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No. 68609-7-I

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

MEHMET KAYMAZ,

Appellant,

v.

CITIBANK, N.A.

Respondent.

REPLY BRIEF OF APPELLANT MEHMET KAYMAZ

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I. INTRODUCTION

Appellant Mehmet Kaymaz agrees with respondent Citibank, N.A. (“Citibank”) that this is a simple collections case. But not for the reasons Citibank asserts. Citibank maintains that Kaymaz had an affirmative duty to disprove the existence of a contract between himself and Citibank. Citibank fails to recognize that as plaintiff and moving party it had the initial burden of proof.

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 with Kaymaz’s signature. But that check was from a separate business entity, made out only to “Citi Bank” with no other account information, and written over eight years ago. Under the rule set out in both *Citibank v. Ryan*, 160 Wn. App. 286, 291, 247 P.3d 778 (Div. 1, 2011) and *Discover Bank v. Bridges*, 154 Wn. App. 722, 727, 226 P.3d 191 (Div. 2, 2010), this evidence is insufficient to show the existence of a valid enforceable contract.

II. ARGUMENT IN REPLY

A. Kaymez Does Not Object to the Admission of Evidence, Only to the Tendency of That Evidence to Support Summary Judgment

Citibank begins by asserting that “Kaymaz ... claims ... that the trial court erred in admitting evidence.” Citibank Resp. at 1. This is not correct. Kaymaz in his brief neither argued that Citibank’s evidence was irrelevant nor that it was not admissible. To the contrary, Kaymaz accepted Citibank’s evidence but maintains that the totality of Citibank’s admitted evidence, under the law, does not demonstrate the existence of a valid contract between the parties.

Citibank repeatedly asserts that Kaymaz (who was acting *pro se* at the time of summary judgment) did not submit a proper affidavit in opposition to its motion. While this may be true, Citibank ignores that consistent with CR 56(c), Kaymaz did at least submit a responsive pleading asserting that he “did not open an account with Citibank.” CP255-256. CR 56(c) provides that:

The judgment sought shall be rendered forthwith if 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 the moving party is entitled to a judgment as a matter of law.

(emphasis added).

More importantly, whether or not Kaymaz submitted contrary evidence is largely irrelevant. Citibank argues here, as it did before the trial court, that Kaymaz necessarily must lose because he failed to submit a proper contravening affidavit at the time of summary judgment. Citibank's argument ignores, however, that the moving party bears the initial burden of demonstrating the absence of an issue of material fact. *Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989). Citibank further ignores that the evidence, and all reasonable inferences that can be drawn from the evidence, must be considered in the light most favorable to the nonmoving party. *Id.*

As the plaintiff and moving party Citibank was required to come forward with evidence proving the existence of a valid contract. The burden of proving a contract, whether express or implied, is on the party asserting it, and it 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. at 291. 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. at 727. Whether or not Kaymaz submitted a proper affidavit, the evidence submitted by Citibank does not demonstrate that it had a valid and enforceable contract with Kaymaz.

B. *Discovery Bank v. Ray* is readily distinguishable

In *Discover Bank v. Ray*, 139 Wn. App. 723, 725-27, 162 P.3d 1131 (2007), Division III 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. 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). The above language of the court in *Ray* clearly indicates that the checks in that case were shown to be made as payment on the actual disputed account.

In the present case, there is only one check, written outside of the statutory period for collection on a debt (*See* RCW 4.16.040), drawn on Petitioner’s business rather than his personal account, and with no notation or payment clip indicating that it is a payment on the disputed account. In *Ray*, Discover Bank provided multiple cancelled checks that were shown to have been made as payment on the disputed account. A single cancelled check that cannot be shown to be a payment on the actual

disputed account does not rise to the same standard as the evidence presented in *Ray*.

C. Both *Discover Bank v. Bridges* and *Citibank v. Ryan* are Controlling

Under the rule set forth in both *Citibank v. Ryan* and *Discover Bank v. Bridges*, Citibank did not meet its burden of proof to establish the existence of a mutually assented to contract between the parties because there was no proof of acknowledgement of the account by Kaymaz. *Citibank v. Ryan*, 160 Wn. App. at 291; *Discover Bank v. Bridges*, 154 Wn. App. at 727.

In order to show that there is a valid contract established through mutual assent, Citibank had to have admitted evidence of such assent by way of cancelled checks which actually evinced payment on the disputed account. Self-generated monthly statements summarizing alleged account balances and payments thereon are not sufficient to make a showing of mutual assent. An affidavit an “authorized agent” of Citibank is also not sufficient to make a showing of mutual assent. *See Ryan*, 160 Wn. App. at 288 and *Bridges*, 154 Wn. App. at 727.

The only single fact on which either of these cases may be distinguishable from the present case is the fact of the one cancelled check with no notation or associated payment slip presented as evidence by Citibank at the time of Summary Judgment. A single outdated check,

issued by a separate business interest, to a generic “Citi Bank,” is insufficient to demonstrate mutual assent.

D. The Account Stated Doctrine is Not Applicable

Relying principally on *Sunnyside Valley Irr. Dist. v. Roza Irr. Dist.*, 124 Wn.2d 312, 877 P.2d 1283 (1994), Citibank seeks to invoke the “accounts stated” doctrine to support the existence of a valid contract. As quoted by the *Sunnyside Valley* court, the law governing accounts stated was explained in the 1910 decision in *Shaw v. Lobe*, 58 Wash. 219, 221, 108 P. 450 (1910):

To impart to an account the character of an account stated it must be mutually agreed between the parties that the balance struck thereon is the correct amount due from the one party to the other on the final adjustment of their mutual dealings to which the account relates. The mere rendition of an account by one party to another does not show an account stated. *There must be some form of assent* to the account, that is, *a definite acknowledgment of an indebtedness in a certain sum.... True, assent may be implied* from the circumstances and acts of the parties, *but it must appear in some form.*”

(emphasis added by Sunnyside Valley Court).

Using accounts stated, the court in *Sunnyside Valley* confirmed the existence of a mutually assented to contract under facts very different from the facts in the present case. In *Sunnyside Valley* - a case which

involved a dispute over alleged overpayment of maintenance bills on a joint system of drainage channels by one irrigation district to another - the two parties to the case met regularly to discuss both the maintenance of the drainage system and the amounts that were billed from one party to the other. Further, while the evidence demonstrated that the opposing party “had concerns” about the bills over several years he still paid the bills without protest. 124 Wn.2d at 317.

In this case, however, there is no evidence of assent by Kaymaz in any form. There is no “definite acknowledgment of an indebtedness in a certain sum.” As discussed above, self-generated electronic statements and the single check do not demonstrate assent.

III. 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 reverse and remand the case.

Respectfully submitted this 19th day of October, 2012.

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