

JMMM PC COMPANY, Assignee from : IN THE COURT OF COMMON PLEAS
 Chase Bank : OF LUZERNE COUNTY
 Plaintiff : CIVIL ACTION
 v. :
 PATRICIA STILLWAGON : NO. 3996 OF 2010
 Defendant :

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OPINION

Background

This matter involves an attempt to recover on a credit card debt. Presently before this Court are Defendant's Preliminary Objections to Plaintiff's Third Amended Complaint alleging: (1) a failure to conform to a Law or Rule by failing to attach writings as required by Pa. R.C.P. 1019 and (2) that there is no writing attached from Chase Bank to Turtle Creek evidencing the alleged assignment.

Defendant filed the current Preliminary Objections and Brief in Support of Preliminary Objections on or about November 8, 2010 and Plaintiff filed a Brief in Support of the Third Amended Complaint on or about November 15, 2010.

Discussion

I. FAILURE TO ATTACH CARDHOLDER AGREEMENT TO COMPLAINT 1019

Defendant alleges that failure to attach a writing to support a claim is fatal to a Complaint, citing *Atlantic Credit and Financial, Inc. v. Guillani*, 2003 Pa. Super. 259, 859 A.2d 430. See, too, *Worldwide Asset Purchasing, LLC v. Stern*, 153 Pitts. L.J. 111 (C.P. Allegh. 2004). See, also *Citibank (South Dakota) N.A. v. Markiewicz*, No. 10400-2008.

Plaintiff alleges that a credit card application or writing signed by the defendant is not necessary to prove that a defendant owes a debt. Plaintiff attempts to advance the theory that an offer may be accepted by conduct and what the parties do pursuant to the offer is germane to show whether the offer is accepted citing *Hardman v. Baker*



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2000 Pa. Super. 140, 766 A.2d 347, 351 (2000) *appeal denied*, 564 Pa. Super. 712, 764 A.2d 1070 (2000); *Mountain Props., Inc. vs. Tyler Hill Realty Corp.*, 2001 Pa. Super. 45, 767 A.2d 1096, 1101 (2001), *appeal denied*, 566 Pa. 666, 782 A.2d 547 (2001); *Temple Univ. Hosp., Inc. vs. Healthcare Mgmt. Alternatives, Inc.*, 2000 Pa. Super. 387, 764 A. 2d 587, 593 (2000), *appeal denied*, 566 Pa. 647, 781 A.2d 147 (2001).

According to *Rush's Service Center Inc. v. Genareo*, 10 Pa. D.&C.4th 445 (Ct. Com. Pl. Lawrence Cty. 1991), to plead a cause of action based upon an account stated theory, a plaintiff must allege that there had been a running account, that a balance remains due, that the account has been rendered upon the defendant, and that the defendant has assented to the account. *Id.* at 47.

Although plaintiff has not cited it in its brief, *Citibank (South Dakota), N.A. v. King*, 2 Pa. D.&C.5th 60 (Ct. Com. Pl. Centre Cty. 2007), is nearly identical to this case. In *King*, the plaintiff sought to recover the statement balance on an AT&T Universal credit card, stating that the defendant's actions constituted an account stated between the parties. *Id.* at 62. The court applied *Rush's Service Center* and found that the plaintiff's complaint properly alleged those elements, noting that "[t]he most essential element of the [account stated] complaint is the parties' agreement to the accuracy and correctness of the account." *Id.* at 62-63. The court further noted that such an agreement can be implied when one party retains a statement of account rendered without objection for an unreasonably long time, which can be construed as their assent to the amount shown as an accurate computation of the amount due. *Id.* Based on that theory, the court held that plaintiff's allegation that defendant had for many months made payments on account of the billing statement or retained the statement without payment was sufficient to state a cause of action. *Id.* at 63.

In *Target National Bank/Target Visa v. Samanez*, 2007 Pa. Dist. & Cnty. Dec. LEXIS 433 (Allegheny Cty. Dec. 19, 2007), the only writing attached to the complaint was a closing statement stating a previous balance, late charges, a new balance, an amount past due, and a minimum payment due. *Id.* at *1-*2. The court discussed an earlier opinion it had issued on the topic of consumer credit cards, *FIA Card Services*,

N.A. v. Kirasic, AR06-009360, P.L.J. (November 7, 2007), in which it had held that in consumer credit transactions the Pa. Rules of Civil Procedure require that a credit card issuer seeking to recover money due needs to attach to the complaint a writing which supports the claim, such as invoices showing cash advances or purchases.¹ *Id.* at *4-*6.

Similarly, in *Capital One Bank (USA) NA v. Clevestine*, 7 Pa. D.&C.5th 153 (Ct. Com. Pl. Centre Cty. 2009), the Centre County Court rejected an account stated theory in the case of credit cards, instead holding that the plaintiff's complaint was insufficient under 1019. In that case, the court noted that "[i]t is unreasonable to expect the average debtor to understand the changing terms of a Customer Agreement such that he or she can object to any invoice received in a timely manner. For many, the first and only time they will consider what is in the "fine print" is when they fall behind on payments and find themselves in a position like the one in which Defendant now finds herself. *Id.* at 158.

For the reasons stated in *Samanez and Clevestine*, rejecting the account stated theory in credit card cases makes more sense. Otherwise, a credit card plaintiff can make an end run around the writing requirements of Pa.R.Civ.P. 1019 simply by distinguishing their complaint as an action in account stated rather than breach of contract, which is exactly what Plaintiff JMM PC Company, has done in this case. On this basis, the defendant's preliminary objection under 1019 and its related objection are sustained and Plaintiff is given twenty (20) days to amend its Complaint to include the writings upon which the claim is based (i.e., cardholder agreement and/or credit card application).

¹ In *FIA*, the credit card company initially sought compensation for purchases made and interest but upon twice being given leave to amend under 1019 was unable to produce a credit card agreement governing interest rates and fees during the relevant times. Therefore, its second amended complaint sought only to recover payment for the amount of cash advances and purchases identified in the statements it attached to the complaint. *3-*6.

II. FAILURE TO ATTACH WRITING TO ESTABLISH LEGAL ASSIGNMENT

Defendant further alleges a fatally defective chain of assignment by Plaintiff to prove it owns the debt in question. Defendant objects on the basis that there is no writing attached from Chase Bank to Turtle Creek evidencing the alleged assignment and as such no sufficient writing exists to demonstrate JMMMPC in fact owns a Chase claim against this Defendant.

Plaintiff has attached the Bill of Sale between Turtle Creek Assets, Ltd. And JMM PC Company as Exhibit "A" to Plaintiff's Third Amended Complaint. This document sets forth that Turtle Creek purchased the accounts from Chase Bank, evidencing the alleged assignment. Further, this Court has previously disposed of this Preliminary Objection in its Order entered on September 23, 2010 in this matter when it determined that the Bill of Sale sufficiently put Defendant on notice of the alleged assignment.

For the reasons stated above, Plaintiff's preliminary objection on the ground of invalid evidence of assignment are **OVERRULED**.

III. CONCLUSION

Based on the above, this Court **SUSTAINS** Defendant's Preliminary Objection under Pennsylvania Rule of Civil Procedure 1019 based upon Plaintiff's failure to attach writing(s) upon which Defendant's obligation to pay is based – namely, the credit card application and/or agreement to which Defendant is allegedly subject; and Defendant's Preliminary Objections asserting that the Bill of Sale attached to Plaintiff's Third Amended Complaint as proof of assignment is **OVERRULED** as it does not name Defendant specifically. Accordingly, Plaintiff's Third Amended Complaint is **DISMISSED, WITHOUT PREJUDICE** and Plaintiff has twenty (20) days from the date of this Order to file an Amended Complaint.

END OF OPINION