COMMONWEALTH OF MASSACHUSETTS
APPELLATE DIVISION OF THE DISTRICT COURT DEPARTMENT
SOUTHERN DISTRICT

DISCOVER BANK

V.

DONALD J. PERRY

NO. 17-ADCV-103SO

In the HINGHAM DIVISION:

Justice: O'Dea, J.; Finigan, J.[1]
Docket No. 1658CV0186
Date of Decision Appealed: May 26, 2017
Date of Entry in the Appellate Division: July 10, 2017

In the APPELLATE DIVISION:

Justices: Hand, P.J., Welch & Finnerty, JJ.
Sitting in: Plymouth, Massachusetts
Date of Hearing: December 8, 2017
Date Opinion Certified: May 30, 2018

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OPINION

[1] The Honorable Thomas L. Finigan recused himself from this appeal, and took no part in its hearing, review, or decision.

WELCH, J. The defendant, Donald J. Perry ("Perry"), appeals following a bench trial in favor of

the plaintiff, Discover Bank ("Discover").[2]

In June, 2016, Discover filed a breach of contract action against Perry regarding charges made on a credit card account. Perry filed an answer and counterclaim. The counterclaim was dismissed in August, 2016. In March, 2017, Discover filed a motion for summary judgment, and Perry filed a motion to dismiss; both motions were denied by the court. On April 6, 2017, the court continued the trial date. On May 26, 2017, a bench trial was held before a different judge, resulting in a judgment for Discover in the amount of $16,737.00.

On appeal, the first claim of error by Perry, which is also the basis in substance of the second claim of error, was that the credit application was not produced in discovery and not presented at trial. As to the discovery issue, the docket is absent of any discovery dispute regarding the issue, such as a motion to compel the production of documents or answers to interrogatories. As to the trial, Perry has not provided us with the transcript.[3] It is the obligation of an appellant to include in the appendix those parts of the trial transcripts, as well as copies of the motions, that are essential for review of the issues raised on appeal (both to determine whether the evidence supports the theory on appeal and whether the issue was properly presented and preserved). This is a fundamental and long-standing rule of appellate civil practice. See

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[2] As a threshold matter, Discover requests that we strike Perry's brief. Although lacking in organization, we decline to strike the brief and address those issues, where possible, that are adequately identified and presented.

[3] Perry also argues, within the context of the application issue, that there was no evidence he was the individual who used the credit card. As there are no transcripts of the trial provided, we are unable to address this issue. It is clear from the record that there is nothing before us for appellate consideration. An appeal to this Appellate Division or any appellate court is restricted to issues of law properly raised in the trial court and preserved for appellate review in the form of the trial court's rulings. *Ducker v. Ducker*, 1997 Mass. App. Div. 147, 148. See generally

***Shawmut Community Bank, N.A. v. Zagami*, 30 Mass. App. Ct. 371, 372-373 (1991), *S.C.*, 411 Mass. 807 (1992), citing *Kunen v. First Agric. Nat'l. Bank*, 6 Mass. App. Ct. 684 (1978), *Iverson v. Board of Appeals of Dedham*, 14 Mass. App. Ct. 951 (1982), and *Holleman v. Gibbons*, 27**

Skowronski v. Sachs, 62 Mass. App. Ct. 630, 632 (2004); *DeLima v. Gossels*, 2009 Mass. App. Div. 4, 5; *Davis v. Douglas*, 2008 Mass. App. Div. 249, 250.

Mass. App. Ct. 563, 566-568 (1989).[4]

The third claim of error was that Perry was denied his due process rights by the motion judge for not allowing him the opportunity to exercise his right to oppose Discover's motion to continue the trial date. In an unsworn statement, not supported by any references to an appended record of the proceeding, Perry states that he was handed a motion to continue on April 6, 2017, the judge "purportedly" allowed him two weeks to respond, and then the judge went ahead and granted the motion to continue, not honoring the two weeks for Perry to respond. Perry goes on to say that the judge made prejudicial statements that demonstrated his unwillingness to consider the arguments fairly. Again, Perry fails to provide us with any documents from the court in support of his argument. The only record before us is the docket, which shows a motion to continue was filed on April 6, 2017 with the trial continued until May 26, 2017. The decision whether to grant a continuance lies within the sound discretion of the judge. *Groff v. da Silva*, 2015 Mass. App. Div. 150, 152. A trial judge is responsible for controlling the trial and maintaining order in the courtroom. *Commonwealth v. Perez*, 390 Mass. 308, 316 (1983). A decision by the court to grant a continuance will be overturned only in the event of an abuse of

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4 Regardless of Perry's failure to raise the issue properly, we note that there need be no application or written contract memorializing the agreement to use the credit card. Section 1 of G.L. c. 259 applies only to contracts that by their terms cannot be performed within the year. It does not apply to contracts that may be performed within, though they may also extend beyond, that period. See *Rowland v. Hackel*, 243 Mass. 160, 162 (1922). Further, G.L. c. 255D, § 1 states that a revolving credit agreement shall be deemed signed by the buyer (here, Perry) if it is used by the buyer. It states as follows:

> "'Revolving credit agreement', an agreement, other than a retail installment sale agreement, signed by the buyer in this commonwealth pursuant to which the buyer may purchase at retail, goods or services or merchandise certificates on credit from time to time and under the terms of which a finance charge is to be computed in relation to the buyer's balance from time to time. . . . *A revolving credit agreement shall be deemed to be signed by the buyer if, after a request for an account, such agreement is in fact signed by the buyer, or if that account is used by the buyer*, or if another is authorized by the buyer to use it, or if, after receiving notice of a change in the terms of an established account pursuant to which a credit card has previously been issued by the creditor, that account is thereafter used by the buyer, or another person is thereafter authorized by the buyer to use it" (emphasis added).

Id.

discretion. *L.L. v. Commonwealth*, 470 Mass. 169 (2014).[5] **There is nothing in the record before us to warrant a finding of an abuse of discretion.**

Appeal dismissed.

HON. KATHRYN E. HAND, Presiding Justice
HON. CHRISTOPHER D. WELCH, Justice
HON. KEVIN J. FINNERTY, Justice

This certifies that this is the Opinion of the Appellate Division in this case. A True Copy, Attest:

Brien M. Cooper, Clerk

[5] In addressing the standard to apply to determine if there has been an abuse of discretion, the Court stated:

> "An appellate court's review of a trial judge's decision for abuse of discretion must give great deference to the judge's exercise of discretion; it is plainly not an abuse of discretion simply because a reviewing court would have reached a different result. But the 'no conscientious judge' standard is so deferential that, if actually applied, an abuse of discretion would be as rare as flying pigs. When an appellate court concludes that a judge abused his or her discretion, the court is not, in fact, finding that the judge was not conscientious or, for that matter, not intelligent or honest. Borrowing from other courts, we think it more accurate to say that a judge's discretionary decision constitutes an abuse of discretion where we conclude the judge made 'a clear error of judgment in weighing' the factors relevant to the decision, such that the decision falls outside the range of reasonable alternatives" (citations omitted).

Id. at 185 n.27.