

*Frank Tenuta*

FILED  
IN THE IOWA DISTRICT COURT FOR WOODUBURY COUNTY  
SMALL CLAIMS DIVISION

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CAPITAL ONE BANK,  
CLERK OF DISTRICT COURT  
Plaintiff  
CLERK DESK

vs.

JEROME RYAN,  
Defendant

SMALL CLAIMS NO: 110704

**FINDINGS, CONCLUSIONS, AND  
ORDER**

NOW, on the 18<sup>th</sup> day of December, 2006, the above-captioned matter came before the court at the time and place scheduled for trial. The Plaintiff appeared by Verification of Account. Defendant appeared personally and with counsel, Frank Tenuta. The file was reviewed and arguments of counsel for the Defendant were made. The court now enters the following findings, conclusions, and order.

The Plaintiff's claim is in the total amount of \$1,442.32, plus accrued interest from the charge off date for a total balance of \$2,270.49, plus interest computed at the rate of 20.400% from November 2, 2006. This claim appears to be based upon a credit card account subject to the Iowa Consumer Credit Code.

In addition to the Verification of Account, the Plaintiff also submitted a copy of a Capital One Statement for the period of December 5, 2003 through January 4, 2004 indicating an overlimit fee and past due fee assessed in the amount of \$25.00 for each and a closing balance of \$1,442.32; a copy of a Cardmember Agreement; a copy of a Notice of Right to Cure dated September 29, 2006; and a copy of the original application signed by the Defendant on March 29, 1999.

The Defendant argues that the Plaintiff's claim is unsubstantiated; the credit card agreement is unconscionable pursuant to Iowa Code Section 537.5108; and/or the Plaintiff accelerated the debt prematurely based upon the timing of the Notice of Right to Cure pursuant to Iowa Code Section 537.5110

Pursuant to Iowa Code Section 631.10, the filing of a verified account or an instrument in writing along with an affidavit shall constitute an appearance for the Plaintiff for purposes of that particular section. In particular, the filing of a verified account prevents this court from automatically dismissing the claim "with prejudice" based upon a claimed failure to appear. It is questionable, however, whether such verified account, by itself, can be considered as evidence at the time of trial. Even if such verification is admitted into evidence, such evidence must still be sufficient to establish Plaintiff's claim and, if insufficient, the claim can be dismissed with prejudice on its merits.

In the within matter, even considering the Verification of Account and documents attached thereto as evidence, the court finds the Plaintiff has failed to prove by a preponderance of the evidence that it is entitled to a judgment against the Defendant or has otherwise failed to comply with the requirements of Iowa Code Section 537.5114.

The Verification of Account submitted by the Plaintiff includes a one-page statement dated November 2, 2006, and a copy of the December, 2003, statement indicating that the principal amount owed was \$1,442.32 in January, 2004, and \$2,270.49 as of November 2, 2006, and that the interest rate was 20.4%. The Plaintiff, however, has submitted no evidence concerning the dates and/or amounts of specific charges incurred by the Defendant using the credit card, such as copies of credit card statements. There is no evidence as to specific purchases made by the Defendant with the credit

card. Finally, the Plaintiff submitted a copy of terms and conditions of a credit agreement which is somewhat illegible but suggests the possibility that the “principal” balance claimed may include charges such as annual fees, over-limit charges, and/or late payment charges. Any such charges may or may not be in excess of that allowed by Iowa Code Sections 537.2501 or 537.2502 and may or may not be consistent with any contractual agreement entered into by both parties.

Even in the case of a default judgment entered against a defendant, a plaintiff pursuing a claim based upon a consumer credit transaction must still provide sufficient information from which the court can compute the amount to which the creditor is entitled. Iowa Code Section 537.5114; ITT Financial Services v. Zimmerman, 464 N.W.2d 486, 489 (Iowa App. 1990). The within claim is based upon a consumer credit transaction and the Plaintiff has failed to submit sufficient information from which this court can compute the amount to which the Plaintiff claims it is entitled.

Given the above findings, the court will not address the Defendant’s other arguments, other than to recognize any credit card agreement between the parties was arguably unconscionable when executed. The Defendant’s application references an annual housing payment alone in excess of his annual income and, thus, the Plaintiff would have had a belief at that time that there was no reasonable probability that the Defendant would have paid any obligation in full. Iowa Code Section 537.5108(4)(a). The court would also note that the Plaintiff cannot accelerate the debt until twenty days after the Notice of Right to Cure is served upon the Defendant. Iowa Code Section 537.5110(4)(a),(c). Based upon the supporting documents submitted by the Plaintiff, the court cannot determine if the Defendant could have cured the default pursuant to the contract by paying an amount less than the full amount claimed to have owed as referenced in the Plaintiff’s Notice and, thus, the court cannot determine if the Plaintiff accelerated the claimed debt in violation of Section

Section 537.5110. Again, a determination of these issues is moot given the court's findings above.

IT IS THEREFORE ORDERED that the Plaintiff's claim is dismissed with prejudice. Costs assessed to the Plaintiff.

Clerk to notify the parties.

Dated this 20<sup>th</sup> day of December, 2006.



Steven J. Andreasen,  
Woodbury County Magistrate

CLERK OF DISTRICT COURT  
CLERK DESIGNATED  
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