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March 8, 2011

**DEFENDANT'S REPLY (SUPPLEMENTAL)
ON SUMMARY JUDGMENT MOTION**

Robert J. Brennan, J.S.C.
Superior Court of New Jersey
Morris County Courthouse
PO Box 910
Morristown, NJ 07963-0910

Re: *New Century Financial Services, Inc. vs. David Shaler*
Docket No. MRS-L-001265-10

Dear Judge Brennan,

I represent the Defendant. Defendant has filed a Summary Judgment Motion presently scheduled to be heard on March 18, 2011.

Kindly accept this letter in lieu of a more formal brief as Defendant's supplemental reply to bring the Appellate Division's March 4, 2011 decision in Cavalry Portfolio Services, LLC v. U. Sharma to the Court's attention. A copy of the slip opinion is enclosed.

I am simultaneously serving my adversary and I have no objection to Plaintiff's submission of a sur-reply to address this new decision.

Like Cavalry, the present case involves a debt-buyer's attempt to collect on an allegedly purchased credit card account. Both cases involve an evaluation of the debt-buyer's submissions on summary judgment.

In Cavalry, the Appellate Division held that “a purported assignee of a credit card account must show by competent evidence [1] the existence of the account, [2] the charges and payments under the account that resulted in the account balance claimed by the assignee, and [3] a valid assignment.” Slip Op. at 5 (bracketed enumeration added).

Although the present case involves a motion brought by the defendant against the debt-buyer and Cavalry involved the debt-buyer’s motion, both situations involve the same analysis of the debt-buyer’s submissions because the debt-buyer bears the burden of persuasion. It is only the effect of that evaluation which differs.

In both situations, the debt-buyer’s burden is to present materials which, if presented at trial, would be admissible to establish its prima facie case. If that burden is satisfied on a debt-buyer’s summary judgment motion, then the burden to establish a material issue of fact shifts to the defendant. If that burden is satisfied in opposition to the defendant’s motion, then the motion should be denied. In either case, however, the Court engages in the same analysis of the debt-buyer’s submissions.

In Cavalry, as in the instant matter, no affidavits were submitted from the creditor who serviced the account; instead, all of the information came from post-default debt-buyers. “Thus, there is no way of knowing whether those books and records included an application by defendant for a credit card or, assuming Washington Mutual issued a credit card to defendant, statement of

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defendant's activities under the account that would show charges and payments." Slip Op. at 4.

Cavalry also submitted an affidavit of its employee, Kristina D. Pagni which appeared to lay the foundation for the application of the business records exception to Cavalry's records. "However, Pagni's affidavit contains no indication of the contents of plaintiff's 'computerized account records for accountholders.' In particular whether those records reflect charges and payments on the alleged account before its alleged acquisition by plaintiff on November 26, 2008." Slip Op. at 5.

Consequently, the Appellate Division concluded that Cavalry's affidavits "clearly did not provide" the necessary evidence. Slip Op. at 6. Likewise, New Century has not submitted the necessary evidence to defeat Defendant's motion and his motion should be granted.

Thank you for your consideration in this matter.

Respectfully,

A handwritten signature in black ink, appearing to read "Philip D. Stern", with a stylized flourish at the end.

Philip D. Stern
via regular mail
enclosure(s)

cc: Leslie Phiefer, Esq., Pressler and Pressler, LLP

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2822-09T2

CAVALRY PORTFOLIO SERVICES, LLC
as assignee of CAVALRY
INVESTMENTS, LLC, as assignee
of CHASE BANK USA, N.A., as
assignee of WASHINGTON MUTUAL BANK,

Plaintiff-Respondent,

v.

U. SHARMA a/k/a UDI SHARMA,

Defendant-Appellant.

Submitted February 15, 2011 - Decided March 4, 2011

Before Judges Espinosa and Skillman.

On appeal from Superior Court of New Jersey,
Law Division, Special Civil Part, Mercer
County, Docket No. DC-005672-09.

U. Sharma, appellant pro se.

Respondent has not filed a brief.

PER CURIAM

Plaintiff filed this collection action against defendant
for recovery of the outstanding balance on a credit card account
that defendant allegedly had with Washington Mutual Bank.
Plaintiff's complaint alleged that with respect to this account,

it is "the assignee of CAVALRY INVESTMENTS, LLC, as assignee of CHASE BANK USA, N.A., as assignee of WASHINGTON MUTUAL BANK."

The complaint claimed that the principal amount due on the account was \$11,585.67 and that plaintiff also owed \$1,887.87 in interest and \$1,208.57 in attorney fees, for a total of \$14,682.11.

Defendant filed an answer denying the allegations of the complaint and asserting various affirmative defenses.

On September 18, 2009, defendant filed a motion to dismiss the complaint based on plaintiff's failure to answer interrogatories and requests for production of documents. Plaintiff subsequently filed answers to interrogatories. It is unclear from the record before us whether plaintiff responded to defendant's request for the production of documents.

On October 5, 2009, the trial court entered an order denying defendant's motion to dismiss based on plaintiff's failure to provide discovery.

On October 16, 2009, defendant filed a second motion to dismiss, which was based on plaintiff's alleged failure to comply with the registration requirements of N.J.S.A. 42:2B-53(a). Plaintiff filed opposition, and on October 28, 2009, the trial court entered an order denying the motion.

On December 15, 2009, plaintiff filed a motion for summary judgment. On December 24, 2009, defendant filed opposition to the motion. The papers submitted in support of and in opposition to the motion are discussed later in this opinion. There was no oral argument on the motion.

On January 6, 2010, the trial court entered summary judgment in plaintiff's favor in the amount of \$15,000. This judgment was not accompanied by any opinion.

Defendant has appealed from the judgment. Plaintiff has failed to file an answering brief.¹ Consequently, our understanding of the case is based solely on plaintiff's pro se brief and appendix.

In support of its motion for summary judgment, plaintiff relied upon a certification by Matteo Velardo, who identified himself as "Assistant Vice President of plaintiff" who "serve[s] as keeper of the books and records of Cavalry, which are kept in the ordinary course of business, with the entries in them having been made at or near the time of the occurrence." Velardo's certification asserted that he had

reviewed the books and records of Cavalry
with respect to the indebtedness of U.

¹ Based on plaintiff's failure to file a timely brief, we entered an order on October 22, 2010, providing that no brief on its behalf would be accepted for filing.

SHARMA A/K/A UDI SHARMA, Debtor(s), (Account No.: 13398878), which reflects that as of September 30, 2008, there was an outstanding balance due of \$11,585.67, with interest accruing at the rate of 24.99% since September 30, 2008 pursuant to the Terms and Conditions applicable to said account.

However, Velardo also stated that "the above-referenced account, which originated with Washington Mutual Bank, was, on November 26, 2008, sold, transferred and conveyed to Cavalry." Thus, it appears that the entire balance of defendant's purported credit account accrued before its transfer to plaintiff on November 26, 2008. Moreover, although Velardo's certification states that he "reviewed the books and records of Cavalry with respect to the indebtedness of [defendant]," it did not set forth the contents of those books and records. Thus, there is no way of knowing whether those books and records included an application by defendant for a credit card or, assuming Washington Mutual issued a credit card to defendant, statements of defendant's activities under the account that would show charges and payments.

Plaintiff also relied upon an affidavit by Kristina D. Pagni, who identified herself as plaintiff's "Legal Administrator." Pagni's affidavit states:

In the normal course of business, Cavalry Portfolio Services, LLC as assignee of Cavalry Investments, LLC maintains computerized account records for

accountholders who have delinquent credit accounts. Cavalry Portfolio Services, LLC as assignee of Cavalry Investments, LLC maintains such records in the ordinary and routine course of business and is charged with the duty to accurately record any business act, condition or event onto the computer record maintained for the accounts, with the entries made at or very near the time of any such occurrence. I have reviewed the applicable computer record as it relates to the above accountholder's credit account, and I make this declaration based upon information from that review, and if called as a witness, I could testify to the following based on that review.

However, Pagni's affidavit contains no indication of the contents of plaintiff's "computerized account records for accountholders," in particular whether those records reflect charges and payments on the alleged account before its alleged acquisition by plaintiff on November 26, 2008.

Plaintiff also apparently attached certain purported credit card statements to the brief in support of its motion for summary judgment. However, there is no indication those statements were properly authenticated. Furthermore, the statements appear incomplete.

To be entitled to summary judgment, a party must establish by competent evidence that it is entitled to the relief sought. See Claypotch v. Heller, Inc., 360 N.J. Super. 472, 488-89 (App. Div. 2003). Consequently, a purported assignee of a credit card account must show by competent evidence the existence of the

account, the charges and payments under the account that resulted in the account balance claimed by the assignee, and a valid assignment. The Velardo certification and Pagni affidavit clearly did not provide such evidence.

Furthermore, defendant filed an affidavit in opposition to plaintiff's motion for summary judgment that disputed Velardo's and Pagni's allegations and claimed that he did not owe the amount sought by plaintiff's complaint. That affidavit stated in part:

5. Cavalry Portfolio Services LLC never extended credit to me.
6. Cavalry Portfolio Services LLC never sent me any monthly statements.

8. I believe some of the charges in the credit card statements provided to me in discovery are not my charges. . . .
9. Plaintiff has not provided any signed credit card application, request for credit or credit card account contract.
10. I have never had a credit card account numbered 13398878, as contended by Plaintiff
11. . . . When I called Plaintiff to procure data for my Affidavit of Diligent Inquiry, which was attached to my complaint, Plaintiff declared that Plaintiff is just a collection firm, and that Plaintiff does not buy debts.

15. . . . Plaintiff has not provided any documents that show *my account(s)* has/have been assigned to Plaintiff or the consideration paid for any alleged assignment.

In sum, plaintiff's moving papers did not show by competent evidence that it was entitled to the relief sought by its complaint and defendant's affidavit disputed his liability for the amount claimed by plaintiff. Therefore, the summary judgment granted to plaintiff must be reversed.

We also note that Rule 4:46-2(c) requires a court that grants a motion for summary judgment to "find the facts and state its conclusions in accordance with R. 1:7-4." The trial court failed to discharge this obligation.

Finally, on remand, the trial court should assure that defendant has been afforded the opportunity to obtain the full discovery permitted under the applicable court rules.

Accordingly, we reverse the summary judgment in plaintiff's favor and remand for further proceedings in conformity with this opinion.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.


CLERK OF THE APPELLATE DIVISION