

No. 68573-2-I

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

AMERICAN EXPRESS BANK, F.S.B.

Respondent

V.

DIANA J. BURLINGTON

Appellant

APPEAL FROM ISLAND COUNTY CASE NO. 09-2-00292-9

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RESPONDENT'S BRIEF

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I. INTRODUCTION

This is a simple collection case in which the defendant Diana J. Burlington (hereafter “Burlington”), seeks to avoid paying a credit card debt that she incurred. Burlington has never denied the fact that she received, used, and made payments on a credit card account issued by plaintiff American Express Bank, F.S.B. (hereafter “AMEX”). In Burlington’s first amended answer and second amended answer to AMEX’s complaint, Burlington admitted to having the AMEX credit card account ending in 1002.

Burlington now claims that the trial court erred in entering summary judgment in favor of AMEX because there was no proof of the existence of a contract. The trial court found that AMEX’s evidence was admissible and that the evidence showed that Burlington entered into a credit card agreement with AMEX and that Burlington was liable for the debt that she incurred. As a result, judgment was entered in favor of AMEX. AMEX respectfully requests that this Court affirm the judgment that was entered on February 27, 2012.

II. STATEMENT OF THE CASE

AMEX issued Burlington a credit card account ending in 1002. CP 180-181. Burlington used the credit card to make purchases for goods and services. CP 180-342. Notably, Burlington purchased a roundtrip airplane ticket to Chicago in Burlington’s own name. CP 278. Burlington

made consistent payments on the credit card account. CP 183-342. Burlington subsequently defaulted by ceasing to make payments on the credit card account and was indebted to AMEX, as of December 10, 2008, in the amount of \$12,471.08. CP 180-181.

On December 11, 2008, Burlington was served with a summons and complaint for the amount due and owing to AMEX. CP 163-166, 451. On May 5, 2009, AMEX filed a motion for default judgment. CP 160-162. On May 26, 2009, Burlington filed her answer to the complaint and the motion for default judgment was stricken. CP 121-124. Burlington later filed a First Amended Answer and a Second Amended Answer. CP 117-120, 51-55. In Burlington's First and Second Amended Answers to the complaint, Burlington admitted to having an AMEX credit card account ending in 1002. CP 117-120, 51-55.

On June 4, 2009, AMEX filed a motion for summary judgment. CP 352-445. AMEX struck the motion for summary judgment and it was not heard. On December 15, 2011, AMEX filed a second motion for summary judgment, setting a hearing date for February 27, 2012. CP 174-175, 176-344.

AMEX's second motion for summary judgment was supported by the affidavit of Edmond Garabedian, a custodian of records for AMEX, who declared under the penalty of perjury that Burlington owed the debt

of \$12,471.08 to AMEX. CP 180-181. Also supporting the motion for summary judgment were billing statements with closing dates for September 29, 2006, through September 29, 2008. CP 183-342. The billing statements show detailed and itemized usage of the account by Burlington. CP 183-342. In particular, the billing statements show that Burlington bought herself a roundtrip airplane ticket to Chicago in 2007. CP 278. The billing statements also show that Burlington made consistent monthly payments on the credit card account for several years. CP 183-342. Burlington made consistent computer and phone payments on the account. CP 183-342.

Burlington filed several pleadings in opposition to AMEX's second motion for summary judgment. CP 36-46, 47-50, 56-62, 63-80, 81-89. Among many of Burlington's allegations, Burlington argued that AMEX had not provided proof of a contract, that AMEX was not the real party in interest, and that AMEX was not licensed in the State of Washington to conduct business. *Id.* On February 23, 2012, AMEX filed its reply in support of summary judgment asserting that AMEX had proven an amount due and owing under the Account Stated Doctrine, that AMEX was not transacting business in Washington by collecting its debts and maintaining a lawsuit, and that Burlington had failed to submit an affidavit putting forth material issues of fact. CP 167-171.

On February 27, 2012, the Honorable Judge Alan Hancock heard argument on AMEX's second motion for summary judgment. CP 7. Judge Hancock granted AMEX's motion for summary judgment. CP 8-9. Burlington subsequently filed this appeal on March 28, 2012. CP 1-6.

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 is Appropriate as a Matter of Law Because there are 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). The essence of a summary judgment motion is to avoid a useless and unnecessary trial. The point of a trial is to determine facts. When facts are undisputed, summary judgment is appropriate. 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). Burlington has failed to put forth any affidavits that set forth specific facts showing that there is a genuine issue for trial.

In support of its motion for summary judgment, AMEX submitted the affidavit of Edmond Garabedian (hereafter “Garabedian”), a custodian of records for AMEX, who declared under the penalty of perjury that Burlington owed the debt of \$12,471.08 to AMEX. CP 180-181. Also supporting the motion for summary judgment were billing statements with closing dates for September 29, 2006, through September 29, 2008, showing that Burlington made consistent purchases and payments on the credit card account. CP 183-342. In particular, Burlington purchased a

roundtrip airplane ticket on American Airlines to Chicago in Burlington's own name. CP 278. Burlington also made consistent online and telephone payments on the credit card account. CP 183-342.

Burlington has not submitted an affidavit denying that she was the holder of this AMEX credit card account. In fact, in Burlington's first and second amended answers to the complaint, Burlington admitted to being the holder of an AMEX credit card account ending in 1002. CP 117-120, 51-55. Burlington has not submitted an affidavit denying that she made purchases on the credit card account. Burlington has not submitted an affidavit denying that she made payments on the credit card account. Burlington has not submitted an affidavit stating that the amount owed was paid in full.

Instead of submitting an affidavit that put forth specific facts and that was sworn to under penalty of perjury as required by CR 56(e), Burlington supplied the court with nothing more than mere allegations. Because Burlington has not provided any evidence in contradiction to that provided by AMEX, as required by CR 56, there are no issues of material fact and Summary Judgment is appropriate. AMEX's motion for summary judgment was proper and should be affirmed.

2. Under the Account Stated Doctrine, AMEX does Not have to Provide a Copy of the Original Credit Card Application.

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.

AMEX provided copies of billing statements with closing dates from September 29, 2006, through September 29, 2008. CP 183-342. The billing statements were mailed to Burlington at the address where she still currently resides. CP 183-342. The billing statements show that Burlington made consistent monthly payments to AMEX using electronic means (the computer and the telephone). CP 183-342. Burlington never

objected to the amounts listed in the billing statements, but rather Burlington 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, Burlington assented to the stated sum in the billing statements as an amount due to AMEX. As such, the original credit card application was not necessary to prove that Burlington promised to pay AMEX.

3. Under Discover Bank v. Ray, AMEX does Not have to Provide a Copy of the Original Credit Card Application.

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 one of AMEX's credit card agreement, in the first paragraph, it states, "When you keep, sign or use the Card issued to you (including any renewal or replacement Cards), or you use the account associated with this Agreement (your "Account"), you agree to the terms of this Agreement." CP 434. It is axiomatic to credit

card agreements that by use of a credit card, a cardholder incurs liability for the charges made.

Burlington has attempted to argue that there is no proof of a credit card agreement between herself and AMEX. However, this argument fails under the Ray standard because Burlington used the credit card for numerous years and Burlington made payments on the credit card throughout those years, and thus, Burlington accepted the terms of the credit card agreement.

4. Under Discover Bank v. Bridges and Citibank v. Ryan, AMEX does Not have to Provide a Copy of the Original Credit Card Application.

Recent case law has created a summary judgment standard for credit card collection cases, wherein creditors must prove assent to the credit card agreement. Discover Bank v. Bridges, 154 Wn. App. 722 (2010); Citibank v. Ryan, 160 Wn. App. 286 (2011). In Bridges, the Court ruled that the bank had to show that the Defendant had mutually assented to the credit card agreement and personally acknowledged the account. Bridges at 727. The Court ruled that personal acknowledgement of the account could be proven a variety of different ways, including 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 Citibank v. Ryan, the Court of Appeals Division I reiterated these ways that the bank can

show the Defendant's personal acknowledgement of the credit card account. Citibank v. Ryan, 160 Wn. App. 286, 294 (2011).

Here, AMEX has provided all billing statements on the account from September 2006 through September 2008. CP 183-342. The billing statements show all purchases and payments made on the account during that time period, and the billing statements were mailed to Burlington at the address where she still currently resides. *Id.* The billing statements clearly show detailed and itemized usage of the account by Burlington. *Id.* In particular, the billing statements show that Burlington purchased a roundtrip airplane ticket to Chicago in Burlington's own name. CP 278. In addition, Burlington admitted to being the holder of the AMEX credit card account ending in 1002. CP 117-120, 51-55. Furthermore, Burlington made continuous monthly payments on the account. CP 183-342.

AMEX clearly provided detailed and itemized usage of the account by showing years of purchases and by showing years of payments. CP 183-342. Both Bridges and Ryan allow assent to be proven by showing detailed and itemized usage of the account. Here, the Bridges and Ryan standards have been met because AMEX has provided the listing of every purchase and payment that was made on the account between September 2006 and September 2008. Along with Burlington's admission that she was the

holder of this credit card account, AMEX has clearly provided a detailed and itemized usage of the account to show Burlington's personal acknowledgement.

AMEX has proven assent to the credit card agreement pursuant to the summary judgment standard as set forth in Bridges and Ryan. Because Burlington did not provide any facts in contradiction to those provided by AMEX, as required by CR 56, there are no issues of material fact and summary judgment is appropriate. AMEX's motion for summary judgment was proper and should be affirmed.

5. Under RCW 23B.15.010, AMEX is Not Required to be Licensed in the State of Washington.

Burlington argues that AMEX lacks the capacity to sue because AMEX is not registered with the Secretary of the State. However, Burlington's argument is completely without merit. AMEX is a foreign corporation. Under RCW 23B.15.010, a foreign corporation must have authority to transact business in the State of Washington. The statute says that "unless it is otherwise authorized to transact business pursuant to a state or federal statute, a foreign corporation may not transact business in this state until it obtains a certificate of authority from the secretary of state." RCW 23B.15.010(1). However, the statute exempts certain types of activities:

The following activities, among others, do *not* constitute transacting business within the meaning of subsection (1) of this section:

- (a) Maintaining or defending any action or suit or any administrative or arbitration proceeding, or effecting the settlement thereof or the settlement of claims or disputes...
- (h) Securing or collecting debts or enforcing mortgages and security interests in property securing the debts...

RCW 23B.15.010(2)(a) and (h) (emphasis added). Therefore, according to RCW 23B.15.010, AMEX is not transacting business in the State of Washington by collecting debts or maintaining lawsuits, and thus is not required to be licensed in the State of Washington.

IV. CONCLUSION

The decision of the trial court in granting Summary Judgment on AMEX's claim should be affirmed. AMEX respectfully requests that this Court affirm the judgment that was entered on February 27, 2012.

Dated this 5 day of November, 2012

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DIVISION I

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Respondent

vs.

APPELLATE COURT

No. 68573-2-I

CERTIFICATION OF MAILING

DIANA J. BURLINGTON

Appellant

TO: Clerk of the Court

AND TO: Appellant

I certify that on November 5, 2012, I mailed, postage prepaid, a copy of Respondent's

Brief to:

Diana J. Burlington
1148 Lisa St.
Oak Harbor, WA 98277



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