IN THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY

Court of Common Pleas

Alex Kinlaw, Jr. Circuit Court Judge

Appellate Case No. 2019-001941

Bank of America, N.A.……Respondent

v.

Janie C. Southern……Appellant

INITIAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

Respondent agrees in part and disagrees in part with Appellant's statements of the issues on appeal. The principal determination for the Court in this case is whether the trial court committed reversible error in awarding Plaintiff Bank of America, N.A. judgment in the amount of $8,417.49 against Defendant Janie Southern for the past due balance on her credit card account. The legal issues presented are as follows:

I. Whether South Carolina's "account stated" legal theory is limited to actions between merchants, and whether creditors are excluded from recovery.

II. Whether Bank of America proved all essential elements of an "account stated" cause of action.

III. Whether this Court is authorized to affirm the judgment in this case under an implied contract legal theory, when the sole theory explicitly pled in Plaintiff's complaint was "account stated."

STATEMENT OF FACTS

Katie Hickey testified on behalf of Bank of America at the non-jury trial of this matter below. Hickey has been employed by Bank of America for the past 25 years and is familiar with Bank of America's records for this case. (Tr. at 7-8). Ms. Southern established a credit card account with Bank of America in 2009. (Tr. at 26). Bank of America mailed billing statements for the account to Ms. Southern each month from December 2009 to August 2016. (Tr. at 8-9, Tr. Exhibit 1).

Each statement was organized into sections, such as, "Payment Information," "Account Summary," "Transactions," and "Interest Charge Calculation." (Tr. Exhibit 1). The "Payment Information" section contained essential items such as, "New Balance Total," "Current Payment Due," and "Payment Due Date." (Tr. Exhibit 1). The "Account Summary" section contained accounting fundamentals such as, "Previous Balance," "Payments and Credits," "Purchases and Adjustments," "Fees Charged," and "Interest Charged," and "Statement Closing Date." (Tr. Exhibit 1). Additionally, a "Transactions" section contained an itemization of each transaction executed on the account during the each billing cycle. (Tr. Exhibit 1).

In addition to account usage details, each account billing statement included a page containing, "IMPORTANT INFORMATION ABOUT THIS ACCOUNT." (Tr. Exhibit 1). This page contained sections such as, "GRACE PERIOD/PAYING INTEREST," "CALCULATION OF BALANCES SUBJECT TO INTEREST RATE," "PAYMENTS," "TOTAL INTEREST CHARGE COMPUTATION," and "HOW WE ALLOCATE PAYMENTS." (Tr. Exhibit 1).

A section entitled, "CUSTOMER TIPS FOR DISPUTED ITEMS," contained the following statement: "Please remember: If you find an error on your bill, you must notify us no

later than 60 days after we sent your first statement on which the error or problem appeared to preserve your billing rights." (Tr. Exhibit 1).

Ms. Southern made payments on her account after receiving account billing statements. (Tr. at 25). In March of 2015 Ms. Southern made a claim to Bank of America that fraudulent charges were made on her account. Bank of America responded by refunding Southern for the fraudulent charges, and Southern thereafter resumed making purchases and payments on the account. (Tr. 26, 28). In August 2016 Southern's account was charged off due to non-payment and a final billing statement was mailed to Ms. Southern with an outstanding balance of $12,778.85. (Tr. 29, Tr. Exhibit 1).

Bank of America filed the instant lawsuit against Ms. Southern on January 5, 2018, after which Ms. Southern initiated another fraud claim. (Tr. at 30). Although this fraud claim was initiated by Southern beyond the permissible 60 day period for raising billing errors, Bank of America initiated a fraud review. (Tr. at 31). Bank of America voluntarily resolved the fraud claim in Ms. Southern's favor and on May 31, 2019, during the pendency of this lawsuit, issued Ms. Southern a letter informing her of a credit to her account of $4,193.62, along with resulting charges and interest, leaving a balance due of $8,417.49. (Tr. Exhibit 2). At trial, Bank of America sought this amount, $8,417.49, rather than the balance on the final billing statement.

Defendant Janie Southern testified at the non-jury trial of this matter below. Ms. Southern's testimony contained material inconsistencies regarding whether she received a final account statement from Bank of America.

On direct examination by her counsel, Ms. Southern first testified that she did not remember receiving a statement from Bank of America with an amount due of $12,778.75. (Tr. at 74-75). She then testified that she called Bank of America on the phone and told them that she

"never run a credit card up to $12,000.00," thus implying that she indeed received the statement. (Tr. at 78). Appellant's Brief acknowledges that Ms. Southern received the $12,778.75 statement and claims that she disputed it by telephone without specifying when the alleged phone call was made. (Appellant's Brief at 4).

Ms. Southern admitted making payments and charges on her account. She testified that she typically made payments on the account via paper checks, which were mailed to Bank of America along with her invoices. (Tr. at 76). She testified that, "Well, I charged medicine at CVS, the grocery store, things that like I needed, you know, I didn't have the money to get." (Tr. at 78).

The trial court's final order contained findings of fact, which acknowledged that Bank of America's witness testimony conflicted with Ms. Southern's testimony. The court's order resolved the conflicting testimony in favor of Bank of America.

STANDARD OF REVIEW

This case is an action at law, on appeal from a trial without a jury, therefore, the standard of review extends only to the correction of errors of law. *Electro Lab of Aiken v. Sharp Const.*, 357 S.C. 363, 593 S.E.2d 170 (Ct. App. 2004). The trial judge's findings of facts should not be disturbed on appeal unless found to be without evidence which reasonably supports the judge's findings. *Id*.

Appellant misstates the applicable standard of review as owing no deference to the lower court. The authority relied upon by Appellant for this standard, *Madison ex rel. Bryant v. Babcock Ctr., Inc.*, 371 S.C. 123, 638 S.E.2nd 650 (2006), involved an appeal from a summary judgment order. Since the case at bar involves an appeal from a non-jury trial, a different standard of review applies, as identified above.

REPLY TO APPELLANT'S INTRODUCTION

Appellant introduces her argument as addressing a trend of missing cardholder agreements in "debt buyer" consumer debt collection cases and electronic debt sales. However, this case does not involve a debt buyer, an electronic debt sale, or any suggestion that the cardholder agreement was unavailable to the parties. The facts of the case are unremarkable and the theory of recovery is not complex.

Bank of America extended a credit card account to Ms. Southern, which was followed by a pattern of charges and payments by Ms. Southern. Eventually Ms. Southern failed to pay, and Bank of America sought to recover the balance due under an "account stated" theory.

Appellant's brief does not dispute the factual findings made by the trial court in this case, nor the court's application of the law to the facts. Rather, Appellant disputes the law itself. Specifically, Appellant seeks to revive an element of the "account stated" cause of action (i.e., a "merchant to merchant" requirement) that has not been recognized in over 100 years. The only case cited by Appellant that even mentions a merchant requirement is a 1916 case that states that the merchant requirement no longer exists. ("*This was at first confined to accounts between merchants. The trend of modern decisions is to open the doors to persons other than merchants.*" *Gwathmey v. Burgiss*, 104 S.C. 280, 88 S.E. 816 (1916)).

Contrary to Appellant's arguments, the "account stated" legal theory's application to this case is not "bold" or novel. This is a cause of action that has remained unchanged for over a century and is recognized by at least one modern South Carolina civil litigation treatise. *See* James L. Ward, Jr. & Edward J. Westbrook, *South Carolina Damages* § *IV.8.C* (2107).

"The essential elements of an 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." *Southern Welding Works, Inc. v. K & S Const. Co.*, 286 S.C. 158, 332 S.E.2d 102 (Ct. App. 1985), *citing Wakefield v. Spoon*, 100 S.C. 100, 84 S.E. 418 (1915).

In this case, account billing statements show the parties' pattern and practice over the course of 6 years of Ms. Southern executing transactions on a credit account, Bank of America's rendering detailed statements to Ms. Southern, and Ms. Southern's responding by paying the amount due on the statements. After 6 years, Ms. Southern ceased making payments and left an unpaid balance due.

ARGUMENT

I. South Carolina's "account stated" legal theory is not limited to actions between merchants and does not exclude creditors from recovery.

Appellant begins her argument with a discussion of the *Gwathmey* cases[1], but these cases do not support her position that an "account stated" legal theory is limited to merchants[2].

First, contrary to Appellant's argument, the *Gwathmey* cases do not contain a finding that the parties were both merchants, nor that the transaction at issue was "between merchants."[3] *Gwathmey I* identifies the plaintiffs as, "cotton commission merchants and brokers of the city of New York and members of the New York Cotton Exchange," but identifies the defendant only as "a resident of Spartanburg, S. C.," without specifying whether he was a merchant. *Gwathmey I* at 395. The lack of a conclusive ruling on whether the parties were merchants shows that the parties' status as merchants was not material to the court's decision, nor a material element of an "account stated" claim.

Second, the court in *Gwathmey II* specifically held that an "account stated" cause of action is *not* limited to merchants. To be clear, the court in *Gwathmey II* stated that an "account stated" cause of action, "was at first confined to accounts between merchants," but went on to state that, "[t]he trend of modern decisions is to open the doors to persons other than merchants." *Gwathmey II* at 817.

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[1] *Gwathmey v. Burgiss*, 98 S.C. 152, 82 S.E. 394 (1914) (hereinafter, "*Gwathmey I*"), and *Gwathmey v. Burgiss*, 104 S.C. 280, 88 S.E. 816 (1916) (hereinafter, "*Gwathmey II*").

[2] "'Merchant' means a person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction or to whom such knowledge or skill may be attributed by his employment of an agent or broker or other intermediary who by his occupation holds himself out as having such knowledge or skill." *S.C. Code Ann. § 36-2-104(1)*.

[3] "'Between merchants' means in any transaction with respect to which both parties are chargeable with the knowledge or skill of merchants." *S.C. Code Ann. § 36-2-104(3).*

Third, the court's recitation of the applicable legal standard in in *Gwathmey II* supports a finding that the "account stated" legal theory applies to a debtor/creditor relationship and that creditors are not excluded from recovery. Specifically, "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." *Gwathmey II* at 817.

The subject matter of the *Gwathmey* cases also supports the conclusion that creditors are not excluded from recovery. These cases did not involve traditional "merchant to merchant" transactions for the sale of goods; they were more akin to financial services transactions. The *Gwathmey* plaintiffs (cotton exchange brokers) filed suit against the defendant (their client) because the defendant failed to reimburse them for cotton futures trading losses. The plaintiffs argued that the transactions were "bona fide" (for the sale of goods), but the court disagreed and characterized the transactions as futures contracts.

The court denied recovery for the *Gwathmey* plaintiffs, but not because the plaintiffs were creditors or that the transactions involved were a form of financial services. Rather, the *Gwathmey* plaintiffs lost because the futures contracts were void as a form of illegal gambling under South Carolina law. Accordingly, the *Gwathmey* cases do not support Ms. Southern's position that creditors and financial services providers, such as Bank of America, cannot recover under an "account stated" theory.

For the reasons discussed above, an "account stated" cause of action is not limited to parties who are merchants and does not exclude creditors from recovery.

II. Bank of America proved all essential elements of an "account stated" cause of action, thus entitling it to judgment against Appellant.

Appellant's brief accurately identifies the essential elements of an "account stated" claim, but contrary to Appellant's conclusion, Bank of America proved all elements of its claim.

"The essential elements of an 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." *Southern Welding Works, Inc. v. K & S Const. Co.*, 286 S.C. 158, 332 S.E.2d 102 (Ct. App. 1985), *citing Wakefield v. Spoon*, 100 S.C. 100, 84 S.E. 418 (1915). Evidence was submitted at the trial of this case that satisfies each element of an "account stated" cause of action.

a. The Account Was Actually Stated

The first element, "that the account is actually stated,"[4] is satisfied by Bank of America's delivery of an account billing statement to Southern each month for a period of 6 years and 8 months, and a final billing statement in the amount of $12,778.85 in August 2016. The monthly account billing statements were clearly printed, well organized, contained an itemization of all transactions on the account, and triggered Ms. Southern to respond by making a payment. It is difficult to imagine what could be missing from these account statements that would prevent them from satisfying the element, "that the account is actually stated."

a. The Parties Impliedly Agreed to the Amount Due

The second element, "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,"[5] is satisfied by Ms.

[4] *Southern Welding Works, Inc.* at 106.
[5] *Id*.

Southern's retention of the account without objection and the parties' pattern of conduct over the course of 6 years and 8 months. Indeed, Ms. Southern's brief actually seems to acknowledge that implied assent was established in this case, but claims that an "account stated" legal theory is inapplicable[6]. Nevertheless, proof of assent is discussed below.

"Assent might be expressed or implied from the circumstances," and implied assent may be shown by "a promise to pay the stated balance; long retention of the account without question of the balance and the like." *Gwathmey II* at 817. However, retention of the account without objection, *alone*, is insufficient to prove implied assent. *Id*.

In this case, Bank of America established delivery of a final billing statement to Ms. Southern in the amount of $12,778.85, and Ms. Southern's retention of the account without objection. Ms. Southern offered inconsistent testimony regarding her objection to the billing statement, but the trial court did not find her credible. Even though Ms. Southern failed to raise a timely objection, Bank of America sought only $8,417.49 at trial after voluntarily crediting Ms. Southern for a dispute raised after the instant lawsuit was filed. (which was in January 2018) (Tr. at 30).

In addition to retention of the account without objection, Bank of America offered evidence of a 6-year pattern of conduct between the parties that establishes implied assent to the balance due. The pattern began each month by Ms. Southern's executing charge transactions on her account. This was followed by monthly delivery of account billing statements to Ms. Southern, which detailed the items for which the account was charged. Ms. Southern responded to the account billing statements each month by making payments to Bank of America. This

[6] "Here the trial court's reasoning was not based on an account being "stated" in the traditional "merchant to merchant" sense, but instead was based upon whether there was a contract implied by the ongoing conduct of the parties." (Appellants Brief p. 16).

pattern of conduct establishes additional evidence of implied assent to the balance due, beyond mere retention of the account billing statements without objection.

Based on the foregoing, Bank of America proved all essential elements of its "account stated" claim and is entitled to judgment against Ms. Southern.

III. The Court is authorized to affirm the judgment in this case under an implied contract legal theory, even though the sole legal theory explicitly pled in Plaintiff's complaint was "account stated."

Contrary to Appellant's argument, the law does not rigidly bind Bank of America to a single legal theory based on the language of its complaint. *Rule 15(b), SCRCP* states that "When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment..." The court in *Stanley Smith & Sons v. Limestone College*, 283 S.C. 430, 322 S.E.2d 474 at 477 (Ct. App. 1984) held that a "complaint alleging express contract does not limit plaintiff to proof of express contract; he may support complaint by evidence of facts giving rise to implied contract." *Id*. Further, *Rule 220(c), SCACR* states that "The appellate court may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal."

Though Bank of America did not plead an implied contract cause of action in its complaint, it nevertheless proved all essential elements of an implied contract claim at trial. As discussed further below, the evidence submitted at trial that supports an implied contract claim is the same as the evidence that supports an "account stated" claim. Therefore, this Court should affirm the trial court's judgment in favor of Bank of America under an implied contract theory.

"A contract is an obligation which arises from actual agreement of the parties manifested by words, oral or written, or by conduct. If agreement is manifested by words, the contract is

said to be express. If it is manifested by conduct, it is said to be implied. In either case, the parties must manifest a mutual intent to be bound." *Stanley Smith & Sons* at 477 (internal citations omitted).

In this case, the parties enjoyed a 6 year and 8 month relationship in which Ms. Southern executed charges on a credit card account, Bank of America delivered monthly billing statements to Ms. Southern, and Ms. Southern paid the balance due (until eventual default). The billing statements reflected sufficient detail to memorialize the terms of the parties' contract. They contained an itemization of charges, total and minimum balances due, and a deadline for payment. Ms. Southern manifested her intent to be bound by her continued use of the card for purchases and her continued payment of the minimum balance due. Rejection of the contract by Ms. Southern could have been manifested by closure of the account or discontinued use.

Appellant's Brief even acknowledges that the trial court found facts to support an implied contract in this case. Specifically, "Here the trial court's reasoning was not based on an account being "stated" in the traditional "merchant to merchant" sense, but instead was based upon whether there was a contract implied by the ongoing conduct of the parties." (Appellants Brief p. 16).

Based on the foregoing, the judgment below should be affirmed because Bank of America proved all elements of an implied in fact contract between the parties.

CONCLUSION

For the foregoing reasons, Bank of America hereby request that the Court affirm the judgment of the trial court below.

Respectfully submitted this 27th day of July 2020.

By:

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PROOF OF SERVICE

The undersigned hereby certifies that the foregoing BRIEF OF RESPONDENT has been served upon Appellant by First Class United States Mail, postage prepaid, to Respondent's counsel of record at the following address:

Susan Ingles
701 South Main St
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This 27 day of July, 2020.

_/s/ Salvatore Louis Schiappa III__
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