

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT  
IN AND FOR PALM BEACH COUNTY, FLORIDA

CAPITAL ONE BANK,

Appellant,

v.

MICHAEL A. CIACCIA,

Appellee.

APPELLATE DIVISION (CIVIL)  
CASE NO.: 502006AP000095XXXXMB  
L.T.: 502005SC007100XXXXMB  
Division: 'AY'

Amended Opinion filed: **AUG 17 2007**  
(Nunc pro *tunc* for the opinion filed August 2, 2007) ,

**Appeal from the County Court in and for Palm Beach County, Florida**  
**Judge Peter M. Evans.**

For Appellant: Robert J. Orovitz, Esq., 7765 SW 87<sup>th</sup> Ave., Ste. 101, Miami, FL 33173.

For Appellee: Michael A. Ciaccia, 632 NW 25<sup>th</sup> St, Fort Lauderdale, FL 33311.

AFFIRMED.

The Appellant in this case states that the Appellee breached his credit card holder agreement by failing to make timely payments. The Appellant sued the Appellee seeking to recover the debt owed. At the pre-trial conference, the Appellee failed to appear and a default judgment was entered in favor of the Appellant. Concluding that the damages were unliquidated, the trial court set a hearing on the Appellant's Motion for Default Final Judgment to provide the Appellant with an opportunity to present evidence to support its claim for unliquidated damages.

The record reflects that the only evidence provided by the Appellant was a copy of a standard card member agreement and the affidavit of its records custodian. While the complaint and affidavit stated a fixed sum of damages, neither referenced the Appellee's account nor

provided evidence of itemized damages relating to the Appellee's account. The trial court found that the Appellant's evidence of damages was insufficient to support an award of unliquidated damages and entered final judgment in favor of the Appellee.

In Hartford Fire Ins. Co. v. Controltec, Inc., 561 So. 2d 1334, 1335 (Fla. 5th DCA 1990), the court held that "in a contractual setting, liquidated damages exist when a specific sum of money has been expressly stipulated or agreed to by the parties . . . ." Damages, however, do not become liquidated simply because a fixed sum of damages is pled in the complaint. Id. Furthermore, the Fourth District Court of Appeal has held that a fixed sum demanded by a complaint is insufficient to create liquidated damages. Bodygear Activewear, Inc. v. Counter Intelligence Services, 946 So. 2d 1148, 1150 (Fla. 4th DCA 2006). Both Hartford and Bodygear support the trial court's finding that the damages sought by the Appellant were unliquidated where the complaint merely demanded a fixed debt owed.

At the hearing, the trial court held that there was insufficient evidence to prove the unliquidated damages. A decision made by the trial court on factual conflicts in a nonjury case will not be set aside on review unless totally unsupported by competent substantial evidence. Clegg v. Chipola Aviation, 458 So. 2d 1186 (Fla. 1st DCA 1984). Additionally, when issues of fact must be evaluated by an appellate court, a record of the factual context presented to the trial court is necessary in determining whether the trial court misapplied the law. Applegate v. Bamett Bank of Tallahassee, 377 So. 2d 1150 (Fla. 1980). The Appellant did not provide a transcript of the hearing, therefore the record brought before this Court is insufficient to demonstrate that the trial court's decision was not supported by competent and substantial evidence. Id.

We affirm the decision of the trial court holding that the damages alleged in the complaint were unliquidated and find that the trial court did not abuse its discretion when it ruled that the Appellant's damages were insufficiently proven and that the Appellee was entitled to judgment in his favor.

KELLEY, STERN. and MCCARTHY, JJ., concur.