

IN THE COURT OF COMMON PLEAS OF CENTRE COUNTY, PENNSYLVANIA  
CIVIL ACTION – LAW

CALVARY PORTFOLIO SERVICES,  
LLC, AS ASSIGNEE OF CALVARY SPV  
I, LLC, AS ASSIGNEE OF RIVERWALK  
HOLDINGS, LTD, AS ASSIGNEE OF  
WASHINGTON MUTUAL BANK,

Plaintiff

v.

TAMMY J. MOSTYN,

Defendant

NO. 2010-3233

*Attorney for Plaintiff:*  
*Attorney for Defendant:*

Jorge M. Pereira, Esq.  
Eric. E. Cummings, Esq.

**LUNSFORD, J.**

**OPINION & ORDER**

Presently before this Court are Defendant Tammy J. Mostyn’s (hereinafter “Defendant”) Preliminary Objections to Plaintiff Calvary Portfolio Services’ (hereinafter “Plaintiff”) Complaint. Upon consideration of the Preliminary Objections and the briefs submitted by the parties, Defendant’s Preliminary Objections to Plaintiff’s Complaint are SUSTAINED.

**DISCUSSION**

Defendant’s Preliminary Objections allege Plaintiff’s Complaint is insufficient per Pa. R.C.P. 1028 and 1019 for failing to attach a signed copy of Defendant’s credit card agreement, for failing to provide written evidence of the assignment of Defendant’s credit card account from the original holder to Plaintiff and finally, for failing to present an account stated. As a threshold issue, Plaintiff counters that Defendant’s Preliminary Objections fail to conform to Pa. R.C.P. 1026 because the responsive pleadings were not

filed within 20 days of service of the Complaint. Plaintiff further argues its Complaint alleges sufficient facts to set forth a cause of action, however to the extent any defects exist, Plaintiff argues this Court should allow an opportunity to amend.

In considering preliminary objections to a complaint in the nature of demurrer, all well-pleaded material facts set forth in the complaint are admitted as true as well as inferences reasonably deducible therefrom, but not the pleader's conclusions of law.

*Clevenstein v. Rizzuto*, 266 A.2d 623, 624-625 (Pa. 1970). In determining whether or not a demurrer should be sustained, two standards must be borne in mind: (1) upon the facts averred, does the law say with certainty that no recovery is permitted; and (2) "where a doubt exists as to whether a demurrer should be sustained, it should be resolved in favor of overruling it." *Id.*

As an initial matter, although Defendant filed her Preliminary Objections more than 20 days after service of the Complaint, this Court does not find the delay to be so prejudicial to Plaintiff to warrant dismissal of Defendant's Preliminary Objections. Pa. R.C.P. 1026(b) requires responsive pleadings, such as preliminary objections, be "filed within twenty days after service of the preceding [complaint]." Pa. R.C.P. 1026(b). The Pennsylvania Supreme Court has held the 20 day requirement in Pa. R.C.P. 1026(b) "is not mandatory but permissive . . . [and] that late pleadings may be filed 'if the opposing party is not prejudiced and justice requires.'" *Paulish v. Bakaitis*, 275 A.2d 318, 321-22 (Pa. 1971) (quoting *Fisher v. Hill*, 81 A.2d 860, 863 (Pa. 1951)). Defendant was served with the Complaint on Sept. 23, 2010. Defendant filed her Preliminary Objections 29 days later on Oct. 22, 2010. Plaintiff's brief does not address how it has been unfairly prejudiced by the 9-day delay in Defendant's filing of her Preliminary Objections.

Strangely, to support its argument for dismissal, Plaintiff cites to *Ambrose v. Cross Creek Condominiums*, a case where the Superior Court found it *completely appropriate* for the trial court to admit the preliminary objections despite Defendant's 9-day delay in filing responsive pleadings. *Ambrose v. Cross Creek Condominiums*, 602 A.2d 864, 868 (Pa. Super. 1992) ("The delay was brief . . . [and] Plaintiffs have not even suggested that they were prejudiced in any way by the brief delay in filing Defendant's responsive pleading."). Therefore, this Court will allow Defendant's Preliminary objections to proceed despite the brief delay beyond the 20 days stipulated by Pa. R.C.P. 1026(b).

Next, this Court agrees with Defendant's argument that Plaintiff's Complaint does not comply with Pa. R.C.P. 1019 and 1028. Specifically, Defendant contends the Complaint lacks a copy of the signed credit card agreement and also lacks a record of the assignment of Defendant's account to Plaintiff. Pursuant to Pa.R.C.P. 1019(h), "when any claim or defense is based upon an agreement, the pleading shall state specifically if the agreement is oral or written." Pa.R.C.P. 1019(h). As required by Pa.R.C.P. 1019(i), when any claim or defense is based upon an agreement, and the agreement is in writing, the agreement must be attached to the pleading. Pa.R.C.P. 1019(i). If the writing is not available to the pleader, in lieu of attaching the agreement, the pleader may provide the reason for the unavailability of the writing and state the substance of the writing in the pleading. Pa.R.C.P. 1019(i). In *Atlantic Credit and Finance, Inc. v. Giuliani*, the Superior Court reaffirmed this attachment requirement when it provided that a creditor must "attach the writings which assertedly establish [the creditor's] right to a judgment." *Atlantic Credit and Finance, Inc. v. Giuliani*, 829 A.2d 340, 345 (Pa. Super. 2003); *see also World Wide Asset Purchasing, LLC v. Stern*, 153 Pittsburgh Legal J. 111 (Allegheny

Ct. Comm. Pl. 2004).

In *Capital One Bank (U.S.A.), N.A. v. James L. Spicer*, -- Pa. D. & C.-- -- (Centre Ct. Comm. Pl. 2009) (Docket No. 2009-774), defendant Spicer argued Capital One's complaint was insufficient because it did not contain the signed agreement or a statement explaining why the agreement is not accessible to the pleader pursuant to Pa.R.C.P. 1019(i). *Id.* Capital One had attached an unsigned and undated copy of a customer agreement form but no statement regarding why the copy of the original signed agreement was not attached. Judge Kistler held the signed agreement must be attached to the complaint or an explanation must be provided pursuant to Pa.R.C.P. 1019. Judge Kistler further provided: "[t]he agreement between the parties is the basis of the claim, so great care must be taken when establishing its authenticity." *Id.*

In *Remit Corp. v. Terry L. Miller*, 5 Pa. D. & C.5th 43 (Centre Ct. Comm. Pl. 2008) (Docket No. 2007-4647), defendant Miller argued that Remit's pleading was insufficient because it contained neither the signed agreement that assigned Miller's credit card account from Bank of America to Remit, nor a statement explaining why the assignment is not accessible. The Complaint alleged that Bank of America transferred Miller's account to its successor in interest, Sagres Company, which then assigned the account to Remit. *Id.* at 45-46. Remit attached an affidavit from one of Sagres's executives charting the path of Miller's account from Bank of America to Remit. *Id.* Judge Ruest, however, found that this affidavit, in the absence of the assignment contract(s) or specific details of the assignment, did not satisfy the requirements of Pa. R.C.P. 1019(i) because it "d[id] not clearly establish the assignment rights between Bank of America . . . and Remit Corporation." *Id.* at 46. "Pa. R.C.P. 2002 requires that all

actions be prosecuted by and in the name of the real party in interest. The court determined there was no assignment from Bank of America to the Sagres Company attached to the complaint and there was no sufficient factual allegation concerning how and when the Sagres Company became a valid successor in interest to Bank of America. Without that allegation, [Remit] has not plead how it has become the real party in interest in this case.” *Id.* at 46-47.

The case *sub judice* is analogous to both *Capital One Bank (U.S.A.), N.A. v. James L. Spicer* and *Remit Corp. v. Terry L. Miller*. Plaintiff’s Complaint does not indicate whether Defendant’s agreement with Washington Mutual Bank was written or oral as required by Pa. R.C.P. 1019(h). Plaintiff attached part of a standard Revolving Credit Card Agreement that is not dated or signed by Defendant. Further, Plaintiff’s Complaint does not indicate whether the assignment of Defendant’s account from Washington Mutual Bank to Plaintiff was written or oral. The Complaint does not give the dates and conditions of the assignment as possession of Defendant’s account was transferred from Washington Mutual Bank to Riverwalk Holdings to Cavalry Spv I to Plaintiff, all required by Pa. R.C.P. 1019(h). If the assignment was based on a written agreement, Plaintiff failed to attach written documentation attesting to the assignment of Defendant’s credit card account from Washington Mutual Bank.

Plaintiff is clearly required to indicate in its Complaint whether the agreements were written or oral to satisfy Pa. R.C.P. 1019(i). Additionally, to meet the standards of Pa. R.C.P. 1019(h), both Superior Court and Court of Common Pleas of Centre County precedent requires Plaintiff to attach written documentation of Defendant’s signed and dated credit card agreement and the assignment of the account from Washington Mutual

Bank to Plaintiff to demonstrate the chain of ownership of the account. If these documents are not available, Plaintiff must provide the reason(s) for unavailability and state the substance of the writing in the Complaint. By failing to conform to these requirements, this Court considers Plaintiff's Complaint insufficient.

Finally, this Court also agrees with Defendant's argument that Plaintiff's Complaint fails to give an account stated showing Defendant's assent to the alleged amount due. Where there is a cause of action on an account stated, "the account must be rendered, and the other party must accept, agree to, or acquiesce in the correctness of the account." 4 Standard Pennsylvania Practice 2d §22:17 at 303 (2001). Such assent may be either express or implied from the parties' actions and dealings with one another.

*Citibank (S.D.) N.A. v. Knepp*, 6 Pa. D. & C.5th -- (Clearfield Ct. Comm. Pl. 2010) (Docket No. 2010-1161-CD). Although Common Pleas Courts in the Commonwealth vary in what is require for a complaint to successfully plead an account stated, there is general agreement that "merely receiving a statement in the mail and not objecting to its contents is not acquiescence." *Id.* at \*3. The presence of payments and the regularity of those payments can be important factors in demonstrating a defendant's agreement. *Id.* at \*4 (holding plaintiff's attachment of one monthly statement to the complaint, along with alleging defendant made "may payments" was not sufficient to properly demonstrate an account stated).

In the particular case of credit card agreements, the fluidity of the interest rates and charges, compounded by the complexity of the agreements, make it very difficult for an average cardholder to affirmatively understand and agree to the amount at issue.

*Capital One Bank (USA) N.A. v. Clevenstine*, 7 Pa. D. & C.5th 153, 157-58 (Centre Ct.

Comm. Pl. 2009) (Docket No. 2008-4139); *Target Nat'l Bank/Target Visa v. Samanez*, 2007 D. & C. Dec. Lexis 433 at \*15 (Allegheny Ct. Comm. Pl. 2007) (Docket No. AR07-009777). In such instances, courts have required a plaintiff to go beyond merely demonstrating a cardholder was informed of the bottom-line amount due, as is laid out in a billing statement or a general cardholder agreement. *Target Nat'l Bank*, 2007 D. & C. Dec. Lexis 433 at \*15; *see also C-E Glass v. Ryan*, 70 Pa. D. & C.2d 251 (Beaver Ct. Comm. Pl. 1975). To show a defendant made the requisite acceptance underlying an account stated, a plaintiff should introduce discussions or transactions that demonstrate the defendant was on notice of where the accrued charges originated. *Capital One Bank (USA) N.A.*, 7 Pa. D. & C.5th at 157. Such actions can be interpreted as conduct manifesting a defendant cardholder's acknowledgment and acquiescence to an account stated.

In the case *sub judice*, Plaintiff's bare-bones Complaint alleges "Defendant has failed and refused to pay the aforesaid balance due" and "Defendant has not objected to account statements issue." To support the establishment of an account stated, Plaintiff attached, as "Exhibit A," three monthly credit card billing statements with Defendant's name listed under the account number. The statements for closing dates of 12/12/08, 11/12/08 and 10/14/08 list payments made on the account during each of those periods in the amounts of \$141.00, \$160.00 and \$150.00 respectively. Plaintiff's Complaint does not allege the account number listed on the statements is the credit card account belonging to Defendant. The Complaint also does not indicate who made the three consecutive payments on the account and does not even allege these monthly statements were ever mailed to Defendant. Additionally, these statements detail transactions and

payments made well over a year before the filing of Plaintiff's Complaint, with no indication as to whether successive payments have been made. Of particular concern, Plaintiff offers no explanation as to how the \$8,463.99 plus interest amount Plaintiff alleges is due increased from the balance of \$6,977.79 listed in the most recent statement of 12/12/08. These statements, along with the bare allegations made in the Complaint, do not sufficiently establish Defendant acquiesced to the amounts Plaintiff alleges are due. As such, this Court finds that Plaintiff's Complaint does not plead sufficient facts to demonstrate an account stated.

**ORDER**

AND NOW, this \_\_\_\_ day of February, 2011, upon consideration of the Preliminary Objections to the Complaint filed by Tammy J. Mostyn and the briefs submitted by the parties regarding the same, Defendant's Preliminary Objections are hereby SUSTAINED and Plaintiff is hereby granted 20 days to amend its Complaint pursuant to this Opinion.

**BY THE COURT:**

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**Judge Bradley P. Lunsford**