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**STATE OF MINNESOTA
IN COURT OF APPEALS
A13-1344**

Discover Bank,
Respondent,

vs.

Crysone C. Lindwall,
Appellant.

**Filed April 7, 2014
Affirmed in part, reversed in part, and remanded
Johnson, Judge**

Anoka County District Court
File No. 02-CV-13-1185

Jennifer M. Zwilling, Derrick N. Weber, Messerli & Kramer P.A., Plymouth, Minnesota
(for respondent)

Gregory B. Lindwall, Lindwall Law Firm, Minneapolis, Minnesota (for appellant)

Considered and decided by Johnson, Presiding Judge; Rodenberg, Judge; and
Randall, Judge.*

*Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

UNPUBLISHED OPINION

JOHNSON, Judge

Cryson C. Lindwall incurred debt with a credit card that was issued by Discover Bank. She did not pay off the debt, which prompted Discover Bank to bring this collection action. The district court entered summary judgment in favor of the bank for the balance due, additional interest at a higher penalty rate, attorney fees, and costs and disbursements. We conclude that the district court did not err by awarding damages for the balance due because the theory of account stated provides a legal basis for that part of the damages award. We also conclude that the district court did not err by awarding costs and disbursements because a prevailing party is entitled to costs and disbursements by statute. But we conclude that the district court erred by awarding damages for additional interest and for attorney fees, which are authorized only by a written cardmember agreement, because there is no evidence in the record that Discover Bank sent a cardmember agreement to Lindwall. Therefore, we affirm in part, reverse in part, and remand.

FACTS

In early 2006, Discover Bank sent Lindwall an invitation to apply for a “Discover Platinum Sea Life” credit card. In March 2006, Lindwall applied for and was issued a Discover Bank credit card. From May 2006 to September 2011, Lindwall received extensions of credit from Discover Bank and made multiple payments on the account. But in March 2011, Lindwall stopped making payments. In September 2011, Discover

Bank accelerated the balance and closed Lindwall's account, leaving a balance of \$2,567.08.

In December 2011, Discover Bank commenced this action against Lindwall, seeking damages for the balance due, additional interest at the higher penalty rate, attorney fees, and costs and disbursements. In April 2013, Discover Bank moved for summary judgment, alleging three alternative theories of relief: breach of contract, account stated, and unjust enrichment. In May 2013, the district court granted Discover Bank's motion and entered judgment in favor of Discover Bank for \$4,550.80, which reflects \$2,567.08 for the balance due, \$735.29 for additional penalty interest, \$590.43 in attorney fees, and \$658 in costs and disbursements. Lindwall appeals.

D E C I S I O N

A district court must grant a motion for summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that either party is entitled to a judgment as a matter of law." Minn. R. Civ. P. 56.03. "On an appeal from summary judgment, we ask two questions: (1) whether there are any genuine issues of material fact and (2) whether the [district court] erred in [its] application of the law." *State ex rel. Cooper v. French*, 460 N.W.2d 2, 4 (Minn. 1990). A genuine issue of material fact exists if a rational trier of fact, considering the record as a whole, could find for the non-moving party. *Frieler v. Carlson Mktg. Grp., Inc.*, 751 N.W.2d 558, 564 (Minn. 2008). This court applies a *de novo* standard of review to a grant of summary

judgment and views the evidence in the light most favorable to the non-moving party. *Valspar Refinish, Inc. v. Gaylord's, Inc.*, 764 N.W.2d 359, 364 (Minn. 2009).

The district court did not state the legal theory on which it relied in granting summary judgment to Discover Bank. This court will affirm a grant of summary judgment “if it can be sustained on any grounds.” *Edwards v. Hopkins Plaza Ltd. P'ship*, 783 N.W.2d 171, 175 (Minn. App. 2010) (quoting *Myers ex rel. Myers v. Price*, 463 N.W.2d 773, 775 (Minn. App. 1990), *review denied* (Minn. Feb. 4, 1991)).

I. Breach-of-Contract Claim

In its memorandum in support of its motion for summary judgment, Discover Bank's first argument was that Lindwall is liable under a breach-of-contract theory. The alleged contract is a written cardmember agreement, which Discover Bank submitted to the district court with its motion papers. Lindwall argues that she cannot be held liable under Discover Bank's breach-of-contract theory because Discover Bank never sent her the cardmember agreement on which it now relies, which prevented her from agreeing to it.

“A claim of breach of contract requires proof of three elements: (1) the formation of a contract, (2) the performance of conditions precedent by the plaintiff, and (3) the breach of the contract by the defendant.” *Thomas B. Olson & Assocs., P.A. v. Leffert, Jay & Polglaze, P.A.*, 756 N.W.2d 907, 918 (Minn. App. 2008), *review denied* (Minn. Jan. 20, 2009). With respect to the first element, “[m]utual assent of the parties is essential for formation of a contract.” *Crince v. Kulzer*, 498 N.W.2d 55, 57 (Minn. App. 1993) (citing *Lake Co. v. Molan*, 269 Minn. 490, 497, 131 N.W.2d 734, 739 (1964)).

Mutual assent entails a “meeting of the minds concerning [a contract’s] essential elements.” *SCI Minnesota Funeral Servs., Inc. v. Washburn-McReavy Funeral Corp.*, 795 N.W.2d 855, 864 (Minn. 2011) (alteration in original) (quoting *Minneapolis Cablesystems v. City of Minneapolis*, 299 N.W.2d 121, 122 (Minn. 1980)). “If an alleged contract is so uncertain as to any of its essential terms that it cannot be carried into effect without new and additional stipulations between the parties, it is not a valid agreement.” *Druar v. Ellerbe & Co.*, 222 Minn. 383, 395, 24 N.W.2d 820, 826 (1946) (quotation omitted). Thus, for a plaintiff to prevail on a breach-of-contract claim, the plaintiff must establish not only that a contract exists but that the defendant assented to its terms. *See, e.g., Bush v. City of Lakefield*, 399 N.W.2d 169, 172 (Minn. App. 1987), *review denied* (Minn. Mar. 18, 1987).

Discover Bank relies on caselaw from other states that allows a credit-card issuer to establish a breach of contract based on a written cardmember agreement. *E.g., In re Brown*, 403 B.R. 1 (Bankr. E.D. Ark. 2009); *Davis v. Discover Bank*, 627 S.E.2d 819 (Ga. Ct. App. 2006). But in those cases, the credit-card issuer actually sent the written cardmember agreement to the cardholder at the commencement of the credit relationship. *Brown*, 403 B.R. at 4; *Davis*, 627 S.E.2d at 820. In this case, however, Lindwall claims that Discover Bank never sent the cardmember agreement to her. Discover Bank conceded at oral argument that the summary-judgment record does not contain any evidence that Discover Bank sent the cardmember agreement to Lindwall before closing the account in September 2011. If Discover Bank did not send the cardmember agreement to Lindwall, a reasonable fact-finder could not conclude that a contract was

formed and, thus, could not find Lindwall liable under the terms of the cardmember agreement. See *SCI Minnesota Funeral Servs.*, 795 N.W.2d at 864; *Minneapolis Cablesystems*, 299 N.W.2d at 122; *Druar*, 222 Minn. at 395, 24 N.W.2d at 826.

Thus, the district court erred by granting summary judgment to Discover Bank to the extent that the district court relied on Discover Bank's breach-of-contract theory.

II. Account-Related Claim

In its memorandum in support of its motion for summary judgment, Discover Bank also argued that Lindwall is liable under the theory of account stated. The doctrine of account stated is a means of establishing liability for a debt as an alternative to a contract-based theory of liability. *American Druggists Ins. v. Thompson Lumber Co.*, 349 N.W.2d 569, 573 (Minn. App. 1984). An account stated is created if a debtor retains a detailed billing statement without objection for an unreasonably long time. *Meagher v. Kavli*, 251 Minn. 477, 487, 88 N.W.2d 871, 879 (1958). The debtor's retention of the statement without objection constitutes a manifestation of assent and implies a promise to pay the balance that is said to be owed. *Id.*; see also *Erickson v. General United Life Ins. Co.*, 256 N.W.2d 255, 259 (Minn. 1977); *Butler Mfg. Co. v. Miranowski*, 390 N.W.2d 380, 384-85 (Minn. App. 1986).

In this case, Lindwall admits that she had a credit-card account with Discover Bank, that she used the account to incur debt, that she received detailed monthly billing statements from Discover Bank, that she never gave Discover Bank written notice of any objection to the monthly billing statements, and that she failed to pay the account in full.

These facts are sufficient to create an account stated. *See American Druggists Ins.*, 349 N.W.2d at 573; *Meagher*, 251 Minn. at 487, 88 N.W.2d at 879.

Lindwall's liability under the account-stated theory extends as far as the amounts stated on Discover Bank's monthly statements. *See American Druggists Ins.*, 349 N.W.2d at 573; *Meagher*, 251 Minn. at 487, 88 N.W.2d at 879. As one would expect, the monthly statements stated the amount due, \$2,567.08. But the monthly statements did not mention additional interest at the higher penalty rate, attorney fees, or costs and disbursements. Thus, Discover Bank is entitled to damages for the principal amount of Lindwall's debt. But the account-stated theory does not entitle Discover Bank to damages for additional interest, attorney fees, or costs and disbursements.

III. Costs and Disbursements

Any party that prevails in a civil action is entitled to costs and disbursements. Minn. Stat. § 549.04 (2012). Discover Bank was the prevailing party in the district court and continues to be the prevailing party. Thus, the district court did not err by awarding Discover Bank costs and disbursements of \$658.

In sum, the district court did not err by granting summary judgment to Discover Bank to the extent that the district court awarded damages for the principal amount of Lindwall's debt, \$2,567.08, and awarded costs and disbursements of \$658. But the district court erred by awarding damages for additional interest and attorney fees. Accordingly, we affirm in part, reverse in part, and remand the case to the district court for further proceedings not inconsistent with this opinion.

Affirmed in part, reversed in part, and remanded.