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SECOND DIVISION  
July 26, 2011

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**IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT**

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DISCOVER BANK,	)	Appeal from the Circuit Court
	)	of Cook County
Plaintiff-Appellee,	)	
	)	
v.	)	No. 10 MI 100430
	)	
GREGORY KULIK.	)	The Honorable
	)	Sheryl Pethers,
Defendant-Appellant.	)	Judge Presiding.

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JUSTICE HARRIS delivered the judgment of the court.  
Presiding Justice Cunningham and Justice Connors concurred in the judgment.

**ORDER**

*HELD:* Defendant waived his arguments concerning plaintiff's complaint and an affidavit attached to plaintiff's motion for summary judgment by failing to first raise an objection to them in the circuit court. The circuit court did not err in granting plaintiff's motion for summary judgment because defendant has not shown that a genuine issue of material fact exists.

¶ 1 Plaintiff, Discover Bank, filed a complaint against defendant, Gregory Kulik, seeking to collect an alleged credit card debt of \$9,357.59. The circuit court granted Discover Bank's motion for summary judgment, and denied Kulik's motion to reconsider. On appeal, Kulik raises several issues concerning Discover Bank's motion for summary judgment and its initial

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complaint.<sup>1</sup> Kulik raises the following issues regarding Discover Bank’s complaint: (1) whether Discover Bank failed to attach a contract between the parties to the complaint; (2) whether the affidavit of Discover Bank’s servicing agent, which it attached to its complaint, failed to comply with Illinois Supreme Court Rule 191; and (3) whether the credit card account statements Discover Bank attached to its complaint are evidence of indebtedness. Kulik raises the following issues regarding Discover Bank’s motion for summary judgment: (1) whether Discover Bank has shown an agreement between the parties; (2) whether Discover Bank has proven that he breached any agreement between them; (3) whether the “Affidavit of Account” of Discover Bank’s agent attached to its motion for summary judgment complied with Illinois Supreme Court Rule 191(Ill. S. Ct. R. 191 (eff. July 1, 2002)); and (4) whether circuit court properly granted Discover Bank’s motion for summary judgment. We hold that Kulik has waived the issues he now raises regarding Discover Bank’s complaint and the affidavit attached to Discover Bank’s motion for summary judgment because he failed to first raise them in the circuit court. We also hold that Discover Bank is entitled to judgment as a matter of law because there is no genuine issue as to any material fact.

¶ 2

## JURISDICTION

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<sup>1</sup> Kulik, in his opening brief, listed six issues under the heading “Issues Presented.” However, the issues that he argues in the argument section of his brief do not exactly correspond with the six issues he listed under the issues presented section. Additionally, at points in his opening brief, Kulik presents a single issue as multiple issues. That single issue is whether Discover Bank has shown an agreement between the parties. For clarity, we have divided the issues Kulik has raised into ones addressing Discover Bank’s complaint and ones addressing Discover Bank’s motion for summary judgment. Our review of Kulik’s opening brief shows that Kulik raised four issues concerning Discover Bank’s motion for summary judgment and three issues concerning Discover Bank’s complaint, for a total of seven issues.

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¶ 3 On July 29, 2010, the circuit court entered its final judgment denying Kulik’s motion to reconsider. On August 26, 2010, Kulik filed his notice of appeal. Accordingly, this court has jurisdiction pursuant to Illinois Supreme Court Rules 301 and 303 governing appeals from final judgments entered below. Ill. S. Ct. R. 301 (eff. Feb. 1, 1994); R. 303 (eff. May 30, 2008).

¶ 4 BACKGROUND

¶ 5 On February 25, 2010, Discover Bank filed its complaint against Kulik alleging that it had issued Kulik a credit card, that Kulik incurred charges by use of that credit card, and that Kulik defaulted by failing to make the required payments on the credit card. Discover Bank attached to its complaint a copy of the “Cardmember Agreement” between the parties that outlined the terms and conditions of the agreement. Discover Bank also attached copies of monthly statements demanding payment and an affidavit from one of its servicing agents, Aaron Spain, attesting Kulik owed \$9,357.59 on the credit card. In his capacity as “Legal Placement Account Manager,” Spain attested that the attached Cardmember Agreement “governs the terms and conditions of the relationship between Discover Bank and [Kulik].” Kulik did not file any motions attacking Discover Bank’s complaint.

¶ 6 Discover Bank filed a motion for summary judgment. In its motion, Discover Bank stated that upon Kulik’s request, it sent him a credit card with a copy of the Cardmember Agreement. The agreement was amended several times, but Discover Bank attached as an exhibit to its motion a copy of the most recent agreement. Discover Bank further alleged that Kulik, through his use and acceptance of the credit card, agreed to the terms of the Cardmember Agreement. Discover Bank attached copies of the monthly statements it sent to Kulik outlining

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the amount he owed on the credit card. Discover Bank also attached, as exhibits to its motion, a copy of the credit card application signed by Kulik, and an affidavit from James Ball, a servicing agent of Discover Bank. Ball attested that Kulik owed \$9,357.59 on the credit card, that he reviewed the account, and that the documents in question were made in the normal course of business, and are reliable. Discover Bank also requested in its motion that Kulik pay its attorneys fees of \$350, and attached an affidavit supporting that amount.

¶ 7 From our review of the record, it appears that Kulik filed three responses to Discover Bank's motion for summary judgment. On May 18, 2010, Kulik filed a response arguing Discover Bank's motion should be denied because he did not receive "any documents relating to [Discover Bank's] claims." In this response, Kulik also asked for more time to review Discover Bank's motion. On May 25, 2010, Kulik filed another response alleging that Discover Bank's motion should be denied because it did not provide any documents that identify him. Specifically, alleging "[Discover Bank has not] produced agreements that can be proven relevant to [him]." On June 16, 2010, Kulik filed a document titled "Genuine Issues of Material Fact" in which he requested that Discover Bank's motion for summary judgment be denied. In this final response, Kulik responded to each paragraph of Discover Bank's motion for summary judgment in turn. Kulik denied that Discover Bank provided a copy of the "original agreement" between the parties; denied that Discover Bank provided any proof that he used and accepted the credit card; denied that Discover Bank sent him any statements; alleged that Discover Bank's Exhibit C, the signed credit card application, was not a legible document; denied Discover Bank provided any documentation regarding interest rates or fee terms; denied Discover Bank provided

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any documentation of how the “balance principle and interest was determined,”; and alleged Discover Bank did not provide an agreement between the parties that included a section titled “ ‘ Default-Acceleration-Collection Costs.’ ” Kulik did not file any counteraffidavits or other exhibits on any of his responses which potentially could have raised a genuine issue as to any material fact.

¶ 8 Discover Bank filed its reply June 15, 2010, alleging that Kulik’s response did not raise any issues of material fact. Discover Bank claimed that it successfully pled the elements of breach of contract, namely that Kulik “applied for the credit card, used the credit card, made payments on the credit card, received statements and credit card agreements regarding the card, and that [Kulik] eventually defaulted on the card.” Discover Bank contended that because Kulik failed to controvert any of its exhibits in its initial motion for summary judgment, they must be taken as true.

¶ 9 The circuit court granted Discover Bank’s motion for summary judgment on June 22, 2010, and entered judgment against Kulik in the amount of \$9,709.57, plus costs. On July, 20, 2010, Kulik filed a motion to reconsider, asking the circuit court to vacate its entry of summary judgment. In his motion, Kulik alleged jurisdiction was not proper, that Discover Bank did not provide him a “written express agreement,” and that the affidavit of James Ball, which Discover Bank attached to its motion for summary judgment showing the amount Kulik owed on the credit card, did not show how the affiant arrived at the amount of \$9,709.57. It does not appear from the record that Discover Bank filed a response to Kulik’s motion to reconsider. On July 29, 2010, the circuit court denied Kulik’s motion to reconsider.

¶ 10

ANALYSIS

¶ 11 Initially, we hold that Kulik has waived his objections to Discover Bank's complaint on appeal because he did not make an objection before the circuit court, file a motion, or in any manner give the circuit court the opportunity to rule on the objections. *Smith v. Airoom, Inc.*, 114 Ill. 2d 209, 229 (1986) ("It is well established that matters not presented to or ruled upon by the trial court may not be raised for the first time on appeal."); *Kostopoulos v. Poladian*, 257 Ill. App. 3d 95, 97 (1993) ("All defects in pleadings are waived by failure to raise them in the circuit court where they can be handled more expeditiously than on review."). We will not consider Kulik's arguments regarding Discover Bank's complaint due to his failure to raise these matters before the circuit court.

¶ 12 We also hold that Kulik has waived his argument that the affidavit of James Ball, attached to Discover Bank's motion for summary judgment, violated Illinois Supreme Court Rule 191. Ill. S. Ct. R. 191 (eff. July 1, 2002). A party cannot attack the sufficiency of an affidavit for the first time on appeal. *Fooden v. Board of Governors of State Colleges and Universities of Illinois*, 48 Ill. 2d 580, 587 (1971). In *Stone v. McCarthy*, 206 Ill. App. 3d 893, 899-01 (1990), this court addressed a similar factual scenario to the one before us now. In *Stone*, this court concluded that a party waived his objection to the sufficiency of an affidavit that was submitted with a reply brief. *Id.* at 900. The party in *Stone* that challenged the sufficiency of the affidavit "did not object in any fashion to the affidavit's sufficiency until his motion to reconsider which was filed \*\*\* well after the entry of judgment." *Id.* This court reasoned "that an affidavit's

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sufficiency must be tested by a motion to strike it, or by a motion to strike the motion setting forth the objections to the affidavit.” *Id.*, (citing *Duffy v. Midlothian Country Club*, 92 Ill. App. 3d 193, 199 (1980)). As in *Stone*, here Kulik did not file a motion to strike the affidavit and did not make any objection to the affidavit until his motion to reconsider, which he filed almost a month after the circuit court entered judgment against him. Accordingly, we hold that Kulik has waived his objection to the affidavit.

¶ 13 The only issues that Kulik has not waived by his failure to object to them in the circuit court all pertain to Discover Bank’s motion for summary judgment. Kulik argues before this court that Discover Bank has not shown, through its motion for summary judgment, that there was an agreement between the parties and that Kulik breached that agreement. As such, Kulik argues the circuit court erred in entering summary judgment against him.

¶ 14 Summary judgment is proper where “the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” 735 ILCS 5/2-1005(c) (West 2008). In ruling on a motion for summary judgment, the circuit court is to determine whether a genuine issue of material fact exists, not try a question of fact. *Williams v. Manchester*, 228 Ill. 2d 404, 417 (2008). A party opposing a motion for summary judgment “must present a factual basis which would arguably entitle him to a judgment.” *Allegro Services, Ltd. v. The Metropolitan Pier & Exposition Authority*, 172 Ill. 2d 243, 256 (1996); see also *National Loss Control Service Corp. v. Dotti*, 126 Ill. App. 3d 804, 807-08 (1984) (“While the nonmoving party is not required to prove his case at this preliminary stage, he is required to present some factual

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basis which would arguably entitle him to a judgment in his favor.”). Further, “an affidavit in support of a motion for summary judgment is actually a substitute for testimony taken in open court \*\*\* and where such well alleged facts are not contradicted by counteraffidavit, they must be taken as true, notwithstanding the existence of contrary averments in the adverse party’s pleadings which merely purport to establish *bona fide* issues of fact.” *Fooden*, 48 Ill. 2d at 587 (citing *Welsh v. Centa*, 75 Ill. App. 2d 305 (1966), *Renieris v. Village of Skokie*, 85 Ill. App. 2d 418 (1967), and *Murphy v. Cory Pump and Supply Co.*, 47 Ill. App. 2d 382 (1964)). When determining whether a genuine issue of material fact exists, the pleadings are to be liberally construed in favor of the nonmoving party. *Williams*, 228 Ill. 2d at 417. “Summary judgment is to be encouraged in the interest of prompt disposition of lawsuits, but as a drastic measure it should be allowed only when a moving party’s right to it is clear and free from doubt.” *Pyne v. Witmer*, 129 Ill. 2d 351, 358 (1989). We review summary judgment rulings *de novo*. *Espinoza v. Elgin, Joliet & Eastern Ry. Co.*, 165 Ill. 2d 107, 113 (1995).

¶ 15 To prove breach of contract, a “plaintiff must show the existence of a valid and enforceable contract, performance of the contract by the plaintiff, breach of contract by the defendant, and resulting injury to the plaintiff.” *Sherman v. Ryan*, 392 Ill. App. 3d 712, 732 (2009).

¶ 16 This court, in *Garber v. Harris Trust & Savings Bank*, 104 Ill. App. 3d 675 (1982), explained the nature of credit card agreements. In *Garber*, the plaintiffs challenged several credit card companies’ ability to modify their credit card agreements. *Id.* at 677. This court held:

“a contract was not formed at the time of the issuance of the credit



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card; that a separate contract is created each time the card is used according to the terms of the cardholder agreement at the time of such use; that the cardholder agreements were subject to modification at will.” *Id.* at 678.

Accordingly, a credit card holder accepts the credit card issuer’s offer to extend credit by using the card and the agreement becomes a contract between the parties. *Id.* at 679, (citing *City Stores Co. v. Henderson*, 116 Ga. App. 114 (1967), see also *Hany v. General Electric Co.*, 221 Ill. App. 3d 390, 396 (1991) (stating that *Garber* holds that a “credit card issuer makes a continuing offer to extend credit to the holder that the holder accepts each time he uses the card. As such, the parties enter into many individual contracts as the issuer allows the holder to use the card and the holder does, in fact, use it.”)).

¶ 17 In this case, Discover Bank successfully pled a cause of action for breach of contract and Kulik failed to produce any facts contradicting the claim and raising a genuine issue as to any material fact. Discover Bank’s motion showed that upon Kulik’s request, it issued him a credit card along with the Cardmember Agreement. Discover Bank attached Kulik’s request to its motion. Kulik accepted the terms of the Cardmember Agreement by using the card and, thus, created a contract between the parties. Discover Bank performed what was required of it under the agreement by issuing the credit card and extending credit to Kulik as evidenced by the monthly statements it attached to its motion. Those monthly statements are also evidence of Kulik’s breach. They show he did not pay the balance according to the Cardmember Agreement. Discover Bank incurred damages by Kulik’s failure to pay. Discover Bank attached the affidavit

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of James Ball to its motion for summary judgment stating that the documents attached to the motion are reliable and made in the usual course of business.

¶ 18 Kulik, opposing Discover Bank's motion for summary judgment, was required to "present a factual basis which would arguably entitle him to a judgment." *Allegro*, 172 Ill. 2d at 256. He failed to do so. He also failed to contradict the facts raised by Discover Bank. In his response, Kulik merely denied Discover Bank's allegations without raising any facts. Because Kulik failed to produce any facts contradicting the facts raised by Discover Bank, we must take those facts as true. *Fooden*, 48 Ill. 2d at 587. Kulik has not raised an issue of material fact such that summary judgment should be denied. The trial court did not err in granting Discover Bank's motion for summary judgment because it successfully pled a cause of action for breach of contract supported by affidavit and Kulik failed to contradict those facts. Therefore, the judgment of the circuit court is affirmed.

¶ 19 CONCLUSION

¶ 20 For the foregoing reasons, the judgment of the circuit court of Cook County is affirmed.

¶ 21 Affirmed.