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SUPERIOR COURT

2011 FEB 28 PM 2:45

CIVIL DIVISION

Philip D. Stern & Associates, LLC  
Attorneys at Law  
697 Valley Street, Suite 2d  
Maplewood, NJ 07040  
(973) 379-7500  
Attorneys for Defendant, David Shaler

NEW CENTURY FINANCIAL SERVICES,  
INC.,  
Plaintiff,

vs.

DAVID SHALER,  
Defendant.

**Superior Court of New Jersey  
Law Division - Morris County**

Civil Action  
Docket No. MRS-L-001265-10

**DEFENDANT'S MEMORANDUM  
IN REPLY TO PLAINTIFF'S  
OPPOSITION TO DEFENDANT'S  
SUMMARY JUDGMENT MOTION**

Plaintiff has failed to submit materials which, if presented at trial, would be admissible to satisfy its burden of persuasion. Therefore, Defendant's summary judgment motion should be granted.

It is well settled that a summary judgment motion tests the admissible evidence in light of the burden of persuasion. Brill v. Guardian Life Ins. Co., 142 N.J. 520 (1995). The party who bears that burden, is obliged to present its admissible evidence sufficient to establish a prima facie case. Where the motion is made against the party who bears the evidential burden, that party must present the requisite materials or face an adverse decision.

Plaintiff's opposition consists entirely of a certification by Leslie L. Phiefer, Esq., ("Phiefer Certif.") one of Plaintiff's attorneys, with several exhibits attached. No brief is included and Plaintiff does not cite any caselaw. Plaintiff did not even respond to the Motion's Statement of Material Facts. Under R. 4:46-2(b), items in that Statement which are not specifically denied along with citations to the evidential record, are to be deemed as admitted.

**I. New Century Has Not Submitted Admissible Evidence Proving Any Contract  
or Amount Owed Between Citibank and Mr. Shaler**

Plaintiff's documentary evidence consists entirely of inadmissible documents because none of the documents are "records of regularly conducted activity" as defined in N.J.R.E. 803(c)(6). Specifically, there is no affidavit from any competent witness that the documents were "made at or near the time of observation by a person with actual knowledge." Id. Neither New Century nor its attorney could know how Citibank created these documents. What Plaintiff's counsel presents is that New Century acquired documents from an intermediary debt-buyer (Sherman) after default occurred. For example, Exhibits A and B to Phiefer's Certif. consist entirely of documents New Century received from Sherman – not from Citibank. (Galic Dep. 35-16, 51-5.) And Plaintiff admits that it has no affidavit from Citibank. (Galic Dep. 22-2, Plaintiff's Response to Interrogatory 7.) Plaintiff does not dispute that it must meet the same evidentiary burden as Citibank would have if it still owned the account. It is, therefore, impossible for Plaintiff to lay the proper foundation for admission of those documents without an affidavit from Citibank.

Plaintiff's evidential record consists entirely of a certification from its counsel. Plaintiff's counsel could not possibly have the requisite personal knowledge to lay the foundation for the admission of the documents to prove Plaintiff's prima facie case. Instead, she merely infers that the documents are what they purport to be. As they are not admissible as self-authenticating documents under Evid.R. 902, they are not evidential and, therefore, cannot create the record necessary to grant summary judgment.

On similar identical facts, the Appellate Division reversed a motion judge's decision on a summary judgment motion where the judge as wrongly relied on incompetent and inadmissible

evidence presented as attachments to the certification of a party's attorney. In Sellers v. Schonfeld, 270 N.J. Super. 424 (App. Div. 1993), the Appellate Division held that documents submitted as attachments to counsel's certification were incompetent and inadmissible. "*None of the documents were certified as true copies-nor was there any authentication of the documents. See generally, N.J.R.E. 901. Moreover, there is nothing that suggests the certifying attorney had any firsthand knowledge concerning the exhibits or facts contained therein. The documents were at best hearsay, once or more removed. One who has no knowledge of a fact except for what he has read or for what another has told him cannot provide evidence to support a favorable disposition of a summary judgment. The absence of competent, admissible evidence precluded resolution of the summary judgments. See Pressler, Current N.J. Court Rules, comment on R. 1:6-6 (1994), and the cases cited therein.*" Sellers, supra, 270 N.J. Super. at 428-29. Thus, Plaintiff's submissions prove nothing and should not be a basis to deny summary judgment.

Furthermore, there is also no proper chain of custody. No document relates the Shaler account back to Citibank. Therefore, Plaintiff's exhibits are mere hearsay and cannot go toward establishing the elements needed to prove the alleged debt between Citibank and Mr. Shaler.

## **II. Defendant's Alzheimer's**

Contrary to Plaintiff's arguments, it is not and never was Defendant's assertion that Mr. Shaler is somehow absolved from his obligation to pay a properly proved debt because he suffers from Alzheimer's. (Phiefer Certif. ¶ 9). His disease was the topic of Plaintiff's supplemental interrogatories after Defendant explained that he was unable to respond to Plaintiff's initial interrogatories due to his failing memory. His health is not an affirmative defense but an explanation as to why Defendant is unable to act as a witness to prove Plaintiff's case.

As noted, Plaintiff's opposition cites no caselaw. Thus, there is not a single authority to support Plaintiff's argument that Defendant is obligated to obtain a written medical report of his physician's diagnosis or that he go through the formality of a power of attorney if his wife is handling the couple's affairs without one. The suggestion that those things are necessary before Plaintiff is compelled to satisfy the same evidentiary burden every other claimant must satisfy has no basis in law or reason.

Based on the foregoing, Defendant David Shaler respectfully requests that the Court grant his Motion for Summary Judgment denying the Complaint with prejudice.

Philip D. Stern & Associates, LLC  
Attorneys for Defendant, David Shaler  
*s/Inna Ryu*

Dated: February 24, 2011

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Inna Ryu