

**IN THE CIRCUIT COURT OF THE CITY OF ST. LOUIS
STATE OF MISSOURI**

CACH LLC,)
Assignee of bank of America, N.A.)
Plaintiff/Counterclaim Defendant,)
)
v.)
)
TONY TREVISANO,)
)
Defendant/Counterclaimant.)

Cause Number: 0822-AC03806

Division: 28

FILED
MAR 16 2010

MARIANO V. FAVAZZA
CLERK, CIRCUIT COURT
BY _____ DEPUTY

ENTERED

MAR 18 2010

DLM

ORDER AND JUDGMENT

Cause called for trial this 19th day of February 2010. Parties appeared by and through counsel. Plaintiff, CACH LLC (hereinafter “CACH”) appeared through the firm of Evans & Dixon, LLC, and attorneys Ron Robinson and Karen Jones. Defendant, Tony Trevisano (hereinafter “Trevisano”) appeared through the firm of James J. Daher, LLC, and attorneys James J. Daher and Sylvia Pociask. Trevisano made a timely motion, prior to the taking of evidence, for findings of fact and conclusions of law pursuant to Rule 73.01. Evidence was adduced and the matter was taken under submission, including the evidentiary objections taken with the case. The Court, having considered the testimony of the witnesses, the evidence received and the arguments of counsel, now makes the following findings of fact and conclusions of law:

This matter arises as a result of the March 3rd, 2008, filing of a petition by CACH, against Trevisano, to collect on an alleged credit card debt. CACH alleged that it was assigned Trevisano’s account from Bank of America. CACH’s Petition was in three counts: (I) Breach of Contract; (II) Account Stated; and (III) Suit on Account. CACH alleged a balance due of \$14,664.00 plus interest of \$10,748.00, calculated at 32.24% on the entire \$14,664.00 balance, for a total amount of \$25,412.62.

Trevisano filed a Counterclaim for violations of 15 U.S.C. §1692a et seq., also known as the Fair Debt Collection Practices Act. Trevisano alleged that CACH violated the FDCPA by making false or misleading representations as to the character, amount or legal status of the debt in violation of §1692e(2)(A), and by attempting to collect amounts not collectable at law, in violation of §1692f(1). Trevisano seeks \$1,000.00 in statutory damages, costs and attorney's fees.

This Court makes the following findings and rulings with respect to Plaintiff's evidence:

Plaintiff, CACH's Exhibit 1, was admitted without objection. Exhibit 1 consisted of Trevisano's responses to written discovery requests, wherein he admitted that the card was issued to him, and that he received it, accepted it, and used it.

CACH Exhibit 2, was admitted without objection. Exhibit 2 is a business records affidavit sworn by Debra L. Pelliccaro, of Bank of America, attesting to an attached record entitled *Assistant Secretary's Certificate of FIA Card Services, National Association* which establishes that FIA Card Services merged into Bank of America.

CACH Exhibit 3, consists of an assortment of documents attached to a business records affidavit from Bank of America, including the Affidavit of T. Law of Bank of America, a cardholder agreement, a Bill of Sale which is also CACH Exhibit 4, and eight pages of monthly statements for account number 4427105000979595. The eight pages of billing statements, from Exhibit 3, were admitted without objection. The statements show the interest rate as variable. The most current statement, dated 10/23/05, shows a balance of \$7,966.51 and an interest rate of 25.064%. Among the statements offered the interest rate ranges from 25.064% to 31.079%. Trevisano objected to all of the other documents that comprise Exhibit 3 (Bill of Sale; cardholder

agreement and an Affidavit of T. Law), as discussed below. The Bill of Sale dated 9/24/2007 and labeled Exhibit A, which is a part of Exhibit 3, states in its pertinent part:

FIA Card Services N.A.(USA) (“Seller”), for value received and pursuant to the terms and conditions of a Account Sale Agreement (“Agreement”) between Seller and CACH,LLC (“Buyer”), dated March 30, 2007 does hereby sell, assign and convey... certain accounts as set forth on Exhibit B, without recourse and without representation of or warranty of collectibility, or otherwise, except to the extent provided for within the Agreement.

The Court finds that the Bill of Sale included within Exhibit 3 (Bill of Sale is also CACH Exhibit 4) is not admissible for the following reasons: The CACH witness, J. Mills testified that Exhibit B referenced in the Bill of Sale is actually the document labeled, Plaintiff CACH’s, Exhibit 5. Mills testimony was that the numerals 4625 hand written on the Bill of Sale and appearing in type face on Plaintiff’s Exhibit 5 are what establish that CACH Exhibit 5 is actually the Exhibit B referred to within the Bill of Sale. The designation Exhibit B does not appear anywhere on CACH Exhibit 5. The Plaintiff offered no evidence as to who hand wrote “4625” on the Bill of Sale. The only evidence presented to this Court that the Bill of Sale included within Exhibit 3, and offered separately as Plaintiff CACH Exhibit 4, has any relationship to Trevisano’s credit card account with Bank of America/FIA Card Services, is the testimony of J. Mills. J. Mills continued to state during his testimony “the information as it was explained to me”. In explanation, J. Mills also stated that his testimony regarding Plaintiff CACH’s, Exhibit 5 is based on what he was told by I.T., however, J. Mills testified that CACH has no employees. In addition, J. Mills testified that Plaintiff CACH’s Exhibit 5 is a screen shot of an electronic submission received by CACH from Bank of America, the document has a designation at top which reads “Bank of America to CACH 10/1/07”. The Bill of Sale is signed by Debra L. Pellicciaro, of Bank of America, and reflects that it was executed on September 24, 2007. The Court does not have any evidence to explain how J. Mills could conclude with any certainty that the *EXHIBIT B* referenced in the Bill of Sale is actually referring to the screen shot which is

Plaintiff CACH's Exhibit 5. The Bill of Sale (as a portion of Exhibit 3 and as CACH Exhibit 4) is not admissible because Plaintiff has not offered credible evidence that it is relevant to this case against Trevisano. This Court does not find that the testimony of J. Mills, that the *EXHIBIT B* referenced in the Bill of Sale is actually CACH Exhibit 5, is credible.

CACH Exhibit 5 is not admissible as a business record. Plaintiff offered Exhibit 5 as a separate single page document. J. Mills as the custodian testified that CACH Exhibit 5 is the screen shot of an electronic submission received by CACH from Bank of America. J. Mills testified that his testimony regarding Plaintiff CACH's, Exhibit 5 is based on what he was told by I.T. and that the contents of Exhibit 5 is actually data received from Bank of America by CACH. J. Mills also indicated that he had no personal knowledge regarding the actual data reflected in Exhibit 5 or how it was prepared. Therefore, J. Mills could not offer testimony as to the mode of preparation of Exhibit 5. Based on the testimony of J. Mills, Exhibit 5 does not have the "presumptive verity" that would allow the court to except it from the hearsay rule, as a business record. C & W Asset Acquisition, LLC v. Janos Somogyi, 136 S.W. 3d. 134, 138(Mo. App. 2004).

CACH offered several documents from various Exhibits under the business records exception to the hearsay rule, in order to support the validity of the debt against Trevisano. In addition to the billing statements from (Exhibit 3), CACH offered the affidavit from T. Law, dated 8/8/2008 (part of Exhibit 3), an affidavit of Vicki Kyle of Bank of America, dated 02/02/2010, (Exhibit 6), and a document entitled "Certificate of Assignment", dated 01/15/2008, (Exhibit 7). Defendant, Trevisano objected to the admission of all portions of Exhibit 3, except the billing statements, and objected to CACH's Exhibits 6 and 7. The CACH witness, J. Mills, acknowledged that each of these documents (save the billing statements) were prepared

immediately before or after this action was filed against Trevisano. The Affidavit of T. Law and the Affidavit of Vicki Kyle are excluded from evidence for the reason that, these documents do not qualify as business records because it is clear that these records were not prepared in the regular course of business, at or near the time of the act, condition or event recorded, as required by 490.680 RSMo; moreover, these documents do not fall within any other exception to the hearsay rule. In fact the affidavit of T. Law does not appear to be a business record at all but an affidavit stating the facts that would be testified to if T. Law was called as a witness at trial. The T. Law *Affidavit of Claim and Certification of Debt*, dated August 28, 2008, states in its pertinent part:

“the statements made in this affidavit are based on the computerized and hard copy books and records of Bank of America, N.A. which are maintained in the ordinary course of business with entries in them having been made at or near the time of the transaction records”.

The records referred to in the T. Law affidavit are apparently business records but the plaintiff did not offer these documents. Instead plaintiff offers a summary of the documents apparently prepared for trial, by a bank employee, T. Law. The same is true of the *Affidavit of Claim and Certification of Debt* by Vicki Kyle dated February 2, 2010. The Kyle affidavit is a summary of some other documents. The only document referenced in the Kyle affidavit that was actually offered into evidence is the “Bill of Sale” discussed above.

CACH Exhibit 7 is admissible as a business record. CACH Exhibit 7, the Certificate of Assignment, is dated 1/15/2008 and appears to be a summary of the data in the “screen shot”, offered as CACH Exhibit 5. J. Mills testified that he executed the Certificate of Assignment. J. Mills testified that the information in Exhibit 7 is based on the “placement amount” of the account. He testified that he has no personal knowledge regarding the amounts owed or the terms of the account.

CACH's Exhibit 3 also included portions of a Bank of America cardholder agreement. CACH argued this document shows there was an agreement between the parties. Trevisano objected to this Bank of America cardholder agreement, arguing this cardholder agreement is not relevant. The Bank of America cardholder agreement offered does not contain any information that relates it to Trevisano. Trevisano's name and account number are not identified on the agreement. "Although the parties need not be named formally, there can be no enforceable agreement unless the contracting parties may be identified with reasonable certainty." Shofler v. Jordan, 284 S.W.2d 612, 614 (Mo.App. 1955). There is no competent evidence before this Court that this particular agreement applied to Trevisano's account. The cardholder agreement is excluded because CACH offered no competent evidence to show its relevance to this case, as it cannot show the agreement's connection to Trevisano.

Count I of the CACH Petition alleges breach of contract. Even if the cardholder agreement had been admitted, there is no evidence before the Court that Trevisano had agreed to its terms. The Court is aware that when a consumer receives a cardholder agreement and then uses the card, his acceptance of the terms and conditions of the cardholder agreement may be implied by his use of the card. Citibank (South Dakota), N.A. v. Wilson, 160 S.W.3d 810, 813-814 (Mo.App. W.D. 2005) The Wilson Court stated:

"Acceptance of an offer need not be made by spoken or written word. Envtl. Waste Mgmt., Inc. v. Indus. Excavating & Equip. Inc., 981 S.W.2d 607, 612 (Mo.App. 1998). An offer may, instead, be accepted by the offeree's conduct or failure to act. *Id.* This is especially true where services are rendered under circumstances such that the party benefited thereby ***knows the terms on which they are being offered. Id.***"

In the instant case, even if this Court found that there was a contract and Trevisano is deemed to have agreed to its terms and conditions, the cardholder agreement offered into

evidence does not provide the Court with competent evidence to find what the pertinent terms of the contract are; specifically, an ascertainable interest amount. Sections 3.3.1 and 3.3.2 of the cardholder agreement state that the variable interest rates are listed in a separate document, referred to as the “Additional Disclosure” document. According to sections 3.4 through 4.2 of the cardholder agreement, this same Additional Disclosure document contains the amounts of “Other Fees and Charges”. This Additional Disclosure was not offered into evidence by CACH. There is no competent evidence to establish that the \$25,412.62 debt that CACH claims is due was indeed calculated pursuant to the terms of that contract. The most current billing statement lists the balance at \$7,966.51 and the interest at 25.064% (variable). The CACH witness, J. Mills, testified that he does not know the interest that was charged in the original agreement. He testified that, “everything is based on placement amount, 32.24% is placement amount”. The cardholder agreement included in CACH Exhibit 3 is inadmissible because Plaintiff has not shown its relevance to Trevisano. The only admissible evidence before this Court concerning the terms of the contract between Trevisano and Bank of America/ FIA Card Services are the billing statements. CACH cannot recover under a breach of contract theory as alleged in Count I because Plaintiff has offered no admissible evidence to establish that CACH was assigned the Trevisano’s credit account identified on the billing statements. The Plaintiff has only offered inadmissible hearsay (Plaintiff’s Exhibit 6) to show any connection between the billing statements concerning account number 4427105000979595 and the account identified in the CACH Certificate of Assignment, 4888936995047176, J. Mills stated he had no personal knowledge of the account or its terms.

Count II of CACH's petition alleges an Account Stated. Count III, of the petition alleges a suit on account. Missouri law requires that in order to recover under either Count II or Count III, CACH must establish: offer; acceptance; consideration between the parties; correctness of the account; and reasonableness of the charges. CACH argues that Trevisano was mailed a monthly statement to which he did not object, thereby implying a promise to pay that amount. CACH submitted eight pages of monthly statements for account number 4427105000979595, the last statement dated 10/23/2005 reflects a balance of \$7,966.51, not \$14,664.00 as pleaded in their petition. There are no statements or bills reflecting any transactions since October of 2005; or for any transactions under the account identified in the Certificate of Assignment. CACH did not present evidence to satisfy the elements of an account stated action or a suit on account for the amount alleged in the petition. CACH did not present any competent evidence to establish the debt is \$14,664.00, as CACH Exhibits 6 and the specific portions of Exhibit 3 are inadmissible for the reasons stated above. Therefore, CACH cannot satisfy the elements of correctness and reasonableness of the charges. Moreover, CACH has offered no admissible evidence to establish that it was assigned any Trevisano credit account other than 488893699504716, the account identified in Exhibit 7.

This Court hereby enters judgment in favor of Defendant Trevisano on Plaintiff CACH's Counts I, II, and III, for the reason that plaintiff CACH has not offered sufficient evidence to establish that it has standing to recover against Defendant concerning his Bank of America/FIA Card Services credit account, 4427105000979595.

This Court makes the following findings regarding Defendants Counterclaim:

In substance the Defendant's Counterclaim is based on CACH's filing of the lawsuit in the instant case. This Court finds that defendant has failed to offer sufficient evidence to establish

that Plaintiff/Counterclaim Defendant violated the Fair Debt Collection Practices Act. **This Court hereby enters its Judgment in favor of Plaintiff/Counterclaim Defendant CACH and against Defendant/Counterclaimant Trevisano on Defendant's Counterclaim Counts I and II.**

DATED: March 16, 2010

SO ORDERED:


Calea Stovall-Reid
Associate Circuit Judge

cc
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