

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF GREENVILLE

BANK OF AMERICA, N.A.

Civil Action No. 2018CP2300136

Plaintiff(s)

vs.

JANIE C SOUTHERN

Defendant(s)

ORDER RECEIVED

NOV 22 2019

SC Court of Appeals

THIS CAUSE, having come before the Court on August 19, 2019 for a Bench Trial. The Plaintiff being represented by Joseph E Brown and the Defendant, represented by Susan Ingles.

The Plaintiff called Katie Hickey, a custodian of records for Bank of America, NA. Ms. Hickey testified to the Business Record foundation for the admission of billing statements issued by Bank of America, NA (herein after referred to as the "Bank") and sent to the defendant at the address shown on the statements. Ms. Hickey testified that the statements are mailed out to the consumer every 30 days. She also stated that payments were received on this account up until January 4, 2016. The account was charged off on August 31, 2016 with an outstanding balance of \$12,778.85 which the statement provided a due date. She testified that calls were made to the defendant but they were hung up on. She testified that at no time after the account was charged off and prior to suit being filed did they receive any written or verbal dispute from the Defendant regarding the amount owed or any particular charges.

Ms. Hickey went on to testify that after suit was filed and the Defendant made a claim that certain charges were fraudulent. The Bank conducted a fraud investigation. As a result of the investigation, the Bank was unable to substantiate charges in the amount of \$4,361.36 which were credited to the Defendant's account. The witness went on to testify that the balance transfer to the Discover Card was a valid charge on the account. The balance transfer was found to have been made to a Discover Card in the Defendant's name. The amount now owed on the account is \$8,417.49.

The defense called Janie Southern whose testimony was contradictory. During answering questions, she stated that first she did not receive the last billing statement and then later on testified that she had received the billing statement and immediately called the Bank and disputed the amount owed. During cross examination, Ms. Southern testified that there was a balance transfer made from the Bank to her Discover Card and that she benefited from that transfer. She also testify that most charges found on the billing statement with the balance transfer were charges she made locally. Therefore she was in possession of the Bank of America, NA Card which has the three digit security number on the back. Ms.

Hickey testified during the Plaintiff's case in chief, that the person requesting the balance transfer called in and verified the card holders Social Security number and the three digit CVC/security number on the back of the card.

The Plaintiff is seeking recovery under an account stated theory. The essential elements of account stated are: 1) that the account is actually stated; and 2) that the parties either expressly or impliedly agreed that it is a true statement and is due to be paid then or at some other specified time. The Plaintiff would argue that an account stated cause of action was established by the Plaintiff mailing monthly billing statements with a specified due date and the Defendant making payments on the account and not disputing any charges found on the billing statement. The Plaintiff is not asking the court to find that the defendant expressly agreed but that the defendant impliedly agreed by her actions. This actions being monthly mailed to the defendant, payments being made, no dispute of the charges found on the statements and the retention of the account without question of the balance.

In Gwathmey vs. Burgiss, 88 S. E. 816 (SC 1916), the court held, "Where a creditor sends to his debtor a statement of the account between them and the debtor assents to the balance stated, then the account between them ceases to be an open account and becomes an account stated." The court went on to hold that "this was at first confined to accounts between merchants but the trend of modern decisions is to open the doors to persons other than merchants." Id. The court stated that "assent might be expressed or implied from the circumstances." Id.

Based upon the documents admitted into evidence and the testimony presented, the Court finds in favor of the Plaintiff and, it is hereby:

ORDERED, ADJUDGED AND DECREE that the Plaintiff, Bank of America, NA, have and recover from the Defendant, Janie Southern, the amount of \$8,417.49 plus court cost.

AND IT IS SO ORDERED.

By: _____
The Honorable Alex Kinlaw, Jr.
Thirteenth Judicial Circuit

_____, South Carolina

_____, 2019



Greenville Common Pleas

Case Caption: Bank Of America Na vs. Janie C Southern
Case Number: 2018CP2300136
Type: Order/Other

So Ordered

s/Alex Kinlaw, Jr., #2763

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