2014 IL App (1st) 14-0784

FOURTH DIVISION
November 6, 2014

No. 1-14-0784

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

CITIBANK N.A.,	)	Appeal from the Circuit Court of Cook County, Illinois,
Plaintiff-Appellee,	)	County Department, Law Division.
v.	)	
LAURA L. LELIS,	)	No. 2012 L 000612
Defendant-Appellant.	)	The Honorable Thomas R. Mulroy, Judge Presiding.

PRESIDING JUSTICE FITZGERALD SMITH delivered the judgment of the court.

Justices Howse and Taylor concurred in the judgment.

ORDER

¶ 1 *Held*: The circuit court properly granted summary judgment in favor of the bank against the credit card owner issued to her by the bank, where the bank adequately alleged and sufficiently supported a cause of action for breach of contract and an account stated. The circuit court properly admitted the bank's response to the credit card owner's request to admit, finding that response to be timely. The circuit court did not abuse its discretion in refusing to permit the credit card owner to amend her answer to include a statute of limitations defense made only after the court had already granted summary judgment in favor of the bank.

¶ 2 This is an appeal from the circuit court's order granting summary judgment in favor of the

plaintiff-appellee, Citibank, N.A. (hereinafter Citibank) against the defendant-appellant, Laura L. Lelis (hereinafter Lelis) in an action by Citibank to recoup the balance due and owing on Lelis' credit card account with Citibank. Lelis contends that the circuit court erred in granting summary judgment in favor of Citibank because: (1) Citibank failed to timely and properly respond to her request to admit facts pursuant to Illinois Supreme Court Rule 216 (Rule 216) (Ill. S. Ct. R. 216 (eff. May 30, 2008)), and therefore those facts should have been deemed admitted for purposes of summary judgment; (2) regardless of the admission of the statements in her request to admit, Citibank failed to present any competent evidence to support its allegations; and (3) Citibank's cause of action should have been barred by the five year statue of limitations for all breach of contract actions (735 ILCS 5/13-205 (West 2012)). For the reasons that follow, we affirm.

¶ 3 I. BACKGOURND

¶ 4 The record reveals the following facts and procedural history. On January 18, 2012, Citibank filed a one-count complaint against Lelis, alleging that she owed Citibank $51,014.88 in unpaid credit card debt. The complaint contained only four paragraphs and alleged that Lelis opened an account with Citibank agreeing to make monthly payments for purchases charged to the account, but then failed to make those payments, so that the balance due and owing on the account was now $51,014.88.

¶ 5 In support of its complaint, Citibank attached as an exhibit the affidavit of Marianne Davis (hereinafter Davis), a custodian of records for Citicorp Services, Inc. (hereinafter CCSI), a subsidiary of Citibank, responsible for, *inter alia*, managing and recording information for Citibank. Davis averred that Citibank and CCSI maintain records and account information "in the ordinary course of business, which is made at or near the time of each event recorded by

someone with personal knowledge of the events, or from information transmitted by someone with personal knowledge of each event, and a business duty to record such information." Davis averred that as CCSI's custodian of records, she has personal knowledge of and access to Lelis' account information, which included, among other things: Lelis' name and billing address, her credit card account number, and her account history (including interest and/or fees assessed, payments and/or records received, minimum monthly payment dues and the total outstanding balance due on the account). According to Davis, Lelis' account information reflected that charges were made on the account for purchases of goods and services and/or cash advances, but that Lelis failed to make the required payments, as a result of which she was in default of $51,014.88.

¶ 6 Davis further averred that Lelis was provided with periodic statements for the account (hereinafter "account statements") which designated the charges made on the account, in addition to the interest, fees, payments, credits and amounts due. According to Davis, these account statements were sent to the defendant either by regular mail or by electronic email, and they do not reflect any outstanding disputes on the account. Davis' affidavit attached and incorporated by reference a copy of a single account statement for the period between June 19, 2010, and July 20, 2010, which Davis averred was sent to Lelis. This statement reflects that Lelis' previous balance on the account was $49,691.65, that the interest charged was $1,323.23 and that the final balance as of July 2010, was $51,014.88.

¶ 7 On May 30, 2012, Citibank filed a motion for default judgment, alleging that Lelis was served with process on April 23, 2012, but failed to answer or otherwise plead within 30 days, as required by law. On June 20, 2012, the court entered a case management order permitting

Citibank to withdraw its motion for default judgment and granting Lelis leave to appear, answer or otherwise plead to Citibank's complaint by July 11, 2012.

¶ 8 On July 18, 2012, the court entered a default judgment against Lelis, stating that she failed to appear in court and setting a prove-up for August 22, 2012. On August 22, 2012, the court again noted that Lelis was not present, that she had been default on July 18, 2012, and that the matter was continued for prove-up on September 13, 2012, with Citibank to notify Lelis.

¶ 9 On September 6, 2012, Lelis, through counsel, filed her first appearance, and with it, a motion to vacate the default judgment. In her motion, Lelis asserted that she failed to appear before the circuit court only because she was attempting to settle with Citibank. On September 13, 2012, the circuit court granted Lelis' motion and ordered her to answer or otherwise plead to Citibank's complaint by September 23, 2012.

¶ 10 On September 20, 2012, Lelis filed a motion to dismiss pursuant to section 2-615 of the Illinois Code of Civil Procedure (Code) (735 ILCS 5/2-615 (West 2012)), alleging that Citibank's complaint was insufficient as a matter of law. Lelis asserted that an action based upon an alleged credit card debt is at its core an action sounding in contract, which requires allegations, and supporting facts indicating an offer, acceptance and consideration. Lelis argued that Citibank's four paragraph complaint, failed to allege any cause of action upon any conceivable contract claim, since it neither attached a copy of any such written agreement between Lelis and Citibank, nor provided evidence in Davis' affidavit about the terms of any such agreement, or the reasons for its unavailability. Lelis further argued that the complaint contained no allegations or factual support for the existence of an oral contract or a claim for an account stated.

¶ 11 Rather than responding to the motion to dismiss, on November 6, 2012, Citibank filed an

amended complaint with the circuit court. In its amended complaint, Citibank explicitly alleged that Lelis entered into an agreement with Citibank to open a charge account. In support, Citibank attached a copy of a Citibank exemplar card agreement.[1] Citibank further asserted that it issued to Lelis a credit card, allowing her to purchase various goods and services, and duly issued and sent to her statements, which set forth in detail all items charged to the account and the total amount due and owing by her. In support, Citibank attached copies of all of the monthly account statements mailed to Lelis between March 21, 2003, and March 19, 2010. Each of those statements contained Lelis' name and mailing address in Northbrook, as well as her account number and information. In its amended complaint Citibank further averred that Lelis received these statements without protest and did not object to them or indicate that they were erroneous in any respect, thereby acknowledging that the debt she owed to Citibank was true and accurate. In addition, Citibank alleged that Lelis made occasional payments on the account, with the last payment made on August 14, 2009, in the amount of $1,255.27. In support, Citibank referred to the payments posted on Lelis' account statements from March 17, 2003, to August 14, 2009. These payments were in the form of executed checks. All but two of these checks: (1) were issued by American Bancorp Savings Ltd., in Northbrook; (2) were made out to Citibank; and (3) noted Lelis' full Citibank credit card account number in the bottom left-hand section of the checks used for explaining the checks' purpose. The remaining two checks explicitly designated "John and Laura Lelis" from Northbrook, Illinois, as owners of the checking account,

[1] The record reflects this agreement to be a standard 16-page credit card agreement issued by Citibank to all its cardholders. The agreement, however, does not contain either Lelis' name or signature; nor is it dated. The last page of the agreement is only signed by Ken Storke, president and chief executive officer of Citibank.

and contained what appears to be Lelis' signature. Finally, in its amended complaint, Citibank asserted that even though Lelis made some payments on her credit card account with Citibank, she did not make all of the required payments and currently has a balance on the account in the sum of $51,014.88. In support, Citibank attached a copy of an affidavit by Kathy Rizor (hereinafter Rizor), Citibank's document control officer.

¶ 12 In her affidavit, Rizor attested that her duties include being a custodian of records of Citibank accounts, and that as such she has personal knowledge of and access to account information and records concerning Lelis' Citibank account. Rizor attested that all of the records relating to Lelis' account with Citibank were business records made in the "course of regularly conducted business activity" and "part of the regular practice of Citibank" and were made "at the time of the act, transaction, occurrence or event or within a reasonable time thereafter." According to Rizor, Lelis' account information reflected that charges were made to the account to purchase goods and services and/or obtain cash advances, and that Lelis was provided with periodic billing statements reflecting those purchases and/or cash advances either by regular mail or by electronic mail. She further averred that the account itself was subject to the written terms and conditions, as amended from time to time, by the exemplar agreement. According to Rizor, Lelis "agreed to the terms and conditions by using the account." Rizor averred that Citibank's records reflect that Lelis opened and/or used the account, and that therefore she was neither an incompetent, nor a minor. In addition, Rizor attested that Lelis never made any disputes to her account and that she eventually failed to make the required payments on it. As a result, Rizor attested, Lelis was in default on the account in the amount of $51,014.88.

¶ 13 After Citibank filed its amended complaint, Lelis' attorney failed to appear in court for the

next case management conference, scheduled for December 5, 2012, and the matter was continued to February 6, 2013. On February 6, 2013, Lelis' attorney again failed to appear. As a result, the trial court *sua sponte* defaulted Lelis, and continued the case for a prove-up on March 20, 2013.

¶ 14 On March 8, 2013, Lelis filed a motion to vacate the default order. Two weeks later, on March 20, 2013, Lelis also filed a section 2-615 motion to dismiss Citibank's amended complaint (735 ILCS 5/2-615 (West 2012)). In its motion to dismiss, Lelis argued that as a matter of law, Citibank's amended complaint failed to present sufficient facts to establish any requisite agreement between Lelis and Citibank so as to permit Citibank to proceed on its contract claim. As to a written contract claim, Lelis asserted that Citibank failed to attach an executed (*i.e.*, signed copy) of the agreement between Lelis and Citibank as is required by section 2-606 of the Code (735 ILCS 5/606 (West 2012)). As to an oral contract, Lelis asserted that Citibank made no allegations or provided supporting documentation to establish that there was ever an oral offer, acceptance or consideration. With respect to a claim for an account stated, Lelis argued that an account stated is merely a form of proving damages for the breach of a promise to pay on a contract, and since Citibank failed to properly allege any contract between the parties, it, likewise failed to allege a claim for an account stated.

¶ 15 On March 20, 2013, the circuit court vacated its February 6, 2013, default order against Lelis. On June 5, 2013, the court denied Lelis' motion to dismiss and granted her 21 days (until June 27, 2013) to answer Citibank's complaint. The court continued the case to July 10, 2013 for "status of discovery/settlement."

¶ 16 On July 9, 2013, Citibank served Lelis with written discovery. On July 10, 2013, Lelis failed to appear in court for the scheduled status hearing, and instead filed her answer to Citibank's

amended complaint with the clerk's office. As a result, the circuit court entered a default judgment against her on the basis of her failure to appear. The court ordered Citibank to notify Lelis of the default order, and set a prove-up for August 1, 2013.

¶ 17 After the court entered the default order, on July 16, 2013, Citibank filed its own motion for default judgment. Citibank alleged that on June 5, 2013, the court granted Lelis 21 days to file her answer to Citibank's first amended complaint but that Lelis failed to file that answer within those 21 days, instead, filing it on July 10, 2013, two weeks after the due date imposed by the trial court. In addition, Citibank alleged that counsel for Lelis failed to appear in court for the scheduled July 10, 2013, status hearing and that the court had to "default the matter" and once again continue it for prove-up on August 1, 2013.

¶ 18 On July 25, 2013, Lelis filed a motion to withdraw the circuit court's July 10, 2013, default order. Lelis asserted that her attorney had prepared the answer to the amended complaint on June 25, 2013, but inadvertently forgot to file it. In addition, Lelis asserted that on July 9, 2013, she "propounded written discovery to Citibank," including interrogatories, requests to admit, and requests for the production of documents.[2] Lelis further contended that her attorney failed to appear in court in July 10, 2013, because of a conflict in schedule (another trial).

[2] Although we have searched the record, we cannot find a single file-stamped copy of the discovery documents, which Lelis purports she served on Citibank on July 9, 2013. The only copy of these documents in the record is as exhibits to Lelis' motion for summary judgment; however these documents are not file-stamped. Nevertheless, as shall be further articulated in more detail Citibank admitted below that it was served with discovery on this date. Accordingly, we will treat this as fact.

¶ 19 On August 1, 2013, the circuit court vacated its July 10, 2013, default, ordered that "oral discovery be issued within 30 days" and set the matter for status on September 6, 2013.

¶ 20 On August 27, 2013, Citibank filed its objections and responses to Lelis' discovery, including interrogatories, requests for admissions of fact and requests for production of documents. On September 6, 2013, the court noted that "all expert and fact written discovery was closed" and the cause was again continued to October 10, 2013.

¶ 21 On October 15, 2013, Citibank filed a motion for summary judgment contending that it was entitled to judgment as a matter of law because the undisputed facts established that Lelis breached her contract with Citibank. In support of its motion, Citibank attached: (1) all of Lelis' statement accounts between March 21, 2003, and July 20, 2010; (2) copies of executed checks for the period between November 7, 2005, and July 14, 2009, made out to Citibank, and containing Lelis' credit card number for the account at issue in this cause; and (3) Rizor's affidavit.

¶ 22 On October 17, 2013, Lelis filed her motion for summary judgment arguing that judgment in her favor was proper because Citibank had failed to respond to her request to admit within the requisite 28 days, as required under Rule 216 (Ill. S. Ct. R. 216 (eff. May 30, 2008)), thereby automatically admitting all the assertions in that request. In this respect, Lelis contended that on July 9, 2013, she issued her interrogatories and document production request to Citibank. She further stated that on that same date, July 9, 2013, she issued her request for admission of fact under a separate seal to Citibank as required by Rule 216 (Ill. S. Ct. R. 216 (eff. May 30,

2008)). In support, she attached a copy of that request to admit.[3] It included the following assertions:

1. There is no written contract between plaintiff [Citibank] and defendant [Lelis].
2. There is no oral contract by and between plaintiff [Citibank] and defendant [Lelis].
3. There is no account stated by and between plaintiff [Citibank] and defendant [Lelis].
4. There is no document creating any sort of account alleged by plaintiff [Citibank] signed by defendant [Lelis].
5. Plaintiff [Citibank] took no steps to verify that it was in fact defendant [Lelis] that requested the "agreement to open a charge account stated," as described at Paragraph 3 of the amended complaint, be opened by plaintiff [Citibank].
6. Plaintiff [Citibank] took no steps to verify that it was in fact defendant [Lelis] that used the credit card relating to the "agreement to open a charge account stated," as described at Paragraph 3 of the amended complaint.
7. Defendant [Lelis] did not request that the "agreement to open a charge account stated," as described at Paragraph 3 of the amended complaint, be opened by plaintiff [Citibank.]
8. Defendant [Lelis] did not use the credit card relating to the "agreement to open a charge account stated," as described at paragraph 3 of the amended complaint, be opened by plaintiff [Citibank].
9. Defendant [Lelis] did not receive any of the bills or invoices submitted by plaintiff [Citibank] relating to the "agreement to open a charge account stated," as described at Paragraph 3 of the amended complaint, be opened by plaintiff [Citibank].

¶ 23 In her motion for summary judgment, Lelis further asserted that Citibank did not respond to

[3] As already noted above this request to admit was not file-stamped.

her request to admit until August 27, 2013, 49 days after her request was issued. According to Lelis, under Illinois Supreme Court Rule 12(c) (Rule 12(c)) (Ill. S. Ct. R. 12(c) (eff. Jan. 4, 2013)) service of a document or pleading by United States Mail is complete four days after mailing. Accordingly, service of the request to admit on Citibank was complete as of July 13, 2013, and Citibank had 28 days from that date until August 10, 2013, to file its response. Lelis admitted that because August 10, 2013, was a Saturday, Citibank had two extra days to file its response (see 5 ILCS 70/1.11 (2012)). Regardless, Lelis asserted that the response was due no later than August 12, 2013.

¶ 24 Lelis asserted that because Citibank's response to her request to admit was not filed until August 27, 2013, pursuant to Rule 216 (Ill. S. Ct. R. 216 (eff. May 30, 2008)) all the assertions therein should have been considered binding judicial admissions by the trial court. Since those admissions included admissions that Lelis never entered into a contract with Citibank, Lelis asserted summary judgment was proper in her favor.

¶ 25 On November 7, 2013, Citibank filed its response to Lelis' motion for summary judgment. Citibank admitted that Lelis served it with discovery on July 9, 2013, but asserted that such service was improper and in contravention of Rule 216 (Ill. S. Ct. R. 216 (eff. May 30, 2008)), because the request to admit was not served separately, but rather bundled up with the interrogatories and the request for production of documents, so as to be concealed. In addition, Citibank argued that because one day after she served process on Citibank, Lelis was defaulted by the trial court for failure to appear at a status conference, and the cause was continued to August 1, 2013, for prove-up and a hearing on Citibank's subsequently filed motion for default judgment, any discovery was tolled pending the result of that hearing. Citibank asserted that the time to file a response began to run only after the court ruled on Citibank's motion and vacated

Lelis' default on August 1, 2013. Accordingly, since Citibank filed its response to the request to admit on August 27, 2013, that response was timely made within the requisite 28 days.

¶ 26 On January 23, 2004, the circuit court denied Lelis' motion for summary judgment and granted judgment in favor of Citibank in the amount of $51,014.88 plus court costs. In doing so, the court implicitly found that the request to admit was timely. On February 24, 2014, Lelis filed a motion to reconsider, for the first time arguing that Citibank's action was time-barred by the five year statute of limitations for contract claims (735 ILCS 5/13-205 (West 2012)). The circuit court denied Lelis' motion and she now appeals.

¶ 27 II. ANALYSIS

¶ 28 On appeal, Lelis challenges the court's grant of summary judgment in favor of Citibank and against her. She makes three assertions. First, she argues that pursuant to Rule 216 (Ill. S. Ct. R. 216 (eff. May 30, 2008)), the trial court should have taken note of Citibank's failure to timely and properly respond to her request for admissions, and admitted all the requested admissions therein as true. Second, Lelis contends that regardless of those admissions by Citibank, Citibank's complaint was insufficient on its face to state a cause of action for breach of contract (and/or account stated) because Citibank failed to provide any factual support for the allegations asserted therein. Specifically, Lelis contends that: (1) Rizor's affidavit was insufficient pursuant Illinois Supreme Court Rule 191(a) (Rule 191(a) (Ill. S. Ct. R. 191(a) (eff. Jul.1, 2002)) because she lacked personal knowledge of the facts she was attesting to; (2) the computer generated records that Rizor's affidavit relied on were inadmissible hearsay; and (3) the checks provided by Citibank, which purport to have been sent by her for payments on her Citibank credit card were not signed by Lelis. Finally, Lelis asserts that, in any event, Citibank's cause of action is barred

by the five year statute of limitations on breach of contract claims (735 ILCS 5/13-205 (West 2012)). We will address each of Lelis' contentions in turn.

¶ 29 We begin, however, by setting forth the well-established principles regarding summary judgment. Summary judgment is proper "if 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 (West 2010); see also, *Carlson*, 2014 IL App (1st) 122463, ¶ 21; *Fidelity National Title Insurance Company of New York v. West Haven Properties Partnership*, 386 Ill. App. 3d 201, 212 (2007) (citing *Home Insurance Co. v. Cincinnati Insurance Co.*, 213 Ill. 2d 307, 315 (2004)); *Virginia Surety Co. v. Northern Insurance Co. of New York*, 224 Ill. 2d 550, 556 (2007). In determining whether the moving party is entitled to summary judgment, the court must construe the pleadings and evidentiary material in the record in the light most favorable to the nonmoving party and strictly against the moving party. *Happel v. Wal-Mart Stores, Inc.*, 199 Ill. 2d 179, 186 (2002); see also *Pearson v. DaimlerChrysler Corp.*, 349 Ill.App.3d 688, 697 (2004). A genuine issue of material fact exists where the facts are in dispute or where reasonable minds could draw different inferences from the undisputed facts. *Morrissey v. Arlington Park Racecourse, LLC*, 404 Ill. App. 3d 711, 724 (2010); see also *Espinoza v. Elgin, Joliet & Eastern Ry. Co.*, 165 Ill. 2d 107, 114 (1995); see also *Sorce v. Naperville Jeep Eagle, Inc.*, 309 Ill.App.3d 313, 328 (1999) ("Mere speculation, conjecture, or guess is insufficient to withstand summary judgment."). We review a trial court's entry of summary judgment *de novo*. *Ragan v. Columbia Mutual Insurance Co.*, 183 Ill. 2d 342, 349 (1998).

¶ 30 A. Timeliness of Citibank's Response to Lelis' Request to Admit

¶ 31 We next turn to Lelis' assertion that Citibank failed to timely respond to her request to admit

facts pursuant to Rule 216 (Ill. S. Ct. R. 216 (eff. May 30, 2008)). Lelis contends that because Citibank did not respond to her request to admit within the requisite 28 days, and did not file a motion for an extension of time with the circuit court, those facts should have been deemed admitted for purposes of summary judgment. For the reasons that follow, we disagree.

¶ 32 Illinois Supreme Court Rule 216(a) (eff. May 30, 2008) provides that "[a] party may serve on any other party a written request for the admission by the latter of the truth of any specified relevant fact set forth in the request." Rule 216(c) also provides in pertinent part:

> "Each of the matters of fact and the genuineness of each document of which admission is requested is admitted unless, within 28 days after service thereof, the party to whom the request is directed serves upon the party requesting the admission either (1) a sworn statement denying specifically the matters of which admission is requested or setting forth in detail the reasons why the party cannot truthfully admit or deny those matters or (2) written objections on the ground that some or all of the requested admissions are privileged or irrelevant or that the request is otherwise improper in whole or in part." Ill. S. Ct. R. 216(c) (eff. May 30, 2008).

¶ 33 The purpose of Rule 216 is to establish certain material facts as true, so as to narrow the issues for trial. *Armagan v. Pesha*, 2014 IL App (1st) 121840, ¶16; see also *P.R.S. International, Inc. v. Shred Pax Corp.*, 184 Ill. 2d 224, 238 (1998); *In re Application of the County Treasurer & ex officio County Collector*, 2012 IL App (1st) 112897, ¶ 27. "This procedure allows for a more streamlined and efficient case where disputed issues may be clearly and succinctly presented." *In re County Treasurer*, 2012 IL App (1st) 112897, ¶ 27 (citing *Vision Point of Sale, Inc. v. Haas*, 226 Ill. 2d 334, 342 (2007)). Accordingly, "failure to comply with Rule 216 [by responding to the request to admit within the requisite 28 days] will result in a judicial admission

that is considered incontrovertible, withdrawing that fact from contention." *In re County Treasurer*, 2012 IL App (1st) 112897, ¶ 37; see also *Armagan*, 2014 IL App (1st) 121840, ¶16 ("Failing to comply with Rule 216(c) can result in judicial admission of the facts and is considered incontrovertible"); see also *Tires 'N Tracks, Inc. v. Dominic Fiordirosa Const. Co., Inc.*, 331 Ill.App.3d 87, 91 (2002) ("The failure to file a timely response to a request to admit facts--including the 'ultimate' facts of a case--in accordance with the requirements of Rule 216(c) results in the admission of those facts."); see also *People v. Mindham*, 253 Ill. App. 3d 792, 797 (1993) (effect of ignoring request to admit is that matters contained in request automatically stand admitted).

¶ 34 "However, Supreme Court Rule 216 is not to be applied automatically whenever a party fails to timely respond to a request to admit fact." *Sims v. City of Alton*, 172 Ill. App. 3d 694, 698 (1988); see also *Vision Point of Sale, Inc., v. Haas*, 226 Ill. 2d 334, 344-45 (2007). Rather, pursuant to Illinois Supreme Court Rule 183 (Rule 183) (Ill. S. Ct. 183 (eff. Feb. 16, 2011)) a circuit court is vested with "wide discretion with regard to the requests to admit and may allow a late filing in order to prevent injustice." *Sims*, 172 Ill. App. 3d at 698. As our supreme court has made clear, "the fundamental principles which animate our Rule 183 have long been part of our case law: circuit courts must be allowed to exercise their sound discretion over the course and conduct of the pretrial discovery process." *Vision Point*, 226 Ill. 2d at 345 (citing *Bright v. Dicke*, 166 Ill. 2d 204, 208 (1995)).

¶ 35 "Under the plain language of Rule 183, a trial court in its sound discretion may extend the time to allow a party to comply with the requirements of Rule 216 after the time deadline for compliance has expired if the delinquent party establishes good cause for its noncompliance." *Vision Point*, 226 Ill. 2d at 344-45. Our supreme court has explained that in doing so, "the

circuit court has the discretion to consider all objective, relevant evidence presented by the delinquent party." *Vision Point*, 226 Ill. 2d at 353. Although it declined to explicitly define what constitutes good cause, noting that such a determination is fact-depended and rests within the sound discretion of the circuit court, our supreme court nevertheless held that:

> "[t]he circuit court may receive evidence with respect to whether the party's original delinquency was caused by mistake, inadvertence, or attorney neglect, but may not engage in an open-ended inquiry which considers conduct that is unrelated to the causes of the party's original noncompliance." *Vision Point*, 226 Ill. 2d at 353-54.

Absent an abuse of discretion, the decision of the circuit court on this issue will not be disturbed. *Vision Point*, 226 Ill. 2d at 354.

¶ 36 In the present case, although Citibank never formally requested an extension of time pursuant to Rule 183, in denying Lelis' motion for summary judgment, the trial court implicitly ruled that Citibank's response to her request to admit was timely. After a review of the record, we find no abuse of discretion in that ruling. It is undisputed that Lelis served her discovery to Citibank on July 9, 2013. Only one day later, on July 10, 2013, the circuit court entered a default judgment against Lelis for her failure to appear in court at a scheduled hearing. The court ordered Citibank to notify Lelis, and set a prove-up date for August 1, 2013. After that, Citibank filed its own motion for default judgment against Lelis, on the basis of her failure to timely respond to Citibank's amended complaint. Pending the resolution of the August 1, 2013, hearing, Citibank had no reason to respond to Lelis' request to admit, particularly since it was seeking an entry of a final default judgment. While Lelis remained in default, and until the court vacated that default order on August 1, 2013, Citibank's discovery was tolled. After the circuit court vacated its order of default, Citibank promptly responded to Lelis' request to admit on August 27, 2013, well

within the mandated 28-day deadline imposed by Rule 216 (Ill. S. Ct. R. 216(c) (eff. May 30, 2008)). Accordingly, the trial court did not abuse its discretion in considering Citibank's response timely, and using that response in deciding the merits of the parties' motions for summary judgment. See *e.g.*, *Vision Point*, 226 Ill. 2d at 351 (noting that in resolving discovery disputes "there is an overall policy goal of resolving cases on the merits rather than on technicalities."); see also *Shimanovsky v. General Motors Corp.*, 181 Ill. 2d 112, 123 (1998) (in resolving discovery disputes, the goal is to "insure [] both discovery and a trial on the merits"); see also *Armagan v. Pesha*, 2014 IL App (1st) 121840 ¶27 ("[B]road discretion is vested in the trial court in the administration of its trial docket and its supervision over the conduct of discovery. The goals are to do justice and to not allow discovery to become a 'trap for the unwary' and to resolve disputes on the merits either through trial or settlement.").

¶ 37 Lelis nevertheless asserts that even if the court considered Citibank's response timely, it should have stricken the response because Citibank failed to either negate or affirm the requests to admit, as she was required to do pursuant to Rule 216(c) (Ill. S. Ct. R. 216(c) (eff. May 30, 2008)). We disagree.

¶ 38 As already noted above, the purpose of a request to admit pursuant Rule 216 is "to enable the parties and the court to limit the issues and to reduce the unnecessary production of proof at trial." *McGrath v. Botsford*, 405 Ill. App. 3d 781, 790 (2010). Accordingly, "a party has a good-faith obligation to a make reasonable effort to secure answers to a request to admit, not only from the facts within its own knowledge but also from persons and documents within its reasonable control." *McGrath*, 405 Ill. App. 3d at 790; *Szczeblewski v. Gossett*, 342 Ill. App. 3d 344, 349 (2003) ("In deciding a party's duty under Rule 216, we are guided by how Supreme Court Rule 213 *** has been construed. Rule 213 has been interpreted 'to require a party to answer fully and

in good faith to the extent of his actual knowledge and the information available to him or to his attorney.' [Citations.] Comparably, Rule 36 of the Federal Rules of Civil Procedure *** explicitly requires as follows: 'An answering party may not give lack of information or knowledge as a reason for failure to admit or deny unless the party states that the party has made reasonable inquiry and that the information known or readily obtainable by the party is insufficient to enable the party to admit or deny.' "). However, the party may, in lieu of answering all or part of the request, serve "written objections on the ground that some or all of the requested admissions are privileged or irrelevant or that the request is otherwise improper." Ill. S. Ct. R. 216(c) (eff. May 30, 2008); see also *Brookbank v. Olson*, 389 Ill. App. 3d 683, 688 (2009).

¶ 39 In the present case, after a review of the record, we find nothing improper in Citibank's responses to the request to admit. When asked to admit that there was no written contract, or an account stated between Citibank and Lelis, Citibank refused to admit or deny the assertions, explaining that it was pursuing a cause of action on a default credit card agreement for which no written contract is required and where the use of the card constituted acceptance of the terms. In addition, Citibank asserted that it would produce the exemplar card agreement and the available account statements for Lelis' credit card account upon which this claim was based. Similarly, Citibank objected to Lelis' request to admit that it took no steps to verify that: (1) it was in fact Lelis that opened a credit card with Citibank, and: (2) that she then herself used that credit card. In objecting to these assertions, Citibank referred Lelis to her account statements, which included Lelis' mailing address, as well as executed checks used to pay some part of the debt owed on Lelis' credit card. Since at least two of those checks contained Lelis' name and the same mailing address as her credit card account with Citibank, we find nothing improper in Citibank's

responses. Finally, we find no fault with Citibank's refusal to admit or deny that Lelis neither opened the account and used the credit card, or received any of the bills or invoices from Citibank. Even with every reasonably inquiry, Citibank could not possibly have personal knowledge as to what Lelis did or did not do. Citibank's referral of Lelis to its account statements with respect to this request to admit was therefore also proper.

¶ 40 B. Sufficiency of Citibank's Complaint

¶ 41 Lelis next contends that regardless of the timeliness and propriety of Citibank's response to her request to admit, Citibank's amended complaint was insufficient on its face to establish a cause of action for breach of contract and an account stated. In that respect, she makes three assertions: (1) that Rizor's affidavit was insufficient pursuant Illinois Supreme Court Rule 191(a) (Rule 191(a)) (Ill. S. Ct. R. 191(a) (eff. Jul.1, 2002)) because she lacked personal knowledge of the facts she was attesting to; (2) that the computer generated records that Citibank relied upon were inadmissible hearsay; and (3) that the checks provided by Citibank, which purport to have been sent by Lelis for payments on the Citibank credit card contradict Citibank's assertions because they were not, in fact, signed by Lelis. For the reasons that follow, we disagree.

¶ 42 We begin by noting that to state a cause of action for a breach of contract, a plaintiff must allege: (1) the existence of a valid, enforceable contract; (2) performance of the contract by the plaintiff; (3) breach by the defendant; and (4) damages resulting from the breach. *Gore v. Indiana Insurance Co.*, 376 Ill. App. 3d 282, 286 (2007). To establish the existence of a valid contract, the plaintiff must show: (1) an offer; (2) an acceptance; and (3) consideration. See *Van Der Molen v. Washington Mutual Finance, Inc.*, 359 Ill. App. 3d 813, 823 (2005). In the context of a breach of a credit card agreement, as is alleged here, our courts have repeatedly held that the issuance of a credit card and cardholder agreement is a standing offer to extend credit, and that

use of the credit card is acceptance, so that each time the credit card is used, a separate contract is formed between the cardholder and the bank. See *Portfolio Acquisitions, L.L.C. v. Feltman*, 391 Ill. App. 3d 642, 649 (2009); see also *Garber v. Harris Trust & Savings Bank*, 104 Ill. App. 3d 675, 679 (1982).

¶ 43 With respect to a cause of action for an account stated we note that an account stated is an agreement between parties who previously engaged in transactions that the account representing those transactions is true and the balance stated is correct, together with a promise, express or implied, for the payment of such balance. *W.E. Erickson Const., Inc., v. Congress-Kenilworth Corp.*, 132 Ill. App. 3d 260, 267 (1985). " '[A]n account stated cannot be created merely by furnishing an account unless the creditor or debtor specifically intends to establish a balance due or to agree upon a final settlement to date between the parties.' " *Patrick Engineering, Inc. v. City of Naperville*, 2012 IL 113148, ¶ 56 (quoting *Toth v. Mansell*, 207 Ill. App. 3d 665, 672 (1990)). In other words, an account stated is " 'merely a final determination of the amount of an existing debt,' " and an action for an account stated is founded upon a promise to pay that debt, not the original promise to pay under the contract. *Patrick Engineering*, 2012 IL 113148, ¶ 56 (quoting *Motive Parts Co. of America, Inc. v. Robinson*, 53 Ill. App. 3d 935, 941 (1977); see also *Dreyer Medical Clinic, S.C. v. Corral*, 227 Ill. App. 3d 221, 226 (1992) ("an account stated is merely a form of proving damages for the breach of a promise to pay on a contract."). Accordingly, a claim for an account stated requires a plaintiff to allege that: (1) the parties had an agreement under which one party was regularly billed for services provided by the other party; (2) the party providing the services billed the other (or provided the other statements of the amounts due on the account); and (3) the party owing the money did not dispute the correctness of the bills but also did not pay. *Dreyer Medical Clinic*, 227 Ill. App. 3d at 226.

¶ 44 Having set forth the relevant case-law, we first address Lelis' argument regarding the sufficiency of Rizor's affidavit in supporting Citibank's claim for a breach of contract and an account stated. Rule 191(a) (Ill. S. Ct. R. 191(a) (eff. Jul.1, 2002)) states in pertinent part:

> "Affidavits in support of and in opposition to a motion for summary judgment * * * shall be made on the personal knowledge of the affiants; shall set forth with particularity the facts upon which the claim, counterclaim, or defense is based; shall have attached thereto sworn or certified copies of all documents upon which the affiant relies; shall not consist of conclusions but of facts admissible in evidence[.]" Ill. S. Ct. R. 191(a) (eff. Jul.1, 2002).

In interpreting this rule, our courts have repeatedly held that where from the affidavit as a whole, it appears that "the affidavit is based upon the personal knowledge of the affiant and there is a reasonable inference that the affiant could competently testify to its contents at trial, Rule 191 is satisfied.' " *Doria v. Village of Downers Grove*, 397 Ill.App.3d 752, 756 (2009) (quoting *Kugler v. Southmark Realty Partners III*, 309 Ill. App. 3d 790, 795 (1999)). Further, courts must accept an affidavit as true if it is uncontradicted by counteraffidavit or other evidentiary materials. *Kugler*, 309 Ill. App. 3d at 795.

¶ 45 In the present case, contrary to Lelis' assertion, the record reveals that in her affidavit Rizor explicitly asserted that she was the custodian of records for Citibank accounts, and that as such she had "personal knowledge of and access to" account information and records concerning Lelis' Citibank account. What is more, although Lelis denied all the allegations in Citibank's amended complaint, she provided no counteraffidavit to refute any of the information contained in Rizor's affidavit. Accordingly, Rizor's affidavit was both sufficient and founded upon her requisite personal knowledge.

¶ 46 Lelis nevertheless asserts that Rizor's affidavit is insufficient because it was entirely based

upon Citibank's computer generated records. She asserts that: (1) such records are inadmissible hearsay; and (2) that regardless of their admissibility, Rizor's affidavit failed to provide a proper foundation for their introduction into the record. We strongly disagree. In Illinois, it is well-accepted that business records are admissible as an exception to the hearsay rule. See Ill. S. Ct. R. 236 (eff. Aug. 1, 1992). Illinois Supreme Court Rule 236 (Rule 236 (Ill. S. Ct. R. 236 (eff. Aug. 1, 1992)) provides in pertinent part:

> "Any writing or record * * * made as a memorandum or record of any act, transaction, occurrence, or event, shall be admissible as evidence of the act, transaction, occurrence, or event, if made in the regular course of any business, and if it was the regular course of the business to make such a memorandum or record at the time of such an act, transaction, occurrence, or event or within a reasonable time thereafter. All other circumstances of the making of the writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but shall not affect its admissibility.* * * " 145 Ill.2d R. 236(a).[4]

[4] In addition, under a more recent amendment to Illinois Rules of Evidence 803(6) (Ill. R. Evid. 803(6) (eff. Apr. 26, 2012)), the following have been explicitly defined as hearsay exceptions:

> "(6) Records of Regularly Conducted Activity. A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, 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 the memorandum, report, record or data compilation, all as shown by the testimony of the custodian or other qualified witness * * * unless the source of the information or the method or circumstances of preparation indicate lack of trustworthiness,

¶ 47 In order to fulfill the foundational requirements of a business record, it is not necessary that the author or creator of the record testify or be cross-examined about the contents of the record. *JPMorgan Chase Bank, N.A. v. East-West Logistics, L.L.C.*, 2014 IL App (1st) 121111, ¶ 93; see also *Piser v. State Farm Mutual Automobile Insurance Co.*, 405 Ill. App. 3d 341, 348-49 (2010); see also *Troyan v. Reyes*, 367 Ill. App. 3d 729, 733 (2006). Rather, the custodian or any other person familiar with the business and its mode of operation may provide testimony for establishing the foundational requirements of a business record. *JPMorgan Chase*, 2014 IL App (1st) 121111, ¶ 95. The reason for this is that "the circumstantial probability of their trustworthiness is a practical substitute for cross-examination of the individual making the entries." *People v. Wells*, 80 Ill. App. 2d 187, 194, 224 N.E.2d 288, 292 (1967).

¶ 48 What is more, specifically with respect to computer-generated business records, our courts have previously held that in order to set the proper foundation for such records, the party attempting to introduce the records must show that: (1) the electronic computing equipment is recognized as standard; (2) the input is entered in the regular course of business reasonably close in time to the happening of the event recorded; and (3) the foundation testimony establishes that the sources of the information, method and time of preparation indicate its trustworthiness and justify its admission. *JPMorgan Chase*, 2014 IL App (1st) 121111, ¶ 100; see also *People v. Lombardi*, 305 Ill.App.3d 33, 42, (1999); *People v. Bynum*, 257 Ill. App. 3d 502, 512 (1994)). The ultimate issue is whether the foundation sufficiently guarantees trustworthiness to justify introduction into evidence. *JPMorgan Chase*, 2014 IL App (1st) 121111, ¶ 100 *Lombardi*, 305 Ill. App. 3d at 43.

---

but not including in criminal cases medical records." Ill. R. Evid. 803(6) (eff. Apr. 26, 2012).

¶ 49 In the present case, the record reveals that Rizor's affidavit sufficiently laid the proper foundation for the admissibility of the computer generated records. As already noted above, in her affidavit, Rizor testified that she is the custodian of records for Citibank accounts, and that as such she has "personal knowledge of and access to" all of Lelis' account information. Rizor explicitly attested that all of the computer-generated records contained in Lelis' account information were business records made in "the course of regularly conducted business activity" and "part of the regular practice of Citibank." Furthermore, she averred that these records were made "at the time of the act, transaction, occurrence or event or within a reasonable time thereafter." The account statements themselves, attached as part of Citibank's amended complaint, directly support Rizor's assertion, since they contain the date of issuance, as well as the dates for all the transactions (purchases and/or payments) made on Lelis' credit card account. Accordingly, under this record, we conclude that the computer-generated account statements were admissible, and that the trial court properly considered them in granting summary judgment in favor of Citibank. See *e.g.*, *JPMorgan Chase*, 2014 IL App (1st) 121111, ¶ 100 (holding that a computer-generated payoff calculation document was admissible pursuant to the business records exception to the hearsay rule in an action by a lender against a guarantor, where the lender maintained its loan records by logging in entries at or near the time of a recordable event by a person with knowledge or from information transmitted from a person with knowledge of the event); see also *Lombardi*, 305 Ill. App. 3d at 43 (holding that testimony that computers were generally used in the industry, that the information was immediately entered by tellers or automatic teller machines and stored in the mainframe computer and that the records were kept in the ordinary course of business and subject to auditing, was sufficient to establish trustworthiness of the information).

¶ 50 Finally, we reject Lelis' assertion that the checks provided by Citibank were insufficient to support its assertion that Lelis knew and made payments on her Citibank account, thereby acknowledging her debt. Although Lelis is correct that from the checks, it is impossible to ascertain whether it was Lelis or someone else who executed the checks to Citibank, those checks explicitly contain Lelis' full credit card number hand-written in the notation section of the checks, describing the purpose of the payments. That credit-card number is contained on every single monthly account statement mailed or emailed by Citibank to Lelis. In addition, two of the checks contained in the record, contain the same exact address for Lelis, as the address on all of Citibank's account statements to Lelis. What is more, the account statements themselves reflect that the payments made to Lelis' Citibank credit card directly mirror the payment amounts on the checks she now disputes executing. Lelis nowhere provided an affidavit negating the fact that Citibank sent the monthly account statements to her address, that she made payments on her credit card account, or that she executed checks to Citibank to that effect. In fact, she provided no evidentiary support whatsoever for these assertions. Under this record, we find that the checks are sufficient to establish that Lelis was aware of the debt she owed to Citibank and that by making occasional payments on her credit card account, she admitted to the debt she owed. See *Kugler*, 309 Ill. App. 3d at 795 (holding that a court must consider an affidavit as true if it is uncontradicted by counteraffidavit or other evidentiary materials).

¶ 51 C. Statute of Limitations

¶ 52 Lelis finally asserts that regardless of the sufficiency of Citibank's allegations and evidence, the trial court should have determined that the majority of Citibank's damages were time-barred pursuant to section 13-205 of the Code (735 ILCS 5/13-205 (West 2012)), which provides a five year statute of limitations for all breach of oral contract claims. Lelis acknowledges that she did

not raise the statue of limitations issue in her answer to Citibank's amended complaint, and that the first time she brought this issue to the trial court's attention was in her motion for reconsideration of the summary judgment grant in favor of Citibank. *Smith v. Menold Construction, Inc*., 348 Ill.App.3d 1051, 105 (2004) ("a statute of limitations is an affirmative defense which a defendant forfeits if not raised"). She nevertheless asserts that because during the course of the proceedings below, Citibank repeatedly offered different statements as to the cause of action it was pursuing, it never became clear to Lelis exactly what defenses might apply. Accordingly, she asserts that the trial court should have considered the statute of limitations issue even though it was brought on her motion to reconsider, and that she should have been permitted to amend her answer to add that defense. We disagree.

¶ 53 Contrary to Lelis' assertion, the record reveals that in its amended complaint Citibank clearly defined the causes of action it was pursuing against Lelis, namely a breach of contract claim and an account stated claim. Although in later pleadings, Citibank may have referred to Lelis' "defaulted credit card agreement," it never abandoned the contract and account stated claims. Rather, it continued to discuss the elements and the merits of those claims in all of its later proceedings. Accordingly, the trial court was well within its discretion when, in denying Lelis' motion to reconsider the grant of summary judgment in favor of Citibank, it rejected Lelis' request to amend its answer to include the statute of limitations defense, so late in the proceedings. See, e.g., *Freedberg v. Ohio Nat. Ins. Co.*, 2012 IL App (1st) 110938, ¶ 44 ("a motion to amend that is nothing more than an attempt to evade an unfavorable summary judgment outcome should not be granted"); see also *Kleinhans v. Lisle Savings Profit Sharing Trust*, 810 F.2d 618, 625-26 (7th Cir.1987) (district court did not abuse its discretion in denying leave to amend where proposed amendment came after the close of discovery and defendants

moved for summary judgment, because plaintiff's motion "represents an apparent attempt to avoid the effect of summary judgment" (internal quotation marks omitted)); *cf. United Air Lines, Inc. v. Conductron Corp.*, 69 Ill.App.3d 847, 858 (1979) (trial court did not abuse its discretion in denying defendants leave to amend their answer to plead statute of limitations where motion was made after plaintiff's motion for summary judgment was presented and heard, and trial court stated that summary judgment would be entered for plaintiff and defendants gave no reason for the failure to plead the affirmative defense at an earlier time).

¶ 54 Nevertheless, even if we were to consider the merits of Lelis' contention, we would find that the five-year statute of limitations would be of little avail to her. As already noted above, we agree with Lelis that our courts have held that the issuance of a credit card and cardholder agreement is a standing offer to extend credit, so that each time the credit card is used, a separate contract is formed between the cardholder and the bank. See *Portfolio Acquisitions*, 391 Ill. App. 3d at 649; see also *Garber*, 104 Ill. App. 3d at 679. However, we disagree that this necessarily means that each separate use of a credit card is time-barred five years from the date of its use. Contrary to Lelis' assertion, "the five year statutory period commences with either the charge off date or the last date of payment." *Parkis v. Arrow Financial Services, LLS*, No. 07 C 410, 2008 WL 9478, *6 (N.D. Ill. Jan. 8, 2008). The record here reveals that Lelis made her last payment on the credit card on August 14, 2009. Since any cause of action for breach of contract began to accrue only after that date, Citibank's complaint, filed January 18, 2012, was well-within the statutory five-year limit. 735 ILCS 5/13-205 (West 2012).

¶ 55 III. CONCLUSION

¶ 56 Accordingly, for all of the aforementioned reasons, we affirm the judgment of the circuit court.

¶ 57 Affirmed.