

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

TARGET NATIONAL BANK/
TARGET VISA

v.

DANETTE I. GREINER

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No. CI-09-03069

OPINION

BY: ASHWORTH, J., SEPTEMBER 30, 2009

This is a debt collection action against a credit card debtor. The matter is before the Court on Defendant Danette I. Greiner's preliminary objections to Plaintiff's Second Amended Complaint. For the reasons set forth below, these objections must be sustained.

I. Background

Plaintiff Target National Bank/Target VISA filed its original complaint on February 27, 2009, seeking to collect past due payments on a credit card allegedly issued to Defendant Greiner. The cause of action was for default of an "account stated." Attached to the complaint was a two-page "Target Visa Credit Card Account Summary" showing a "new balance" of \$2,317.10 due January 22, 2009.

Defendant filed preliminary objections to the complaint and a brief in support thereof on April 21, 2009, based on Plaintiff's failure to attach writings and to plead material facts supporting the allegations that (1) Defendant created the account, and (2)

there is a balance due of \$2,317.10. The preliminary objections asserted 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 asserted that since this is a claim based on a writing, under Rule 1019(i), Plaintiff must attach the relevant writing. On June 4, 2009, Defendant filed a praecipe to assign the preliminary objections noting that no responsive brief had been filed by Plaintiff. The matter was assigned to this Court on June 10, 2009.

By Order dated June 11, 2009, this Court sustained the preliminary objections and dismissed Plaintiff's Complaint as Plaintiff was deemed not to oppose the preliminary objections for having failed to file a responsive brief pursuant to L.C.R.C.P. No. 1028(c)(A)(4). Plaintiff was granted 20 days to file an amended complaint that conformed to the requirements of Pa. R.C.P. 1019 and 1028(a)(3).

Unbeknownst to the Court, Plaintiff had filed an amended complaint on June 10, 2009, over seven weeks after Defendant's preliminary objections had been filed, and the very day the case was assigned to the Court for disposition. This complaint added a breach of contract action. Also, attached to the amended complaint were two exhibits. Exhibit "A" was a pre-printed "Credit Card Agreement" form (unsigned, undated, and not identified with any account) setting forth "[t]he terms that you agree to follow for your Target Visa Account." It allows the bank to "change this Agreement (including the right to add additional terms) and to apply those changes to any existing balance on the Account." Exhibit "B" consisted of "Target Visa Credit Card Account Summary" sheets starting with a "statement closing date" of August 28, 2007, and continuing through a

“statement closing date” of March 28, 2009. The August 28, 2007, Account Summary shows an existing balance of \$135.88.

On June 19, 2009, Defendant filed timely preliminary objections to the amended complaint raising the same grounds raised in her initial preliminary objections, that is, that the amended complaint still failed to conform with Pa. R.C.P. Nos. 1019 and 1028(a)(3). In an effort to comply with this Court’s Order of June 11, 2009, Plaintiff filed a second amended complaint on June 24, 2009. This complaint is identical in all respects to the first amended complaint. It contains two causes of action against Defendant.

In Count I, Account Stated, Plaintiff avers that Defendant opened an account with Plaintiff for the purchase of goods and services, that Defendant made or authorized a number of purchases, and that, as of December 28, 2008, Defendant owes \$2,317.10 on the account. (See Second Amended Complaint at ¶¶ 3, 4, 8.) Plaintiff alleges in Count II, Breach of Contract, that Defendant opened this consumer credit account pursuant to an “Account Agreement in effect at the time the account was opened or charges were made,” and that she “is in default [of that agreement] for failing to make payments as due.” (Id. at ¶¶ 12, 13.) Plaintiff seeks the balance due and owing on the credit card account in the amount \$2,317.10, plus interest and reasonable attorneys’ fees. (Id. at ¶ 14.)

Defendant again filed timely preliminary objections to Plaintiff’s second amended complaint seeking dismissal on the ground that this amended pleading does not substantially address the preliminary objections that Defendant has been raising throughout these proceedings. These objections must be sustained because of

Plaintiff's continued failure to file a complaint that meets the pleading requirements of the Pennsylvania Rules of Civil Procedure.

III. Discussion

A. Breach of Contract

In a credit card collection action, a creditor must "attach the writings which assertedly establish [the creditor's] right to a judgment." **Atlantic Credit and Finance, Inc. v. Giuliana**, 829 A.2d 340, 345 (Pa. Super. 2003). Defendant's objection to Plaintiff's second amended complaint is that Plaintiff has failed to include the writing evidencing the agreement between the parties. Plaintiff counters that it has satisfied the requirements of Pa. R.C.P. 1019(i) by attaching to the pleading a copy of an undated and unsigned cardholder agreement which appears to have been prepared in "4/05." (See Plaintiff's Memorandum of Law at 3-4.)

Rule 1019(i) requires the pleader to attach a copy of a writing, or the material part thereof, whenever any claim is based on a writing. Written agreements are considered "writings" and thus subject to this rule. See Pa. R.C.P. 1019, Explanatory Comment. It is clear from the text of the Rule that supporting documentation is necessary when submitting a complaint that calls into question the validity of a written agreement.

Plaintiff concedes that an agreement bearing Defendant's signature accepting the terms and conditions of the credit card account "is not currently available." (See Plaintiff's Memorandum of Law at 4.) However, Plaintiff argues that this is not a "fatal

flaw” to its claim because Pennsylvania law does not require signatures to create an enforceable contract, citing **Hartman v. Baker**, 766 A.2d 347, 351 (Pa. Super. 2000). Rather, Plaintiff contends that Defendant's use of the credit card is itself her acceptance of the terms and conditions governing her use of the card. Plaintiff therefore asserts that when Defendant utilized the credit card, she bound herself to the accompanying terms and conditions.

Pennsylvania law is clear that to satisfy the pleading requirements in a consumer credit card collection case, the signed agreement between the credit card holder and credit card company must be attached to the complaint. See **Atlantic Credit**, supra; **Capital One Bank (USA) NA v. Clevenstine**, 7 D.&C.5th 153, 154 (Center Co. 2009); **Belmont Financial Service Group, Inc. v. Hawkins**, 156 P.L.J. 376 (2008); **Worldwide Asset Purchasing, LLC v. Stern**, 153 P.L.J. 111 (2005); **Belmont Financial Services Group, Inc. v. Hodson**, No. 3187-2004 (Monroe Co. 2004). In **Worldwide Asset Purchasing**, the Honorable Stanton R. Wettick held that under the Pennsylvania Rules of Civil Procedure the complaint in a collection case must include writings describing the terms and conditions of any original or amended credit card agreements involving the particular defendant.

[T]he relationship between the cardholder and the issuer begins with a written application signed and submitted by the cardholder. In this application, the cardholder agrees to be bound by provisions set forth in the application and possibly other terms and conditions that are furnished to the cardholder at the time the card is issued. The application also provides that the terms and conditions may be changed through mailings to the cardholder and accepted by the cardholder's continued use of the credit card. In this situation, *the writings that must be attached to the complaint include the application signed by the cardholder and any other relevant terms and conditions*

which govern the issuer's claims. For example, if the claim involves a period of time in which the initial terms and conditions applied and a later period of time in which amended terms and conditions apply, the complaint must attach both the original and amended terms and conditions with the dates for which they were applicable.

153 P.L.J. at 112 (emphasis added). Plaintiff has not attached the relevant writing to establish its claim against this Defendant. In truth, Plaintiff acknowledges that the original agreement bearing Defendant's signature accepting the terms and conditions of the credit card account "is not currently available."¹ (See Plaintiff's Memorandum of Law at 4.) In the place of a signed, dated agreement with Defendant, Plaintiff attached a copy of a form customer agreement with a printing date of "4/05" – nearly two and one-half years before the earliest statement of account attached to the complaint dated August 28, 2007. There is simply no documentation signed by Defendant that would show whether Defendant ever agreed to the terms and conditions of the credit card (the late payment fees and finance charges as shown on the statement) or whether these terms and conditions are applicable to the relevant period in which Plaintiff's claim is based.

¹While Plaintiff has conceded in its memorandum of law that the signed application or agreement "is not currently available," it has failed to include allegations in its complaint regarding the missing document sufficient to satisfy the pleading requirements of Rule 1019(i). This Rule states: "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.*" (Emphasis added.) As noted by Judge Wettick: "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." **Belmont Financial Services Group, Inc. v. Hawkins**, No. AR 07-010035, slip op. at 5 (Allegheny Co. July 24, 2008). Plaintiff has failed to plead even the date of the alleged agreement in the instant case, let alone the specific terms of the agreement with this particular defendant.

We find that the record in the instant case does not include any writings describing the terms and conditions of the original or amended credit card agreements involving Defendant Greiner. Plaintiff has not attached Defendant's signed, original credit application, any of the periodic mailings detailing changes to the terms of the contract, or a statement averring that it lacks access to any or all of the relevant writings. Accordingly, Plaintiff has failed to satisfy the requirements of Pa. R.C.P. 1019(i) relative to the breach of contract claim and Defendant's preliminary objection for failure of a pleading to conform to law or rule of court pursuant to Pa. R.C.P. 1028(a)(2) must be sustained.

Nor has Plaintiff produced a sufficient statement of activity on the account to withstand an objection by Defendant pursuant Pa. R.C.P. 1028(a)(3) and 1028(a)(4). Plaintiff avers that Defendant owes \$2,317.10 for charges made under the credit agreement with a credit card. Relying upon **Worldwide Asset Purchasing v. Stern**, supra, this Court has recently held that, under Rule 1019, a complaint to recover credit card balances 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. See **LVNV Funding, LLC v. Dougherty**, No. CI-08-00372, slip op. at 4 (Lanc. Co. Feb. 18, 2009); **Chase Bank USA, N.A. v. Rader**, No. CI-08-01186, slip op. at 4 (Lanc. Co. Mar. 17, 2009). See also **Capital One Bank v. Clevenstine**, 7 D.&C.5th at 155. The complaint must 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. See **Worldwide Asset Purchasing v. Stern**, 153 P.L.J. at 112.

Plaintiff has attached monthly billing statements from August 28, 2007, through March 28, 2009, bearing Defendant's name, and reflecting individual charges and fees. However, these statements do not date from the opening of the account. In fact, there is no averment in the pleading as to when this account was opened and there is no documentation attached to the pleading to establish that date. Rather, the first "Target Visa Credit Card Account Summary" sheet starting with a "statement closing date" of August 28, 2007, shows an existing balance of \$135.88. Plaintiff has failed to attach all statements needed to establish how it arrived at the amount that it claims is due from Defendant. Accordingly, Defendant's preliminary objection for insufficient specificity in a pleading pursuant to Pa. R.C.P. 1028(a)(3) must be sustained.

B. Account Stated

In an effort to avoid the implications of the case law set forth above, credit card collectors have resurrected a little-known and seldom-used cause of action known as "account stated." According to Target, itemized charges are not necessary in an action for an account stated, nor is a signed credit card agreement. Instead, Plaintiff claims it need only plead and prove that (1) Plaintiff "maintains accurate books of account recording all credits and debits for this account," (2) Defendant "assented to the correctness of the balance by making payments on the account," (3) Defendant "received monthly billing statements from Plaintiff setting forth the nature and amount of

all charges made by Defendant(s),” and (4) “[b]y making payments and by failing to object or dispute the statements, Defendant(s) have/has assented to and agreed to the correctness of the balance due on the credit card account.” (Second Amended Complaint at ¶¶ 5-7, 9.) Thus, according to Target, Defendant Greiner has agreed to pay the balance set forth in the final statement so any writings describing the relationship between the parties and the monthly charges and credits set forth in prior statements are irrelevant.

Plaintiff correctly notes that itemized charges are not generally necessary in an action for an account stated because in such an action, the parties have previously agreed to the balance due to the creditor.

An ‘account stated’ traditionally arises when two parties, who engage in a series of transactions with one another, come together to balance the credits and debits and fix upon a total amount owed. See **David v. Veitscher Magnesitwerke Actien Gesellschaft**, 348 Pa. 335, 341-42, 35 A.2d 346, 349 (1944). This final tally, once assented to, becomes the ‘account stated,’ and any further cause of action is based on this ‘account stated’ rather than on any of the underlying transactions. *Id.*

...
[A]n ‘account stated’ is just a variety of contract. It is an agreement between debtors and creditors. The parties agree to a consolidated statement of debt, give up their right to bring suit on any of the underlying debts, and create a duty to pay. Restatement (Second) of Contracts § 282 (1981); Restatement of Contracts § 422(1) (1932). The ‘account stated’ is ‘a debt as a matter of contract implied by law. It is to be considered as one debt, and a recovery may be had upon it without regard to the items which compose it.’ 29 Williston on Contracts § 73:58 (2007).

Richburg v. Palisades Collection LLC, 247 F.R.D. 457, 464-65 (E.D. Pa. 2008).

Thus, there must be “an agreement to, or acquiescence in, the correctness of the account.” **David v. Veitscher**, 348 Pa. at 341-42, 35 A.2d at 349. In the instant case,

the parties did not come together and agree upon the “correctness of the account” or the balance due the creditor.

In sustaining preliminary objections to an identical “account stated” claim in a credit card collection case by this same Plaintiff in **Target National Bank/Target VISA v. Samanez**, No. AR07-009777 (Allegheny Co. Dec. 19, 2007), Judge Wettick succinctly analyzed Target’s legal argument and soundly rejected it:

It is the position of Target that in litigation instituted by an issuer to recover money allegedly due, a cardholder cannot question the correctness of the claim unless the cardholder previously questioned the correctness of the invoices upon which the claim is based. If I were to accept Target's position, I would be creating a rule of law that imposes an obligation on the part of any person receiving an invoice to respond to the issuer of the invoice. There is no body of law which supports this position. If this were to become the law of Pennsylvania, every lawsuit to recover money allegedly due in which invoices were sent would include two counts – a breach of contract count and an account stated count based on the invoices that the plaintiff furnished the defendant.

The cause of action of an account stated is based on principles of contract law. There must be an express or implied agreement between the creditor and debtor that the debtor owes the amount set forth in the account. Where a complaint does not describe an express agreement, the complaint must include allegations which would support a finding that the cardholder has agreed that he or she owes the amount set forth in the writing. Plaintiff’s complaint does not do so.

Cardholders do not know whether the finance charges, fees, penalties, and costs set forth in a monthly statement are permitted under the applicable credit card agreement. If cardholders cannot be expected to know whether the information in the monthly statement accurately states what they owe, there cannot be an express or implied agreement that their silence means that they have agreed that the amount claimed is correct.

(Slip op. at 12.) For these reasons, the Allegheny Court sustained the defendant debtor's preliminary objections for failure of the creditor to attach writings describing the

relationship between the parties and the monthly charges and credits dating from the inception of the credit relationship.

Similarly, I find that Plaintiff is not relieved of the pleading requirements by claiming default by Defendant on an account stated. The second amended complaint fails to aver an express or implied agreement between Plaintiff and Defendant Greiner that Defendant owes the amount set forth in the account. Alternatively, the pleading does not include allegations which would support a finding that the cardholder, Danette Greiner, has agreed that she owes the amount set forth in the writing. Accordingly, Defendant's preliminary objections for failure of a pleading to conform to law or rule of court pursuant to Pa. R.C.P. 1028(a)(2) and for insufficient specificity in a pleading pursuant to Pa. R.C.P. 1028(a)(3) must be sustained.

III. Conclusion

For the reasons set forth above, Defendant's Preliminary Objections to Plaintiff's Second Amended Complaint are sustained.

Accordingly, I enter the following:

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

TARGET BANK/TARGET VISA

No. CI-09-03069

v.

DANETTE I. GREINER

ORDER

AND NOW, this 30th day of September, 2009, upon consideration of the Preliminary Objection of Defendant Danette I. Greiner, and the briefs filed by the parties, it is hereby ORDERED that said Defendant's Preliminary Objections to Plaintiff's Second Amended Complaint are sustained.

It is further ORDERED that Plaintiff may file an amended complaint within 20 days of the date of this Order. If Plaintiff files an amended complaint on or before the 20th day which does not substantially address the preliminary objections of Defendant, this Court, on motion of Defendant, will dismiss the amended complaint with prejudice and order counsel fees imposed against Plaintiff.

BY THE COURT:

DAVID L. ASHWORTH
JUDGE

ATTEST:

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