18 Fla. L. Weekly Supp. 559b
Online Reference: FLWSUPP 1806FEKE

Contracts -- Credit card agreement -- Where account records produced by bank at trial in action to recover credit card debt contain omissions and errors, lack credibility and reliability, and do not qualify for an exception to hearsay rule, and bank's witness has no personal knowledge or admissible evidence that notices of account changes and account statements were furnished to and received by defendant, judgment is entered against defendant only for amount she admits she owes

CHASE BANK USA, N.A., Plaintiff, vs. AMBER D. FEKETE, Defendant. County Court, 7th Judicial Circuit in and for Volusia County. Case No. 2010-20731-CONS, Division 78. February 1, 2011. Amended February 17, 2011. Shirley A. Green, Judge. Counsel: Philip A. Orsi, Deerfield Beach, for Plaintiff. Leonard P. Cabral, Sanford, for Defendant.

ORDER FOR FINAL JUDGMENT FOR PLAINTIFF

On November 17, 2010, a bench trial on this matter was conducted before the Honorable Shirley A. Green. Present in the courtroom were the Defendant, Amber Fekete, and her attorney Leonard Cabral of Sanford, Florida. Present in the Courtroom for the Plaintiff, Chase Bank USA, N.A., were Plaintiff's witness, Michelle Donaldson of Maryland, as the representative of Chase Bank USA, N.A. as the Business Analyst and Custodian of Records for "Chase" and Attorney Pace A. Allen, Jr. of Daytona Beach, Florida who represented the Plaintiff for JPMorgan Chase -- Legal Department.

The Plaintiff filed a one count Complaint for Account Stated arising from two accounts and Chase relied on the decision in *Patricia Farley v Chase Bank, USA., NA* No. 4D09-651 (Fla. 4th DCA, 2010) [35 Fla. L. Weekly D1296a], __ So.3d __ to form its prima facie case for Account Stated. In *Farley,* the Court found "when an account statement has 'been rendered to and received by one who made no objection thereto within a reasonable time,' a prima facie case for the correctness of the account and the liability of the debtor has been made", citing *Daytona Bridge Co. V. Bond,* 356 So.445, 447 (Fla 1904); *Gendzier v. Bielechi*, 97 So,.2d 604,608 (Fla. 1957), The*Farley* Court further stated that "[a] debtor may overcome a prima facie case of an account stated by 'meeting the burden of proving fraud, mistake[,] or error' in the account", citing *Robert C. Malt & Co. v. Kelly Tractor Co.,* 518 So, 2d 991, 992 (Fla. 4th DCA 1988);*Gendzier,* 97 So. 2d at 608.[1]

Plaintiff called the Defendant, Amber Fekete, as its first witness. Defendant testified that she had two Chase credit cards, that there was an outstanding balance on the cards but did not remember receiving any of the statements attached to the Plaintiff's Complaint and that she disputed the amounts owed according to those statements. Defendant testified that she examined the documents produced for trial and they contained inaccurate information including incorrect address for her residence at the time they were sent. Defendant further testified that some of the documents contained an address where no building existed at the time of the dates shown on the documents, and some of the documents contained blanks where Defendant's address information should have been and other documents contained "Sample A. Sample, 1234 Main Street, Anytown, USA 00000" where a name and address should have appeared.

On cross examination, the Defendant, Amber Fekete, testified that both of her Chase accounts were "zero interest" accounts and that she did not remember ever receiving a notice of change of terms notifying her that Chase intended to increase the interest rate on

her account. She personally calculated the balance of her Chase accounts and according to her records and calculations, she owed Plaintiff a total of $85.22 for both accounts and had *no objection* to paying this amount. Defendant testified that she inspected but did not remember ever receiving the documents sought to be introduced by Chase as evidence for trial titled *Important Notice for Credit Card Customers about Changes to Your Cardmember Agreement* and the *Important Information Regarding Changes to Your Account and Your Right to Reject Changes.*

Plaintiff called as its second witness Chase employee, Michelle Donaldson, and sought through its witness to have documents presented at trial admitted as business records as an exception to the hearsay rule. Defendant's counsel was allowed to voir dire the witness.

After questioning by Defense Counsel, the Chase's witness, Ms. Donaldson, stated that she worked for Chase but was unable to state whether she worked for Chase Bank USA, N.A. or Chase Bankcard Services, Inc. Chase's witness testified that there was no hard copy or physical paper file of the account record. Chase's witness testified that all the records were computerized but that she did not input any of the information. Chase's witness stated that she lacked personal knowledge of Chase's procedures for inputting any of the information contained in the computer file nor could Chase's witness produce any manuals or written policies explaining the procedure or policy of how the customer information was inserted into the computer. Chase's witness did not know if the same computer system was being used when the account was opened and at the time the credit card charges were made and if or how the data was converted to a new system. The witness could not testify that she had personal knowledge of the reliability of the computer system or the audit procedure used to assure the integrity of the computer records.

Chase's witness, Ms. Donaldson, identified a document titled*Important Notice for Credit Card Customers about Changes to Your Cardmember Agreement.* Chase's witness testified that the *Important Notice for Credit Card Customers about Changes to Your Cardmember Agreement,* is the document that is sent to its customers to inform them of an increase in the percentage rate and terms of their credit card account but did not know what triggered a change to the interest rate on a credit card account. Chase's witness also admitted during her testimony that the *Important Notice for Credit Card Customers about Changes to Your Cardmember Agreement* produced as evidence for trial did not contain the addressee's name, address or to whom the notice was mailed.

Chase's witness, Ms. Donaldson, identified a document titled*Important Information Regarding Changes to Your Account and Your Right to Reject Changes* and a similar document titled *Important Notice of Change in Terms and Right to Opt-Out.* Chase's witness admitted during her testimony that on the document titled *Important Information Regarding Changes to Your Account and Your Right to Reject Changes* and the similar document titled *Important Notice of Change in Terms and Right to Opt-Out* were produced for evidence for this trial and the name and address shown on both documents were “Sample A. Sample, 1234 Main Street, Anytown, USA 00000” and not the name and address of the Defendant. Furthermore the documents did not contain an account number or a date the changes were to take effect.

Chase's witness, Ms. Donaldson, identified a document titled *Primary Applicant Information* and testified that it contained the information taken from the Defendant at the time the accounts were opened. The document titled *Primary Applicant Information* not only contained an address where the Defendant did not reside at the time she applied for the credit cards but contained an address where no building existed at that time.

Other documents the Plaintiff's witness, Ms. Donaldson, sought to have admitted into evidence either had no address for the Defendant or contained blank spaces where the name and address should have appeared.

Defendant timely objected to the documents the Plaintiff sought to introduce into evidence at trial and the Court sustained the objection. The business records exception to the hearsay rule authorizes admission of certain written material made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity and if it was the regular practice of that business activity to make such memorandum, report, record, or data compilation all as shown by the testimony of the custodian or other qualified witness, unless the sources of information or other circumstances show lack of trustworthiness. Fla. Stat. §90.803(6).

It is apparent that these records were not made in the ordinary course of business on or about the time of the event described therein, but were created for this trial. The records offered by Plaintiff lacked credibility and trustworthiness and are not admissible. Because the documents lacked credibility, Chase's witness, Ms. Donaldson, is limited to testify at this trial only to her personal knowledge about the Defendant's accounts.

Chase's witness, Ms. Donaldson, then testified that she did not have personal knowledge if an *Important Notice for Credit Card Customers about Changes to Your Cardmember Agreement* was sent to or received by the Defendant, what the interest rate would have changed to nor the date the interest rate or other changes on the Defendant's accounts would have taken effect if such a notice was sent to the Defendant.

Chase's witness, Ms. Donaldson, then testified that she did not have personal knowledge if an *Important Information Regarding Changes to Your Account and Your Right to Reject Changes* or the similar*Important Notice of Change in Terms and Right to Opt-Out* was sent to or received by the Defendant, what the interest rate would have changed to nor the date the interest rate or other changes on the Defendant's accounts would have taken effect if such a notice was sent to the Defendant.

Chase's witness, Ms. Donaldson, testified that she did not physically calculate the account balances herself but relied on comparing the computer records with the computer screen for the balance of the Defendant's accounts.

Chase's witness, Ms. Donaldson, then testified that she did not have any personal knowledge that the statements attached to the Complaint were sent to the Defendant or if the Defendant received them nor did she have personal knowledge whether or not the Defendant objected to the statements attached to the Complaint. Chase's witness had no personal knowledge or evidence whatsoever of proof of mailing the statements attached to the Complaint or any return receipt from the U.S. Post Office.

It is therefore FOUND:

1. The account records produced by Plaintiff at trial and sought to be introduced as evidence of the Defendant's accounts with the Plaintiff contained omissions, mistakes and errors and lacked credibility, reliability and trustworthiness and did not qualify for any exception to the hearsay rule. They are not admissible as evidence in this trial.

2. Chase's witness, Ms. Donaldson, had no personal knowledge or admissible evidence that the *Important Notice for Credit Card Customers about Changes to Your Cardmember Agreement,* the*Important Information Regarding Changes to Your Account and Your Right to Reject Changes* and/or the *Important Notice of Change in Terms and Right to Opt-Out* were furnished to or received by the Defendant.

3. Chase's witness, Ms. Donaldson, had no personal knowledge or admissible evidence whatsoever to prove that the account statements attached to the Complaint were furnished to or received by Defendant nor if the Defendant made no objection to the account statements.

4. The testimony of Chase's witness, Ms. Donaldson, was insufficient to prove the Plaintiff's case for Account Stated against the Defendant.

5. The Defendant admitted during her testimony that she did have two credit cards with Chase and admitted that she owed $85.22 to the Plaintiff for the balance owed on both credit card accounts and that she had no objection to a judgment in that amount.

ORDERED AND ADJUDGED that a Final Judgment be entered in favor of the Plaintiff, Chase Bank USA, N.A. in the amount of $85.22 (Eighty-five Dollars and Twenty Two Cents).

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[1]The Plaintiff filed a one Court complaint for "Account Stated". The Defendant has questioned if the "Account Stated" cause of action is applicable in an action to collect a debt of a credit card account because it violates The Federal Truth in Lending Act, 15 U.S.C. §1601 et seq. This issue is moot because the Defendant and her counsel agreed to judgment in the amount of $85.22.

AMENDED FINAL JUDGMENT FOR THE LIMITED
PURPOSE OF ADDING COSTS

THIS CAUSE came before the Court on Plaintiff's Motion to Amend Final Judgment entered herein on February 1, 2011 to add court costs and, after reviewing this matter and being fully advised in the premises, without destroying the remaining provisions, it is

ORDERED AND ADJUDGED that the Order for Final Judgment for Plaintiff against Defendant, AMBER D FEKETE, dated February 1, 2011 and recorded in Official Records Book 6560, Page 3956, is hereby amended to provide for the sum of $85.22 on principal and costs of $350.00, making a total judgment award of $435.22 which shall bear interest at the rate of 6% per year, all for which let execution issue.