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Appeal No. 64159-0-I

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

CITIBANK SOUTH DAKOTA N.A.

Respondent

V.

TIM P RYAN

Appellant

APPEAL FROM KING CASE NO. 09-2-01355-4

RESPONDENT'S BRIEF

CITIBANK SOUTH DAKOTA N.A.
c/o Suttell & Hammer, P.S.
1450-114th Ave SE, #240
Conifer Bldg.
Bellevue, WA 98004
425-455-8220
888-788-8355
425-454-7884 FAX
nick@suttelllaw.com

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COURT OF APPEALS
DIVISION I
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TABLE OF CONTENTS

I. INTRODUCTION.....1

II. STATEMENT OF CASE.....1

III. ARGUMENT.....4

 A. STANDARD FOR REVIEW.....4

 B. SUMMARY JUDGMENT IS APPROPRIATE AS A MATTER OF LAW AS THERE ARE NO GENUINE ISSUES OF MATERIAL FACT.....5

 C. RYAN HAS NOT RAISED A GENUINE ISSUE OF MATERIAL FACT TO DEFEAT SUMMARY JUDGMENT.....5

 1. Pursuant to CR 56(e), the adverse party to a motion for Summary Judgment must provide by affidavit specific facts showing that there is a genuine issue for trial.....5

 2. Credit Card Agreements Do Not Have To Be Signed By the Consumer To Be Binding on the Consumer.....7

 D. CITIBANK IS ENTITLED TO RECOVER IT’S ATTORNEY’S FEES PURSUANT TO RAP 14.2, RAP 18.1, RCW 7.04A.250 AND IT’S CREDIT CARD AGREEMENT.....10

IV. CONCLUSION.....10

TABLE OF AUTHORITIES

CASES

<i>AT&T Universal Card Services v. Mercer</i> , 246 F.3d 391, 406 (5th Cir. 2001).....	8
<i>Carrier v. Citibank (South Dakota), N.A.</i> , 180 Fed. App'x 296, 297 (2d Cir. 2006).....	8
<i>Citibank (South Dakota) N.A. v. Lesnick</i> , No. 2005-L-013, 2006 WL 763078 at *3 (Oh Ct. App. 11 th Dist.),	9
<i>Citibank (South Dakota), N.A. v. Ogunduyile</i> , (Oh. Ct. App. 2nd Dist.), No. 21794, 2007 WL 2812969 at *2.....	9
<i>Citibank (S.D.) N.A. v. Roberts</i> , 304 A.D.2d 901, 902, 757 N.Y.S.2d 365, 366 (N.Y. App. Div. 2003).....	8
<i>Citibank (South Dakota), N.A. v. Runfola</i> , 283 A.D.2d 1016, 1016, 725 N.Y.S.2d 246 (N.Y. App. Div. 2001).....	8
<i>Discover Bank v. Ray</i> , 139 Wn. App. 723, 162 P.3d 1131 (2007).....	7
<i>In re Ciavarelli</i> , 16 B.R. 369, 370 (Bankr. E.D. Pa. 1982).....	8
<i>Jones v. Citibank (South Dakota), N.A.</i> , 235 S.W.3d 333, 336 (Tex. Ct. App. 2007).....	8
<i>Lybbert v. Grant County</i> , 141 Wn.2d 29, 34, 1 P.3d 1124 (2000).....	4
<i>Petty v. Citibank (South Dakota) N.A.</i> , 218 S.W.3d 242, 244 (Tex. Ct. App. 2007).....	8
<i>Preston v. Duncan</i> , 55 Wn.2d 678, 684, 349 P.2d 605 (1960).....	10
<i>Soc'y Bank & Trust v. Niggemyer</i> , 1993 WL 172268, *3 (Ohio Ct. App. May 21, 1993) (unreported).....	8

Weathersby v. Citibank, (South Dakota), N.A., 928 So.2d 941, 945
(Miss. Ct. App. 2006).....8

STATUTES

RCW 7.04A.250.....10

S.D.C.L., § 54-11-9.....9

RULES

CR 56(c).....4, 5

CR 56(e).....5, 6

RAP 9.12.....10, 11

RAP 18.1.....10, 11

I. INTRODUCTION

This is a simple collection case in which the defendant-appellant Timothy Ryan (hereinafter “Ryan”), seeks to avoid paying his credit card debt. Ryan does not, and cannot, dispute the fact that he used and made payments on a credit card account issued by plaintiff-respondent Citibank (South Dakota), N.A. (“Citibank”). Nor does he dispute the balance owed on the account. Instead, Ryan asserts that his answer and mere allegation under oath that he does not recall signing the credit card agreement are genuine issues of material fact. As recognized by the trial court, Ryan never set forth pursuant to CR 56(e) in affidavit specific facts to contradict that he is liable for the debt. As a result judgment was entered against him. Accordingly, Citibank respectfully requests that this Court affirm the judgment and that it be awarded its fees incurred in defending this unwarranted appeal.

II. STATEMENT OF THE CASE

Ryan contracted and entered into a credit card agreement with Citibank and was issued credit card account number XXXXXXXXXXXXX4549. CP 4. Ryan used the account and incurred debt on the card in the amount of \$9477.71. CP 6, 7, 9, 29. Ryan made payments on the account until May 9, 2008 after which no further

payments were received by Citibank on this account. CP 14-29.

Citibank filed suit against Ryan on June 29, 2009 in an effort to collect on the delinquent credit card account. Ryan served an answer upon Citibank which he eventually filed August 12, 2009. CP 36-38.

Citibank filed a motion for summary judgment on or about July 17, 2009, noting a hearing before the Chief Civil Judge for August 24, 2009. CP 6-35. Citibank's motion was supported by an affidavit by Delores Wageman, a Citibank employee, which confirmed the debt of \$9,477.71 and thirteen of Ryan's credit card account statements, including an April 7, 2009 account statement showing a balance of \$9,477.71 owing on the account. CP 9, 29. Additionally, the credit card agreement for the account was provided. CP 30-35. The billing statements show Ryan's last payments made on this account were for \$111.00 on March 3, 2008, CP 10-11, \$109.00 on March 27, 2008, CP 12-13, and \$124.95 on May 9, 2008, CP 14-16. All billing statements included in the motion show a mailing address for Ryan of 116 Heritage Place, #104, Burlington, WA, 98233, CP 10-29, which is still Ryan's current mailing address. See Appellant's Brief.

On August 12, 2009, Ryan filed a response to Citibank's motion for summary judgment, CP 39-47, with supporting affidavit of

fact. CP 48-56. On August 21, 2009, Citibank filed a reply to Ryan's response. CP 57-83.

The summary judgment hearing was held August 24, 2009 before the Honorable Judge Susan Cook. RP 1. During the hearing, Citibank stressed the fact that never once did the defendant in his response to the motion for summary judgment or accompanying affidavit of fact swear under oath that he did not incur the debt or use the credit card. RP 3, CP 39-56. Judge Cook specifically asked Ryan on the record if there was anything under oath where he stated that he didn't use the card and that this was not his obligation. RP 5. Ryan only stated that he had no recollection of signing up for the card. RP 5. Judge Cook focused that Ryan's affidavit only stated that he was unable to recall being solicited for a credit card or filling out the application and not that the debts were not his. RP 5, 8. Ryan stated that he did deny the debt under oath in his response but when pressed by Judge Cook on where it was located in either his response to the motion for summary judgment or accompanying affidavit was unable to do so. RP 9-10. Due to Ryan's lack of denial under oath as to owing the card, Judge Cook granted Citibank's motion for summary judgment on August 24, 2009. RP 10-11, CP 84-85. This appeal ensued. CP 86-89.

III. ARGUMENT

A. STANDARD FOR REVIEW

When reviewing a grant of Summary Judgment, the court reviews the grant *de novo*, engaging in the same inquiry as the trial court. *Lybbert v. Grant County*, 141 Wn.2d 29, 34, 1 P.3d 1124 (2000). Summary Judgment is proper if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c). When considering a Summary Judgment, the court must construe all facts and reasonable inferences in the light most favorable to the non-moving party. *Lybbert*, 141 Wn.2d at 34.

B. SUMMARY JUDGMENT IS APPROPRIATE AS A MATTER OF LAW AS THERE ARE NO GENUINE ISSUES OF MATERIAL FACT

This court must determine whether it is appropriate to grant Citibank summary judgment as a matter of law. To do so this court must find that there are no genuine issues of material fact. CR 56(c).

The following facts are undisputed. Ryan was issued a credit card account by Citibank. CP 4. Ryan used the account and incurred debt on the card in the amount of \$9477.71. CP 6, 7, 9, 29. Ryan last made payments on March 3, 2008 for \$111.00, CP 10-11, on March 27, 2008 for \$109.00, CP 12-13, and on May 9, 2008 for \$124.95, CP 14-16. Since May 2008, Ryan has not made a single payment to the

account CP 14-29. All billing statements included in the motion were sent to Ryan's current mailing address. CP 10-29. The amount of \$9477.71 is long past due and owing. CP 6, 7, 9.

Ryan has raised under oath in his response to the motion for summary judgment and accompanying affidavit only mere allegations that he does not recollect signing the application; he never once denies using the account, making the payments shown in the billing statements, or owing the money. As it is undisputed that amount due and owing to Citibank is \$9477.71 and Ryan has not presented specific facts in his affidavit showing that there are genuine issues of material fact, Citibank is entitled to summary judgment.

C. RYAN HAS NOT RAISED A GENUINE ISSUE OF MATERIAL FACT TO DEFEAT SUMMARY JUDGMENT

1. Pursuant to CR 56(e), the adverse party to a motion for Summary Judgment must provide by affidavit specific facts showing that there is a genuine issue for trial.

Summary Judgment is proper if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c). In particular as to affidavits in support of the adverse party, CR 56(e) holds:

"When a motion for summary judgment is made and supported as provided in this rule, 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. If he does not so respond, summary judgment, if appropriate, shall be entered against him.”

CR 56(e) requires the adverse party to provide specific facts in their affidavit showing that there is a genuine issue of material fact. Ryan’s affidavit does not put forth any such specific facts. Ryan’s affidavit merely states that he does not recall being solicited for a credit card or loan from Citibank and that he does not recall ever having filled out an application. CP 49. Ryan in his affidavit does not deny the account is his, Ryan does not deny owing money on the account, Ryan does not deny making payments on the account, Ryan does not deny the amount owed is improper. He merely makes a self serving statement that he does not recall opening the account, a statement which does not say that he did not open it.

The purpose of the summary judgment motion is to eliminate what is in dispute from what is not in dispute to make a trial if necessary less burdensome. Citibank has provided evidence showing that Ryan opened the credit card account in question, that he used the account, that he made payments on the account, that he ceased to make payments on the account, and that an amount is due and owing. In response to this evidence, Ryan to defeat the motion for summary judgment was required to provide specific facts in his affidavit showing that there is a genuine issue of material fact as to this evidence put forth by Citibank, he did not do so. Because Ryan has

failed to raise any genuine issues of material fact, Citibank's motion for summary judgment was proper and should be affirmed.

2. Credit Card Agreements Do Not Have To Be Signed By the Consumer To Be Binding on the Consumer

Ryan's only possible argument properly under oath in his response and accompanying affidavit concerns the lack of a signed credit card agreement. This contention does not provide any basis for overturning the trial court's ruling.

It is undisputed from the record that Ryan used and paid on the account. By doing so, he entered into a contract with Citibank. In *Discover Bank v. Ray*, 139 Wn. App. 723, 162 P.3d 1131 (2007), the Court ruled that a credit card agreement that stated the use of the credit card constituted agreement to the terms and conditions of the credit card constituted a valid acceptance of the terms and conditions. Here, Citibank's credit card agreement under the section *Your Account* states in the very first paragraph:

"You agree to use your account in accordance with this Agreement. This Agreement is binding on you unless you cancel your account within 30 days after receiving the card and you have not used or authorized use of the card. You must pay us for all amounts due on your account as specified in this agreement."

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

Soc’y Bank & Trust v. Niggemyer, 1993 WL 172268, *3 (Ohio Ct. App. May 21, 1993) (unreported, interpreting Ohio Revised Code § 1319.01); *Jones v. Citibank (South Dakota), N.A.*, 235 S.W.3d 333, 336 (Tex. Ct. App. 2007) (reasoning that the “issuance of a credit card constitutes a credit offer, and the use of the card constitutes acceptance of the offer” such that a contract is formed “under federal law”); *In re Ciavarelli*, 16 B.R. 369, 370 (Bankr. E.D. Pa. 1982) (stating that “whenever a credit card holder uses his credit card, he is representing that he has both the ability and the intention to pay for those purchases and the credit card issuer relies on those implied representations in extending credit to the card holder”) (citations omitted); *AT&T Universal Card Services v. Mercer*, 246 F.3d 391, 406 (5th Cir. 2001) (use of credit card “was a loan request and promise to pay”).

Indeed, numerous courts in other jurisdictions have affirmed judgment in Citibank’s favor where, as here, Citibank presented evidence establishing that that the cardholders used the accounts at issue. *See, e.g., Carrier v. Citibank (South Dakota), N.A.*, 180 Fed. App’x 296, 297 (2d Cir. 2006); *Citibank (S.D.) N.A. v. Roberts*, 304 A.D.2d 901, 902, 757 N.Y.S.2d 365, 366 (N.Y. App. Div. 2003); *Citibank (South Dakota), N.A. v. Runfola*, 283 A.D.2d 1016, 1016, 725 N.Y.S.2d 246 (N.Y. App. Div. 2001); *Weathersby v. Citibank, (South Dakota), N.A.*, 928 So.2d 941, 945 (Miss. Ct. App. 2006); *Petty v. Citibank (South Dakota) N.A.*, 218 S.W.3d 242, 244 (Tex. Ct. App.

2007); *Citibank (South Dakota), N.A. v. Ogunduyile*, (Oh. Ct. App. 2nd Dist.), No. 21794, 2007 WL 2812969 at *2; *Citibank (South Dakota) N.A. v. Lesnick* (Oh Ct. App. 11th Dist.), No. 2005-L-013, 2006 WL 763078 at *3.

Moreover, under South Dakota law, which applies based on the South Dakota choice-of-law provision in the Card Agreement, use of a credit card creates a binding agreement. *See* S.D.C.L. § 54-11-9 (“The use of an accepted credit card ... creates a binding contract between the card holder and the card issuer with reference to any accepted credit card”).

Ryan never denies not using the account and never denies not making payments on the account, payments reflected in the evidence provided to the Court. Simply put, Ryan agreed to the terms and conditions of the credit card agreement upon his use and in particular his repayment of his use of the account; a signed credit card agreement is not necessary to show liability and thus does not raises a genuine issue of material fact.

D. CITIBANK IS ENTITLED TO RECOVER IT'S ATTORNEY'S FEES PURSUANT TO RAP 14.2, RAP 18.1, RCW 7.04A.250 AND IT'S CREDIT CARD AGREEMENT

Pursuant to RAP 14.2, RAP 18.1, RCW 7.04A.250 and the express terms of the credit card agreement, Citibank requests that it be awarded its attorney's fees for responding to this appeal.

The "Applicable Law and Enforcing our Rights" provision, CP 35, of the credit card agreement provides for an award of attorney's fees. The language reads as follows under "Collection Costs":

"If we refer collection of your account to a lawyer who is not our salaried employee, you are liable for any reasonable attorney's fees we incur, plus the costs and expenses of any legal action, to the extent permitted by law."

IV. CONCLUSION

As quoted many years ago:

The very object of a motion for summary judgment is to separate what is formal or pretended in denial or averment from what is genuine and substantial, so that only the latter may subject a suitor to the burden of a trial.

Preston v. Duncan, 55 Wn.2d 678, 684, 349 P.2d 605 (1960).

In this case, the trial court properly distinguished that which was "pretended in denial" from genuine and substantial issues of fact, and Citibank respectfully requests that the Court affirm the \$10,597.21 judgment entered in its favor. Additionally, Citibank also respectfully

requests that the Court award Citibank reasonable attorney's fees in responding to this petition. RAP 14.2, RAP 18.1, RCW 7.04A.250.

RESPECTFULLY SUBMITTED this 14th day of July, 2010.

Suttell & Hammer
Attorneys for Respondent
Citibank South Dakota, N.A.

By: 

Nicholas R. Filer
WSBA #39536
1450-114th Avenue SE, #240
Bellevue, WA 98004
Telephone: (425) 455-8220
Fax: (425) 454-7884

