

[Cite as *Chase Bank USA, NA v. Lopez*, 2008-Ohio-6000.]

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT  
COUNTY OF CUYAHOGA

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JOURNAL ENTRY AND OPINION  
**No. 91480**

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**CHASE BANK USA, NA**

PLAINTIFF-APPELLEE

vs.

**ANGEL A. LOPEZ**

DEFENDANT-APPELLANT

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**JUDGMENT:  
AFFIRMED**

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Civil Appeal from the  
Cuyahoga County Court of Common Pleas  
Case No. CV-623904

**BEFORE:** Kilbane, J., Gallagher, P.J., and Calabrese, J.

**RELEASED:** November 20, 2008

**JOURNALIZED:**

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B), 22(D) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(E) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(E). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

MARY EILEEN KILBANE, J.:

{¶ 1} Appellant, Angel A. Lopez (Lopez), appeals from the order of the trial court granting summary judgment in favor of Chase Bank USA, NA (Chase) in the amount of \$14,388.97, plus interest, in an action on a credit card account. For the following reasons, we affirm the trial court.

{¶ 2} On May 9, 2007, Chase filed a complaint in account against Lopez, seeking to collect money claimed due on a credit card account that originated with Chase. The complaint alleged that, by use of the credit card account, Lopez became bound by the terms in the VISA agreement. Copies of the credit card statement and the cardmember agreement were attached to the complaint. Chase stated it was exercising its rights under the VISA agreement to accelerate the time for payment of the entire balance due and owing by Lopez, which Lopez has failed to pay despite demand upon him to do so.

{¶ 3} On December 3, 2007, Lopez filed an answer denying the allegations in the complaint, and stating that he did not sign the credit card statement or the cardmember agreement attached to the complaint. He also denied owing the monies alleged to be owed, but admitted he has refused to pay Chase.

{¶ 4} Chase filed its motion for summary judgment on February 26, 2008, opposed by a response to the motion filed by Lopez on March 7, 2008. On April 24, 2008, the trial court granted the motion for summary judgment stating: "Plaintiff is granted Judgment in its favor and against Defendant Angel A. Lopez

in the amount of \$14,388.97, together with interest from August 31, 2007 at the rate per ORC 1343.03 per annum and costs.”

{¶ 5} The documentary evidence attached in support of the motion for summary judgment consisted of the cardmember agreement, Exhibit A, the affidavit of Chase’s custodian of records, John Wells, Exhibit B, and eleven monthly statements addressed to Lopez, Exhibit C, reflecting a balance due and owing in the amount of \$14,388.97.

{¶ 6} The sole piece of documentary evidence offered in opposition to Chase’s motion was Lopez’s affidavit, attached to his response of March 7, 2008. In this affidavit, Lopez stated that he reviewed the complaint and the “attachments” to the “lawsuit paper.” He also stated “he has never been furnished with a copy of the ‘cardholder agreement’ before he received the copy of that document at the time the Lawsuit was given to him.”

{¶ 7} Lopez filed the instant appeal and presents one assignment of error for our review:

**“THE TRIAL COURT ERRED IN GRANTING PLAINTIFF/  
APPELLEE’S MOTION FOR SUMMARY JUDGMENT.”**

{¶ 8} Lopez argues that the trial court erred in granting Chase’s motion for summary judgment because none of the exhibits attached to Chase’s motion contained his signature. Lopez argued that Chase’s inability to produce a

written application or agreement signed by him precludes granting of the motion for summary judgment against him.

{¶ 9} Additionally, Lopez argues that Chase's attempt to create a contract between the parties based on the "delivery" of the "cardmember agreement" to him is insufficient as a matter of law. Lopez contended that, absent evidence of a written contract, there is a genuine issue of material fact as to whether the parties have been doing business with each other. He offers the following statement from *Booth v. Bob Caldwell Dodge County, Inc.*, 10th Dist. App. No. 95 APE 10-1397, in support of this statement: "An action in an account, such as the one before this Court, is appropriate when the parties have conducted a series of transactions for which a balance remains to be paid. *Blanchester Lumber & Supply, Inc. v. Coleman* (1990), 69 Ohio App.3d 263, 265, \*\*\*."

{¶ 10} Chase argues that it has met its burden under current Ohio law to warrant judgment in its favor by attaching to its motion for summary judgment a copy of the cardmember agreement along with account statements showing Lopez's use of the issued card. According to Chase, these items of documentary evidence established a prima facie case that Lopez was liable for the amounts owing on the card. Chase cites to the unreported decision in *Society Bank & Trust v. Niggemeyer* (May 21, 1993), 6th Dist. App. No. S-92-5, for the proposition that under Ohio law a cardholder incurs liability for charges made on a credit card by using the credit card itself.

{¶ 11} In reviewing an award of summary judgment, this court must apply a de novo standard of review. *Cole v. American Industry & Resources Corp.* (1998), 128 Ohio App.3d 546, 552. We apply the same test as the trial court in determining whether summary judgment was proper. Civ.R. 56(C) provides that the trial court shall render summary judgment if no genuine issue of material fact exists and, when construing the evidence most strongly in favor of the nonmoving party, reasonable minds can only conclude that the moving party is entitled to judgment as a matter of law. *State ex rel. Parsons v. Fleming*, 68 Ohio St.3d 509, 511, 1994-Ohio-172. The party moving for summary judgment has the burden of demonstrating that there is no genuine issue of material fact thereby entitling judgment as a matter of law. *Dresher v. Burt*, 75 Ohio St.3d 280, 292-293, 1996-Ohio-107. "A 'material fact' depends on the substantive law of the claim being litigated." *Hoyt, Inc. v. Gordon & Assoc., Inc.* (1995), 104 Ohio App.3d 598, citing *Anderson v. Liberty Lobby, Inc.* (1986), 477 U.S. 242, 247-248, 106 S.Ct. 2505.

{¶ 12} This court recently reversed a trial court refusing to grant judgment in favor of plaintiff-creditor when the plaintiff-creditor introduced as evidence at trial unanswered requests for admission deemed admitted under Civ.R. 36. See *Capital One Bank v. Zavatchen*, Cuyahoga App. No. 90524, 2008-Ohio-4224. The plaintiff-creditor argued that the trial court erred in refusing to grant it judgment when at the ex parte trial it had argued that its complaint had not

been answered, and that by operation of Civ.R. 36, the unanswered requests for admissions, which provided in pertinent part, “[t]he computations by which the principal balance claimed by Plaintiff [is] accurate,” were deemed admitted. We stated in *Zavatchen* at ¶25:

**“In *Discover Bank v. Hicks*, Washington App. No. 06CA55, 2007-Ohio-4448, the plaintiff alleged that the defendant owed \$4,317.58 on his credit card account. The defendant did not file an answer or otherwise appear. The court therefore held that he did not deny that he owed the stated debt on the account and his account constituted an admission of the allegations under Civ.R. 8(D).**

**Further, in *Capital One Bank v. Nolan*, Washington App. No. 06CA77, 2008-Ohio-1850, the court held that where the plaintiff credit card company attached to the complaint copies of the card agreement and two monthly statements showing a past due balance the attachments were sufficient to establish a complaint on an account. Accord, *Huntington National Bank v. Twining* (Feb. 21, 1991), Cuyahoga App. No. 60222.”**

{¶ 13} In the instant matter, Chase, through the use of exhibits attached to its motion for summary judgment, established in a similar manner a prima facie case on its account. The affidavit attached in support of Lopez’s response in opposition to the motion for summary judgment merely denies receipt of the cardmember agreement. The affidavit does not contain any sworn statement of Lopez that he never used the card, that he denied making the charges set forth in the eleven statements constituting “Exhibit C” attached as documentary

evidence in support of the motion for summary judgment, or that he denied making some payments on the account.

{¶ 14} Lopez did not submit any competing documentary evidence raising any issue of material fact to counter Chase's motion for summary judgment. His sole argument, that lack of a signed credit card agreement precludes proof of any contract between the parties based on an account, is deficient in light of *Zavatchen*.

{¶ 15} Lopez did not raise any issue of material fact to counter Chase's motion for summary judgment to which Chase attached in support: a copy of the cardmember agreement, and eleven monthly statements addressed to Lopez, showing a past due balance in the amount claimed. Under the authority of *Zavatchen*, and the cases cited therein, Lopez did not raise any issue of *material* fact to counter Chase's motion for summary judgment, when "a 'material fact' depends on the substantive law of the claim being litigated." *Hoyt* at 603.

{¶ 16} Chase notes that Lopez, in his appellate briefs, raises for the first time the issue that the affidavit of John Wells, attached to its motion for summary judgment, did not meet the requirements of Civ.R. 56(E). We agree that because this issue was not raised in the trial court, Lopez cannot raise it for the first time on appeal. *Republic Steel Corp. v. Bd. of Revision* (1963), 175 Ohio St.179, at syllabus. Furthermore "[f]ailure to move to strike or otherwise object to documentary evidence submitted by a party in support of, or in opposition to,

a motion for summary judgment waives any error in considering that evidence under Civ.R. 56(C).” *Darner v. Richard E. Jacobs Group, Inc.*, Cuyahoga App. No. 89611, 2008-Ohio-959, at ¶15.

{¶ 17} We find the trial court properly granted Chase’s motion for summary judgment given that un rebutted evidence attached to the motion warranted a judgment in its favor against Lopez. The evidence attached to Lopez’s response to the motion did not create an issue of material fact precluding granting of the motion. “Once the moving party satisfies its burden, the nonmoving party ‘may not rest upon the mere allegations or denials of the party’s pleadings, but the party’s response, by affidavit or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial.’” *Id.* at ¶6, quoting Civ.R. 56(E). See, also, *Mootispaw v. Eckstein*, 76 Ohio St.3d 383, 385, 1996-Ohio-389.

{¶ 18} For the foregoing reasons, Lopez’s sole assignment of error is overruled.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

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MARY EILEEN KILBANE, JUDGE

SEAN C. GALLAGHER, P.J., and  
ANTHONY O. CALABRESE, JR., J., CONCUR