

RENDERED: October 29, 2004; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-001278-MR

JOHNNY R. BAKER

APPELLANT

v. APPEAL FROM WAYNE CIRCUIT COURT
HONORABLE ROBERT WILSON, JUDGE
ACTION NO. 03-CI-00111

CITIBANK SOUTH DAKOTA, N.A.

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: JOHNSON AND TAYLOR, JUDGES; EMBERTON, SENIOR JUDGE.¹

EMBERTON, SENIOR JUDGE: Johnny R. Baker appeals from an order of the Wayne Circuit Court dismissing his counterclaim and striking affirmative defenses filed in appellee's action to collect a credit card indebtedness. We affirm.

Upon approval of appellant Baker's application for a credit card account, appellee Citibank opened an account from

¹ Senior Judge Thomas D. Emberton sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

which appellant was authorized to purchase goods and services or receive cash advances. Although appellant made several payments for his utilization of the credit card account, his subsequent failure to comply with the terms of the credit card agreement precipitated the filing of a collection action in the Wayne Circuit Court. In response to Citibank's complaint seeking the amount of \$8,047.69 plus interest and attorneys' fees, Baker asserted what he termed "affirmative defenses" of prejudice, no money lent, fraud, payment, failure to state a cause of action, failure of consideration, accord and satisfaction, breach of contract, and offset, as well as filing a counterclaim alleging fraud, no money lent, set-off and breach of contract.

Citibank subsequently moved to dismiss the counterclaim and to strike the affirmative defenses. At a hearing on these motions, the trial court specifically questioned appellant concerning the defenses and counterclaim. In the course of that questioning, appellant admitted that he did not deposit money into the credit card account, stating only that the "accounting records" would show where the money came from. The trial court then informed appellant that despite repeated attempts to understand the nature of his claims, it was unable to do so. The trial court thereafter granted Citibank's motions, entering the order that precipitated this appeal.

Appellant posits two questions in his brief to this court: (1) is a credit card statement proof of a loan or instrument used to create a loan; and (2) did Citibank risk any of its funds? His argument appears to be that improper proof of a loan violates the Truth-in-Lending law and that he has a right to all records Citibank possesses with respect to this account. The remainder of his brief consists of a letter from a CPA which purports to explain general banking principles. Although appellant had asked the trial court to take judicial notice of the information contained in the letter, it declined to do so. Noticeably absent from appellant's argument is any indication that he had made a deposit into the credit card account; any denial that Citibank had established a credit card account which he had utilized; or any citation of authority to support his claims. We, like the trial court, confess to being at a loss as to how anything asserted in appellant's brief can be construed as relieving appellant from the consequences of the undisputed facts: he applied for a credit card, he incurred debt by utilizing the credit card, and he defaulted on the terms of repayment.

As Citibank points out in its brief, the trial court afforded appellant every opportunity to explain his position at the hearing on the motion to dismiss, but he was unable to articulate, much less prove, any basis for the matters asserted

in his answer and counterclaim. It is therefore clear beyond any reasonable debate that appellant could not prove any facts in support of his claims that would entitle him to relief. Accordingly, the trial court did not err in dismissing the counterclaim.² Nor do we perceive any error in the striking of defenses that are clearly irrelevant to the issues raised in the complaint.³

Finally, Citibank cites numerous procedural impediments to appellant's prosecution of this appeal. Our election to decide this case on the merits obviates the need to discuss those procedural shortcomings.

The judgment of the Wayne Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Johnny R. Baker
Monticello, Kentucky

BRIEF FOR APPELLEE:

Merv Warren
MAPOTHER & MAPOTHER, P.S.C.
Louisville, Kentucky

² Grzyb v. Evans, Ky., 700 S.W.2d 399 (1985) and Pari-Mutual Clerks' Union of Kentucky v. Kentucky Jockey Club, Ky., 551 S.W.2d 801 (1977).

³ See Ludlow v. Union Light, Heat & Power Company, 229 Ky. 621, 186 S.W.2d 640 (1945).