

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION, CIVIL PART
MORRIS COUNTY
DOCKET NO. MRS-L-001265-10
A.D. # _____

NEW CENTURY FINANCIAL	:	
SERVICES, INC.,	:	
	:	TRANSCRIPT
Plaintiffs,	:	OF
vs.	:	DECISION
	:	EXCERPT
DAVID SHALER,	:	
	:	
Defendant.	:	

Place: Morris County Courthouse
Washington & Court Streets
Morristown, New Jersey 07963

Date: March 18, 2011

B E F O R E:

HONORABLE ROBERT J. BRENNAN, J.S.C.

T R A N S C R I P T O R D E R E D B Y:

INNA RYU, ESQ. (Philip D. Stern & Associates, LLC)

A P P E A R A N C E S:

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The Court - Decision

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1 THE COURT: This is the matter of New Century
2 Financial Services, Inc. versus Shaler. The Docket
3 Number is MRS-L-1265-10.

4 Appearances please?

5 MS. PHIEFER: Good morning, Your Honor.
6 Leslie Phiefer, from Pressler and Pressler,
7 representing the plaintiff, New Century Financial
8 Services.

9 THE COURT: Thank you.

10 MR. STERN: May it please the Court, Philip
11 Stern, on behalf of Defendant, David Shaler.

12 THE COURT: Thank you both, please be seated.
13 (Motion for summary judgment not transcribed)

14 THE COURT In this action New Century
15 Financial Services, the plaintiff, seeks to recover
16 from the defendant, David Shaler, on a debt allegedly
17 incurred by Mr. Shaler to Citibank on a revolving
18 credit card. That -- in the terminology of the
19 parties, or at least the plaintiff, the debt was
20 charged off in 2006, I believe, in the approximate
21 amount of \$17,000, I think.

22 And subsequently, conveyed by Citibank to
23 Sherman Acquisition, LLC, in a -- what is -- what is
24 referred to as a pool of charged off debts incurred by
25 consumers on revolving credit cards issued by the bank.

1 Sherman in turn assigned the -- the obligation to the
2 plaintiff.

3 There was kind of a sub-assignment path
4 through Sherman, which is not an issue raised by the
5 defendant in this case. So, we needn't -- we needn't
6 review the assignments within Sherman, or the
7 assignment within Sherman. It's enough to refer to
8 Sherman as a single entity. And there was then an
9 assignment by Sherman, as I say, to the plaintiff.

10 The defendant here seeks summary judgment
11 because the -- on a legal basis, not disputing the
12 debt, but disputing -- disputing -- well, disputing the
13 debt, in a manner of speaking. But the real attack
14 here is on the adequacy of the proofs that New Century
15 would offer in support of its claim.

16 The -- the defendant argues that there's no
17 admissible evidence of a formation of a contract
18 between Citibank, the issuer of the card, and Mr.
19 Shaler. There's no admissible evidence that Shaler
20 breached. That the debts and -- the debits and credits
21 assigned -- I'm sorry -- associated with the alleged
22 account, including fees, charges and interest. There's
23 no admissible evidence establishing that. Or the
24 purchase by Sherman of Shaler's account, which was, as
25 I say, a pool.

1 There is -- there is no certification here,
2 or affidavit, from Citibank that would speak to any of
3 the issues in terms of its relationship with Shaler.
4 In fact, there's no certification at all offered by the
5 plaintiff, except for a hearsay certification of
6 Counsel.

7 So, in opposition to a motion for summary
8 judgment under Rule 446, the defendant -- I'm sorry,
9 the plaintiff has not set forth a statement disputing
10 the material facts set forth in the plaintiff's
11 statement of material facts. We have the certification
12 of Counsel, which attaches certain documents. But
13 Counsel's certification, of course, is hearsay, and
14 does not establish anything as a matter of a record
15 upon which a Court can rely in terms of a motion for
16 summary judgment.

17 What we do have are certain discovery
18 responses, including the deposition testimony of the
19 plaintiff's client services manager, Marko Galic. And
20 Mr. Galic testified, in part, as follows. And this is
21 attached to the plaintiff's moving papers, at page 22
22 line 2.

23 Question. "Has New Century obtained any
24 affidavits from either Sherman Financial or the
25 original creditor which assert the accuracy of the

1 statements in this case?"

2 Answer: "No."

3 Page 22 line 23.

4 Question: "Do you have any information as to
5 whether these statements were actually mailed to Mr.
6 Shaler?" That is to say the billing statements. The
7 statements we're all familiar with in terms of credit
8 card statements.

9 The answer was: "I do not."

10 Page 28 line 4. "D-2 is a bill of sale and
11 assignment from Sherman Acquisitions, LLC to New
12 Century Financial Services."

13 The next question was: "What is D-3?"

14 Answer: "It's a bill of sale assignment from
15 Citibank South Dakota to Sherman Originator, LLC."

16 Question: "What is D-4?"

17 Answer: "D-4 is an affidavit from a Sherman
18 director, Jon Mazzoli, that states Sherman
19 Acquisitions, LLC, LVNV Funding, LLC, and Sherman
20 Originator, LLC, are all subsidiaries under Sherman
21 Financial Group, LLC."

22 Page 29 line 14.

23 Question: "In D-2 is there anything in that
24 that identifies Mr. Shaler's account?"

25 The answer: "No."

1 Page 30 line 8.

2 Question: "What information are you aware of
3 that connects Mr. Shaler's account to the pool of debts
4 that's reflected in D-2?"

5 Answer: "The list of accounts that --
6 arrived with this bill of sale."

7 And he says further at page 30, starting at
8 line 25. "With -- with -- within in -- with each
9 purchase there's a purchase and sale agreement." And
10 I'm omitting -- I'm skipping down to line 4. "A
11 company by an electronic spreadsheet with a list of
12 accounts."

13 At page 36 line 16.

14 Question: "Is there any information that New
15 Century has with respect to Mr. Shaler's debt that came
16 from anyone other than the Sherman financial Group?"

17 Answer: "No."

18 Page 35 line 23.

19 Question: "All of the information that New
20 Century Financial has with respect to Mr. Shaler's
21 account came from the Sherman Financial Group;
22 correct?"

23 Answer: "Yes."

24 Page 37 line 24. "Exhibit D-6 is an account
25 statement." And then there's a question at page 38

1 line 8.

2 Question: "Do you know whether D-6 is a
3 duplicate of what was actually mailed to Mr. Shaler?"

4 Answer: "Yes."

5 Question: "Was it an exact duplicate?"

6 Answer: "That's what we were told."

7 Question: "When you say that's what we were
8 told, by whom would that -- by whom would you have been
9 told that?"

10 Answer: "By Sherman."

11 At page 40 line 23. "D-3 was identified as a
12 bill of sale assignment from Citibank to Sherman." And
13 at page 41 the question was asked.

14 Question: "Is there anything in D-3 which
15 identifies Mr. Shaler's account?"

16 The answer: "No."

17 Page 44 line 16.

18 Question: "So, it would be fair to say that
19 D-3 does not necessarily reflect Sherman's purchase of
20 Mr. Shaler's account?"

21 Answer: "A specific document, no."

22 Question: "Are you aware of any specific
23 document which would reflect Sherman's purchase of Mr.
24 Shaler's account?"

25 Answer: "No."

1 Bottom of page 47 line 25.

2 Question: "D-3 recites a sale or assignment
3 between whom and whom?"

4 Answer: "Between Citibank and Sherman."

5 Question: "And this D-2 reflects the same
6 between whom and whom?"

7 Answer: "From Sherman Acquisition to New
8 Century Financial."

9 Question: "And where does New Century
10 Financial get the information, the specific
11 information, with regard to Mr. Shaler's account?"

12 Answer: "From the list of accounts, the
13 spreadsheet."

14 Answer: "This bill of sale is part of the --
15 " oh, I'm sorry, now I'm down on 48:16. "This bill of
16 sale is part of the purchase and sale agreement. The
17 purchase and sale agreement contains the bill of sale
18 on the spreadsheet."

19 Page 49 line 8 -- line 9.

20 Question: "How do you get -- and how do you
21 get provided with that, with D-3?"

22 Answer: "This comes along with a sale for
23 each account that we purchase. If Sherman purchased it
24 from another entity we get the full chain of title at
25 the time of purchase."

1 Question at line 16: "The reason you get
2 this is to show Mr. Shaler's account went from Citibank
3 to Sherman, and then from Sherman to New Century?"

4 Answer: "Correct."

5 At page 50 he says he gets certain
6 information from Sherman Acquisitions, and that's the
7 spreadsheet.

8 Question: "In what form, mail or electronic
9 form?"

10 Answer: "We get it in both CD and
11 electronically."

12 Question: "And what is it that you're
13 looking at that has that information?"

14 Answer: "The electronic spreadsheet."

15 That's at page 50 from line 1 to line 7. And
16 at the same page line 13. "Citibank provided to
17 Sherman -- they get whatever Citibank provided to
18 Sherman, account number, origination date, date of
19 charge off, the consumer's social security number,
20 address, any information they have."

21 Page 51 line 5.

22 Question: "From where do you get this
23 personal information, specifically about Mr. Shaler?"

24 Answer: "From Sherman." And at line 10 on
25 page 51. "Obtained from the sale and purchase

1 agreement that was on the CD."

2 Page 58 line 25.

3 Question: "There is a Microsoft Excel --
4 Excel spreadsheet in New Century Financial's computers
5 named SHER20.xls?"

6 Answer: "That's correct."

7 Question: "And in that spreadsheet would be
8 the debtor placement information for Mr. Shaler's
9 account?"

10 Answer: "Correct."

11 And finally, at page 64 line 7 -- oh, I don't
12 need that. Page 66 line 3.

13 Question: "You're making an assumption based
14 upon looking at D-3 and D-2 that the information that
15 Sherman provided you was information that it obtained
16 from Citibank?"

17 Answer: "Correct."

18 Question: "Your knowledge about what
19 information Sherman obtained is just based on making
20 that assumption between -- assumption from the two
21 documents, D-3 and D-2?"

22 Answer: "Yes. And the fact that in our
23 purchase and sale agreement with Sherman Financial, any
24 purchase and sale agreement with Sherman that we've had
25 in the past, they represent all that information

1 transferred is accurate and true."

2 Other documentation that we have includes
3 Plaintiff's responses to Defendant's document request,
4 Exhibit 4 in Plaintiff's -- Defendant's original moving
5 papers. And there is a request for the purchase
6 agreement under which Plaintiff purchased the accounts.
7 And the response is a refusal to produce, an objection,
8 because that's irrelevant, according to the plaintiff.
9 In supplemental interrogatories -- that we don't need
10 either.

11 So, it's clear that Mr. Galic, from his
12 deposition testimony, has no first hand information
13 about the establishment of the relationship between
14 Citi and Shaler. Whether he received -- whether he
15 actually used this card, and whether he incurred
16 obligations, and whether those obligations were not
17 paid.

18 All of that is by way of hearsay information
19 received from Sherman, which in turn received it from
20 -- from Citi. The -- the defendant's position here is
21 that there is an absence of competent evidence that
22 would be offered by the -- by the plaintiff.

23 As I've said, the plaintiff relies first on a
24 hearsay affidavit of certification of Counsel, which
25 does not establish anything. Attached to it are -- is

1 the bill of sale assignment from Citibank to Sherman,
2 which recites conveyance of certain accounts, as well
3 as the bill of sale from Sherman to the plaintiff,
4 which refers to a charged off accounts described in
5 appendix A, which is a spreadsheet.

6 And that portion of the spreadsheet that
7 refers to Mr. Shaler is attached there, but there's
8 nothing that authenticates any of this. There are also
9 a number of credit card statements attached to
10 Counsel's certification, but they are not
11 authenticated. In spite of Plaintiff's argument that
12 803C6 would make them admissible under the business
13 records exception to the hearsay rule, they cannot be
14 authenticated by Counsel.

15 They still must be authenticated. They
16 cannot simply be -- be described as business records
17 without the appropriate authentication.

18 The plaintiff also relies on a brief, a sur
19 reply brief that attaches a number of credit card
20 statements, and the same bill of sale and assignments.
21 But that establishes nothing more. And part of the
22 spreadsheet, that establishes nothing more than the
23 original certification.

24 Now, the -- and Counsel, Plaintiff argues
25 that it is sufficient, that a -- I'm sorry. That under

1 Moran versus Joyce, 125 N.J.L. 558 at 560, 1941, it --
2 that a debtor is -- I'm sorry -- that one can own the
3 debt of another. But that doesn't answer the question
4 of -- of whether the owner of the debt establishes the
5 debt through competent evidence.

6 And here, there must be competent evidence
7 that establishes the existence of the account, the
8 charges and payments under the account that resulted in
9 the account balance claimed by the assignee, and a
10 valid assignment.

11 And even if we assume there is a valid
12 assignment here, which is not authenticated anywhere,
13 we -- except perhaps in Mr. Galic's testimony. But
14 even assuming that we have a valid assignment, we don't
15 have competent evidence of the existence of the debt,
16 and the charges and payments under the account that
17 resulted in the account balance claimed by the
18 assignee.

19 All of this must be established by competent
20 evidence of one with knowledge of the information being
21 conveyed. Without that competent evidence, which has
22 not been set forth here, in any form, in opposition to
23 the defense motion for summary judgment, the Court is
24 left with no alternative but to dismiss the complaint
25 with prejudice for failure to establish the -- the

The Court - Decision

1 cause of action.

2 There is no establishment of the validity of
3 these records through evidence Rule 803C6, or any other
4 way. So, for all of these reasons, the Court grants
5 the motion of the defendant for summary judgment
6 dismissing the plaintiff's complaint with prejudice.

7 Counsel, thank you both very much. We'll
8 send you copies of the order.

9 MS. PHIEFER: Thank you, Judge.

10 MR. STERN: Thank you, Your Honor.

11 (Proceedings concluded)
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CERTIFICATION

I, Rachel Healy, the assigned transcriber, do hereby certify the foregoing transcript of proceedings at the Morris County Superior Court, on March 18, 2011, Digitally Recorded, Index No. 11:52:12 to 12:06:46, is prepared to the best of my ability and in full compliance with the current Transcript Format for Judicial Proceedings and is a true and accurate compressed transcript of the proceedings as recorded.

Rachel Healy (KH)
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March 29, 2011
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