

IN THE DISTRICT COURT OF THE FIRST CIRCUIT

HONOLULU DIVISION

STATE OF HAWAII

UNIFUND CCR PARTNERS,

Plaintiff,

vs.

KEVIN KIM,

Defendant.

) CIVIL NO. 1RC04-1-6258
)
) AFFIDAVIT OF KEVIN F. KIM;
) EXHIBITS "A"- "D"
)
)
)
)
)

AFFIDAVIT OF KEVIN KIM

STATE OF HAWAII)
) SS.
CITY AND COUNTY OF HONOLULU)

KEVIN KIM, being first duly sworn on oath, deposes and says as follows:

- 1) I am a resident of the City and County of Honolulu, State of Hawaii;
- 2) He is competent to testify on the matters stated herein and makes this affidavit on personal knowledge;
- 3) In early 1996, I opened a Visa credit card account with Citibank which had a \$1,000.00 credit limit;
- 4) At the same time, I also agreed to accept the CreditShield insurance policy for this account, and I have attached a copy of the CreditShield policy papers which I have and the acceptance letter as Exhibit "A";
- 5) I began using this credit card soon after I opened the account and received my first card from Citibank;

6) I have attached all of the statements from Citibank for this account which I know to have dating from April 1996 to April 1998 as Exhibit "B";

7) The statement dated April 1998 is the last statement from Citibank that I believe to have received from them although I continued to make monthly payments;

8) The last time I used this credit card was in December 1997, and I have not made any charges on this account since then;

9) I was making electronic, pay-by-phone payments each month until the end of 1998 or beginning of 1999 when I authorized my bank, American Savings Bank, to begin making automatic payments of \$30.00 to be made on the sixteenth (16th) of each month to Citibank;

10) I have attached two (2) bank statements from American Savings from 1999 as Exhibit "C" and account sheet from American Savings of the automatic payments made from September 16, 2000 to December 15, 2001 as Exhibit "D";

11) I stopped the payments in December 2001 because I was about to enter the hospital for open heart surgery and, while in the hospital, I could not continue payments because I would not be receiving any income and therefore could not continue payments each month;

12) I believe that the last credit card I received from Citibank expired soon after I got the April 1998 statement and have not received any since then;

13) Prior to December 2001, I made several telephone calls to Citibank complaining that I was not receiving any statements and asking for my balance;

14) I was assured by Citibank each time that they would send me my statements but I never received any after April 1998, and, as a result, I did not know what was happening with my account except that I was making automatic monthly payments and my

account was being charged the premium for CreditShield until this lawsuit was file against me and Plaintiff's attorneys gave a few of the statements from 2000-01;

15) On or about June 23, 1997, I was involved in a moped accident which left me hospitalized for several days with severe injuries including acute head trauma;

16) As a result of these injuries, I was not able to work for several months;

17) Sometime in July 1997, while still recuperating and convalescing from my injuries, I contacted Citibank to activate the CreditShield insurance policy;

18) I never heard from Citibank or CreditShield again on this claim;

19) They never sent me any forms to file my claim or any other type of paperwork so I could have my payments covered under my insurance plan for which I was paying monthly premiums;

20) In all of the statements included in Exhibit "B", CreditShield charged my account some kind of amount for these premiums;

21) In December 2001, I again contacted Citibank to again try to activate my CreditShield insurance and was given an 800 number to call;

22) When I tried to call this number, no one answered the phone;

23) I then called Citibank again and was given the proverbial runaround;

24) I could not continue to pursue the matter because I was busy preparing my affairs in anticipation of the open heart surgery that I was about to have in January 2002;

25) After undergoing the open heart procedure and recuperating for several months, I contacted Citibank to find out what was happening to my account and to find out my balance;

26) I could not get a straight answer out of Citibank on my account;

27) It was only after pressing the matter further that I learned that Citibank may have sold my account to a collection agency;

28) At no time since April 1998 had I been contacted by Citibank; the only contact I had with them until June 2002 was when I called them to try to get my balance and statements and to activate my insurance policy with CreditShield;

29) The next contact I had over this account was from someone claiming to be from a collection agency who was very rude and abrasive and who demanded my Social Security number;

30) I refused to give my Social Security number over the phone to someone who called out of the blue, I did not know and claiming to be from a collection agency especially in this day an age with ID theft being rampant;

30) The next thing I knew was that I was being sued over this credit card account;

31) I tried to get the missing statements from Citibank but they say that they sold my account to Plaintiff and that Plaintiff has everything;

32) I did not dispute any charges or fees on this account because I was not aware what was happening with my Citibank credit card account until after Plaintiff file this lawsuit against me and I am still in the dark as to what happened with my account between April 1998 and June 2000;

33) After repeated discussions with Plaintiff's attorneys, I was informed that they would get the missing statements but so far they have come up with nothing, and they will not speak to me on this subject again;

34) I am also trying to get any missing gaps in my bank statements from

American Savings, but, because of its merger with the former Bank of America branches in Hawaii, a change of computer systems that went with it, and Y2K, they claim that they cannot locate them at this time;

FURTHER AFFIANT SAYETH NAUGHT.



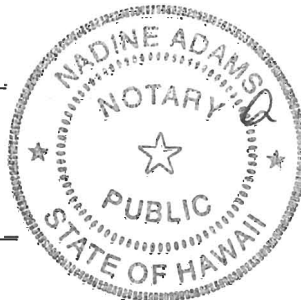
KEVIN KIM

Subscribed and sworn to before me
this 9th day of May, 2006.



NOTARY PUBLIC, State of Hawaii
First Judicial Circuit

My commission expires: 7/17/09



KEVIN KIM
2543 Date Street
Honolulu, Hawaii 96826

Defendant Pro se

MAY 9 4 01 PM '06

K. OKADA

IN THE DISTRICT COURT OF THE FIRST CIRCUIT

HONOLULU DIVISION

STATE OF HAWAII

UNIFUND CCR PARTNERS,) CIVIL NO. 1RC04-1-6258
)
Plaintiff,) DEFENDANT'S MEMORANDUM IN
) OPPOSITION TO PLAINTIFF'S MOTION
vs.) FOR SUMMARY JUDGMENT;
) AFFIDAVIT OF KEVIN F. KIM;
KEVIN KIM,) EXHIBITS "A" - "D"; CERTIFICATE OF
) SERVICE
Defendant.)
) HEARING
) DATE: May 15, 2006
) TIME: 8:03 AM
 JUDGE: PRESIDING

**DEFENDANT'S MEMORANDUM IN OPPOSITION TO
PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT**

COMES NOW Defendant KEVIN KIM and respectfully submits his
Memorandum in Opposition to Plaintiff's Motion For Summary Judgment.

I. FACTS

In early 1996, I opened a credit card account with Citibank. At the same time that I opened the account, I opted to for the insurance on my account with CreditShield (see Exhibit "A"). Soon after opening this account, I received my first credit card for it which had a one-year expiration on it. And, like most people, I began to use it almost immediately.

The last time I charged anything on this card was in December 1997. Four

months later in April 1998 I received the last statement on this account although there was a balance of \$1,000.41 and I was still making monthly payments. The credit card I had expired soon after, and I have not received another from Citibank since then.

I continued to make monthly payments, and in the latter part of 1998 or early 1999, I authorized my bank, American Savings, to make automatic payments of \$30.00 on the sixteenth (16th) of each month to Citibank. (See Exhibits "C" and "D") On several occasions, I called Citibank to try to get my statements and balance. On each occasion, I was assured they would be sent to me. But I never received any.

On two occasions, I tried to activate the insurance policy with CreditShield to make my monthly payments, but, on both occasions, I was stonewalled by Citibank and CreditShield. The first was after I was involved in a horrible moped accident in June 1997 and was laid up for several months during which time I could not work. The second was prior to going through open heart surgery in December 2001.

Because I did not receive any statements after April 1998, I did not know what was happening with my account other than I was making monthly payments. I only stopped the automatic payments after December 2001 because I would not have any income following my surgery until I could get back to work.

ARGUMENT

II. PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT SHOULD BE DENIED BECAUSE THERE ARE STILL ISSUES OF FACT IN THIS CASE.

Plaintiff's motion for summary judgment should be denied because it is unsupported by the facts in this case. In fact, Plaintiff's motion is unsubstantiated relying totally on innuendo and inferences only with no firsthand knowledge of the facts of this case at all. In

other words, Plaintiff's motion is not supported by any affidivits based on personal knowledge or at all. In fact, there are large holes in the evidence of this case which need to be filled before the issues of facts are decided.

In deciding on a motion of summary judgment, the trial court should always bear in mind that:

Because its impact is rather drastic, summary judgment must be used with due regard for its purposes and should be cautiously invoked so that no person will be improperly deprived of a trial of disputed factual issues.

McKeague v. Talbert, 3 Haw. App. 646, 658 P.2d 898, 903 (1983).

Generally, “[s]ummary judgment, ..., is proper only when ‘there is no genuine issue as to any material fact and movants clearly demonstrate that they should prevail as a matter of law.’” (citing *Hulsman v. Hemmeter Development Corp.*, 65 Haw. 58, 61, 647 P.2d 713, 716 (1982)) *Bidar v. Amfac, Inc.*, 66 Haw. 547, 669 P.2d 154, 159 (1983). However, “[w]here there are genuine issues of material fact, and the moving party is not able to establish that it is entitled to a judgment as a matter of law, the case should be remanded for jury resolution.” *Wong v. City and County of Honolulu*, 66 Haw. 389, 665 P.2d 157, 164 (1983). “In deciding the motion the evidence must be viewed in the light most favorable to the non-moving party.” *K.M. Young & Associates v. Cieslik*, 4 Haw. App. 657, 675 P.2d 793, 199 (1983).

The moving party “thus has the burden of demonstrating that there is no genuine issue as to any material fact relative to the claim or defense ...” (10A WRIGHT, MILLER & KANE, *Federal Practices and Procedure: Civil 2d* § 2727, at 121 (1983)) *First Hawaiian Bank v. Weeks*, 70 Haw. 390, 772 P.2d 1187, 1190 (1989).

Another point which a trial court should bear in mind when deciding a motion for summary judgment is that:

Even in cases where the judge is of the opinion that he will have to direct a verdict for one party or the other on the issues that have been raised, he should ordinarily hear the evidence and direct the verdict rather than attempt to try the case in advance on a motion for summary judgment, which was never intended to enable parties to evade jury trials or have the judge weigh evidence in advance of it being presented.

(citing *Pierce v. Ford Motor Co.*, 190 F.2d 910, 915 (4th Cir.), cert. denied, 342 U.S. 887, 72 S. Ct. 178, 96 L. Ed. 666 (1951)) *McKeague*, 3 Haw. App. 646, 658 P.2d at 903.

Rule 56(f) is especially applicable in this case which reads as follows:

Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

““The purpose of subdivision (f) is to provide an additional safeguard against an improvident or premature grant of summary judgment and the rule generally has been applied to achieve that objective. Consistent with this purpose, the courts have stated that technical rulings have no place under the subdivision and that it should be applied with a spirit of liberality.””

(citing 10 WRIGHT & MILLER, *Federal Practice and Procedure*, § 2740 at 724 (1973)).

Crutchfield v. Hart, 2 Haw. App. 250, 252, 630 P.2d 124 (1981).

Let's start by stating that Plaintiff has not shouldered its burden of proving that there are no issues of genuine fact to be decided. In fact, the evidence in this case is incomplete. There is a huge gap in the evidence which is very pertinent to this case, and Plaintiff knows it but tries to gloss over it and uses misdirection to avoid the issue.

There is one fact is that is plainly obvious in this case: ***Plaintiff is only a successor-in-interest and not the original lender or creditor.*** Plaintiff purchased my account from Citibank and therefore the only information that it has is from the papers, forms and the few account statements that Citibank provided it when it turned over the account to Plaintiff. As

such, Plaintiff has no firsthand knowledge, actual or constructive, of what occurred. If it is not in the papers provided it by Citibank, then Plaintiff does not know the information and is just guessing as to what happened.

Apparently, the earliest statement that Citibank provided Plaintiff was June 2000 (Plaintiff's Exhibit "2"). If I had not given Plaintiff the statements from April 1996 to April 1998 after it filed suit against me, it would not know what happened prior to June 2000. In fact, however, it still does not know everything of what happened prior to June 2000 because there is a gigantic gap of over two (2) years between the time my statements end in April 1998 and its starts in June 2000 (hereinafter referred to as the "Gap").

And, as the saying goes, "therein lies the tale."

I stated in my affidavit that I did not receive any statements from Citibank after April 1998 and that I continued to make monthly payments until December 2001. Even the statements that Plaintiff provided in its Exhibit "2" prove that I was making monthly payments. However, it is in the Gap where we will find out what happened to this account.

From my statements, the balance in my account peaked in December 1997 at \$1,018.14 and, with steady payments and no charges on the account except for CreditShield, the balance was reduced to \$1,000.41 in April 1998. There is no evidence to show how the balance jumped from \$1,018.14 in April 1998 to \$1,296.62 in June 2000.

The natural conclusion given the last three statements from 1998 is that the balance should have continued to decline given that I did not charge anything on the account and was making regular monthly payments. The only charges to the account would have been the CreditShield premiums and the enormous interest fees. But even then, the balance was declining.

We know that at some point in time Citibank began charging my account "Over Credit Limit Fees", eventually late fees and the ever-rising, usurious interest rates from the statements Plaintiff provided, but *when, why and how* these fees came to be is not know. As a result, we also do not know when, how or why the balance starting going up instead of down, ..., or even should it have.

So, why did it suddenly go up? At this point, no one involved in this case knows. Plaintiff does not know because Citibank only gave it statements beginning in June 2000 only. I do not know because I stopped receiving statements from Citibank after April 1998.

Here's where Plaintiff begins using innuendo and inferences to make its case. And as we all know, you cannot build a case on innuendo and inferences, but Plaintiff tries. It spouts all kinds of case law and legal citations that it is the debtor's duty to inform the creditor of any discrepancies in the account such as fraudulent charges, etc. with 60 days of learning of them in any statements sent to the debtor by the creditor. Here's where Plaintiff begins to make up all kinds of stuff and does not have a shred of evidence to back up its fallacious a statements.

As I stated on numerous occasions, I stopped receiving statements after April 1998. Plaintiff ignores this fact completely, and the fact that you cannot examine what you do not have. And if you do not know what is happening, you cannot complain about false charges, improper fees or rising interest rates.

Also, Plaintiff has no firsthand knowledge, actual or constructive either, that any statements were sent to me by Citibank during the Gap although it stated so in its memorandum in support of its motion. I do not see an affidavit in support of this statement from Plaintiff. (Plaintiff's use of an unsworn declaration rather than a sworn affidavit makes me wonder if it knows anything for sure at all.) It cannot even produce any statements during this time.

There is also the fact that I did not have a valid, unexpired credit card after mid-1998. Here, Plaintiff again made a false and unsubstantiated statement that I was still charging on the card or allowing someone else to do so during the Gap. Nothing could be further from the truth. Plaintiff made these false and unsubstantiated statements without regard to their veracity. It cannot show that I made any charges on the account during the Gap.

As to whether there are any issues of material fact, Plaintiff glossed over it and tries to make its case with sleight of hand. It based its argument here totally on its Verified Complaint and has not presented a shred of evidence supporting its position at all only spouting more rule of law. Apparently, Plaintiff is of the opinion that, because it filed a verified complaint, then therefore the allegations in it must be fact since it is a verified complaint after all — everything else is immaterial of course.

Plaintiff is completely off-base in its arguments. First, the main body of evidence in this case has yet to be found and presented by the parties. That evidence is all in the Gap. Plaintiff does not explain why it has failed to fill this informational gap and just completely ignores it.


Then, there is the fact that I was denied insurance coverage by CreditShield, even though I paid the monthly premiums, when I tried to activate my coverage on two occasions. This failure to provide coverage could be pertinent as to the amount I owe if any.

Therefore, Plaintiff's motion for summary judgment should be denied. The evidence is incomplete, and, without the missing evidence, the factual picture is too muddled to get a clear picture of the events in this case. Plaintiff failed to present any credible evidence to back its arguments. Any evidence it presented is not based on firsthand knowledge, actual or constructive, of the pertinent events in this case and is rather innuendo and inferences.

III. CONCLUSION

Based on the arguments and authorities cited herein and in Defendant's Memorandum in Opposition, Defendant KEVIN KIM respectfully requests that Plaintiff's Motion For Summary Judgment be denied.

DATED: Honolulu, Hawaii, May 9 2006.



KEVIN KIM
Defendant Pro se