THE STATE OF NEW HAMPSHIRE
Northern District of Hillsborough County

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- 03-C-0018 MBNA American Bank NA v. Troy T. Cornock

DEFENDANT'S MOTION FOR SUMMARY JUDGMENT:

Order made, a copy of which is enclosed herewith. (Abramson, J.)

NOTE: In view of the above order, please be advised that the Motion hearing scheduled for 3/26/07, Trial management conference scheduled for June 8, 2007 and Jury trial scheduled for June 18, 2007 all have been cancelled.

3/20/2007
Date

/s/ John Safford
Clerk of Court

cc: Paul C Bordeau, Esq.

THE STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS
NORTHERN DISTRICT

SUPERIOR COURT
2007

MBNA AMERICA BANK, NA

v.

TROY T. CORNOCK

03-C-0018

ORDER ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

In this civil action, the plaintiff, MBNA America Bank, NA ("MBNA"), seeks to enforce an arbitration award against the defendant, Troy T. Cornock ("the defendant"). Presently before the Court is the defendant's motion for summary judgment. MBNA objects. After consideration of the parties' pleadings, evidence, argument, and applicable law, the Court grants the defendant's motion.

The record supports the following relevant facts. Prior to June 1995, the defendant and his then-wife, Lisa Cornock, resided at 52 Meeting Hill Road in Hillsboro, New Hampshire ("the Hillsboro address"). During their marriage, Ms. Cornock, a bookkeeper and office manager, paid the bills and maintained the couple's checking accounts. In June 1995, the couple separated, and the defendant moved out of the residence and to his father's house at 3 Gordon Court in Concord, New Hampshire. After moving from the residence, the defendant never used the Hillsboro address for business or mailing purposes. During the time that the defendant lived at the Hillsboro address, he never observed any bills or statements from MBNA.

On June 1, 1995, a credit card account was opened with MBNA in the name of Troy Cornock, with Lisa Cornock listed as an authorized user. Thereafter, MBNA sent all monthly statements and other correspondence related to this account to the Hillsboro address. For three years, between June 1995 and June 1998, Ms. Cornock made purchases using the MBNA credit card. The record contains no evidence indicating precisely what items were purchased with the credit card during this three-year time frame. On April 29, 1996, December 3, 1996, and June 30, 1998, Ms. Cornock made payments to MBNA through a bank account with CFX Bank in Hillsboro, New Hampshire. (Def.'s Mot. For Summ. J. ("Def.'s Mot."), Ex. E at 18). There is no other evidence of whether, or the manner in which, Ms. Cornock paid the monthly credit card bill between June 1995 and June 1998.

In January 1998, the defendant moved from his father's home in Concord to 14 Rush Road, Apartment 3 in Henniker, New Hampshire ("the Henniker address"). Shortly thereafter, he opened a post office box in Henniker ("post office address"). The post office address, PO Box 97, Henniker, New Hampshire 03242, was the defendant's mailing address. The defendant and Ms. Cornock finally divorced on August 30, 1998. Pursuant to the divorce decree, on September 20, 1998, the defendant conveyed the residence located at the Hillsboro address to Ms. Cornock. Id. at Ex. A, p. 3. At some time before November 1998, MBNA and Ms. Cornock entered into an agreement whereby Ms. Cornock would make payments to MBNA via automatic deductions from a joint checking account. Apparently, the joint account listed the defendant as the primary holder of the account. Ms. Cornock also appears to have made a telephonic payment to MBNA using the same checking account.

In November 1998, the defendant received a telephone call from an MBNA account representative concerning a balance due on the credit card account. The defendant avers, and MBNA does not dispute, that MBNA did not inform the defendant that he was the primary cardholder. However, the parties dispute what was said in the rest of the conversation. According to the defendant, he "informed MBNA that [he] did not have a credit card with it, that if there were any credit card agreement containing [his] signature, that that signature was a forgery, and that [he] had never made any charges to an MBNA account." Id. at Ex. A, ¶ 10. The defendant also claims that it was at that time that he learned that Ms. Cornock had charged items to the MBNA credit card, and that the card had not been used after the last charge on the account in June 1998. Id.

To contradict the defendant's version of the conversation, MBNA relies upon dated entries in its Archived Comment Records ("the comment records"), which, according to MBNA, reflect account activity and contacts by or with MBNA account representatives. (Pl.'s Obj. To Def.'s Mot. ("Pl.'s Obj.") at 2; Def.'s Mot., Ex. E). The comment records consist of abbreviated notations by the MBNA account representatives of conversations with customers. (Pl.'s Obj. at 2; Def.'s Mot., Ex. E). With respect to the November 30, 1998 conversation between the defendant and an MBNA account representative, the notations in the comment records provide:

> 0755 COLJJT CHNGD NMBR TO DRCT LNE TO PLNT
> 0810 COLCAM RFD . . GOING THROUGH DIVC . . . . . .
> . . . . . AND
> 0810 COLCAM HE SD THT HIS WFE DID THIS MESS
> 0812 COLCAM C/H WLL CLL WFE TO PAY ON ACCT AND
> HE SD THT
> 0813 COLCAM HE CANT PAY ON ACCT OFFER LOWER
> INTEREST AND HE SD THAT

0813 COLCAM HE WLL CLL BACK

(Def.'s Mot., Ex. E at 16-17).

After speaking with the MBNA representative, the defendant spoke with Ms. Cornock. According to the defendant, during that conversation he learned that Ms. Cornock had made all the charges on the MBNA credit card, that she had entered into an agreement with MBNA to have payments deducted automatically from her checking account, and that she had made a telephonic payment to MBNA.

It appears that between November 30, 1998 and June 5, 2000, Ms. Cornock continued to make payments to MBNA from a joint checking account held with the Bank of New Hampshire in Manchester, New Hampshire. Id. at Ex. E, 10-15. The checking account appears to list the defendant as the primary account holder, and Ms. Cornock as a secondary holder. Id. As of December 23, 1999, approximately six months after Ms. Cornock stopped making purchases with the credit card, the balance owed on the account was $6,126.88. Id. at Exs. C, F.

On June 5, 2000, an MBNA representative called the defendant regarding the credit card account. It is unclear at what number the MBNA representative called the defendant, or how MBNA received the defendant's phone number. Again, the parties dispute what was said during this conversation. According to the defendant, he "explained to the representative ... that [he] had not applied for that account, that [he] had not made any charges on that account and that [his] ex-wife Lisa had taken full responsibility for that account and had been making payments to that account." (Def.'s Mot., Ex. A at ¶ 12). He also claims he "informed MBNA that Lisa and [he] were divorced, and that [they] had been divorced since August 1998, and that [he] did not live

at" the Hillsboro address. Id. at Ex. A, ¶ 13. He requested that MBNA send him duplicate copies of the MBNA statements, and provided MBNA with his post office address. Id.

MBNA again relies upon its comment records to contradict the defendant's recollection of the conversation. The June 5, 2000 notations in the comment records state:

> 1140 TACAYC THIRD PARTY – SENT DUP 12-1999
> STATEMENT – MJW
> 1140 TACAYC THIRD PARTY – SENT DUP 1-2000
> STATEMENT – MJW
> 1140 TACAYC THIRD PARTY – SENT DUP 2-2000
> STATEMENT – MJW
> 1140 TACAYC THIRD PARTY – SENT DUP 3-2000
> STATEMENT – MJW
> 1140 TACAYC THIRD PARTY – SENT DUP 4-2000
> STATEMENT – MJW
> 1140 TACAYC THIRD PARTY – SENT DUP 5-2000
> STATEMENT – MJW
> 1141 TACAYC THIRD PARTY – INT FILM REQ – APPLCTN
> – SEND TO CUST
> 1141 TACAYC TROY T CORNOCK P.O. BOX 97
> HAGNNIKER NH 03242 – DOES
> 1141 TACAYC NOT RECALL APPLYING
> 1143 TACAYC THIRD PARTY CALLER-MBNA PERSON
> 1143 TACAYC CALLER PRIVILEGES BYPASSED FOR
> THIRD PARTY
> 1143 TACAYC * * * * * * UNDERSTAND MAY BE PURGED
> BUT IS W/IN 5 YRS PLS SEN
> 1143 TACAYC D IF AVAILABLE * * * * * * * * * * * * * * * * * *
> * * * * * * * * * * * * * * * *

Id. at Ex. E, pp. 9-10. The June 6, 2000 entry states "0616 MICJHG IHFR RTR DU2 APP OLDER THAN 5 YEARS NOT AVBLE." Id. at Ex. E, p. 9.

Subsequently, the defendant received six duplicate copies of MBNA credit card statements at the post office address. Id. at Ex. A, ¶ 12. The statements were dated December 1999 through May 2000. Id. at Ex. C. The defendant noticed that Ms.

Cornock "had been making payments from her checking account" during that time period. Id. at Ex. A, ¶ 12. According to the defendant, "[n]o payments had ever been made to that account from any checking account of [his] or to which [he] was contributing monies." Id. When he "received the duplicate statements, [he] learned for the first time that the account was in [his] name alone." Id. at Ex. A, ¶ 14. The defendant received no further mailings from MBNA at his post office address.

Also on June 6, 2000, MBNA sent two letters addressed to the defendant at the Hillsboro address. Id. at Ex. G. One letter provided information regarding a program that was available to assist the defendant in meeting his payment obligations. Id. The other letter offered the defendant a settlement figure, and informed the defendant that he should pay the first installment by June 22, 2000. Id. It is unclear whether the defendant ever received these letters.

Between June 6, 2000 and September 23, 2000, it appears that Ms. Cornock continued to make some payments to MBNA on the credit card account. Id. at Ex. E, pp. 7-9. The September 24, 2000 comment records provide, in relevant part, "E waived LST R/A DT 09131999 LST R/A TYPE J U/C c/h w[ ]rkng sttlmnt, over extnd due to dvrce." Id. at Ex. E, p. 7. Thereafter, on November 10, 2000, the defendant called MBNA, and "attempted to get MBNA to remove [his] name from th[e credit card] account so that it would be in Lisa's name only, the person who had been paying on that account." Id. at Ex. A., ¶ 14. The comment records from that date state, in pertinent part, "TROY T CORNOCK - TRANSFER TO TELESALES NEW APPLICATIONS."

On what appears to be December 1, 2000, the defendant received a facsimile transmission from MBNA, which consisted of a letter and an attached form. Id. at Ex. G.

The letter informs the defendant that MBNA had received his request to delete a name from the credit card account, but that the defendant needed to provide MBNA with authorization from both himself and Ms. Cornock in order to do so. Alternatively, Ms. Cornock could request a new individual account. The defendant did not complete the form and return it to MBNA because Ms. Cornock "refused to fill out the required information." Id. at Ex. A, ¶ 14.

Between January 8, 2001 and September 6, 2001, payments were made to the MBNA account through the Bank of New Hampshire checking account. Id. at Ex. E, pp. 2-7. During that time, MBNA appears to have had conversations with Ms. Cornock, including one on May 10, 2001 where a representative noted in the comment records, among other things, "U/C C/H GOING THRU DIVRC ...." Id. at Ex. E, p. 3. The last payment on the account was apparently made on July 13, 2001. Id. at Ex. F, p. 5; see also id. at Ex. E, p. 2. As of October 26, 2001, the balance owed on the account was $7,753.16.

On November 2, 2001, MBNA commenced an arbitration proceeding with the National Arbitration Forum ("NAF") against the defendant.[1] MBNA sought arbitration based on two amendments it made to its credit card agreements in October 1998 and April 2001. Id. at Ex. B. The October 1998 version of the credit card agreement ("the 1998 agreement") contains an "Amendments" section, which allows MBNA to amend the agreement at any time, so long as it complies with the notification requirements of federal and Delaware law and provides the customer an opportunity to reject any changes. Id. The 1998 agreement contains no arbitration provisions. The April 2001

[1] After commencing arbitration, MBNA continued to send monthly statements to the Hillsboro address. The January 2002 statement is the last statement in the record, and provides that the balance owed on the account as of January 26, 2002 is $8,194.68. (Pet'r. Mot., Ex. F at 5).

amendment ("the 2001 amendment") enacts "additional terms and conditions" that modify the prior agreement. Id. Specifically, the 2001 amendment contains an "Arbitration and Litigation" provision, which provides, *inter alia*, that unless the customer objected to the provision, any claim or dispute

> arising from or relating in any way to th[at] Agreement or any prior Agreement or [the customer's] account ... including Claims regarding the applicability of this Arbitration and Litigation section the validity of the entire Agreement or any prior Agreement, shall be resolved by binding arbitration ... conducted by the National Arbitration Forum [ ], under the Code of Procedure in effect at the time the Claim is filed.

Id.

The original 1995 credit card agreement that would have applied at the time the account at issue was opened is, according to MBNA, no longer available. The record contains no evidence indicating that either the 1998 agreement or the 2001 amendment was actually mailed to the Hillsboro, Henniker, or post office addresses. MBNA asserts that, pursuant to usual and customary practice, they would have been mailed to the address listed on the account – the Hillsboro address. The defendant avers, and MBNA does not dispute, that prior to the commencement of the arbitration proceeding, the defendant never viewed or personally received these mailings. Id. at Ex. A.

On approximately November 15, 2001, the defendant received an Airborne Express envelope from MBNA, which contained a Notice of Arbitration. Id. at Ex. A, ¶ 15 and Ex. B. MBNA mailed the envelope to the Hillsboro address. Id. at Ex. B. It appears that upon learning that the defendant did not reside at the Hillsboro address, the Airborne Express delivery person somehow obtained the defendant's telephone number. He or she contacted the defendant, and received the defendant's work

address for redelivery. Thereafter, the defendant signed for and received the envelope and Notice of Arbitration. The defendant's work address and telephone number are handwritten on the envelope, and portions of the Hillsboro address are crossed off. See id.

The Notice of Arbitration ("the notice") provided the defendant with 30 days from receipt of service to respond to the arbitration claim. It notified the defendant that he could obtain a copy of NAF's Code of Procedure from MBNA, the World Wide Web, or by calling a toll-free number. The notice consisted of MBNA's written claim, a summary of the MBNA credit card account as of November 5, 2001, and copies of the 1998 agreement and 2001 amendment. The contact information on the account summary lists the Hillsboro address, a home telephone number of (603) 464-4613, and work number of (603) 428-7900. According to the defendant, the telephone numbers belong to Ms. Cornock.

The notice also informed the defendant that he could proceed in three ways. First, the defendant could "*[s]ubmit a written response to the Claim*, stating [his] reply and defenses to the Claim, together with documents supporting [his] position." Id. (emphasis in original). According to the notice, if he failed to respond in writing to the Claim, an Award could be entered against him in favor of MBNA, thus resulting in him losing his case. Id. Second, the defendant could, "*[d]emand a Document Hearing or a Participatory Hearing* ... in [his] Response or in a separate writing." Id. (emphasis in original). The notice further states: "Unless you have agreed otherwise, an In-person Participatory Hearing will be held in the Judicial District where you reside or do business. You may also request a hearing on-line or by telephone. Your written

Request for a Hearing must be filed with the Forum." Id. Finally, the notice informed the defendant that he had other options, such as seeking the advice of an attorney. Id.

After receiving the notice, on November 30, 2001, the defendant mailed a letter ("the Response") to both MBNA and NAF. The Response states, in relevant part:

> I did not apply for the Credit card in question. I never made a payment on this credit card account nor do I intend to. The person responsible is my ex-wife Lisa K. Cornock residing at 52 Meeting Hill Road Hillsboro, NH 03244 Home Phone # 603-464-4613 Work # 603-428-7900. I have requested a copy of the original application for proof its (sic) not my signature and copies of any purchase slips to compare signatures.
> The person who applied has been paying on this account sporadically. I have documented information from MBNA that my ex-wife instructed the collection dept to call her and not me.
> Also I was separated from my ex wife for 2 ½ years prior to my divorce and was not residing at the Hillsboro address, at the time of our divorce in July 1998 my ex-wife never mentioned this credit card account in her financial statement to the court ... If the credit card account is in my name and my ex-wife made each payment is proof enough it is not my account. She has forged my name and I want this matter straighten[ed] out immediately and cleared from my credit report ...
> Troy T Cornock
> PO Box 97
> Henniker, NH 03242
> Home # 603-428-8457
> Work # 603-428-3636

Id. at Exs. D, F.

On December 6, 2001, NAF mailed two letters to MBNA and the defendant. The first letter informed them that: (1) it had received the Response from the defendant; (2) the matter would be set for a hearing; and (3) the parties had certain negotiated settlement options that they should consider. Id. at Ex. F. The second letter states, in relevant part:

> The Respondent has filed a response to the Claimant's Initial Claim. A Document Hearing will be held not more than 30 days from this date. Please submit any additional materials to be considered by the arbitrator directly to the Forum within **10 days** of the date of this notice (Rule 28) ....
> Douglas R Gray has been appointed as Arbitrator for the above matter (resume enclosed) .....
> The Forum should be notified immediately, in writing, should the Parties resolve the matter before the hearing date.

Id. (emphasis in original). Both letters were addressed to the defendant at the Hillsboro address, not the post office address listed on his Response. The Court notes that the record contains no evidence indicating that NAF sent a hearing notice listing the date and time of the hearing to the defendant or MBNA, or that a hearing ever occurred before the arbitrator.

During the arbitration proceeding, by letter dated January 11, 2002 and sent to the defendant at the Hillsboro address, NAF requested that MBNA "provide[, by January 30, 2002,] the following and/or documentation: 1. Copy of credit application form signed by Respondent. 2. Several purchase receipts showing signature of purchaser." Id. In response, MBNA submitted copies of billing statements from December 1999 through January 2002.[2] Id. Thereafter, by letter dated February 26, 2002, NAF again requested that MBNA submit, by March 18, 2002, "a copy of the original card application with signature, as well as, any copies of signed receipts with the Respondent's signature." Id. (emphasis omitted). MBNA did not submit the requested documents. Instead, it asserted that the account stated theory of liability applied, and therefore, it was not required "to produce either the original signed application or a signed receipt." Id.

Specifically, MBNA argued:

[2] The record contains no evidence indicating that MBNA provided the arbitrator with billing statements dating from June 1995 through November 1999, the time during which purchases were allegedly made with the credit card, nor has MBNA provided these statements to this Court.

> The account stated cause of action specifically vitiates any requirement that the Claimant/Creditor prove each and every charge on the account. The account stated theory, a common law cause of action, merely requires a creditor to show that a balance is due and owing by the debtor based on an account established between the parties and that the debtor has failed to object to the balance claimed after having reasonable opportunity to do so. Cases from federal courts and from other jurisdictions have explained that the common law account stated theory of liability is applicable to credit card agreements. See, e.g., In Re: Burklow, 60 B.R. 728 (Bankr. S.D. Ill. 1986); Sinclair Refining Company v. Consolidated Van & Storage, 192 F. Supp. 87 (N.D. Ga. 1960); and Citibank v. Jones, 708 N.Y.S.2d 517 (N.Y.A.D. 3 Dept. 2000). These cases illustrate that Claimant has alleged an account stated cause of action, has verified the existence of the account, and verified the Respondent's acknowledgement of that balance. Taken together, this is all that is required for judgment purposes.
>
> In this claim, it is significant to note that the account in question was opened in 1995 and Respondent's name appears on the credit card statements. The original application or signed receipts are unavailable. A copy of the monthly billing statements has been previously provided to NAF and to the Respondent. Those monthly statements evidence that payments were made to the account in Respondent's name. Claimant has no record of Respondent requesting that his name be removed from the billing statement or the credit card, nor is there any record of Respondent disputing the charges in seven (7) years.
>
> Further, Claimant is not aware of any evidence from Respondent supporting his allegation that the amount owed belongs to his ex-wife. Instead of proffering evidence, Respondent is attempting to persuade NAF through his unsupported, legally deficient assertion that the debt is owed by his ex-wife. Until Respondent can prove otherwise, Claimant's documentary evidence through the monthly billing statements supports an award on behalf of Claimant for the amount prayed for in the Claim.

Id. MBNA mailed this response, addressed to the defendant, to the Hillsboro address.

Id.

Subsequently, on March 26, 2002, the arbitrator issued "[a]n Award in favor of [MBNA], for a total amount of $9,446.85" ("the Award"). Id. In so doing, the arbitrator found:

1. That no conflict of interest exists.
2. That on or before 11/02/2001 the Parties entered into an agreement providing that this matter shall be resolved in accordance with the Forum Code of Procedure.
3. That the Claimant has filed a claim with the Forum and served it on the Respondent.
4. That the Respondent has filed a response with the Forum and served it on the Claimant.
5. That the matter has proceeded in accord with the applicable Forum Code of Procedure.
6. The parties have had an opportunity to present all evidence and information to the Arbitrator.
7. That the Arbitrator has reviewed all evidence and information submitted in this case.
8. That the information and evidence submitted supports the issuance of an Award as stated.

Id. On March 26, 2002, NAF sent a copy of the Award to MBNA and the defendant. With respect to the defendant, it was sent to the Hillsboro address. Thereafter, on December 23, 2002, MBNA filed the present action, seeking to enforce the Award against the defendant.

The defendant now moves for summary judgment, arguing that the Award may not be enforced against him for four primary reasons. First, he argues that the undisputed facts establish that MBNA cannot prove that he entered into a written arbitration agreement with MBNA. Specifically, the defendant maintains that MBNA has submitted no facts demonstrating that he assented to the credit card agreement in the first instance, and thus, MBNA's reliance on the account stated theory of liability is misplaced. Second, the defendant contends that his procedural due process rights were violated because he had no opportunity to be heard during the arbitration process.

Third, the defendant asserts that MBNA either intentionally or negligently misrepresented the law and facts to the arbitrator. Finally, the defendant argues that the arbitrator committed plain mistake and the arbitration decision is inconsistent with public policy. Therefore, according to the defendant, the Award may not be enforced against him.

MBNA objects, arguing that "[t]he material facts concerning Defendant's liability for payment on the account remain in dispute and the only reasonable inference that can be drawn from all the facts is that Defendant remains liable for on (sic) the account." (Pl.'s Obj. at 9). According to MBNA, "the facts and reasonable inferences drawn from them" establish "that [the] Defendant was contractually obligated to MBNA for the debt on the credit card account ...." Id. at 5. MBNA submits that the comment records show that the defendant had not disputed being responsible for the account and was only uncertain as to whether he had signed an application for the account. Id. at 3. Thus, MBNA claims: "[w]here, Defendant was obligated to make payment on the credit card account and the modified agreement contained written arbitration provisions, the arbitration provisions must be enforceable as part of the contract." Id. at 6.

Further, MBNA maintains that, while the defendant's Response to NAF and MBNA "does contain his then current address below his signature, there is no express notice to the [NAF] that he was not receiving mail sent to [the] account address, that the address used on the complaint was incorrect and that its use should be discontinued." Id. at 7. Thus, according to MBNA, because the defendant received the arbitration notice and submitted a Response that was considered by the arbitrator, the defendant received an adequate opportunity to be heard. Id. at 7-9. Additionally, MBNA contends

that it did not make any intentional or negligent misrepresentations of law or fact to the arbitrator. Finally, MBNA asserts that "Delaware Law is applicable to the Defendant's and MBNA's credit card dispute, including the issue of whether the claim is arbitrable." Id. at 12. Based on this law, MBNA argues that "MBNA accountholders are bound by the arbitration provision by virtue of the accountholders' acceptance, use and derived benefit from the account, id. at 14; and that "the continued use of the credit card account after February 1, 2000, binds Defendant to the arbitration amendment[,]" id. at 15. Therefore, according to MBNA, "the [NAF] was correct in finding that a contract to arbitrate exists between the parties." Id.

"The [C]ourt shall grant a motion for summary judgment pursuant to RSA 491:8-a if, after considering all the evidence in the light most favorable to the non-moving party, it finds that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." Horse Pond Fish & Game Club, Inc. v. Cormier, 133 N.H. 648, 653 (1990). A fact is "material . . . if it affects the outcome of the litigation under the applicable substantive law." Palmer v. Nan King Restaurant, 147 N.H. 681, 683 (2002) (quotation and citation omitted). "The party objecting to a motion for summary judgment may not rest upon mere allegations or denials of his or her pleadings, but his or her response, by affidavits or by reference to depositions, answers to interrogatories, or admissions, must set forth specific facts showing that there is a genuine issue of material fact for trial." Panciocco v. Lawyers Title Ins. Corp., 147 N.H. 610, 613 (2002) (citing R.S.A. 491:8-a) (quotation omitted). The nonmoving party "must put forth contradictory evidence under oath, sufficient . . . to indicate that a genuine issue of fact exists so that the party should have an opportunity to prove the fact at trial. All

reasonable doubts should be resolved against the movant." Phillips v. Verax, 138 N.H. 240, 243 (1994) (quotation omitted).

The purpose of the summary judgment procedure is to "save time, effort, and expense and to streamline the administration of justice by avoiding the formal trial of cases where there is no genuine issue of material fact." Green Mtn. Ins. Co. v. Bonney, 131 N.H. 762, 766 (1989); High Country Assoc. v. N.H. Ins. Co., 139 N.H. 39, 41 (1994). "Its most effective use is in breach of written contract or debt cases. It becomes less effective in tort cases where there are generally more disputed issues of fact." Iannelli v. Burger King Corp., 145 N.H. 190, 192 (2000) (citations omitted). Further, "[i]t has been recognized that the presence of a question involving state of mind or intent does not automatically foreclose the application of summary judgment, but it should be cautiously and sparingly invoked in such instances." Concord Grp. Ins. Cos. v. Sleeper, 135 N.H. 67, 69 (1991).

"[A]rbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit ...." Appeal of the City of Manchester, 144 N.H. 386, 388 (1999) (internal quotations and citation omitted). "[T]he extent of an arbitrator's jurisdiction depends upon the extent of the parties' agreement to arbitrate." Sch. Dist. #42 of the City of Nashua v. Murray, 128 N.H. 417, 420 (1986) (citations omitted). "[U]nless the parties clearly state otherwise, the question of whether the parties agreed to arbitrate is to be decided by the court, not the arbitrator[.]" Appeal of City of Manchester, 144 N.H. at 388 (internal quotations and citation omitted). When deciding whether the parties agreed to arbitrate, the Court "should not rule on the merits of the parties' underlying claims ...." Id. (internal quotations and citation omitted).

However, after an arbitration decision, the Court may issue "an order confirming the award, correcting or modifying the award for plain mistake, or vacating the award for fraud, corruption, or misconduct by the parties or by the arbitrators, or on the ground that the arbitrators have exceeded their powers." N.H. REV. STAT. ANN. § 542:8 (1997 & Supp. 2006); see also Sherman v. Graciano, 152 N.H. 119, 120 (2005).

> A "plain mistake" is an error that 'is apparent on the face of the record and which would have been corrected had it been called to the arbitrator['s] attention. It must be shown that the arbitrator[ ] manifestly fell into such error concerning the facts or law, and that the error prevented [his] free and fair exercise of judgment on the subject. When undertaking a "plain mistake" analysis, [the Court] afford[s] great deference to the arbitrator['s] decision. [The Court] examine[s] the face of the record to determine if there is validity to the claim of 'plain mistake,' and defer[s] to the arbitrator['s] decision if the record reveals evidence supporting it.

Merrill Lynch Futures, Inc. v. Sands, 143 N.H. 507, 509 (1999) (internal citations omitted).

As a preliminary matter, the Court finds that, contrary to MBNA's assertion, New Hampshire law applies to determining whether the claim is arbitrable. In arguing that Delaware law applies, MBNA relies upon the "governing law" provisions of the 1998 agreement and 2001 amendment. However, the threshold issue in this case is precisely whether the defendant entered into a credit card agreement with MBNA. Only after it is determined that the defendant actually entered into a credit card agreement with MBNA can the Court examine whether he also agreed to arbitration under such an agreement. The governing law provisions arguably would apply to the latter assessment; that is, to issues regarding the validity and enforceability of the arbitration

clause itself. Thus, the Court applies New Hampshire law in analyzing whether the claim is arbitrable.

The defendant claims he never signed or entered into a credit card agreement with MBNA. Based on the account stated theory of liability, MBNA argues "that [the] Defendant was contractually obligated to MBNA for the debt on the credit card account ...." (Pl.'s Obj. at 5). According to MBNA, "[w]here, Defendant was obligated to make payment on the credit card account and the modified agreement contained written arbitration provisions, the arbitration provisions must be enforceable as part of the contract." Id. at 6.

"When proof of an express contract does not exist, liability for a particular debt may be established pursuant to the doctrine of account stated." Nelson v. First Nat'l Bank Omaha, 2004 WL 2711032, * 2 (Minn. App. 2004) (unreported) (citing Am. Druggists Ins. v. Thompson Lumber Co., N.W.2d 569, 573 (Minn. App. 1984)). While numerous courts have described the concept of "account stated" in various ways, the Court finds that the Appellate Court of Illinois thoroughly summarized the common law theory in Motive Parts Company of America v. Robinson, 369 N.E.2d 119 (Ill.App.Ct. 1977). According to that court:

> The concept of "account stated" has been explicated in several definitions. For example, it has been defined as an agreement between parties who have had previous transactions of a monetary character that all the items of the accounts representing such transactions are true and that the balance struck is correct, together with a promise, express or implied, for payment of such balance. It has also been defined as an agreement between two parties which constitutes a new and binding determination of the balance due on indebtedness arising out of previous transactions of a monetary character, containing a promise, express or implied, that the debtor shall pay the full amount of the

> agreed balance to the creditor. The agreement mentioned in these definitions must, of course, manifest the mutual assent of the debtor and creditor. The meeting of the parties' minds upon the correctness of an account is usually the result of one party rendering a statement of account and the other party acquiescing thereto. The form of the acquiescence or assent is immaterial, however, and the meeting of the minds may be inferred from the conduct of the parties and the circumstances of the case. For example, where a statement of account is rendered by one party to another and is retained by the latter beyond a reasonable time without objection, the retention of the statement of account without objection within a reasonable time constitutes an acknowledgement and recognition by the latter of the correctness of the account and establishes an account stated.

Motive Parts, 369 N.E.2d at 122 (internal citations omitted); see White v. Schrafft, 94 N.H. 467, 469-70 (1947) ("'To establish an account stated there must be an assent, express or implied, to the correctness of the balance struck. It is not essential that the account shall be stated in any particular form, and the mere statement of a balance due, if accepted as correct, may constitute an account stated.'" (quoting Connolly v. Bank, 92 N.H. 89, 91, 92 (1942))); Roehrdanz v. Schlink, 368 N.W.2d 409, 412 (Minn. App. 1985) ("Existence of an account stated requires 'mutual examination of the claims of each other by the parties' and a 'mutual agreement between them, as to the correctness of the allowance and disallowance of the respective claims, and of the balance'"); see generally 1 AM. JUR. 2D *Accounts and Accounting*, §§ 26-57 (1994). However,

> the rule that an account rendered and not objected to within a reasonable time is to be regarded as correct assumes that there was an original indebtedness, but there can be no liability on an account stated if no liability in fact exists, and the mere presentation of a claim, although not objected to, cannot of itself create liability. In other words, *an account stated cannot create original liability where none exists; it is merely a final determination of the amount of an existing debt.*

Motive Parts, 369 N.E.2d at 124 (internal citations omitted) (emphasis added); see also Bucklin v. Nat'l Shawmut Bank of Boston, 244 N.E.2d 726, 728 (Mass. 1969) ("An account stated 'cannot be made the instrument to create a liability where none before existed, but only determines the amount of debt where liability exists'"); Roehrdanz, 368 N.W.2d at 412-13 (affirming referee's implicit finding of no account stated when alleged debtor was unaware that he was being billed for certain items); Butterly & Green, Inc. v. Marsalona, 26 Misc.2d 284, 286 (N.Y. Sup. Ct. 1960) ("Since an account stated 'can only determine the amount of the debt where a liability exists and will not be permitted to be made the instrument to create a liability where none existed before," the [ ] cause of action is insufficient as against the individual defendant who was not a party to the written agreement from which the original liability stemmed"). Thus, "[w]hen the debtor has no knowledge of the terms of the account or the account itself, mutuality [of assent] is missing and the account-stated doctrine cannot apply." Erickson v. Johnson, 2006 WL 453201, *5 (D. Minn. 2006) (unreported).

Because they involve strikingly similar factual patterns, the Court finds two unreported cases from Minnesota to be informative here. First, in Nelson, the Court of Appeals of Minnesota addressed whether the appellant was liable for a credit card debt based on the account stated theory of liability. In that case, two credit card accounts were opened with First National Bank Omaha on January 18, 1990. Both accounts were in the names of the appellant and his wife. At the time the accounts were opened, the appellant and his wife resided together. The appellant maintained, however, "that he neither applied for these credit cards nor knew of their existence until 2001." Nelson, 2004 WL at *1. The bank provided "[n]o evidence ... showing appellant's signature or

any credit-card application, charge slips, or checks payable to [the bank] for the credit-card debt." Id.

"For approximately one year beginning in late 1995, account statements were mailed to the home of appellant's father-in-law ...." Id. Thereafter, until September 2002, the statements were sent to the residence of the appellant and his wife. The appellant's wife "signed checks payable to [the bank] out of a joint checking account she shared with appellant." Id. In February 2001, after learning that the two accounts bore his name, the appellant objected in writing to any liability on the debt. Id. At that time, the bank suspended the accounts for nonpayment. The accounts' statements established that purchases were made at various restaurants and stores. The record, however, "contain[ed] no evidence as to the specific items and services that were purchased." Id.

In addressing the bank's assertion that the appellant was liable on the account stated theory of liability, the Nelson Court reasoned:

> Here, [the bank] failed to produce a credit-card agreement signed by appellant or any other evidence establishing appellant's assent to the Visa and Mastercard accounts. [The bank]'s production of an unsigned cardmember agreement and numerous billing statements bearing the names of both appellant and [his wife] fails to establish that a genuine issue of material fact does not exist as to the parties' mutual assent, particularly when countered by appellant's sworn statements, which deny that he (1) had personal knowledge of these accounts; (2) applied for or accepted these credit cards; and (3) agreed to pay any amount. Without more, appellant's name on an account, when considered along with his denial of mutual assent, fails to establish the existence of an account. Thus, when viewed in a light most favorable to appellant, the record fails to establish a necessary element for liability under the doctrine of account stated.

> ...It is true that acquiescence to an account balance may be established if the debtor retained without objection, for a long period of time, a statement of account rendered by the creditor. But implicit in this notion of implied consent to the account balance is an existing relationship between the debtor and creditor in which assent to the account itself is undisputed.

Id. at *3 (internal citations omitted). Thus, the Nelson Court "conclude[d] that the district court erred in granting summary judgment in favor of [the bank] based on the doctrine of account stated." Id. at *4.

In Erickson, the United States District Court for the District of Minnesota examined Citibank's assertion that the plaintiff was liable for a credit card debt based on the account stated theory of liability. In that case, "[o]n September 6, 2001, a credit card account was opened over the telephone with Citibank. The primary account holder was listed as Plaintiff Kermit Erickson, and his wife, Betty Erickson, was listed as an authorized user." Erickson, 2006 WL at *1. The credit card application was unavailable because the account was opened over the telephone. Id. The plaintiff averred that he had no knowledge of the account until October 2003. He never: (1) applied for a credit card account with Citibank; (2) received a credit cardholder agreement from Citibank; (3) signed such an agreement; (4) activated the credit card; (5) entered into a credit card transaction with the card; or (6) made any payment on the account. The plaintiff "theorized that his then wife ... opened the account in his name." He moved out of the family home in March 2003, and, in May 2003, filled out a postal change of address form.

Sometime in 2003, the plaintiff's wife ceased making payments on the account. The plaintiff and his wife divorced on March 12, 2004. The plaintiff's wife disputed

opening the account, but did not testify at trial that the plaintiff took any action to manifest assent to the account. In the divorce, the plaintiff's wife was ordered to pay on the account, and the divorce court held the plaintiff harmless on it.

After examination of the evidence, the Erickson Court found that it "merely establishe[d] that [the plaintiff's wife] opened the account, used the credit card, made payments on the credit card, and received the bills without complaint." Id. at *5. The court noted that because Citibank "ha[d] not presented evidence that [the p]laintiff assented to the account, the account-stated doctrine d[id] not establish liability." Id. After examining Nelson, the Erickson Court held that there was no evidence that the plaintiff manifested assent to the account, and thus, the plaintiff was not liable for the account or bound by the cardholder agreement.

In this case, even after viewing the facts in a light most favorable to MBNA, the Court concludes that no genuine issue of material fact remains regarding whether the arbitration award may be enforced against the defendant. First, as in Nelson and Erickson, the Court finds that MBNA cannot prove that the defendant assented to the credit card account. The defendant affirms he never: (1) signed the original credit card applications; (2) agreed to the terms of any of the credit card agreements or amendments; (3) made purchases with the MBNA credit card; (4) made any payments on the account to MBNA; and/or (5) agreed to the alleged account stated. MBNA contradicts the defendant's assertions by submitting: (1) monthly billing statements dating from December 1999 through January 2002, which are addressed to the defendant and were sent to the Hillsboro address, where Ms. Cornock lived; (2) evidence suggesting that payments on the account were made from a joint checking

account in the names of the defendant and Ms. Cornock; and (3) excerpts from comment records indicating that the defendant, at some point in time, was aware of the account's existence. None of this evidence suggests that the defendant ever assented to the account itself.

However, even if it may be inferred from the evidence that the defendant assented to the balance owed on the account, the account stated theory of liability does not prove that the defendant ever agreed to the terms of the credit card agreement. MBNA presumes that the defendant agreed to all the conditions of the cardholder agreement, including those mandating arbitration, simply because the account stated theory of liability may dictate that the defendant is liable for the amount owed on the account. MBNA overlooks the fact that, prior to relying up on the account stated theory of liability to establish that the defendant assented to the amount of debt owed on the account, it needs to prove that a credit card contract existed between the defendant and MBNA in the first instance. "An account stated 'cannot be made the instrument to create liability where none before existed ....'" Bucklin, 244 N.E. 2d at 728 (quoting Chase v. Chase, 78 N.E. 115 (Mass. 1906)). Thus, to compel the defendant to submit to arbitration, MBNA is first required to establish that the defendant entered into the credit card agreement. In the absence of the signed credit card application, purchase receipts exhibiting the defendant's signature, or other evidence demonstrating that the defendant entered into the credit card agreement, the Court cannot find that the defendant agreed to arbitration pursuant to such an agreement. Therefore, as the record contains no such evidence, MBNA could not subject the defendant to arbitration on this claim.

MBNA argues that, "[w]here, Defendant was obligated to make payment on the credit card account and the modified agreement contained written arbitration provisions, the arbitration provisions must be enforceable as part of the contract." (Pl.'s Obj. at 6). However, MBNA does not provide, and the Court cannot find any, legal support for this analytical leap. Even if the defendant assented to the balance on the credit card account pursuant to the account stated theory of liability, MBNA has not presented any evidence or law suggesting that the defendant's assent to the amount owed on the account implies that he also agreed to every provision of the 1998 agreement and 2001 amendment. Rather, the law explicitly prohibits using an account stated in this fashion. MBNA is attempting to use the alleged account stated as the contractual instrument for liability, without establishing that an actual contract existed in the first place. Therefore, even if the defendant assented to an account stated, the Court cannot impute all the terms of the credit card agreement, including the arbitration provisions, into such an assent.

Thus, in the absence of a signed credit card application or signed purchase receipts demonstrating that the defendant used and retained the benefits of the card, the defendant's name on the account, without more, is insufficient evidence that the defendant manifested assent to the terms of the 2001 amendment, specifically the arbitration provisions. To hold otherwise would allow any credit card company to force victims of identity theft into arbitration, simply because that person's name is on the account. Cf. Def.'s Resp. To Pl.'s Obj., Ex. 3 (Federal Trade Commission Identity Theft Survey Report, Sept. 2003). Thus, as MBNA has produced no evidence indicating that

the defendant ever agreed to the credit card agreement, especially the arbitration provisions of that agreement, the Court finds that the present claim is not arbitrable.

Furthermore, the Court finds it necessary to note some of its concerns regarding the manner in which MBNA has handled this case. First, as it is evident from the record that MBNA had continuous contact with Ms. Cornock regarding this credit card account, the Court is mystified as to why MBNA never included this authorized user in any of the proceedings. Interestingly, MBNA did not attach an affidavit from Ms. Cornock to contradict the defendant's position that Ms. Cornock was the applicant of the credit card.

Second, while this case may not present the prototypical identity theft case, most of MBNA's assertions to this Court and the arbitrator in support of its argument that the defendant assented to both the credit card agreement and the account stated would be equally applicable to another case where an identity theft victim challenged his or her assent to these items. For example, MBNA argues that "the continued use of the credit card account after February 1, 2000, binds Defendant to the arbitration amendment." (Pl.'s Obj. at 15). Notably, MBNA presents no evidence suggesting that it was the *defendant's* continuous use of the credit card after receiving the arbitration amendment that could bind *him* to that amendment. Moreover, it is undisputed that the credit card was no longer used to make purchases after June 1998. In any event, under MBNA's reasoning, any identity theft victim would be subject to arbitration simply because the perpetrator used the fraudulently obtained credit card after the arbitration provisions became effective. Such a result would be contrary to public policy.

Finally, as noted by the Kansas Supreme Court in MBNA America Bank, N.A. v. Credit, 132 P.3d 898 (Kan. 2006), this case along with two Kansas cases involving MBNA's efforts to arbitrate a dispute

> appear to reflect a national trend in which consumers are questioning MBNA and whether arbitration agreements exist. See e.g., MBNA America Bank, N.A. v. Boata, 94 Conn.App. 559, 893 A.2d 479 (2006); MBNA America Bank, N.A. v. Rogers, 838 N.E.2d 475 (Ind.App. 2005); MBNA America Bank, N.A. v. Hart, 710 N.W.2d 125 (N.D. 2006); MBNA America Bank, N.A. v. Terry, 2006 WL 513952 (Ohio); MBNA America Bank, N.A. v. Berlin, 2005 WL 3192850 (Ohio App.); MBNA America Bank, N.A. v. Perese, 2006 WL 398188 (Texas App.). Given MBNA's casual approach to this litigation, we are not surprised that the trend may be growing.

132 P.3d at 902; see also MBNA America Bank, N.A. v. Barben, 111 P.3d 663 (Kan. App. 2005). In that case, the Kansas Supreme Court emphasized that when the alleged debtor objected to arbitration by letter in the arbitration forum, "the responsibility fell to MBNA to litigate the issue of the agreement's existence." Credit, 132 P.3d at 900-01 (citing 9 U.S.C. § 4 and K.S.A. 5-402). While New Hampshire law may not place the same obligation upon MBNA, it is noteworthy that MBNA never sought court intervention to compel arbitration when the defendant objected and claimed (as he had always claimed) that he never entered into a credit card agreement with MBNA.

In summary, MBNA has produced no evidence suggesting that the defendant manifested his assent to any credit card agreement, including the arbitration provisions of the 2001 amendment. Evidence that the defendant's name was on the account, that payments were made from a joint checking account in his name, and that the defendant contacted MBNA to challenge the account is not sufficient to indicate that the defendant assented to the credit card agreement in the first instance. Therefore, the Court finds

that MBNA has not shown that the claim is arbitrable, and as such, the arbitrator had no jurisdiction in the first place. Accordingly, the Award is unenforceable as a matter of law, and the Court grants summary judgment in favor of the defendant.

SO ORDERED.

3/20/07
Date

Gillian L. Abramson
Presiding Justice