IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

KRISTEN KRAUS,	)	**CASE NO. CV 09 683945**
	)	
Plaintiff	)	**JUDGE JOHN P. O'DONNELL**
	)	
vs.	)	**JOURNAL ENTRY**
	)	
BANK OF AMERICA, *et al.*	)	
	)	
Defendants.	)	

***John P. O'Donnell, J.*:**

INTRODUCTION

Plaintiff Kristen Kraus filed a complaint against Bank of America and FIA Card Services, N.A. on February 4, 2009. She alleges that she held a credit card issued by the defendants who, without her knowledge or consent, enrolled her in a credit protection program, for which a monthly fee was assessed to her credit card statement. She paid the fee for several months until she discovered it and withdrew from the program. Without designating a specific cause of action, she alleges that the defendants "falsely and fraudulently billed" for fees she "never agreed to pay."[1] She claims damages in the amount of $392.13 in credit protection fees charged to her account. The complaint does not include a prayer for punitive damages.

[1] Complaint, ¶9.

On December 10, 2009, defendant FIA Card Services, N.A.[2] filed a motion for summary judgment. That motion is now fully briefed and this entry follows.

STATEMENT OF FACTS

The plaintiff had a credit card issued by FIA Card Services, N.A. but "bearing the Bank of America name."[3] Kraus first acquired the credit card around 2000. The record does not include a copy of the contract, known as a cardholder agreement, entered into then between Kraus and FIA.

On September 22, 2007, the plaintiff called Bank of America to make a payment by phone. The defendant's records show that during the call the company representative and Kraus discussed the subject of Credit Protection Plus. Credit Protection Plus is an insurance program that allows the cardholder to avoid charges associated with failing to make a minimum payment due if certain events, such as hospitalization or involuntary unemployment, occur. This is a product that Bank of America regularly sold to customers who called for any reason.

FIA's business records show that the plaintiff agreed to enroll in the program, but the plaintiff testified at a deposition on November 24, 2009, and by an affidavit dated February 10, 2010,[4] that she never consented to be enrolled. In any event, after that telephone conversation, the plaintiff was enrolled in the program and a separate line item charge for "Credit Protection Plus" was added to her credit card bill each month.

Despite paying her bill on a monthly basis thereafter (except in March, 2008) the plaintiff didn't notice the charge until May 4, 2008. She concedes that she usually made her

[2] Defendant FIA Card Services, N.A. asserts that it is the proper defendant, and that Bank of America was improperly named. Assuming that there is only one correct defendant, the court will refer in this entry to FIA as "the defendant."
[3] Motion for summary judgment exhibit B, affidavit of Kimberly Ann Zettle, ¶2.
[4] Or February 6; the date is difficult to read.

monthly payment without reviewing the detailed monthly statement and, if she had looked, the charge was easy to see and understand. By then the plaintiff had paid $392.13 for the credit protection and no benefits were claimed or paid under the plan. Kraus was removed from the program at her request and no further charges were assessed. This lawsuit followed.

LAW AND ANALYSIS

Rule 56 of the Ohio Rules of Civil Procedure prescribes the availability of a motion for summary judgment and the circumstances under which the motion can be granted. In particular, Civil Rule 56(C) provides that a "summary judgment shall not be rendered unless it appears from the evidence . . . that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, that party being entitled to have the evidence or stipulation construed most strongly in the party's favor."

Ordinarily, a defendant moving for summary judgment will outline the elements a plaintiff must prove to *prima facie* support her claim for relief, and then describe how, given the evidence of record, the plaintiff cannot prove at least one or more of those elements, hence entitling the defendant to summary judgment. And the defendant here endeavors to do just that: the motion for summary judgment notes that the plaintiff "seeks to recover under contract theories, based upon breach of contract and breach of the duty of good faith and fair dealing, and equitable theories, based on unjust enrichment,"[5] and then proceeds to offer evidence and argument for why there are no genuine issues of material fact preventing summary judgment in the defendant's favor as a matter of law on causes of action for breach of contract and unjust enrichment.

[5] Motion for summary judgment, page 8.

But before considering a motion for summary judgment on a cause of action for breach of contract, it must first be apparent to the court that the plaintiff is asserting a claim for breach of contract. Civil Rule 8 requires only that a complaint contain a short and plain statement of the claim showing that the plaintiff is entitled to relief. Although many plaintiffs often list in the complaint, by name, the particular causes of action they intend to prove, the rule does not obligate plaintiffs to identify particular causes of action. Indeed, a plaintiff who alleges a cause of action by name but does not allege sufficient facts to support the elements of that cause of action, risks dismissal of her lawsuit for failure to state a claim. (See, *e.g.*, *Digiorgio v. City of Cleveland*, 8th Dist. No. 95945, 2011 Ohio 5878, ¶41: While a complaint attacked by a motion to dismiss does not need detailed factual allegations, the [plaintiffs'] obligation to provide the grounds for their entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.)

Usually, a reading of the complaint will make a plaintiff's causes of action obvious, even if no labels are attached to them. If not, Civil Rule 12(E) allows a defendant to request a more definite statement of the claim. That did not happen here. Instead, the defendant filed a motion for summary judgment on a breach of contract cause of action and the plaintiff opposed the motion on the same basis. Therefore, even though the lawsuit is not explicitly denominated as such, the court, in addressing the merits of the summary judgment motion, will consider the complaint to contain a cause of action for breach of contract.

Generally, the elements for a breach of contract are that a plaintiff must demonstrate by a preponderance of the evidence that (1) a contract existed, (2) the plaintiff fulfilled her duties, (3) the defendant failed to fulfill its duties, and (4) damages resulted from this failure. *Anzalaco v. Graber*, 8th Dist. Nos. 96761 and 96787, 2012-Ohio-2057, ¶18.

In this case, the facts do not support a breach of contract claim. To the contrary, the whole case is about the *absence* of a contract. Kraus denies a contract for the credit insurance by alleging that "without plaintiff's consent, defendants started charging" her for credit protection.[6] She goes on to allege that the defendants "falsely and fraudulently billed plaintiff and the class for Credit Protection fees they never agreed to pay."[7] As a result, she claims that the defendants were "unjustly enriched."[8] To be sure, the plaintiff does describe having an "account (related to a card) with one or both of the defendants,"[9] an allegation that implies a contract. But the substance of the complaint, and the facts, do not support a claim that the contract governing the credit card agreement was breached; the contract only provides the context for the parties' relationship, and it is their contractual relationship that gave the defendant the opportunity to charge for a service that the plaintiff alleges she never agreed to buy. But the plaintiff cannot point to a duty that FIA had under the terms of the contract not to unilaterally sign her up and charge her for credit protection. Because of that, the plaintiff cannot demonstrate that doing so was a breach of the only contract – the cardholder agreement – between them. However underhanded it might be for the defendant to sneak a monthly charge onto Kraus's bill in the hope that she'll pay it either without noticing or questioning it, Kraus has not shown a contractual provision whereby FIA undertook a duty not to impose such a charge.

The plaintiff's own arguments underscore the point. Kraus analogizes FIA's conduct to "slamming" and "cramming" as sometimes practiced by telecommunications companies. “Slamming" is the illegal practice of switching a consumer's traditional wireline telephone

[6] Complaint, ¶4.
[7] Id., ¶9.
[8] Id., ¶10.
[9] Id., ¶3.

company for local, local toll, or long distance service without permission. Federal Communications Commission, *FCC Encyclopedia*, http://www.fcc.gov/encyclopedia/slamming (accessed December 26, 2012). "Cramming" – the more apt analogue to Kraus's description of FIA's conduct – is the practice of placing unauthorized, misleading or deceptive charges on a telephone bill. *Id.*, http://www.fcc.gov/encyclopedia/cramming (accessed December 26, 2012). But both slamming and cramming are illegal not because they violate the contracts that phone companies have with their customers, but only because they are prohibited by federal statutes, namely 47 U.S.C. 201(b) and 258. Presumably, one of the reasons Congress enacted those laws was that consumers did not have effective recourse under contract law against phone companies. So, even though FIA's conduct as alleged by Kraus is at least unsavory it cannot be characterized as a breach of a specific duty owed by contract.

Nor can it be classed as a breach of the general duty of good faith and fair dealing implied in every contract, since that duty is not violated in the absence of a specific contractual breach. (See, *e.g.*, *Arts Rental Equip. v. Bear Creek Constr.*, Hamilton C.P. No. A0902785 (Feb. 11, 2011): A duty of good faith and fair dealing is implied in every contract. This duty, however, does not create a separate cause of action; rather it is part of a contract claim.)

For these reasons, FIA's motion for summary judgment on a breach of contract claim is granted, leaving a cause of action for unjust enrichment.

To prove a claim of unjust enrichment, the plaintiff must establish the following elements: (1) a benefit conferred by the plaintiff upon a defendant; (2) knowledge by the defendant of the benefit; and (3) retention of the benefit by the defendant under circumstances where it would be unjust to do so without payment. *Grey v. Walgreen Co.*, 197 Ohio App. 3d 418, 2011-Ohio-6167, ¶20 (8th Dist.). Unjust enrichment operates in the absence of an express

contract or a contract implied in fact to prevent a party from retaining money or benefits that in justice and equity belong to another. *Kwikcolor Sand v. Fairmount Minerals Ltd.*, 8th Dist. No. 96717, 2011-Ohio-6646, ¶14. An equitable action for unjust enrichment cannot exist where there is a valid and enforceable written contract. *Id.*

The defendant's primary argument in support of summary judgment on this claim is that an express contract – a cardholder agreement, a credit protection contract or both – exists that precludes a claim for unjust enrichment as a matter of law. But the cardholder agreement does not authorize the defendant to charge Kraus for monthly credit protection without her consent. Moreover, based on the parties' differing accounts of whether Kraus actually agreed over the phone to enroll in the credit insurance program, there is a genuine issue of material fact about whether a separate contract for credit protection exists. Construing the evidence most strongly in the plaintiff's favor, she never signed on for the insurance and is not prevented as a matter of law from pursuing a claim for unjust enrichment.

Nor is unjust enrichment precluded as a matter of fact. If the plaintiff can show that she never agreed to the service but was charged for it anyway, a rational finder of fact can conclude that it would be unjust for the defendant to retain her payments. This is true even in the face of the uncontroverted evidence that she did nothing for about six months to discover or contest the charges, since the fact finder could decide that is exactly what the defendant hoped would happen. As for the argument that the circumstances cannot demonstrate an injustice because Kraus received a benefit – insurance coverage – in exchange for her payments, that is another question for the fact finder at a trial, not the court on summary judgment.

For those reasons, summary judgment is not warranted on the complaint's implied cause of action for unjust enrichment.

Finally, although the motion for summary judgment was not directed to a claim for fraud, because of the generality of the allegations in the complaint it is worth addressing whether the plaintiff can proceed on a cause of action for fraud. Kraus alleges that she was "fraudulently billed"[10] for the credit insurance. However, nowhere in the 11 terse paragraphs of the complaint does the plaintiff set forth the elements of a fraud claim. Moreover, in her brief in opposition to the defendant's earlier motion to dismiss, the plaintiff argues that the complaint is not only for unjust enrichment but "also sounds in breach of contract, money had and received and breach of the [covenant] of good faith and fair dealing."[11] Additionally, the plaintiff has not prayed for punitive damages. All of these facts combine to make it clear to this court that the complaint does not include a cause of action for fraud, and the lawsuit will proceed on the claim for unjust enrichment only.

IT IS SO ORDERED:

_____ Date: _____
Judge John P. O'Donnell

[10] Complaint, ¶9.
[11] Plaintiff's brief in opposition to the motion to dismiss, filed June 12, 2009, pages 1-2.

SERVICE

A copy of this journal entry was sent by email, the _____ day of December 2012, to the following:

Brian Ruschel, Esq.
bruschel@aol.com
Patrick J. Perotti, Esq.
pperotti@dworkenlaw.com
Attorneys for the plaintiff

David A. Wallace, Esq.
wallace@carpenterlipps.com
Joel E. Sechler, Esq.
sechler@carpenterlipps.com
Attorneys for the defendants

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Judge John P. O'Donnell