

63409-7

63409-7

FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON

2009 OCT -1 PM 3:55

NO. 63409-7

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

ANDREW D. MACHLEID,

Petitioner

v.

CITIBANK SOUTH DAKOTA,

Respondent

On Appeal from King County Superior Court
The Honorable Susan J. Craighead

King County Superior Court No. 07-2-35994-0 SEA

PETITIONER'S REPLY BRIEF

Edward C. Chung
WSBA# 34292
Attorney for Petitioner

EDWARD C. CHUNG, ATTORNEY AT LAW, PLLC
Edward C. Chung, WSBA# 34292
600 1st Avenue, Suite 403
Seattle, Washington 98104
Phone: (206) 264-8999
Facsimile: (206) 264-9098

TABLE OF CONTENTS

- I. INTRODUCTION..... 1
- II. SUMMARY OF REPLY TO CITIBANK’S RESPONSE..... 1
- III. REPLY TO CITIBANK’S RESPONSE..... 3
 - A. EVERY ELEMENT OF CITIBANK’S BREACH OF CONTRACT CLAIM RAISES GENUINE ISSUES OF MATERIAL FACT FOR WHICH CITIBANK’S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED.....3
 - B. CITIBANK MISINTERPRETS THE STATUTORY LANGUAGE OF RCW 19.36.010 AND ERRONEOUSLY ARGUES THAT THE STATUE OF FRAUDS IS NOT APPLICABLE AS A DEFENSE TO CITIBANK’S BREACH OF CONTRACT CLAIM. RCW 19.36.110 MANDATES THAT CREDIT AGREEMENTS BE IN WRITING.....5
- IV. CONCLUSION.....7

T A B L E O F A U T H O R I T I E S

Statutes

RCW 19.36.010

RCW 19.36.110

Cases

Bogle and Gates, P.L.L.C. v. Holly Mountain Resources, 108 Wash. App. 557, 32 P.3d 1002.....4

Fidelity and Deposit Co. of Maryland v. Dally, 148 Wash. App. 739, 745, 201 P.3d 1040, 1044.....3

Hansen v. Transworld Wireless TV-Spokane, Inc., 111 Wn.App. 361, 370, 44 P.3d 929 (2002).....5

Palmer v. Clark, 52 Wn. 345, 100 P.749 (1909).....4

Yakima County (West Valley) Fire Protection Dist. No. 12 v. City of Yakima, 122 Wn.2d 371, 388, 858 P.2d 245 (1993).....5

I. INTRODUCTION

The Appellant, Andrew D. Machleid, submits this reply in support of his July 10, 2009 brief, petitioning the Washington State Court of Appeals for appellate relief from the King County Superior Court's granting of Citibank's Motion for Summary Judgment. For the reasons set forth below, Appellant respectfully requests that this Court reject the arguments presented in Citibank's Response and remand this matter to the trial to carry on with discovery and trial.

II. SUMMARY OF REPLY TO CITIBANK'S RESPONSE

Every prima facie element of Citibank's breach of contract claim raises genuine issues of material fact that overcome Citibank's Motion for Summary Judgment. In response to Mr. Machleid's appeal, Citibank has presented a number of arguments that misinterprets the statutory language of Washington State's Statute of Fraud's statute, the applicability of the United States Truth in Lending Act to the pending action and the evidentiary basis for which the evidence proffered by Citibank is inadmissible. Moreover, Citibank's responsive brief contains a number of averments that have been and are disputed by Mr. Machleid, such as:

- Whether, as a matter of triable fact, Mr. Machleid provided a dispute letter contesting Citibank's arbitrary increase of its interest rate on 0.00% balance transfer. Mr. Machleid's January 22, 2008 declaration, stating that he sent a timely dispute letter is a genuine issue of material for fact for a trier-of-fact to judge. *See*, CP 60-61
- Whether, as a matter of triable fact, whether Mr. Machleid entered into an agreement for a "credit card" or whether he entered into an agreement for a "balance transfer." While Washington State law exempts credit cards for "personal use" to be signed by the party to be charged, it does require a signature for other signed agreements, such as a balance transfer.
- Whether, as a matter of triable fact, Mr. Machleid agreed to the terms and the amounts owed of Citibank's Credit Card Agreement. Citibank acknowledges and the date on the Credit Card Agreement reveals that the Credit Card Agreement binding Mr. Machleid to the interest rate terms that are a matter of dispute, did not exist until after Mr. Machleid applied for Citibank's 0.00% balance transfer.
- Whether, as a matter of triable fact, Shauna Houghton or Leola Phenix, employees of Citibank, have any personal knowledge as to the content of the contractual agreement entered by Mr. Machleid.

In the instant case and as a matter of equity in future collection cases, a credit card company, national bank, or any plaintiff which files suit, bears the burden of establishing a prima facie case before judgment may be rendered in its favor. Allowing a plaintiff to obtain a judgment based on evidence that lacks the proper evidentiary foundation, violates the defendant's substantive and procedural due process right. Here,

Citibank seeks to collect on a debt by providing a “Credit Card Agreement” that was never agreed upon or factually proven to have been provided to Mr. Machleid. Moreover, it is undisputed that this was not the Credit Card Agreement that Mr. Machleid entered into at the time he applied for a 0.00% balance transfer rate. If the Court holds that the declarations of Shauna Houghton or Leola Phenix support the contention that Mr. Machleid received this Credit Card Agreement via mail and that he agreed to its terms, the Court must equally hold that Mr. Machleid’s declaration that he sent and Citibank received a dispute letter disputing the arbitrary increase in interests, bars Citibank from being able to collect on this debt.

III. REPLY TO CITIBANK’S RESPONSE

A. EVERY ELEMENT OF CITIBANK’S BREACH OF CONTRACT CLAIM RAISES GENUINE ISSUES OF MATERIAL FACT FOR WHICH CITIBANK MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED.

Citibank has the burden of proof with respect to the three basic elements of its contract case: 1) the making of a contract, 2) the breach of the contract by Mr. Machleid; and 3) the damages resulting to Citibank from the breach. *Fidelity and Deposit Co. of Maryland v. Dally*, 148 Wash. App. 739, 745, 201 P.3d 1040, 1044, 68 U.C.C. Rep. Serv. 2d 44 (Div. 2 2009) (“To prevail on a contract claim, the plaintiff must show an

agreement between the parties, a parties' duty under the agreement, and a breach of that duty"); *Bogle and Gates, P.L.L.C. v. Holly Mountain Resources*, 108 Wash. App. 557, 32 P.3d 1002 (Div. 1 2001) (retention letter sent by law firm to former client did not constitute written contract and thus was not binding). *Palmer v. Clark*, 52 Wn. 345, 100 P.749 (1909). (elements of a contract sufficient to state a cause of action).

In order for Citibank to be successful in its breach of contract claim, Citibank must prove each essential fact or elements of the contract. *Bogle & Gates, P.L.L.C. v. Zapel*, 121 Wash. App. 444, 90 P.3d 703 (Div. 1 2004); *Bogle and Gates, P.L.L.C. v. Holly Mountain Resources*, 108 Wash. App. 557, 32 P.3d 1002 (Div. 1 2001) (retention letter sent by law firm to former client did not constitute written contract and thus was not binding). The essential facts or elements of a contract include the subject matter, the parties, the promise, the terms and conditions and the consideration. *Id.* In the instant case, Citibank has proffered no evidence that Mr. Machleid agreed to the terms and conditions of the Credit Card Agreement offered by Citibank. Moreover, Citibank has not established any breach of the terms Mr. Machleid believe he was subject to nor an adequate showing that he even applied for a credit card.

In order to show a contract exists, by and between Mr. Machlin and Citibank, it must show that that the parties objectively entered into a mutual agreement as to the contract's material terms. *See, e.g., Hansen v. Transworld Wireless TV-Spokane, Inc.*, 111 Wn.App. 361, 370, 44 P.3d 929 (2002); *Yakima County (West Valley) Fire Protection Dist. No. 12 v. City of Yakima*, 122 Wn.2d 371, 388, 858 P.2d 245 (1993). No evidence has been offered by Citibank that provides a showing that Mr. Machleid agreed to the terms they are seeking to collect a judgment on.

B. CITIBANK MISINTERPRETS THE STATUTORY LANGUAGE OF RCW 19.36.010 AND ERRONEOUSLY ARGUES THAT THE STATUTE OF FRAUDS IS NOT APPLICABLE AS A DEFENSE TO CITIBANK'S BREACH OF CONTRACT CLAIM. RCW 19.36.110 MANDATES THAT CREDIT AGREEMENTS BE IN WRITING

The statutory language of RCW 19.36.010 requires a writing signed by the party to be charged, for:

every special promise to answer for the debt, default, or misdoings of another person.

RCW 19.36.010 (2); *emphasis added*

The foregoing statutory language applies to individual debtor debts, as well as debts assumed for another person, such as a guaranty contract. Washington State's adherence to the signing requirement for credit agreements is evidenced in contained in RCW 19.36.110 which specifically addresses the rights

and obligation of parties to a credit agreement. The applicable language of RCW

19.36.110 reads:

The rights and obligations of the parties to a credit agreement shall be determined solely from the written agreement, and any prior or contemporaneous oral agreements between the parties are superseded by, merged into, and may not vary the credit agreement.

RCW 19.36.110

Citibank's position that the pending appeal is subject to federal credit card laws that pre-empt Washington State's writing requirement neglects to acknowledge that Mr. Machleid never entered into a "credit card agreement" with Citibank; he applied for a "balance transfer". No records or statements provided by Citibank show that the alleged dispute relates to a credit card. While Citibank seeks to characterize this agreement as a credit card agreement, Citibank has failed to provide any evidence supporting this contention; thus barring them from establishing the prima facie elements of a breach of contract claim.

As previously addressed in Mr. Machleid's opening brief, Citibank has not produced Mr. Machleid's signed credit card agreement. By allowing Citibank to produce any agreement it wishes to obtain a judgment against a debtor in court, without providing the foundation that the terms offered were mutually assented to, then there is no effective monitoring of the evidentiary proof that credit card companies or national

banks use as evidence in collection of debts via our judicial system. IN the instant case Citibank is openly admitting that the Credit Card Agreement it offers is not the Credit Card Agreement that Mr. Machleid assented to.

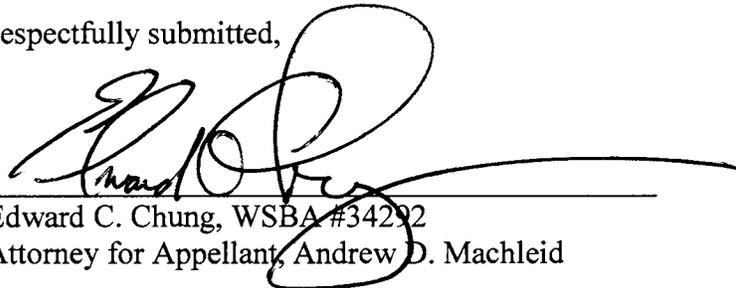
The position that the Credit Card Agreement that Citibank offers may be modified from the terms of the original contract, without providing the original terms makes the exist Credit Card Agreement unconscionable as an adhesion contract . Furthermore, the existing Credit Card Agreement does not comply with TILA, as stated in Appellant's original brief.

IV. CONCLUSION

Based on the arguments contained herein and in Appellant's opening brief, Mr. Machleid respectfully requests that this court overrule the Superior Court's ruling granting summary judgment and remand this matter back to the trial court.

Dated this 1st day of October, 2009

Respectfully submitted,



Edward C. Chung, WSBA #34292
Attorney for Appellant, Andrew D. Machleid

FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
2009 OCT -1 PM 3:55

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

CITIBANK OF SOUTH DAKOTA

Respondent,

v.

ANDREW M. MACHLEID

Appellant.

Court of Appeals No. 63409-7

CERTIFICATE OF SERVICE

TO: Court of Appeals Division 1 Clerks office and
TO: Suttel & Associates, Attorney for Plaintiff, Citibank South Dakota

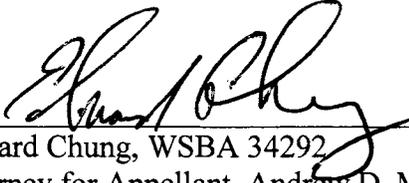
I, Edward C. Chung, Attorney at Law, PLLC, declare under penalty of perjury under the laws of the State of Washington that I am a citizen of the United States, I am over the age of eighteen years old, I am not a party to this matter. I further declare that I caused a copy of Appellant's Reply to be served 1st day of October, 2009, as follows:

Attorney for Plaintiff

Mr. Isaac Hammer, Esq.
Suttel & Associates, P.S.
1450-114th Avenue SE, #240
Conifer Building
Bellevue Washington 98004

U.S. Mail, postage prepaid
 Legal Messenger
 Fax to: (425) 454-7884
 Email to: isaac@suttelllaw.com
 Other:

Dated this 1st day of October 2009



Edward Chung, WSBA 34292
Attorney for Appellant, Andrew D. Machleid