

[Cite as *Discover Bank v. Doran*, 2011-Ohio-205.]

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

Discover Bank,	:	
Plaintiff-Appellee,	:	
v.	:	No. 10AP-496 (M.C. No. 2009CVF042547)
Julianna Michelle Doran,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on January 20, 2011

Weltman, Weinberg & Reis Co., L.P.A., and Matthew G. Burg,
for appellee.

Julianna Michelle Doran, pro se.

APPEAL from the Franklin County Municipal Court.

SADLER, J.

{¶1} Defendant-appellant, Julianna Michelle Doran ("appellant"), pro se, appeals from the judgment of the Franklin County Municipal Court granting summary judgment in favor of plaintiff-appellee, Discover Bank ("appellee"), and entering judgment for appellee in the amount of \$4,693.31, plus contractual interest and costs.

{¶2} According to the evidence in the record, appellant signed a Discover Platinum Card application on May 1, 2002. The cardmember agreement outlining the terms and conditions of the credit card provides that use of the account or card by the cardholder or an authorized user, or the cardholder's failure to cancel the account within 30 days after receiving the card constitutes acceptance of the agreement. By the terms of the cardmember agreement, the cardholder agrees to pay for "all purchases, cash advances and balance transfers including applicable [f]inance [c]harges and other charges or fees, incurred" by the cardholder or an authorized user, and the cardholder further agrees to pay the minimum payment due each month as shown on the monthly billing statement. (Cardmember Agreement at 5.) The cardmember agreement also provides that the cardholder is in default if the cardholder fails to make a required payment when due. Once in default, the entire balance may be declared immediately due and payable, and the matter referred to collection.

{¶3} Appellant made both purchases and payments on the credit card until September 2008, after which time, though there were additional purchases, no additional payments were made. There is no evidence that appellant ever disputed any of the individual charges appearing on the credit card account.

{¶4} On September 28, 2009, appellee filed the instant complaint seeking to recover damages in the amount of \$4,693.31, the balance due according to the April 15, 2009 statement, plus interest and costs. On March 30, 2010, appellee filed a motion for summary judgment. In support of said motion, appellee submitted the cardmember agreement and appellant's credit card account statements from January 2003 to April 2009, along with an affidavit authenticating the documents. On April 21, 2010, appellee

submitted the signed credit card application. In response to the motion for summary judgment, appellant filed a memorandum in opposition asserting multiple "objections." Though appellant's memorandum made many conclusory statements, appellant failed to include either legal argument or evidence.

{¶5} On April 27, 2010, the trial court granted appellee's motion for summary judgment, and entered judgment in favor of appellee in the amount of \$4,693.31, plus interest at the rate of 24.90 percent from the date of judgment, plus costs. This appeal followed, and appellant brings the following eight "points of law" for our review:

[1.] Defendant-Appellant, Julianna Doran did not sign a contract with Plaintiff-Appellee, Discover Bank.

[2.] Defendant-Appellant never received or agreed to any cardmember agreement with Plaintiff-Appellee.

[3.] The alleged account with Plaintiff-Appellee, Discover Bank is "unassigned" or "unsubscribed". This account was disputed before complaint, during the case and after entry of summary judgment. Defendant-Appellant, Julianna Doran does not owe Plaintiff-Appellee money.

[4.] Plaintiff-Appellee, Discover Bank did not authorize this civil action. Discover Bank is unaware of this case or legal proceedings. There is no incurred injury to plaintiff-appellee.

[5.] Plaintiff-Appellee, Discover Bank is not licensed in the state of Ohio. (ORC 1703.03) An unlicensed business cannot conduct business in the state. (ORC 1703.30) No proof that Discover Bank has a license through the state, superintendant of financial institutions of Ohio or the Comptroller of Currency. (ORC 1119.02)

[6.] Discover Bank is prohibited to conduct business in this state, and is forbidden to maintain an action in the courts of Ohio. (ORC 1703.29) Lack of jurisdiction.

[7.] Statements of counsel are not facts before the court. ((Case: US v Armedo-Sarmiento 545 F.2d 785 (2nd Cir.

1976) and US v Ewing 979 F.2d 1234 (7th Cir. 1992).)) An attorney for a party is an incompetent witness. Copies are not admissible in court. Lack of evidence.

[8.] Credit cards are non-transferable. Weltman, Weinberg and Reis Co., L.P.A. illegally and wrongfully took money from Appellant's bank account.

{¶6} As an initial matter, we must address appellant's failure to comply with App.R. 16(A)(3), which provides that an "appellant shall include in its brief * * * [a] statement of the assignments of error presented for review, with reference to the place in the record where each error is reflected," and App.R. 16(A)(7), which requires an appellate brief to contain "[a]n argument containing the contentions of the appellant with respect to each assignment of error presented for review and the reasons in support of the contentions, with citations to the authorities, statutes, and parts of the record on which appellant relies." These requirements have great significance because appellate courts "[d]etermine [an] appeal on its merits on the assignments of error set forth in the briefs under App.R. 16." App.R. 12(A)(1)(b). Without assignments of error, an appellate court has nothing upon which to rule. *Chambers v. Ohio Dept. of Job & Family Servs.*, 10th Dist. No. 06AP-1043, 2007-Ohio-1493, ¶5. The fact that appellant is acting pro se is immaterial because a pro se person " 'is held to the same rules, procedures and standards as those litigants represented by counsel and must accept the results of her own mistakes and errors.' " *Dailey v. R & J Commercial Contracting*, 10th Dist. No. 01AP-1464, 2002-Ohio-4724, ¶17, quoting *Dornbirer v. Paul* (Aug. 19, 1997), 10th Dist. No. 96APE11-1560, discretionary appeal not allowed, 80 Ohio St.3d 1476.

{¶7} Putting aside appellant's briefing errors, we will treat these "points of law" as an assignment of error challenging the trial court's granting of summary judgment in favor

of appellee.¹ We review the trial court's grant of summary judgment de novo. *Coventry Twp. v. Ecker* (1995), 101 Ohio App.3d 38. Summary judgment is proper only when the party moving for summary judgment demonstrates: (1) no genuine issue of material fact exists, (2) the moving party is entitled to judgment as a matter of law, and (3) reasonable minds could come to but one conclusion, and that conclusion is adverse to the party against whom the motion for summary judgment is made, when the evidence is construed in a light most favorable to the non-moving party. Civ.R. 56(C); *State ex rel. Grady v. State Emp. Relations Bd.*, 78 Ohio St.3d 181, 1997-Ohio-221.

{¶8} Under summary judgment motion practice, the moving party bears an initial burden to inform the trial court of the basis for its motion, and to point to portions of the record that indicate that there are no genuine issues of material fact on a material element of the non-moving party's claim. *Dresher v. Burt*, 75 Ohio St.3d 280, 1996-Ohio-107. Once the moving party has met its initial burden, the non-moving party must produce competent evidence establishing the existence of a genuine issue for trial. *Id.*

{¶9} "To prove a breach of contract claim, a plaintiff must show 'the existence of a contract, performance by the plaintiff, breach by the defendant, and damage or loss to the plaintiff.' " *Discover Bank v. Poling*, 10th Dist. No. 04AP-1117, 2005-Ohio-1543, ¶17, quoting *Nilavar v. Osborn* (2000), 137 Ohio App.3d 469, 483, quoting *Doner v. Snapp* (1994), 98 Ohio App.3d 597, 600. Pursuant to Ohio law, "[c]redit card agreements are

¹ We note that appellant's first, second, and third "points of law" were not raised before the trial court in the proceedings below. Issues not initially raised in the trial court may not be raised for the first time on appeal. *Ohio Civ. Rights Comm. v. Triangle Real Estate Servs.*, 10th Dist. No. 06AP-157, 2007-Ohio-1809, ¶30, citing *Porter Drywall, Inc. v. Olentangy Bldg. & Dev. Co.* (Feb. 24, 2000), 10th Dist. No. 99AP-306. Regardless, as will be explained infra, it matters not because even if raised below, appellant presented no evidence in the trial court to support any of her arguments.

contracts whereby the issuance and use of a credit card creates a legally binding agreement." *Bank One, Columbus, N.A. v. Palmer* (1989), 63 Ohio App.3d 491, 493; *Poling; Asset Acceptance LLC v. Davis*, 5th Dist. No. 2004CA00054, 2004-Ohio-6967.

{¶10} A fact pattern analogous to the one currently before us was presented to this court in *Discover Bank v. Heinz*, 10th Dist. No. 08AP-1001, 2009-Ohio-2850. In that case, the trial court granted summary judgment in favor of Discover Bank, and entered judgment against Heinz in the amount of \$8,549.63, plus interest and costs. The judgment arose out of Heinz's use of a credit card issued by Discover Bank upon which Heinz failed to make payments. Because of Heinz's default, Discover Bank filed a breach of contract action against Heinz, and subsequently moved for summary judgment. In support of its motion for summary judgment, Discover Bank submitted the signed credit card application, the cardmember agreement, and credit card account statements encompassing five years, together with an affidavit authenticating the documents. Heinz filed a memorandum in opposition, but failed to include any supporting evidentiary materials.

{¶11} This court found that while Discover Bank presented uncontroverted evidence establishing breach of contract and resulting damages, Heinz presented no evidence to demonstrate the existence of a genuine issue of material fact. Therefore, this court affirmed the trial court's grant of summary judgment in favor of Discover Bank.

{¶12} Here, the evidentiary materials filed in support of appellee's motion for summary judgment establish the existence of the credit card account, the terms of the cardmember agreement, appellant's default, and the balance owed on the account. These evidentiary materials were sufficient to carry appellee's burden of showing that

there was no genuine issue of material fact, and that it was entitled to judgment as a matter of law on its claims. *Heinz, Citibank (S. Dakota), N.A. v. Lesnick*, 11th Dist. No. 2005-L-013, 2006-Ohio-1448 (credit card statements attached to affidavit of credit card company employee submitted by the bank in support of its motion for summary judgment in its action on an account were sufficient to establish existence of account and amount due).

{¶13} The burden thereupon shifted to appellant to affirmatively demonstrate the existence of genuine issues of material fact. *Dresher*. Appellant, however, failed to do so. In her memorandum in opposition, appellant neither filed nor directed the trial court to any evidentiary materials that demonstrated the existence of a genuine issue of material fact. In fact, appellant's memorandum did not even include an affidavit denying that she owed the sums, alleging that such sums were incorrect, or attesting to any other fact to support the "objections" asserted in her memorandum in opposition to appellee's motion for summary judgment. Instead, appellant made conclusory statements, with no supporting Civ.R. 56 evidence, that appellee failed to produce evidence to support its claims, that appellee was not licensed to do business within the state of Ohio, and that appellee was further unaware of these proceedings.

{¶14} Like the defendant in *Heinz*, appellant has not claimed that she did not reap the benefits of using the credit card issued by appellee; rather, her allegations are akin to those made in *The Bank of New York v. Barclay*, 10th Dist. No. 04AP-48, 2004-Ohio-4555, that are unsupported by both evidence or judicial precedent. As stated in *Barclay*, "[t]he trial court was not obligated to manufacture fully developed arguments of this nature

and speculate upon the existence of substantiating facts to support them; neither are we." *Id.* at ¶9.

{¶15} In essence, appellant failed to provide an affidavit or any other evidence as required by Civ.R. 56 in response to appellee's motion for summary judgment that would create a genuine issue of material fact as to, for example, whether or not the debt was hers or whether or not the amounts were otherwise not properly calculated. Accordingly, rendering summary judgment in favor of appellee was proper. *Discover Bank v. Paoletta*, 8th Dist. No. 95223, 2010-Ohio-6031 (summary judgment in bank's favor proper where bank's affidavit in support of its motion for summary judgment demonstrated an agreement between the parties for use of a credit card and that attached account statements accurately reflected the amount due on the account, and the cardholder failed to present any evidence contrary); *Discover Bank v. Lammers*, 2d Dist. No. 08-CA-85, 2009-Ohio-3516 (because the defendant submitted no evidence in response to a bank's summary judgment motion on amounts due on a credit card account, summary judgment was properly granted to the bank); *Pinnacle Credit Servs., LLC v. Kuzniak*, 7th Dist. No. 08 MA 111, 2009-Ohio-1021 (no error in granting summary judgment on a claim for amounts due on a credit card account where the defendant failed to provide any evidence to create a genuine issue of material fact).

{¶16} In conclusion, appellee presented uncontroverted evidence in the trial court that appellant applied for the credit card, was issued the credit card, and used the credit card for a number of years. After failing to make the required minimum monthly payments, appellant was then in default by terms of the cardmember agreement. The resultant loss to appellee as evidenced in the record was \$4,693.31, plus interest and

costs. Because in response to appellee's motion for summary judgment appellant provided only conjecture, she did not meet her reciprocal burden under Civ.R. 56 to establish the existence of a genuine issue of material fact, and appellee was entitled to judgment as a matter of law. *Carroll v. Alliant Techsystems, Inc.*, 10th Dist. No. 06AP-519, 2006-Ohio-5521 (speculation and conjecture are not sufficient to overcome an appellant's burden of demonstrating there are genuine issues of material fact remaining for trial). Accordingly, we find the trial court did not err in granting summary judgment in favor of appellee.

{¶17} For the foregoing reasons, appellant's eight "points of law" contained within her challenge to the trial court's granting of summary judgment in favor of appellee are not well-taken, and the judgment of the Franklin County Municipal Court is hereby affirmed.

Judgment affirmed.

KLATT and CONNOR, JJ., concur.
