

Case No. 47474-3-II

COURT OF APPEALS OF THE STATE OF
WASHINGTON DIVISION II

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STATE OF WASHINGTON

BY _____
DEPUTY

AP

FIRST NATIONAL BANK OF OMAHA,

Plaintiff-Appellee

vs.

David T. Gilchrist,

Defendant-Appellant.

Appeal from an Order of the Cowlitz County Superior Court
Case No. 14-2-00156-9

AMENDED APPELLANT'S OPENING BRIEF

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INTRODUCTION

This is an appeal for an Order denying a motion to dismiss for both a failure to state a claim upon which relief can be granted and for lack of subject matter jurisdiction and also an appeal for a summary judgment in part for monies due and attorney's fees.

The complaint filed in the original action was one of a civil nature, whereby the Appellee contended that the sole reason for the action brought was due to the Appellant's alleged breach of terms and conditions of an agreement that, according to the Superior Court, did not apply to the Appellant. Thus, the Appellant contends that the Superior Court erred in rendering summary judgment for monies due and attorney's fees, when the court could make no determination for lack of a definitive duty and a breach of that said duty, because there was no agreement with terms and conditions for the court to make such a determination. Since the damages sought for by the Appellee were directly connected to the agreement that did not apply to the Appellant, the Appellee failed to bring a justiciable issue before the Superior Court. Further, because Appellee's attorney failed to conduct a reasonable pre-filing inquiry to independently verify the facts and determine that the stated agreement did not apply to the Appellant, the Appellee's attorney violated Rule 11b(3). Therefore, since

no justiciable issue was presented to the court through proper pleadings and the Appellee failed to bring a cognizable cause of action against the Appellant, the Superior Court lacked subject matter jurisdiction and should have dismissed the case and summary judgment in part for monies due and attorney's fees should be reversed.

A. Assignments of Error

Assignments of Error

1. The Superior Court erred on October 22, 2014 when it denied the Appellant's motion to dismiss the complaint for lack of subject matter jurisdiction.
2. The Superior Court erred on October 22, 2014 when it denied the defendant's motion to dismiss the complaint for failure to state a claim upon which relief could be granted.
3. The Superior Court erred on February 25, 2015 when it rendered summary judgment in part for monies due and attorney's fees when genuine issues of fact precluded summary judgment.

Issues Pertaining to Assignments of Error

- 1 After Appellant challenged specific subject matter jurisdiction, should the Superior Court have determined subject matter

jurisdiction or stayed the action until the Appellee was able to prove subject matter jurisdiction by use of a competent fact witness

2. Should the Appellant's motion to dismiss for failure to state a claim be denied when the agreement and its terms and conditions were not attached to the affidavit or the complaint and the Appellee's attorney failed to assert in arguments that in fact their claim was, to the best of his knowledge, a pleading well-grounded in fact.
3. Did the Superior Court error when it granted summary judgment in part for money damages and attorney fees without an agreement showing terms and conditions evidencing a default and acceleration for monies due of the Appellant.

B. Statement of the Case

On December 6, 2013, Appellant was served with a summons and complaint (CP 1). Attached to the summons and complaint was an affidavit from a Daniel Dunn (CP 2). The affiant, Daniel Dunn, declared that, "Attached hereto is a true and correct copy of the Agreement, which is the subject of the claim in this action and/or true and correct copies of billing statements" (CP 2, ¶ 2). The affiant,

Daniel Dunn, also declared in that same affidavit that the Appellant had defaulted under the terms of the agreement (CP 2, ¶ 3). Because the December 6, 2013 summons and complaint had been voided due to improper service, Appellee served the Appellant a second time on August 20, 2014 with the same summons and complaint and affidavit that the Appellee had served the Appellant on December 6, 2013 (CP 1, CP 2). After the Appellant had been properly served by the Appellee the second time, the Appellant, on October 9, 2014, filed his motion to dismiss (CP 38). The Appellant contended in his motion to dismiss that, "It is a long-settled principle that standing cannot be inferred argumentatively from averments in the pleadings, but rather must affirmatively appear in the record" (CP 38, pg 2, ¶ 1 - 2). The Appellant specifically contended in his motion to dismiss that the Superior Court lacked subject matter jurisdiction because the affiant could not be counted on as a competent fact witness due to the fact that Daniel Dunn, the affiant, had not attached the agreement to his affidavit, which Daniel Dunn stated was the subject of the claim (CP 38, pg 3, ¶ 2 sections 1. and 2.) On October 22, 2014, during oral arguments in the Superior Court, Appellant directed the Superior Court to notice that no agreement was attached to the Appellee's affidavit

(VR pg 4 ¶ 6). Appellant, during oral arguments in the Superior Court on October 22, 2014 pointed out to the Superior Court that the Discover v. Bridges case was very similar to the Appellants and contended that the Appellee, just like Discover, had not established a proper claim because there was *no evidence in the record* to support the testimony of the affiant, Daniel Dunn (VR pg 6). The Appellee, on October 22, 2014, during oral arguments in the Superior Court, contended that attaching the agreement to the affidavit was not necessary and that the Appellant's motion to dismiss was not proper because the Discover v. Bridges was a summary judgment case (VR pg 9 ¶ 4 – pg 11 ¶ 1) On October 22, 2014, during oral arguments in the Superior Court, Judge Evans determined that Daniel Dunn's declarations proved by a preponderance that the Appellee had a claim and that there is an underlying contract (VR pg 14, ¶ 2). On October 22, 2014, during oral arguments in the Superior Court, Judge Evans denied the Appellant's motion to dismiss for lack of subject matter jurisdiction and failure to state a claim upon which relief can be granted (VR pg 13 – 14). On January 5, 2015, Appellant was served by the Appellee with a motion for summary judgment that was supported with a declaration from Scot Mayo (CP 71). On February 6, 2015,

Appellant filed his memorandum in opposition to Appellee's motion for summary judgment (CP 63). Appellant attached his affidavit to his memorandum in opposition to Appellee's motion for summary judgment on February 6, 2015 (CP 64). The Appellant contended in his memorandum in opposition to Appellee's motion for summary judgment, that because the terms and conditions brought forth as evidence by Scot Mayo in his declaration were never ratified by the Appellant, a genuine issue of material fact existed precluding summary judgment (CP 63, pg 1, ¶ 2 – pg 2, ¶2 section d.). Appellant also contended in his memorandum in opposition to Appellee's motion for summary judgment, that the testimony of Scot Mayo came into direct conflict with the evidence Scot Mayo offered the Appellant in support of the Appellee's claims (CP 63, pg 8 – 9, ¶ 31 - ¶ 36, CP 71) On February 25, 2015, during oral arguments in the Superior Court, the Appellee, in opening statements made no reference to the agreement and its terms and conditions (VR pg 19 – 20) On February 25, 2015 during oral arguments in the Superior Court, the Appellant contended in his responsive argument to the Appellee that the agreement, with its terms and conditions provided as evidence by Scot Mayo, did not apply to the Appellant because the provided agreement was dated after

the closing of the alleged and disputed account and therefore could not be assented to by use of a said credit card (VR pg 26, ¶ 3 – pg 27). The court asked the Appellee on February 25, 2015 during oral arguments in the Superior Court about the issue of the terms and conditions (VR pg 33, ¶ 2). The Appellee responded to the Superior Court stating that there were all kinds of different versions of each one, and that the provided terms and conditions by Scot Mayo were the most current ones while the Appellant's alleged account was still open (VR pg 33, ¶ 3). On February 25, 2015 during oral arguments in the Superior Court, the Judge made a determination that the provided terms and conditions by Scot Mayo did not apply to the Appellant (VR pg 34, ¶ 2). On February 25, 2015 during oral arguments in the Superior Court, the Judge granted summary judgment in part on all issues except on the terms and conditions, and so the Appellant's memorandum in opposition to Appellee's motion for summary judgment was denied (VR pg 34, ¶ 3).

C. Summary of Argument

The Appellee filed an action into a court of equity, a civil court. A court of equity must determine if claims brought before it are actionable based upon two things: some type of evidenced duty either

under statute, contract or common law and testimony to authenticated evidence that's in harmony with the breach of duty. In this case, the Appellee, in order to establish a claim, had to show that the Appellant mutually assented to a contract by accepting the cardmember agreement and personally acknowledged their account¹. The Appellee stated in their original complaint in ¶ 6 that, "As a result of the terms of the agreement, the defendant agreed by use of said credit account (1) to assume responsibility for all credit extended on the basis of said credit account, and (2) to make regular monthly payments." In ¶ 8 of the same complaint the Appellee stated that, "...the defendant is now in default under the terms and conditions of the agreement." [(CP 1), Summons and Complaint, 02-18-2014] It is undisputed that the action brought before the Superior Court by the Appellee was for a breach of a duty, a default under terms and conditions of an agreement that did no apply to the Appellant. When the Court requested a response from the Appellee's attorney about the Terms and Conditions that the Appellant had denied assenting to, opposing counsel stated in rebuttal arguments that, "The Terms and Conditions, they – they're all kind of

¹ *Discover Bank v. Bridges*, 226 P 3d 191 - Wash: Court of Appeals, 2nd Div 2010 - "¶ 13 To establish a claim, Discover Bank had to show that the Bridges mutually assented to a contract by accepting the cardmember agreement and personally acknowledged their account "

are different versions of each one, and these are the most current ones while his account was still open.” [Verbatim Report VR, page 33, ¶ 2] The Superior Court, having heard the Appellee's response, stated, “I will grant Plaintiff's Motion for Summary Judgment on all issues except what the applicable Terms and Conditions of the contract are. On that, I'll find that they're – they've not met their burden, because the one that was presented doesn't apply to the current circumstance.” [Verbatim Report VR, page 34, ¶ 2, 3] The question before this court is this: Did the Appellee bring a justiciable issue or a cognizable cause of action against the Appellant? Did the Appellee establish before the Superior Court that the Appellant had assented to a duty and that the assented to duty was breached by the Appellant, evidencing a default and acceleration, and therefore allowing for an award of monetary damages with attorney's fees? Appellant appeals to this court arguing that the conclusions of the Superior Court in determining summary judgment in part for money damages and attorney's fees were not supported by evidence.

D. Argument

1. Subject Matter Jurisdiction

Subject Matter Jurisdiction was challenged in Appellant's

motion to dismiss [CP 38, motion to dismiss, 10-09-2014] The prerequisites for subject matter jurisdiction is two part: the statutory or common law authority for the court to hear the case and the appearance and testimony of a competent fact witness. In other words, sufficiency of pleadings.

Though the State Court may claim that it has general jurisdiction to hear a claim, it must make a determination of subject matter jurisdiction when a specific, legitimate challenge has been brought forward. The Appellant's motion to dismiss raised a specific issue regarding subject matter jurisdiction, which was challenging the alleged competent fact witness' unverified statements. The competent fact witness at the time was a Daniel Dunn, the affiant who's affidavit made declared in ¶ 2 that, "Attached hereto is a true and correct copy of the Agreement, which is the subject of the claim in this action . . ." In ¶ 3 of the same affidavit the affiant stated that, "The Borrower has defaulted under the terms of the Agreement and the default has not been cured. The balance has been accelerated making the entire balance due and owing in accordance with the terms of the Agreement." (CP 1, Summons and Complaint, attached affidavit, 02-18-2014)

In oral arguments and in his pleadings, the Appellant challenged the Affidavit and argued that the affiant's sworn to statements rested entirely on an agreement that wasn't attached to the affidavit, which the affiant swore to by saying "Attached hereto is a true and correct copy of the Agreement, which is the subject of the claim." The affiant continued by swearing under oath that, "The Borrower has defaulted under the terms of the Agreement". However, the agreement was not attached to the sworn statement (affidavit). The Appellee's attorney in his rebuttal in oral arguments stated that, "It seems like he thinks that we need to attach everything to our complaint and have established the claim before we can actually serve him with the complaint, which just isn't correct." (VR, pg 10, ¶ 3) The Appellant in his reply back raised the issue of opposing counsel violating Rule 11b(3)² and trying to bring a case without evidence, hoping to find some as the case progresses (VR, pg 11, ¶ 3) CR 11b(1)³ states that the claim should be well grounded in fact. Appellant argued that when a

² The Appellant filed a federal lawsuit against the Appellee's attorney firm and used Federal Rules of Civil Procedure to determine a violation of Rule 11. However, the Superior Court Rule 11 is not an exact duplicate of Rule 11 in the federal rules. The Appellant, by citing Rule 11b(3) of the federal Court meant Rule 11b(1) of the Superior Court Rules, in that the Complaint was not well grounded in fact.

³ Ibid

witness to a claim rests entirely upon an agreement that is not attached to his affidavit, that they claimed was attached to the affidavit, the Appellee's attorney has a duty to acquire the attached agreement sworn to and submit them in his filing the next time he serves the opposition. The "well grounded in fact" requirement is met when an attorney or other signer has reasonably inquired into the factual underpinning of the essential elements of the pleading⁴. The signer who certifies that the paper is well grounded in fact must have acquired sufficient knowledge to ascertain that the paper is not frivolously filed. The Appellee's attorney signed the summons and complaint on November 13, 2013. However, the affiant, Daniel Dunn, did not swear to any statements until December 17, 2013. At the time of the second summons and complaint on the Appellant, the Appellee's attorney had almost 6 more months to acquire the agreement and make reasonable inquire of the agreement that the affiant had sworn to when they served the Appellant the first time in December of 2013. Strangely, the Appellee's attorney, failed again to attach the agreement, which was the subject of the claim. Appellant argues that the Superior Court erred by not dismissing the complaint without prejudice due to the issues raised by the Appellant. Appellant asserts that a court

⁴ Greenberg v Sala, 822 F 2d 882, 887 (9th Cir. 1987)

has a duty to also investigate the legitimacy of a claim that has been challenged for lack of evidence establishing a cognizable cause of action, especially when the Appellee has served the Appellant twice and failed both times to attach the agreement, the subject of the claim, of which the Superior Court later determined had no application to the case. The Superior Court, by examination of the pleadings, should have recognized the gross neglect by the Appellee's attorney, in which he had over 6 months to acquire the agreement, the subject of the claim, and attach it to the second summons and complaint served on the Appellant. The Superior Court should have dismissed the action without prejudice, at the very least, and requested the Appellee to file his next summons and complaint with the Agreement attached to the affidavit.

- Subject matter jurisdiction cannot exist where no justiciable issue is presented to the court through proper pleadings. *Ligon v. Williams*, 264 Ill. App.3d 701, 637 N.E.2d 633 (1st Dist. 1994).
- Subject matter jurisdiction cannot exist where a complaint states no cognizable cause of action against that party. *Charles v. Gore*, 248 Ill.App.3d 441, 618 N.E.2d 554 (1st Dist. 1993).

2. **Genuine Issue of Material Fact Exist**

In *Discover Bank v. Bridges*, this court stated that “When reviewing a summary judgment order, we review the evidence in a

light most favorable to the nonmoving party. *Herron v. Tribune Publ'g Co.*, 108 Wash.2d 162, 170, 736 P.2d 249 (1987). Mere allegations or conclusory statements of facts unsupported by evidence do not sufficiently establish such a genuine issue. *Baldwin v. Sisters of Providence in Wash., Inc.*, 112 Wash.2d 127, 132, 769 P.2d 298 (1989). In addition, the nonmoving party "may not rely on speculation, argumentative assertions that unresolved factual issues remain, or on having its affidavits considered at face value." *Seven Gables Corp. v. MGM/UA Entm't Co.*, 106 Wash.2d 1, 13, 721 P.2d 1 (1986). After the moving party submits adequate affidavits, the non-moving party must set forth specific facts rebutting the moving party's contentions and disclose that a genuine issue of material fact exists. *Seven Gables*, 106 Wash.2d at 13, 721 P.2d 1."

The Appellee's motion for summary judgment was based upon the subject matter of the complaint which was the agreement and its terms and conditions. The argued cognizable cause of action was that the Appellant had assented to their agreement presented in their motion for summary judgment and had defaulted on that same said agreement, incurring acceleration of alleged monies due. In

the Appellant's verified memorandum in opposition to Appellee's motion for summary judgment (CP 63, 02-06-2015), and the Appellant's oral arguments (VR, pages 18-35), the Appellant contended that the agreement was not assented to because the agreement with its terms and conditions were dated after the disputed account was closed. The Superior Court agreed and stated that the terms and conditions did not apply to the case.

According to *Discover Bank v. Bridges*, in order for an Appellee, in this case, First National Bank of Omaha to establish a claim, First National Bank of Omaha had to show that the Appellant mutually assented to a contract by accepting the cardmember agreement and personally acknowledged their account. The pleadings of this case, including the answer to the complaint and the Appellee's propounded discovery on the Appellant, clearly show that the account ending in 9716 was never personally acknowledged but disputed and challenged. Secondly and most importantly, the cardmember agreement was not assented to by the Appellant and the Superior Court determined that the said cardmember agreement did not apply to the Appellant. Further, any account statements presented to the court by the Appellee as

evidence of monies due or a breached duty fail because the very few statements that actually show purchases, disputed by the Appellant, were purchases that took place long before the April 9, 2013 dated agreement that was presented before the Superior Court as having been the agreement that was breached, causing acceleration of the alleged monies due, and thus necessitating an action. Therefore, since the cardmember agreement presented to the Superior Court did not apply to the Appellant, no default could have occurred. Because no default occurred, no acceleration of alleged monies due could have been initiated. Therefore, the evidence before the court was insufficient to make a determination for summary judgment in part for monies due. And should this court determine that the Superior Court erred in granting summary judgment in part for monies due, then the Superior Court also erred in awarding attorney's fees based upon the foregoing.

Based upon the foregoing argument, the Appellant contends that the Superior Court erred in granting summary judgment in part for money damages and attorney's fees. There are genuine issues of fact that remain before the court. The Superior Court was unable to make a determination that monies were due

- Sufficient evidence must be established to demonstrate that the Appellate assented to the terms of the cardmember agreement. *Citibank (South Dakota), NA v. KAYMAZ*, Wash: Court of Appeals, 1st Div. 2013 Appellate denied and never assented or ratified the terms and conditions to the agreement brought as evidence for summary judgment.

E. Conclusion

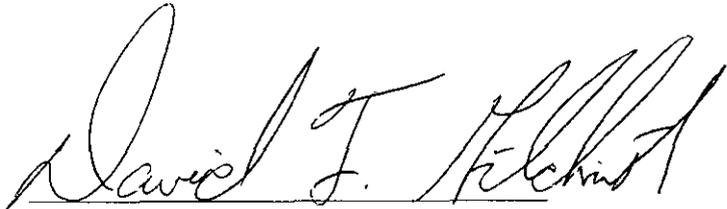
The Superior Court of Cowlitz County Erred in granting summary judgment in part for monies due and for awarding attorney's fees based upon their summary judgment in part. The Superior Court of Cowlitz County also erred for failing to dismiss a claim for lack of subject matter jurisdiction and for failure to state a claim upon which relief can be granted.

This Court should reverse the summary judgment in part for monies due, reverse the award of attorney's fees, and based upon a clear lack of a cognizable cause of action, dismiss the action with prejudice for lack of subject matter jurisdiction

In the alternative, this Court should reverse the decisions of the Superior Court and remand back for further review and/or proper adjudication.

Dated December 3, 2015

Presented by:

A handwritten signature in black ink, appearing to read "David T. Gilchrist". The signature is written in a cursive style with a horizontal line underneath it.

David T. Gilchrist
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Email: mortetyrann1776@hotmail.com

Plaintiff

CERTIFICATE OF SERVICE

I declare under penalty of perjury under the laws of the state of Washington that a copy of the foregoing, **APPELLANT'S OPENING BRIEF along with VERBATIM REPORT**, was mailed by certified U.S. mail to Matthew Cheung, Attorney of Record, at the law office of Patenaude & Felix, A.P.C., 19401 40th Ave West, Suite 280, Lynnwood, WA 98036 on February 6, 2015.

Dated December 3, 2015

Presented by:



A handwritten signature in cursive script that reads "David T. Gilchrist".

David T. Gilchrist
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Plaintiff

STATE OF WASHINGTON
COUNTY OF COWLITZ

BEFORE ME personally appeared David T. Gilchrist who, being
by me first duly sworn and identified in accordance with Washington law,
did execute the foregoing in my presence
this 3 day of Dec 2015

A handwritten signature in cursive script that reads "Cynthia L. Corl".

Notary Public

My commission expires: 05-28-2018