

ARROW FINANCIAL SERVICES LLC,	:	IN THE COURT OF COMMON PLEAS
Plaintiff	:	OF CUMBERLAND COUNTY,
	:	PENNSYLVANIA
v.	:	
	:	
	:	CIVIL ACTION - LAW
JODI A. WITMER,	:	
Defendant	:	
	:	No. 09-6197 Civil Term

IN RE: DEFENDANT’S PRELIMINARY OBJECTIONS TO PLAINTIFF’S AMENDED COMPLAINT

BEFORE OLER, J., AND EBERT J.

OPINION AND ORDER OF COURT

Ebert, J., May 13, 2010 –

On December 12, 2009, Jodi A. Witmer (hereinafter Defendant) filed Preliminary Objections to Arrow Financial Services, LLC’s (hereinafter Plaintiff) Amended Complaint. Plaintiff’s one count Amended Complaint against Defendant seeks damages based on Defendant’s default on a credit card account. Defendant’s Preliminary Objections raised five issues regarding Plaintiff’s Amended Complaint. They include: (1) failure to conform to rule of court (improper Verification); (2) failure to conform to rule of court (failure to attach written assignments of debt); (3) failure to conform to rule of court (claiming Plaintiff is not the real party of interest); (4) failure to provide sufficient specificity in a pleading; and (5) failure to conform to rule of court (failure to state whether agreement is oral or written, state its terms, and/or attach a written contract upon which the claim is based). Defendant’s Preliminary Objections will be **SUSTAINED**.

STATEMENT OF FACTS

Plaintiff asserts it is an assignee and successor in interest to the original creditor on a certain credit card account issued to Defendant.¹ Plaintiff alleges Defendant used the credit card, resulting in an outstanding balance.² Plaintiff alleges Defendant has not paid amounts owing under the account and seeks a judgment for \$6,021.76, plus costs.³

PROCEDURAL HISTORY

On September 14, 2009, Plaintiff instituted this action against Defendant in the Court of Common Pleas of Cumberland County, Pennsylvania. On September 28, 2009, Defendant filed Preliminary Objections to Plaintiff's Complaint. On November 17, 2009, Plaintiff filed an Amended Complaint. On December 11, 2009, Defendant filed Preliminary Objections to Plaintiff's Amended Complaint. Defendant's Preliminary Objections to the Amended Complaint are now before this Court.

DISCUSSION

A. Standard of Review

The Defendant in this case has filed preliminary objections that claim Plaintiff has failed to plead in conformance with law or rule, Pa.R.C.P. 1028(a)(2), and that Plaintiff's pleadings are insufficiently specific, Pa.R.C.P. 1028(a)(3). Based on these preliminary objections, the Defendant has asked the Court to dismiss the complaint. The Defendant bears the burden of proof with regard to preliminary objections, and any doubt should be resolved against the objecting party. Koken v. Steinberg, 825 A.2d 723 (Pa. Cmwlth. 2003). Even where a trial court sustains preliminary objections on their merits, it is generally an abuse of discretion to dismiss the complaint without leave to amend. Harley Davidson Motor Company, Inc. v. Hartman, 442

¹ Pl.'s Compl., Sept. 14, 2009, ¶ 3.

² Pl.'s Compl., Sept. 14, 2009, ¶ 4.

³ Pl.'s Compl., Sept. 14, 2009, ¶ 5; Pl.'s Am. Compl., Nov. 17, 2009.

A.2d 284 (Pa.Super. 1982). A trial court's decision regarding preliminary objections will be reversed only where there has been an error of law or abuse of discretion. Cooper v. Frankford Health Care System, Inc., 960 A.2d 134 (Pa.Super. 2008).

B. Background

“A breach of contract claim in Pennsylvania requires three elements: (1) the existence of a contract (2) a breach of a duty imposed by the contract and (3) resulting damages.” J.F. Walker Co., Inc. v. Excalibur Oil Group, Inc., 792 A.2d 1269, 1272 (Pa. Super. 2002), *citing* Williams v. Nationwide Mut. Ins. Co., 750 A.2d 881, 884 (Pa. Super. 2000). Turning to the contents of Plaintiff's Amended Complaint, it is clear that it has pleaded sufficient facts to set forth a facially valid breach of contract action. Starting with the existence of a contract, Plaintiff asserts it is an assignee and successor in interest to the original creditor on a certain account issued to Defendant. Plaintiff has also pleaded sufficient facts to set forth a breach of a contractually imposed duty and resulting damages. Plaintiff alleges Defendant used the credit card, resulting in an outstanding balance totaling \$6,021.76 and that Defendant has not paid these amounts owing under the account. Despite the sufficiency of the pleaded facts, Plaintiff's Amended Complaint is found to be lacking several necessary requirements identified by Defendant's preliminary objections.

C. Analysis of Defendant's Preliminary Objections

1. Failure to conform to rule of court (improper Verification)

Defendant's first preliminary objection goes to Plaintiff's failure to properly verify the Amended Complaint. In accordance with Pa.R.C.P. No. 1024(c), “verification shall be made by one or more of the parties filing the pleading unless all the parties (1) lack sufficient knowledge or information, or (2) are outside the jurisdiction of the court and the verification of none of them

can be obtained within the time allowed for filing the pleading. In such cases, the verification may be made by any person having sufficient knowledge or information and belief and shall set forth the source of the person's information as to matters not stated upon his or her own knowledge and the reason why the verification is not made by a party.” Plaintiff’s Amended Complaint was not verified by a party filing the pleading. Instead it was verified by Plaintiff’s counsel. Plaintiff made no averment that either of the two exceptions, provided under Pa.R.C.P. No. 1024(c), applied in this case.

Furthermore, no reason was provided in the Amended Complaint as to why the Verification was not made by a party. At oral argument counsel indicated that there was perhaps some connection between Arrow Financial Services, LLC and the law firm of Apothaker and Associates, P.C. which identifies itself as a law firm engaging in debt collection. Be that as it may, Plaintiff must explain why none of the parties filing the pleading have sufficient knowledge or information and/or are otherwise outside of the jurisdiction of the Court and that none of them can provide verification within the time allowed for by the pleading. The verification supplied by Kimberly F. Scian, Esquire, is simply devoid of any of these required averments.

2. Failure to conform to rule of court (failure to attach written assignments of debt; Plaintiff not real party in interest)

Defendant’s second and third preliminary objections go to Plaintiff’s failure to attach necessary writings to the Amended Complaint. In accordance with Pa.R.C.P. No. 1019(i), “[w]hen any claim or defense is based upon a writing, the pleader shall attach a copy of the writing, or the material part thereof, but if the writing or copy is not accessible to the pleader, it is sufficient so to state, together with the reason, and to set forth the substance in writing.” If any claim or defense set forth within the pleadings is based upon a contract, then either a copy of the

contract must be attached or if unavailable then the substance of the contract must be set forth in writing.

In Atlantic Credit and Finance, Inc. v. Giuliana, 829 A.2d 340 (Pa. Super. 2003), the Court found that a complaint in debt collection action filed against credit card debtors by creditor's alleged assignee did not satisfy the requirement set forth in Pa.R.C.P. No. 1019(i), where the alleged assignee did not attach to the complaint: (1) a cardholder agreement; (2) a statement of account; and (3) evidence of assignment from credit card issuer to alleged assignee. Likewise in the case *sub judice*: (1) Plaintiff failed to identify the terms of the parties' agreement within the Amended Complaint, or attach a copy of the document upon which its claim is based to the Amended Complaint; (2) Plaintiff failed to provide a detailed statement of any cash advances, items purchased, dates of purchase and prices paid in the Amended Complaint; and (3) Plaintiff failed to attach a writing to the Amended Complaint that evidences the assignment of predecessor's account to the Plaintiff. Even if the writing or a copy is not accessible to Plaintiff, it failed to provide any reason for the writings absence and also failed to set forth the substance of the contract in writing.

The document attached to Plaintiff's brief titled "Appendix B, Bill of Sale" is purported to evidence the sale and assignment of Defendant's account from the original creditor to Plaintiff. This Appendix B, Bill of Sale, is not attached to the complaint. Briefs are not part of the record, and thus this appendix cannot be considered by this Court. Secondly, even if it could be considered, this document reflects a transfer of some unspecified accounts. The individual accounts that were transferred by the original creditor to Plaintiff are not specified in this document. Nowhere does it reflect that Defendant's account was among the accounts that were transferred to Plaintiff by the original creditor. "An assignee may sue as the real party in

interest, but it must first ‘trace in [its] pleading the derivation of [its] cause of action from [its] assignor.’” Remit Corp. v. Miller, 5 Pa. D. & C. 5th 43, 47 (Pa. Com. Pl. 2008) (*quoting Brown v. Esposito*, 42 A.2d 93, 94 (1945)). Pa.R.C.P. No. 1019 (h) states that “[w]hen any claim or defense is based upon an agreement, the pleading shall state specifically if the agreement is oral or written.” Plaintiff must indicate whether this alleged agreement with the original creditor was oral or written. If it was a written agreement, Plaintiff must attach to the Amended Complaint a writing evidencing the assignment of Defendant’s account to Plaintiff by the original creditor. Therefore, Plaintiff has failed to attach the necessary writing to the Amended Complaint evidencing the assignment of debt.

3. Fourth Preliminary Objection, Pa.R.C.P. No. 1028(a)(2)(3) - Failure to conform to rule of court, and insufficient specificity

Next is the question of whether the Court should grant Defendant’s Motion for More Specific Pleading. Pa.R.C.P. No. 1019(f) states that “[a]verments of time, place and items of special damage shall be specifically stated. Generally, when evaluating a motion for more specific pleading under Rule 1028(a) (3), the issue is “whether the complaint is sufficiently clear to enable the Defendant to prepare his defense, or whether the Plaintiff’s complaint informs the Defendant with accuracy and completeness of the specific basis on which recovery is sought so that he may know without question upon what grounds to make his defense.” Rambo v. Green, 906 A.2d 1232, 1236 (Pa.Super. 2003). In debt collection actions filed by credit card companies against their customers, the plaintiff must include with the complaint a copy of the credit card agreement and a statement of account. Atlantic Credit and Finance, Inc. v. Giuliana, 829 A.2d 340, 344-45 (Pa.Super. 2003). In Capital One Bank (USA) N.A. v. Clevestine, 7 Pa. D & C 5th 153 (Centre County 2009), the Court held that the Plaintiff satisfied Rule 1019 (i) by

including with the complaint “several Capital One monthly billing statements bearing the Defendant’s name, dating from the opening of the account to the present and reflecting individual charges and fees” sufficient to illustrate how the Plaintiff arrived at the amount it sought from the Defendant. In Plaintiff’s complaint, the only statement of amounts related to the account is exhibit “A” which appears to be 2 copies of the same monthly statement from May 15, 2008. This one statement does not reflect any individual charges. It does show that as of the statements closing date of April 18, 2008, \$133.33 of finance charges had been assessed as a result of an annual percentage interest rate of 28.99 percent.

While we decline to hold that the Plaintiff in this case must attach each and every monthly billing statement related to this account, the fact remains that Plaintiff obviously has access to the account statements of Washington Mutual Card Services (the original creditor) and should attach statements reflecting the opening of the account and statements which show the individual charges and fees. We are satisfied that in this case, plaintiff’s amended complaint falls short of the requisite specificity required by Rule 1019.

4. Fifth Preliminary Objection, Pa.R.C.P. No. 1028(a) (2) - Failure to conform to rule of court (failure to state whether agreement is oral or written, state its terms, and/or attach a written contract upon which the claim is based)

Plaintiff alleges that Defendant had a credit card account with the original creditor, Washington Mutual Card Services. A credit card account is an agreement between the issuer and the cardholder. Pa.R.C.P. No. 1019 (h) states that “[w]hen any claim or defense is based upon an agreement, the pleading shall state specifically if the agreement is oral or written.” Plaintiff must indicate whether this alleged agreement between Defendant and the original creditor was oral or written. If it was a written agreement, Plaintiff must attach to the Amended Complaint the

cardholder agreement between Defendant and the original creditor. The Amended Complaint simply does not address the requirements of Rule 1019 (h) or (i).

CONCLUSION

There is no question that this Court is a valid forum in which a business who is owed money pursuant to an agreement with another may seek redress. Clearly, debtors who have incurred legitimate debt are required to pay their obligations. This having been said, this Court has noted over the past two years given the economic turmoil present in this country, that the practice of assigning bad debts to businesses dedicated to debt collection have proliferated. Again, such businesses are entitled to collect the assigned debts legitimately owed them.

However, such businesses must also follow the Rules of Civil Procedure for filing complaints to recover such debt. It has become clear to this Court that all too often these corporate collection plaintiffs tend to file shoddy, incomplete pleadings without making the necessary inquiries regarding the details of these debt transactions. It appears that this is done in order to obtain quick default judgments against unrepresented debtors at minimal expense. This case represents an example of such sub par pleading which unnecessarily increases the work of the Court. For example, Plaintiff's brief clearly indicates that Arrow is in possession of additional information which should have been pled in the complaint. In its brief, Arrow states (1) that the account was open on August 21, 2000, (2) that the Defendant made its last payment of \$100.00 on July 17, 2008, and (3) that the outstanding balance that was charged off on April 20, 2008, was \$5,566.95. There is no question that electronic data concerning this account does exist and which could be properly produced and pled in the complaint. At one point in its brief, on page 3 in paragraph 2, Plaintiff states "Defendant, when entering into a contract with Capital One Bank agreed to make interest payments on unpaid balances on this account..." This credit

card was supposedly issued by Washington Mutual Card Services not Capital One Bank. Furthermore, the Amended Complaint provides at Exhibit "A" one Washington Mutual Card Services credit card statement from May 15, 2008, which it attached twice. Such inattention is indicative of the shoddy legal work being presented to this Court.

If a legitimate outstanding debt is owed, this Court is obligated to see that justice is done and debt is paid. However, the Rules of Civil Procedure are perfectly clear. Credit card debt collection is not some type of cut rate fast track legal process. The Plaintiff must pay attention to detail and submit a properly pleaded and complete complaint.

Here, the "failure to produce a cardholder agreement and statement of account, as well as evidence of the assignment, establishes a meritorious defense" requiring preliminary objections be sustained. Atlantic Credit and Finance, Inc. v. Giuliana, 829 A.2d 340, 345 (Pa. Super. 2003). Failure to attach these writings to the Amended Complaint is fatal. Plaintiff must provide a proper verification and plead with more specificity. Defendant's Preliminary Objections are sustained. This Court will grant Plaintiff leave to file a legally sufficient Amended Complaint within 30 days of the date of this Order.

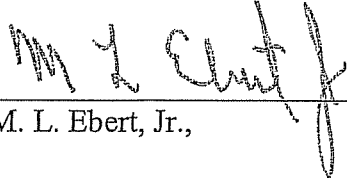
Accordingly the following order is entered:

ORDER OF COURT

AND NOW, this 13th day of May, 2010, upon consideration of the Defendant's Preliminary Objections to Plaintiff's Amended Complaint, and the briefs filed by the parties and after argument,

IT IS HEREBY ORDERED AND DIRECTED that Defendant's Preliminary Objections to Plaintiff's Amended Complaint are **SUSTAINED**. This Court grants Plaintiff leave to file a legally sufficient amended Complaint within 30 days of the date of this Order.

By the Court,


M. L. Ebert, Jr., J.

Kimberly F. Scian, Esq.
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