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No. 69903-2-I

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

CITIBANK, N.A.

Respondent

V.

MARGARET & LEON CARTER

Appellant

APPEAL FROM KING COUNTY CASE NO. 10-2-36779-9 SEA

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 Appellant Margaret Carter (hereafter “Carter”), seeks to avoid paying a credit card debt that she incurred. Carter has never denied the fact that she applied for, received, used, and made payments on a Sears Premier Mastercard credit card issued by Respondent Citibank, N.A. (hereafter “Citibank”). Carter did not submit a contradicting affidavit to the trial court in response to Citibank’s second motion for summary judgment.

Carter now claims that the trial court erred in determining whether genuine issues of material fact existed. As recognized by the trial court, Citibank’s evidence clearly showed that Carter entered into a credit card agreement with Citibank and that Carter was liable for the debt that she incurred. As a result, judgment was entered against Carter. Citibank respectfully requests that this Court affirm the summary judgment that was entered on January 4, 2013.

II. STATEMENT OF THE CASE

Citibank issued a Sears credit card account to Carter. CP 14-15, 88-95. Originally, the credit card account had an account number ending in 0965. CP 101-111. In 2006, the account number changed to an account number ending in 7192. CP 14-15, 112-242. Carter used the credit card to make purchases for goods and services. CP 101-242. Carter made consistent monthly payments on the credit card account. CP 101-242.

Carter made some payments by check, which were written on Leon Carter's bank account and signed by Leon Carter himself. CP 97-99. The checks were written out to Sears and the memo line listed an account number ending in 0965. Id. Carter eventually defaulted on the credit card agreement by ceasing to make payments on the credit card account and Carter became indebted to Citibank in the amount of \$15,882.82. CP 14-15, 240-242. Carter admitted that there is a debt due and owing to Citibank. CP 251.

As a result of the default, Citibank initiated a lawsuit against Margaret Carter by serving her with a summons and complaint via substitute service. CP 1-7. Citibank filed a motion for summary judgment to be heard on December 17, 2010. (No citation to clerk's papers is available because the appellants did not include the first summary judgment in their designation of clerk's papers, even though the appellants discuss the motion on page 6 of Appellant's Opening Brief). On December 17, 2010, the Honorable Judge Mary Yu denied Citibank's motion for summary judgment because Margaret Carter's husband Leon Carter appeared at the summary judgment hearing and asked to be added to the lawsuit and also disputed the amount owed. In the Order Denying Summary Judgment the trial court ruled that Leon Carter, as a joint holder of the credit card, should be added to the caption for the lawsuit.

On November 13, 2012, Citibank filed a second motion for summary judgment. CP 8-244. In the second motion for summary judgment, Citibank cured the defects in its previous motion for summary judgment by producing years of billing statements, the credit card agreement, and copies of cancelled checks that were signed by Leon Carter. CP 8-242. In response to Citibank's second motion for summary judgment, Carter filed a pleading with the caption "Response to Plaintiff's Second Motion for Summary Judgement (sic), Counter-Claim and Cross-Motion for Summary Judgment." CP 247-258. Instead of submitting an affidavit that set forth specific facts showing that there is a genuine issue for trial, as required by CR 56(e), Carter filed a pleading that contained nothing more than mere allegations. Id. Carter did not provide any facts to contradict the evidence that was provided by Citibank. Id. Furthermore, Carter's response acknowledged that there is a debt owed to Citibank. CP 251.

Citibank's second motion for summary judgment was supported by the affidavit of Mary E. Crum, an authorized agent of Citibank, who stated that Carter owed a debt of \$15,882.82 to Citibank. CP 14-15. Also supporting the motion for summary judgment were several years of billing statements with closing dates from 2005 through 2010, and the applicable credit card agreement. CP 14-242. The credit card agreement and the

billing statements explain that Citibank was the issuer of the Sears Premier Mastercard. CP 88-95, 123-240. In addition, Citibank provided copies of canceled checks that were used to make payments on this account. CP 97-99. The checks were dated January 28, 2005, March 21, 2005, and May 12, 2005, and they were written on a bank account held by Leon Carter. Id. The checks were written out to Sears and the memo line listed the account number ending in 0965. Id. Furthermore, the address listed on the checks matches the address where the billing statements for this account were sent. CP 97-99, 120-242.

The billing statements show detailed and itemized usage of the account by Carter. CP 16-242. Prior to Carter's default on the account, the billing statements show that throughout the life of the credit card account Carter made monthly payments. Id. The billing statements also show that Carter made consistent purchases for goods and services. Id. Carter never submitted an affidavit stating that she did not make charges on the credit card account; Carter never submitted an affidavit stating that she did not make payments on the credit card account; Carter never submitted an affidavit denying that she was the holder of the credit card account. CP 247-258. In fact, Carter admits that a debt is owed to Citibank. CP 251.

On January 4, 2013, the Honorable Judge Mary Yu heard argument on Citibank's second motion for summary judgment and entered an order granting summary judgment. CP 267-268. Carter subsequently filed this appeal on January 28, 2013. CP 271-274.

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). Carter failed to put forth any affidavits that set forth specific facts showing that there was a genuine issue for trial. In fact, Carter admitted that a debt was owed to Citibank. CP 251. Instead of setting forth specific facts showing that there was a genuine issue for trial, Carter merely made meritless legal arguments. CP 247-258. Carter did not submit an affidavit denying that she made purchases on the credit card account. Id. Carter did not submit an affidavit denying that she made payments on the credit card account. Id. Carter did not submit an affidavit explaining that the amount owed was incorrect. Id. Carter did not submit an affidavit denying that she was the holder of the credit card account. Id.

In contrast, Citibank’s second motion for summary judgment was supported by the affidavit of Mary E. Crum, an authorized agent of

Citibank, who stated that Carter opened the Citibank credit card account, that Carter used the account to purchase goods and services, that Carter subsequently failed to make payments on the account, and that as a result Carter was in default on the account and owed a debt of \$15,882.82 to Citibank. CP 14-15. Carter failed to submit a contradicting affidavit as required by CR 56(e). Instead of submitting an affidavit that set forth facts showing that there was a genuine issue for trial, Carter supplied the court with nothing more than mere allegations. Because Carter did not provide the court with 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, Carter Assented to the Amount Stated as Due and Owing.

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.

Carter admitted that a debt is owed to Citibank. CP 251. Citibank provided copies of billing statements from 2005 through 2010. CP 14-242. In addition, Citibank provided copies of checks that Carter used to make payments on the account. CP 97-99. The checks were written on a bank account for Leon Carter and the checks were signed by Leon Carter. Id. The address on the checks matches the address where the billing statements were sent. CP 97-99, 120-242. It is uncontroverted that these checks were written on Leon Carter's bank account and that they were applied to the Citibank credit card account.

The billing statements also show that throughout the life of the credit card account Carter made monthly payments to Citibank up until default. CP 16-242. Carter never objected to the amounts listed in the billing statements, instead Carter 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, Carter assented to the stated sum in the billing statements as an amount due to Citibank.

3. Under Discover Bank v. Ray, Carter's Usage of the Credit Card Account is Proof of Carter's Assent to the Credit Card Agreement.

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 89. It is axiomatic to credit card agreements that by use of a credit card, a cardholder incurs liability for the charges made.

Carter has argued that Citibank failed to provide proof of Carter's assent to the unsigned credit card agreement. However, this argument fails under the Ray standard because Carter used the credit card account to make purchases of goods and services for several years. CP 16-242. Furthermore, Carter made consistent monthly payments for several years until the account went into default. CP 14-242. Carter does not deny that she used the credit card account. CP 247-258. In fact, Carter admits that a debt is owed to

Citibank. CP 251. Therefore, by using the credit card account to make purchases for goods and services, Carter accepted the terms of the credit card agreement.

4. Under Discover Bank v. Bridges, Citibank v. Ryan, and American Express Centurion Bank v. Stratman, Citibank has Provided Proof of Carter's Personal Acknowledgment of the Account.

Carter alleges that Citibank has not met the summary judgment standard as set forth in Bridges. In Bridges, the Court of Appeals Division II ruled that the bank had to show that the defendant 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 through 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 Ryan, this Court reiterated these ways that the bank can show the Defendant's personal acknowledgement of the credit card account. Citibank South Dakota NA v. Ryan, 160 Wn. App. 286, 294 (2011).

Recently, this Court decided American Express Centurion Bank v. Stratman, 172 Wn. App. 667 (2012), which upheld the entry of summary judgment and found that the case was distinguishable from Bridges and Ryan because the account billing statements provided in Stratman listed

specific information about the individual purchases and payments that were made on the account (e.g. the date of the purchase, the amount of the purchase, the name of the entity who provided the goods or services purchased). Thus, this Court held that the billing statements in Stratman were enough to show personal acknowledgment of the account.

Here, Carter admitted that a debt is owed to Citibank. CP 251. Citibank has provided all billing statements on the account from 2005 through 2010. CP 14-242. The billing statements show all purchases and payments made on the account from 2005 until the account went into default. Id. The billing statements clearly show detailed and itemized usage of the account by Carter. Id. In addition, Citibank provided copies of checks that Carter used to make payments on the Citibank account. CP 97-99. The checks were written on a bank account for Leon Carter and the checks were signed by Leon Carter. Id. Furthermore, the address on the checks matches the address where the billing statements for this account were sent. CP 97-99, 120-242.

Citibank has clearly shown that Carter personally acknowledged this credit card account, and thus that Carter assented to the terms of the credit card agreement. Citibank has provided detailed and itemized usage of the account by showing that Carter made years of purchases, years of payments, and by providing copies of payments that were made by Carter on this

account. CP 14-242. Here, the Bridges, Ryan, and Stratman standards have been met because Citibank provided the listing of every purchase and payment that was made on the account since 2005, along with copies of checks that were applied to this account. Because Carter 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 trial court's order of summary judgment in favor of Citibank should be affirmed. Therefore, Citibank respectfully requests that this Court affirm the judgment that was entered on January 4, 2013.

Dated this 14 day of October, 2013.

SUTTELL & HAMMER, P.S.
Attorneys for Respondent



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

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

CITIBANK, N.A. vs. Margaret & Leon Carter Defendant(s).	Plaintiff, APPELLATE COURT NO. 69903-2-I CERTIFICATE OF MAILING s/h 257670.001
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STATE OF WASHINGTON
COURT OF APPEALS
DIVISION I

The undersigned declares and states as follows:

I am a citizen of the United States of America, and of the State of Washington, over the age of twenty-one years, not a party to the above entitled proceeding and competent to be a witness therein.

On 10/15/2013 I mailed a copy of the RESPONDENT'S BRIEF;
CERTIFICATE OF MAILING in the above entitled action to:

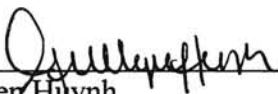
Margaret and Leon Carter
PO Box 22433
Seattle WA 98122-6137

placing said documents in a sealed envelope with first class postage fully paid thereon.

//

Declarant states the foregoing is true and correct to the best of her knowledge and belief,
subject to the penalty of perjury under the laws of the State of Washington.

DATED this 15th day of October, 2013, at Bellevue, Washington.



Tu Uyen Huynh
s/h 257679.001