2019 IL App (2d) 180707-U
No. 2-18-0707
Order filed May 16, 2019

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

CACH, LLC,	)	Appeal from the Circuit Court
	)	of Kane County.
Plaintiff-Appellant,	)	
	)	
v.	)	No. 17-SC-2746
	)	
LORETTA K. MOORE,	)	Honorable
	)	Alice C. Tracy,
Defendant-Appellee.	)	Judge, Presiding

JUSTICE SCHOSTOK delivered the judgment of the court.
Justices Hutchinson and Spence concurred in the judgment.

ORDER

¶ 1 *Held*: We hold that summary judgment was not proper in this case because the record does not establish as a matter of law that the plaintiff's complaint was barred by the statute of limitations.

¶ 2 The plaintiff, Cach, LLC, filed a complaint alleging a cause of action for account stated against the defendant, Loretta K. Moore, to recoup a balance due on a delinquent credit card account. The defendant filed a motion for summary judgment alleging, in part, that the cause of action was barred by the statute of limitations. The trial court granted the defendant's motion, finding that the claim was time barred. The plaintiff appeals from that order. We reverse and remand for additional proceedings.

¶ 3 BACKGROUND

¶ 4 On August 9, 2017, the plaintiff filed its cause of action for account stated. In the complaint, the plaintiff alleged that in November 2001, the defendant was issued a credit card by a bank. The defendant used the credit card and made payments on amounts due. However, the defendant ultimately defaulted on her obligation to make the payments due and made her last payment on August 24, 2012.

¶ 5 The plaintiff further alleged that the bank charged off the account as a loss on April 10, 2013. On March 21, 2014, the plaintiff purchased the account from the bank, as evidenced by a bill of sale and affidavits attached to the complaint. The plaintiff alleged that the amount due on the card was $6,545.23 and that the defendant had refused the plaintiff's demands for payment. The plaintiff attached two monthly statements to the complaint. One of the statements, with a billing period of August 14 to September 12, 2012, showed a payment of $10,000 received on August 14, 2012, and a payment of $2,568.72 received on August 24, 2012. The other statement, with a billing period of March 14 to April 10, 2013, showed a final balance on the account of $6,682.12 with payment in full due by May 8, 2013.

¶ 6 On May 18, 2018, the defendant filed a motion to dismiss the plaintiff's complaint pursuant to section 2-619 of the Code of Civil Procedure (Code) (735 ILCS 5/2-619 (West 2016)). The defendant asserted that a five year statute of limitations applied because the plaintiff's complaint was based on an unwritten contract. The defendant argued that the statute of limitations began to run from the last time she used her credit card, November 1, 2010, and thus the complaint, not filed until 2017, was barred by the five-year statute of limitations. The defendant further argued that for an account stated to be established, there must be mutual assent as to the correctness of the amount due. Because her last payment, made by check dated August 21, 2012, included a note on its face indicating that it was payment in full, there was no

agreement between the parties as to the amount owed and thus no basis for an account stated. The defendant also argued that the complaint was in violation of section 425/8b of the Collection Agency Act (225 ILCS 425/8b (West 2016)), because the attachments to the complaint failed to state the consideration paid for the account. Finally, the defendant argued that the complaint was not clear whether the balance due was only a charge for interest, in which case the claim for account stated failed because an agreement to pay interest must be in writing.

¶ 7 On May 18, 2018, the defendant filed an affidavit stating that the last time she used the credit card was November 1, 2010. She also stated that she "objected to the debt by way of correspondence and phone calls to [the bank]. When the account would not be adjusted, [she] made a payment in August 2012 by check upon which she marked it payment in full." The defendant attached a copy of her check, dated August 21, 2012, in the amount of $2,568.72, with a note on the lower left memo line saying "pmt in full."

¶ 8 On June 27, 2018, the plaintiff filed a response to the defendant's motion to dismiss. The plaintiff argued that its complaint was timely filed because the five-year statute of limitations did not begin to run until the defendant made her last payment on August 24, 2012, and the plaintiff's complaint was filed less than five years later. Additionally, citing section 8.6 of the Collection Agency Act (225 ILCS 425/8.6 (West 2016)), the plaintiff argued that the Collection Agency Act was amended in January 2013 such that a debt buyer was not required to comply with the pleading requirements of section 425/8b. The plaintiff argued that it complied with the pleading requirements of section 2-403 of the Code (735 ILCS 5/2-403 (West 2016)) and thus had standing to file suit. The plaintiff alleged that an account stated was created by the defendant's use of the credit card, the bank's subsequent payment of the charges, and the defendant's acceptance of monthly statements and corresponding payments.

¶ 9 On August 2, 2018, following a hearing, the trial court entered a written order denying the defendant's motion to dismiss with regard to the defendant's arguments that the plaintiff had not properly alleged an account stated, but granting the defendant's motion on the basis that the complaint was barred by the statute of limitations. The trial court's written order indicated that the statute of limitations commenced from the date the defendant last used her credit card, in November 2010. The plaintiff filed a timely notice of appeal from this order.

¶ 10 ANALYSIS

¶ 11 On appeal, the plaintiff argues that the trial court erred in granting the defendant's motion to dismiss and in finding that the statute of limitations began to run on the date of the last use of the credit card. The plaintiff argues that partial payment of a debt tolls the statute of limitations such that it commences to run from the date of the defendant's last payment on the credit card. Because the defendant's last payment was on August 24, 2012, the complaint filed in August 2017 was within the five-year statute of limitations.

¶ 12 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(c) (West 2016). 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. *Purtill v. Hess*, 111 Ill. 2d 229, 240 (1986). 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. *Williams v. Manchester*, 228 Ill. 2d 404, 417 (2008). We review a trial court's entry of summary judgment *de novo*. *Ragan v. Columbia Mutual Insurance Co.*, 183 Ill. 2d 342, 349 (1998).

¶ 13 In the present case, the trial court erred in finding that the statute of limitations began to run on the date the credit card was last used. As the defendant points out, the issuance of a credit card and a cardholder agreement constitute a standing offer to extend credit, and each time a credit card is used, a separate contract is formed. *Portfolio Acquisitions, LLC v. Feltman*, 391 Ill. App. 3d 642, 649 (2009). However, there is little Illinois case law setting out how to determine when the statute of limitations begins to run on a delinquent credit card account. The general principle is that a statute of limitations period begins to run when a party has the right to invoke the aid of the court and to enforce his remedy. *Rohter v. Passarella*, 246 Ill. App. 3d 860, 869 (1993). Further, "[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 (2002). There is no indication in the record that the bank was aware of the defendant's future delinquency at the time she last used the credit card. Additionally, there is no case law to support the proposition that the statute of limitations automatically begins to run on the date the credit card was last used to make a purchase. Thus, we cannot agree with the trial court that the statute of limitations commenced on that date.

¶ 14 Further, there is no evidence in the record as to when the plaintiff was aware of the defendant's potential delinquency on the account or other factors that would allow us to state as a matter of law when the statute of limitations commenced. The defendant's affidavit stated that she objected to the debt by way of phone calls and correspondence, but she did not say when any of that occurred or include any of the alleged correspondence. It is well settled that summary judgment should only be granted "when a moving party's right to it is clear and free from doubt." *Pyne v. Witmer*, 129 Ill.2d 351, 358 (1989). Accordingly, the trial court erred in granting summary judgment in favor of the defendant. Because the record does not establish

when the statute of limitations commenced, we need not determine whether either of the defendant's August 2012 payments tolled the statute of limitations.

¶ 15 The defendant argues that summary judgment can be affirmed on the basis that there was an accord and satisfaction. Specifically, because her last payment included a note that it was "pmt in full," the defendant argues that the dispute was settled when the plaintiff cashed her check. However, on the basis of the record before us, this issue is forfeited because it does not appear to have been raised before the trial court. See *Hytel Group, Inc. v. Butler*, 405 Ill. App. 3d 113, 127 (2010) (issues not raised before the trial court are forfeited). The defendant did not raise the issue of accord and satisfaction in her motion to dismiss or in her reply to that motion. Further, the record does not contain a transcript of the hearing on the motion to dismiss and the trial court's written order does not make any findings as to any argument concerning accord and satisfaction.

¶ 16 Moreover, even if the issue is not forfeited, the defendant has not established an accord and satisfaction sufficient to warrant summary judgment. One of the elements of accord and satisfaction is a *bona fide* dispute. *Sherman v. Rokacz*, 182 Ill. App. 3d 1037, 1043 (1989). While the defendant's affidavit indicated that there was a dispute over the amount owed on the credit card, this was not sufficient to establish that it was a *bona fide* dispute. *Id.* at 1045 (merely asserting the existence of a dispute does not establish that it was a *bona fide* dispute). Accordingly, we decline to affirm summary judgment in the defendant's favor on the basis of an accord and satisfaction.

¶ 17 The defendant also argues that the trial court's determination can be affirmed on the basis that the claim is only for interest. The defendant cites to *Gonzalez v. Danaher*, 30 Ill. App. 3d 992, 994 (1975), for the proposition that interest cannot be recovered in the absence of a contract or a statutory provision. Contrary to the defendant's assertion, the record does not establish that

the amount claimed to be due is interest only. The first statement in the record, with a payment due date of October 8, 2012, indicated that the balance due was $5,536.76 and, of that amount, $155.76 was interest. The statement also indicated that the total amount of interest charged in 2012 was $4,220.92. The other statement, with a May 8, 2013, due date, showed a balance due of $6,682.12, a current interest charge of $136.99, and total 2013 interest charged of $558.12. If the interest from the two statements is added up, it does not establish that the amount due is interest only. The defendant's argument necessarily fails.

¶ 18 Moreover, an account stated is an agreement between persons who have had prior transactions that the account representing those transactions is true and that the balance outstanding for those transactions is correct with an express or implied promise for the payment of such balance. *Patrick Engineering, Inc. v. City of Naperville*, 2012 IL 113148, ¶ 56. It is axiomatic that an account stated for a delinquent credit card account could include late payment fees and interest if the cardholder agreed, through the cardholder agreement, to pay such fees and interest.

¶ 19 CONCLUSION

¶ 20 For the foregoing reasons, the judgment of the circuit court of Kane County is reversed and the case is remanded for additional proceedings.

¶ 21 Reversed and remanded.