

RECEIVED & FILED
SUPERIOR COURT
2011 JUL -7 AM 11:56
CIVIL DIVISION

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

<p>MIDLAND FUNDING, LLC, Plaintiff,</p> <p>vs.</p> <p>CHERYL E. WILLIAMS, Defendant.</p>	<p>SUPERIOR COURT OF NEW JERSEY LAW DIVISION - MORRIS COUNTY SPECIAL CIVIL PART</p> <p>Civil Action</p> <p>Docket No. DC-004044-11</p> <p>NOTICE OF MOTION FOR SUMMARY JUDGMENT AND PROOF OF SERVICE</p>
--	--

TO: Ralph Gulko, Esq.
Pressler and Pressler, LLP
7 Entin Road
Parsippany, NJ 07054

I. NOTICE OF MOTION

Please take notice that Defendant, Cheryl E. Williams, will move for an Order to Granting Summary Judgment in favor of Defendant. The grounds for this Motion are set forth below.

Statement Under R. 6:3-3(c)(2): The Order sought will be entered in the discretion of the Court unless you notify the clerk of the court and the attorney for Defendant, Cheryl E. Williams, in writing within 10 days after service of this Motion that you object to the entry of the order. The address of the Court is:

Special Civil Part - Morris County
Superior Court Clerk's Office
P.O. Box 910
Morristown, New Jersey 07963-0910

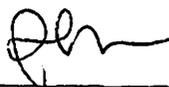
Notice Under R. 6:3-3(c)(3): NOTICE. IF YOU WANT TO RESPOND TO THIS MOTION YOU MUST DO SO IN WRITING. Your written response must be in the form of a certification or affidavit. That means that the person signing it swears to the truth of the statements in the certification or affidavit and is aware that the court can punish him or her if the statements are knowingly false. You may ask for oral argument, which means you can ask to appear before the court to explain your position. If the court grants oral argument, you will be notified of the time, date, and place. Your response,

if any, must be in writing even if you request oral argument. Any papers you send to the court must also be sent to the opposing party's attorney, or the opposing party if they are not represented by an attorney.

Notice Under R. 6:3-3(c)(4): We are asking the court to make a final decision against you without a trial or an opportunity for you to present your case to a judge. We are requesting that a decision be entered against you because we say that the important facts are not in dispute and the law entitles us to a judgment. If you object to the motion, you must file a written response stating what facts are disputed and why a decision should not be entered against you.

ORAL ARGUMENT: Oral Argument is REQUESTED IF OPPOSITION IS FILED.

Philip D. Stern & Associates, LLC
Attorneys for Defendant, Cheryl E. Williams



Dated: July 5, 2011

Inna Ryu

II. SUPPORTING CERTIFICATION

I, Inna Ryu, certify as follows:

1. I am a New Jersey attorney and represent Defendant, Cheryl E. Williams.
2. I have attached a copy of the unpublished decision, *Cavalry Portfolio Svcs., LLC, v. Sharma*, No. DC-005672-09, 2011 WL 744634 (App. Div. Mar. 4, 2011), as Exhibit 1. In accordance with R. 1:36-3, I am unaware of any contrary unpublished opinions.

I certify that the forgoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.



Dated: July 5, 2011

Inna Ryu

III. MEMORANDUM

A. Statement of Material Facts and Procedural History

The Complaint was filed on April 20, 2011. Defendant, Cheryl Williams, was served on May 31, 2011. The Complaint alleges that Plaintiff, Midland Funding, LLC, purchased a defaulted account originally owned by Chase Bank USA, N.A. ("Bank"). Complaint ¶1. Defendant submitted an Answer simultaneously with this Motion in response to the Complaint. The Answer was submitted solely for the purpose of avoiding the Clerk's automated entry of default.

The filing of this Motion at this stage of the litigation is expressly contemplated in R. 4:6-1(b), where the time within which to answer is altered by the filing of a summary judgment motion; specifically, if the motion is denied, the answer will become due ten days after Defendant received notice of the Court's action. *See* R. 4:46-1 (allowing defendant to file such a motion "at any time").

Although a Statement of Material Facts is not required (R. 6:6-1), Defendant submits this Statement of Material Fact in support of its summary judgment motion. As this Motion pierces the pleadings and tests the sufficiency of Plaintiff's evidence, Plaintiff, who bears the burden of proof, must submit a record of admissible evidence to deny summary judgment. *Brill v. Guardian Life Insurance Co.*, 142 N.J. 520 (1995),

1. There is no admissible evidence of the formation of a contract between the Bank and Ms. Williams.
2. There is no admissible evidence of the terms of any contract between the Bank and Ms. Williams.
3. There is no admissible evidence that Ms. Williams breached any contract with the Bank.
4. There is no admissible evidence as to the debits, credits, and payments associated with the alleged account, including the fees, charges, and interest from which to determine the amount purportedly due.
5. There is no admissible evidence as to the purchase by Midland Funding of Ms. Williams' alleged account, either directly from the Bank or through intermediate debt buyers.
6. There is no admissible evidence regarding the mailing of any written agreements by the Bank to Ms. Williams.
7. There is no admissible evidence regarding the mailing of any billing statements by the Bank to Ms. Williams.

B. Legal Arguments

1. Lacking Evidence to Prove Its Case, Plaintiff's Complaint Should Be Dismissed

This is a suit by a debt-buyer asserting that it is the owner of an alleged Chase account in default. Plaintiff, Midland Funding, filed a one-count Complaint alleging It is now the owner of the defendant(s) CHASE BANK USA, N.A. account number 4266841076720398 which is now in default. There is due the plaintiff from the defendant(s) CHERYL WILLIAMS the sum of \$4,826.96 plus finance charges from 04/30/2009 to 04/15/2011 of \$2,269.34 for a total of \$7,096.30.

Summary judgment pierces the pleadings and compels submission of evidence to demonstrate that a party can meet its evidential burden. *See Matsushita Elec. Indus. Co., Ltd., v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

Pursuant to R. 1:4-8(a)(3), the signature of Plaintiff's attorney is a certification that "to the best of his or her knowledge, information, and belief, formed after an inquiry reasonable under the circumstances... the [Complaint's] factual allegations have evidentiary support." This Motion challenges whether such evidentiary support exists.

To defeat this Motion, Midland Funding must submit that “evidentiary support” and demonstrate how it would be admissible and sufficient to carry its burden of persuasion. *Id.* In the absence of such materials, summary judgment should be granted dismissing the Complaint with prejudice. *Brill, supra.*

By not utilizing the optional language permitted under R. 1:4-8(a)(3), Plaintiff’s counsel has unequivocally certified that “the factual allegations have evidentiary support.” *Id.* Plaintiff could have, but did not, assert that any “specifically identified allegations... are either likely to have evidentiary support or they will be withdrawn or corrected if reasonable opportunity for further investigation or discovery indicates insufficient evidentiary support.” *Id.* (emphasis added). As a result, Plaintiff should not be heard to argue that it needs discovery before it is prepared to demonstrate evidentiary support for its allegations. To the extent the Court would permit discovery, Defendant requests that a continuance be ordered to permit the identified discovery and this Motion then be considered with the benefit of that discovery. *See, R. 4:46-5(a).*

2. Plaintiff – Not Defendant – Must Submit Evidence of Its Claim

The summary judgment standard is well settled. Plaintiff, as the party bearing the burden of persuasion at trial, must present admissible evidence to sustain its burden as to each element of its cause of action. *Brill, supra* at 533; and R. 4:46-5(a). That evidence must be viewed in the light most favorable to the non-moving party. *Id.*

This is precisely the type of summary judgment motion contemplated by the U.S. Supreme Court in *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). Adopting the *Celotex* rule, the New Jersey Supreme Court concluded that the test for summary judgment is the same as for a directed verdict and for a judgment notwithstanding the verdict. *Brill* at 536. Consequently, while the motion court does not assess the credibility or weight of evidence, it does evaluate, analyze and sift through the evidence, in *light of the burden of proof*, to determine whether Plaintiff has submitted a sufficient evidential record of facts which, when viewed with indulgent inferences, would be sufficient to establish a *prima facie* case. *Id.* at 533-4 and 536.

At this stage, Defendant has no obligation to submit evidence negating the factual elements of Plaintiff’s cause of action. In *Celotex*, a defendant moved for summary judgment but submitted no evidential materials. The Supreme Court upheld the trial court’s grant of summary judgment and expressly rejected the argument that the moving party must establish an evidential record; rather, summary judgment should be entered

against a party *who fails to make a showing sufficient to establish the existence of an element essential to that party’s case, and on which that party will bear the burden of proof of trial.* ... The moving party is “entitled to judgment as a matter of law” because the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof.

Id. at 322-3 (emphasis added).

Here, Ms. Williams – like the moving party in *Celotex* – has no obligation to submit evidence negating the factual elements of Plaintiff’s cause of action. Rather,

Plaintiff's failure to demonstrate evidence to get to a jury mandates summary judgment.

3. What Plaintiff Must Prove

As Midland Funding bears the burden of proof, absent such proof, Ms. Williams' right to summary judgment should be recognized. Thus, that right can only be defeated by Midland Funding's submission of admissible evidence to establish its cause of action. See *James Talcott, Inc. v. Shulman*, 82 N.J. Super 438, 443 (App. Div. 1964); see also *Robbins v. Jersey City*, 23 N.J. 229, 241 (1957).

Particularly significant to what evidence Plaintiff must submit are the Business Records Exception, *Evid.R.* 803(c)(6), the requirement for a witness's personal knowledge, *Evid.R.* 602, proper authentication of documents, *Evid.R.* 901 and *Evid.R.* 902, and submission of originals, *Evid.R.* 1002. Read together, these rules require that:

1. Plaintiff produce competent witnesses with sufficient personal knowledge to authenticate and lay the proper foundation for the admission of hearsay materials, and
2. The admissible records be sufficient to carry Plaintiff's evidentiary burden.

Plaintiff alleges that it is the assignee of a claim based on an allegedly defaulted contractual relationship between Defendant and the Bank, which may or may not include one or more intermediary debt buyers.

A contract claim involves proof of an offer, acceptance, consideration, breach and causally related damages. *Weichert Realtors v. Ryan*, 128 N.J. 427, 435 (1992).

Also, "where the suit is brought by the assignee in his own name, he must aver and prove that the cause of action was in fact assigned to him" *Sullivan v. Visconti*, 68 N.J.L. 543, 550 (Sup Ct. 1902). Therefore, 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. *Cavalry Portfolio Srvs., LLC, v. Sharma*, No. DC-005672-09, 2011 WL 744634, 2 (App. Div. Mar. 4, 2011) (unpublished, copy attached to the Certification of Inna Ryu).

Regarding the contract, there must be written terms. The Truth in Lending Act at 15 U.S.C. § 1637(a) requires the essential terms of a credit card account be disclosed in writing. In addition, creditors are required to post on the internet "the written agreement between the creditor and the consumer for each credit card account under an open-ended consumer credit plan." 15 U.S.C. § 1632(d)(1).

Even in the absence of federal law, Plaintiff cannot prove the basis for any finance or interest charges, late fees and other charges, payment due dates, or even whether Defendant breached an obligation, without a contract. Consequently, someone with the requisite personal knowledge must be able to identify the controlling contract and, in the absence of Ms. Williams' signature, demonstrate what conduct, if any, demonstrated mutual assent to the purported terms.

Turning to breach and damages, Plaintiff must have a competent witness who can establish that each charge was authorized as the Truth in Lending Act imposes that burden on Plaintiff. 15 U.S.C. § 1643(b). As observed by our Appellate Division in

Cavalry Portfolio, supra, there must be proof of the charges and payments substantiating the alleged balance and that proof must come from a competent witness.

Plaintiff's failure to come forward with sufficient evidence as to each element of its *prima facie* case compels the entry of summary judgment for Defendant.

C. The Motion Is Not Premature

As already mentioned, the Court Rules expressly contemplate summary judgment motions being filed prior to an answer or discovery. Summary judgment *can* be withheld, however, "when discovery is incomplete *and* critical facts are peculiarly within the moving party's knowledge." *James v. Bessemer Processing Co., Inc.*, 155 N.J. 279, 311 (1998) (internal quotes and citations omitted; emphasis added). In addition, under R. 4:46-5(a), summary judgment can be withheld when the opponent submits an affidavit explaining the reasons "the party was unable to present by affidavit facts essential to justify opposition". Even decisions withholding summary judgment under such circumstances "do not suggest that granting summary judgment at an early stage is flatly prohibited." *New Jersey State Bar Ass'n v. State*, 382 N.J. Super. 284, 338 (Ch. Div. 2005) *amended* 387 N.J. Super. 24 (App. Div. 2006).

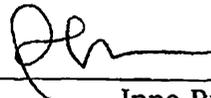
Here, it is difficult to imagine, in a collections case such as this one, what information could be exclusively in Defendant's possession to warrant the need for discovery. That the Plaintiff would be incapable of proving a debt without discovery from the debtor is seemingly implausible and is contrary to counsel's R. 1:4-8 certification that evidentiary support exists for its allegations.

D. Conclusion

For the foregoing reasons, Defendant, Cheryl E. Williams, requests that summary judgment be entered in favor and against Plaintiff, Midland Funding, LLC.

Philip D. Stern & Associates, LLC
Attorneys for Defendant, Cheryl E.
Williams

By: _____



Inna Ryu

Dated: July 5, 2011

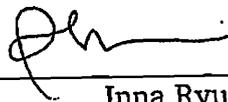
IV. PROOF OF SERVICE

In accordance with R. 1:5-3, I certify that the within pleading was served in accordance with R. 1:5-2, on the following attorney by ordinary mail, postage prepaid, mailed on the date set forth below and addressed to:

Ralph Gulko, Esq.
Pressler and Pressler, LLP

7 Entin Road
Parsippany, NJ 07054

Dated: July 5, 2011



Inna Ryu