

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

BELMONT FINANCIAL
SERVICES GROUP, INC.,

Plaintiff

vs.

CURTIS HAWKINS, SR.,

Defendant

CIVIL DIVISION

NO. AR07-010035

OPINION AND ORDER OF COURT

HONORABLE R. STANTON WETTICK, JR.

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ALLEGHENY COUNTY PA
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10:30 AM

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OPINION AND ORDER OF COURT

WETTICK, J.

Defendant's preliminary objections to plaintiff's fourth complaint are the subject of this Opinion and Order of Court.

Plaintiff's first complaint was filed on September 24, 2007. The complaint alleges that on September 21, 2000, defendant contracted with Bank of America for a Visa Credit Card. The account was purchased from Bank of America by The Sagres Company. It was next assigned to Global Acceptance Credit Company, LP. Subsequently, on February 16, 2006, it was assigned to Belmont Financial Services Group, Inc.,

The complaint alleges that a principal balance was due on the account as of November 18, 2004 in the amount of \$10,731.73. However, the complaint does not contain any material facts supporting the bald assertion that \$10,731.73 was due as of November 18, 2004.¹

The complaint contains two attachments. Exhibit A is an Affidavit of Indebtedness of Mike Varrichio, dated April 12, 2007, who is identified as President and CEO of Global Acceptance. He states that the company's business records show there

¹The complaint, which identifies plaintiff as a Pennsylvania corporation with its principal place of business in Wynnewood, PA, is verified by plaintiff's attorney. The verification includes his statement that "the Plaintiff is outside the jurisdiction of the court and verification cannot be obtained within the time allowed for filing."

was due and payable from plaintiff the amount of \$10,731.73. The company acquired this account as assignee in interest from The Sagres Company on February 16, 2006. The company's records show the account was established by Bank of America on September 21, 2000 and that the date of last payment was November 18, 2004.

Exhibit B is two printed pages (unsigned, undated, and not identified with any account) stating that a "Bank of America Commercial Card or Corporate Card was issued to you" and that "[t]his Agreement governs your use of the Card." It allows the bank to amend the agreement upon fifteen days written notice and for the amendment, at the option of the bank, to be applicable to both existing balances and future transactions (Complaint, Ex. B at ¶26).

Defendant filed preliminary objections based on plaintiff's failure to attach writings and to plead material facts supporting the allegations that (1) plaintiff acquired an account for a credit card issued by Bank of America to defendant, and (2) there is a balance due of \$10,731.73. The preliminary objections assert that Pa.R.C.P. No. 1019 requires plaintiff to allege and/or attach documentation which contains the charges that are part of the claim, the dates of the charges, credits for payments, amounts of interest charges, and amounts of other charges. The preliminary objections also assert that since this is a claim based on a writing, under Rule 1019(i), the pleading party must attach the relevant writings, including each assignment.

The preliminary objections became moot when plaintiff filed a second complaint on October 9, 2007.

There are some differences between the first complaint and the second complaint. Plaintiff added an allegation that dates of charges, credits for payments,

dates and amounts of interest charges, and dates and amounts of other charges are not presently available as they have not been provided to plaintiff by Bank of America. The second complaint is verified by an Assistant Treasurer of Belmont who alleges that the statements made in the amended complaint are true and correct to the best of her knowledge, information, and belief.

Attached to the second complaint as part of Exhibit B is a Bill of Sale from Bank of America to Sagres dated November 28, 2005 which provides that the bank assigns to Sagres all rights in those accounts as set forth in Exhibit B. However, the Bill of Sale does not include this Exhibit B.

Also attached to the second complaint as part of Exhibit B is a March 27, 2006 Bill of Sale from Sagres to Global stating that it assigned all rights in accounts as set forth in Exhibit A. However, this Exhibit A is not attached.

Also attached to the second complaint as part of Exhibit B is an April 6, 2007 Assignment and Bill of Sale from Global to Belmont, stating that Global assigns each of the accounts described in the Loan Sale Agreement dated April 6, 2007, Schedule A. However, this Schedule A is not attached.

Defendant filed preliminary objections to the second complaint raising the same grounds raised in his initial preliminary objections. On November 16, 2007, with the consent of both parties, I entered a court order stating that plaintiff's complaint is dismissed and an amended complaint shall be filed within ninety days.

On January 31, 2008, plaintiff filed its third complaint. This complaint included different allegations regarding the initial account and subsequent assignees. It alleges that on September 21, 2000, defendant originally contracted with Fleet Bank

(predecessor in interest to Bank of America) for a Visa account and that on April 1, 2004, Bank of America acquired the account through a merger with Fleet Bank.

Exhibit C to the third complaint attaches to the Assignment and Bill of Sale between Global and Belmont a Listing of Accounts Purchased by Belmont which includes defendant's account. In addition, Exhibit D to this third complaint includes various monthly account summaries issued by Fleet.

In response to defendant's preliminary objections to the third complaint, I entered a court order dated April 25, 2008 in which I struck the third complaint and granted plaintiff thirty days to file an amended complaint. The court order provided: "If plaintiff(s) file(s) an amended complaint on or before the thirtieth (30th) day which does not substantially address the preliminary objections of defendant(s), this court, on motion of defendant(s), will dismiss the amended complaint with prejudice."

On May 21, 2008, plaintiff filed a fourth complaint, very similar to the third complaint, that is the subject of this Opinion and Order of Court. Defendant filed preliminary objections seeking dismissal on the ground that this amended complaint does not substantially address the preliminary objections that defendant has been raising throughout these proceedings. I am granting these preliminary objections because of plaintiff's continued failure to file a complaint that meets the pleading requirements of the Pennsylvania Rules of Civil Procedure.

I addressed the pleading requirements with respect to credit card collection complaints in *Worldwide Asset Purchasing, LLC v. Stern*, 153 P.L.J. 111 (2004). I ruled that under the Rules of Civil Procedure the complaint cannot simply assert that a

specific amount of money is owing. The complaint must include the material facts supporting the recovery of this amount of money:

Under Rule 1019, a complaint must include the amounts of the charges that are part of the claim, the dates of the charges, credits for payments if any, dates and amounts of interest charges, and dates and amounts of other charges. The complaint should contain sufficient documentation and allegations to permit a defendant to calculate the total amount of damages that are allegedly due by reading the documents attached to the complaint and the allegations within the complaint. 153 P.L.J. at 112 (citations and footnote omitted).

In *Worldwide Asset*, I also stated that the complaint must attach documents establishing a chain of title:

Defendant's preliminary objections raise the failure of the complaint to contain allegations as to the terms and conditions of any alleged assignment between Citibank and Unifund CCR Partners, and plaintiff's failure to attach a copy of this assignment. I am sustaining this preliminary objection.

The complaint is based on an alleged credit card relationship between defendant and Citibank Universal Card. Plaintiff is not a party to this relationship (i.e., plaintiff does not stand in the shoes of Citibank Universal Card) unless plaintiff can establish that its assignor (Unifund CCR Partners) acquired Citibank's right, title, and interest in and to the alleged account between defendants and Citibank. As I previously discussed, rule 1019(i) requires a party to attach all documents which form the foundation of the plaintiff's cause of action. The foundation of plaintiff's cause of action includes Citibank's assignment of defendant's account. *Id.* at 113.

Plaintiff's fourth complaint does not meet either of the above requirements. With respect to the first requirement, it does not include any writings describing the terms and conditions of any original or amended credit card agreements involving defendant.²

²Plaintiff had attached to the first two complaints an undated and unsigned Bank of America Credit Card Agreement which it alleged to be the credit card agreement which defendant breached. In its third and fourth complaints, plaintiff now alleges that its claims are based on a credit card agreement between defendant and Fleet Bank. In these complaints,

While the fourth complaint contains monthly account summaries which Fleet furnished to defendant dated October 22, 2002 to May 30, 2003 (Exhibit E), these summaries do not support a finding that defendant owes \$10,731.73 on this account. The initial summary shows a new balance of \$10,273.48. As of May 21, 2003, the new balance is \$12,223.23. However, the most recent summary shows a new balance of \$0 as of May 30, 2003. The summary states that as of May 30, the following transactions occurred: "Charge Off Account—Principals"—9,562.78 and "Charge Off Account—Finance Charges"—2,660.45.³

Plaintiff's fourth complaint includes allegations that the original application and agreement between Fleet and defendant is not accessible to plaintiff as it has not yet been provided by Fleet or its successors and that plaintiff is unaware of the exact substance of the application or agreement at this time (Fourth Amended Complaint, ¶13). The complaint further alleges that statements issued prior to October 22, 2002 or after May 30, 2003 are not presently available as they have not been provided to plaintiff by Bank of America or its assigns. "The substance of the missing account statements likely provides the details regarding changes [sic] made and payments credited to Defendant's account prior to 10/22/02 or after 5/20/03" (Fourth Complaint, ¶18).

Plaintiff contends that the fourth complaint complies with the pleading requirements because of the latter provision of Rule 1019(i) which I have underlined:

plaintiff has not attached any writings that purportedly set forth the terms of the credit card agreement.

³ Plaintiff's fourth complaint continues to attach the Affidavit of Mike Varrichio, President and CEO of Global (Exhibit A), which states that "[t]he Company's records state that the account was established by Bank of America, N.A. (U.S.A.) on 9/21/2000 . . ." (emphasis added) and that the company's business records show an amount due of \$10,731.73."

(i) When 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.

The purpose of this provision is to permit a party to proceed where the writing is in the possession of an opposing party (in which event if the plaintiff misstates the contents of the writing, the defendant may attach a copy of the writing to its responsive pleading) or to proceed with a claim where the writing is unavailable if the party can state the contents of the writing from his or her own recollection.

In the present case, plaintiff has never seen and, thus, has no recollection of the writings. It cannot describe the terms and conditions of the writings. Consequently, the latter part of Rule 1019(i) is inapplicable because of the requirement that the pleader “set forth the substance in writing.”

With respect to the requirement that the complaint include writings establishing a chain of title, plaintiff’s chain of title includes four prior transactions (assuming that Fleet issued a credit card to defendant). The first transaction is from Fleet to Bank of America. Plaintiff’s allegations that Bank of America acquired the credit card account through a merger is sufficient. The second transaction is an alleged transfer from Bank of America to Sagres. The Bill of Sale attached to the complaint states only that Bank of America assigns Sagres its interests in those accounts as set forth in Exhibit B. Exhibit B is not attached. Consequently, this writing does not establish that Sagres acquired defendant’s account. For the third transaction, plaintiff has attached a Bill of Sale in which Sagres assigns Global Acceptance its interests in accounts set forth in Exhibit A. Exhibit A is not attached.

In summary, these writings attached to the fourth complaint, coupled with any material facts alleged in that complaint, do not support a finding that plaintiff acquired defendant's account with Fleet (assuming that there was such an account), and plaintiff's complaint does not include any allegations setting forth the substance of the writings because plaintiff is not in a position to know which accounts were included in the missing exhibits.

For these reasons, I am sustaining defendant's preliminary objections to plaintiff's complaint for failure to establish the terms and conditions of any agreement upon which plaintiff is suing, for failure to set forth any allegations supporting its claim that defendant owes \$10,731.73, and for failure to attach or describe writings that establish a chain of title. I am dismissing this complaint because through ninety and thirty day orders of court, plaintiff has had ample opportunity to obtain from third parties any documents that may support plaintiff's claims. Either the documentation is not available or plaintiff has failed to exercise diligence in obtaining the information necessary to plead a claim against defendant based on transactions occurring prior to the April 6, 2007 transaction between Global and plaintiff.

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CURTIS HAWKINS, SR.,

Defendant

NO. AR7-011035

On this 14 day of July, 2008, it is hereby ORDERED that defendant's preliminary objections to plaintiff's fourth complaint are sustained and this case is dismissed with prejudice.

BY THE COURT:



WETTICK, J.

Copies mailed. (CA) 7/25/08