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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST DISTRICT

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AMERICAN EXPRESS TRAVEL	)	Appeal from the
RELATED SERVICES COMPANY.	)	Circuit Court of
INC., a New York Corporation,	)	Cook County.
	)	
Plaintiff-Appellee,	)	No. 2012 L 9926
	)	
v.	)	Honorable
	)	Raymond Mitchell,
THE TICKET RESERVE, INC.,	)	Judge Presiding.
An Illinois Corporation,	)	
	)	
Defendant-Appellant.	)	

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JUSTICE COBBS delivered the judgment of the court.

Presiding Justice McBride and Justice Howse concurred in the judgment.

**ORDER**

¶ 1 *Held:* The trial court did not err in finding that The Ticket Reserve, Inc. (Ticket Reserve), a merchant, breached its contract with American Express Travel Related Services Company, Inc. (Amex), a credit card company, where it failed to pay charge backs charged to its merchant account.

¶ 2 Following a bench trial, defendant Ticket Reserve appeals the trial court's ruling that it breached its contract with plaintiff Amex for failing to pay \$345,633.47 for merchant

financial services. Ticket Reserve contends that: 1) the trial court erred in finding that section 1666 of the federal Truth in Lending Act (15 U.S.C. §1666 (2012)) only applies to bankruptcy cases; 2) Amex cannot establish a valid contract because it failed to offer the original 2003 agreement into evidence; 3) Amex did not establish a *prima facie* case for breach of contract because it failed to prove all of the material terms of the 2008 Agreement; 4) Amex failed to prove the allegations set forth in the complaint; and 5) the trial court abused its discretion in admitting exhibits. For the following reasons, we affirm the judgment of the trial court.

¶ 3

### BACKGROUND

¶ 4

Amex is a banking entity which issues credit cards to companies for the purpose of purchasing goods and services and provides related merchant financial services. Ticket Reserve is a merchant who receives payment from third-party consumers. In 2003, Amex and Ticket Reserve entered into a Merchant Agreement (Agreement) for Amex to provide merchant financial services to Ticket Reserve for a fee. The Agreement was renewed in 2008. On August 31, 2012, Amex filed a complaint in the circuit court of Cook County alleging that Ticket Reserve refused to pay amounts owed on its account. In the complaint, Amex contends that it issued merchant account no. xxxxxxxxxxxx7081, associated with credit card numbers, to Ticket Reserve and Ticket Reserve agreed to pay Amex for merchant card services provided. Thereafter, Ticket Reserve allegedly incurred charges on its account totalling \$345,633.47. Amex sued for the full amount owed plus costs. Nowhere in the complaint is it stated that the amount owed was a result of "charge backs." In its Answer and Affirmative Defenses, however, Ticket Reserve acknowledged that it had a contractual

relationship with Amex and that the amount owed was due to charge backs and not charges incurred from use of a credit card.<sup>1</sup>

¶ 5 Prior to trial, Ticket Reserve made a verbal motion *in limine* objecting to the presentation of any evidence that did not conform to Amex's complaint. Specifically, Ticket Reserve argued that Amex should not be permitted to present evidence that did not relate to the non-payment of a credit card bill. The court took the motion under advisement and the case proceeded to a bench trial. At trial, Amex presented its sole witness, Sean Hamilton, and offered three exhibits into evidence: the 2008 Merchant Agreement, a document labeled "Chargeback Status and Charge Detail," and the "Statement of Account" for Ticket Reserve's merchant account. These exhibits were admitted into evidence over Ticket Reserve's objection.

¶ 6 Hamilton testified that he had worked for Amex for 18 years and is employed as an Assistant Custodian of Record, a position he had held for four years. His duties include supervision of documents between card holders and merchants with Amex, disputes, and physical payments. Hamilton testified that, generally, merchants agree to accept Amex credit cards for purchases and then submit a request to Amex for reimbursement. Once the request is received, Amex reimburses the merchant, less a transaction fee. Hamilton explained that the relationship between Amex and merchants is governed by the Merchant Agreement. He further testified that Ticket Reserve entered into a contract with Amex in 2003. The Agreement was updated on November 15, 2008, and Ticket Reserve continued to accept Amex cards and use its services after that date.

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<sup>1</sup>Defendant's affirmative defense states: "[t]he account deficit for which Plaintiff has filed this lawsuit is the result of charge backs paid to third parties by American Express. Some or all of the charge backs were improperly paid."

¶ 7 The 2008 Agreement stated that "[b]y accepting the American Express Card, you agree to be bound by the Agreement." The Agreement also provides that it is subject to changes to which Ticket Reserve will be notified. Hamilton explained that when a "major change" to the Agreement is made, Amex sends a revised Agreement to all of its merchants 60 days prior to the commencement of the change. Hamilton testified that a charge back occurs when a cardholder contacts Amex and disputes a charge on his account. The Agreement defines a charge back as "the amount of a Charge subject to reimbursement from you." The Agreement further states:

"2. Accepting the Card

\* \* \*

v. Chargeback. We have chargeback rights, as described in the Merchant Regulations. We may chargeback by deducting, withholding, recouping from, or offsetting against our payments to you (or debiting your Account), or we may notify you of your obligation to pay us, which you must do promptly and fully. Our failure to demand payment does not waive our Chargeback rights."

Amex did not provide Ticket Reserve with a copy of the Merchant Regulations, however, the Agreement states that they are available online and provides the website. Hamilton explained that once a card holder initiates a dispute and Amex contacts a merchant, under the Merchant Regulations, the merchant has 20 days to respond and send documentation to Amex to prove that the charge was valid. If after that time has expired the merchant has not responded, Amex will automatically find in favor of the card holder.

¶ 8 Ticket Reserve did not present a case-in-chief. After trial, Amex submitted its closing argument in a post-trial brief and Ticket Reserve submitted a combined motion for directed

finding and closing argument. In its motion, Ticket Reserve argued that: 1) it is not liable for charge backs unless the consumer submits a written objection to Amex; 2) Amex's complaint is deficient because it alleges that Ticket Reserve did not pay a credit card bill, not failure to pay charge backs; 3) Amex failed to prove Ticket Reserve's assent to the 2003 Agreement; 4) Ticket Reserve's Statement of Account should not have been admitted as a business record; and 5) Amex failed to establish a contract because it did not offer the Merchant Regulations into evidence.

¶ 9           Thereafter, the court issued an order finding that Ticket Reserve breached the Agreement with Amex. The court stated that charge backs constitute the entirety of the fees for which Amex is suing. The court further found that pursuant to the Agreement, Ticket Reserve received monthly billing statements that listed the amount owed and had 20 days to dispute each charge back after receiving an initial notice. Ticket Reserve did not dispute the charge backs, and thus, pursuant to the Agreement, it agreed to pay them all.

¶ 10          Further, the court rejected Ticket Reserve's argument that it could not be liable for a charge back that was not prompted by written notice of the dispute. The court found that the case cited by Ticket Reserve, *In re Standard Financial Management Corporation*, 94 B.R. 231, 238 (Bankr. D. Mass. 1988), was distinguishable from the instant matter because that case involved bankruptcy. The court noted that subsequent cases have limited the application of that rule<sup>2</sup> to bankruptcy and have acknowledged the converse rule in cases outside of bankruptcy.

¶ 11          Additionally, the court found that the complaint was sufficient to put Ticket Reserve on notice of the charge back claim. Moreover, the court noted that Ticket Reserve had the

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<sup>2</sup>The court was referring to TILA's requirement that an initial charge dispute be in writing, as explained in *Standard Financial*, 94 B.R. at 238.

opportunity to take discovery on the complaint and its affirmative defense that the account deficit was the result of charge backs. Thus, regardless of whether there was any deficiency in the complaint, there was no prejudice.

¶ 12 Further, the court concluded that Ticket Reserve assented to the 2008 Agreement by continuing to accept Amex cards and use Amex's financial services. Therefore, the 2008 Agreement governed the relationship between Amex and Ticket Reserve and the 2003 Agreement did not need to be entered into evidence to establish a valid contract.

¶ 13 The court also rejected Ticket Reserve's argument that the Statement of Account should not have been admitted as a business record. The court explained that contrary to Ticket Reserve's assertion that Hamilton was not a custodian or other qualified witness as required by Illinois Rule of Evidence 803(6), Hamilton was familiar with the manner by which Amex keeps its records and he identified the exhibit as an Amex document with Ticket Reserve's merchant number on it. Additionally, the charge backs in that document are consistent with the charge backs reflected in the "Chargeback Status and Charge Detail" document.

¶ 14 Finally, the court found that it was not necessary for Amex to offer the Merchant Regulations as evidence because all the material terms of the contract between the parties were included in the Agreement. The court concluded that the Agreement established that Amex has the right to charge Ticket Reserve for charge backs, and Ticket Reserve is obligated to pay them. Ticket Reserve filed a motion to reconsider, which was denied.

¶ 15 ANALYSIS

#### Truth in Lending Act

¶ 16 Ticket Reserve contends that Amex cannot establish that it breached the Agreement because section 1666 of the Federal Truth in Lending Act (15 U.S.C. §1666 (2012)) (TILA)

requires a card holder to notify a credit card company of a charge dispute in writing. Ticket Reserve asserts that Amex did not allege that it had been notified in writing of the charge disputes that resulted in the charge backs to Ticket Reserve. Therefore, Ticket Reserve argues, Amex could not legally assert these charge backs against it. The interpretation of a statute is a question of law, which we review *de novo*. *Sense v. Village of Buffalo Grove*, 383 Ill. App. 3d 276, 278 (2008).

¶ 17 Ticket Reserve's primary support for this proposition is *In re Standard Financial Management Corporation*, 94 B.R. at 231. In that case, the Bank of New England (BNE), processed credit transactions for Standard Financial Management Co., a merchant that sold rare coins. *Id.* at 233. After Standard Financial filed for bankruptcy, BNE asserted that it was a secured creditor over Standard Financial's funds in the amount of owed charge backs because the provisions of the VISA and Master Charge standard form agreements gave it the right to charge back. *Id.* In fact, BNE argued that the charge back funds are not the funds of the debtor at all, but are merely provisional credits subject to being cancelled until the expiration of the charge back period. *Id.* at 233-34. The court concluded that funds on deposit from credit card transactions are the debtor's funds subject to charge backs. *Id.* at 235. Therefore, the funds from the credit card transactions were the property of Standard Financial's estate, subject to defeasance by settlements. *Id.*

¶ 18 Thus, in that case, because the bankruptcy estate funds were subject to settlement for the charge backs, the court had to determine the actual amount owed for them. *Id.* at 235. BNE argued that the Visa Operating Rules and the Master Charge Rules and Regulations governed when a customer could contest a charge and initiate a charge back and Standard Financial's estate contended that TILA controls when a customer may charge back. *Id.* In determining

when a customer may charge back, the court first looked to the agreements at issue in that case and concluded that they did not provide sufficient guidance to the merchant as to when it would be responsible for a charge back. *Id.* at 236. The court noted that the Master Charge agreement provided that credit card holders can charge back from a merchant pursuant to the "Operating Guide," however the "Operating Guide" only referred to charge backs for technical flaws in submitting a credit slip. *Id.* In addition, the Visa card agreement stated that charge backs were governed by the Visa Operating Regulations, however, these were only available upon request. *Id.* The court found that because there was no "consensual agreement between the card holder, the banks, and the merchant in this case, the right of the merchant's bank to charge back against the merchant for some claim initiated by the card holder must be based on some other controlling law other than the unrevealed VISA and Master Charge Regulations." *Id.* at 237. Therefore, the court looked to TILA. *Id.*

¶ 19 TILA sets forth several requirements for the manner in which a card holder can dispute a charge that ultimately leads to a charge back. *Id.* at 237-38. The court held that TILA's requirements, including that the original dispute be in writing, applied in that case. *Id.* The court explained that:

"[c]ompanies in bankruptcy especially need written objections to be able to review the basis of chargebacks. Chargebacks which are questionable may be borne by companies outside of bankruptcy as a cost of business, but they cannot automatically be allowed in bankruptcy because they deplete the estate from which honest creditors will receive a pro rata share and frustrate the equitable distribution of assets to all creditors which is the essence of the bankruptcy process." *Id.* at 238.

Therefore, in that case, only the charge backs that were initiated by written notice could be



settled against Standard Financial's estate. *Id.* The court specifically declined to decide whether TILA's requirements would apply to a non-bankruptcy case. *Id.*

¶ 20 We find that *Standard Financial* is distinguishable from the instant appeal for two reasons. First, in *Standard Financial*, the court was analyzing charge backs in the context of creditor priority in a bankruptcy case. It is apparent that the court was limiting its analysis to that situation. Significantly, the court noted that it was important to have clear guidelines for when a charge back could be made in the bankruptcy context where funds are limited because the court is concerned with determining the priority of creditors and facilitating a fair payment process. The instant appeal does not involve bankruptcy or determining the priority of creditors. Rather, Ticket Reserve is asserting TILA's requirements as a defense to alleged non-payment for charge backs it owes Amex under their Agreement.

¶ 21 Second, in *Standard Financial*, the court analyzed when a card holder could properly initiate a charge back in order to determine the amount owed by Standard Financial's estate. However, here, the circumstances under which a card holder can dispute a charge are not at issue. In this case, Amex sent Ticket Reserve statements notifying it of the disputed charges. At that time, Ticket Reserve had the opportunity to contest the disputes and could have argued that the card holder was required to submit a written document. Instead, it chose not to respond. Under the Merchant Regulations, which are incorporated into the Agreement, merchants are automatically liable for charge backs if they do not respond to notice of a dispute. Accordingly, Amex found that Ticket Reserve was responsible for the charge backs.

¶ 22 Moreover, courts have previously held that the purpose of TILA is to protect consumers by assuring meaningful disclosure of credit terms so that consumers can avoid the uninformed use of credit. *Johnson v. Thomas*, 342 Ill. App. 3d 382, 390 (2003). Specifically,

section 1666 was enacted to "impose an orderly procedure for identifying and resolving disputes between a cardholder and a card issuer as to the amount due at any given time." *Gray v. American Express Co.*, 743 F.2d 10, 13 (D. C. Cir. 1984). In this manner, TILA creates a cause of action for card holders against card issuers that do not comply with TILA. *Id.* We note that the cases Ticket Reserve cites other than *Standard Financial*, involve card issuers and card holders and not merchants. See *e.g.*, *Grengo v. Target National Bank*, 513 F. Supp.2d 842 (S.D. Tex. 2007); *Maranto v. CitiFinancial Retail Services, Inc.*, 448 F. Supp.2d 758 (W.D. La. 2006); *Himelfarb v. American Express Co.*, 301 Md. 698, 484 A.2d 1013 (1984); *Israelwitz v. Manufacturers Hanover Trust Co.*, 120 Misc.2d 125, 465 N.Y.S.2d 486 (1983); *Contra Lincoln First Bank v. Carlson*, 103 Misc.2d 467, 426 N.Y.S.2d 433 (1980).

¶ 23 Amex argues that TILA does not apply to merchants because they are not the group that Congress intended to protect. We agree. As discussed above, the purpose of TILA is to protect consumers and regulate their relationship with credit card issuers. Further, the court in *Symeonidis v. Paxton Capital Group, Inc.*, 220 F. Supp.2d 478, 480 (D. Md. 2002), explained that TILA "provides a civil right of action, but only for borrowers or debtors." *Id.* at n.3. Given that this case does not involve a dispute between a card issuer and a card holder or bankruptcy, we conclude that Ticket Reserve cannot allege non-compliance with TILA as a defense to its alleged failure to pay the amount it would otherwise owe Amex under the clear terms of the contract.

¶ 24 *Prima Facie Case*

¶ 25 Ticket Reserve additionally argues that Amex failed to establish a *prima facie* case for breach of contract because it failed to offer the Merchant Regulations into evidence, and thus,

it did not prove all the material terms of the 2008 Agreement. Amex responds that it was unnecessary to offer the Merchant Regulations into evidence because all of the material terms were included in the 2008 Agreement. Following a bench trial, the appellate court reviews the lower court's judgment for whether it is against the manifest weight of the evidence. *Southwest Bank of St. Louis v. Poulokefalos*, 401 Ill. App. 3d 884, 890 (2010). A judgment is against the manifest weight of the evidence only when the opposite conclusion is apparent or when the findings appear to be unreasonable, arbitrary, or not based on evidence. *Id.* For a claim to succeed, the plaintiff must present at least some evidence on each essential element of a claim. *Vandevier v. Mulay Plastics, Inc.*, 135 Ill. App. 3d 787, 790 (1985).

¶ 26 To establish a *prima facie* case for breach of contract, the plaintiff must prove that there was: 1) an offer and acceptance; 2) consideration; 3) the terms of the contract; 4) plaintiff's performance of all contractual conditions required of him; 5) the defendant's breach of the terms of the contract; and 6) damages resulting from the breach. *In re Liquidation of Inter-American Insurance Co. of Illinois*, 329 Ill. App. 3d 606, 617 (2002). Ticket Reserve contends that the Merchant Regulations contain material terms regarding when a customer is entitled to initiate a charge back. We note that the Agreement refers to the Merchant Regulations and indicates Amex's entitlement to charge backs and the manner in which it may recoup them. However, the Agreement does not independently include the circumstances under which a merchant would be responsible for charge backs.

¶ 27 The lower court found that Amex established the material terms of the contract through the presentation of the Agreement, which stated that Amex had charge back rights and that Ticket Reserve agreed to pay charge backs. Thus, even without the Merchant Regulations, it is evident from the terms of the Agreement that Amex had the right to charge back.

Moreover, the relevant provisions of the Merchant Regulations were presented in Hamilton's testimony, where he explained that, under the Merchant Regulations, merchants have 20 days to respond to a disputed charge and they are automatically liable if they fail to do so. Therefore, we do not find the lower court's decision that Amex established a *prima facie* case of breach of contract to be against the manifest weight of the evidence.

¶ 28 Existence of a Valid Contract

¶ 29 Ticket Reserve makes the additional argument that Amex did not establish that a valid contract existed because it did not offer the original 2003 Agreement into evidence. Amex attached the Agreement from 2008 to the complaint, which was the Agreement in effect at the time of the charge backs. The 2008 Agreement provides that "[b]y accepting the American Express Card, you agree to be bound by the Agreement." It is undisputed that Ticket Reserve accepted Amex cards. Thus, Amex sufficiently established that Amex accepted the terms of the 2008 Agreement and it was unnecessary to present the 2003 Agreement as evidence. Accordingly, we do not find the court's decision that a contract existed to be against the manifest weight of the evidence.

¶ 30 Sufficiency of the Complaint

¶ 31 Next, Ticket Reserve contends that Amex failed to prove the allegations set forth in the complaint. Specifically, Ticket Reserve argues that the complaint alleged failure to pay a credit card debt and the evidence Amex presented at trial related to a claim for failure to pay charge backs. This proposition is completely without merit. The complaint states that Amex provides "credit cards to companies for the purpose of purchasing goods and services and provides *related merchant financial services*." It further alleges that Ticket Reserve had a merchant account with account number XXXXXXXXXXXX7081. Although it stated that

credit cards were issued associated with that account number, the complaint also alleged that the terms governing the relationship between Amex and Ticket Reserve were governed by the Agreement, which was attached and contained the charge back provision. In addition, the complaint alleges, "The Ticket Reserve incurred charges by use of said merchant card services." Thus, the complaint expressly alleged that Ticket Reserve incurred charges from the use of Amex's services, which included facilitating transactions when customers pay with Amex cards. Furthermore, the complaint unambiguously states that "[u]nder the terms of the Agreement; [sic] The Ticket Reserve agreed to pay American Express \*\*\* \$345,633.47 for the *merchant financial services*." It is clear that Amex alleged that Ticket Reserve failed to pay for charges it incurred for merchant financial services. Therefore, the court did not err in finding that the complaint was sufficient and that the evidence Amex presented on charge backs was relevant.

¶ 32

#### Exhibits

¶ 33

In finding that Amex's argument and evidence conformed to the complaint, we also reject Ticket Reserve's argument that the court erred in admitting Amex's exhibits at trial because they were not relevant. Ticket Reserve asserts that the court abused its discretion when it admitted the Agreement, the "Chargeback Status and Charge Detail" document, and the Statement of Account for Ticket Reserve's merchant account because they related to charge backs and not a credit card debt. A trial court's decision to admit evidence will not be disturbed unless it is an abuse of discretion. *Boyd v. City of Chicago*, 378 Ill. App. 3d 57, 67 (2007). We have already found that the complaint sufficiently alleged a breach of contract based on an alleged charge back balance and, therefore, these exhibits were relevant and the court did not abuse its discretion.

¶ 34 Finally, Ticket Reserve makes the additional argument that the court erred in admitting the Statement of Account because Hamilton did not have access to the document before trial. Consequently, it maintains that Hamilton was unqualified to present that exhibit as a business record. An exhibit can be admitted into evidence as a business record if it was: " 'made (1) in the regular course of business, and (2) at or near the time of the event or occurrence.' " *US Bank, National Ass'n v. Avdic*, 2014 IL App (1st) 121759, ¶ 23 (quoting *Gulino v. Economy Fire & Casualty Co.*, 2012 IL App (1st) 102429, ¶ 27). Illinois Rule of Evidence 803 (6) further requires that the record be shown by "the testimony of the custodian or other qualified witness." IL. R. EVID. 803 (6) (eff. April 26, 2012). In its order, the trial court explained that Hamilton "was familiar with the manner in which American Express keeps its records, and he identified the exhibit as an American Express document and he identified Defendant's merchant number on the document." The court further noted that the charge backs listed in the Statement of Account are consistent with the charge backs listed in the "Chargeback Status and Charge Detail" document. Therefore, it is apparent that the court considered whether Hamilton was a qualified witness and determined that he was knowledgeable of Amex documents and that the document was trustworthy because it corresponded to another exhibit. We do not find the court's decision to admit the Statement of Account to be an abuse of discretion.

¶ 35 CONCLUSION

¶ 36 For the following reasons, we affirm the judgment of the lower court.

¶ 37 Affirmed.