

IN THE COURT OF COMMON PLEAS
OF LEBANON COUNTY, PENNSYLVANIA

CIVIL ACTION – LAW

LVNV FUNDING LCC,
ASSIGNEE OF SEARS,
Plaintiff,

v.

LARRY THEURER,
Defendant

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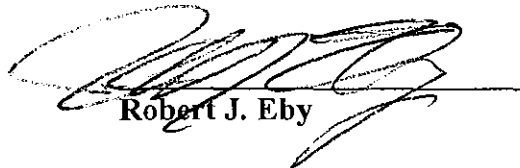
No. 2008-01509

PROthonotary Office
Lebanon, PA
2009 FEB -2 A 10:42
ENTERED & FILED

ORDER OF COURT

AND NOW, to wit, this 2nd day of February, 2009, upon careful consideration of Defendant’s Preliminary Objections to Plaintiff’s Second Amended Complaint, Plaintiff’s lack of a response thereto, the legal memoranda presented and the record of this case, we hereby direct that Defendant’s Preliminary Objections to Plaintiff’s Second Amended Complaint are sustained. Plaintiff is afforded twenty (20) days from the date of service of this Order to file a Third Amended Complaint, consistent with the attached Opinion. In the event that Plaintiff fails to file a Third Amended Complaint within the time directed above, we will entertain an application by Defendant to dismiss this action with prejudice.

BY THE COURT:

, S.J.
Robert J. Eby

RJE/sg

pc: Michael F. Ratchford, Esq.
Alexandra R. Roberts, Esq.

PURSUANT TO RULE 236
You are hereby notified
that this order has been
entered in this case.

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APPEARANCES:

**MICHAEL F. RATCHFORD, ESQUIRE
Edwin A. Abrahamsen & Assoc.**

For Plaintiff

**ALEXANDRA R. ROBERTS, ESQUIRE
MidPenn Legal Services**

For Defendant

OPINION BY EBY, S.J., FEBRUARY 2, 2009:

Before the Court are Defendant’s Preliminary Objections to Plaintiff’s Second Amended Complaint. On July 17, 2008, Plaintiff filed a Complaint in connection with Defendant’s alleged failure to pay a balance due on a credit card. On August 19, 2008, Defendant filed Preliminary Objections to Plaintiff’s Complaint. On September 22, 2008, Plaintiff filed an Amended Complaint. On October 15, 2008, Defendant filed Preliminary Objections to Plaintiff’s Amended Complaint. On November 4, 2008, Plaintiff filed a Second Amended Complaint.¹

¹ While Plaintiff avers in its Second Amended Complaint that the principal amount due and owing on the balance associated with the credit card was \$6,220.02 at the time “it” was received by Plaintiff and the time of the charge-off, Plaintiff avers that the total amount due and owing to Plaintiff at this time, including interest, is \$1,087.35.

On November 24, 2008, Defendant filed the Preliminary Objections to Plaintiff's Second Amended Complaint currently before the Court. Defendant raises the following Preliminary Objections to Plaintiff's Second Amended Complaint:

- I. Plaintiff's Second Amended Complaint fails to conform to law or to rule of court, as Plaintiff failed to attach the Cardmember Agreement upon which the cause of action is based;
- II. Plaintiff's Second Amended Complaint fails to conform to law or to rule of court, as Plaintiff failed to attach the assignment under which Plaintiff purportedly acquired its interest in this cause of action; and
- III. Plaintiff's Second Amended Complaint is insufficiently specific, as it fails to set forth any charges or payments made by Defendant that are alleged to comprise the balance claimed to be due.

Defendant's Preliminary Objections subsequently were listed for disposition through Argument Court. Defendant has lodged legal memoranda in support of his Preliminary Objections. Plaintiff, however, has filed neither a Response nor legal memoranda in opposition to Defendant's Preliminary Objections. Since the time established for the lodging of legal memoranda in this matter has expired, Defendant's Preliminary Objections now are ripe for this Court's disposition.

In Defendant's first Preliminary Objection, Defendant argues that Plaintiff's Second Amended Complaint fails to conform to law or to rule of court, as Plaintiff failed to attach the writing to its pleading upon which its cause of action is based. Defendant argues that Pa.R.C.P. Rule 1019(i) requires a party to attach a copy of a writing to its pleading when the cause of action alleged is based upon that writing. Defendant argues that despite the fact that Plaintiff's cause of action is based upon an alleged breach of a credit card agreement, Plaintiff has failed to attach a copy of the Cardmember Agreement to its Second Amended Complaint in violation of Rule 1019(i).

A preliminary objection may be filed by any party to any pleading on the basis that the pleading fails to conform to law or to rule of court. Pa.R.C.P. Rule 1028(a)(2). Pa.R.C.P. Rule 1019 sets forth the required contents of pleadings. Specifically, Rule 1019(i) provides:

“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.”

In a cause of action based upon an alleged breach of a credit card agreement, the failure of a plaintiff to attach to the Complaint the writing or writings that establish the plaintiff’s claimed right to relief is fatal to the cause of action. *Atl. Credit and Fin., Inc., v. Giuliana*, 829 A.2d 340, 345 (Pa.Super. 2003).

In this case, Plaintiff avers in the Second Amended Complaint that Defendant applied for and received a credit card issued by Plaintiff, that Defendant’s use of the credit card was subject to the terms and conditions of a Cardmember Agreement, that Defendant used the credit card to incur a balance, and that Defendant defaulted upon the terms of the Cardmember Agreement by failing to make all payments when due. Plaintiff’s claim against Defendant plainly is based upon a writing. As such, Plaintiff was required by Rule 1019(i) to attach a copy of the Cardmember Agreement to the Second Amended Complaint or to state that the Cardmember Agreement is inaccessible to Plaintiff, the reason that the Cardmember Agreement is inaccessible to Plaintiff, and the substance of the Cardmember Agreement.

Plaintiff neglected to attach a copy of the Cardmember Agreement to its Second Amended Complaint. Further, Plaintiff failed to state that the Cardmember Agreement is inaccessible to Plaintiff, the reason that it is inaccessible, and the terms of the

Cardmember Agreement. Instead, Plaintiff avers, "A copy of this document has been requested from LVNV Funding LLC, and will be provided upon receipt." (Second Amended Complaint at paragraph 5). Plaintiff's failure to attach a copy of the Cardmember Agreement to the Second Amended Complaint and averment that a copy of the Agreement was requested and will be provided upon receipt falls far short of complying with the express requirements of Rule 1019(i). For these reasons, we will sustain Defendant's Preliminary Objection on this point and will afford Plaintiff twenty (20) days to file a Third Amended Complaint that is in compliance with the requirements of Rule 1019(i).

In Defendant's second Preliminary Objection, Defendant argues that Plaintiff's Second Amended Complaint again fails to conform to law or to rule of court, as Plaintiff failed to attach to the Second Amended Complaint the written assignment establishing Plaintiff's interest in this matter. With regard to its interest in this matter, Plaintiff avers in the Second Amended Complaint that "LVNV Funding LLC Assignee of Sears" issued the credit card to Defendant. Moreover, in the First Amended Complaint in this case, Plaintiff averred that the credit card was issued to Defendant by Sears and documents purported by Plaintiff to be the Cardmember Agreement and appended to the First Amended Complaint reflect that Sears issued the credit card to Defendant.

Pa.R.C.P. Rule 2002(a) requires that all actions be prosecuted by and in the name of the real party in interest. Pursuant to Rule 2002, the original owner of a cause of action, or the assignor, is not to be named as a party to the action. *Brown et al., v. Esposito*, 42 A.2d 93, 94 (Pa.Super. 1945). Rather, the assignee becomes the legal plaintiff, who must plead his own interest in the cause of action and how he acquired his

interest in the cause of action. *Id.* Accordingly, a plaintiff's pleading affirmatively must show that he is the real party in interest. *Id.* The Pennsylvania Superior Court has explained the rationale for requiring the assignee to affirmatively plead his interest in the matter:

“When suit is brought against the defendant by a stranger to his contract, he is entitled to proof that the plaintiff is the owner of the claim against him. This protection must be afforded the defendant. Otherwise, the defendant might find himself subjected to the same liability to the original owner of the cause of action, in the event that there was no actual assignment.”

Id. at 94. While a pleader is not required to aver an assignment verbatim or to attach a copy of the assignment as an exhibit to the pleading, the pleader must state the fact and the date of the assignment, as well as the parties thereto. *Id.*

In this case, Plaintiff failed to attach any written assignment setting forth the fact and the date of the assignment or the parties to any assignment. Moreover, Plaintiff failed to affirmatively plead the fact of the assignment, the date of the assignment and the parties to the assignment. Other than referring to itself as “LVNV Funding LLC Assignee of Sears,” Plaintiff provided no explanation whatsoever as to the manner in which it acquired its interest to recover on a debt incurred on a credit card it did not issue. While we will not require Plaintiff to attach to its pleading a copy of the assignment under which it acquired its interest in this cause of action, Plaintiff will be required to aver the manner in which it came to be a real party in interest in this cause of action. For these reasons, we will sustain Defendant's Preliminary Objection on this point and will afford Plaintiff twenty (20) days in which to file a Third Amended Complaint affirmatively averring the manner in which it came to be a real party in interest in this case, including the fact and the date of the assignment, as well as the parties to the

assignment. In the event that the attachment of a copy of the actual assignment would be of assistance in establishing the same, Plaintiff certainly may elect to attach a copy of the assignment to its Third Amended Complaint.

In Defendant's final Preliminary Objection, Defendant argues that Plaintiff's Second Amended Complaint is insufficiently specific, as neither the body of the Second Amended Complaint nor any attachments thereto show any charges alleged to have been made by Defendant, credits given to Defendant for any payments made or the balance alleged to be due by Plaintiff.

Pa.R.C.P. Rule 1028(a)(3) provides that any party to a pleading may file a preliminary objection to the pleading on the basis that the pleading is insufficiently specific. Rule 1019(a) provides that the material facts upon which a cause of action or defense is based must be stated in a concise and summary form. The purpose of Rule 1019(a) is to ensure that a party's pleadings apprise the defendant of the nature and the extent of the plaintiff's claim so that the defendant has notice of what the plaintiff intends to prove at trial and can prepare to meet such proof with his or her own evidence. *Weiss v. Equibank*, 460 A.2d 271, 274-275 (Pa.Super. 1983), citing *Laursen v. Gen. Hosp. of Monroe County*, 393 A.2d 761, 766 (Pa.Super. 1978). Further, Rule 1019(f) provides that averments of time, place and items of special damages shall be specifically stated.

After review of the Second Amended Complaint in its entirety, we agree with Defendant that the Second Amended Complaint is insufficiently specific in setting forth the amount alleged to be due to Plaintiff as a result of a breach of the Cardmember Agreement. Initially, Plaintiff failed to aver the date or any particular timeframe when the credit card itself is alleged to have been issued to Defendant. Coupled with the fact

that Plaintiff has failed to attach a copy of the Cardmember Agreement to its pleading, the Second Amended Complaint provides no indication whatsoever as to when this credit card is alleged to have been issued to Defendant. Plaintiff avers that the account became delinquent on September 19, 2004. However, Plaintiff does not aver the date when the last payment was made by Defendant or the balance of the account when the last payment was made.

Moreover, although Plaintiff avers that the principal amount due was \$6,220.02 at the time of charge-off and at the time that "it" was received by Plaintiff, in its next allegation, Plaintiff avers that the total amount now due and owing, including interest, is \$1,087.35. There is no explanation whatsoever as to why Plaintiff avers that \$6,220.02 was due at one point but that the total amount due and owing at this point, including interest, is \$1,087.35. In the event that the amount due upon the credit card was \$6,220.02 at the time when Sears assigned the credit card account to Plaintiff and events later occurred so that the amount due and owing with interest now is \$1,087.35, Plaintiff must aver those matters. Further, Plaintiff failed to attach any statement of account whatsoever documenting the amount now alleged to be due by Plaintiff. Had Plaintiff averred the dates when the credit card was issued and when the last payment was made, attached a copy of the Cardmember Agreement setting forth the terms governing the credit card and the fees associated therewith, and attached statements of account reflecting the activity of the account culminating in the amount now alleged to be due by Plaintiff, we would hold that sufficient information was averred such that Defendant could respond to the amount that is alleged by Plaintiff to be due. If this information had been provided, we would be inclined to conclude that Defendant, as the individual to

whom it is alleged the credit card was issued and who is alleged to have incurred the balance using the credit card, would have personal knowledge of the accuracy or inaccuracy of the amount claimed by Plaintiff. Further, we would surmise that additional information regarding Plaintiff's computation of the amount claimed to be due could be obtained by Defendant through discovery. However, in light of the fact that Plaintiff has failed even to aver these fundamental matters and to attach the above-referenced documentation to the Second Amended Complaint, we concur with Defendant's assertion that the Second Amended Complaint is insufficiently specific as to the amount claimed to be due by Defendant. For these reasons, we will sustain Defendant's Preliminary Objection on this point and will afford Plaintiff twenty (20) days to file a Third Amended Complaint setting forth the balance claimed to be due with the requisite degree of specificity.

We will expect, if Plaintiff seeks to utilize the resources of the Judicial system to resolve its financial dispute with Defendant, Plaintiff will proceed in a more serious and professional manner.

We will enter an appropriate Order.