2014 IL App (1st) 140521-U

Nos. 1-14-0521 & 1-14-0522 (Consolidated)

December 29, 2014

FIFTH DIVISION

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

CITIBANK (SOUTH DAKOTA) N.A.	)	Appeal from the Circuit Court
	)	of Cook County.
Plaintiff and Counterdefendant-Appellee,	)	
	)	
v.	)	
	)	Nos. 09 M1 179377
LAURENTIU V. COVACI,	)	09 M1 177024
	)	
Defendant and Counterplaintiff-Appellant,	)	The Honorable
	)	Mary Minella,
(Blatt, Hasenmiller, Leibsker & Moore, LLC, Counterdefendant).	)	Judge, presiding.
	)	

PRESIDING JUSTICE PALMER delivered the judgment of the court.
Justice McBride and Justice Reyes concurred in the judgment.

O R D E R

Held: We affirm the circuit court's decisions denying defendant's motions to dismiss plaintiff's second amended complaints and its decision to grant plaintiff's motion to dismiss defendant's counterclaim.

¶ 1 Plaintiff Citibank (South Dakota) N.A. (Citibank) brought two separate one-count complaints against defendant, Laurentiu V. Covaci (Covaci), after Covaci defaulted on two

credit card accounts. Following a bench trial, the trial court entered judgments against Covaci in the amounts of $10,921.11 (in Case No. 09 M1 179377) and $26,143.41 (in Case No. 09 M1 177024). Covaci filed a notice of appeal from these two final judgments, in addition to the denial of his motions to dismiss Citibank's second amended complaints, the denial of his post-judgment motions to reconsider, and the dismissal of his counterclaim in Case No. 09 M1 179377. He argues on appeal that the trial court erred in denying his motions to dismiss Citibank's second amended complaints and in granting Citibank's motion to dismiss his counterclaim. For the reasons that follow, we affirm.

¶ 2 I. BACKGROUND

¶ 3 A. Case No. 09 M1 179377

¶ 4 On April 29, 2010, Citibank brought suit in Case No. 09 M1 179377 against Covaci to recoup the balance owed on a credit card account in the amount of $10,921.11, for which Covaci had failed to make monthly payments and defaulted. Citibank attached an affidavit from a Citibank employee regarding the account and an account statement for account activity between May 22 and June 22, 2009, showing a total balance due of $10,921.11. Citibank made several unsuccessful attempts at serving the complaint. Covaci ultimately filed a *pro se* appearance on November 8, 2012, and moved to dismiss the complaint because Citibank failed to attach the contract or other evidence of a contract. The motion was granted and Citibank was given leave to amend the complaint.

¶ 5 Citibank filed a first amended complaint on September 17, 2012, and attached a copy of Covaci's credit card application agreement, which was filled out with Covaci's information, but not signed by Covaci. Citibank also attached an account statement from May 22 through June 22, 2009, and an affidavit from a Citibank employee. Covaci moved to dismiss the first amended complaint on grounds that its breach of contract claim was insufficiently pleaded. The circuit court again granted the motion, but again granted Citibank leave to amend the complaint.

¶ 6 Citibank filed a second amended complaint on December 14, 2012, this time setting forth an account stated theory of liability instead of a breach of contract claim. Citibank attached a set of terms and conditions dated 2011, numerous credit card statements, a copy of a payment via check by Covaci, and an affidavit from a Citibank employee.

¶ 7 On January 24, 2013, Covaci moved to dismiss the second amended complaint pursuant to sections 2-606, 2-615, and 2-619 of the Illinois Code of Civil Procedure (the Code) (735 ILCS

5/2-606, 2-615, 2-619 (West 2012)). Covaci asserted that the complaint failed to attach a copy of a contract, and that, although Citibank had previously attached the application agreement to an earlier complaint, it intentionally withheld the application now because Covaci had not signed that document. Covaci also argued that Citibank's claim was barred by the five-year statute of limitations applicable to actions based on unwritten contracts (735 ILCS 5/13-205 (West 2012)), as Citibank filed suit on September 22, 2009, so any alleged charges between December 10, 2003 (when Covaci allegedly opened the credit card account), through September 22, 2009, were barred. Covaci asserted that Citibank did not sufficiently plead an account stated theory based on an unwritten contract as it failed to attach copies of the terms and conditions that applied in all of the years in which transactions occurred. Further, Covaci contended that the account statements attached to Citibank's complaint were inadmissible as they were prepared for purposes of litigation and lacked a proper foundation. Covaci argued that under section 2-606, Citibank had to provide the underlying contract and statement of account for its account stated allegations.

¶ 8 Citibank filed a response to the motion on February 28, 2013, arguing that it pursued an account stated theory in the second amended complaint because additional documents became available after the first amended complaint was dismissed. Citibank denied withholding evidence and explained that the application agreement was not necessary under an accounts stated theory. With respect to the five-year statute of limitations, Citibank asserted that Covaci's last payment to Citibank posted on November 14, 2008, and Citibank filed its complaint less than one year later on September 22, 2009. Covaci filed a reply on April 5, 2013. The circuit court entered an order denying the motion to dismiss on April 18, 2013, and ordered Covaci to answer the complaint.

¶ 9 Covaci filed an answer on May 30, 2013, and raised eight affirmative defenses: Citibank's claim was (1) legally insufficient, (2) barred by unclean hands, (3) illegal under Illinois law, (4) illegal under federal law, (5) would result in unjust enrichment, (6) Citibank's damages were limited to real or actual damages, (7) Citibank lacked standing, and (8) the claim was barred by the statute of limitations. In addition, Covaci brought a counterclaim under the Illinois Consumer Fraud and Deceptive Business Practices Act (815 ILCS 505/1 *et seq.* (West 2012)) based on two letters Citibank sent Covaci which Covaci claimed were inaccurate and deceptive. Covaci alleged that Citibank sent him a letter on January 20, 2011, which stated that a judgment was entered against him on October 26, 2009, and that he owed $12,455.60. The

second letter was dated March 30, 2012, and stated that Covaci owed $13,627. Covaci argued that no judgment had been entered against him when he received the letters and the amount demanded was different than that set forth in the complaint.

¶ 10 On July 23, 2013, Citibank filed a motion to strike and dismiss Covaci's counterclaim pursuant to section 2-619 of the Code. Citibank maintained that the two letters were sent as a result of a clerical error by Citibank's law firm. Citibank explained that Covaci's account was opened with Citibank in 2003, and Covaci or an authorized purchaser charged purchases and made payments to the account over six years, but the account fell into default and was charged off in June 2009. Citibank filed the original complaint and made numerous attempts to serve Covaci. Citibank explained that during one such attempt, Citibank's law firm inadvertently entered a code denoting the entry of a default judgment in Citibank's computer system instead of the code for issuing an alias summons, and the case thus lay dormant for almost two years. During the interim, two computer-generated letters were sent to Covaci offering to settle the account and incorrectly stated that a judgment had been entered and showed an incorrect balance with judgment interest. The mistake was discovered during an audit in 2012; an alias summons was then issued and Covaci was served, almost two years after the original complaint was filed. Citibank argued that, as the letters were mistakenly sent and contained isolated misstatements resulting from an inadvertent clerical error, Citibank did not intend for Covaci to rely on any misrepresentations. Citibank also argued that Covaci had not stated with specificity his damages and failed to show that he suffered any actual damages. Citibank noted that Covaci did not need to drive down to the circuit court to verify that no judgment had been entered against him as this information was available online, and he also could have called Citibank or its law firm. Citibank noted that Covaci likely did not call because this would have notified Citibank that Covaci had never been served with the previous complaint. Citibank also noted that, in the counterclaim, Covaci sought damages from Citibank and its attorneys, Blatt, Hasenmiller, Leibsker & Moore LLC, but the firm was not an existing party to the lawsuit and could not be sued.

¶ 11 Covaci filed a response to Citibank's motion to dismiss, arguing that Citibank failed to attach an affidavit to support its motion, that Citibank's intent was clear from the letters it sent him, and that he incurred actual damages in having to travel to the clerk of court to verify the information in the letters. In Citibank's reply, it countered that its motion was sufficient and did not require an affidavit, Covaci could not show that Citibank intended to deceive Covaci into

paying a higher amount than he owed, Covaci failed to plead with specificity what damages he suffered, and Citibank's law firm was not an existing party to the lawsuit and could not be sued.

¶ 12 On September 24, 2013, the circuit court granted Citibank's motion to dismiss Covaci's counterclaim, with prejudice, and set the case for trial. Following a bench trial, the court entered judgment for Citibank in the amount of $10,921.11, in addition to costs, on December 4, 2013.[1] On January 3, 2014, Covaci moved for reconsideration pursuant to section 2-1203 of the Code (735 ILCS 5/2-1203 (West 2012)). The circuit court denied the motion to reconsider on January 15, 2014. Covaci filed a timely notice of appeal from the April 18, 2013, order denying Covaci's motion to dismiss the second amended complaint, the September 24, 2013, order dismissing his counterclaim, the December 4, 2013, order awarding final judgment to Citibank, and the January 15, 2014, order denying Covaci's motion to reconsider.

¶ 13 B. Case No. 09 M1 177024

¶ 14 On September 15, 2009, 2010, Citibank brought suit in Case No. 09 M1 177024 against Covaci to recoup the balance owed on another credit card account in the amount of $26,143.41. Citibank alleged that the account was opened in May 2000 and Covaci failed to make payments. Citibank attached an affidavit from a Citibank employee regarding the balance due and a printout of the balance owed on the account through June 24, 2009. Similar to the other case, Covaci filed a motion to dismiss the complaint based on Citibank's failure to attach a copy of the contract on which its breach of contract claim was based. The circuit court granted the motion but gave Citibank leave to file an amended complaint.

¶ 15 Citibank subsequently filed a first amended complaint on August 23, 2012, setting forth a claim for the amount due based on an account stated theory of liability. Citibank attached numerous account statements and copies of payments made by Covaci, including the last

[1] No transcript or bystander's report of the trial were provided in the record. See Ill. S. Ct. R. 323 (c) (eff. Dec. 13, 2005) ("If no verbatim transcript of the evidence of proceedings is obtainable the appellant may prepare a proposed report of proceedings"). We note that plaintiff indicates in its statement of facts that Steve Sabo, a custodian of records for plaintiff, testified about monthly billing statements and copies of payments that were presented at trial. We also note that although defendant's notice of appeal listed the orders following the bench trial which granted judgment in favor of plaintiff, defendant focuses his arguments on appeal on the trial court's decision to deny his motions to dismiss and grant plaintiff's motion to dismiss his counterclaim. It is the appellant's burden to support a claim of error on appeal and any issue with respect to the trial court's factual findings or legal conclusions "cannot be reviewed absent a report or record of the proceeding. [Citation.] *** Without an adequate record preserving the claimed error, the reviewing court must presume the circuit court had a sufficient factual basis for its holding and that its order conforms with the law." *Corral v. Mervis Industries, Inc.*, 217 Ill. 2d 144, 156-57 (2005).

payment made by Covaci on October 20, 2008. Citibank also attached a memo indicating that the application for the credit card account was no longer available because applications were kept for seven years and the account originated on May 1, 2000. Citibank attached an affidavit from an employee regarding the account and amount due. Covaci moved to dismiss the first amended complaint for failure to adequately plead its claim or attach the contract. The circuit court granted the motion to dismiss and allowed Citibank leave to file a second amended complaint.

¶ 16 Citibank filed a second amended complaint on December 14, 201, alleging that Covaci entered into an agreement with Citibank in May 2000 to open a charge account, Covaci was issued an account number, and Covaci accepted and utilized the account, thereby agreeing to all the terms and conditions in the card agreement. Citibank alleged that it sent Covaci statements detailing the charges and amount owed, and Covaci did not object to the statements and made occasional payments. Citibank alleged that Covaci failed to make all of the required payments and the account had a balance of $26,143.41. Citibank attached copies of a credit card agreement dated 2006 containing terms and conditions, numerous account statements, copies of checks from Covaci to Citibank for payments, and an affidavit from an employee regarding the amount due on the account.

¶ 17 Covaci filed a motion to dismiss the second amended complaint on January 24, 2013, pursuant to sections 2-606, 2-615, and 2-619 of the Code (735 ILCS 5/2-606, 2-615, 2-619 (West 2012)). Covaci asserted that Citibank intentionally destroyed the original credit card application, the cause of action was time barred, Citibank's claim was legally insufficient under section 2-606 (735 ILCS 5/2-606 (West 2012)) as it did not attach the terms that were in effect throughout the duration of the account, Citibank relied on inadmissible evidence as the account statements were not originals and were not authenticated, and Citibank failed to provide the underlying contract and a complete account history.

¶ 18 Citibank filed a response on February 28, 2013, arguing that it sufficiently stated a basis for recovery under an account stated theory, that it was not required to attach a copy of the contract because it did not plead a breach of contract claim, that Covaci failed to dispute the correctness of the account statements that were attached to the second amended complaint, and that the action was not barred by the statute of limitations. Covaci filed a response on April 5, 2013, reiterating its previous arguments. On April 18, 2013, the circuit court entered an order

denying Covaci's motion to dismiss and directing Covaci to file an answer to the second amended complaint.

¶ 19 Covaci then filed an answer to the second amended complaint and raised eight affirmative defenses: (1) the claim was legally insufficient, (2) unclean hands, (3) the claim was illegal under Illinois law, (4) the claim was illegal under federal law, (5) unjust enrichment, (6) Citibank was limited to real or actual damages, (7) Citibank lacked standing, (8) the claim was barred by the statute of limitations. The parties thereafter filed interrogatories, requests for admission of facts, and disclosure statements.

¶ 20 On December 4, 2013, the trial court entered an order providing that judgment was entered against Covaci after a bench trial in the amount of $26,143.41, plus costs. Covaci moved to reconsider and vacate the judgment, arguing as before that Citibank was required to allege and prove all the terms of the contract for the duration of the account. The trial court denied the motion to reconsider on January 15, 2014. Covaci filed a timely notice of appeal from the April 18, 2013, December 4, 2013, and January 15, 2014, orders.

¶ 21 II. ANALYSIS

¶ 22 On appeal, Covaci asserts that the trial court erred in denying his motions to dismiss the second amended complaints in both cases because Citibank was required to plead and prove the terms of the credit card agreements for the entire life of the accounts, the written contract/credit card application initially provided by Citibank in Case No. 09 M1 179377 was unsigned, Citibank admitted in a memo to intentionally destroying the written contract in Case No. 09 M1 177024, and Citibank's claims were barred by the statute of limitations.

¶ 23 Citibank counters that the trial court did not err in denying the motion to dismiss its second amended complaints because the complaints adequately set forth an action based on an account stated theory, it was permissible to change the theory upon which Citibank sued Covaci, Citibank did not intentionally or fraudulently destroy the credit card application and the application was not needed to support its second amended complaints, and its claims were not barred by the statute of limitations because Citibank filed suit in both cases less than one year after Covaci's last payments on each account.

¶ 24 A. Standard of Review

¶ 25 When reviewing the circuit court's decision on a motion under section 2-615 of the Code, this court examines "whether the allegations of the complaint, when construed in the light most favorable to the plaintiff, and taking all well-pleaded facts and all reasonable inferences which may be drawn from those facts as true, are sufficient to establish a cause of action upon which relief may be granted." *Dratewska-Zator v. Rutherford*, 2013 IL App (1st) 122699, ¶ 14. Any exhibits attached to the complaint "are considered part of the pleading for every purpose." *Id.* "Mere conclusions of law or facts unsupported by specific factual allegations in a complaint are insufficient to withstand a section 2-615 motion to dismiss." *Ranjha v. BJBP Properties, Inc*., 2013 IL App (1st) 122155, ¶ 9. In a section 2-619 motion to dismiss, the moving party "admits the legal sufficiency of the complaint, but asserts an affirmative defense or other matter to defeat the plaintiff's claim." *Van Meter v. Darien Park District*, 207 Ill. 2d 359, 367 (2003). The court views the pleadings and any supporting documentary evidence " 'in the light most favorable to the nonmoving party.' " *Id.* at 367-68 (quoting *In re Chicago Flood Litigation*, 176 Ill. 2d 179, 189 (1997)). For motions to dismiss under either section 2-615 or 2-619 of the Code, "our standard of review is *de novo*." *Kean v. Wal-Mart Stores, Inc.*, 235 Ill. 2d 351, 361 (2009).

¶ 26 B. Covaci's Motions to Dismiss Citibank's Second Amended Complaints

¶ 27 Relying on *Razor Capital v. Antaal*, 2012 IL App (2d) 110904, and *Garber v. Harris Trust & Savings Bank*, 104 Ill. App. 3d 675, 679 (1982), Covaci asserts that Citibank failed to properly plead the terms of the unwritten contracts here because it only attached generic terms and did not link them to the terms of the accounts or show that they were communicated to Covaci. Covaci notes that Citibank attached a generic set of terms dated 2011 to its second amended complaint in Case No. 09-M1-179377, which was after the account was closed (in November 2008), and Citibank attached generic terms dated 2006 to its second amended complaint in Case No. 09-M1-177024, but the account was allegedly active from May 2000 to October 2008. Covaci argues that Citibank must provide every version of the terms that were in effect for each of the charges Covaci incurred over the life of the account.

¶ 28 We find Covaci's reliance on *Razor Capital* to be misplaced. This Second District case involved a breach-of-contract cause of action to recoup amounts owed on a credit card account. *Razor Capital*, 2012 IL App (2d) 110904, ¶ 30. The issue was whether the plaintiff had sufficiently plead a breach-of-contract claim based on an unwritten agreement where the complaint failed to allege that (1) there was a contract between the parties, (2) a contract was

formed each time the credit card holder used the card, or (3) the terms of the contract, and the plaintiff attached generic terms to the complaint without linking these terms to the account or indicating that they had been communicated to the card holder. *Id.* ¶¶ 31-34. In *Razor Capital*, the court held that, when pleading a cause of action based on an unwritten credit card contract, the plaintiff must provide allegations or documents containing the terms of the agreement, and must allege that these terms pertained to the defendant's account, that the defendant was mailed the agreement or it was communicated to him, and that the defendant agreed to these terms by subsequently using the credit card. *Id.* ¶¶ 33-34.

¶ 29 In contrast, in the present cases, Citibank pursued an account stated claim in the second amended complaints.

> "The concept of 'account stated' has been explicated in several definitions. For example, it has been defined as an agreement between parties who have had previous transactions of a monetary character that all the items of the accounts representing such transactions are true and that the balance struck is correct, together with a promise, express or implied, for the payment of such balance. [Citations.] It has also been defined as an agreement between two parties which constitutes a new and binding determination of the balance due on indebtedness arising out of previous transactions of a monetary character, containing a promise, express or implied, that the debtor shall pay the full amount of the agreed balance to the creditor." *Motive Parts Company of America, Inc. v. Robinson*, 53 Ill. App. 3d 935, 938 (1977).

¶ 30 An account stated requires the mutual assent of both parties, that is, a meeting of the minds as to the correctness of the account, which is "usually the result of one party rendering a statement of account to which the other party acquiesces." *W.E. Erickson Construction, Inc. v. Congress-Kenilworth Corp.*, 132 Ill. App. 3d 260, 267 (1985) (citing *La Grange Metal Products v. Pettibone Mulliken Corp.*, 106 Ill. App. 3d 1046, 1053 (1982); *Motive Parts Company of America, Inc. v. Robinson*, 53 Ill. App. 3d 935, 938 (1977)).[2]

> "The form of acquiescence is immaterial and the meeting of the minds may be inferred from the conduct of the parties and the circumstances of the case. Where a

[2] In contrast, when a breach of contract is alleged in the context of a credit card agreement, courts have held that the issuance of the card and cardholder agreement constitute an offer to extend credit and use of the card constitutes acceptance; consequently, a separate contract is formed each time the credit card is used. *Portfolio Acquisitions, LLC v. Feltman*, 391 Ill. App. 642, 649 (2009).

> statement of account is rendered by one party to another and is retained by the latter beyond a reasonable time without objection, this constitutes a recognition by the latter of the correctness of the account and establishes an account stated." *W.E. Erickson Construction,*132 Ill. App. 3d at 267 (citing *La Grange Metal Products*, 106 Ill. App. 3d. at 1053; *Allied Wire Products, Inc. v. Marketing Techniques, Inc*., 99 Ill. App. 3d 29 (1981); *Motive Parts Company of America*, 53 Ill. App. 3d at 939).

See also Chicago & Eastern Illinois R. Co. v. Martin Brothers Container & Timber Products Corp., 87 Ill. App. 3d 327, 330 (1980) (same).

¶ 31 "Repeatedly it has been held that where a statement of account is rendered by one party to another and is retained by the latter beyond a reasonable time without objection, this constitutes a recognition by the latter of the correctness of the account and establishes an account stated." *Allied Wire Products*, 99 Ill. App. 3d at 40. See also *La Grange Metal Products* 106 Ill. App. 3d 1046, 1053 (1982) ("the retention of the statement of account without objection within a reasonable time constitutes an acknowledgment and recognition by the latter of the correctness of the account and establishes an account stated").

¶ 32 We find that Citibank sufficiently pleaded its claims against Covaci based on an account stated theory of liability to withstand Covaci's motions to dismiss. According to Citibank's second amended complaint, and as supported by the exhibits attached to it, Covaci regularly used the credit card accounts to make purchases over the span of several years. Citibank rendered statements of account that it mailed to Covaci throughout the life of the accounts, which showed the various charges that Covaci made to the accounts. As Citibank points out, the statements indicated that any term terms and conditions were attached to the statements. Citibank also provided copies of payments that Covaci made on the accounts over the years. However, Covaci eventually failed to continue making payments and defaulted on the accounts, and the accounts were charged off on May 26, 2009, and June 22, 2009, respectively. Covaci's continued use of the credit card accounts and payments made to Citibank demonstrated his acceptance of them and the attendant terms and conditions. Additionally, at no point did Covaci raise an objection with respect to the statements of account that he received from Citibank as to the correctness or accuracy of the amounts owed. Rather, he retained them "beyond a reasonable time without objection." *Allied Wire Products*, 99 Ill. App. 3d at 40. As noted, "[t]he meeting of the minds

may be inferred from the conduct of the parties and the circumstances of the case ***." *W.E. Erickson Construction,*132 Ill. App. 3d at 26.

¶ 33 Covaci nevertheless contends that Citibank's claims must fail because it did not attach the application agreements for the credit cards, and therefore failed to prove that any contracts existed. Specifically with regard to Case No. 09-M1-179377, Covaci argues that in Citibank's original complaint, it attached an unsigned application, but this contract was void because it was not signed by Covaci. Covaci asserts that Citibank intentionally omitted this document in its second amended complaint because it would defeat its case. With regard to Case No. 09-M1-177024, Covaci argues that Citibank indicated in a memo attached to its first amended complaint that it destroyed the original credit application because it only keeps records for seven years, that Citibank intentionally destroyed this evidence and therefore should not be permitted to use secondary evidence to prove its case.

¶ 34 Section 2-606 of the Code provides that "[i]f a claim or defense is founded upon a written instrument, a copy thereof, or of so much of the same as is relevant, must be attached to the pleading as an exhibit or recited therein." 735 ILCS 5/2–606 (West 2012). Pursuant to this section, which "generally applies to instruments being sued upon, such as contracts or agreements" a plaintiff is "statutorily required to attach to their complaint the written instruments upon which their claim is based." *Law Offices of Colleen M. McLaughlin v. First Star Financial Corp*., 2011 IL App (1st) 101849, ¶ 32. A complaint may be dismissed where a plaintiff fails to comply with section 2-606. *Sherman v. Ryan*, 392 Ill. App. 3d 712, 733 (2009).

¶ 35 However, as discussed, the application agreements were not necessary to support Citibank's claims under an account stated theory of liability. An account stated is "founded upon a promise to pay that debt, not the original promise to pay under the contract." *Patrick Engineering, Inc. v. City of Naperville*, 2012 IL 113148, ¶ 56. As an account stated "raises a new cause of action between the parties, matters of anterior liability which are pertinent to a cause of action upon the original contract, such as lack or failure of consideration, may not be raised as defenses because the action is founded upon the promise to pay the balance ascertained and not upon the original contract[,]" although exceptions are recognized for fraud, error, or mistake. *Chicago & Eastern Illinois R. Co.*, 87 Ill. App. 3d at 330. Thus, a failure to object within a reasonable time creates an account stated and precludes consideration of affirmative defenses

based on the original contract. *Id.* In the present cases, proof of the original credit card contract was not one of the necessary elements of establishing liability based on an account stated theory.

¶ 36 Although Citibank's prior complaints alleged breach of contract claims, both of the second amended complaints set forth account stated theories of liability. It is well established that the most recent amended complaint controls and supersedes earlier complaints where the amended complaint does not refer to or adopt the original complaint. *Foxcroft Townhome Owners Association v. Hoffman Rosner Corp.*, 96 Ill. 2d 150, 154 (1983) ("allegations in former complaints, not incorporated in the final amended complaint, are deemed waived.") "Where an amendment is complete in itself and does not refer to or adopt the prior pleading, the earlier pleading ceases to be a part of the record for most purposes, being in effect abandoned and withdrawn." *Bowman v. County of Lake*, 29 Ill.2d 268, 272 (1963). Here, Citibank amended the complaint twice, with permission of the trial court, and Citibank's second amended complaints did not refer to or adopt the prior complaints. As such, the second amended complaints supersede these earlier pleadings and the breach-of-contract claims are no longer at issue.

¶ 37 Further, there is no support for Covaci's contention that Citibank intentionally omitted the unsigned credit card application in its second amended complaint in Case No. 09 M1 179377 because the application was not signed by Covaci. As explained, Citibank is proceeding on an account stated theory and Citibank's complaint alleges that a credit card was issued to Covaci, Covaci charged numerous purchases to the account over its lifetime, Citibank issued periodic statements to Covaci for the charges on the account, and Covaci occasionally made payments but ultimately failed to pay the full amount due. For the same reasons, we also reject Covaci's argument that Citibank intentionally destroyed the credit card application in Case No. 09 M1 177024 and therefore we should infer fraud.

¶ 38 Finally, Covaci asserts that both of Citibank's claims are barred by the statute of limitations. The parties do not dispute that the five-year statutory time limit applies to Citibank's claims here. "[A]ctions on unwritten contracts, expressed or implied *** and all civil actions not otherwise provided for, shall be commenced within 5 years next after the cause of action accrued." 735 ILCS 5/13-205 (West 2012). Covaci contends that *Portfolio Acquisitions*, 391 Ill. App. 3d at 649, and *Garber,* 104 Ill. App. 3d at 678-79, should be read to conclude that each separate unwritten contract created by each individual use of a credit card constitutes a separate oral agreement with a separate five-year statute of limitations period. Citibank contends that

Covaci misinterprets these rulings and *Garber* should not apply to the present circumstances as it did not involve a statute of limitations issue.

¶ 39 Illinois courts have generally held that the issuance of a credit card and a cardholder agreement constitutes a standing offer to extend credit and each time a credit card is used, a separate contract is formed. *Portfolio Acquisitions*, 391 Ill. App. 3d at 649; *Garber*, 104 Ill. App. 3d at 678-79. Generally, an action accrues when the plaintiff knows or reasonably should know of the injury and that the injury was wrongfully caused. *Continental Casualty Co., Inc. v. American National Bank & Trust Company of Chicago*, 329 Ill. App. 3d 686, 700-01 (2002). However, "[t]he five year statutory period commences with either the charge off date or the last date of payment." *Parkis v. Arrow Financial Services, LLS*, No. 07 C 410, 2008 WL 94798 (N.D. Ill. Jan. 8, 2008).[3] As alleged by Citibank, Covaci's last payment to Citibank in Case No. 09 M1 177377 was on November 14, 2008, and Citibank therefore timely instituted suit on September 22, 2009, less than one year after the last payment. Regarding Case No. 09 M1 177024, Citibank alleged that the last payment was posted on October 20, 2008, and Citibank filed a timely complaint on September 15, 2009.

¶ 40 C. Dismissal of Covaci's Counterclaim

¶ 41 Covaci argues that the trial court erred in granting Citibank's motion to dismiss his counterclaim in Case No. 09-M1-179377 because he adequately pleaded a claim that Citibank and its law firm violated the Illinois Consumer Fraud and Deceptive Business Practices Act (Consumer Fraud Act) (815 ILCS 505/1 *et seq.* (West 2012)) by sending Covaci two letters stating that a judgment had been entered against him and listing an inaccurate amount due. Covaci argues that the misrepresentation involved a consumer credit card account and Citibank's intent that he rely on the misrepresentation was evident from the letters. He argues that Citibank also failed attach an affidavit to support its motion to dismiss. We find that the trial court properly dismissed the counterclaim for the several reasons that follow.

¶ 42 The Consumer Fraud Act "is a regulatory and remedial statute intended to protect consumers, borrowers and business persons against fraud, unfair methods of competition, and other unfair and deceptive business practices. [Citation.] The Act is to be liberally construed to

[3] We recognize that "[u]npublished federal decisions are not binding or predecential in Illinois courts." *King's Health Spa, Inc. v. Village of Downers Grove*, 2014 IL App (2d) 130825, ¶ 63. However, "nothing prevents this court from using the same reasoning and logic as that used in an unpublished federal decision" where we find it to be persuasive. *Id*.

effectuate its purpose." *Cripe v. Leiter*, 184 Ill. 2d 185, 190-91 (1998). Section 2 of the act prohibits "[u]nfair methods of competition and unfair or deceptive acts or practices, including but not limited to the use or employment of any deception, fraud, false pretense, false promise, misrepresentation or the concealment, suppression or omission of any material fact, with intent that others rely upon the concealment, suppression or omission of such material fact ***." 815 ILCS 505/2 (West 2012).

¶ 43 "In order to adequately plead a cause of action under the Consumer Fraud Act, a plaintiff must allege: (1) a deceptive act or practice by the defendant; (2) the defendant's intent that the plaintiff rely on the deception; (3) that the deception occurred in the course of conduct involving trade or commerce; and (4) actual damage to the plaintiff (5) proximately caused by the deception." *Aliano v. Ferris*, 2013 IL App (1st) 120242, ¶ 24. "A consumer fraud violation must be pled with the same particularity and specificity required for common law fraud claims." *Kindernay v. Hillsboro Area Hospital*, 366 Ill. App. 3d 559, 575-76 (2006).

¶ 44 Covaci contends that Citibank's motion to dismiss should have been denied because it failed to attach an affidavit to support the motion. However, this court has determined that a motion to dismiss may be supported by a certification of a portion of the motion. *Griffin*, 274 Ill. App. 3d at 1063. "Under Section 1-109 of the Code of Civil Procedure, a certified pleading may be used 'as though subscribed and sworn to under oath.' " *Id.* (quoting (735 ILCS 5/1-109 (West 1992)). In *Griffin*, the court held that the party's "certification of a portion of the defendant's motion to dismiss is the equivalent of an affidavit under Illinois Supreme Court Rule 191, which governs affidavits filed under Section 2-619 of the Code." *Id.* Here, Citibank properly supported its motion to dismiss the counterclaim because the motion included a certification pursuant to section 1-109 of the Code.

¶ 45 Citibank argues that the court properly dismissed the counterclaim because it did not intend to deceive Covaci as the letters were sent inadvertently. As a companion argument, Citibank also argues that as the letters were sent inadvertently, it did not intend for Covaci to rely on them.

¶ 46 We do not find the first argument to be persuasive. A party alleging a claim for deceptive acts under the Consumer Fraud Act "need not establish any intent to deceive on the part of the defendant because even an innocent misrepresentation may be actionable under the Act." *Cripe*, 184 Ill. 2d at 191. See also *Nava v. Sears, Roebuck & Co.*, 2013 IL App (1st) 122063, ¶ 20

(noting that neither the "deceptive act or practice" nor the intent that the party rely on the deceptive act requires an intent to deceive). "The plaintiff need not show that a defendant intended to deceive but only that it intended the plaintiff to rely on its act or information. [Citation.] Even an innocent or negligent misrepresentation, therefore, may be actionable under the Consumer Fraud Act." *Griffin v. Universal Casualty Co.*, 274 Ill. App. 3d 1056, 1065 (1995).

¶ 47 However, Citibank's second argument, that Citibank did not intend for Covaci to rely on the letters, defeats Covaci's claim. As noted above, in a pleading certified pursuant to section 1-109 of the Code, Citibank established that these two letters were sent by inadvertence. This allegation stands unrebutted and thus must be taken as true for the purposes of the motion to dismiss. *Napleton v. Great Lakes Bank, N.A.*,408 Ill. App. 3d 448, 450-51 (2011); *Barrett v. Fonorow*, 343 Ill. App. 3d 1184, 1189 (2003). It follows as a matter of simple logic that if a party did not intend to make a statement, then that same party had no intent for anyone to rely on it. As Covaci has not shown that Citibank had the intent for Covaci to rely on the letters his counterclaim fails to establish a key element of the Consumer Fraud Act claim.

¶ 48 Additionally, Covaci's counterclaim fails for a more general reason. "The Act is not applicable to every wrong caused to a consumer." *Skyline International Development v. Citibank*, 302 Ill. App. 3d 79, 85 (1998). Consumer Fraud Act actions are often brought in conjunction with fraud or breach of contract actions. However, "[a] single course of conduct by a defendant toward a plaintiff is not enough to impose liability under the Consumer Fraud Act because consumers are not affected generally. If [the] plaintiffs were allowed to allege a violation of the Consumer Fraud Act in a controversy involving an isolated act, they would effectively supplant Illinois common law of contracts and fraud." *Neumann v. John Hancock Mutual Life Insurance Co.*, 736 F. Supp. 182, 185 (N.D. Ill. 1990).[4] See *Exchange National Bank v. Farm Bureau Life Insurance Company of Michigan*, 108 Ill. App. 3d 212, 216 (1982) ("Every individual breach of contract between two parties does not amount to a cause of action cognizable under the [Consumer Fraud] Act. If it did, common law breach of contract actions would be supplemented in every case with an additional and redundant remedy. Such is not the intention of the Consumer Fraud Act."). We note that although the Consumer Fraud Act was amended after *Neumann* was decided to allow plaintiffs to recover damages without being required to show an

[4] We recognize that lower federal court decisions are at most persuasive authority and are not binding on Illinois courts. *Hope Clinic for Women, Ltd. v. Flores*, 2013 IL 112673, ¶ 78.

effect on consumers generally, Illinois courts have "continue[d] to adhere to the rule that '[e]very individual breach of contract between two parties does not amount to a cause of action under the Act.' " *Lake County Grading Company of Libertyville, Inc. v. Advance Mechanical Contractors*, 275 Ill. App. 3d 452, 459 (1995) (quoting *Law Offices of William J. Stogsdill v. Cragin Federal Bank for Savings*, 268 Ill. App. 3d 433, 437-38 (1995). "Indeed, if litigants could invoke the Act merely by alleging an intentional or fraudulent breach of a contract, common-law breach of contract actions would be supplemented in every case with an additional and redundant remedy under the Act." *Id.* "[C]ourts have consistently resisted attempts by litigants to portray otherwise ordinary breach of contract claims as causes of action under the Act." *Id.* As such, courts continue to adhere the rule that "where a plaintiff attempts to allege a violation of the Act in a case which appears on its face to involve only a breach of contract, the relevant inquiry is 'whether the alleged conduct *** implicates consumer protection concerns.' " *Id.* (quoting *Downers Grove Volkswagen, Inc. v. Wigglesworth Imports*, Inc. 190 Ill. App. 3d 524, 534 (1989)). We find that this line of reasoning applies equally to cases involving an underlying claim for breach of contract or fraudulent misrepresentation.

¶ 49 We find *Skyline* to be particularly instructive here. In *Skyline*, the defendant Citibank sent a wire transfer at the plaintiff corporation's request. *Skyline International Development*, 302 Ill. App. 3d at 81. However, a principal of the corporation gave Citibank the wrong account information for the recipient of the transfer. *Id.* at 81-82. Once the mistake was discovered it was too late to stop the transfer. *Id.* Nevertheless, a Citibank employee assured the principal that he would recall or cancel the wire. *Id.* As a result, the corporation's principal sent another wire transfer for the same amount of money to the correct account. *Id.* One month later, Citibank notified the corporation that its account was being debited for the first wire transfer as despite its attempts it was unable to recall the funds. *Id.* at 82. The corporation brought suit, and among other claims, asserted a claim under the Consumer Fraud Act. *Id.* Summary judgment for the corporation was granted by the trial court on the Consumer Fraud Act claim. *Id.* This court reversed the grant of summary judgment for the corporate plaintiff and entered judgment for Citibank. *Id.* at 85. In reversing, we held that we did not believe that the Consumer Fraud Act "was intended to apply [to] an isolated misstatement like the one at issue here." *Id.* Further, we found that "[t]his is not the type of misstatement that raised the consumer protection concerns the Act was intended to address." *Id.*

¶ 50 Similarly, in the case at bar, the counterclaim concerns an isolated misstatement that resulted from a misplaced keystroke. Such conduct does not implicate the consumer protection concerns of the Consumer Fraud Act and as a result the dismissal of the counterclaim was not error.

¶ 51 As we find that, for the above reasons, the dismissal of the counterclaim was not error, we decline to address the additional claims of Citibank that damages were not sufficiently shown and that Citibank's law firm should not have been named in the counterclaim.

¶ 52 III. CONCLUSION

¶ 53 Based on the foregoing, we affirm the circuit court's decisions denying Covaci's motions to dismiss Citibank's second amended complaints and its decision to dismiss the counterclaim with prejudice. As a result, the judgments in favor of Citibank are affirmed.

¶ 54 Affirmed.