

IN THE COUNTY COURT, FOURTH
JUDICIAL CIRCUIT, IN AND FOR
CLAY COUNTY, FLORIDA

CASE NO.: 2007-SC-293
DIVISION: D

CAPITAL ONE BANK,
Plaintiff,

vs.

[CONSUMER],
Defendant.

_____ /

**DEFENDANT'S ANSWER, AFFIRMATIVE DEFENSES
AND COUNTERCLAIMS IN RESPONSE TO
PLAINTIFF'S AMENDED COMPLAINT FOR DAMAGES
ANSWER**

The Defendant, [Consumer], (“[Consumer]”) files this his answer to the Plaintiff’s Amended Complaint for Damages and states:

1. Defendant admits the allegations contained in Paragraph 1 of Plaintiff’s Amended Complaint for Damages for jurisdictional purposes only and does not admit any sums are due Plaintiff.
2. Defendant admits Paragraph 2 of Plaintiff’s Amended Complaint for Damages.
3. As to Paragraphs 3 and 14 of Plaintiff’s Amended Complaint for Damages, Defendant denies Plaintiff is entitled to any sums for attorneys fees.
4. Defendant denies Paragraphs 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 15, 16, 17, 18, and 19 of Plaintiff’s Amended Complaint for Damages.

Affirmative Defenses

First Affirmative Defense-Violations of the Florida Consumer Collection Practices Act

5. Defendant realleges the allegations contained in Paragraphs 3 through 13 and Count One of her Counterclaims below and incorporates them by reference herein.

6. Based upon Plaintiff's violations of the Florida Consumer Collection Practices Act, it is not entitled to the relief sought herein. In the alternative, Defendant is entitled to a set off as to the amounts deemed owed, if any, as a result of the imposition of actual and statutory damages.

Second Affirmative Defense-Unjust Enrichment

7. Defendant realleges and incorporates by reference herein the allegations contained in Paragraphs 3 through 13 of her Counterclaims below.

8. According to the exhibits attached to Plaintiff's response to request for production, [Consumer] was charged and paid excessive and unauthorized fees and charges well over the amounts legally incurred in connection with the credit card which is the subject of this case.

9. The only reason the card stayed active was so that Plaintiff could continue to charge Defendant finance charges and for past due, over-the-limit, Capital Pay, Payment Protection, Membership, and Privacy Guard and artificially inflate the balance of her account.

10. The subject transaction has been unconscionable and materially unfair to the party of lesser bargaining power and therefore, unenforceable in the interests of equity.

11. Further, Defendant should be entitled to a refund for sums paid in excess of the benefit received.

Third Affirmative Defense - Unconscionability

12. Defendant realleges and incorporates by reference herein the allegations contained in Paragraphs 3 through 13 of her Counterclaims below.

13. According to the exhibits attached to Plaintiff's response to request for production, [Consumer] was charged and paid excessive and unauthorized fees and charges well over the amounts legally incurred in connection with the credit card which is the subject of this case.

14. The reason the card stayed active was so that Plaintiff could continue to charge Defendant financial charges and for finance charges and for past due, over-the-limit, Capital Pay, Payment Protection, Membership, and Privacy Guard and artificially inflate the balance of her account.

15. Further in its efforts to collect the subject debt, Plaintiff caused [Consumer]'s Social Security number to be published in the public domain.

16. The alleged debt and Plaintiff's means of collecting it are and have been unconscionable and materially unfair to the party of lesser bargaining power and therefore, unenforceable in the interests of equity.

17. Further, Defendant should be entitled to a refund for sums paid in excess of the benefit received.

Fourth Affirmative Defense - Invasion of Privacy

18. Defendant realleges and incorporates by reference herein the allegations contained in Paragraphs 3 through 13 and Count Two of her Counterclaims below.

19. Based upon Plaintiff's invasion of [Consumer]'s privacy, it is not entitled to the relief sought herein. In the alternative, Defendant is entitled to a set off as to the amounts deemed owed, if any, as a result of the imposition of damages.

WHEREFORE, Defendant requests this Court to enter an order in her favor, for attorney's fees and costs and for such other and further relief as necessary and appropriate.

COUNTERCLAIMS

The Defendant/Counterclaim Plaintiff, [Consumer], ("[Consumer]" or "Defendant") by and through her undersigned attorneys, sues the Plaintiff/Counterclaim Defendant, Capital One Bank (hereinafter "Capital One" or "Defendant") and alleges:

JURISDICTION

1. This is an action based upon claims arising out of the consumer transaction which is the subject of Capital One's Amended Complaint for Damages.

2. [Consumer] is seeking declaratory and injunctive relief (temporary and permanent), statutory and actual damages, which do not exceed \$5,000.00, exclusive of interest, costs and attorney's fees.

PARTIES

3. At all times material hereto, [Consumer] is and was a consumer residing in Orange Park, Clay County, Florida.

4. At all times relevant hereto, Capital One was and is a corporation doing business in Orange Park, Clay County, Florida as a consumer debt collector.

5. On or about February 13, 2007, [Consumer] was served with a summons and complaint regarding a debt which purportedly originated in 2000. Insufficient documentation to support a claim was attached to the Plaintiff's Complaint for Damages and this Court entered an order granting Defendant's motion to dismiss and allowing Plaintiff to file an Amended Complaint. Plaintiff's Amended Complaint for Damages suffered from the same deficiencies, however, Plaintiff subsequently filed a response to request for production of documents containing account statements.

6. Attached to Plaintiff's Amended Complaint for Damages and response to request for production of documents and filed in the public records of the Clay County, Courthouse were documents containing [Consumer]'s Social Security Number. By attaching these documents containing her Social Security Number to the Amended Complaint for Damages and response to request for production of documents, Capital One has caused private information to be published in the public domain. Publication of [Consumer]'s Social Security Number was not necessary in the due course of a judicial proceeding or necessarily preliminarily thereto.

7. According to the account statements filed in response to [Consumer]'s request for production of documents, [Consumer] only charged the total amount of \$1,790.27 on her account between July, 2000 and November, 2001. She last used the card on or about November 26, 2001. During that same period, Capital One charged \$57.50 in finance charges for a total of \$1,847.77 .

8. [Consumer] continued to make monthly payments on the subject card from July, 2000 until September, 2003. During this time she paid a total of \$2,307.80, an amount well in excess of the amounts due for principal and interest. During this time she paid \$460.03 in excess of the amounts owed.

9. The sums being sought by Plaintiff are finance charges and late and over-the-limit fees incurred subsequent to the last use of the card and membership fees and charges for Capital Pay, privacy guard and payment protection which accumulated during the pendency of the card.

10. Based upon the account statements attached to Plaintiff's response to request for production, the only reason the card stayed active was so that Plaintiff could continue to charge Defendant finance charges and for late fees, over-the-limit and membership fees and Capital Pay, Payment Protection, Membership, and Privacy Guard charges to artificially inflate the balance of her account.

11. [Consumer] did not use the card after November, 2001. Based upon a review of the account statements attached to Plaintiff's response to request for production during the time period from December, 2001 to November, 2004, [Consumer] received no benefit from the card and was charged the following unnecessary sums:

| | |
|---------------------|-------------|
| Finance Charges | \$ 486.02 |
| Late Fees | \$ 400.00 |
| Over-the-Limit Fees | \$ 675.00 |
| Total | \$ 1,561.02 |

12. Based upon a review of the account statements attached to Plaintiff's response to request for production during the time period from July, 2000 to November, 2004, [Consumer] was also charged the following unauthorized and unnecessary sums:

| | |
|--------------------|-----------|
| Capital Pay | \$ 40.00 |
| Payment Protection | \$ 82.25 |
| Membership Fees | \$ 117.00 |
| Privacy Guard | \$ 59.95 |
| Total | \$ 299.20 |

[Consumer] received no benefit and did not request the products reflected in these fees at the time they were incurred.

13. Based upon a review of the statements attached to the Plaintiff's response to request for production, even though [Consumer] made significant payments to Plaintiff the majority of which were for unauthorized and unwarranted charges for which she received no benefit and her balance did not decrease. She also paid excessive sums as a result of Plaintiff's willful delay in pursuing this case. Even though she made significant payments, her balance increased during a time period during which she received no benefit.

COUNT ONE
FLORIDA CONSUMER COLLECTION PRACTICES ACT

[Consumer] brings this action against Capital One, seeking statutory damages for its violations of the Florida Consumer Collection Practices Act, *Fla.Stat.*, §559.55, *et seq.* (FCCPA) in the transaction which is the subject of the above-styled case. [Consumer] alleges:

14. [Consumer] realleges the allegations contained in Paragraphs 1 through 13 of her Counterclaims above, inclusive and incorporates the same herein.

15. The FCCPA was enacted to protect Florida consumers from creditors and debt collectors who seek to collect debts through illegal means.

16. [Consumer] is a "debtor" and "consumer" within the meaning of FCCPA, §559.55(2), *Fla. Stat.* (2002). Capital One alleges [Consumer] owed a "consumer debt" as this phrase is defined by §§559.55(1) and (2), *Fla.Stat.* (2002).

17. Capital One is a "creditor" or "debt collector" within the meaning of FCCPA, §559.55(3) or (6), *Fla. Stat.* (2002).

18. Capital One filed a lawsuit to collect the debt without sufficient documentation and over six years after the true benefit was purportedly provided.

19. Capital One seeks to collect unauthorized and inflated sums which provided no benefit to [Consumer] and after an unconscionable delay which inured only to Capital One's benefit. Capital One allowed the account to continue so it could assess [Consumer] for expensive products that provided no benefit to her.

20. Further, Capital One attached a document to its Amended Complaint for Damages and response to request for production which contained her Social Security Number leaving her susceptible to identity theft.

21. The FCCPA prohibits creditors from claiming, attempting or threatening to enforce a debt when such a person knows that the debt is not legitimate or assert the existence of some other legal right when such person knows that the right does not exist. *See* § 559.72 (9), *Fla. Stat.* (2002). Capital One knew or should have known that [Consumer] has paid back any sums for benefits actually received and has been paying junk charges and interest on junk charges for many years.

22. Capital One knew or should have known that it did not have a legitimate litigation purpose in publishing [Consumer]'s Social Security Number in the public domain.

23. Capital One's actions as described above violate the Florida Consumer Collections Practices Act, §§559.55, *Fla. Stat. et seq.*

24. As a result of the above-referenced violations of the Act, [Consumer] has been subjected to an unwarranted and illegal collection activities and the unjust loss of income, and therefore, has been harmed. She has also become susceptible to identity theft.

25. As a result of these violations, Capital One is liable to [Consumer] for actual damages or \$1,000.00, whichever is greater, together with court costs and attorneys fees, as provided by Florida Statutes §559.77.

26. [Consumer] reserves the right, pursuant to Florida Statute §768.72 (1991), to amend this action to add a prayer for punitive damages upon a reasonable showing by evidence in the record or proffered providing a reasonable basis for recovery of punitive damages.

27. It has been necessary for [Consumer] to retain counsel including Jacksonville Area Legal Aid, Inc., a nonprofit law firm which provides free legal services to the indigent and working poor, to prosecute civil litigation based upon the Act. Her counsel has incurred and will incur costs and other related expenses in prosecuting this action and their counsel is entitled to reimbursement of their costs and attorneys fee's pursuant to §559.77, *Fla. Stat.*

WHEREFORE, [Consumer] requests this Court to enter a judgment against Capital One as follows:

- A. Awarding her statutory damages as provided by §559.77, *Fla. Stat.*;
- B. Awarding attorney's fees and costs; and
- C. Granting such other and further relief as may be deemed just and proper.

COUNT TWO

INVASION OF PRIVACY

28. [Consumer] hereby incorporates by reference the allegations of Paragraphs 1 through 13 of her Counterclaims, inclusive and incorporates the same herein by reference.

29. This is an action for actual damages, costs, and attorney's fees.

30. Capital One has caused [Consumer]'s Social Security Number to be published in public documents. By attaching a document containing her Social Security Number to its Amended Complaint for Damages and its response to request for production, Capital One has caused private information to be published in the public domain. Publication of [Consumer]'s Social Security Number was not necessary in the due course of a judicial proceeding or necessarily preliminarily thereto.

31. As a direct result of Capital One's publication of [Consumer]'s private information, she has been damaged because she has become susceptible to identity theft.

32. [Consumer] reserves the right, pursuant to Florida Statute §768.72 (1991), to amend this action to add a prayer for punitive damages upon a reasonable showing by evidence in the record or proffered providing a reasonable basis for recovery of punitive damages.

33. It has been necessary for [Consumer] to retain counseling including Jacksonville Area Legal Aid, Inc., a non-profit law firm which provides free legal services to the indigent and working poor, to prosecute civil litigation based upon the Act. Her counsel has incurred and will incur costs and other related expenses in prosecuting this action and her counsel is entitled to reimbursement of their costs and attorneys fee's pursuant to §§501.2105(1),(3) and 501.211, *Fla. Stat.*.

WHEREFORE, [Consumer] requests this Court to enter a judgment against Capital One and therein to:

- a. Declare Capital One's actions in connection with the subject transaction illegal;
- b. Denying Plaintiff's request for damages for a purported breach of contract; and
- c. Award her costs and attorneys fees, and any other and further relief as this Court deems equitable.

COUNT THREE

UNCONSCIONABILITY

34. [Consumer] hereby incorporates by reference the allegations of Paragraphs 1 through 13 of her Counterclaims, inclusive and incorporates the same herein by reference.

35. This is an action for actual damages, costs, and attorney's fees.

36. In connection with the purported debt which is the subject of Plaintiff's Amended Complaint for Damages, Capital One has assessed and collected unconscionable amounts and has been materially unfair to [Consumer], the party of lesser bargaining power and against the concepts of equity.

37. [Consumer] should be entitled to a refund for sums paid in excess of the benefit received and reasonable interest thereon.

WHEREFORE, [Consumer] requests this Court to enter a judgment against Capital One and therein to:

- a. Declare Capital One's actions in connection with the subject transaction unconscionable;
- b. Denying Plaintiff's request for damages for a purported breach of contract; and
- c. Award her costs and attorneys fees, and any other and further relief as this Court deems equitable.

DEMAND FOR JURY TRIAL

Defendant/Counterclaim Plaintiff demands a trial by jury on all counts so triable.

RESPECTFULLY SUBMITTED,
JACKSONVILLE AREA LEGAL AID, INC.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the above document has been furnished to Jason S. Dragutsky, Esquire; Hayt, Hayt & Landau; Attorneys for Plaintiff; 7765 South West 87 Avenue, Suite 101; Miami, Florida 33173 by United States Mail and facsimile, this _____ day of November, 2007.

ATTORNEY