

FILED
MAY 11 2011
COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
B)

Appeal No. 295419-III

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

CAPITAL ONE BANK (USA), N.A.

Respondent

V.

GEORGIA A. PLUMB

Appellant

APPEAL FROM YAKIMA CASE NO. 10-2-01247-7

RESPONDENT'S BRIEF

CAPITAL ONE BANK (USA), N.A.
c/o Suttell & Hammer, P.S.
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I. INTRODUCTION

This is a simple collection case in which the defendant-appellant Georgia Plumb (hereinafter “Plumb”), seeks to avoid paying her credit card debt. Plumb does not, and cannot, dispute the fact that she applied for, received, used, and made payments on a credit card account issued by plaintiff-respondent Capital One Bank (USA), N.A. (hereinafter “Capital One”). Nor does she dispute the balance owed on the account. Instead, Plumb asserts that the trial court erred in determining whether genuine issues of material fact existed, that the trial court erred in admitting evidence, and that the court denied Plumb her due process rights. As recognized by the trial court, the evidence submitted by Capital One was admissible and clearly showed that Plumb entered into a credit card agreement with Capital One and thus was liable for the debt she incurred. As a result, judgment was entered against her. Accordingly, Capital One respectfully requests that this Court affirm the judgment.

II. STATEMENT OF THE CASE

On July 30, 1999, Plumb entered into a credit card agreement with Capital One by submitting a signed credit card application. CP 14. The application states above Plumb’s signature “I have read and agree to the Agreement to Terms on the reverse.” CP 14. In addition to

the application, a \$50.00 security deposit was required to secure the credit card account. CP 14-15. Capital One issued Plumb a credit card account numbered XXXXXXXXXXXXX7770. CP 12. Plumb used the credit card account over the next several years, making purchases and payments. CP 12, 16-18. Plumb breached the contract by not paying periodic payments as required by the Customer Agreement and was, as of November 15, 2009, indebted to Capital One in the amount of \$5862.57. CP 12-13.

On March 29, 2010, Plumb was served with a summons and complaint for the monies owed to Capital One. CP 8. On April 21, 2010, Capital One filed the case with the Yakima County Superior Court CP 1-5. On April 23, 2010, Plumb filed an answer to the summons and complaint. CP 6-7.

Capital One filed a motion for summary judgment on June 22, 2010, noting a hearing before the Civil Motions Judge for August 11, 2010 at 3:00PM. CP 9-28. Capital One's motion was supported by the Affidavit of Jamie Williams (hereinafter "Williams"), an authorized agent of Capital One working in the capacity as a Litigation Support Representative, who confirmed the debt of \$5862.57. Also supporting the Motion was the application for the account signed by Plumb, the security deposit check for opening the account, billing statements

(including one billing statement from September 2006 showing a payment by Plumb as well as 47 separate transactions), a copy of the Customer Agreement, and a copy of Requests for Admissions which Capital One had not received a response to at the time. CP 12-26.

On July 9, 2010, Plumb noted a Motion to Strike Evidence. CP 51. Plumb's Motion primarily argued that Capital One's supporting documents were inadmissible hearsay and that Requests for Admissions were responded to within the allowed time period. CP 29-40. On July 20, 2010, Capital One filed a response to Plumb's Motion to Strike Evidence. CP 41-54. On July 23, 2010, the Honorable Michael E. Schwab heard oral argument but did not rule, preserving Plumb's Motion to Strike Evidence to be heard contemporaneously with Capital One's Motion for Summary Judgment. RP 1-16 July 23, 2010. On July 29, 2010, Plumb filed her Opposition to and Motion to Strike Capital One's Motion for Summary Judgment. CP 64-93.

Capital One's Motion for Summary Judgment and Plumb's Motion to Strike Evidence were held before the Honorable James Lust. Plumb's husband, Carl Plumb, even though not a named party in the suit or an attorney, was allowed to speak on Plumb's behalf first as to their Motion to Strike Evidence. RP 3-14 August 13, 2010. During this time Capital One stipulated to the striking of the Requests for

Admissions from the record. RP 5 August 13, 2010. Capital One then responded to Plumb's Motion and also made its argument as to why the Motion for Summary Judgment should be granted. RP 14-16 August 13, 2010. Judge Lust then requested that all billing statements be provided to Plumb, specifically Judge Lust requested the last billing statement where the balance was zero. RP 17 August 13, 2010. Judge Lust, after directing Capital One to provide additional documents, ruled that the documents provided to the court in Plaintiff's motion were admissible as business records. RP 18 August 13, 2010. Plumb started to argue with the court about several documents being marked and doctored up, RP 19 August 13, 2010. Judge Lust asked counsel for Capital One if the marks were redactions of personal and private information; counsel confirmed they were redactions. RP 19 August 13, 2010. Judge Lust then directed Capital One to provide the billing statements to Plumb but specifically asked counsel not to file them with the court. RP 20-21 August 13, 2010. The court then continued the hearing to September 17, 2010, to allow Capital One to provide the documents to Plumb. RP 24 August 13, 2010. When asked, the court replied that all of Capital One's evidence would be before the court. RP 24 August 13, 2010.

On August 17, 2010, Capital One sent a letter to Plumb outlining Judge Lust's rulings at the August 13, 2010 hearing and sending billing statements dating back to 2003. CP 137. Pursuant to the court's specific request, the billing statements were not filed with the court but were sent to Judge Lust as working copies. CP 137. On September 10, 2010, Plumb filed a second Motion to Strike Evidence, Motion for Sanctions, Motion to Dismiss with Prejudice, and Motion for Damages. CP 109-128. On September 14, 2010, Capital One filed a Response to Plumb's new set of motions. CP 129-132. On September 17, 2010, the day of the continued summary judgment hearing, Plumb filed a Motion to Strike Capital One's Response to Plumb's new motions. CP 133-139.

On September 17, 2010, Judge Lust heard additional argument on Capital One's Motion for Summary Judgment. RP 1-13 September 17, 2010. After hearing additional argument on the evidence previously admitted by the court, Judge Lust stated he would take the case under advisement and issue a ruling. RP 12. September 17, 2010. On November 2, 2010, Judge Lust issued a decision that he had reviewed all of the documents submitted, finding that there were no disputed facts, and summary judgment was granted. CP 139. On November 10, 2010, Plumb filed a motion for reconsideration with the

court. CP 140-142. The Motion for Reconsideration was denied by the court on November 16, 2010. CP 143. This appeal ensued. CP 144-147.

III. ARGUMENT

A. STANDARD FOR REVIEW

Plumb brings up three issues for review before this court. First this Court should review Plumb's second issue on appeal, whether the trial court erred in admitting Capital One's evidence. The trial court's decision to admit evidence is reviewed for a manifest abuse of discretion. *See State v. Powell*, 126 Wn.2d 244, 258, 893 P.2d 615 (1995), *see also State v. Ziegler*, 114 Wn.2d 533, 538, 789 P.2d 79 (1990)(trial court's decision to admit business records is reviewed only for a manifest abuse of discretion). A trial court abuses its discretion when it bases its decision on unreasonable or untenable grounds. *Dix v. ICT Group, Inc.*, 160 Wn.2d 826, 833, 161 P.3d 1016 (2007)(citing *Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, Wn. 2d 299, 339, 858 P.2d 1054 (1993)).

The next issue to review is Plumb's first issue on appeal, whether the trial court properly granted summary judgment. 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.

The final issue is whether the trial court denied Plumb's due process rights. When reviewing a constitutional issue, the Court reviews the issue *de novo*. *State v. Jones*, 159 Wn.2d 231, 237, 149 P.3d 636 (2006).

B. THE COURT PROPERLY ADMITTED PLAINTIFF'S EVIDENCE UNDER THE BUSINESS RECORDS EXCEPTION

The first issue this Court must review is whether the trial court properly admitted Plaintiff's evidence. Plumb argues that the evidence does not comply with CR 56(e), RCW 5.45.020, and ER 602. Capital One's evidence is admissible under RCW 5.45.020 as a business records exception to the hearsay rule.

Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. ER 801(c). Hearsay is not admissible except as provided by the rules of evidence, other court rules, or by statute. ER 802. William's Affidavit and the accompanying documents

do contain statements made by other Capital One employees regarding records and notes on Plumb's account that are hearsay. However these hearsay statements fall under the business records exception to the hearsay rule. Articulated under RCW 5.45.020, the business records exception holds:

A record of an act, condition or event, shall in so far as relevant, be competent evidence if the custodian or other qualified witness testifies to its identity and the mode of its preparation, and if it was made in the regular course of business, at or near the time of the act, condition or event, and if, in the opinion of the court, the sources of information, method and time of preparation were such as to justify its admission.

Williams swears under the penalty of perjury that she is a Litigation Support Representative and authorized agent for Capital One and thus is a qualified witness. CP 12. Williams swears that she is familiar with the manner and method by which Capital One maintains its normal books and records. CP 12. Williams swears in her Affidavit that the books and records she bases her affidavit on are kept in the regular course of business. CP 12. Williams swears that the records are made at or near the time the events they purport to describe occurred, by a person with knowledge of the acts or events or by a computer or other digital means which contemporaneously records an event as it occurs. CP 12. Williams finally swears that the information provided in her Affidavit is provided under the penalty of perjury. CP 13. While the evidence provided by Capital One does contain hearsay, it is

admissible as it falls directly under the business records hearsay exception.

Plumb argues that pursuant to CR 56(e) no evidence has been introduced showing that Williams is competent to testify on matters concerning herself and therefore ER 602 requires that she have personal knowledge on the matter. Despite Plumb's claims, Williams' Affidavit is very clear that she is an authorized agent of Capital One, with access to its records and who is familiar with the manner and method they are kept; the trial court found her facts admissible. Capital One's Affidavit meets the criteria of CR 56(e).

The trial court's decision to admit evidence is reviewed for a manifest abuse of discretion. Here, the trial court listened to extensive argument, both written and oral, on the admissibility of Capital One's evidence. The trial court ruled that the evidence submitted by Capital One fell under the business records exception and thus admitted Capital One's evidence into the record. RP 18-19 August 13, 2010. Plumb has failed to provide any evidence or legal argument that the trial court based its decision on unreasonable or untenable grounds and thus abused its discretion. As there is no evidence that the trial court

abused its discretion in admitting Capital One's evidence, the trial court's ruling on this issue should be affirmed.

C. 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 Capital One summary judgment as a matter of law. Summary Judgment is proper 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).

In support of its motion for summary judgment, Capital One submitted Williams' Affidavit with the amount due and owing on the account, CP 12-13, the application signed by Plumb for the credit card account in question, CP 14, a check from Plumb paid to Capital One to open the account, CP 15, records of usage of the account by Plumb, CP16-17, and a copy of the Customer Agreement, CP 19-20. Additionally, Capital One submitted all billing statements available to Plumb and as working copies to the trial court but, pursuant to the trial court's specific instructions, these statements were not filed into the record.

In particular, 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 there is a genuine issue of material fact. Plumb, in her responsive pleadings, raised objections to the admissibility of the evidence but she has failed to set forth specific facts showing a genuine issue for trial. Plumb has failed to set forth facts showing she did not sign the application entering into the credit card agreement with Capital One, she has not set forth specific facts showing she did not submit a check for \$50.00 to open the account, she has failed to set forth specific facts showing she did not use the account, she has not set forth specific facts showing she did not make payments on the account, and, finally she has failed to set forth specific facts showing that the amount provided for by the Affidavit of Williams is incorrect. In fact, if Plumb believed that there was an error as to the amount owed on the account, she was required by both federal law and the credit card agreement to make any dispute over a credit error in writing.

15 U.S.C. § 1666(a) states:

a) Written notice by obligor to creditor; time for and contents of notice; procedure upon receipt of notice by creditor:
If a creditor, **within sixty days** after having transmitted to an obligor a statement of the obligor’s

account in connection with an extension of consumer credit, receives at the address disclosed under section 1637

(b)(10) of this title a **written notice** (other than notice on a payment stub or other payment medium supplied by the creditor if the creditor so stipulates with the disclosure required under section 1637 (a)(7) of this title) from the obligor in which the obligor—

(1) sets forth or otherwise enables the creditor to identify the name and account number (if any) of the obligor,

(2) indicates the **obligor's belief that the statement contains a billing error** and the amount of such billing error, and

(3) **sets forth the reasons for the obligor's belief** (to the extent applicable) that the statement contains a billing error. (Emphasis added).

The cardholder has the burden of establishing that the notice of “billing error” was given within 60 days from the receipt of the credit card statement that first disclosed the “billing error.” *Plutchok vs. European American Bank*, 540 N.Y.S.2d 135, 143 Misc.2d 149 (1989).

There is no evidence on the record that Plumb ever wrote a letter to Capital One disputing the charges. As Plumb did not give Capital One notice of a “billing error” within the statutory allotted time, she is barred from bringing such a dispute as a defense to this action. Plumb cannot raise dispute of the debt as a way to bar recovery of the claim owed to Citibank.

Plumb references the recent case of *Discover Bank v. Bridges*, 154 Wn. App. 722, 226 P.3d 191 (2010) as proof of a genuine issue of material fact. In *Bridges*, the Court ruled that to establish a claim the bank had to show that the defendant had mutually assented to the credit card agreement and personally acknowledged their account. *Id.*

at 727. The Court ruled that this 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 acknowledgment of the account. *Id.* at 727-728.

The facts in this case are distinguishable from those of *Bridges*. In *Bridges*, the court ruled that the evidence provided by the creditor was insufficient to show that the defendant had assented to the credit card agreement as they had failed to provide a signed agreement, copies of checks, or detailed, itemized usage of the account. In this case, the record contains the signed application for the account in question and a copy of a signed check for \$50.00 from Plumb to Capital One to open the account in question. Moreover, the 2006 billing statement provided by Capital One not only showed an undisputed payment by Plumb but also forty seven separate undisputed transactions. The billing statement is distinguishable from the billing statements in *Bridges* as there is a detailed and itemized usage of the account by Plumb in addition to a payment. So, unlike *Bridges*, where the creditor's only evidence was billing statements which did not show detailed and itemized usage of the account, Capital One has provided evidence of Plumb's assent to the credit card agreement through the three specific methods the Court listed out.

Furthermore, Capital One, per the instructions of the trial court, did not file over 200+ pages of billing statements showing detailed itemized usage of the account into the court record. Copies of the billing statements were sent to Plumb and the trial court as working copies only. The trial court referenced receiving the billing statements in the last oral hearing heard on this matter. Plumb referenced receiving the billing statements as well. As instructed by the trial court over 200+ pages of billing statements were provided to Plumb for review so she could claim if the balance was calculated wrong, yet she never articulated one error on any specific statement.

The purpose of the summary judgment motion is to eliminate what is in dispute from what is not in dispute making a trial, if necessary, less burdensome. Capital One has provided evidence that Plumb entered into an agreement with Capital One through the application signed by Plumb and the security deposit required to open the account. Evidence has been provided that Plumb not only opened the credit card account in question, but also that she used the account, she made payments on the account, she ceased to make payments on the account, and an amount is due and owing. In response to this evidence, to defeat the motion for summary judgment Plumb was required to provide specific facts showing that there is a genuine issue of material fact as to this evidence put forth by Capital One; she failed

to do so. Plumb's arguments are primarily evidentiary based which were ruled on by the trial court. The argument that the *Bridges* decision precludes summary judgment is not applicable in this case as establishment of the claim has been provided by the signed application and corresponding check from Plumb. Because Plumb has failed to raise any genuine issues of material fact, Capital One's motion for summary judgment was proper and should be affirmed.

D. PLUMB WAS NOT DENIED HER DUE PROCESS RIGHTS TO A FAIR HEARING.

Plumb claims that she was deprived of due process and a fair hearing in several ways but fails to list out any concrete evidence that this is the case. The Due Process Clause of the Fifth Amendment provides that "no person shall...be deprived of life, liberty, or property, without due process of law." U.S. Const. amend V. The Fourteenth Amendment provides that "no State shall...deprive any person of life, liberty, or property without due process of law." U.S. Const. amend. XIV. The actions of a private actor may constitute state action when "there is such a close nexus between the State and the challenged action that seemingly private behavior may be fairly treated as that of the State itself." *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 350, 95 S.Ct., 449, 42 L.Ed. 2d 477 (1974).

Plumb does not outline any facts outlining which rights were violated. Plumb has also failed to demonstrate in the facts presented any nexus between Capital One and the State. As a result Plumb's due process claim raised in this appeal is without merit and should be disregarded by the Court

Plumb argues that the letter opinion by Judge Lust is such a violation because it found there to be no disputed facts, CP 139, when clearly she had disputed facts on the record. This argument is flawed as Judge Lust's letter simply means he did not find material facts in dispute which would preclude summary judgment.

Plumb also claims that the trial court prevented her from receiving a fair hearing by ignoring her voluminous motions and disputes. As can be clearly seen from the transcripts, the trial court went above and beyond what was required of it to let Plumb have her day in court. The transcripts show the trial court allowed Plumb to extensively argue her Motions, allowed her husband a non-party to the action and a non-attorney to argue on her behalf, ordered Capital One to provide documentation to Plumb without having to file a motion to compel. The Yakima County Superior Court made every convenience for Plumb on this case. Being on the losing side of a case does not mean that a person was denied their due process rights.

IV. CONCLUSION

As stated 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.

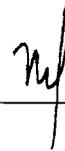
Preston v. Duncan, 55 Wn.2d 678, 684, 349 P.2d 605 (1960).

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 \$7022.07 judgment entered in its favor.

RESPECTFULLY SUBMITTED this 10th day of May, 2011.

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