

**15 Fla. L. Weekly Supp. 365d**

**Contracts -- Credit card agreement -- Limitation of actions -- Conflict of laws -- Choice of law provision in agreement makes Arizona law applicable to account, and three-year Arizona statute of limitations applies to actions on non-written agreements and open and stated accounts -- Allegations of amended complaint and generic, unsigned customer agreement attached thereto did not sufficient assert claims based upon written contract -- Cardholder agreement attached to complaint did not contain all material terms required to establish all elements of claim and was not sufficient to constitute a written contract -- Where cardholder agreement provides that creditor had right to sue when debtor first missed payment, creditor's cause of action accrued on first date payment was missed, not on date creditor chose to accelerate the debt -- Amended complaint was not brought within three-year limitations period required by Arizona law and is dismissed with prejudice**

FLORIDA CREDIT RESEARCH, INC., assignee of Metris Companies, Inc., Plaintiff, vs. MARK STROMBERG, Defendant. County Court, 4th Judicial Circuit in and for Duval County. Case No. 16-2007-CA-002294-XXXX-MA, Division P. February 20, 2008. Angela M. Cox, Judge. Counsel: Mark Rickard, for Plaintiff. **Lynn Drysdale**, for Defendant.

*ORDER GRANTING DEFENDANT'S MOTION TO  
DISMISS PLAINTIFF'S AMENDED COMPLAINT*

This matter came before the Court on Defendant's Motion to Dismiss Plaintiff's Amended Complaint. Defendant's motion to dismiss the Amended Complaint is based upon Plaintiff's failure to state a cause of action and Plaintiff's failure to file this case within the applicable statute of limitations time period. The Court having heard argument of counsel for the Plaintiff and Defendant, having reviewed the file and being otherwise sufficiently advised in the premises, finds as follows:

1. Plaintiff filed an Amended Complaint raising three claims, Count One (Open Account), Count Two (Breach of Contract) and Count Three (Account Stated). The only attachments to the Amended Complaint were the same October 31, 2003 statement from Direct Merchants Bank with "charge off" account principal and interest amounts and two pages of a document entitled "Cardholder Agreement" payable to Direct Merchants Bank which were attached to Plaintiff's original Complaint. The attached agreement was not signed or dated and did not contain any reference to the Defendant.
2. In this Court's June 22, 2007 Order Granting Defendant's Motion to Dismiss Plaintiff's Complaint, the Court found
3. Plaintiff has failed to attach a credit card application or agreement signed by Defendant.
4. The generic, form "Cardholder Agreement" attached to the Complaint is undated, unsigned and contains no reference to Defendant.
5. Plaintiff has failed to attach copies of the account, showing items, time of accrual of each, and amount of each. *See by analogy* Forms 1.932 and 1.933, *Fla.R.Civ.Pro.*, requirements for an account stated or open account claim.

6. The documents which are attached to the Complaint conflict with the allegations of the complaint.

3. In its Amended Complaint, Plaintiff failed to correct the deficiencies leading to the dismissal of its original Complaint.

4. In its Amended Complaint, Plaintiff alleges that Arizona law applies to the credit card account.

5. Plaintiff also seeks the sums remaining due as of the October 31, 2003 account statement and seeks interest as of November 22, 2003.

6. The document attached to the Amended Complaint provides the following:

You will be in default under this agreement upon : (a) your failure to make at least the minimum payment by the date specified on your statement; (b) your violation of any other provision of this agreement. . .

There are eight other contingencies listed which constitute default. This document also provides that upon the occurrence of any these contingencies, Plaintiff has the right to sue.

7. *Arizona Revised Statutes Annotated* Section 12-548 provides

Contract in writing for debt; six year limitation

An action for debt where indebtedness is evidenced by or founded upon a contract in writing executed within the state shall be commenced and prosecuted within six years after the cause of action accrues, and not afterward.

8. *Arizona Revised Statutes Annotated* § 12-543 provides in pertinent part

Oral debt; stated or open account; relief on ground of fraud or mistake; three year limitation

There shall be commenced and prosecuted within three years after the cause of action accrues, and not afterward, the following actions:

1. For debt where the indebtedness is not evidenced by a contract in writing.

2. Upon stated or open accounts other than such mutual and current accounts as concern the trade of merchandise between merchant and merchant, their factors or agents, but no item of a stated or open account shall be barred so long as any item thereof has been incurred within three years immediately prior to the bringing of an action thereon.

9. As to Defendant's motion to dismiss for failure to timely file this case within the applicable statute of limitations the Court finds persuasive its holding in *Capital One Bank v. Sawyer*, 15 Fla. L. Weekly Supp. 170a, County Court, 4th Judicial Circuit in and for Duval County, Case

No. 16-2007-SC-4544, the Honorable Angela M. Cox, December 17, 2007. In *Sawyer*, this Court held the Plaintiff's breach of contract claim was not subject to the extended Florida five year statute of limitation. §95.11(3)(b). In so doing the Court found:

for “[a] legal or equitable action on a contract, obligation, or liability founded on a written instrument” The “Customer Agreement” attached to the Complaint does not identify the Defendant or his account, show the amount lent to Defendant or the terms of repayment, or otherwise establish that Defendant is liable to Plaintiff. When a document does not on its face establish all the elements of Plaintiff's claim, that claim is not “founded on a written instrument” so as to extend the statute of limitations.

*See also ARDC Corp. v. Hogan*, 656 So. 2d 1371, 1374 (Fla. App. 1995) (Florida courts apply the statute of limitations for unwritten contract where the “written instrument is ‘a link in the chain of evidence to prove the cause of action’ but does not on its face establish all of the elements of plaintiff's claim.”); *Portfolio Recovery Associates, LLC v. Fernandes*, 13 Fla. L. Weekly Supp. 506a (Circuit Court, 15th Judicial Circuit (Appellate) in and for Palm Beach County, Florida) (the Cardholder Account and Security Agreement alone introduced at trial would not be enough to establish liability and the action is not founded on a written instrument for purposes of the statutes of limitations). *See also consistent Arizona authority Kersten v. Continental Bank*, 628 P.2d 592 (Ariz. 1981) (court affirmed a summary judgment for defendant based upon the three year statute of limitations -- a cause of action is not upon a ‘contract founded upon an instrument in writing’ merely because it is in some way remotely or indirectly connected with the instrument or because the instrument would be a link in the chain of evidence establishing the cause of action).

10. This Court adopts the policy stated in *Fernandes, supra*:

(S)tatute of limitations are designed to prevent undue delay in bringing suit on claim and to suppress fraudulent and stale claims from being asserted, to the surprise of parties or their representatives, when all the proper vouchers and evidence are lost, or the facts have become obscure from the lapse of time or the defective memory or death or removal of [a] witness” citing *Foremost Properties, Inc. v. Gladman*, 100 So.2d 669 (Fla. 1st DCA 1958), *cert. den.* 102 So.2d 728 (Fla. 1958). A review of the statute shows, consistent with common sense, that those actions on which proof is less likely to deteriorate over time are subject to longer limitation periods; those actions on which proof is more likely to deteriorate because of faulty memory or otherwise are subject of shorter limitations periods. Unlike a written contract containing all the terms sued on, proof of the balance due under a store credit card depends on the correctness of the store's books. We know, though, that record keepers come and go; purchased items are returned or exchanged; and partial payments are made. Proof of the amount due under a store credit card is simply not as secure as proof of the amount due on, for example, a promissory note that contains in writing all the terms of the parties' undertakings. *See Nardone v. Reynolds*, 333 So. 2d 25, 36 (Fla. 1976), *mod. on other grds.*, *Tanner v. Hartog*, 618 So. 2d 177 (Fla. 1993) (unfair to allow one who has slept on his rights to sue a party “ ‘. . .who is left to shield himself from liability with nothing more than tattered or faded memories, misplaced or discarded records, and missing or deceased witnesses’ ”); *Allie v. Ionata*, 503 So. 2d 1237 (Fla. 1987).

11. This Court finds Arizona limitations periods have a statutory analysis consistent with the Florida analysis above. Actions “on which proof is less likely to deteriorate over time are subject to longer limitation periods. . .” In Arizona, actions on written contracts must be brought in six years and actions on non-written agreements, open and stated accounts must be brought in three years.

12. Based upon the allegations contained in the four corners of Plaintiff's Amended Complaint and the attachments thereto, its claims are not sufficiently based upon a written contract. Therefore, each of the counts of Plaintiff's Amended Complaint is governed by Arizona's three year statute of limitations. *Arizona Revised Statutes Annotated* Section 12-543.

13. Even though Count Two is purportedly based upon a breach of a contract the documents attached to Plaintiff's Complaint are at best only “a link in the chain of evidence to prove the cause of action” and do not on their face establish all of the elements of plaintiff's claim. The subject purported debt is not a written contract signed by both parties as is contemplated by *Arizona Revised Statutes Annotated* Section 12-548. Plaintiff has not attached a sufficiently complete and signed “written document” for purposes of the six year statute of limitations. Therefore, the relevant statute of limitations for Plaintiff's claim in Count Two is three years. *See Arizona Revised Statutes Annotated* Section 12-543.

14. Plaintiff also claims the documents attached to its Amended Complaint are sufficient to constitute a written contract. The federal Truth in Lending Act provides that no credit card shall be issued to any person except in response to a request or application for a credit card. 15 U.S.C. §1642. Also, 15 U.S.C. §1637(a) requires a creditor to disclose rates, fees and other cost information in applications and solicitations to open credit card accounts before opening any account under an open end consumer credit plan.

The “Cardholder Agreement” does not contain all of the “material terms” required to establish all of the elements of Plaintiff's claim and is, therefore, merely a link containing only some of the material terms, including the choice of law provision. This agreement does not provide the interest rate, the maximum credit limit and penalty rates. Although the agreement contains these figures, the figures in this agreement conflict with the figures in the other attachment to the Amended Complaint. This is a prime example why the shorter statute of limitations should apply because there are material missing terms, inconsistencies or gaps in the documents Plaintiff attached to its Amended Complaint.

15. Further, Plaintiff claims the relevant date to begin the running of the statute of limitations is the date it chooses to accelerate the debt. This is not accurate. The document attached to the Amended Complaint provides the following:

You will be in default under this agreement upon : (a) your failure to make at least the minimum payment by the date specified on your statement; (b) your violation of any other provision of this agreement. . .

The document attached to the Complaint does not require Plaintiff to provide notice of acceleration. Based upon the terms of the document attached to Plaintiff's Complaint, Plaintiff

had the right to sue when Defendant first missed a payment. *See also* 51 *Am. Jur.* 2d Limitation of Actions §148 and 160.

The credit card contract will provide that missing a payment is a default, and that upon default, the bank can accelerate the entire amount due. So the cause of action accrues on the first day when a payment is missed.

16. The Eleventh Circuit *Maxcess, Inc. v. Lucent Technologies, Inc.*, 433 F.3d 1337 (11th Cir. 2005) applied Florida law in upholding a choice of law provision in a contract. The Court held under Florida law courts will enforce choice-of-law provisions unless the law of the chosen forum contravenes strong public policy. The Florida Supreme Court in *Mazzoni Farms, Inc. v. E.I. Dupont De Nemours & Co.*, 761 So. 2d 306, 311 (Fla. 2000) upheld a choice of law provision which released the defendant from all claims, including fraud claims. The Supreme Court held “while we both recognize and reaffirm Florida's policy disfavoring fraudulent conduct, we are mindful of the rigorous standard employed in determining whether to invalidate choice-of-law provisions. Accordingly, we hold that enforcement of the choice-of-law provision is not so obnoxious to Florida public policy as to render it unenforceable.” The Court also placed the burden on party seeking to avoid enforcement of the choice of law provision to show that the foreign law contravenes public policy of the forum jurisdiction. *See also Burroughs Corp. v. Suntogs of Miami, Inc.*, 472 So. 2d 1166, 1167-69 (Fla. 1985) (contractual provision shortening the period of time for filing a suit was not contrary to a strong public policy); *Credigy Receivables, Inc. v. Hinte*, Circuit Court, Florida Fourth Judicial Circuit, Duval County, Florida signed by Judge Charles W. Arnold, Jr. on November 8, 2007.

17. The above-styled lawsuit was filed on March 8, 2007, therefore it was filed in excess of three years from the last activity and not filed within the three year limitations period required by Arizona law. Plaintiff drafted the subject Amended Complaint and attached the portion of the contract containing the choice of law provision and now cannot meet the burden required to avoid enforcement of this provision. Therefore, this Court finds this action was not timely filed and is barred.

It is therefore,

ORDERED AND ADJUDGED:

A. Defendant's Motion to Dismiss Plaintiff's Amended Complaint for Plaintiff's failure to timely file this case is granted and Plaintiff's Amended Complaint is dismissed with prejudice.

B. Based upon the foregoing, this Court shall not rule upon Defendant's other grounds for dismissal or his motion to strike request for attorneys' fees.

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