

IN THE COURT OF COMMON PLEAS OF CARBON COUNTY, PENNSYLVANIA
CIVIL DIVISION

BANK OF AMERICA, N.A. :
Plaintiff/Appellee :
vs. : No. 22-0548
:
CARL MONDERO, :
Defendant/Appellant :
:

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MEMORANDUM OPINION

Matika, J. - March 4, 2025

This Opinion is issued in support of our verdict rendered on October 30, 2024 in favor of the Plaintiff, Bank of America, N.A. (hereinafter "Bank of America") and against the Defendant, Carl E. Mondero (hereinafter "Mondero") from which Mondero filed a Notice of Appeal to the Superior Court. For the reasons set forth herein, this Court asks the Honorable Appellate Court to affirm its decisions and allow the verdict to stand.

FACTUAL AND PROCEDURAL BACKGROUND

On April 11, 2022, the Plaintiff, Bank of America, N.A. filed a complaint sounding in breach of contract against the Defendant, Carl E. Mondero claiming Mondero failed to pay in accordance with the terms of the agreement in the sum of \$27,986.41. After

partially sustaining Mondero's preliminary objections, Bank of America filed an amended complaint to which Mondero filed an answer and new matter. Eventually, after a non-jury trial, this Court entered a verdict in favor of Bank of America and against Mondero in the amount of \$27,940.63.

At this trial, Bank of America presented one witness, Bruce Van Kleeck (hereinafter "Van Kleeck"). Van Kleeck testified as to a number of exhibits, six in total, which formed the basis for the contract, the breach of said contract by Mondero and the resultant damages from this breach.

Plaintiff's Exhibit #1 was a copy of an information sheet containing data obtained during the application process. This included demographic and financial information provided by the consumer, in this case Mondero, which forms the basis of his request for credit. It is this request made on or about June 21, 2008 which allows for the credit card company to decide if it was appropriate to advance credit to a consumer. On June 23, 2008, this request for credit was approved and the credit card was eventually sent to Mondero for his use.

Bank of America, through Van Kleeck, presented Plaintiff's Exhibit #2, which was a copy of the 2007 Bank of America credit card agreement that would have been in place at the time Mondero applied for and was extended credit in 2008. This multiple page document was sent to Mondero outlining the terms and conditions of

the agreement between the parties pertaining to the use of the credit card. Mondero's name appears on the first page of this agreement and the last four numbers of the credit card itself, along with other identifying information, including the approval month and year (0608) of the application appears on the last page. Additionally, on page 12 it makes reference to "FIA Card Services N.A. being also known as Bank of America."¹

Van Kleek was then presented with Plaintiff's Exhibit #4. These documents were identified as various documents which changed the terms and conditions of the original card holder agreement over the years. These were periodically sent to Mondero at his address in Weatherly.

Van Kleek next testified about a packet of documents collectively identified as Plaintiff's Exhibit #5. These documents were copies of monthly billing statements sent from Bank of America to Mondero over the years. The first of these documents is for the billing period ending August 18, 2016 and actually showed a credit to Mondero in the amount of \$184.50. These statements ran through January 21, 2022 which showed a balance of \$27,986.41.² This January 21, 2022 statement was the last statement sent and the

¹ FIA Card Services, N.A. was the originator of the credit to Mondero. It merged into Bank of America N.A. in 2006. (See Plaintiff Exhibit #3). Van Kleek testified that this merger occurred in October, 2014, but apparently that was a different merger.

² This amount owed was reduced at trial to \$27,940.63 due to a credit of \$45.78 being applied against the \$27,986.41 balance through the Bank's charge off process.

balance claimed to be owed Bank of America by Mondero.

After rendering a verdict in favor of Bank of America and against Mondero in the amount of \$27,940.63, Mondero filed a timely post-trial motion which this Court summarily denied.

On January 6, 2025, Mondero filed a timely appeal. This Court issued its 1925(b) Order on January 14, 2025 and Mondero filed his Concise Statement of Errors Complained of on Appeal on January 17, 2025. In that statement, Mondero raised a series of perceived errors centered around his claim that the Plaintiff failed to prove a breach of contract occurred. Specifically, Mondero claims that the Court erred as follows:

1. That Plaintiff's Exhibit #1 was not an "application for credit", could not be the original application, does not state that it is an application for credit with FIA Credit Services or to whom Mondero was making application with, nor state that by making application Mondero agreed to be bound by any terms;

2. That without any evidence of a date of formation, Plaintiff's #2 cannot be held to be that original card holder agreement nor can the last page, which reflects the last four digits of the account (0608), be part of any card holder agreement as it does not have any identifying marks to tie it to that original card holder agreement;

3. That all amendments identified in Plaintiff's #4 were identified as Bank of America Corporation Documents and not FIA

Card Services nor Bank of America, N.A.;

4. That there was no evidence that Van Kleek had any personal knowledge of the mailing of any of the statements identified in Plaintiff's Exhibit #5;

5. That Van Kleek was unfamiliar with the file as his testimony pertaining to the \$26,700.00 check (Exhibit #6) was not the reason that the August 18, 2016 statement showed a credit balance to Mondero; and

6. That it was error to find in favor of the Plaintiff and against the Defendant on any other legal theory other than a breach of contract.

This Court will address each claim seriatim.

I. Exhibit #1 is not an Application for Credit

Appellant's first perceived error is that the Court erred in finding that Bank of America proved the necessary elements of a breach of contract in the sense that no contract was formed since Exhibit #1 is not: 1) an application for credit; 2) an original application for credit, 3) fails to identify if that exhibit seeks credit with FIA Card Services or other company to which Mondero was making credit application to; and 4) any date of formation of an alleged contract. This perceived error is meritless for a number of reasons.

Bank of America's representative testified that Exhibit #1 was "a copy of the information that was obtained during the credit

card application process"³, a process that " . . . can either come in the form of a hard copy, sometimes a customer will return a solicitation for a credit card application. Sometimes they will apply online. Sometimes they may go into a banking center and apply for a credit card."⁴ Van Kleek also identified on this exhibit the date as being June 21, 2008, the date of "application."⁵

This Court agrees with Appellant that Exhibit #1 is not an application per se, let alone an original of an application. This Court also agrees that it does not refer in any way to FIA Card Services nor does it identify this document as having the date on which the contract was formed. However, our acquiescence in these claims does not negate what we understood this document to be: Mondero's request for an extension of credit. Thus, this Court did not error in accepting it and admitting it for what it was: a request for credit based upon information contained thereon by Mondero to allow the creditor to extend that credit.

II. Exhibit #2 as Original Card Member Agreement

Mondero next argues that the Court erred in relation to its consideration of Plaintiff's Exhibit #2 referenced by Van Kleek

³ Notes of Testimony, September 13, 2024 proceeding, page 6 lines 7-8.

⁴ Notes of Testimony, September 13, 2024 proceeding, page 5, lines 13-17.

⁵ Van Kleek and Counsel regularly referred to Exhibit #1 as "the application." This Court did not consider this an application per se, but rather, information gleaned from a request by Mondero for credit. This request, in conjunction with the approval and the forwarding of Exhibit #2, the credit card agreement constitutes the contract in question.

as a copy of the "credit card agreement", also known as terms and conditions, between Mondero and Bank of America.⁶ Van Kleek identified this as belonging to the Mondero account. This same document reflected the last two numbers of Mondero's account as well as the date it was approved, i.e. June 23, 2008, two days after the request for credit was submitted.

Van Kleek also testified that the document identified FIA Card Services as the party extending the credit to Mondero, that FIA Card Services was a wholly owned subsidiary of Bank of America, and that this document had a date of 2007 on it, evidencing the terms and conditions of the agreement would have been in effect for when this contractual relationship was created on June 23, 2008. Van Kleek also testified that this agreement would have been sent to Mondero at the address provided. Had it been returned, it would have raised a red flag for possible fraud but instead, it was not returned but used quickly thereafter.

Thus, with regard to Mondero's claims that Exhibit #2 is not the original agreement, this Court agrees, as technically the original of the 2007 Terms and Conditions equating to a card holder agreement was sent to Mondero. Rather, this Exhibit was a copy of the document sent to Mondero. Additionally, despite Mondero's claim, it does reflect on page 12 the creditor as "FIA Card

⁶ Notes of Testimony September 13, 2024, page 7 lines 2-4.

Services, N.A. also known as Bank of America" on this 2007 document. Mondero disputed this as Van Kleek testified that "FIA Card Services merged under the name of Bank of America National Association" effective October 1, 2014. This however, was inaccurate as Bank of America, National Association (USA) merged into FIA Card Services, National Association effective October 20, 2006, a date prior to the creation of the 2007 agreement sent to Mondero.⁷ While Van Kleek's testimony may have referenced a different, later merger date, Plaintiff's own exhibit introduced and admitted without objection says otherwise.

III. Plaintiff Failed to Prove Necessary Elements for a Breach of Contract

Mondero next claims the Court erred in finding that Bank of America proved a breach of contract on the basis that Plaintiff's Exhibit #4, collectively a series of changes in the terms and conditions to the card member agreement sent periodically by Bank of America to Mondero beginning in June, 2010 and continuing until June 2021 to the address Mondero provided to them, was in fact provided by Bank of America Corporation and not sent by FIA Card Services nor Bank of America, N.A. While this is true, least we remind Mondero of Van Kleek's testimony that FIA Card Services was a wholly owned subsidiary of Bank of America Corporation which eventually merged into Bank of America, N.A.,

⁷ See Plaintiff's Exhibit #3.

thus, they are all one in the same.⁸

IV. Plaintiff Failed to Prove Elements of Breach of Contract Due to Van Kleek Not Having Personal Knowledge of Plaintiff's Exhibit #5.

Mondero next claims the Court erred in finding a breach of contract and crediting Van Kleek's testimony because he did not have first hand knowledge of the mailing of all of the credit card statements collectively identified as Plaintiff's Exhibit #5 as well as the fact that he could not be otherwise familiar with Mondero's file as his testimony as to Exhibit #6 was not credible.

Simply stated, Van Kleek, along with other responsibilities for Bank of America, is a "custodian of records." In that capacity, he is capable of authenticating bank records for purposes such as this by virtue of his familiarity with a particular file. In this case, he testified he was familiar with the Mondero file and generally identified all of the statements in Exhibit #5 as those involving the Mondero account and maintained by the Bank. He testified that these statements were mailed to Mondero and further, nothing in the Mondero file indicated that any of them were returned for any reason. These statements ranged from the billing period ending August 18, 2016 through the billing period ending January 21, 2022, which showed a balance owed at that time of

⁸ Notes of Testimony September 13, 2024 proceeding, page 6, lines 21-24.

\$27,986.41.⁹ Thus, Mondero's claim here does not hold water.

Mondero further claims that Van Kleek cannot be familiar with this file as much as he says he is because Plaintiff's Exhibit #6, a check sent by National Penn Bank on behalf of Carl Mondero to Bank of America in the amount of \$26,700.00 did not create the credit that shows on the August 18, 2016 statement. While this Court agrees that nowhere on that statement does it reflect a credit of \$26,700.00, Van Kleek testified that it was made prior to that statement. This is also reflected on the check from National Penn Bank which is dated May 29, 2016 and which also appears to have been deposited into Mondero's account on June 1, 2016.¹⁰

This Court sees no issues with Van Kleek's credibility vis-à-vis this testimony.

V. Breach of Contract - Other Legal Theories

Lastly, Mondero claims that the Court, when deciding to find in favor of Bank of America and against Mondero erred if it decided this matter on other legal theories other than breach of contract since Plaintiff did not plead them. Mondero may rest assure that this Court did not decide this on any other legal

⁹ This amount which Bank of America claimed Mondero owed in its complaint was reduced at trial to \$27,986.41 due to a change off credit owed to Mondero in the amount of \$45.78.

¹⁰ On the back of this check is a numerical notation of "06012016" which would appear to be the deposit date and crediting of these monies onto the Mondero credit card, as the account number is also reflected on the back of this check ending in 6138.

theory other than breach of contract.

In order for the court to find judgment in favor of a plaintiff against a defendant in a breach of contract action, the plaintiff must plead and prove:

"Three elements are necessary to plead properly a cause of action for breach of contract: '[1] the existence of a contract, including its essential terms, (2) a breach of a duty imposed by the contract and (3) resultant damages.'" *Williams v. Nationwide Mut. Ins. Co.*, 750 A.2d 881, 884 (Pa. Super. 2000) (citation omitted).

Plaintiff must establish these elements by a preponderance of the evidence, *Snyder v. Gravell*, 666 A.2d 341, 343 (1995). Here this Court determined that Mondero requested credit from FIA Card Services N.A., credit which was approved after submitting an online request. No application can be produced, as in this instance, no such one exists. The documents produced, as we determined, collectively created the contract: the request for credit (Plaintiff's Exhibit #1) and the subsequent tender to Mondero of the then existing terms and conditions upon use of the credit card (Plaintiff's Exhibit #2) and the credit card itself. Thus, the first element of a breach of contract action is present.

Ultimately, Bank of America presented documentation showing that Mondero breached his duty under the terms and conditions of this contract, as periodically modified, by failing to tender payment.

In the case of *Discover Bank v. Booker*, 259 A.3d 493(2021),

the Superior Court affirmed the trial court's verdict in favor of Discover Bank in a case with very similar facts as the case *sub judice*.

"In June of 2003, [Booker] applied for a credit card with [Discover, and] Discover issued Booker a credit card [which she used] to make purchases. Each month, until Febr[u]ary 26, 2018, Discover mailed to Booker's residence address[] monthly credit card statements, which included the balance owed by Booker to Discover and the minimum payment Booker was obligated to pay to Discover. From May 17, 2006 to September of 2017, Booker made payments that were equal to or slightly greater than the minimum payment amount. Booker last made a payment in September of 2017 in the amount of \$235. The statements from October of 2017 through February of 2018 show Booker failed to make any payment [during that period]. However, Booker made no objection about the statements she received from Discover. Discover produced Bookers' cardholder application, some of Booker's credit card statements, some of the checks Booker sent to Discover as payment, and a 2010 updated credit card agreement []. At 495.

Similarly, to our decision and verdict, the Appellate Court in *Booker*, affirmed the trial court when it stated

[7] We conclude that Booker's card application, in tandem with the updated agreement, supports the trial court's finding that the parties contracted for Booker's use of the card in accordance with Discover's terms and conditions for that use. Booker's own behavior, in continuing to use the card and comply with its terms for so long, strongly evidences her active *497 acquiescence to the contract's terms, which she accepted when she applied for the card. Finding no error, we may not upset the trial court's determination that Booker breached her agreement with Discover. At 496-497.

We likewise find that Mondero breached his agreement with Bank of America.

Lastly, it is clear that Bank of America established the resultant damages of Mondero's breach when it presented

statements, collectively as Plaintiff's Exhibit #5 and Van Kleeck's testimony that the monies owed to Bank of America for Mondero's breach and failure to pay equalled \$27,940.63.

Accordingly, Bank of America has proven the elements of an expressed breach of contract against Mondero.

CONCLUSION

Based upon the foregoing, this Court asks that the Appellate Court deny the appeal and affirm our Decision and Verdict.

BY THE COURT:



Joseph J. Matika, J.