

No. 1-10-3413

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

AMERICAN EXPRESS CENTURION BANK,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 09 M2 1959
)	
MERDELIN JOHNSON,)	Honorable
)	Roger G. Fein,
Defendant-Appellant.)	Judge Presiding.

JUSTICE CUNNINGHAM delivered the judgment of the court.
Presiding Justice Quinn and Justice Harris concurred in the judgment.

ORDER

¶ 1 *Held:* The plaintiff's motion for summary judgment was properly granted on its complaint to collect on a defaulted credit card debt despite the defendant's claim of a genuine issue of material fact as to whether a contract existed between the parties, where each use of the credit card by the defendant constituted a separate contract between the parties; and the plaintiff's suit was not precluded by the statute of limitations.

¶ 2 The defendant, Merdelin Johnson (Merdelin) appeals *pro se* from an order of the circuit court of Cook County awarding summary judgment in favor of the plaintiff, American Express Centurion Bank (AmEx) in the amount of \$17,838.30, plus attorney fees and costs, for the unpaid account balance on a credit card AmEx issued to Merdelin. On appeal, Merdelin contends summary judgment was erroneously entered where genuine issues of material fact existed as to whether a valid and enforceable contract existed between the parties, and whether the suit was barred by the statute of limitations. For the following reasons, we affirm the judgment of the circuit court of Cook County.

¶ 3 The parties dispute the nature of the appeal. Merdelin describes her appeal as being from an order of summary judgment in favor of AmEx, whereas AmEx contends Merdelin is appealing the denial of her motion to dismiss AmEx's complaint. The record on appeal establishes that on October 6, 2010, the circuit court granted a motion by AmEx for summary judgment and awarded judgment in favor of AmEx and against Merdelin in the amount of \$17,838.30 plus attorney fees and costs. Merdelin timely filed an appeal from that order.

¶ 4 On July 1, 2009, AmEx filed a complaint charging that: in 1987 AmEx established an account in the name of Merdelin and issued an American Express credit card to her; AmEx also sent to Merdelin a written Card Member Agreement stating Merdelin's obligation to pay AmEx for all charges made on her account through the use of the credit card; that Merdelin did use the card; that Merdelin defaulted by failing to make payments pursuant to the Agreement; and that the balance due on the account was in the amount of \$17,838.30. A copy of a Card Member Agreement was attached to the complaint. The Agreement stated in pertinent part:

"Welcome to American Express Cardmembership. Please read this Agreement thoroughly, because when you keep, sign or use the American Express Credit Card issued to you, including any renewal or replacement Cards issued to you (hereafter referred to as the "Card"), you agree to the terms of this Agreement.

* * *

*** You are responsible for paying all amounts charged to the Account by either yourself or any Additional Cardmembers."

¶ 5 On August 6, 2009, Merdelin filed an answer to the complaint, admitting that AmEx had established an account in her name and issued the American Express credit card bearing the card number specified in the complaint. However, she denied there was a written Card Member Agreement.

¶ 6 Subsequently, Merdelin filed a motion to dismiss the complaint, arguing that AmEx had not sufficiently pleaded breach of contract in that it had failed to attach to its complaint "a signed copy of the original contract." AmEx responded, *inter alia*, that a credit card agreement is formed by the use of the card and not by any signed document. The court denied Merdelin's motion to dismiss the complaint.

¶ 7 Following the cutoff date for discovery, a date for arbitration was set, but AmEx moved the court to postpone arbitration to allow AmEx to file a motion for summary judgment. Thereafter, AmEx filed a motion requesting summary judgment in its favor. The motion also requested that the court bar certain testimony of the defendant at arbitration and at trial on the basis that during the discovery process, which by then was closed, Merdelin had provided AmEx with no information or documents that she would produce at trial. The documents attached to AmEx's motion for summary judgment included Merdelin's responses to requests for admissions of facts in which Merdelin admitted that: AmEx had issued the credit card to her and she was responsible for that card; she used the credit card to purchase some goods and for balance transfers; and she received monthly statements from AmEx showing the transactions on the credit card.

¶ 8 Merdelin filed a response in opposition to summary judgment, claiming that AmEx had not proved the existence of a contract and failed to attach a written contract to its complaint. Merdelin also claimed that AmEx's suit was barred by the five-year statute of limitations on suits for enforcement of unwritten contracts.

¶ 9 The circuit court granted AmEx's motion for summary judgment after finding that there was no genuine issue as to the following material facts: AmEx issued a credit card to Merdelin, along with a Card Member Agreement; Merdelin used the credit card; Merdelin received monthly statements from AmEx; and Merdelin never lodged a dispute with AmEx as to the amount due set forth in the monthly statements. The court's order also ruled that AmEx would be entitled to an order barring Merdelin from presenting any testimony or evidence at arbitration and trial that had not been

disclosed during the discovery process. The circuit court entered judgment in favor of AmEx and against Merdelin in the amount of \$17,838.30 plus \$350 for reasonable attorney fees and costs.

¶ 10 On appeal, Merdelin's primary contention is that where AmEx's suit was for breach of contract, entry of summary judgment for AmEx was error because a genuine issue of material fact existed as to whether a valid enforceable contract existed between the parties.

¶ 11 We review *de novo* a grant of summary judgment. *Pritza v. Village of Lansing*, 405 Ill. App. 3d 634, 641, 940 N.E.2d 1164, 1171 (2008). Summary judgment is properly granted where the pleadings, deposition transcripts, and admissions on file, together with any affidavits and exhibits, when viewed in the light most favorable to the nonmoving party, indicate there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. 735 ILCS 5/2-1005(c) (West 2008); *Dowe v. Birmingham Steel Corp.*, 2011 IL App (1st) 091997, ¶ 26. "In ruling on the motion, the circuit court is required to construe all evidentiary material strictly against the movant and liberally in favor of the nonmovant." *Id.* at ¶ 27. Summary judgment is a drastic means of disposing of litigation, but it is nonetheless an appropriate measure to expeditiously dispose of a lawsuit when the moving party's right to a judgment in its favor is clear and free from doubt. *Madigan v. Yballe*, 397 Ill. App. 3d 481, 493, 920 N.E.2d 1112, 1122 (2009).

¶ 12 In *Garber v. Harris Trust & Savings Bank*, 104 Ill. App. 3d 675, 680, 432 N.E.2d 1309, 1312 (1982), we adopted the prevailing view that the issuance of a credit card does not create a contract but is only an offer to extend credit. Consequently, we held that "a contract was not formed at the time of the issuance of the credit 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; ***." *Id.* at 678, 432 N.E.2d at 1311. Accord, *Hany v. General Electric Co.*, 221 Ill. App. 3d 390, 396, 581 N.E.2d 1213, 1217 (1991).

¶ 13 Merdelin claims on appeal that both the circuit court's order granting summary judgment in favor of AmEx and its earlier order denying Merdelin's motion to dismiss AmEx's complaint were

error because AmEx did not establish the existence of a written 1987 contract. The motion to dismiss the complaint alleged that AmEx had failed to provide a signed copy of the original contract. AmEx contends on appeal that Merdelin forfeited her right to attack the sufficiency of the complaint after she filed her answer to the complaint. As Merdelin's notice of appeal stated only that she was appealing from the order granting summary judgment and did not specify she was also appealing from the earlier order denying her motion to dismiss the complaint, we are not required to consider the correctness of the earlier order. *People v. Smith*, 228 Ill. 2d 95, 105, 885 N.E.2d 1053, 1059 (2008). However, both Merdelin's motion to dismiss and her response to AmEx's motion for summary judgment relate to the same argument; that AmEx failed to establish a written enforceable contract between the parties. Therefore, we will address Merdelin's argument concerning her motion to dismiss the complaint.

¶ 14 The motion to dismiss cited no authority, but on appeal Merdelin invokes § 2-606 of the Illinois Code of Civil Procedure (Code) (735 ILCS 5/2-606 (West 2008)) in arguing that AmEx's complaint should have been dismissed. That provision requires that if a claim is founded upon a written instrument, a copy thereof must be attached to the plaintiff's pleading as an exhibit or recited therein. 735 ILCS 5/2-606 (West 2008). If a plaintiff fails to comply with this requirement, the complaint may be dismissed. *Sherman v. Ryan*, 392 Ill. App. 3d 712, 733, 911 N.E.2d 378, 398 (2009). Merdelin asserts that § 2-606 required dismissal of the complaint because the cardholder Agreement was not a written enforceable contract and that AmEx "never established the original 1987 contract terms."

¶ 15 The flaw in Merdelin's analysis is that AmEx was not proceeding on a specific written document from 1987. Although the written Card Member Agreement outlined the terms of Merdelin's obligations with respect to the use of the credit card, AmEx's complaint stated that the written contract between the parties was entered into "[b]y the terms of the Card Member Agreement, and upon [Merdelin's] use of the card." A separate contract was formed between

Merdelin and AmEx each time Merdelin used the American Express credit card. *Garber*, 104 Ill. App. 3d at 678, 432 N.E.2d at 1311. Consequently, Merdelin's claim, that AmEx's failure to produce a 1987 written contract was fatal to its suit, is without foundation, and the *Garber* holding defeats her argument as to both her motion to dismiss and her opposition to summary judgment.

¶ 16 Merdelin also contends that a genuine issue of facts existed as to charges incurred on the credit card prior to March 2003, as those charges were precluded by a five-year statute of limitations. We deem the contract at issue to be a written contract for purposes of the statute of limitations, and we hold that AmEx's cause of action was governed by the 10-year limitation applicable to written contracts pursuant to § 13-206 of the Code (735 ILCS 5/13-206 (West 2008)). *Harris Trust & Savings Bank v. McCray*, 21 Ill. App. 3d 605, 610, 316 N.E.2d 209, 212 (1974). Under § 13-206, actions on "written contracts, or other evidences of indebtedness in writing *** shall be commenced within 10 years next after the cause of action accrued." A cause of action accrues when a plaintiff knows or reasonably should know of the injury and that the injury was wrongfully caused. *Continental Casualty Co., Inc. v. American National Bank and Trust Co. of Chicago*, 329 Ill. App. 3d 686, 700-01, 768 N.E.2d 352, 364 (2002). The record on appeal contains recent monthly statements on Merdelin's account, showing that she made monthly payments on her American Express credit card account. Merdelin made payments at least in the amount of the minimum payment due up to the statement dated June 9, 2008, when she still had an available credit line of \$613.73. Thereafter, Merdelin made only one more small payment. The statement dated September 8, 2008, showed no payment activity and no available line of credit. Merdelin made no further payments, and her accumulated finance charges and late payment fees brought her balance to \$17,838.30 as of the statement dated May 10, 2009. AmEx filed its complaint less than two months later, on July 1, 2009. Consequently, AmEx's cause of action did not accrue until mid-2008 and its complaint was filed well within the limitation period.

¶ 17 Merdelin relies on our decision in *Portfolio Acquisitions, L.L.C. v. Feltman*, 391 Ill. App. 3d

642, 909 N.E.2d 876 (2009), involving a defaulted credit card debt, in support of her contention that AmEx failed to establish the existence of an enforceable contract. *Feltman* is inapposite, as it related to the plaintiff's failure to provide evidence of a written agreement only for purposes of establishing the applicability of the 10-year statute of limitations. *Id.* at 652, 909 N.E.2d at 884. We observed in *Feltman* that there was "no dispute that the use of a credit card constitutes a contractual obligation or that the contract alleged by plaintiff exists." *Id.* at 647, 909 N.E.2d at 880.

¶ 18 Merdelin also contends that the instant case should have been decided by mandatory arbitration pursuant to the Card Member Agreement. However, the record contains no evidence that Merdelin invoked the arbitration provisions of the Agreement. The circuit court assigned the suit to the mandatory arbitration calendar. The mandatory arbitration hearing date was postponed upon the filing of, and later mooted by the circuit court's decision on, AmEx's motion for summary judgment. Consequently, any issue relating to arbitration is not properly before us.

¶ 19 Merdelin also contends that the circuit court abused its discretion by failing to grant her "motions to enforce proper discovery" and that, but for this error, the court's ruling on AmEx's motion for summary judgment would have been different. Specifically, Merdelin asserts that AmEx failed to tender statements of charges against her account. The record discloses that on August 20, 2010, more than two months after discovery was closed and five weeks after AmEx filed its motion for summary judgment, Merdelin filed a motion to compel discovery and for sanctions. On September 14, 2010, Merdelin filed an emergency motion to compel discovery. On September 16, 2010, the circuit court entered an order denying Merdelin's motion to compel and for sanctions, based on the statement by AmEx that all documents then currently available to AmEx's counsel had been provided to Merdelin. The record does contain a small number of recent statements of account that AmEx tendered during the discovery process. The record also shows that Merdelin admitted in written responses to requests for admissions of facts that she used the credit card issued by AmEx to purchase goods and for balance transfers, and she received monthly statements from AmEx

showing the transactions on the credit card. In its order granting summary judgment in favor of AmEx, the circuit court found, and Merdelin does not deny, that she never lodged a dispute with AmEx as to the amount due set forth in the monthly statements.

¶ 20 The circuit court is vested with considerable discretion in ruling on discovery matters, and a reviewing court will not disturb such a ruling absent an abuse of discretion. *City of Chicago v. St. John's United Church of Christ*, 404 Ill. App. 3d 505, 516, 935 N.E.2d 1158, 1170 (2010). We conclude that Merdelin has failed to demonstrate either that the circuit court abused its discretion in ruling on discovery matters or in what manner she was prejudiced. Likewise, she has failed to show how the court's ruling on AmEx's motion for summary judgment would have been different if additional documentation from AmEx had been forthcoming during the discovery process.

¶ 21 Merdelin's final claim, that the circuit court improperly ordered that she would be precluded from testifying at trial or arbitration, is moot in light of our affirmance of the court's order granting summary judgment in favor of AmEx. *Steinbrecher v. Steinbrecher*, 197 Ill. 2d 514, 522-23, 759 N.E.2d 509, 514 (2001) ("An appeal is moot when it involves no actual controversy or the reviewing court cannot grant the complaining party effectual relief.").

¶ 22 In summary, the pleadings and admissions on file establish that Merdelin acknowledged receiving and using the American Express credit card issued by AmEx, she accrued financial obligations to AmEx in doing so, and she failed to meet those obligations. As the party opposing the motion for summary judgment, Merdelin was required to present a factual basis which would arguably entitle her to a judgment. *Hornacek v. 5th Avenue Property Management*, 2011 IL App (1st) 103502, ¶ 25, citing *Allegro Services, Ltd. v. Metropolitan Pier & Exposition Authority*, 172 Ill. 2d 243, 256, 665 N.E.2d 1246, 1254 (1996). As Merdelin failed to do so, AmEx was entitled to judgment as a matter of law. Accordingly, we affirm the judgment of the circuit court of Cook County.

¶ 23 Affirmed.

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