

**IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO**

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

John P. O'Donnell, J.:

The plaintiff filed her complaint on February 4, 2009. On April 15, the defendants filed a motion to dismiss. The plaintiff opposed that motion in a brief filed June 12 and the defendants submitted their reply brief on July 6. This entry follows:

The factual allegations of the complaint are uncomplicated. The plaintiff filed this lawsuit for herself and on behalf of the class of people who were charged by the defendants for credit protection on their credit card accounts but did not authorize the expense of that plan.¹

The plaintiff alleges that she has a credit card account with the defendants and that, on September 22, 2007, the defendants began to charge her a fee for "credit protection."² The plaintiff claims that it was not until May 5, 2008, that she realized her account statements included this charge.³ Despite being told by the plaintiff on May 5 that she did not wish to participate in the credit protection program, the defendants did not discontinue her charges for

¹ See complaint at ¶1.

² See complaint at ¶3 and ¶4.

³ See complaint at ¶5.

credit protection until June 10.⁴ The plaintiff claims she never agreed to pay for the credit protection plan.⁵

The defendants' motion to dismiss is based upon Ohio Rule of Civil Procedure 12(B)(6), which allows for the dismissal of a complaint if it fails to state a claim upon which relief can be granted.

A Civil Rule 12(B)(6) motion to dismiss tests the sufficiency of a complaint. *State ex rel. Hanson v. Guernsey Cty. Bd. of Commrs.* (1992), 65 Ohio St. 3d 545, 548. In reviewing the complaint, the trial court must take all of the material allegations as admitted and construe all reasonable inferences in favor of the non-moving party. *State ex rel. Boggs v. Springfield Local School Dist. Bd. of Edn.* (1995), 72 Ohio St. 3d 94, 95. In order for a court to dismiss a complaint for failure to state a claim upon which relief can be granted, it must appear beyond doubt from the complaint that the plaintiff can prove no set of facts entitling her to recovery. *O'Brien v. Univ. Community Tenants Union, Inc.* (1975), 42 Ohio St. 2d 242, syllabus.

The plaintiff asserts that she was charged money for a product she never agreed to buy. That factual allegation alone may support several claims for relief, including those discussed by the plaintiff in her brief in opposition to the motion to dismiss: unjust enrichment, money had and received, or fraud.⁶ These facts, if true, may also support a claim for the tort of conversion or another quasi-contract theory besides unjust enrichment.

It is correct, as pointed out by the defendants, that the plaintiff did not frame the factual allegations of her complaint with reference to the elements of a specific cause of action.

⁴ See complaint at ¶6.

⁵ See complaint at ¶9.

⁶ The court is less confident that the alleged facts support a claim for breach of contract. If anything, the plaintiff is claiming that no contract – *i.e.*, no agreement to buy the credit protection plan – was ever made. The claim that the imposition of a charge for the credit protection plan violates the defendants' duty of good faith and fair dealing arising from the original credit card agreement is also dubious but its merits are not addressed here.

Although considerations of fairness dictate that a plaintiff should notify a defendant in the body of the complaint the theory of liability she is pursuing, the omission of reference to a particular cause of action does not necessitate dismissal of the complaint. Civil Rule 8(A) requires only “a short and plain statement of the claim showing that the party is entitled to relief.” The plaintiff here claims that the defendants collected money for a product she did not agree to purchase. While she will eventually have to produce evidence to support the elements of at least one specific theory of legal liability, the allegations are enough at the complaint stage to show that she may be entitled to relief.

If the facts alleged by the plaintiff – that she was charged fees that she never agreed to pay – are true, then she has stated a claim for relief. Therefore, the defendants’ motion to dismiss is denied.

IT IS SO ORDERED:

Date: _____

Judge John P. O’Donnell

SERVICE

A copy of this Journal Entry was sent by regular U.S. mail, this _____ day of July 2009,
to the following:

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Judge John P. O'Donnell