

CITIBANK, N.A. v. HEATHER B. WADAS, CUMBERLAND CO., COMMON PLEAS, No. 2012-1705 CIVIL TERM.

Civil Law—Defendant's Preliminary Objections—Consumer Credit Card Debt Collection—Sufficiency of Pleading—Specificity—"Account Stated" Pleading vs. Contract Pleading—**Target Nat'l Bank/Target Visa v. Samanez**, 156 Pitts. Leg. J. 76, 77 (Pa. Com. Pl. Allegh. Cnty. 2007)—Single Billing Statement Attached to Pleading—Failure To Attach Signed Agreement—**Atlantic Credit and Finance v. Giuliani**, 829 A.2d 340 (Pa. Super. 2003)—Silence Is Not Adequate To Plead Acquiescence—Preliminary Objections Sustained.

1. In determining sufficiency of the pleadings in a complaint, the court will consider whether the plaintiff's complaint informs the defendant with accuracy and completeness of the specific basis on which recovery is sought so that he may know without question upon what grounds to make a defense.

2. In an action based on a theory of account stated in which the plaintiff argues that the defendant's silence and retention of monthly statements are to be interpreted as acquiescence to the correctness of the account, it is clear that a single isolated and uninformative billing statement cannot be considered sufficient for an action to collect on an alleged consumer credit card debt.

3. Where a complaint does not include any signed agreement between the parties and there is no statement explaining why a copy of the original agreement is not attached to the pleading, Plaintiff's complaint is inadequate to support an action seeking judgment for the amount demanded.

4. An "account stated" cause of action traditionally involves a promise by a debtor to pay a stated amount of money which the parties expressly agreed was owed, in satisfaction of a preexisting debt; however, mere failure to take an exception to a series of statements of account received in the mail is required to create an account stated, unless the creditor can plead facts in addition to the failure to object to the invoice which show an express or implied agreement to pay the amount set forth in the invoice.

TRENTON A. FARMER, ESQUIRE and BRIT J. SUTTELL, ESQUIRE, for Plaintiff.

JAMES VINCENT NATALE, ESQUIRE, for Defendant.

IN RE: DEFENDANT'S PRELIMINARY OBJECTIONS
PURSUANT TO Pa. R.C.P. 1028

Before HESS, P.J., and PECK, J.

OPINION AND ORDER OF COURT

PECK, J., June 14, 2012:—

In this debt collection case against a credit card debtor, Plaintiff, Citibank, N.A., has filed an action against Defendant for an allegedly delinquent credit card balance of \$23,404.55.¹ For disposition at this time are Defendant's Preliminary Objections Pursuant to Pa. R.C.P. 1028, which were filed on April 25, 2012.² Oral argument on the preliminary objections was held on June 1, 2012.

¹ Complaint, ¶11, filed March 16, 2012.

² Defendant's Preliminary Objections Pursuant to Pa. R.C.P. 1028, filed April 25, 2012.

For the reasons stated in this opinion, Defendant's preliminary objections will be sustained.

STATEMENT OF FACTS

On March 16, 2012, Plaintiff filed an eleven-paragraph complaint against Defendant, alleging that Defendant failed to pay a credit card obligation.³ Attached to Plaintiff's Complaint as "Exhibit A" was a single-page document, which, according to the Complaint, purported to be a monthly statement of an account with respect to a credit card. The document, which indicated a "Statement Closing Date" of November 14, 2011, showed a "New Balance" of \$23,404.55 and a "Minimum Payment Due" of \$1,827.07.⁴ Plaintiff's brief complaint asserted the following:

4. Defendant obtained extensions of credit from Citibank, N.A., successor in interest to Citibank (South Dakota), N.A., by means of a credit card account (hereafter the Account) with account number ending in 4386.

5. Citibank (South Dakota), N.A. merged into Citibank, N.A. in or about July 2011.

6. Accurate records of all debits and credits to the Account were maintained by plaintiff.

7. Defendant was provided with monthly statements for the Account including the billing statement attached hereto as Exhibit A (redacted to remove confidential information). The monthly statements accurately stated the previous balance and the debits and credits to the Account for the prior billing period.

8. Defendant had for many months after receipt of a billing statement made payment on the Account or retained the statement without payment.

9. Defendant retained the Exhibit A statement without making payment by the stated date.

10. Defendant's assent to the Account balance set forth in the Exhibit A statement is manifested through the prior conduct of defendant either making payment on the Account or retaining the statement without payment, after receipt of the monthly billing statements.

³ Complaint, filed March 16, 2012.

⁴ Exhibit A (Citibank Statement for Account ending in 4386, Statement closing date of November 14, 2011), attached to Complaint, filed March 16, 2012.

11. As a result of said assent, an account stated for the sum of \$23,404.55 exists which sum reflects the Exhibit A statement balance less credits, if any, which were applied subsequent to the date of Exhibit A.⁵

On April 25, 2012, Defendant filed her Preliminary Objections Pursuant to Pa. R.C.P. 1028.⁶ Defendant's preliminary objections are premised upon the following purported deficiencies in the pleading: (1) failure to state a cause of action for which relief may be granted, pursuant to Pennsylvania Rule of Civil Procedure 1028(a)(4), due to Plaintiff's failure to properly plead an account stated cause of action;⁷ (2) failure to allege with specificity averments of time, place and items of special damages or to attach documentation in support thereof, pursuant to Pennsylvania Rules of Civil Procedure 1019(a) and 1019(f), resulting in the Complaint being insufficiently specific according to Rule 1028(a)(3);⁸ (3) failure to specify whether the agreement is oral or written, a deficiency according to Pennsylvania Rule of Civil Procedure 1019(h);⁹ and (4) failure to attach a copy of the writing upon which the action is based or otherwise comply with the requirements of Rule of Civil Procedure 1019(i).¹⁰ Based upon these preliminary objections, Defendant requests the court to order Plaintiff to file an Amended Complaint, or in the alternative, to dismiss the action with prejudice.

Plaintiff filed response to the preliminary objections on May 9, 2012, maintaining, *inter alia*, that (1) its cause of action was premised upon an account stated theory rather than contract, as a consequence of which it was not required to attach to the complaint any documentation other

⁵ Complaint, ¶¶4-11, filed March 16, 2012.

⁶ Defendant's Preliminary Objections Pursuant to Pa. R.C.P. 1028, filed April 25, 2012. The court notes that, at times, the meaning of the contents of Defendant's counseled preliminary objections are difficult to discern. From the court's fair reading of Defendant's preliminary objections, it appears Defendant challenges the Complaint on four grounds: (1) failure to properly plead an account stated cause of action; (2) insufficient specificity; (3) failure to indicate whether the agreement is oral or written; (4) failure to attach a copy of a written agreement. The court will address the substance of the preliminary objections over their arguably deficient form.

⁷ Defendant's Preliminary Objections Pursuant to Pa. R.C.P. 1028, Count I, filed April 25, 2012.

⁸ Defendant's Preliminary Objections Pursuant to Pa. R.C.P. 1028, Count II, filed April 25, 2012.

⁹ Defendant's Preliminary Objections Pursuant to Pa. R.C.P. 1028, Count III, filed April 25, 2012.

¹⁰ Defendant's Preliminary Objections Pursuant to Pa. R.C.P. 1028, Count IV, filed April 25, 2012.

than the last billing statement, (2) that Exhibit A properly sets forth the total balance due and owing, (3) that the complaint contains no allegations of special damages, and (4) that, in an account stated cause of action, a plaintiff is not required to allege any item with specificity, including the individual items comprising the total balance due.¹¹ Both Plaintiff and Defendant submitted briefs to the court in accordance with local rules of court. Oral argument was held on June 1, 2012, and the matter is now ripe for disposition.

DISCUSSION

This matter raises the familiar issue of whether a credit card collection action may proceed without written documentation by characterizing it as a claim based on an account stated. Based upon a reading of the relevant appellate precedent, and in accordance the holdings of other members of the same bench,¹² the court will adhere to the position that a plaintiff in a credit card action cannot escape the pleading formalities described in **Atlantic Credit and Finance, Inc. v. Giuliani**, 829 A.2d 340, 345 (Pa. Super. 2003) and **Arrow Financial Services LLC v. Witmer**, 59 Cumb. L.J. 154 (Pa. Com. Pl. Cumb. Cnty. 2010) (EBERT, J.) simply by characterizing its claim as one based on an account stated.

Defendant's preliminary objections will be addressed in an order facilitating their discussion.

I. Preliminary Objection Raising Insufficient Specificity

Defendant argues that Plaintiff's Complaint is insufficiently specific because it does not meet the requirements of Rule 1019 (averments of time, place and special damages are to be specifically stated).¹³ Plaintiff maintains it has pled facts with sufficient specificity to allow Defendant to answer the complaint and to support its claim for account stated.

Statement of law. In determining sufficiency of the pleadings in a complaint, the court will consider "whether the plaintiff's complaint informs the defendant with accuracy and completeness of the specific

¹¹ See Plaintiff's Response to Preliminary Objections, filed May 9, 2012.

¹² See e.g., **Arrow Financial Services LLC v. Witmer**, No. 59 Cumb. L.J. 154 (Pa. Com. Pl. Cumb. Cnty. 2010) (EBERT, J.) (in an action to collect on an alleged debt due on a consumer credit card, creditor cannot escape otherwise applicable pleading requirements simply by characterizing the claim as one based upon an "accounts stated" theory, and must support debtor's acceptance of account stated by attaching copy of cardholder agreement, statement of account, and debtor's acquiescence to amount due); **Citibank (South Dakota) N.A. v. Skaboulos**, No. 2009-8676 (Pa. Com. Pl. Cumb. Cnty. 2011) (OLER, J.); **Citibank (South Dakota) N.A. v. Ross**, No. 2010-5668 Civ. T. (Pa. Com. Pl. Cumb. Cnty. 2011) (slip op.) (MASLAND, J.) (holding attachment of single statement insufficient for pleading requirements in an account stated cause of action to collect on an alleged consumer credit card debt).

¹³ Defendant's Preliminary Objections Pursuant to Pa. R.C.P. 1028, Count II, filed April 25, 2012.

basis on which recovery is sought so that he may know without question upon what grounds to make his defense.” **Rambo v. Greene**, 906 A.2d 1232, 1236 (Pa. Super. 2006). Rule 1019(a) states that “[t]he material facts on which a cause of action or defense is based shall be stated in a concise and summary form.” Rule 1019(f) states that “[a]verments of time, place and items of special damage shall be specifically stated.”

Defendant argues that case law directs that, in an action to collect on consumer credit card debt, a properly-pled complaint must set forth several averments with specificity, including the specific identification of items purchased, the specific date during which the purchases were made, the place from where the items were purchased, the dates and amounts corresponding to any cash advances, and the amount of money that a defendant had paid on the account. The basis for Defendant’s contention is that it is only by pleading these averments particularly that a defendant would be enabled to “calculate the total amount of damages ... allegedly due.”¹⁴ Pennsylvania case law, not all of which is binding on this court, does provide legal support for Defendant’s position. In the frequently cited case, **World Wide Asset Purchasing, LLC v. Stern**, 153 Pitts. L.J. 111 (Pa. Com. Pl. Allegh. Cnty. 2004), the Honorable R. STANTON WETTICK provided a list of items that must be included in a complaint for an action to collect on consumer credit card debt as follows:

Amounts of the charges that are part of the claim, the dates of the charges, credit for payments if any, dates and amounts of interest charges, and dates and amounts of other charges. The complaint should 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.

Id. at *4. In **Marine Bank v. Orlando**, 25 D. & C. 3d 264 (Pa. Com. Pl. Erie Cnty. 1982), the Erie County Court of Common Pleas addressed the issue of specificity in the context of consumer credit card debt collection cases. The **Marine Bank** court held that, although Rule 1019(f) requires only items of special damages to be specifically stated, in the context of credit cards, the plaintiff must particularize general damage as far as is reasonably practicable. **Id.** at 268-69; *see Remit Corp. v. Miller*, 5 D. & C. 5th 43 (Pa. Com. Pl. Centre Cnty. 2008).

Application of law. Neither binding appellate precedent nor the Cumberland County Court of Common Pleas have ever held that, in an

¹⁴ See Defendant’s Preliminary Objections Pursuant to Pa. R.C.P. 1028, Count II, ¶12, filed April 25, 2012.

action to collect on an outstanding credit card balance, the complaint must identify **each** transaction with such particularity as to entitle a defendant to acquiesce or contest each individual purchase. However, in an action based on a theory of account stated, in which the plaintiff argues that the defendant's silence and retention of monthly statements are to be interpreted as acquiescence to the correctness of the account, it is clear to the court that the single isolated and uninformative billing statement¹⁵ cannot be considered sufficient for an action to collect on an alleged consumer credit card debt, the amount of which is supported solely by the number appearing on said statement. To clarify, while the court does not require a plaintiff to attach every single statement detailing each transaction to properly plead an action to collect on an outstanding consumer credit card account, the contents of the instant Complaint are insufficient to support a cause of action for an account stated.

II. Preliminary Objection Raising Failure of a Pleading To Conform to Law or Rule of Court

Statement of law. A fair reading of Defendant's preliminary objection contained in "Count III" and "Count IV" show that Defendant contends that Plaintiff's Complaint fails to conform to law or rule of court pursuant to Pennsylvania Rule of Civil Procedure 1028(a)(2). In particular, Defendant argues that Plaintiff has failed to allege whether the agreement upon which its action is based is either oral or written, in contradiction to Rule 1019(h), and that if the agreement is written, Plaintiff fails to conform to Rule 1019(i) by way of its failure to attach a signed written contract between the parties. The Pennsylvania Superior Court has held in **Atlantic Credit and Finance** that a plaintiff should either attach a copy of the signed agreement that it entered into with defendant or provide an explanation as to why the writing is not accessible to the pleader. **Atlantic Credit and Finance v. Giuliana**, supra at 344-45; see also, **Target Nat'l Bank v. Kilbride**, 10 D. & C. 5th 489, 2010 WL 1435304 (Pa. Com. Pl. Centre Cnty. 2010); **Marine Bank v. Orlando**, supra.

Application of law. A review of Plaintiff's brief complaint demonstrates that no such agreement is attached. Furthermore, there is no statement in the complaint explaining why a copy of the original agreement

¹⁵ The billing statement attached to the complaint did not indicate a single charge made by the alleged account holder. The only information contained therein, in relation to debits or credits on the account, was in the form of what appears to be a creditor-generated description of interest charged, resulting in a "Total Interest for this Period" charge of \$216.84. See Exhibit A (Citibank Statement for Account ending in 4386, Statement closing date of November 14, 2011), attached to Complaint, filed March 16, 2012.

is not attached to the pleading. Initially, the court must note that Plaintiff's Complaint does not attempt to plead a cause of action sounding in breach of contract, nor does it allege that a contract was ever entered into between the parties from which the cause of action is arises. While Defendant's objection raising Plaintiff's failure to conform to Rules 1019(h) and (i) appear misplaced *ab initio*, the court cannot view such objection in a vacuum. Plaintiff's argument, that its cause of action is premised upon an "accounts stated" theory, and, therefore, that it need not attach the writing, is not entirely consistent when viewed in connection with the remainder of its complaint. For instance, in its *ad damnum* clause, Plaintiff requests, *inter alia*, that it be awarded \$23,404.55, which is the amount listed as the "New Balance" on the statement attached as Exhibit A.¹⁶ However, the single statement, upon which Plaintiff relies in support of its account stated cause of action,¹⁷ displays a "Minimum Payment Due" as \$1,827.07.¹⁸ Without an agreement that authorizes Plaintiff to collect on an amount other than that due as explicitly indicated on the statement, the conclusion must follow that Plaintiff is not entitled, at this time, to collect on the amount requested in its complaint. Therefore, a consideration of the applicable pleading requirements for an action to collect on an alleged consumer credit card debt, Plaintiff's complaint is inadequate to support an action seeking judgment for the amount demanded. Unless the court accepts Plaintiff's "accounts stated" theory based in part upon Defendant's retention of the monthly bill as acquiescence to a total balance of \$23,404.55, and Plaintiff's position that an action based in such a theory does not require the otherwise applicable pleading formalities, the complaint as drafted is not sustainable.

III. Preliminary Objection Raising Failure to Plead a Proper Cause of Action

Statement of law. In "Count I" of her preliminary objections, Defendant argues that Plaintiff's complaint fails to set forth sufficient facts to support its cause of action on an "account stated" theory. An account stated is "an account in writing, examined and expressly or impliedly accepted by both parties thereto, as distinguished from a simple claim or a mere summary of accounts." *Target Nat'l Bank/Target Visa v. Samanez*, 156 Pitts. Leg. J. 76, 77 (Pa. Com. Pl. Allegh. Cnty. 2007). Such a cause of action is appropriate in the context of an ongoing relationship

¹⁶ Exhibit A (Citibank Statement for Account ending in 4386, Statement closing date of November 14, 2011), attached to Complaint, filed March 16, 2012.

¹⁷ See *infra*, Part III.

¹⁸ Exhibit A (Citibank Statement for Account ending in 4386, Statement closing date of November 14, 2011), attached to Complaint, filed March 16, 2012.

between the parties where the substance of the parties' back and forth discussions regarding the amount due is averred in the complaint. *Id.* at 77; **Capital One Bank v. Clevestine**, 7 D. & C. 5th 153, 2009 WL 1245043 (Pa. Com. Pl. Centre Cnty. 2009). An account stated cause of action traditionally involved a promise by a debtor to pay a stated amount of money which the parties expressly agreed was owed, in satisfaction of a preexisting debt. See 29 Williston On Contracts 4th 73:55. When a debtor had an opportunity to scrutinize the account, his or her silence may be *prima facie* evidence of acquiescence in an account stated. See **Weck v. First Pennsylvania Banking and Trust Company**, 202 Pa. Superior Ct. 39, 41, 195 A.2d 111, 114 (1963); **Peirce v. Peirce**, 199 Pa. 4, 14, 48 A. 689, 691 (1901). Nonetheless, more than a mere failure to take exception to a series of statements of account received in the mail is required to create an account stated, "unless the creditor can plead facts in addition to the failure to object to the invoice which show an express or implied agreement to pay the amount set forth in the invoice." **Target Nat'l Bank/Target Visa v. Samanez**, *supra*; see **C-E Glass v. Ryan**, 70 D. & C. 2d 251, 253, 1975 WL 16632 (Pa. Com. Pl. Beaver Cnty. 1975) (holding that, when presenting allegations of defendant's assent to the amount owed, "something more than mere acquiescence by failure to take exception to a series of statements of accounts received in the mail is required").¹⁹

¹⁹ This court does recognize the disagreement among the courts of common pleas concerning the acceptance of an account stated cause of action in consumer credit card collections cases, and, if the theory is accepted, what the Plaintiff must plead for its complaint to survive preliminary objections. See **Citibank (South Dakota) v. Ambrose**, 13 D. & C. 5th 402, 2010 WL 3923159 (Pa. Com. Pl. Adams Cnty. 2010) (holding account stated properly pleaded on averments similar to those of the instant complaint); **Citibank v. King**, 2 D. & C. 5th 60 2007 WL 4967502 (Pa. Com. Pl. Centre Cnty. 2007) (holding account stated properly pleaded on averments similar to those of the instant complaint). But see, **Citibank (South Dakota) N.A. v. Skaboulos**, No. 2009-8676 (Pa. Com. Pl. Cumb. Cnty. 2011) (OLEA, J.); **Citibank (South Dakota) N.A. v. Ross**, No. 2010-5668 (Pa. Com. Pl. Cumb. Cnty. 2011) (MASLAND, J.) (requiring creditor to plead debtor's acceptance of account stated by attaching a copy of cardholder agreement, statement of account, and acquiescence to amount due, and cannot escape such pleading requirements by characterizing its claim as being based upon an account stated theory); **Citibank (South Dakota) N.A. v. Ananiev**, 13 D. & C. 5th 557, 2010 WL 3993713 (Pa. Com. Pl. Monroe Cnty. 2010) (rejecting account stated claim and requiring attachment of credit card statements and cardholder agreement); **Target Nat'l Bank v. Kilbride**, 10 D. & C. 5th 489, 2010 WL 1435304 (Pa. Com. Pl. Centre Cnty. 2010) (holding defendant's mere failure to respond to monthly credit card statements insufficient to establish assent required to plead account stated claim); **Capital One Bank v. Clevestine**, 7 D. & C. 5th 153, 2009 WL 1245043 (Pa. Com. Pl. Centre Cnty. 2009) (rejecting account stated claims for modern credit card collections); **Target Nat'l Bank/Target Visa v. Samanez**, 156 Pitts. L.J. 76 (Pa. Com. Pl. Allegh. Cnty. 2007) (requiring detailed averments to plead account stated against alleged credit card debtor).

Application of law. In the present case, Plaintiff attaches a single account statement, arguing that it is unnecessary to attach a contract or any other documentation since the case is being brought under an “accounts stated” cause of action. Limited to the contents of the Complaint *sub judice*, it is clear that, even under an account stated theory, the Complaint must at the very least include allegations which would support a finding that the cardholder has agreed to, or acquiesced in, the correctness of the account.

Here, Plaintiff claims that Defendant’s acquiescence exists in Defendant’s failure to object to the monthly statements sent to her home. However, as the court in *C-E Glass* held, something more than merely failing to respond to statements received in the mail is required to demonstrate a defendant’s assent. *Id.* More than Defendant’s failure to object to the mailed statements is not averred in the instant Complaint.

Furthermore, the court must note the relatively brief time between the sending of the statement and the date on which the Complaint was filed. Exhibit A displays a “Statement Closing Date” of November 14, 2011, and a “Payment Due Date” of December 10, 2011. It follows that the time frame for which Defendant’s silence on the accuracy of the statement commenced, at the earliest, on November 14, 2011. The instant Complaint was filed on March 16, 2012, a mere four months later. While the court certainly does not condone silence between a creditor and a debtor, the court cannot interpret the debtor’s failure of communication to equate to *prima facie* evidence of acquiescence in an account stated.²⁰ The court concludes that Plaintiff’s position, namely that an allegation of Defendant’s silence is sufficient to plead acquiescence to the correctness of the account, is without merit. Accordingly, Plaintiff has failed to sufficiently plead a cause of action in the present context, and Defendant’s preliminary objection in this regard must be sustained.

²⁰ Exhibit A indicates that Plaintiff and Defendant had an alleged ongoing relationship for well over a decade (“Member Since” 1995). See Exhibit A (Citibank Statement for Account ending in 4386, Statement closing date of November 14, 2011), attached to Complaint, filed March 16, 2012. Assuming, *arguendo*, that this sufficiently pleads the “ongoing relationship” element of an account stated cause of action, it does not establish the debtor’s acquiescence to the correctness of the outstanding amount by way of her silence. In the court’s view, the arguable lengthy “ongoing relationship” between Plaintiff and Defendant further undermines Plaintiff’s position that it properly pleaded an account stated by way of its failure to allege with any type of specificity the date(s) or time(s) on which Defendant “manifested” her assent, especially when Plaintiff had maintained “accurate records of all debits and credits to the account.” See Complaint, ¶¶6, 10, filed March 16, 2012.

Based on the foregoing, the following order will be entered:

ORDER OF COURT

AND NOW, this 14th day of June, 2012, upon consideration of Defendant's Preliminary Objections Pursuant to Pa. R.C.P. 1028, following oral argument held on June 1, 2012, and for the reasons stated in the accompanying opinion, Defendant's preliminary objections are **SUSTAINED**, to the extent that the Complaint fails to properly plead a cause of action for account stated. This court grants Plaintiff leave to file a legally sufficient Amended Complaint in accordance with this court's Opinion within 30 days from the date of this Order.