IN THE COURT OF APPEALS OF IOWA

No. 1-521 / 10-1096
Filed September 8, 2011

GEMINI CAPITAL GROUP,
Plaintiff-Appellee,

vs.

PHILIP NEW,
Defendant-Appellant.

Appeal from the Iowa District Court for Story County, James Malloy, District Associate Judge.

Philip New appeals from the district court order affirming a small claims judgment against him on a delinquent account balance for credit card expenditures. **REVERSED AND REMANDED.**

Ray Johnson and E.J. Flynn of Johnson Law Firm, West Des Moines, for appellant.

Curtis G. McCormick and Cherie L. Johnson of Neiman, Stone & McCormick, P.C., Des Moines, for appellee.

Heard by Eisenhauer, P.J., and Doyle and Tabor, JJ.

DOYLE, J.

Philip New appeals from the district court order affirming a small claims judgment against him on a delinquent account balance for credit card expenditures. New contends the judgment should be reversed because the statute of limitations has expired. He argues the statute of limitations is five years because there was no written contract. *See* Iowa Code § 614.1(4) (2009). Gemini Capital Group, L.L.C. counters the statute of limitations is ten years because the contract was written. *Id*. § 614.1(5).

New also contends Gemini failed (1) to prove its case under a breach of contract or account stated theory, (2) to establish it was entitled to judgment in the amount demanded, and (3) to prove he received notice of the assignments of the account as required by Iowa Code section 537.3204.

Because we agree the statute of limitations on Gemini's claim is five years, we reverse.

***I. Background Facts and Proceedings*.**

Gemini is a debt buyer. It purchased a debt allegedly owed by Philip New to Sears in the amount of $3016.48. On July 21, 2009, Gemini filed a petition seeking the balance due on the account plus interest. In his answer, New denied the claim, listing only one reason for his denial: "Statute of limitations has expired for this debt."

The matter proceeded to trial on March 2, 2010, before a judicial magistrate. New, who appeared without counsel, was the only witness to testify. He admitted opening a Sears credit account on August 28, 2002, making charges and payments on it, and having no evidence of any payments made

after June 9, 2004. Gemini also introduced as evidence a statement showing a balance remaining on New's account, the assignment of that debt through several other debt buyers, and the terms and conditions of the Sears account. Finally, Gemini submitted an interest calculation on the debt owed.

For his defense, New stated: "[T]he statute of limitations I understand to be five years on revolving accounts. And I had, uh, my Equifax and Transunion credit reports, both of which list them as revolving accounts." He entered those credit reports as evidence. When asked if he had anything else, New replied: "Uh, I think that was . . . I think that was all I had." When offered an opportunity to make a closing argument, New asked about Gemini's theory of the case relating to the statute of limitations, stating: "He said that I had a written contract, but that was with Sears. But if the account was closed, would that still be a written contract?" After the court explained Sears was the underlying creditor and had assigned the debt several times so now Gemini is the creditor, New responded: "I guess that's it."

The small claims court found in favor of Gemini on its claim on March 2, 2010, and entered judgment against New in the amount of $3016.48, plus interest and costs. New, now represented by an attorney, filed a notice of appeal to the district court on March 18, 2010. The notice stated:

> [New] appeals from all findings and conclusions inherent in the Ruling, including but not limited to whether [New] proved its case as to liability and damages by a preponderance of the evidence and whether the alleged debt at issue is time barred by the applicable statute of limitations.

New also filed a memorandum in support of his appeal alleging: (1) Gemini failed to prove a breach of contract, (2) Gemini failed to prove an account stated,

(3) the alleged debt is time barred, (4) Gemini failed to provide the court with documents sufficient to calculate the amount of the alleged debt as required by the Iowa Consumer Credit Code, and (5) Gemini has failed to establish it or any prior owners of the account provided notice of any of the assignments.

After reviewing the record before it, the district court found New obtained a Sears credit card on or about August 28, 2002, made purchases with it, and made his last payment toward the balance on June 9, 2004. The court found Gemini obtained the right to collect on the debt. The court further found the agreement for the credit account was a written agreement and therefore the statute of limitations on Gemini's claim is ten years. The district court affirmed the small claims court judgment.

New filed an application for discretionary review, raising the same issues he previously asserted in his memorandum to the district court. Our supreme court granted discretionary review, and the case was transferred to this court.

II. Scope and Standard of Review.

Our standard of review of small claims actions on discretionary review depends on the nature of the case. *Midwest Check Cashing, Inc. v. Richey*, 728 N.W.2d 396, 399 (Iowa 2007). As a small claims action tried at law, our review is for the correction of assigned errors. *Conkey v. Hoak Motors, Inc.*, 637 N.W.2d 170, 172 (Iowa 2001).

III. Statute of Limitations.

Was Gemini's action timely filed? New argues the statute of limitations on the action was five years because there was no written contract. Gemini argues

and the district court found the statute of limitations is ten years because a written contract exists.

Iowa Code section 614.1 sets forth the statute of limitations for various causes of actions. Generally, those founded on unwritten contracts must be brought within five years of the time they accrue. Iowa Code § 614.1(4). Those founded on written contracts must be brought within ten years. *Id*. § 614.1(5). With respect to continuous, open, accounts, "the cause of action shall be deemed to have accrued on the date of the last item therein, as proved on the trial." *Id*. § 614.5. There is no dispute the last payment on the account was made in June 2004. Accordingly, an action brought in July 2009 would be untimely if governed by the statute of limitations for unwritten contracts, but timely if governed by the statute of limitations for written contracts.

New claims the generic cardholder agreement provided by Gemini did not establish the existence of a written agreement. He cites to *Portfolio Acquisitions, L.L.C. v. Feltman*, 909 N.E.2d 876 (Ill. Ct. App. 2009), in support of his claim and asks us to adopt its reasoning. There, Portfolio Acquisitions, L.L.C. presented the court with a copy of the signed credit card application, copies of the cardholder agreement, and several statements from Feltman's account to prove the existence of a written contract. *Portfolio Acquisitions*, 909 N.E.2d at 883. The Appellate Court of Illinois found Portfolio Acquisitions failed to establish the existence of a written contract because parol evidence was necessary to show the relationship between the parties and to demonstrate Feltman's receipt and acceptance of the essential terms. *Id*. at 884. Although the reasoning in *Portfolio Acquisitions* has some appeal, we do not find it comports with Iowa law.

Nevertheless, we agree with New that Gemini did not establish the existence of a written contract. In Iowa, in order for an action to be founded on a written contract, the essential facts establishing liability of the defendant must be shown by a writing. *Matherly v. Hanson*, 359 N.W.2d 450, 454 (Iowa 1984). The *Matherly* court found the "cryptic and fragmentary" nature of the writings in that case required the use of parol evidence to determine the essential terms of the agreement. *Id*. at 456-57. It concluded the writings themselves were not a contract, but "at best [were] merely links in a chain of evidence indicating a contract." *Id*. at 457. This was insufficient to allow the creditor to claim the benefit of the ten-year statute of limitations. *Id*. The court's holding in *Matherly* did not address what more, if anything, was required to be contained in a writing in order to be considered a written contract within the meaning of section 614.1(5). *See id*. The court only held

> that where no writing (or series of writings) chargeable to one party shows the existence of an obligation to another party (or facts from which the law will infer an obligation), any action urging an obligation between the parties is subject to the statute of limitations for actions founded on unwritten contracts.

Id.

The writings produced in this case do not establish a contract. Gemini produced no written promise by New to pay money. That is not to say a written promise did not exist, but none was produced at trial. The only agreement Gemini placed in evidence was a generic Sears cardholder agreement. It was not signed by New, nor did New's name appear on the agreement. Gemini produced no documents signed by New.

To be sure, New used the Sears credit card, but Gemini produced no writing in which New expressed acceptance of Sears's extension of credit upon use of the credit card Sears issued. The written evidence presented at trial was therefore just not sufficient to establish the existence of an essential element of the contract pursuant to which New promised to pay money. Thus, parol evidence was necessary to establish New's obligation.

"When a proposition is in writing, and the acceptance is verbal, the contract is an oral contract." *Hulbert v. Atherton*, 59 Iowa 91, 93, 12 N.W. 780, 781 (1882); *see also Capital One Bank v. Creed*, 220 S.W.3d. 874, 878 n.2 (Mo. Ct. App. 2007) (quoting *Lively v. Tabor*, 107 S.W.2d 62, 67 (Mo. 1937)) ("'Parol acceptance of an offer in writing does not give rise to an agreement or contract in writing, within the meaning of statutes relating to limitations governing actions on contracts in writing.'"). So, without evidence of New's written acceptance to Sears's offer, Gemini's action must be construed as one to enforce an oral contract. We conclude the five-year statute of limitations applies here for lack of proof of a written contract.

Since Gemini's suit was filed more than five years after the cause of action accrued, it was time barred.[1] We therefore reverse the judgment of the district court and remand for entry of a judgment consistent with this opinion.

REVERSED AND REMANDED.

Tabor, J., concurs specially, and Eisenhauer, P.J., dissents.

[1] Because we find Gemini's suit was time barred, we need not consider New's remaining arguments.

TABOR, J. (concurring specially)

I agree with the majority's conclusion that Gemini's action to collect credit card debt is barred by the five-year statute of limitations for unwritten contracts under Iowa Code section 614.1(4). I specially concur to express my view that the more comprehensive analysis of what evidence is necessary to show the existence of a written contract set forth by the Illinois appellate court in *Portfolio Acquisitions v. Feltman*, 909 N.E.2d 876 (Ill. App. 2009) is not at odds with Iowa law.

The generic Sears card agreement that Gemini offered into evidence in magistrate's court did not satisfy its obligation under *Matherly v. Hanson*, 359 N.W.2d 450 (Iowa 1984) to show the existence of a written contract without resort to parol evidence. *Matherly* left open the question whether a writing, to qualify as a written contract for the purposes of the statute of limitations, must show all the material terms of the agreement, not merely an obligation of the party against whom enforcement is sought.[2] *See Matherly*, 359 N.W.2d at 456.

In *Portfolio*, the Illinois court of appeals acknowledged there was no dispute that a contract existed when the card company extended credit and the consumer charged transactions on the card; the question was whether the application form submitted with the plaintiff's complaint was sufficient proof of a written contract. *Portfolio Acquisitions*, 909 N.E.2d at 652. Finding that parol evidence was "required to show the relationship between the parties and demonstrate defendant's receipt and acceptance of the essential terms," the

[2] The dissent in *Matherly* characterized the majority's position as requiring "a degree of completeness sufficient to permit recovery without any resort to parol evidence." *Matherly*, 359 N.W.2d at 458 (Carter, J., dissenting).

Portfolio court found the contract at issue to be oral for purposes of the statute of limitations. *Id*.

Given the limited holding in *Matherly*, we do not know whether the Illinois courts—by requiring all essential terms to be ascertainable from the written instrument—employ a stricter interpretation of the meaning of a written contract than we would in Iowa. Regardless, I find the reasoning in *Portfolio* to be helpful to our analysis here. *See Smither v. Asset Acceptance, LLC*, 919 N.E.2d 1153, 1159 (Ind. Ct. App. 2010) (finding *Portfolio* "highly instructive").

The same deficiencies exist in Gemini's proffered document as were identified in *Portfolio* and *Matherly*; it fails on the most basic level to show the essential fact of New's obligation to Gemini without proof by parol evidence. As the *Matherly* court explained: "Resort must be had to parol evidence if any obligation of defendant is to be established, and we believe that this precludes plaintiff's reliance on the ten-year statute of limitations." *Id*.

The legislative policy behind the differing lengths of limitation periods for oral and written contracts recognizes "the undesirability of relying on parol evidence, which frequently tends to become less reliable with the passage of time." *Matherly,* 359 N.W.2d at 457. This phenomenon can be seen in the testimony before the magistrate:

> McCormick [Gemini's attorney]: And when you received the credit card, did you receive the credit card in the mail? New: I don't remember, that was a long time ago. I don't remember.

In my estimation, we should not create a special, more minimal burden for credit card companies and their assignees to prove the existence of a written contract for statute-of-limitations purposes than we require of other parties who

enter into a contract. I recognize, as did the Illinois court, that "the nature of credit card transactions and the relationships between the parties is complex and only made more difficult to analyze under modern realities." *See Portfolio Acquisitions*, 909 N.E.2d at 884 (noting the advent of electronic signatures and related legislation). But I agree with the *Portfolio* court that any departure from the requirement for a written agreement to account for modern business practices must come from the legislature. *See id*.

EISENHAUER, P.J. (dissenting)

I dissent. The majority concludes the five-year statute of limitations applies, whereas I conclude there is a written contract and therefore the ten-year limitation applies. Having reached this conclusion I would also affirm the judgment of the trial court.

Statute of Limitations. New claims the generic cardholder agreement provided by Gemini did not establish the existence of a written agreement. He cites to *Portfolio Acquisitions v. Feltman*, 909 N.E.2d 876 (Ill. App. 2009), in support of his claim and asks us to adopt its reasoning. There, Portfolio Acquisitions, L.L.C. presented the court with a copy of the signed credit card application, copies of the cardholder agreement, and several statements from Feltman's account to prove the existence of a written contract. *Portfolio Acquisitions,* 909 N.E.2d at 883. The Appellate Court of Illinois found the plaintiff failed to establish the existence of a written contract because parol evidence was necessary to show the relationship between the parties and to demonstrate Feltman's receipt and acceptance of the essential terms. *Id.* at 884. Although the reasoning in *Portfolio* has some appeal, I do not find it comports with Iowa law.

In Iowa, in order for an action to be founded on a written contract, the essential facts establishing liability of the defendant must be shown by a writing. *Matherly v. Hanson*, 359 N.W.2d 450, 454 (Iowa 1984). The *Matherly* court found the "cryptic and fragmentary" nature of the writings required the use of parol evidence to determine the essential terms of the agreement. It concluded the writings themselves were not a contract, but at best were merely links in a

chain of evidence indicating a contract. This was insufficient to allow Matherly to claim the benefit of the ten-year statute of limitations. *Id.* at 456-57. The court's holding in *Matherly* did not address what more, if anything, was required to be contained in a writing in order to be considered a written contract within the meaning of section 614.1(5). *Id.* at 457. The court only held

> that where no writing (or series of writings) chargeable to one party shows the existence of an obligation to another party (or facts from which the law will infer an obligation), any action urging an obligation between the parties is subject to the statute of limitations for actions founded on unwritten contracts.

Id.

Here, the written agreement for the Sears account states in pertinent part:

> I am responsible for all amounts owed on my account. I agree to repay all amounts owed on my account according to the terms of this agreement. This agreement is effective when any accountholder or authorized user uses the account, activates the card, or takes any other action which indicates acceptance of the account or card.

Information regarding the credit limit, payment options, finance charges, and other fees and charges is contained in the written agreement. When New used his credit card, he accepted the terms of the written agreement, which set forth the essential facts stating his liability. *See Gray v. American Express Co.*, 743 F.2d 10, 15 (D.C. Cir. 1984). Because the written agreement qualifies as a written contract under section 614.4(5), I agree with the district court's conclusion the ten-year statute of limitations applies.

Sufficiency of the Evidence. New also contends Gemini failed to prove its claim under a breach of contract or account stated theory. Gemini argues New failed to preserve error on this issue.

Our supreme court has noted "that for small claims suits 'the legislature thought it was in the public interest to provide a simpler, easier, and less expensive procedure than was afforded in district court under the Rules of Civil Procedure.'" *Hyde v. Anania*, 578 N.W.2d 647, 648 (Iowa 1998) (quoting *Barnes Beauty Coll. v. McCoy*, 279 N.W.2d 258, 259 (Iowa 1979)). Chapter 631, which governs small claims actions, provides for simplified procedures. *Id.* For instance, "hearing[s] shall be to the court, shall be simple and informal, and shall be conducted by the court itself, without regard to technicalities of procedure." Iowa Code § 631.11(1).

Chapter 631 provides no provision for post-trial motions, and therefore a motion for new trial is inappropriate in small claims actions. Iowa Code § 631.13; *Midwest Recovery Serv. v. Cooper*, 465 N.W.2d 855, 856 (Iowa 1991). An appeal to the district court under section 631.13, in which the case is examined anew, provides essentially the same relief as a new trial. *Hyde*, 578 N.W.2d at 649. A motion pursuant to Iowa Rule of Civil Procedure 1.904(2) is likewise not permitted in small claims actions. *Cooper*, 465 N.W.2d at 857.

I conclude the question of whether Gemini proved the elements of their claim is preserved for our review. The purpose of our error preservation rules is to ensure the opposing party and district court are alerted to an issue at a time when corrective action can be taken or another alternative pursued. *Top of Iowa Co-op v. Sime Farms, Inc.*, 608 N.W.2d 454, 470 (Iowa 2000). Our error preservation rules are also designed to preserve judicial resources by avoiding proceedings that would have been rendered unnecessary had an earlier ruling on the issue been made. *Id.* Gemini was required to prove each element of the

claim, and the small claims court ruled accordingly. New did not need to present any evidence contradicting the elements of the claim or to make an argument to the court regarding each claim to appeal from the adverse ruling.

In order to recover a credit card debt from a consumer under an accounts stated theory, a creditor must:

> (1) *Meet the requirements of account stated,* by providing an account agreement with the consumer, a final or "charge-off" statement with the consumer's address, and a sworn statement from a person with knowledge that regular monthly account statements were sent to the consumer at the address provided by the consumer, the charge-off statement is the sum total of those statements, the consumer used the credit card, and the consumer never objected to the monthly statements.

Capital One Bank (USA), N.A. v. Denboer, 791 N.W.2d 264, 282 (Iowa Ct. App. 2010).

I conclude Gemini has met its burden of proof under an accounts stated theory of recovery. Gemini provided a final statement with New's address and New himself testified he charged the purchase of items to the account and received monthly billing statements. There was no evidence New ever objected to any of the monthly statements or made a payment after his June 9, 2004 statement. New did not contest the amount on the statement was the sum total of his statements.

New also contends the court erred in finding Gemini met its burden of proof it was entitled to judgment in the amount demanded. He cites section 537.5114, which requires a creditor prove "the facts of the consumer's default, the amount to which the creditor is entitled, and an indication of how that amount was determined." In *Denboer*, 791 N.W.2d at 280, this court held a creditor that

provides proof of an account stated "has met the requirements of section 537.5114, assuming the judgment sought is consistent with the final account statement." Here, the final account statement showed a balance of $3016.48. Gemini sought judgment in the same amount. Gemini has met its burden.

Proof of Assignment. New contends the court erred in failing to require Gemini prove he received notice of assignments of the account. New did not raise this claim to the smalls claim court or on appeal to the district court. In its ruling on appeal, the district court did not address New's claim section 537.3204 requires notice of assignment by the original creditor to the consumer in order to recover. However, even if New preserved error on his claim, I find it has no merit.

Iowa Code section 537.3204 states:

> A consumer is authorized to pay the original creditor until the consumer receives notification of assignment of rights to payment pursuant to a consumer credit transaction and that payment is to be made to the assignee. A notification which does not reasonably identify the rights assigned is ineffective. If requested by the consumer, the assignee must seasonably furnish reasonable proof that the assignment has been made and unless the assignee does so the consumer may pay the original creditor.

Nothing in this code section bars an assignee creditor from recovering in a debt collection action for failing to give notice of the assignment to the creditor.