affidavit or the attached documents.

Gardner argues that Discover has failed to show a proper “chain of custody” with regard to the proffered business records. This argument mistakenly conflates two unrelated evidentiary rules. “Chain of custody” generally refers to the rule that, before a court admits physical evidence, the proponent of such evidence must establish a chain of custody, including the circumstances surrounding the preservation and custody of the evidence. *State v. Roche*, 114 Wn.App. 424, 436, 59 P.3d 682 (2002). The records offered in support of Discover’s motion for summary judgment were not offered as the actual physical records, but rather as business records. Therefore, Discover need not show that they are, for example, the actual statements that were mailed to Ms. Gardner, or the actual checks they received, since they are offered as copies of business records.

2. THE TRIAL COURT PROPERLY GRANTED DISCOVER BANK’S MOTION FOR SUMMARY JUDGMENT.

The law underpinning Summary Judgment is well-settled and

familiar. Under CR 56(c), summary judgment is appropriate when “there is no genuine issue as to any material fact and...the moving party is entitled to a judgment as a matter of law.” CR 56(c). The court should affirm the grant of summary judgment if, from all the evidence, it is clear that reasonable persons could reach but one conclusion. *In the Matter of the Parentage of J.M.K.*, 155 Wn.2d 374, 386, 119 P.3d 840 (2005).

The standard of review on appeal from an order on summary judgment is de novo. *Id.* The appellate court engages in the same inquiry as the trial court. *Id.* In reviewing an order granting summary judgment, the appellate court will consider the evidence in the light most favorable to the nonmoving party. *Champagne v. Thurston County*, 163 Wn.2d 69, 76, 178 P.3d 936 (2008). The Court will only consider the evidence and issues considered by the trial court. *Ambach v. French*, 141 Wn.App. 782, 791, 173 P.3d 941 (2007).

In this case, the trial court had before it an affidavit of a competent witness, as well as extensive evidence clearly substantiating the existence of a valid contract which was in default. Because the argument that the affidavit and the attached exhibits should not have been considered fails, and Gardner raised no issues of material fact before the trial court, summary judgment was properly granted.

a. There is sufficient proof of a valid contract.

As with most credit card issuers, the terms and conditions of the cardmember agreement in the present case are accepted when a person uses the credit card or fails to cancel the account within the given time. The cardmember agreement states in pertinent part, “Your Acceptance of this Agreement. The use of your Account or a Card by you or an Authorized User, or your failure to cancel your Account within 30 days after receiving a Card, means you accept this Agreement....” CP 132, 287. Here, Gardner accepted the terms of the cardmember agreements when she did not cancel the Account and used the Discover Card.

Courts in other jurisdictions have held that credit card companies are not required to provide a signed credit card agreement in order to prove mutual assent. For instance, in *Citibank South Dakota v. Santoro*, 210 Or. App. 344, 150 P.3d 429 (2006), the Oregon Court of Appeals affirmed summary judgment in favor of the creditor. The card holder contended that there was no evidence of mutual assent because he did not sign the cardmember agreement. The Court disagreed. The Court noted language in the cardmember agreement which was similar to the one at issue here, which provided that the cardmember is bound by the terms of the agreement by use of the card or failure to cancel the account. The

Court concluded that Santoro's "conduct" in using the card "constituted mutual assent to the terms of the credit card agreement." Further, as in our case, Citibank submitted a standard copy of the cardmember agreement along with credit card statements and an affidavit showing the balance due. *Id.* at 350. The Court held:

Santoro did not directly contravene that evidence; he merely denied that his account was in default because he did not have an agreement. First, as we have concluded, Santoro is incorrect that he did not have an agreement with Citibank. Second, Santoro's denial of the existence of the agreement does not refute Citibank's assertions that he used the credit card and incurred the debt, and it therefore does not establish that there is a genuine issue of material fact as to his default. The trial court did not err in granting summary judgment to Citibank. *Id.* at 350 (citations omitted).

The *Santoro* case relied on the case of *Davis v. Discover Bank*, 277 Ga. App. 864, 627 SE 2.d 819 (2006). In *Davis*, the cardholder argued that Discover had "presented no evidence that Appellant had ever signed an agreement or agreed to be personally obligated to the Bank." *Id.* at 865. The *Davis* Court held:

Discover need not produce a copy of Davis's application to establish the existence of a valid credit card debt. "[A] contract was effected in this case when the plaintiff issued its credit card to the defendant to be accepted by [him] in accordance with the terms and conditions therein set forth, or at [his] option to be rejected by [him]. Such rejection need take the form of returning the card, or simply its non-use. The issuance of the card to the defendant amounted to

a mere offer on the plaintiff's part and the contract became entire when defendant retained the card and thereafter made use of it. The card itself constituted the formal and binding contract. *Id.* at 820-21, citing *Read v. Gulf Oil Corp.*, 114 Ga. App. 21, 22, 150 S.E.2d 319 (1966).

The Courts in *Heiges v. JP Morgan Chase Bank, N.A.*, 521 F. Supp.2d 641, 647 (N.D. Ohio 2007) and *Taylor v. First North American Nat'l Bank*, 325 F. Supp.2d 1304, 1313 (M.D. Ala 2004) also held that use of the card constitutes a binding agreement. For instance, in *Heiges*, the Federal District Court held that "Heiges' argument that he never signed the underlying Agreement misses the relevant point. By simply using the card, he agreed to be bound by the Agreement and all its terms." *Heiges*, 521 F. Supp.2d at 647.

Furthermore, as stated earlier, the parties' Agreements, by their terms, do not require a signature and there is no signature line. The cardmember accepts the terms of the Agreement by using the account. The evidence on the record illustrates that Gardner did so.

Even under the standard set forth in recent Washington decisions, there is ample evidence that Gardner assented to the terms of the written Cardmember Agreement. Division I of the Washington Court of Appeals recently held in *Citibank South Dakota N.A. v. Ryan* 160 Wash.App. 286, 247 P.3d 778 (2011), that summary judgment on a defaulted credit card

was improper where there was insufficient evidence of the Defendant's "personal acknowledgment of the account," in addition to the unsigned credit card agreement. *Id.* However, the court went onto specify that one way that personal acknowledgment could be shown would be through cancelled checks. *Id.* at 293. In this case, the evidence before the court, which included numerous cancelled checks and a handwritten application, leaves no question that Gardner personally acknowledged the account and therefore accepted the terms of the agreement.

b. Discover commenced action within the Statute of Limitations.

Gardner argues that, without a written contract, Discover cannot show that it filed its suit within the three year statute of limitations prescribed by Wash. Rev. Code 4.16.080(3). This argument fails for two reasons. First, the statute of limitations for breach of contract commences on the date of breach. *McGowan v. Pillsbury Co.*, W.D.Wash.1989, 723 F.Supp. 530. Here, the breach occurred the date of the last payment received by Discover. This date, as reflected in the record, was May 3, 2010. CP 196. The suit was filed on January 4, 2012, well within 3 years of the date of breach.

However, based on the rationale explained in the recent cast of *Unifund CCR Partners v. Sunde*, 163 Wash.App. 473, 485, 260 P.3d 915,

922 (2011), Washington's six-year statute of limitations actually applies here. In *Sunde*, the court held that, where the governing contract chooses Delaware law (as does the contract in this matter), based on the interaction between Delaware's tolling statute and Washington's adoption of the Uniform Conflict of Laws-Limitations Act, ch. 4.18 RCW, Washington's six-year applies. Wash. Rev. Code 4.18; *Id.*

- c. Gardner raised no genuine issue of material fact in response to Discover Bank's motion for summary judgment.

Under CR 56(c), the defendant "may not rest upon the mere allegations or denials of his pleading," but instead must bring forward evidence setting forth "specific facts showing that there is a genuine issue for trial," or summary judgment "shall be entered against him." CR 56(e). "[C]onclusory allegations, speculative statements or argumentative assertions that unresolved factual matters remain are not sufficient to preclude an order of summary judgment." *Turngren v. King County*, 104 Wn.2d 293, 314, 705 P.2d 258 (1985).

In response to Discover Bank's motion for summary judgment and the large volume of supporting evidence offered in support thereof, Gardner argued that the affidavit and documents provided lacked a proper evidentiary foundation, were based on hearsay, and should be stricken.

Therefore, Gardner argued, genuine issues of fact remained as to whether an agreement existed, or whether it was in default. Because the court was correct in considering the affidavit and attached records, and Gardner offered no substantive evidence to call into question the existence of an agreement, or any error in a particular charge on the account, summary judgment should be upheld.

Gardner did submit an affidavit in support of her opposition, but it fails to raise any genuine issue of material fact. Much of the Gardner Affidavit consists of statements that are inadmissible hearsay and/or irrelevant because it is signed by Tom Gardner, not Alaine Gardner, the actual account holder. These conclusory and argumentative statements include “No credit card is applied for or issued to either my wife or myself without my knowledge and approval,” (this hearsay fails to address the copy of a handwritten credit card application signed by Alaine Gardner that was attached to the Szczygiel Affidavit); “I am responsible for the payment of all debts incurred by our marital community,” (whether or not Mr. Gardner believes he is “responsible” for the payments of his community debts is irrelevant and again, he offers no exception to the hearsay rule as to why he can claim that Mrs. Gardner never made any such payment); and “I never agreed to the terms of the Agreement Plaintiff relies on in this action,” (this statement is irrelevant because the credit

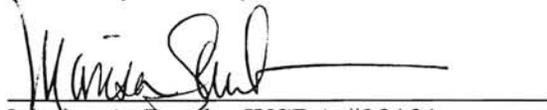
card agreement is in the name of Alaine Gardner). CP 230-232. Gardner offers no explanation for the cancelled checks offered into evidence, the voluminous record of charges and credits contained in the statements, nor is any argument as to a miscalculation of amount owed offered.

D. CONCLUSION

For the reasons set out above, Discover Bank respectfully requests that the Court affirm the trial court's grant of judgment. The affidavit and exhaustive records provided in support thereof fully supported the Discover's claim, and Gardner's response failed to raise an issue of material fact which would preclude the entry of judgment, which was appropriate as a matter of law.

Respectfully submitted this 16th day of May, 2012.

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