SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ONONDAGA

CITIBANK, N.A.,

Plaintiff,

vs.

LISA K. MAJKA,

Defendant.

Index No. 12-0356
RJI No. 33-12-1837

DECISION

Plaintiff brings the instant motion for summary judgment on this action arising out of a credit card debt allegedly owed by the defendant in this action. The defendant opposes and asks, pursuant to CPLR 3212(b), that the Court not only deny the plaintiff's motion, but also dismiss the complaint in its entirety.

This action was initiated by the filing of a summons and complaint in the office of the County Clerk for the County of Onondaga on or about January 20, 2012. Thereafter, on or about February 29, 2012, the defendant served her verified answer, setting forth affirmative defenses, and at the same time served her discovery demands upon the plaintiff. The plaintiff verily ignored the defendant's discovery demands and interrogatories, neither responding nor objecting to them, nor moving the Court for a protective order from them. Instead, on or about May 14, 2012, the plaintiff brought the instant motion for summary judgment. The defendant opposes and asks the Court to search the record and not only deny the plaintiff's motion, but dismiss the plaintiff's action as well. After defendant's opposing papers were filed and served, plaintiff's counsel sought an adjournment specifically for the purpose of having ample time to reply to the defendant's opposing papers. A two-week adjournment was granted by the

Court and plaintiff's counsel was directed to serve their reply on or before July 5, 2012. No reply papers were served.

First and foremost, the plaintiff provides no proof of any agreement between the parties. At oral argument on the motion, counsel appearing on behalf of the plaintiff, when questioned by the Court, states that a copy of the credit card agreement was attached to the plaintiff's papers. Neither the Court nor counsel for the defendant has any such document in the motion papers and counsel did not attempt to provide copies of any such agreement to the Court at motion term.

There is nothing in the record before the Court that evidences that the defendant entered into a credit card agreement with the plaintiff, Citibank, much less what the terms of that agreement were at the time it was entered. Further, nowhere in the copies of the bank statements provided by the plaintiff in support of its motion for summary judgment and attached as Exhibit "A" to the affirmation of Carol VanHouten, dated May 14, 2012, is there any mention whatsoever of the plaintiff herein. All of the statements provided to the Court indicate that they were generated by AT&T Universal Card. The statements indicate a customer service location for AT&T Universal Card located in Jacksonville, Florida; that online internet customer service inquiries can be made at www.universalcard.com; that any payments are to be remitted to an AT&T Universal Card address in Columbus, Ohio; and that all checks for payment are directed to be made to AT&T Universal Card. There is nothing on those statements that indicate that they are in any way at all connected to Citibank, NA, the plaintiff in this action. There is simply no proof in the record before the Court that the defendant has an account with

the plaintiff, Citibank, NA, and therefore, the plaintiff fails to establish any standing to bring this cause of action.

At oral argument on the motion, counsel appearing on behalf of the plaintiff argued that the defendant admitted to owing the subject debt in writing. There is nothing in the record before the Court of any such admission, and counsel did not provide any such written admission to the Court at motion term.

Even if the reasons set forth above were not enough, by itself, to deny the plaintiff's motion, in support of the plaintiff's motion for summary judgment, the plaintiff submits the affidavit of Ryan Cogan. This affidavit is without a doubt inadmissible hearsay, as the affiant fails to lay a proper foundation for the admissibility of the business records upon which he relies. Mr. Cogan's affidavit, without more, is insufficient to prove plaintiff's prima facie entitlement to summary judgment as a matter of law.

The affidavit was obviously prepared in advance of knowing who would sign the affidavit. Mr. Cogan's name is simply rubber-stamped into the opening sentence of the affidavit and, while he does state that he is a "Document Control officer", he does not provide the specific name of his employer - only that he is employed by "Citibank or an affiliate." This is clearly a "robo-signed" affidavit, which in and of itself, does not indicate any impropriety, but it does make the Court take a closer look at whether the affiant does indeed have personal knowledge with regard to the defendant's alleged account and the defendant's alleged indebtedness. *See* American Express Centurion Bank v. Bajek, 29 Misc.3d 1126(A) (Orange County, 2010).

Upon examination of Mr. Cogan's affidavit, it appears as though much of his knowledge of the defendant's alleged indebtedness rests upon business records that are merely reproductions of parts of an electronic file. He establishes no independent basis for having personal knowledge of the defendant's account with the plaintiff, if one exists at all. Recitation from documents in one's possession is insufficient to prove personal knowledge of any dealings between the defendant and the plaintiff. Rushmore Recoveries v. Skolnick, 15 Misc.3d 1139(A); Palisades Collection v. Kedik, 67 AD3d 1329 (4th Dept. 2009). Mr. Cogan avers that he is a custodian of records and has knowledge of and access to account information and records concerning the defendant's Citibank account. Mr. Cogan also states that "the records submitted are business records reflecting information created and maintained by Citibank or its affiliates, in the course of regularly conducted business activity, and are part of the regular practice of Citibank to create and maintain such information, and also were made at the time of the act, transaction, occurrence or event within a reasonable time thereafter." However, Mr. Cogan does not establish that he himself is familiar with the plaintiff's business practices or procedures, and he further failed to establish when, how or by whom the records were made. *See* CPLR § 4518(a); West Val. Fire Dist. No. 1 v. Village of Springville, 294 AD2d 949 (4th Dept. 2002); *see also* Palisades Collection v. Kedik, *supra*.

It is apparent that the plaintiff has failed to provide all of the statements relevant to the account the defendant is alleged to have had with the plaintiff. There are no statements for the account which date after February 8, 2007. This statement reflects an alleged debt of $8,592.71. However, in Mr. Cogan's affidavit, he states that a payment of $2,000.00 was made on the account. There is nothing in the record before the Court

that indicates by whom this payment was made, when it was made, or when it was received.

Finally, as the plaintiff has failed to provide any sort of agreement entered into by and between the parties, there is no basis for the various interest rate charges against the defendant's account, including an interest rate of 32%, which is far in excess of what is permissible under New York Law. Also, because there is no agreement provided, there is no basis for the plaintiff's requests for costs and disbursements of this action.

While the plaintiff has moved for summary judgment, alleging that there are no triable issues of fact, in reality, there are nothing but questions raised by the papers before the Court.

The plaintiff's motion for summary judgment is DENIED in its entirety.

Further, as the plaintiff has provided nothing that establishes that the plaintiff has any agreement with the defendant, or an assignment of any sort from AT&T Universal Card, it has failed to prove it has standing to bring this cause of action. The Court has searched the record before it and has found no basis for plaintiff's standing here. Prior to even looking at the merits of a case to determine whether partial summary judgment is warranted, the court must find whether there is subject matter jurisdiction to make such a determination. Lack of standing to sue of a jurisdictional defense and when one without the requisite standing to sue does bring suit, the matter shall be dismissed. *See* Seigel, New York Practice, Fourth Edition, §136. The plaintiff has failed to provide proof to this Court, in admissible form, as to its standing to bring suit. As such, the plaintiff's case is DISMISSED, with prejudice, in its entirety.