

**Commonwealth of Kentucky**

**Court of Appeals**

NO. 2009-CA-000515-MR

DISCOVER BANK

APPELLANT

v.

APPEAL FROM CLARK CIRCUIT COURT  
HONORABLE GARY D. PAYNE, JUDGE  
ACTION NO. 08-CI-00261

DOROTHY SEA

APPELLEE

OPINION  
AFFIRMING

\*\* \*\* \* \*\* \* \*\* \*

BEFORE: LAMBERT AND STUMBO, JUDGES; WHITE,<sup>1</sup> SENIOR JUDGE.

STUMBO, JUDGE: Discover Bank appeals from an Order of the Clark Circuit Court denying its motion to vacate a Summary Judgment in favor of Dorothy Sea. Discover Bank contends that the circuit court erred in failing to allow the Bank to resurrect the action and tender additional proof after Summary Judgment was rendered. For the reasons stated below, we affirm the Order on appeal.

---

<sup>1</sup> Senior Judge Edwin M. White sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

On April 4, 2008, Discover Bank filed the instant action to recover damages allegedly arising from Sea's usage of a Discover Bank credit card. The Bank alleged that Sea was issued a consumer credit card by the Bank, that she incurred debt to the Bank by using the card, and that she fell behind on the payments and defaulted on her obligation to make payments on the card. Sea filed a general denial of the allegations on April 28, 2008, and shortly thereafter filed a Request for Production of Documents and Interrogatories. Sea sought from Discover Bank the signed contract between herself and the Bank, and an accounting of all charges and credits.

The Bank responded by producing internal documents related to the account, but did not provide a signed contract or accounting of the alleged transactions. The Bank stated in its response that the account application was not available, but would be provided if it became available.

On July 2, 2008, Sea filed a Motion for Summary Judgment and Motion to Compel the Bank's response to her discovery motion. On September 4, 2008, the Clark Circuit Court sustained the Motion to Compel, granting Discover Bank 30 days to provide the requested documents. The Court passed the Motion for Summary Judgment for later adjudication.

Discover Bank mailed a Supplemental Response to Sea's counsel on September 29, 2008. The response failed to include a copy of the signed agreement between the Bank and Sea, and again stated that it was unavailable but

would be provided at a later date. The Bank filed a second Supplemental Response on October 9, 2008.

On November 6, 2008, Sea's Motion for Summary Judgment was heard before the Clark Circuit Court. The motion was sustained by way of an Order rendered on November 14, 2008. The Bank responded by filing a CR 59 Motion to Vacate Judgment on November 26, 2008. The motion was denied, and this appeal followed.

Discover Bank now argues that the Clark Circuit Court erred in sustaining Sea's motion for Summary Judgment. It maintains that it presented affirmative evidence demonstrating that genuine issues of material fact existed regarding liability and damages. As such, it contends that Summary Judgment was improperly rendered. The Bank contends that its action to recover damages arising from Sea's alleged default on the credit card debt is at its core an action in contract, and that it presented sufficient documentary evidence to rebut Sea's motion for Summary Judgment. In support of this claim, the Bank first directs our attention to the Complaint, in which it alleged that Sea's credit card account through Discover Bank had a principal balance of \$10,094.46 plus interest accruing at the rate of 19.800% per annum. Further, in response to Sea's Motion for Summary Judgment, the Bank produced an affidavit of an employee of the Bank's servicing agent, which set out the alleged account number, two transactions, the interest rate and purported balance, and related information. The Bank also notes that Sea did not attach any affidavit to her Motion for Summary Judgment. It goes on to maintain

that after Summary Judgment was rendered, it located an executed application bearing Sea's signature, and argues that even if it did not properly comply with Sea's discovery request, dismissal was not warranted. In response, Sea maintains that Summary Judgment was proper because the Bank failed to produce any evidence whatsoever that a contract existed, making it impossible for the Bank to prevail at trial.

Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, stipulations, 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." CR 56.03. "The record must be viewed in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor." *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 480 (Ky. 1991). "Even though a trial court may believe the party opposing the motion may not succeed at trial, it should not render a summary judgment if there is any issue of material fact." *Id.* Finally, "[t]he standard of review on appeal of a summary judgment is whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law." *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky. App. 1996).

When viewing the record in a light most favorable to Discover Bank and resolving all doubts in its favor, we find no basis for disturbing the Summary Judgment on appeal. Sea properly argues that in order to prevail on a breach of

contract claim, the plaintiff must demonstrate the existence of a valid contract, a breach by the opposing party, and resultant damages. *Barnette v. Mercy Health Partners-Lourdes, Inc.*, 233 S.W.3d 723 (Ky. App. 2007). Additionally, the terms of a contract must be complete and sufficiently definite for the Court to determine damages. *Mitts & Pettit, Inc. v. Burger Brewing Co.*, 317 S.W.2d 865 (Ky. 1958). Discover Bank did not produce a credit card application bearing Sea's signature, nor any proof that a contract existed between the Bank and Sea, and upon which a claim for damages could be based. While the Bank did produce partial internal documentation, the Clark Circuit Court implicitly determined via its entry of Summary Judgment that this internal documentation, taken alone, would not sustain the Bank's action if the matter went to trial. At trial, the burden would rest with Discover Bank to demonstrate the existence of a valid contract and to show damages arising from Sea's breach thereof. *Barnette, supra*. The Bank was unable to produce any proof to support a breach of contract claim in response either to Sea's discovery request or her Summary Judgment motion. As such, Summary Judgment in favor of Sea was proper.

The Bank also contends that even if it failed to comply with Sea's discovery motion, it was never warned that its failure to comply would result in the dismissal of its action. This claim is refuted by the record and the law. Sea's Summary Judgment motion placed the Bank on notice that its action could be terminated if the court found no genuine issue of material fact and that Sea was entitled to a judgment as a matter of law. The Bank failed to offer proof in support

of its claim for damages, and accordingly Summary Judgment was properly rendered.

For the foregoing reasons, we affirm the Order of the Clark Circuit Court sustaining Sea's Motion for Summary Judgment.

ALL CONCUR.

BRIEF FOR APPELLANT:

Jill A. Keck  
Cincinnati, Ohio

BRIEF FOR APPELLEE:

David G. Perdue  
Winchester, Kentucky