By Order of the Court, *Judge Ramona V. Manglona*

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FOR PUBLICATION

IN THE SUPERIOR COURT
FOR THE
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

BISNES-MAMI (CNMI) INC., dba MID-PAC MICRONESIA,	**CIVIL ACTION NO. 04-0569**
Plaintiff,	**FINDINGS OF FACTS & CONCLUSIONS OF LAW**
vs.	
CANDIDO I. CASTRO, DBA CASTRO & ASSOCIATES,	
Defendant.	

I. INTRODUCTION

This matter came before the Court on a bench trial on September 25 and 26, 2007. Plaintiff appeared by and through its counsel, Michael A. White, Esq. Defendant appeared and was represented by attorney Ramon K. Quichocho, Esq. Plaintiff filed its claim for money due on account from Defendant on November 26, 2004. Plaintiff's evidence introduced and admitted at trial consisted of documentary evidence and the testimony of witness Marisel C. Gatdula, Plaintiff's accountant and custodian of records. Defendant's trial evidence was comprised of the testimony of Defendant Candido I. Castro, the testimony of Defendant's sister, Anna Castro Javier, and further documentary evidence. Based on the evidence presented and the applicable laws, this Court concludes as follows.

II. FINDINGS OF FACTS

1. Plaintiff Bisnes-Mami (CNMI), Inc., is a domestic corporation of the Commonwealth of the Northern Mariana Islands (CNMI) authorized and licensed to do business on Saipan under the trade name Mid-Pac Micronesia. Its business includes providing parts and repair services for small engines and heavy equipment.

2. Defendant Candido I. Castro is a resident of Saipan, CNMI, and at all times relevant to the present action was doing business as Castro & Associates, a sole proprietorship.

3. In October of 1998, Defendant sought repair services from Plaintiff for Defendant's electrical generator located on property owned by Defendant at Agingan Point, Saipan, and leased to an enterprise operating a nightclub facility known as Pacific Castle. On October 26, 1998, in accordance with its usual practice, Plaintiff prepared a written application for credit on behalf of Defendant stating a credit limit of $12,000.00 and assigning an account number of 3434. The application was approved by Plaintiff's manager on October 26th, but was never signed by Defendant. (Def.'s Ex. A).

4. On October 27, 1998, Defendant signed each page of an eight-page invoice prepared by Plaintiff as Invoice No. 109570 on Account No. 3434, showing a charge sale to Defendant of parts and repair services in the amount of $11,855.98. (Pl.'s Ex. 1; Def.'s Ex. D).

5. On October 29, 1998, Defendant signed a second, one-page invoice prepared by Plaintiff as Invoice No. 109716 on Account No. 3434, showing an additional charge sale to Defendant of parts and services in the amount of $1,350.00. (Pl.'s Ex. 2; Def.'s Ex. E).

6. Just over two years later, on December 1, 2000, Plaintiff prepared a third, two-page invoice for further generator repairs as Invoice No. 163777 on Account No. 3434, showing a charge sale to Defendant in the amount of $1,546.00. Both pages of Invoice No. 16377 indicate that the services were requested by "Anna Javier" for charge to Defendant's Account No. 3434 and bear the apparent signatures of Anna Javier. (Pl.'s Ex. 3; Def.'s Ex. G).

7. On each occasion related to the three transactions evidenced by Plaintiff's separate invoices, Plaintiff's employees performed repair services and replaced parts on the same generator owned by Defendant at Pacific Castle. (*Id.*; Test. of Candido I. Castro).

8. Between September 29, 1998 and September 11, 2001, inclusive, Defendant made thirteen payments to Plaintiff, for an aggregate total of $11,957.26 in payments. With the exception of one cash payment for $500.00 made on December 12, 2000, all payments were by check drawn on Defendant's business account. (Pl.'s Ex. 4; Def's Ex. F).

9. At least ten of the checks used by Defendant for payment bear typewritten annotations made by Defendant's employees prior to their tender to Plaintiff. After receiving the checks, Plaintiff's employees also inscribed notes on most checks for Plaintiff's own accounting purposes. The sequence of payments and Defendant's representations marked on the instruments were as shown in the following table. (Pl.'s Ex. 4; Def's Ex. F).

Date	Check No.	Payment Amount	Payor's Annotation
09/29/98	1141	$3,000.00	*Partial payment for Generator repair at Pacific Castle.*
10/28/98	1165	$500.00	*Partial Payment for Pacific Castle Generator repair.*
11/12/98	1171	$1,350.00	-- --
03/12/99	1248	$200.00	-- --
03/30/99	1263	$200.00	*Payment on account for Pacific Castle Generator repairs.*
05/03/99	1281	$500.00	*Partial payment for Generator repairs at Pacific Castle.*
06/22/99	1363	$500.00	*Payment for repair of Pacific Castle Generator.*
12/02/99	1470	$1,407.26	*Partial Payment for repair of Pacific Castle Generator. Totl $8,407.26* *$1,407.26* *New Balance $7,000.00*
01/06/00	1525	$2,000.00	*Balance as of Dec. 31, 1999 $7,140.00* *This payment $2,000.00* *$5,140.00*
03/28/00	1604	$500.00	*Partial payment on account.*
04/11/00	1626	$800.00	*Partial Payment for Pacific Castle account.*
12/12/00	Cash	$500.00	-- --
09/11/01	1853	$500.00	*Payment on account (Partial Payment).*

10. Plaintiff's practice during this period was to make payment due for its services on the tenth day of the month following purchase and to charge its customers interest in the form of a two percent "service charge" per month (24% per annum) on any balance still outstanding after the 15th of the month in which payment is due. (Def.'s Ex. B; Test. of Marisel C. Gatdula).

11. Plaintiff also allocated partial payments between items in its customers' accounts generally in the manner most beneficial to Plaintiff. (Test. of Marisel C. Gatdula). In this case, Plaintiff split Defendant's September 29, 1998 first payment for $3,000.00 by applying $2,730.00 toward the principal amount of the first Invoice No. 109570 and the remaining $270.00 toward the principal of the second Invoice No. 109716. (*Id.*; Pl.'s Ex. 4; Def's Ex. F).

12. Likewise, Plaintiff allocated Defendant's May 3, 1999 payment of $500.00 between the principal amounts Plaintiff determined to be outstanding on the two charges, applying $230.00 to Invoice No. 109570 and $270.00 to invoice No. 109716. Defendant's payments of $2,000.00 on January 6, 2000 and of $800.00 on April 11, 2000 were split three ways, with Plaintiff respectively applying a portion of each to the first two charges, while crediting another portion of each payment toward the Defendant's growing finance charges. Plaintiff allocated the remainder of Defendant's payments, including those made after December 1, 2000, entirely toward discharge of the principal remaining on the initial charge item shown on Invoice No. 109570. (*Id.*).

13. Defendant never instructed Plaintiff orally or in writing as to the manner in which Defendant's payments were to be applied by Plaintiff and never directed that a particular payment should be credited against Plaintiff's charges for one transaction rather than another. (Test. of Candido I. Castro).

14. Defendant's employees maintained a record of the amount owed to Plaintiff and prepared the checks issued for payment by Defendant. As far as Defendant knew at the time, he had only one account with Plaintiff. (*Id.*).

15. Anna Castro Javier is the sister of Defendant Candido I. Castro. Defendant denies ever employing Ms. Javier or ever authorizing her to incur charges with Plaintiff on Defendant's behalf. Ms. Javier denies ever receiving such authority or ever working for Defendant. (*Id.*, Test. of Anna C. Javier).

16. Ms. Javier claims that she never sought repair services from Plaintiff, either for herself or for Defendant. Ms. Javier denies that the signatures on Plaintiff's Invoice No. 16377 were made by her. The signatures on copies of Invoice No. 16377 are substantially similar to authenticated copies of Ms. Javier's signatures appearing on her Social Security card and U.S. Passport, with the exception that the first letter "A" of her name does not appear on copies of the invoice. (Test. of Anna C. Javier; Def.'s Ex. G, I, J.).

17. Defendant does not deny that Plaintiff performed the repair work shown on Invoice No. 16377, dated December 1, 2000. Defendant made two further payments to Plaintiff on December 12, 2000, and September 11, 2001, but did not dispute or make inquiry of Plaintiff regarding the charges shown on Invoice No. 16377.

18. Plaintiff made a written demand to Defendant on or about March 5, 2004 for payment on account within 15 days in the sum of $11,805.84. Defendant has made no payment to Plaintiff after September 11, 2001. (Complaint, Ex. "A.").

19. On December 6, 2004, Plaintiff filed its civil complaint stating a single cause of action against defendant for non-payment of account based upon an outstanding balance of $11,805.84. Plaintiff admitted that the demand amount consisted of less than $3,000.00 in principal arrears and over $8,000.00 in interest as calculated by Plaintiff. (Def.'s Ex. "B" in Supp. of Mot. for Summ. J., filed July 24, 2007).

20. As amended and clarified at trial, Plaintiff now seeks recovery of a principal amount due in the sum of $2,795.02, together with prejudgment interest of $1,518.96 measured at nine percent (9%) per annum from the date of Defendant's last payment, for a total judgment award of $4,313.98, plus allowable costs.

21. Defendant answered and by stipulation filed a First Amended Answer on May 2, 2007, stating a general denial and generally raising the affirmative defenses that Plaintiff has failed to state a claim for relief, failed to join an indispensible party, and that the action is barred by the statute of limitations. (Def.'s First Amended Answer, at 2).

III. CONCLUSIONS OF LAW

A. Defendant's objection to the Court's jurisdiction based upon the statute of limitations and Plaintiff's alleged nonappearance are without merit.

At the time that the present civil action was called for trial, Defendant orally raised two preliminary objections to the trial of the matter before this Court. Defendant contends that the matter may not be heard because Plaintiff, a corporation, appears only through its legal counsel and that no officer, shareholder or director of the corporation has appeared personally to pursue its claims at trial. Defendant also renews arguments raised in a prior motion for summary judgment, contending that Plaintiff's action is barred by the statute of limitations as a matter of law. The consequence of this absolute bar, according to Defendant, is that the Court lacks jurisdiction to adjudicate Plaintiff's claims.

These objections were overruled for reasons explained from the bench. There is no rule requiring the personal appearance by a principal of the corporate plaintiff at trial, or prohibiting it from appearing through legal counsel alone. On the contrary, it would be incongruous to deny a corporation the ability to appear and present its claims through its officer *pro se*, while requiring an appearance by the officer anyway. *Cf.*, *Benevente v. Double One Enters., Inc.*, 4 N.M.I. 299, 300 (1995). Defendant analogizes to Civil Rule 30(b)(6), which requires a corporation to respond to a deposition subpoena by making available to the requesting party designated "officers, directors, or managing agents, or other

persons....” Com. R. Civ. P. 30(b)(6). Defendant has issued no subpoena for trial, however, and it is otherwise the prerogative of Plaintiff to choose the witnesses needed to prove its claims.

Plaintiff is a CNMI corporation based on Saipan and Defendant resides and conducts business on Saipan, CNMI. Defendant was timely served with summons and has generally appeared in defense of Plaintiff’s common law claim for money due on account, which claim arises from the parties’ transactions on Saipan. Jurisdiction and venue are therefore vested in this Court. N.M.I. CONST. ART. IV, § 2; 1 CMC § 3202. Defendant bears the burden of proving that Plaintiff’s claim is procedurally barred by an applicable statute of limitation. Com. R. Civ. P. 8(c), 56(c); *Santos v. Santos*, 4 N.M.I. 206, 210 (1994). Defendant’s affirmative defense entails a determination that a *cause of action* has accrued and that the limitation period has expired, which presupposes the jurisdiction of the Court. *See*, *Chase Securities Corp. v. Donaldson*, 325 U.S. 304, 312 (1945); 51 AM.JUR.2D *Limitations of Actions* § 20. The statute of limitations on a common law action is not jurisdictional, but provides a defense that can be waived. *Id.*; *See, also*, *Vernon v. Heckler*, 811 F.2d 1274, 1277 (9th Cir. 1987). This Court previously determined that Defendant’s asserted defense raises material issues of fact to be resolved at trial. (Order, Aug. 23, 2007). By no more than restating his prior argument in jurisdictional terms, Defendant has not presented a sufficient basis for reconsideration of the Court’s ruling.

B. The six-year limitation period of 7 CMC § 2505 does not bar Plaintiff’s recovery of the entire amount due on Account No. 3434.

The parties stipulate that this action is governed by 7 CMC § 2505 (six-year limitation period) and 7 CMC § 2507 (accrual of action on mutual account or on partial payment). Plaintiff asserts that Defendant had a single credit account with Plaintiff against which Defendant incurred charges and made partial payments between 1998 and 2001, contending that its cause of action for nonpayment of the balance accrues, at the earliest, on the date of the last payment. Defendant argues that Plaintiff’s claim is really based on three separate transactions or “accounts.” According to Defendant, the first of these

transactions was his credit charge for $11,855.98 on October 27, as represented by Invoice No. 109570. The second transaction occurred two days later, when Defendant acquired additional parts and services from Plaintiff for $1,350.00, as shown on Invoice No. 109716. The final transaction for which Plaintiff seeks recovery took place just over two years later, when Anna Javier charged another $1,546.30 for generator repairs as shown on Plaintiff's Invoice No. 163777. Defendant argues that the statutory limitation period in this case must run separately with respect to each transaction. On this basis, Defendant contends that his subsequent payments to Plaintiff must be credited in the order of the transactions, with the result that Plaintiff's first invoice of October 27, 1998 has already been paid in full and that Plaintiff's December 4, 2004 civil suit to recover on the second transaction is fully barred by the statute. Defendant denies responsibility for the charges incurred by Anna Javier and maintains that the statute of limitation now precludes Plaintiff from joining her as a party defendant.

Beyond their initial agreement that Title 7, Commonwealth Code Sections 2505 and 2507 are applicable to Plaintiff's action, neither Plaintiff nor Defendant cite any legal authority to support their respective arguments for the proper characterization of Defendant's obligation. Defendant's counsel rested his argument against Plaintiff's claim on a general appeal to fairness and public policy, and his claim that it is unjust to allow Plaintiff to extend Defendant's obligations by unilaterally splitting his payments between selected charges. Plaintiff's counsel argued that it is self-evident from common practice that when a customer makes several charges with the same merchant, the customer understands that his obligation is to pay the balance, and the merchant will send the customer regular statements to this effect. Plaintiff, however, has not submitted into evidence any copy of such a statement delivered to Defendant in this case. Granted that there is no controlling Commonwealth decisional authority on the precise point at issue, if the parties had cited the rules of the Restatements or the abundant persuasive authority from other jurisdictions addressing this question, they might have profitably selected their proof in accordance with the established rules that do exist.

Defendant's defense rests upon the determination of the time when Plaintiff's cause of action for nonpayment on account accrued against Defendant. Section 2507, Title 7 of the Commonwealth Code specifies the point of accrual for causes of action arising from mutual accounts or where partial payments have been made.

Section 2507 states in its entirety:

> **In an action brought to recover the balance due upon a mutual and open account, or upon a cause of action upon which partial payments have been made, the cause of action shall be considered to have accrued at the time of the last item proved in the account.**

7 CMC § 2507[1]

A "mutual and open account" is an account in which both parties maintain charges or demand items that are capable of setoff against each other, and that remains open in anticipation of future transactions; i.e., it has not been settled by payment or otherwise become "stated." *See*, *Greer Limestone Co. v. Nestor*, 332 S.E.2d 589, 593 (W.Va. 1985); 1 AM.JUR.2D *Accounts and Accounting* § 6; 51 A.L.R.2d 331 § 2. The typical merchant's line of credit with a customer is *not* a "mutual account," because the customer simply receives goods in exchange for debt and satisfies the debt by paying money to the merchant. *Id.* There is no evidence that the parties to the present action ever entered into a mutual account. The applicable portion of the statute, therefore, is the disjunctive clause concerning "partial payments" toward a "cause of action."

Section 2507 of Title 7 succinctly states the general rules governing the accrual of a cause of action on an account. An "account" for this purpose is simply a claim by one person against another that creates a debtor-creditor relationship between them, and a cause of action on the account arises when

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[1] The Commonwealth Supreme Court has not addressed 7 CMC § 2507 in a published opinion. This Court has found one prior CNMI Superior Court opinion applying 7 CMC § 2507. In *NMHC v. Asterio Ruben, et al.*, Small Claims No. 96-0485 (Order Granting Motion to Dismiss, Feb. 10, 1999) (Bellas, AJ), the court cited Section 2507 to hold that the statute of limitations on an action for unpaid rent began to run from the date of the last rent payment. The decision was apparently based upon the second clause in the statute, but the court did not provide an analysis.

there is a present unconditional obligation to pay the debt. *Greer Limestone*, at 592; 1 AM.JUR.2D § 1. An account is "stated" when there is an agreement or recognition by the parties of the balance due on the account with an express or implied promise by the obligor to pay the balance. 1 AM.JUR.2D § 26. "When an account has been stated, the balance, and not the constituent items, constitutes the cause of action thereon." 51 A.L.R.2d 331. The cause of action on a stated account accrues at the time of the statement or at the time agreed upon for when payment is due. *Id.* When a simple "non-mutual" account is open and running, however, the general rule is that a cause of action will accrue to each item of the account severally on the date of the item, and that each action on an item will have its own period of limitation. *Dixie Clamp & Scaffold, Inc. v. Toll Dev. Corp.*, 473 So.2d 729, 730 (Fla.App. 1985); 1 AM.JUR.2D *Accounts and Accounting* § 22.[2] How the parties keep their books may be evidence of an account, but it is not itself determinative of the existence or nature of the account. *Rocky Mountain Helicopters, Inc.*, 773 P.2d 911, 921-922 (Wyo. 1989). In every case, it is the agreement of the parties as evidenced by their objective manifestation of mutual consent which determines the nature of the account and therefore the cause of action to which the relevant limitations statute will attach. *Id.*

The second clause of Section 2507 incorporates the general principle of contract law that a partial payment of a debt may operate as an acknowledgement of the debt by the debtor and thereby

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[2] Separate accrual as to each item in an open account remains the general rule in a majority of jurisdictions, even though the common agreements by which credit is extended typically supplant the rule in practice, at least when the action is for nonpayment. Some states have expressly rejected the general rule by statute or by judicial decision, treating actions on unilateral open accounts as accruing on the date of the last item, just as with actions on mutual accounts. *See*, *Chadwick v. Chadwick*, 22 S.W. 479, 480 (Mo. 1893) ("when the account sued on is a running account *and it is fairly inferable from the conduct of the parties* while the account was accruing, *that the whole was to be regarded as one*, as in the case of a merchant's account against a customer, none of the items are barred by the statute unless all are.") (emphasis added); *Kadrmas, Lee & Jackson, P.C. v. Bolken*, 508 N.W.2d 341, 345 (N.D. 1993) ("We hold partial payments on an open account may, *under the circumstances*… toll the statute of limitations for the entire debt.") (emphasis added); *also*, *Rosati v. Heimann*, 271 P.2d 953, 957 (Cal.App. 1954) (applying CAL. CIV. PROC. CODE § 337(2)). The factual underpinnings of the judicial decisions expressing the minority rule suggest that the results would likely have been the same if the general rule had been applied together with ordinary contract principles and a precise characterization of the accounts in question. *See*, 51 A.L.R.2d 331. The difference between the majority and minority views becomes irreconcilable only with the addition of determinative rules extrinsic to the intention of the parties; for example, if the state's statute of frauds requires the statement of certain kinds of accounts to be in writing. *Id.* The Commonwealth has no statue of this kind applicable to this case. Section 2507 includes, without limitation as to the nature of proof, the contract doctrine of partial payment on an obligation.

serve to revive the limitation period on the original obligation. RESTATEMENT (SECOND) OF CONTRACTS § 82 (1981). In order for the partial payment doctrine to apply, the debtor must make the payment under circumstances in which it is reasonable to infer that the debtor acknowledged the debt, and the acknowledged debt must be the one that the creditor sues upon. *Reznor v. J. Artist Management, Inc.*, 365 F.Supp.2d 565, 578 (S.D.N.Y. 2005). These contract principles are condensed within the statutory language expressing that "the cause of action" that accrues is the one "upon which" partial payments are made.

In this case, Defendant's first charge transaction with Plaintiff was on October 28, 1998. If the parties do not agree otherwise, payment on a credit obligation is considered to be due immediately upon the charge. 1 AM.JUR.2D *Accounts and Accounting* § 11. Plaintiff's expressed practice was to make payment due on the 10th day of the month following he charge, which in this case was November 10, 1998. Applying the six-year limitation period provided by 7 CMC § 2505 to the November 10th date yields a tentative expiration date of November 9, 2004 on Plaintiff's cause of action. If the charges incurred by Defendant are regarded as a series of separate transactions giving rise to independent obligations to pay Plaintiff, the limitation period on an action to recover on Defendant's second charge would have originally expired on November 11, 2004. Plaintiff's action to recover payment on the first two transactions would be barred by the statute because Plaintiff's complaint was not filed until December 6, 2004. Only an action by Plaintiff based on the credit transaction of December 1, 2000, which Defendant denies making, would fall within its original period of limitation.

If Defendant's account were treated as an open "non-mutual" account, application of the rule that a cause of action accrues separately as to each item in the account on the date of the charge would produce the same original limitation periods just noted: Plaintiff's action on the October 1998 charges will be barred and Plaintiff may only maintain its action on the December 2000 charge item. *Greer Limestone*, 332 S.E.2d at 593. Of course, a new limitation period will attach if there is a valid statement

of the account and the original limitation period will be renewed for any cause of action on which the obligor makes partial payment. 7 CMC § 2507. Defendant in this case made thirteen payments toward the whole of his account, with the last payment made September 11, 2001. All of Defendant's payments were made before the expiration of the *original* period of limitation attached to Plaintiff's earliest cause of action. Plaintiff unilaterally accounted for its receipts by splitting four of Defendant's payments between the first and second invoices, the last payment so allocated having been made by Defendant on April 11, 2000. Plaintiff applied Defendant's last payment, made September 11, 2001, entirely to the first invoice. Assuming Plaintiff's right to allocate payments between each charge or "cause of action" in an open account, the limitation periods for Plaintiff's action on the first and second charges would have each started to run, respectively, on September 11, 2001 and April 11, 2000. Therefore, Plaintiff's December 2004 complaint would fall within the six-year period of limitation attaching to each cause of action even on Defendant's characterization, disputed by Plaintiff, that the account sued upon was an open account to which the general rule should apply.

Defendant's counsel argued at trial, without reference to legal authority, that it is contrary to public policy to allow a plaintiff to avoid the bar of the statute of limitations by unilaterally splitting a debtor's undesignated payment and allocating portions of the payment between the debtor's separate obligations. The Court is unaware of any law of the Commonwealth prohibiting such an accounting practice, even when performed for the purpose of tolling the statute of limitations. On the contrary, it is generally held that an undesignated payment by a debtor owing multiple obligations to the same creditor may be applied as the creditor sees fit. *Drake v. Tyner*, 914 P.2d 519, 523 (Colo.App. 1996). "Courts in other jurisdictions have held that when a debtor makes an undesignated payment on multiple debts before the limitations period has expired, the creditor retains the discretion to apply such payment to any debt not yet barred." *Id.*, citing, *Neal v. Gideon*, 138 P.2d 419 (Kan. 1943); *Anderson v. Stanley*, 753 S.W.2d 98 (Mo.App. 1988); 4 R. LORD, WILLISTON ON CONTRACTS § 8:31 (4th ed. 1992). Plaintiff may

apply Defendant's undirected partial payment toward any cause of action not already barred because, in such a case, partial payment alone operates as a sufficient acknowledgement of the debt. *Greer Limestone*, at 596; *Drake v. Tyner*, at 522. Courts applying this rule have reasoned that, because the debtor generally has the right to direct application of his payments but has not specified his intention in making the particular payment, the presumption of acknowledgment should apply equally to all of the debtor's actionable debt items held by the creditor receiving payment, or in other words, to the balance. *Id.*; *Cornell University v. Roth*, 439 N.W.2d 745 (Wis.App. 1989); 1 WILLISTON ON CONTRACTS § 178; 51 AM.JUR.2D *Limitations of Actions* § 260.

The power of a creditor to allocate the debtor's undirected payment to any of the debtor's existing debts is subject to limitations. The Restatement position is that any such application by the creditor will only be effective if it is communicated to the debtor within a reasonable time. RESTATEMENT (SECOND) OF CONTRACTS § 259(1) (1981). Comment b to Section 259 of the Second Restatement of Contracts states:

> *b. Manifestation of intent*. Although application by the creditor requires no consent by the debtor, it is not effective unless within a reasonable time the creditor notifies the debtor or otherwise manifests to him his intention to make the application. Mere entry by the creditor on his books is not enough. What length of time is reasonable depends on the circumstances. Action taken by the creditor after a controversy has arisen between the parties regarding application of the payment is not within a reasonable time.

The Restatement further provides that an application made ineffective by the rule may later be validated by an acknowledgment from the debtor, provided the application is one that the debtor originally could have made. REST. § 259, cmt. e.[3] If neither the creditor nor the debtor has effectively

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[3] The Restatement's rule limiting the creditor's "effective application" of the debtor's undirected partial payment was introduced in the First Restatement of Contracts but appears to have developed only a sparse following. RESTATEMENT OF CONTRACTS § 391 (1932); *See*, *Weston Group v. A. B. Hirschfeld Press, Inc.*, 845 P.2d 1162, 1165-66 (Colo. 1993) (rejecting §259 on the basis of its own precedent and widespread persuasive authority); *F. H. McGraw & Co. v. Milcor Steel Co.*, 149 F.2d 301, 305-306 (2nd Cir. 1945), *cert. denied*, 326 U.S. 753 (finding rule in conflict with N.Y. law).

directed the payment to a particular debt, the court will apply the payments, subject to equities, to discharge first the interest and then the principal on the earliest debt. REST. § 260. Payments are then applied in the same manner to the subsequent remaining debts in order of time. *Id.*

There is no evidence of when Plaintiff first notified Defendant that it had applied Defendant's September 29, 1998 payment, and each of three later payments, between separate items in its account. Therefore it cannot be determined whether or not Plaintiff notified Defendant of its application within a reasonable time under the rule expressed in Restatement § 259. Plaintiff's demand letter to Defendant, dated March 5, 2004, states only a total balance due comprised of a current amount and three periods of arrears. (Complaint, Ex. A). Plaintiff urges its application of payments between the separate charges to rebut Defendant's prima facie showing that Plaintiff's action based on the 1998 transactions is barred by the statute of limitations, but the Restatement rule would only allow such use if Plaintiff also shows that it timely apprised Defendant of its application.

If the three charge items corresponding to Plaintiff's invoices represent separate causes of action and Plaintiff's application of Defendant's undirected partial payments is disregarded, the result is that all of Defendant's payments would be credited to the interest and principal on the original charge of October 27, 1998. REST. § 260. This is the status of the account as argued by Defendant; that Plaintiff's action on the second charge transaction is now barred and Plaintiff's only viable action under the statute is on the December 1, 2000 transaction. The rules which lead to this conclusion, however, presuppose the debtor's obligation to the creditor on multiple debts or the existence of an open account subject to the general rule of separate accrual on each item of charge. They cannot support an inference as to the nature of Defendant's actual obligation. The defense presented to Plaintiff's action essentially rests on the supposition that the characterization of the nature of the account between the parties must be fixed by law, no matter how the parties may have conceived of their rights and obligations at the time of their transactions. Defendant candidly admitted that he thought at the time that he had only one account, but

presses his defense by claiming that a correct legal characterization of the account(s) and a proper application of his payments show that Plaintiff's action is barred by the statute of limitations. (F.O.F. # 14). The Court does not accept this view of the matter. *Rocky Mountain Helicopters*, 773 P.2d at 922.

Defendant advanced the supplemental argument that, just as the partial payment of a debt obligation may operate as an acknowledgment of the debt by the debtor, the same principle should logically apply to treat Plaintiff's allocation of Defendant's undirected payments between the separate charge items in Defendant's account as an acknowledgment by Plaintiff that Defendant in fact owed three separate debt obligations to Plaintiff, rather than a single obligation to pay the balance. Insofar as the accounting practice of a party to an account may be evidence of the nature of the account, the Court agrees that the creditor's application is probative on this issue. Such application is not the equivalent of a payment on an obligation, however, and cannot give rise to the proposed presumption. The partial payment doctrine rests on the notion that a person is unlikely to part with his money on a debt that he is unsure of, but the same cannot be said of the creditor's application of money received on the debtor's account. *See*, *Greer Limestone*, at 596, n. 7.

On the contrary, the preponderance of the evidence presented at the trial of this matter leads this Court to conclude that at the time of the transactions, and throughout the period that Defendant made payments to Plaintiff, both parties understood Defendant to owe one, and not several, obligations to Plaintiff. Each invoice signed by Defendant bore the same account number "3434." Moreover, the multiple checks annotated by Defendant "payment on account" or "partial payment," and particularly Defendant's calculation of the outstanding "balance" on the checks numbered 1470 and 1525, together with the omission of any oral or written indication by Defendant that any individual payment was directed toward a particular charge item, rather than to a single current balance, manifest Defendant's understanding and agreement with Plaintiff that he was obligated on the whole of a single account. *Cf.*, *F. M. Slagle & Co. v. Bushnell*, 16 N.W.2d 914, 920-921 (S.D. 1944) (pattern of payments and precise,

rather than round, figures on checks revealed intention to pay each item rather than on the balance). This conclusion is compelled without effect given to Plaintiff's undated applications of Defendant's payments between separate charges. Defendant generally denied Plaintiff's complaint on May 2, 2007, without objecting to Plaintiff's prayer for relief on a single cause of action for payment on account. That Defendant owed Plaintiff payment on one balance, rather than on multiple debts, is not a fact that Defendant could belatedly discover. This Court therefore finds for the Plaintiff on the issue that Defendant is liable for payment of the whole of the proven balance of Defendant's account with Plaintiff No. 3434.

Defendant disputes the charge on account shown on Plaintiff's Invoice No. 163777, claiming that Anna Javier was never authorized to make the charge on Defendant's behalf and that she never made the charge. In rebuttal of Defendant's claim, Plaintiff produced no testimony from any individual with actual knowledge of the circumstances surrounding the disputed transaction. Plaintiff instead relies upon the invoice itself as an authenticated business record and the testimony of its current accountant that Plaintiff's consistent policy has always required its manager to personally verify the authority of any person attempting to place a charge on the account of a customer prior to the issuance of an invoice. Plaintiff thus proffers the existence of the invoice itself as a basis for the inference that one of its managers adhered to its policy by exercising reasonable commercial prudence to verify the authority of the person charging to Defendant's account and accurately did so on that occasion. Such an inference is insufficient to sustain Plaintiff's burden of proof on this issue.

The full factual circumstances actually proven in this matter, however, lead decisively in Plaintiff's favor. Defendant does not dispute the $1,546.00 figure shown on Plaintiff's December 1, 2000 invoice or that the amount represents the value of the work performed by Plaintiff on Defendant's generator, only that the work was authorized by Defendant. Defendant, however, allowed the repairs to be made in December 2000, making two subsequent payments without protest to Plaintiff on December

12, 2000 and September 11, 2001, noting that the last payment was "Payment on account (Partial Payment)." The balance demanded by Plaintiff includes the amount charged on this item and Defendant's amended answer does not specifically deny Defendant's liability for the item. No evidence shows that Defendant raised a dispute over the charge shown on Plaintiff's Invoice No. 163777 prior to the commencement of the present action on December 6, 2004. For these reasons, the Court determines that Defendant has endorsed and ratified the authority of the person who engaged Plaintiff to perform work on Defendant's generator in December 2000 and who signed Invoice No. 163777 for Defendant. Having accepted the benefits of Plaintiff's performance of this transaction, Defendant may not disclaim his obligation to make the payment due thereunder.

VI. CONCLUSION

Based upon the foregoing findings of fact and conclusions of law, and for the reasons stated, the Court finds for Plaintiff Bisnes-Mami (CNMI), Inc., dba Mid-Pac Micronesia, on its Complaint for money due on account, and against Defendant Candido I. Castro, dba Castro & Associates. Judgment shall forthwith issue and Plaintiff is entitled to recovery from Defendant of the principal amount of $1,518.96, as well as prejudgment interest at the annual rate of nine percent (9%) in the amount of $2,795.02, for a total monetary judgment award of $4,313.98, plus costs.

IT IS SO ORDERED this 5th day of February, 2009.

/s/
RAMONA V. MANGLONA, Associate Judge