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STATE OF SOUTH CAROLINA )  
COUNTY OF SPARTANBURG )  
  
DISCOVER BANK, )  
Plaintiff, )  
  
vs. )  
  
STACY E. SYMBORSKI, )  
Defendant. )

IN THE COURT OF COMMON PLEAS  
SEVENTH JUDICIAL CIRCUIT  
CASE NUMBER: 2012-CP-42-00503

ORDER GRANTING JUDGMENT  
AGAINST DEFENDANT

**RECEIVED**  
JUN 10 2015  
SC Court of Appeals

**THIS MATTER** came for hearing before the undersigned Judge initially on, March 30, 2015, and again for additional hearing - due to the Defendant's excusable absence - on, April 1, 2015. At issue before the Court were three separate motions: Plaintiff's Motion for Sanctions Against Defendant, Plaintiff's Motion for Summary Judgment, and Defendant's Motion to Squash [sic]. At both hearings, Trevor M. Hughey, Esq. appeared on behalf of Plaintiff, and Defendant, Stacy E. Symborksi, appeared *pro se* at the second hearing. The Court having considered the pleadings, motions, memoranda and the arguments presented at each hearing finds as follows:

**IN REVIEW OF THE PLEADING HISTORY THE COURT FINDS** that Plaintiff filed the instant action alleging that Defendant defaulted under the terms of a credit card account agreement and sought damages for the outstanding balance due on the account. Defendant was served with a copy of the summons and complaint. In response, Defendant filed and served an Answer and Counterclaim, which denies liability for the balance, claims the account was closed in 2009, alleges that she has been the victim of identity theft, and asserts various consumer protection claims against Plaintiff.

After Plaintiff filed a Reply to Defendant's Answer and Counterclaim, Defendant filed two motions: 1) to amend her pleadings and assert additional statutory claims related to consumer and debtor collections protection and 2) to strike Plaintiff's

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CLERK OF COURT

Complaint. Plaintiff also filed a Motion to Dismiss Defendant's counterclaims, under South Carolina Rule of Civil Procedure ("SCRCP") 12(b)(6).

Oral arguments on these motions came before the Honorable Judge Roger L. Couch on March 5, 2013. At the conclusion this hearing, the Court ordered Defendant to conform her Motion to Amend Pleadings to the pleading requirements of the South Carolina Rules of Civil Procedure (SCRCP) within thirty (30) days of the issuance of that order and that any rulings on the two motions would be held in abeyance and considered subsequent to the filing of Defendant's appropriately amended motion.

Defendant failed to file a proper Motion to Amend Pleadings as ordered. Thereafter, Defendant was timely noticed of Plaintiff's intent to reinstate and to seek a ruling on those matters held in abeyance. At the subsequent hearing, the Court held that even a liberal construction of Defendant's Answer and Counterclaim failed to state facts sufficient to constitute a cause of action and went on to note that this analysis remains true even when Defendant's pleadings are read in conjunction with the claims and statutory references contained in the Defendant's Motion to Amend Pleadings.

In addition to granting Plaintiff's Motion to Dismiss, the Court also denied Defendant's Motion to Strike. The Court held that Plaintiff's Complaint - and incorporated Exhibits - clearly state a claim for breach of contract against Defendant.

**IN REVIEW OF THE DISCOVERY HISTORY THE COURT FINDS** that Defendant was served with Plaintiff's First Set of Interrogatories, Plaintiff's First Set of Requests for Production and First Request for Admission on August 23, 2012. The Request for Admissions incorporate by reference what Plaintiff contends are two CardMember Agreements the first of which governed the account at the time of its opening and the second at the time of charge-off.

On or about September 21, 2012, the Defendant submitted her responses to the Plaintiff's Interrogatories, Requests for Production, and responses to Plaintiff's Requests for Admissions. Unfortunately, many of the responses provided by the Defendant did not properly address the discovery requests made.

Based on these deficiencies, Plaintiff filed a Motion to Compel Discovery Responses seeking full and complete responses to its discovery requests. Plaintiff also

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sought resolution of a number of inconsistent and contradictory statements made outside of her formal discovery responses as well as clarity regarding a number of vague and indiscernible claims for relief appearing in the discovery responses. This Motion to Compel came before the Honorable Judge Allison Lee. On the whole, the Court granted Plaintiff's Motion to Compel, and through several amended Orders, clarified and tailored the ruling.

Judge Lee also noted that Defendant, through the course of the hearing, admitted she made the payments as reflected in the monthly statements of account supplied by Plaintiff. This point is important as the dates of many these payments occurred after Defendant maintains she stopped using and thereafter paid in full the account at issue.

Although, Defendant supplemented much of her written discovery responses, Plaintiff complains that these supplemental responses still fail to redress the deficiencies and which the Plaintiff's Motion to Compel and Judge Lee's Orders were designed to remedy. Plaintiff also complains that Defendant failed to produce bank statements as order. It is this contention which forms the basis for Plaintiff's Motion for Sanctions.

Further, this Court notes that Defendant's initial response to certain Requests for Admission admit that the older of the two CardMember Agreements (dated 2007) attached to the Requests contains the governing terms and conditions of the account at issue. Defendant's supplemental responses to this topic fail to adequately address whether she believes this older agreement still governs the account. As such, the Court finds that her prior admission is controlling, and Defendant is estopped from now denying that the older agreement governs.

**IT APPEARING TO THE COURT** that Summary judgment is appropriate when "there are no genuine issues as to any material fact and the moving party is entitled to judgment as a matter of law."<sup>1</sup> And, in order to recover under a breach of contract theory, Plaintiff must establish three essential elements by the greater weight of the evidence: contract formation, breach, and damages.<sup>2</sup> The Court finds that Plaintiff has

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<sup>1</sup> Rule 56 (c), SCRPC and *Spencer vs. Miller*, 259 S.C. 453, 192 S.E.2d 863 (1972).

<sup>2</sup> See Tom J. Ervin, *Ervin's South Carolina Request to Charge - Civil Section 22-13*, at 181 (1994) and 17A Am.Jur. 2d Contracts Section 716

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met its initial burden through the Affidavit submitted by Plaintiff in support of Summary Judgment, along with its incorporated exhibits. Once a party has made its prima facie case, the burden then shifts to the non-moving party to demonstrate an issue of fact.<sup>3</sup>

**AND IT FURTHER APPEARING TO THE COURT** that prior findings made by the Spartanburg Family Court in Defendant's Divorce Proceedings<sup>4</sup> and certain sworn statements made by Defendant in her Financial Declaration, (filed during the pendency of this action) conclusively determine that Defendant is liable for any outstanding balance on the account at issue. In her Financial Declaration, filed April 30, 2013, Defendant states that she is indebted to Plaintiff in an amount almost identical to balance asserted due in the Statements of Account produced by Plaintiff.

"Judicial estoppel is an equitable concept that prevents a litigant from asserting a position inconsistent with, or in conflict with, one the litigant has previously asserted in the same or related proceeding. The purpose of the doctrine is to ensure the integrity of the judicial process."<sup>5</sup> Defendant cannot assert that the very same debt claimed due here is a valid obligation in previous judicial proceedings - which she received the benefit of this assertion from the ensuing equitable distribution - then deny she incurred that identical obligation.<sup>6</sup>

Moreover, the final Divorce Decree incorporates by reference the Memorandum of Agreement entered into by the divorcing parties. The Memorandum specifically references the account at issue and assigns all rights and obligations arising under that account to Defendant. The issue of Defendant's obligations on this account having been conclusively determined in a prior hearing, Defendant is further estopped from now disputing such obligation.

**AND IT FURTHER APPEARING TO THE COURT** that Defendant's admission that the 2007 CardMember Agreement, incorporated into Plaintiff's Request for Admission, contains the terms governing the account at issue have not been retracted.

<sup>3</sup> Rule 56 (c), SCRPC

<sup>4</sup> *Symborski v. Symborski*, 2010-DR-42-00392

<sup>5</sup> *Auto-Owners Ins. Co. v. Rhodes*, 405 S.C. 584, 597-598 (S.C. 2013) (Internal citations omitted)

<sup>6</sup> *Id.*

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Defendant's subsequent statements on the matter of which agreement controls do not properly address this prior admission. Moreover, Defendant provides no cognizable basis why this agreement would not continue to govern the account given she acknowledges she used the credit account from 2007 through parts of 2010 and disputes the effectiveness of the second agreement issued at a later date.

Further, the Court notes that both agreements contain language requiring card holders, such as the Defendant, to timely report billing disputes, including unauthorized card use, to Plaintiff. The timeliness of this report is material to Plaintiff. The nearer in time the report is made the more likely any investigation into its claims will yield reliable evidence as to the veracity of the claims. Defendant admits she did not notify Plaintiff of the allegedly unauthorized charges until more than a year, and in some cases closer to two years, after the charges appeared on her billing statements.

Additionally, during the hearing on Plaintiff's Motion to Compel, Defendant admits she continued to make payments toward the account throughout 2010 and into 2011 while these disputed charges were appearing on Defendant's monthly statements. This means Defendant knew or should have known whether the charges were authorized and timely reported any unlawful use to Plaintiff. Defendant's failure to adhere to her contractual obligations denied Plaintiff the opportunity to conduct a contemporary investigation into the veracity of the charges or to take steps to ensure additional charges did not occur by closing the account. As such, this Court finds the Defendant liable for all charges appearing on the statements supplied by Plaintiff through discovery.

**AND IT FURTHER APPEARING TO THE COURT** that based on the forging the Court shall grant Plaintiff's Motion for Summary Judgment and enter an award based on the balance indicated in the monthly statements of account. Since there are no other claims pending in this action, such a ruling ends the instant action and makes Plaintiff's Motion for Sanctions and Defendant's Motion to Squash [sic] moot.

**NOW THEREFORE, IT IS HEREBY ORDERED, ADJUDICATED AND DECREED THAT** Plaintiff shall have and recover from Defendant \$12,604.66 the

2015 JUN 3 AM 8:32  
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principal balance on the account, \$1,890.70 in reasonable attorney's fees, and \$637.43 in Court costs for a total Judgment amount of \$15,132.69.

  
The Honorable R. Keith Kelly

Dated: 2 June, 2015

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6 of 6

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M. Hope Blackley  
CLERK OF COURT  
SPARTANBURG COUNTY  
BY: Coco Jones D.C.  
DATED 6/3/15