13.3 Motion To Dismiss Plaintiff's First Complaint

IN THE COUNTY COURT, IN AND FOR OSCEOLA COUNTY, FLORIDA
CIVIL DIVISION

Case No.:[NO.]

ASSET ACCEPTANCE, LLC
Plaintiff
vs.

[DEFENDANT]
[Address]
[Address]
Defendant
_____/

MOTION TO DISMISS PLAINTIFF'S FIRST COMPLAINT
(Or, in the alternative, MOTION FOR MORE DEFINITE STATEMENT)

COMES NOW, the Defendant, [DEFENDANT], ("[DEFENDANT]") by and through undersigned counsel and moves this Court to dismiss (pursuant to Rule 1.110, Florida Rules Civil Procedure) or, in the alternative, require a More Definite Statement (pursuant to Rule 1.140, Florida Rules of Civil Procedure) the above-styled action on the grounds that:

INTRODUCTION

A-1. Plaintiff, ASSET ACCEPTANCE, LLC, ("Plaintiff") is a debt collector who primarily purchases "tertiary" accounts.[1]

A-2. On or about June 8, 2006, Plaintiff filed a Complaint alleging three (3) causes of action : (1) Breach of Contract; (2) Account Stated; and (3) Quantum Meruit. None of the three counts of Plaintiff's Complaint state a cause of action upon which relief may be granted.

[1]In other words, the accounts purchased by ASSET ACCEPTANCE have typically been assigned at least three times before ASSET ACCEPTANCE purchases such accounts. See ASSET ACCEPTANCE CORP., Form 10-K, Fiscal Year Ending December 31, 2004, pg. 9.

A-3. In each count, Plaintiff, ASSET ACCEPTANCE, demands that this Court enter a judgment against Defendant, [DEFENDANT], "in the amount of $ 5,223.86 plus interest, costs and such other relief as the Court may deem equitable and just".

A-4. The so-called "Statement of Account" attached to Plaintiff's Complaint indicates that Plaintiff is seeking $ 9,302.78 (principal in the amount of $ 5,223.86 together with interest in the amount of $ 4,078.92 accruing at 20.00% annually) accruing since the date Plaintiff ASSET ACCEPTANCE alleges that Plaintiff purchased the debt (i.e., August 11, 2005). Although Plaintiff fails to state the amount Plaintiff is actually demanding (or effective on a recent date), Plaintiff is obviously demanding that this Court enter a judgment in an amount exceeding $ 10,000.

A-5. Plaintiff demands that this Court enter a judgement against Defendant based upon "Breach of Contract" without even the pre-text of attaching a copy of the contract upon which Plaintiff bases such demand. Plaintiff's cause of action for "Breach of [Written] Contract" is inappropriate (the written instruments are insufficient to establish the amount allegedly owed) and is time barred (the limitations period for suing upon a contract not based upon a written instrument is four years). A complete copy of the contract should be attached pursuant to Rule 1.130, Florida Rules of Civil Procedure.

A-6. Plaintiff demands judgment based upon "Account Stated" without attaching a copy of the account showing items, time of accrual of each, amount of each to the Complaint as required by Form 1.933, Florida Rules of Civil Procedure, in order to state a cause of action for "Account Stated".A copy of the account ledger should be attached pursuant to Rule 1.130, Florida Rules of Civil Procedure.

A-7. Plaintiff probably paid no more than $ 104 for the principal balance of the claim sued upon. Despite demanding judgment pursuant to causes of action for "Breach of Contract" and "Account Stated", Plaintiff ASSET ACCEPTANCE further demands that this Court enter judgment against Defendant [DEFENDANT] based upon the equities of the case. Plaintiff ASSET ACCEPTANCE asks this Court to disregard the unconscionable credit card industry practices (e.g., the usurious interest rate (i.e., 20.000%) demanded by ASSET ACCEPTANCE) while attempting to conceal from Defendant and this Court the minimal price that ASSET ACCEPTANCE allegedly paid for the debt upon which this action arises.

A-8. Plaintiff's Form 10-K for the fiscal year ended December 31, 2004, filed with the United States Securities and Exchange Commission by ASSET ACCEPTANCE CAPITAL CORP. states:

> "During the year ended December 31, 2004, we acquired charged-off consumer receivables portfolios with an aggregate face value of $ 4.5 billion at a cost of $ 89.2 million, or 1.99% of face value, net of buybacks. Included in these purchase totals were 30 portfolios with an aggregate face value of $ 280.7 million at a cost of $ 8.1 million, or 2.89% of face value, which were acquired through five forward flow contracts. During the year ended December 31, 2003, we acquired charged-off consumer receivables portfolios with an aggregate face value of $ 4.1 billion at a cost of $ 87.5 million, or 2.12% of face value (adjusted for buy-backs through 2004)."

Form 10-K, Asset Acceptance Capital Corp., page 38 (available at http://www.sec.gov/Archives/edgar). In this case, the attachments to Plaintiff's Complaint indicate that the account may have been assigned at least three times since the date of default (allegedly November 7, 2001) before the account was allegedly assigned to ASSET ACCEPTANCE on July 29, 2005. The "market value" for such debts is less than the average

(1.99% of "face" amount) paid by Asset Acceptance. Again, according to ASSET ACCEPTANCE:

> "• Fresh accounts are typically 120 to 270 days past due, have been charged-off by the credit originator and are either being sold prior to any post charge-off collection activity or are placed with a third party collector for the first time. These accounts typically sell for the *highest* purchase price".
>
> • Primary accounts are typically 270 to 360 days past due, have been previously placed with one third party collector and typically receive a *lower purchase* price."
>
> • *Secondary and tertiary accounts are typically* ***more than 360 days past due,*** *have been placed with* ***two or three third party collectors*** *and* ***receive even lower purchase prices***."

ASSET ACCEPTANCE CORP., Form 10-K, Fiscal Year Ending December 31, 2004, pg. 8 (emphasis supplied).

A-9. Defendant's counsel is informed and believes that Plaintiff routinely fails to obtain adequate documentation of tertiary or subsequent debts such as the account at issue in this case and, instead of obtaining and reviewing proper documentation, obtains minimal information such as the information shown in the so-called "Account Summary" attached to Plaintiff's Complaint.

A-10. If Plaintiff, ASSET ACCEPTANCE, wishes to purchase time-barred accounts without obtaining and reviewing the required documents to state a cause of action, this Court should not refashion Florida law in order to accommodate Plaintiff's greed to convert an investment of approximately $ 103.95[2] in a time-barred, "no doc" debt, into a judgment in the amount of $ 9,302.78.

[2] 1.99 % of the alleged principle amount (i.e., $ 5,223.86) is $ 103.95. However, Defendant does not concede that Plaintiff paid even $ .02 on the dollar for this shopworn, charged-off, unenforceable debt.

DEFICIENCIES COMMON TO ALL THREE COUNTS

(Failure to Attach Documents Establishing the Rights Transferred and/or Chain of Ownership)

B-1. Plaintiff further failed to attach a complete copy of the contract which allegedly transferred ownership of the alleged debt from any intervening assignees to subsequent alleged assignees including, but not limited to, Plaintiff.

> (A). The "Bill of Sale" purportedly transferring the debt from Discover Bank to Consolidation USA, Inc. references and incorporates a "Credit Card Accounts Sale Agreement (effective April 1, 2003) along with an "Account Schedule" without attaching either document.
>
> (B). The "Assignment and Bill of Sale" purporting to transfer the . account from Consolidation USA, Inc. to New Century Financial Services[3], Inc. references and incorporates the terms of a "Purchase Agreement" dated March 12, 2004, without attaching the "Purchase Agreement"; and
>
> (C). The "Assignment and Bill of Sale" purporting to transfer the account from First American Investment Company, LLC to Asset Acceptance, LLC references and incorporates a "Credit Card Purchase Agreement" (dated July 29, 2005) without attaching the "Credit Card Purchase Agreement".

B-2. Therefore, Plaintiff has not attached written instruments sufficient to demonstrate that Plaintiff may even bring this action against Defendant nonetheless what rights, if any, Plaintiff actually acquired which would establish or limit the relief which Plaintiff may be eligible to seek from this Court

[3] Plaintiff's Complaint fails to attach any evidence concerning who, if anyone, transferred the unidentified accounts to First American Investment Company, LLC.

DEFICIENCIES COMMON TO ALL COUNTS
(LIMITATIONS PERIOD EXPIRED)

C-1. The statute of limitations defense appears on the face of the Complaint and, therefore, the Court may dismiss Plaintiff's action *with prejudice*. See, *Estate of James v. Martin Memorial Hospital*, 422 So.2d 1043 (Fla. 4th DCA 1982) (holding that complaint need not anticipate affirmative defenses, but if grounds for such exist on face of the complaint, motion to dismiss may be made based on same).

C-2. Plaintiff's Complaint alleges that Defendant made its final payment (referred to as a "Partial Payment") on November 7, 2001. Plaintiff filed this action on or about June 16, 2006, a date which is over four (4) years after the date Plaintiff alleges that Defendant made the final payment (i.e., November 7, 2001). Therefore, the action should be dismissed *with prejudice* because it is time barred.

C-3. The statute of limitations for "breach of contract", "account stated" and "quantum meruit" are four (4) years.

C-4. Florida courts have routinely applied the four year statute of limitations in breach of contract cases rather than the five year limitations period applicable in cases alleging breach of a written contract. Even if ASSET ACCEPTANCE introduced a complete copy of the "card holder agreement"(or similar contract) into evidence at trial, it would not be sufficient to establish Defendant [DEFENDANT]'s liability. See *Portfolio Recovery Associates, LLC v. Fernandes*, Circuit Court, 15th Judicial Circuit (Appellate) in and for Palm Beach County, Case No. [No.], March 6, 2006, 13 Fla. L. Weekly Supp. 560 citing Colorado National Bank of Denver v. Story, 261 Mont. 375, 862 P.2d 1120 (Mont. 1993).

C-5. If evidence of liability is partially in writing but the writings are incomplete to establish liability, then the contract is regarded as oral for statute of limitations purposes. *Porfolio Recovery Associates, LLC v. Fernandes.*, at 560 *citing ARDC Corp. v. Hogan*, 656 So.2d 1371 (Fla. 4th DCA) *rev. denied*, 666 So.2d 143 (Fla. 1995) (holding that for purposes of the statute of limitations, a contract is not founded upon a written instrument for purposes of statute of limitations, where written instrument is link in chain of evidence to prove cause of action, but does not on its face establish all elements of plaintiff's claim); *Multi-Line Claims Service, Inc. v. Cumis Insurance Society, Inc*., 739 So.2d 144 (Fla. 3d DCA 1999) (applying four year statute of limitations for breach of oral contract to action on oral contract for adjusting services, though parties agreed to compensation based on a written fee schedule); *Johnson v. Harrison Heardware Furniture Co.*, 119 Fla. 479, 472 160 So. 878 (1935) ("(t)he writings attached to, relied on, and made a part of, the second amendment to plaintiff's replication do not on their face constitute a contractual acknowledgment of the loan of any money by plaintiff to defendant, which is the thing sued for, therefore such writings per se can avail nothing to plaintiff as sufficient preclusion of the bar of the three-year statute of limitations [applicable to actions not founded upon an instrument in writing.]...."); *Gulf Life Inc. Co. v. Hillsborough County*, 129 Fla. 98, 104, 176 SO. 72 (1937) ("(i)n order that a contract be founded upon a written instrument, the instrument must contain a contract to do the thing for the nonperformance of which the action is brought."); Ball v. Roney, 112 Fla. 186, 150 So. 240 (1933); *Schrank v. Pearlman*, 683 So.2d 559 (Fla. 3d DCA 1996), rev. den. 691 So.2d 1081 (Fla. 1997).

C-6. Similarly, the applicable limitations periods for Count II (alleging "Account Stated") and Count III (alleging "Quantum Meruit") are both four (4) years. Florida Statutes, Section 95.11(3)(k), provides that:

> "with respect to limitation of actions on an account, it is provided by statute that a *legal or equitable* action on a contract, obligation, or liability not founded on a written instrument, including an action for the sale and delivery of goods, wares, and merchandise, and on store accounts, must be commenced within four years".

Fla. Stat. § 95.11(3)(k) (2006) (emphasis supplied).

C-7. Assuming the allegations in the Complaint (Paragraph No. 4), alleging that "Defendant made a partial payment to DISCOVER on or about November 7, 2001" are true, the four-year limitations period in which to file any action alleging "Account Stated" or "Quantum Meruit" expired on November 7, 2005, a date which is a date more than four years after November 7, 2001.

COUNT I : BREACH OF CONTRACT

D-1. Plaintiff failed to attach a full and complete copy of : (1) the ***original*** Agreement between the parties (i.e., DISCOVER and Defendant); and (2) ***complete*** copies of the agreements through which Plaintiff allegedly acquired the right to bring an action against Defendant.

D-2 . Paragraph 4 of Plaintiff's Complaint alleges that DISCOVER issued Defendant a credit card on or about February 29, 1996.

D-3. Plaintiff failed to attach any documents[4] concerning the alleged agreement between DISCOVER and Plaintiff to the Complaint.

D-4. The Plaintiff's failure to attach a copy of the contract between the parties violates Rule 1.130(a), Florida Rules of Civil Procedure, which provides:

> "All bonds, notes, bills of exchange, contracts, accounts, or documents upon which action may be brought or defense made, or a copy thereof or a copy of the portions thereof material to the pleadings, shall be incorporated in or attached to the pleadings."

Rule 1.130(a), Fla. R. Civ. Pro. See also, *Monogram Credit Card Bank of Georgia v. Foster*, 12 Fla. L. Weekly Supp. 563a, County Court, 4th Judicial Circuit in and for Duval County, Florida, Case No. 16-2004-SC-007335-XXXX, Division H (December 3, 2004) (dismissing statement of claim seeking damages for failure to pay credit card debt because plaintiff violated Rule 7.050, Florida Rules of Civil Procedure, by failing to attach a copy of the credit card contract on which claim is based); *Global Acceptance Corporation v. Herring*, 12 Fla. L. Weekly Supp. 768a, County Court, 4th Judicial Circuit in and for Duval County, Florida, Case No. 16-2004-CC-17715 (May 31, 2005) (dismissing action seeking damages for nonpayment of a credit card debt where plaintiff failed to attach portions of the credit card contract material to the pleadings and copy of an account that complies with Form 1.933.)

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[4] Credit Card "agreements" typically consist of four types of documents : (1) an account application signed by the consumer (which is a pre-requisite to the enforcing any consumer debt allegedly arising from a credit card); (2) a "Card Holder Agreement" (or similarly entitled document) which typically contains voluminous adhesive terms in tiny type fonts including the methods for amending or changing the terms; (3) a "Card Folder" which typically sets forth the interest rate and other important terms and is routinely incorporated in the Card Holder Agreements; and (4) the Amendments to the Card Holder Agreement (typically referred to as "Billing Stuffers"). All of these documents are necessary in order to determine whether the credit card agreement is enforceable against the consumer and the complete terms of the contract.

D-5. Plaintiff's attachments concerning ownership are insufficient to document ownership of any account concerning Defendant.

D-6. Plaintiff also failed to attach a *complete copy* of the contract which allegedly transferred ownership of the alleged debt from the alleged original creditor, DISCOVER (hereinafter, the "Original Creditor" or "DISCOVER") to any assignees including but not limited to Plaintiff.

D-7. Therefore, Plaintiff has not attached written instruments sufficient to demonstrate that Plaintiff may even bring this action against Defendant nonetheless what rights, if any, Plaintiff actually acquired which would establish or limit the relief which Plaintiff may be eligible to seek from this Court.

COUNT II : "ACCOUNT STATED"

E-1 Count II, of Plaintiff's Complaint, alleging "Account Stated", fails to state a cause of action for "Account Stated".

E-2. Plaintiff's Complaint failed to attach any documents concerning the original account.

E-3 Form 1.933, Florida Rules of Civil Procedure, requires Plaintiff to attach *a copy of the account showing items, time of accrual of each, amount of each to the Complaint* in order to state a cause of action for "account stated".

E-4 Therefore, Plaintiff failed to state a cause of action because Plaintiff failed to attach any documents to the Complaint nonetheless the documents required by Rule 1.933.

COUNT III : "QUANTUM MERUIT"

F-1. Count III of Plaintiff's Complaint attempts to state a cause of action for "Quantum Meruit" but is also deficient because this count also fails to state a cause of action upon which relief may be granted.

F-2. Count III of Plaintiff's Complaint ("Quantum Meruit") is entirely inconsistent with Count I ("Breach of Contract") and Count II ("Account Stated"). In this case, Plaintiff alleges that there was a "written credit agreement" (Complaint; Paragraphs 9 & 10) and an "Account Stated" (Complaint, Paragraphs 10 through 12). Quantum Meruit is improper where Plaintiff alleges that the parties had an enforceable contract. See *Corn v. Greco*, 694 So.2d 833 (Fla. 2nd DCA 1997) (holding that quantum meruit is improper where rights of parties are described in enforceable, written contract because quantum meruit is founded on legal fiction of implied contract).

F-3. Plaintiff may not circumvent the strict requirements of Rule 1.130, Florida Rules of Civil Procedure, especially where consumer protection laws require that a written contract must have existed in order to form a *valid* contract to pay a credit card debt. Count III fails to state a cause of action for additional reasons as well.

F-4. Count III of the Complaint alleges that Defendant "voluntarily accepted the benefit of the services furnished by DISCOVER" without alleging the types, amounts, or dates of any of the "goods or services" that DISCOVER allegedly provided Defendant.

F-5. Plaintiff's boilerplate Complaint alleging that Plaintiff received "goods and services" without any itemizations of the "goods and services" plaintiff allegedly received fails to state a cause of action for "Quantum Meruit". Plaintiff's failure to attach an account ledger itemizing the account history (as required by the Comments to Form 1.933, Florida Rules of

Civil Procedure, requiring Plaintiff to attach *a copy of the account showing items, time of accrual of each, amount of each to the Complaint* in order to state a cause of action for "account stated") also means that Plaintiff has not identified the "goods" or the "services" allegedly provided by Discover or others.

F-6. In Count III of the Complaint, Plaintiff does not identify the "goods and services" provided to the Defendant. In order to state a claim for "Quantum Meruit", the Plaintiff must allege (1) by enumerating the "goods and services" provided; (2) that the Defendant received those such goods and services; and (3) that in the ordinary course of events, a reasonable person would expect to pay for it. A mere recitation of boilerplate language is inadequate.

F-7. Count III of Plaintiff's Complaint fails to allege any facts identifying the "goods and services" allegedly provided by DISCOVER to the Defendant, the amount of such purchases, and the dates of such purchases.

F-8. Nor does Plaintiff's attempt to plead "Quantum Meruit" relieve Plaintiff of its obligation to attach a complete copy of each assignment (not merely a "bill of sale") through which Plaintiff alleges it acquired any rights in the alleged debt.

WHEREFORE, Defendant requests that the Court dismiss the Plaintiff's Complaint (as to all counts) *with prejudice* based upon the statute of limitations defense which appears on the face of Plaintiff's Complaint.

In the alternative, if the Court does not grant Defendant's request (stated above), Defendant requests that the Court : (1) dismiss Counts II and III *with prejudice* on the grounds that any such cause of actions are time barred; (2) dismiss Count I *with prejudice* but, as to

Count I, allow Plaintiff 20 days in which to amend or to furnish a More Definite Statement by attaching or producing copies of : (A) the complete "Discover Card Agreement"; (B) any account application signed by the Defendant; (C) any amendments to the "Discover Card Agreement"; (D) complete copies of any agreements evidencing ownership of the debt including each of the intermediary assignments (*not* merely the "Bill of Sale"); (E) a complete history of the account (i.e., an account ledger from the original creditor); and (F) complete documents evidencing the chain of ownership and complete terms of any assignments from the original creditor to Plaintiff including but not limited to any intermediary assignees.

WHEREFORE, in the event that Plaintiff's Complaint is dismissed for any reason, Defendant also seeks reasonable attorney's fees pursuant to Florida Statutes, Section 57.105(7) and the attorney's fees provision of any credit card agreement which Defendant should be in the possession of the Plaintiff.

RESPECTFULLY SUBMITTED on this 4th day of JULY, 2006

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DONALD E. PETERSEN

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished this 4th day of JULY, 2006, to:

Asset Acceptance, L.L.C.
Attn: Mr. Jackie Wainio
P.O. Box 9065
Bandon, FL 33509

via First Class United States Mail, regular postage pre-paid and also to Mr. WAINIO via facsimile at (813) 569-0626 on this 4th day of JULY, 2006.

_____
DONALD E. PETERSEN