[Cite as *Unifund CCR Partners Assignee of Palisades Collection, L.L.C. v. Childs*, 2010-Ohio-746.]

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

UNIFUND CCR PARTNERS ASSIGNEE OF PALISADES COLLECTION, LLC :

Plaintiff-Appellee : C.A. CASE NO. 23161

v. : T.C. NO. 08 CVF 00033

TODD CHILDS : (Civil appeal from Municipal Court)

Defendant-Appellant :

:

. . . . . .

O P I N I O N

Rendered on the 26th day of February, 2010.

. . . . . .

STACIE E. BARHORST, Atty. Reg. No. 0072711, 901 W. Jackson Street, Suite 301, Chicago, Illinois 60607
Attorney for Plaintiff-Appellee

TODD CHILDS, 2530 McCall Street, Dayton, Ohio 45408
Defendant-Appellant

. . . . . .

DONOVAN, P.J.

{¶ 1} Pro se defendant-appellant Todd Childs appeals a decision of the Dayton Municipal Court, Civil Division, in which the trial court sustained the motion for summary judgment of plaintiff-appellee Unifund CCR Partners (hereinafter "Unifund"). The trial court filed a judgment entry sustaining Unifund's motion on November 25, 2008. Childs

filed a timely notice of appeal with this Court on December 17, 2008.

I

{¶ 2} On August 21, 1995, Childs opened a credit card account issued by Citibank, South Dakota, N.A.[1] On December 27, 2004, Citibank charged off the account after Childs failed to make the requisite payments and defaulted on the account.

{¶ 3} On January 3, 2008, Unifund, claiming that it had purchased the account from Citibank, filed a complaint against Childs. The complaint made claims for breach of contract, promissory estoppel, and unjust enrichment. Unifund alleged in the complaint that Childs owed a principal sum of $4,218.90, plus accrued interest of $4,488.98, for a total sum of $8,707.88.

{¶ 4} Childs filed an answer in which he alleged that South Dakota's statute of limitations applied, and Unifund's claims were time barred as a result. Childs also stated that Unifund failed to attach documentation to the complaint regarding "interest payments" and "late fees." The trial court construed Childs' answer to be a motion for a more definite statement pursuant to Civ. R. 10(D), and ordered Unifund to serve Childs with a "copy of the final original credit card account statement showing the name and address of the debtor, the account number, the interest rate, and the final balance due on the account ***."

{¶ 5} Shortly thereafter, Unifund filed the charge-off statement on the account and provided a copy of the requested documentation to Childs. Childs subsequently filed a response in which he stated that the address listed on the account statement "did not exist

[1]The number of the account involved in this appeal ends with the numbers "7664."

and is an erroneous address." Childs further claimed that he had been living at a different address for 21 years. Childs also reasserted his claim that South Dakota's three-year statute of limitations served to bar Unifund's claims.

{¶ 6} On July 10, 2008, Unifund served Childs with interrogatories, requests for production, and requests for admission. Childs did not respond to any of the requested discovery items. Unifund filed a motion for leave to file summary judgment with an attached memorandum on October 1, 2008. In its motion, Unifund asserted that by failing to respond to the requests for admission, Childs was deemed to have admitted liability for the account and the existing balance. In response, Childs again claimed that he never lived at the address listed on the account and that South Dakota's statute of limitations barred Unifund's claims against him.

{¶ 7} On November 25, 2008, the trial court sustained Unifund's motion for summary judgment and issued a judgment against Childs in the amount of $8,707.88, plus interest in the amount of 8.00% per annum. The trial court issued a notice of final appealable order on December 1, 2008.

{¶ 8} It is from this judgment that Childs now appeals.

II

Standard of Review

{¶ 9} An appellate court reviews an award of summary judgment de novo. *Grafton v. Ohio Edison Co.* (1996), 77 Ohio St.3d 102, 105, 671 N.E.2d 241. We apply the same standard as the trial court, viewing the facts in the case in a light most favorable to the non-moving party and resolving any doubt in favor of the non-moving party. *Viock v.*

Stowe-Woodward Co. (1983), 13 Ohio App.3d 7, 12, 467 N.E.2d 1378.

{¶ 10} Pursuant to Civil Rule 56(C), summary judgment is proper if:

{¶ 11} "(1) No genuine issue as to any material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the party against whom the motion for summary judgment is made, that conclusion is adverse to that party." *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 327, 364 N.E.2d 267. To prevail on a motion for summary judgment, the party moving for summary judgment must be able to point to evidentiary materials that show that there is no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law. *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 293, 662 N.E.2d 264. The non-moving party must then present evidence that some issue of material fact remains for the trial court to resolve. *Id*.

III

{¶ 12} Although not stated as such, Childs essentially advances four assignments of error on appeal. Those assignments are as follows: a) that South Dakota's three-year statute of limitation should bar Unifund's claims; b) that the address on the account statement filed by Unifund was not his address and that he was not the individual who signed the original credit card agreement; c) that he did not receive a time-stamped copy of the judgment rendered against him by the trial court; and d) that Unifund's retainer of different appellate counsel requires that the case be dismissed in its entirety.

A.

{¶ 13} In his first assignment, Childs contends that South Dakota's three-year statute of limitations bars Unifund's claims for breach of contract, promissory estoppel, and unjust enrichment. Childs points out that the credit card account was closed on December 27, 2004, and Unifund did not file its complaint until January 3, 2008. In support of his argument, Childs relies on a provision in the original credit card agreement which states "[t]he terms and conditions of this Agreement shall be governed by federal law and the law of South Dakota, where we are located."

{¶ 14} We review a trial court's choice-of-law determination under a de novo standard. *Callis v. Zilba* (2000), 136 Ohio App.3d 696, 698. "In choice-of-law situations, the procedural laws of the forum state, including applicable statutes of limitations, are generally applied." *Lawson v. Valve Trol. Co.* (1991), 81 Ohio App.3d 1, 4, citing *Howard v. Allen* (1972), 30 Ohio St.2d 130.

{¶ 15} "The Ohio Supreme Court has adopted the Restatement (Second) of Conflict Laws as the governing law for Ohio conflicts issues. *Lewis v. Steinrich* (1995), 73 Ohio St.3d 299; *Morgan v. Biro Mfg. Co., Inc.* (1984), 15 Ohio St.3d 339. When a conflict arises between two states' statutes of limitations, the Restatement provides: An action will be maintained if it is not barred by the statute of limitations of the forum, even though it would be barred by the statute of limitations of another state. Restatement (Second) of Conflict Laws § 142(2). Section 142(2) thus requires Ohio courts to apply Ohio's statute of limitations to breach of contract actions brought in Ohio, even if the action would be time-barred in another state. See *Males v. W.E. Gates & Associates* (1985), 29 Ohio Misc.2d 13 (applying Ohio's fifteen year statute of limitations to a breach of contract action that

would have been barred by Virginia's five-year statute)[.]" *Cole v. Mileti* (C.A.6, 1998), 133 F.3d 433, 437. "Absent an express statement that the parties intended another state's statute of limitations to apply, the procedural law of the forum governs time restrictions on an action for breach[.]" *Id.*

{¶ 16} In light of the foregoing, we find that Ohio law governs in deciding the correct statute of limitations to apply in the instant case. Unifund argues that the fifteen-year statute of limitations contained in R.C. § 2305.06 should control. We note, however, that R.C. § 2305.06 is limited to contracts or agreements in writing. Although Unifund attached the Citibank credit card account agreement to its complaint, Unifund failed to submit evidence of Childs' signature on an application for the credit card. Thus, as we recently found in *Unifund CCR Partners v. Hemm*, Miami App. No. 08-CA-36, 2009-Ohio-3522, an issue of fact exists "whether the contract was reduced to writing, so that it is not clear, as a matter of law, that the fifteen-year statute of limitations applies."

{¶ 17} However, we note that Ohio recognizes that the issuance and use of a credit card can create a legally binding agreement. *Bank One, Columbus, N.A. v. Palmer* (1989), 63 Ohio App.3d 491. R.C. 2305.07 provides that " *** an action upon a contract not in writing, express or implied, or upon a liability created by statute other than a forfeiture or penalty, shall be brought within six years after the cause thereof accrued." Thus, we conclude that even without an agreement reduced to writing, the claim would not be barred.

{¶ 18} "Likewise, Unifund's claims for equitable estoppel and unjust enrichment are governed by the six-year statute of limitations of R.C. 2305.07, since they arise out of a claim regarding an implied contract. *LeCrone v. LeCrone*,

Franklin App. No. 04AP-312, 2004-Ohio-6526, ¶20; *Cully v. St. Augustine Manor* (Apr. 20, 1995), Cuyahoga App. No. 67601, *4." *Unifund CCR Partners v. Hemm*, Miami App. No. 08-CA-36, 2009-Ohio-3522.

{¶ 19} In the instant case, Childs acknowledged that the cause of action arose when the credit card account was closed on December 27, 2004. Unifund filed suit on January 3, 2008, which clearly falls within the six-year limitations period for actions sounding in breach of contract, promissory estoppel, and unjust enrichment. Thus, the trial court did not err in failing to dismiss Unifund's claims against Childs based on the applicable statute of limitations.

{¶ 20} Moreover, Childs was mistaken when he stated that the statute of limitations in breach of contract cases in South Dakota was three years. S.D.C.L § 15-2-13 states in pertinent part:

{¶ 21} "Except where, in special cases, a different limitation is prescribed by statute, the following civil actions other than for the recovery of real property *can be commenced only within six years after the cause of action shall have accrued:*

{¶ 22} *"(1) An action upon a contract, obligation, or liability, express or implied* ***."

{¶ 23} Based upon the clear language in the statute, Unifund had six years from the date that the action arose (December 27, 2004) in which to file suit for breach of contract. Were we to apply South Dakota law in the instant case, we would still find that Unifund's action against Childs was not time barred.

{¶ 24} Childs' first assignment of error is overruled.

B.

{¶ 25} In his second assignment of error, Childs essentially argues that Unifund filed suit against the wrong individual. In support of his argument, Childs states that the address listed for the individual who originally opened the account is not his address. Childs also asserts that he has been living at the same address for 21 years.

{¶ 26} Civ. R. 36(A) states in pertinent part:

{¶ 27} "A party may serve upon any other party a written request for the admission, for purposes of the pending action only, of the truth of any matters within the scope of Rule 26(B) set forth in the request that relate to statements or opinions of fact or of the application of law to fact ***. The matter is admitted unless, within a period designated in the request, not less than twenty-eight days after service thereof *** the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter ***."

{¶ 28} "It is *** settled law in Ohio that unanswered requests for admission render the matter requested conclusively established for the purpose of the suit." *Cleveland Trust Co. v. Willis* (1985), 20 Ohio St.3d 66, 67. Moreover, a motion for summary judgment may be based on such admitted matter. *St. Paul Fire & Marine Ins. Co. v. Battle* (1975), 44 Ohio App.2d 261. "Failure to answer is not excused because the matters requested to be admitted are central or non-central to the case or must be proven by the requesting party at trial. See *Youssef v. Jones* (1991), 77 Ohio App.3d 500." *Klesch v. Reid* (1994), 95 Ohio App.3d 664, 674. "[W]here a party files a written request for admission, a failure of the opposing party

to timely answer the request constitutes a conclusive admission pursuant to Civ. R. 36 and also satisfies the written answer requirement of Civ. R. 56(C) in the case of summary judgment." *Id*. at 675.

{¶ 29} Litigants who choose to proceed pro se are presumed to know the law and correct procedure, and are held to the same standards as other litigants. *Yocum v. Means* (July 26, 2002), Darke App. No. 1576, 2002-Ohio-3803. A litigant proceeding pro se "cannot expect or demand special treatment from the judge, who is to sit as an impartial arbiter." *Id*.

{¶ 30} When Childs failed to respond to Unifund's requests for admission, he conclusively admitted liability for the credit card account at issue. Specifically, by failing to respond, Childs admitted the following: 1) that he applied for the credit card at issue; 2) that he received the credit card with an account number ending in 7664; 3) that he received a cardmember agreement when he received the card; 4) that he used the card to purchase goods and services, as well as draw cash advances; 5) that he made payments to Citibank for the credit card account; 6) that he received monthly billing statements; 7) that he was responsible for the account; and 8) that he owed the sum of $4,218.90 plus interest at the rate of 24.99% accruing from December 27, 2004 when the account was closed by Citibank for nonpayment. Since Childs was deemed to have admitted responsibility for nonpayment of the credit card account by virtue of having failed to provide responses to Unifund's requests for admissions, Childs cannot now claim that he was not the individual who was liable for the account. Thus, the trial court did not err when it sustained Unifund's motion for summary judgment against Childs.

{¶ 31} Childs' second assignment of error is overruled.

C.

{¶ 32} In his third assignment of error, Childs contends that he "never received a time-stamped file judgment from the court stating that a judgment was rendered against me and the reasons for the judgment."

{¶ 33} Initially, we note that the trial court filed its judgment entry sustaining Unifund's motion for summary judgment on November 25, 2008. On December 1, 2008, the trial court filed a final appealable order in the instant case which was sent to both parties. Shortly thereafter on December 17, 2008, Childs filed a notice of appeal of the trial court's decision. Thus, the alleged failure of the trial court to send Childs a copy of the judgment entry sustaining Unifund's motion for summary judgment was harmless insofar as it did not adversely affect Childs' ability to file a timely notice of appeal with this Court.

{¶ 34} Childs' third assignment of error is overruled.

D.

{¶ 35} In his fourth and final assignment of error, Childs argues that the entire case should be dismissed because Unifund retained different counsel to prepare and litigate the appeal in the instant case. Clearly, it is not unusual for a litigant to hire different counsel to replace the attorney utilized at the trial level for the purposes of handling an appeal. Nor does the substitution of different appellate counsel require the underlying judgment to be vacated. Childs' argument in this regard is frivolous and will not be addressed further.

{¶ 36} Childs' fourth assignment of error is overruled.

IV

{¶ 37} All of Childs' assignments of error having been overruled, the judgment of the trial court is affirmed.

. . . . . .

BROGAN, J. and GRADY, J., concur.

Copies mailed to:

Stacie E. Barhorst
Todd Childs
Hon. Dennis J. Greaney