

DEBT COLLECTION FOR NON-CONSUMER LAWYERS

GENERAL RULE: Debt need not be in writing to be enforceable except the following:

- Agreement to pay someone else's debt. N.C.G.S. § 22-1.
- Agreement to pay debt discharged in prior bankruptcy. N.C.G.S. § 22-4.
- Consumer credit installment sale (i.e. car loan). N.C.G.S. § 25A-28.
- Agreement to buy goods worth less than \$500. N.C.G.S. § 25-2-201.
- Land leases for more than three years. N.C.G.S. § 22-2.
- Contracts for sale of real property. N.C.G.S. § 22-2.

PERSONAL INJURY

—Liens

N.C.G.S. § 44-49 et seq.

Lien "cram down method" --Lien cannot exceed 50% of the amount of damages recovered less attorneys' fees---but not costs. N.C.G.S § 44-50. When dealing with multiple liens you should pay them on a pro-rata basis (proportion of each lien to the 50% available to pay all liens)

BUT if you use the "cram down method" any lien holder can exercise its rights under N.C.G.S. § 44-50.1. Lien holder can request a certification with sufficient information to demonstrate that the distribution was pro rata and consistent with N.C.G.S § 44-50. "The certification.. shall include a statement of all of the following: (1) The total amount of the settlement, (2) The total distribution to lien holders, the amount of each lien claimed, and the percentage of each lien paid, (3) The total attorney's fees." N.C.G.S. § 44-50.1(a).

—Subrogation claims

—Assignment of claims

—Medical records copy costs N.C.G.S. § 90-411

Pages 1-25 @ 75 cents per page; pages 26-100 @ 50 cents per page; pages 101 and beyond @ 25 cents per page OR a minimum charge of \$10.00 may be imposed.

WORKERS' COMPENSATION

—N.C.G.S § 97-90(e) prohibits a medical provider from billing a worker for medical treatment or services as long as the WC case is still pending. A medical provider who knowingly charges or otherwise holds a worker financially

responsible for the cost of any services provided for a compensable injury is guilty of a Class 1 misdemeanor. N.C.G.S § 97-88.3(c).

Employers/carriers are responsible for paying for authorized services up to the point of the denial of the worker's injury claim. North Carolina Industrial Commission Workers' Compensation Rule 407(7).

—Medical records copy costs--N.C.G.S. § 97-26.1

Pages 1-40 @ 50 cents per page; pages 41 and beyond @ 20 cents per page OR a minimum charge of \$10.00 may be imposed which includes searching, handling, copying, and mailing medical records.

FAMILY LAW

—Joint obligors a/k/a co-signors. Creditor need not release either obligor and each obligor is jointly and severally liable for the debt

—Doctrine of necessities: (1) services or goods were provided to the spouse; (2) the services or goods were necessary for the health and well-being of the receiving spouse; (3) the person against whom the action is brought was married to the person to whom the necessary services or goods were provided at the time such services were provided; and (4) the payment for the necessities has not been made. *North Carolina Baptist Hospital v. Harris*, 319 N.C. 347, 354 S.E.2d 471 (1987); *Moses H. Cone Memorial Hosp. Operating Corp. v. Hawley*, 195 N.C. App. 455, 457, 672 S.E.2d 742, 743 (2009).

Exception: Spouses were separated + the provider of the necessary services or goods had actual notice of the spouses' separation at the time the services were rendered or the goods supplied. *Forsyth Memorial Hospital v. Chisholm*, 342 N.C. 616, 621, 467 S.E.2d 88, 90-91 (1996).

GENERAL RULES IN DEBT COLLECTION CASES

■ Statute of limitations on recovery of debt is 3 years after claim arises on account (i.e. breach by debtor) BUT bar of SOL may be avoided if:

- (1) debtor acknowledged the obligation within 3 years of action being filed [*Whitley's Elec Service v. Sherrod*, 238 S.E.2d 607, 293 NC 498 (1977)] AND
- (2) debtor manifested definite and unqualified intent to pay debt. *American Multimedia Inc. v. Freedom Distributing Inc.*, 384 S.E.2d 32, 95 N.C. App. 750 (1989).

New promise to pay a debt fixes new run date on SOL BUT promise must be in writing to be binding. N.C.G.S § 1-26; *Norris v. Belcher*, 358 S.E.2d 79, 86 N.C. App. 459 (1987).

■ Definition of account stated:

- (1) a calculation of the balance due;

- (2) submission of a statement to plaintiff;
 - (3) acknowledgment of the correctness of that statement by plaintiff; and
 - (4) a promise, express or implied, by plaintiff to pay the balance due.
- Carroll v McNeill Industries*, 296 N.C. 205, 250 S.E.2d 60 (1978).

■ A party need not expressly acknowledge the correctness of the statement if, after receipt thereof, the party fails "to deny liability for a reasonable time." *Brooks v. White*, 187 N.C. 656, 658, 122 S.E. 561, 562 (1924). Instead, "[t]he agreement [as to the correctness of an acct] may be . . . implied by failure to object within a reasonable time after the other party has calculated the balance and submitted a statement of the acct." *Mazda Motors*, 36 N.C. App. 1, 18, 243 S.E.2d 793, 804 (1978).

■ Choice of law clauses--usually valid BUT contract must specify exactly which state's law applies. *Smither v. Asset Acceptance*, 919 N.E.2d 1153, 2010 Ind. App. LEXIS 4 (2010).

KEY NOTE: In actions filed in NC, NC statutes of limitations apply. In matters of procedure, North Carolina courts apply the rule of *lex fori* and adhere to the procedural rules of the forum state. *Charnock v. Taylor*, 223 N.C. 360, 361, 26 S.E.2d 911, 913 (1943). Additionally, North Carolina law "is dispositive on whether an issue is substantive or procedural." *Williams v. Riley*, 56 N.C. App. 427, 429, 289 S.E.2d 102, 104 (1982). Under North Carolina law, a statute of limitations is a procedural device, and in actions in North Carolina courts, the forum's statute of limitations must be applied. *Sayer v. Henderson*, 225 N.C. 642, 643, 35 S.E.2d 875, 876 (1945).

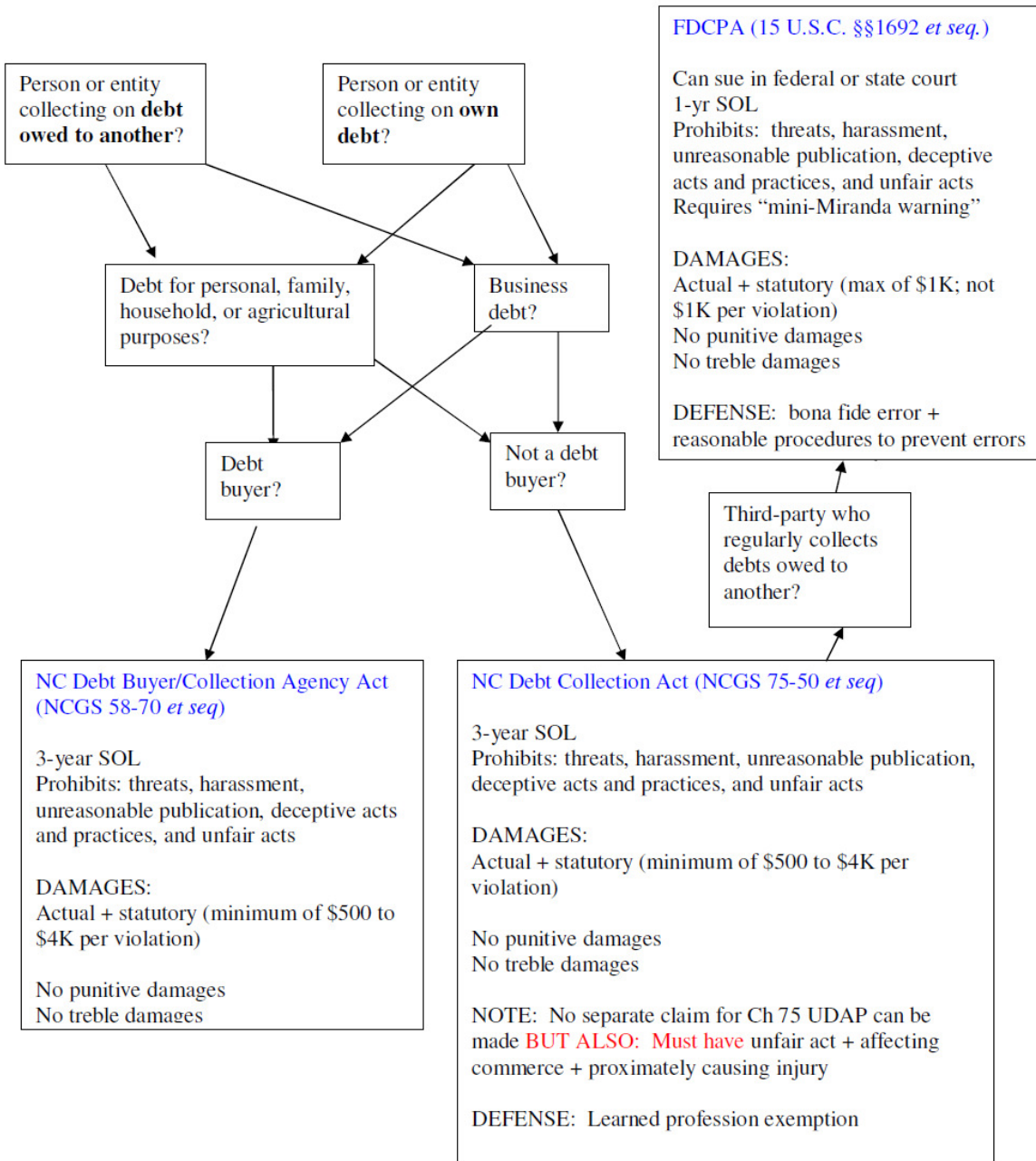
■ Choice of forum clauses—If contract made is NC, clause specifying an out-of-state forum is invalid. N.C.G.S § 22B-3. But this provision does not apply to contracts that are not for family, personal, household, or agricultural purposes.

■ Attorneys' fees clauses— In contracts governed by NC law attorneys' fees clauses are unenforceable except for "obligation to pay attorney fees related to a note, conditional sale contract, or other evidence of indebtedness." N.C.G.S § 6-21.2. Statutory cap of 15% of balance due AND claimant must have provided written notice of intent to pursue attorneys' fees at least five days before claiming fees.

ADDITIONAL RESOURCES

- Contact a member of the Consumer Areas of Practice Section of your NCAJ!
- Bankruptcy issues: www.nacba.org and Family Lawyer's Guide to Bankruptcy, American Bar Association (2d. Ed., 2009).
- Legal Aid: www.legalaidnc.org
- Manuals and resources re debt collection issues and abuses: www.nclc.org

DEBT COLLECTION DEFENSE



NORTH CAROLINA

IN THE GENERAL COURT OF JUSTICE

DISTRICT COURT DIVISION

ALEXANDER COUNTY

10 CvD 579

AMERICAN EXPRESS CENTURION BANK,)
Plaintiff,)

vs.)

) ANSWER AND
) COUNTERCLAIMS
) (AOC Code: ANSR)

DAVID F. CHARPENTIER,)
Defendant.)

Now comes the Defendant responding to the allegations of the Plaintiff as follows:

FIRST DEFENSE---MOTION TO DISMISS

The Complaint fails to state a claim against the Defendant upon which relief may be granted and should therefore be dismissed pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure.

SECOND DEFENSE---STATUTE OF LIMITATIONS

Defendant pleads the statute of limitations as an affirmative and absolute defense to the claims of Plaintiff's Complaint. The contract balance sued upon was due and payable over four years ago and the right of action thereon was barred by the statute of limitations prior to the commencement of this action.

THIRD DEFENSE---LACHES

Plaintiff is guilty of laches in not commencing this action within a reasonable time in that the contract sued upon was due and payable over four years ago and the right of action thereon was barred by the statute of limitations prior to the commencement of this action.

FOURTH DEFENSE---ANSWER

Defendant responds to the number paragraphs of Plaintiff's Complaint as follows:

1. Admitted upon information and belief.
2. Admitted.

3. Admitted.
4. Admitted that Defendant accepted the aforesaid charge card and agreed to certain terms and conditions via said acceptance but Defendant does not possess or retain a copy of said agreement and lacks information and belief to admit acceptance of the terms and conditions set forth in the Agreement Plaintiff attached to its Complaint in this action. Therefore the remaining allegations of paragraph 4 of the Complaint are denied.
5. Admitted.
6. Denied.
7. Defendant reincorporates his responses to paragraphs 1 through 6, inclusive, of the Complaint as if fully stated herein.
8. Denied.
9. Denied.
10. Defendant reincorporates his responses to paragraphs 1 through 9, inclusive, of the Complaint as if fully stated herein.
11. Admitted that Defendant received certain monthly statements of account from Plaintiff. The remaining allegations of paragraph 11 of the Complaint are denied.
12. Denied.
13. Denied.
14. Defendant reincorporates his responses to paragraphs 1 through 14, inclusive, of the Complaint as if fully stated herein.
15. Denied.
16. Defendant acknowledges receipt of Plaintiff's "Notice to Defendant" pursuant to N.C.G.S. § 6-21.2 and denies Plaintiff's entitlement to the relief sought therein. Defendant contends the statements in the paragraph entitled "Notice to Defendant" do not require a response from Defendant but to the extent it is deemed otherwise, Defendant denies Plaintiff's claimed entitlement to the relief sought thereby.
17. Defendant prays the Plaintiff have and recover nothing on its claims, and that its claims be dismissed with prejudice with Plaintiff to bear his own costs.

FOR A FURTHER ANSWER AND DEFENSE AND COUNTERCLAIM

Counterclaim I--Violation of North Carolina Debt Collection Practices Act

18. The Defendant herein incorporates the allegations made in paragraphs 1 through 17 above.

19. Plaintiff constitutes a debt collector under Article 2 of Chapter 75 of the North Carolina General Statutes as interpreted by the courts of North Carolina.

20. Plaintiff's Complaint falsely represents the character, extent, and amount of the debt against Defendant.

21. Plaintiff's Complaint, which constitutes a legal proceeding, falsely represents the status of the debt against Defendant.

22. Plaintiff's Complaint falsely represents that an existing obligation of the consumer may be increased by the addition of attorney's fees, interest, and other charges and fees.

23. Plaintiff's Complaint seeks acknowledgment of a debt barred by the statute of limitations.

24. Plaintiff's actions as set forth above are in violation of Article 2 of Chapter 75 of the North Carolina General Statutes and have caused the Defendant actual damages in an amount to be determined at trial.

25. Plaintiff's actions also entitle the Defendant to an award of statutory civil penalties and damages pursuant to N.C. Gen. Stat. § 75-56.

Counterclaim II-- Unfair and Deceptive Acts and Practices

26. The Defendant herein incorporates the allegations made in paragraphs 1 through 25 above.

27. The North Carolina Unfair and Deceptive Trade Practices Act provides that "[u]nfair or deceptive acts or practices in or affecting commerce are declared unlawful." N.C. Gen. Stat. § 75-1.1(a).

28. Plaintiff's actions set forth herein violate North Carolina law as illegal, unfair, and deceptive acts or practices in the conduct of any trade or commerce because they are inherently deceptive.

29. Plaintiff's actions proximately caused harm to Defendant and proximately caused harm to North Carolina consumers in that said actions were capable of being deceptive in their effect upon an average consumer.

30. By reason of Plaintiff's actions, Defendant has been actually damaged in an amount in to be proven at trial. In addition, the damages to the Defendant should be trebled pursuant to N.C. Gen. Stat. § 75-16 and Defendant should be allowed to recover attorneys' fees pursuant to N.C. Gen. Stat. § 75-16.1.

PRAYER FOR RELIEF

WHEREFORE, the Defendant prays this Court for relief as follows:

- A. Award the Defendant a sum in excess of \$4,000 as compensation for his damages incurred as a result of the Plaintiff's violation of the North Carolina Debt Collection Act (N.C. Gen. Stat. § 75-50 et seq.) commission of unfair and deceptive trade practices and treble al
- B. Treble all compensatory damages awarded to Defendant for Plaintiff's violations of law;
- C. Award the Defendant statutory damages;
- D. Award the Defendant the costs of suit, including any discretionary costs as may be allowable;
- E. Award the Defendant pre-judgment and post-judgment interest;
- F. Award the Defendant reasonable attorney's fees as allowed by law;
- G. Award the Defendant all such other and further relief as the Court deems just and proper under the circumstances.

This the 29th day of October, 2010.

Attorney for Defendant
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NORTH CAROLINA
ALEXANDER COUNTY

IN THE GENERAL COURT OF JUSTICE
DISTRICT COURT DIVISION
10 CvD 579

AMERICAN EXPRESS
CENTURION BANK,

Plaintiff,

vs.

DAVE CHARPENTIER,

Defendant.

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Defendant’s Conversion of previously filed
Rule 12(b)(6) Motion to Defendant’s Motion
for Summary Judgment

NOW COMES the Defendant and moves the court, pursuant to Rule 56 of the North Carolina Rules of Civil Procedure, for an Order dismissing Plaintiff’s claims for relief on the grounds that they are barred by the doctrine of laches and the expiration of the statute of limitations. Defendant attaches to the current pleading a copy of Plaintiff’s Responses to Defendant’s First Set of Interrogatories to Plaintiff and hereby converts the previously filed Motion to Dismiss pursuant to Rule 12(b)(6) to the current Motion for Summary Judgment. Defendant hereby provides Plaintiff with the legally required notice of said conversion which is accompanied by a Calendar Request and Notice of Hearing of the current Motion for Summary Judgment.

This the 1st day of February, 2011.

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NORTH CAROLINA
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IN THE GENERAL COURT OF JUSTICE
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AMERICAN EXPRESS
CENTURION BANK,

Plaintiff,

vs.

DAVE CHARPENTIER,

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**DEFENDANT’S MEMORANDUM OF
LAW IN SUPPORT OF MOTION FOR
SUMMARY JUDGMENT**

Defendant, through his undersigned counsel of record and pursuant to Rule 5(a1) of the North Carolina Rules of Civil Procedure, respectfully submits this memorandum of law in support of his Motion for Summary Judgment.

Summary of Motion

Pursuant to Rule 56 of the North Carolina Rules of Civil Procedure, Defendant is entitled to summary judgment in his favor because the Complaint with attached Cardholder Agreement, Defendant’s Answer and Counterclaims, and Plaintiff’s Responses to Defendant’s First Set of Interrogatories demonstrate on their face that all of Plaintiff’s causes of action are barred by the applicable statute of limitations.

Parties and Pertinent Facts

The Plaintiff is a banking corporation in the business, *inter alia*, of issuing credit cards to consumers. The Defendant is the holder of an American Express Centurion Bank Blue Charge card issued by the Plaintiff. The Complaint alleges Defendant breached his contract with Plaintiff by failing to maintain satisfactory payments on the

card account. The Complaint asserts three causes of action: breach of contract (Count One), account stated (Count Two), and unjust enrichment (Count Three). In each cause of action the Plaintiff asserts the same operative facts via incorporation and reference as to the Defendant's acts and omissions.

The Defendant's Answer asserts the statute of limitations as an affirmative and absolute defense to the causes of action in Plaintiff's Complaint. The Answer further states that Defendant did accept and utilize the charge card issued by the Plaintiff. Solely for the purposes of the current summary judgment motion, Defendant stipulates that he breached his agreement with Plaintiff to maintain payments on the card account.

Arguments

Because the formal pleadings and interrogatory responses by Plaintiff reveal no dispute that the Defendant's alleged acts and omissions occurred more than three years before this action was instituted, all Plaintiff's causes of action are barred by the three-year statute of limitations imposed by N.C. Gen. Stat. § 1-52(1). Summary judgment is appropriate when “..the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law”. N.C. Gen. Stat § 1A-1, Rule 56©. "A defendant may show entitlement to summary judgment by "(1) proving that an essential element of the plaintiff's case is non-existent, or (2) showing through discovery that the plaintiff cannot produce evidence to support an essential element of his or her claim, or (3) showing that the plaintiff cannot surmount an affirmative defense." *Draughon v. Harnett County Bd. of Educ.*, 158 N.C. App. 208, 212,

580 S.E.2d 732, 735 (2003) (quoting *N.C. Gen. Stat. § 1A-1, Rule 56(c)* (2001)), *aff'd per curiam*, 358 N.C. 131, 591 S.E.2d 521 (2004).

I. The facts pertinent to resolving the current motion for summary judgment are not contradicted by the pleadings.

In assessing a motion for summary judgment the Court must consider the evidence in the light most favorable to the non-moving party. *Wallen v. Riverside Sports Center*, 173 N.C. App. 408; 618 S.E.2d 858 (2005); *Liberty Mut. Ins. Co. v. Pennington*, 356 N.C. 571, 579, 573 S.E.2d 118, 124 (2002). As will be shown in Part V. of this Memorandum of Law, *infra*, the evidence taken in the light most favorable to Plaintiff demonstrates there exists no genuine issue of material fact on the issue of the fact that Plaintiff's three causes of action were filed outside of the applicable statute of limitations.

In its interrogatory responses Plaintiff asserts Defendant breached the contract by failing to pay Plaintiff an outstanding balance of \$8,777.78. (Plaintiff's Answer to Interrogatory #1). On June 22, 2005, Plaintiff cancelled the Defendant's account. (Plaintiff's Answer to Interrogatory #1). Plaintiff states Defendant's last usage of the charge account occurred on June 22, 2005. (Plaintiff's Answer to Interrogatory #2). Plaintiff states Defendant's last account payment was received on July 6, 2005. (Plaintiff's Answer to Interrogatory #3).

Thus based on Plaintiff's assertions the last activity on the subject account and the latest possible breach of contract would have occurred on July 6, 2005. In addition to the Court applying the relevant Rule 56 standard of "Plaintiff's assertions are deemed true" thereby leading to the conclusion that Defendant breached the Agreement, for the purposes of the current Rule 56 motion Defendant stipulates that he breached the

agreement with Plaintiff¹. Plaintiff did not file the current civil action until October 4, 2010. (Plaintiff's Complaint).

II. A motion for summary judgment is an appropriate vehicle for asserting a claim is barred by the statute of limitations.

North Carolina courts have long recognized summary judgment as appropriate where the relevant facts show a claim is barred by the statute of limitations. *Pembee Mfg. Corp. v. Cape Fear Construction Co. Inc.*, 313 N.C. 488, 329 S.E.2d 350, (1985); *Marshburn and Marshburn v. Associated Indemnity Corporation*, 84 N.C. App. 365, 353 S.E.2d 123 (1987); *VEPCO v. Tillett*, 80 N.C. App. 383, 343 S.E.2d 188 (1986), *cert. denied*, 317 N.C. 715, 347 S.E.2d 457 (1986). When the only issues present are a matter of law summary judgment is an appropriate remedy. *VEPCO, Id.*

III. The choice of law provision in the contract does not render New York's six-year statute of limitations applicable to the current civil action.

It is well settled that the mere choice of law in an agreement is insufficient to adopt a specific state's statute of limitations to be applied to claims arising out of the agreement or a breach thereof. *Smither v. Asset Acceptance*, 919 N.E.2d 1153, 2010 Ind. App. LEXIS 4 (2010); *Western Video Collectors, L.P. v. Mercantile Bank of Kansas*, 23 Kan. App. 2d 703, 935 P.2d 237, 239 (Kan. Ct. App. 1997). Several other courts have decided that, unless the parties expressly agree to apply the statute of limitations of another state, general choice of law provisions in contracts incorporate only substantive law and do not displace the procedural law of the forum state. *Phelps v. McClellan*, 30 F.3d 658, 662 (6th Cir. 1994); *Gluck v. Unisys Corp.*, 960 F.2d 1168, 1179-80 (3d Cir.

¹ Defendant's stated stipulation is asserted *arguendo* and shall not be deemed a waiver of any defenses, counterclaims, or rights Defendant may have if the Defendant's Motion for Summary Judgment is denied and this litigation continues.

1992); *Federal Deposit Ins. Corp. v. Petersen*, 770 F.2d 141, 142-43 (10th Cir. 1985); *Des Brisay v. Goldfield Corp.*, 637 F.2d 680, 682 (9th Cir. 1981).

In *Smither*, the cardholder obtained a Mastercard credit card from Providian Bank. The cardholder entered into an agreement with Providian which said, in pertinent part, the following: "No matter where you live, this Agreement and your Credit Card Account are governed by federal law and by New Hampshire law." At some point Smither apparently defaulted on the credit card account. Subsequently Asset Acceptance acquired the account and sued Smither in Indiana state court for breach of contract. After a peculiar procedural history that resulted in essentially cross motions for summary judgment, the trial court granted summary judgment in favor of Smither and denied Asset Acceptance's motion for summary judgment. Asset Acceptance appealed to the Indiana Court of Appeals.

In *Smither* the Indiana Court of Appeals relied on the reasoning of the Kansas Court of Appeals in *Western Video Collectors, L.P.*, and upheld the trial court's decision that the Indiana---not the New Hampshire---statute of limitations applied to the lawsuit. In upholding the trial court's grant of summary judgment against Asset Acceptance the Indiana Court of Appeals opined "...contractual choice of law provisions govern only the substantive law of any claims arising out of the contract; the law of the forum state where the suit is filed still governs procedure." *Smither*, 919 N.E.2d at 1157-1158; 2010 Ind. App. LEXIS at 8.

The facts in the current case are remarkably similar to those in *Smither*. In the current case Plaintiff asserts New York's six-year statute of limitations applies. (Plaintiff's Answer to Interrogatory #2). Plaintiff's basis for this assertion is found in the

Cardholder Agreement which was attached to the complaint. The relevant part of the Agreement is the “Applicable Law” paragraph which is found on page 4 at the bottom of the first column of text:

The Agreement and your Account, and all questions about their legality, enforceability and interpretation, are governed by the laws of the state of New York (without regard to internal principles of conflicts of law), and by applicable federal law.

Unfortunately for Plaintiff, the Agreement does not have the language required to render the choice of law applicable to the statute of limitations to be used in enforcing the contract. The Agreement contains no language whatsoever specifically stating that New York’s statute of limitations applies to litigation and disputes arising out of the Agreement. As such, the New York statute of limitations has no applicability to the current case and Plaintiff cannot rely upon the six-year statute of limitations for his action.

IV. Under North Carolina law, the forum’s statute of limitations must be applied to all three claims in Plaintiff’s complaint.

In matters of procedure, North Carolina courts apply the rule of *lex fori* and adhere to the procedural rules of the forum state. *Charnock v. Taylor*, 223 N.C. 360, 361, 26 S.E.2d 911, 913 (1943). Additionally, North Carolina law "is dispositive on whether an issue is substantive or procedural." *Williams v. Riley*, 56 N.C. App. 427, 429, 289 S.E.2d 102, 104 (1982). Under North Carolina law, a statute of limitations is a procedural device, and in actions in North Carolina courts, the forum's statute of limitations must be applied. *Sayer v. Henderson*, 225 N.C. 642, 643, 35 S.E.2d 875, 876 (1945); *Eagle Nation Inc. v. Market Force Inc. et al.*, 180 F. Supp. 2d 752; U.S. Distr.

LEXIS 23699 (2001). Consequently North Carolina's statutes of limitations apply to each of the three causes of action evinced by Plaintiff in its complaint.

V. Each of Plaintiff's three causes of action is barred by the applicable statute of limitations.

When the affirmative defense of the statute of limitations has been pled, the burden is on the plaintiff to show that his cause of action accrued within the limitations period. *Baum v. John R. Poore Builder, Inc.*, 183 N.C.App. 75, 80, 643 S.E.2d 607, 610 (2007) (citations and quotation marks omitted). As to Plaintiff's cause of action for breach of contract, the relevant statute of limitations is set forth in N.C. Gen. Stat § 1-52(1):

Within three years an action -

- (1) Upon a contract, obligation or liability arising out of a contract, express or implied, except those mentioned in the preceding sections or in G.S. 1-53(1).

N.C. Gen. Stat § 1-52(1) “.. begins to run when the claim accrues; for a breach of contract action, the claim accrues upon breach”. *Scott & Jones v. Carlton Ins. Agency Inc.*, 196 N.C.App. 290, 293, 677 S.E.2d 848, 850 (2009); citing *Miller v. Randolph*, 124 N.C.App. 779, 781, 478 S.E.2d 668, 670 (1996) (citations, brackets, and ellipses omitted). As noted above the latest possible date that Defendant could have been deemed to have breached the contract was sometime in 2005. Since Plaintiff's complaint was filed in 2010---over 5 years later---Plaintiff's cause of action breach of contract would necessarily be subject to dismissal pursuant to N.C. Gen. Stat § 1-52(1).

Plaintiff's cause of action for unjust enrichment claim is derivative of and inextricably linked to the cause of action for breach of contract. In North Carolina, the statute of limitations for bringing a cause of action for unjust enrichment is three years.

N.C. Gen.Stat. § 1-52(1), (4) (2007); *Housecalls Home Health Care, Inc. v. State, Dept. of Health and Human Services*, 682 S.E.2d 741 (N.C.App. 2009); *disc. review denied and appeal dismissed*, 363 N.C. 802, 690 S.E.2d 698 (2010); see *Dean v. Mattox*, 250 N.C. 246, 251, 108 S.E.2d 541, 546 (1959). Consequently Plaintiff's cause of action for unjust enrichment is subject to dismissal as being barred by the statute of limitations.

The remaining cause of action found in Plaintiff's complaint is for account stated. However before there is a need to assess the statute of limitations issue Plaintiff must first establish the existence of a valid cause of action for an account stated. An account stated cause of action consists of four basic elements: "(1) a calculation of the balance due; (2) submission of a statement to [the party to be charged]; (3) acknowledgment of the correctness of that statement by [the party to be charged]; and (4) a promise, express or implied, by [the party to be charged] to pay the balance due." *Carroll v. Industries, Inc.*, 296 N.C. 205, 209, 250 S.E.2d 60, 62 (1978). "An account stated is by nature a new contract to pay the amount due based on the acceptance of or failure to object to an account rendered." *Id.*

A review of the relevant allegations and materials reveals that Plaintiff has failed to meet this evidentiary burden and has not established a valid account stated. There is no evidence of any agreement between the parties that the account rendered by Plaintiff to Defendant was correct. The Cardholder Agreement attached the Plaintiff's complaint contains no language establishing Defendant's affirmation of on account stated by waiver or inaction. Further there is no evidence that Defendant ever promised to pay the last balance claimed due by Plaintiff in the amount of \$8,777.78 or the interest and fees associated therewith.

Assuming *arguendo* that Plaintiff has met the prima facie elements for its cause of action for an account stated, this cause of action is still barred by the statute of limitations. Generally the statute of limitations begins to run once a cause of action accrues. *McCutchen v. McCutchen*, 360 N.C. 280, 283, 624 S.E.2d 620, 623 (2006). A cause of action accrues "[a]s soon as the right to institute and maintain a suit arises[.]" *Motor Lines v. General Motors Corp.*, 258 N.C. 323, 325, 128 S.E.2d 413, 415 (1962) (quoting 54 C.J.S., Limitations of Actions § 109)." Consequently an action based on an account stated is subject to a three year statute of limitations. Since the last cognizable account activity or acquiescence by Defendant would have occurred in 2005 (or even in 2006 if one seeks to be generous to the Plaintiff), Plaintiff's right to institute a suit accrued well over three years prior to its October 4, 2010 filing of the current action. Accordingly Plaintiff's cause of action on account stated is time-barred.

Conclusion

Consideration of the pleadings and interrogatory responses of the Plaintiff and the evidence taken in the light most favorable to Plaintiff demonstrates there exists no genuine issue of material fact on the issue of whether the current civil action was filed within the applicable statute of limitations. The latest possible breach of contract by Defendant would have occurred on July 6, 2005. As Plaintiff's complaint was not filed until October 4, 2010, all causes of action stated by Plaintiff therein---breach of contract, account stated, and unjust enrichment--- are all barred by the three-year statute of limitations in N.C. Gen. Stat. § 1-52(1). Therefore Plaintiff's complaint and causes of action asserted therein should be dismissed with prejudice.

This the 16th day of February, 2011.

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CERTIFICATE OF SERVICE

This is to certify that the undersigned has this day served the Defendant's Memorandum of Law in Support of Motion for Summary Judgment in this action by (1) facsimile delivery to 704-332-0005 and (2) depositing a copy of each document, postage prepaid, in the United States Mail, first class, properly addressed to:

Reginald L. Yates---Attorney for Plaintiff
1815 East 7th Street
Charlotte, NC 28024

This the 16th day of February, 2011.

John T. O'Neal— Attorney for Defendant
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