

New Century Financial Services, Inc.

Plaintiff

Vs

Ahlam Oughla

Defendant

Superior Court of New Jersey
Law Division
Hudson Special Civil Part
Docket Number DC-004244-12

Civil Action
Opposition to Motion for
Summary Judgment
Dated 05/24/12

To: Daryl J. Kipnis
Pressler and Pressler
7 Entin Road
Parsippany, NJ 07054

Comes now the Defendant and objects to Plaintiff's Motion for Summary Judgment. The grounds of this motion are set below.

N.J. Courts rule R. 6:6-3: Judgment by Default.

In *LVNV FUNDING, LLC v. Colvell*, 22 A. 3d 125 - NJ: Appellate Div. 2011, the Defendant Mary Colvell appealed an entry of summary judgment in favor of the Plaintiff. The Superior Court of New Jersey, Appellate Division stated:

"After reviewing the record in light of the contentions advanced on appeal, we reverse and remand, concluding that the proofs submitted by LVNV were insufficient to grant summary judgment. In particular, when suing to collect the balance allegedly owed on an unpaid revolving credit card account, the creditor must prove more than merely the total amount remaining unpaid. Instead, as required to obtain a default judgment by Rule 6:6-3(a), the creditor must set forth the previous balance, and identify all transactions and credits, as well as the periodic rates, the balance on which the finance charge is computed, other charges, if any, the closing date of the billing cycle, and the new balance."

The court further stated:

"Although the Rule does not generally apply in a summary judgment situation, we agree with the trial court that Rule 6:6-3(a) provides a guide to the proofs necessary to grant summary judgment in a credit card collection matter.

Rule 6:6-3(a) provides required forms of proof, consistent with federal regulations for credit card account periodic billing statements."

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Brief in Support of Defendant's Opposition to Motion for Summary Judgment

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

This lawsuit was filed by a debt-buyer claiming to be the owner of an alleged defaulted Credit One Bank N.A. account. Plaintiff, New Century Financial Services, Inc. filed a one-count Complaint alleging: "It is now the owner of the defendant(s) Credit One Bank, N.A. account number 4447962145828657 which is now in default. There is due the plaintiff from the defendant(s) AHLAM OUGHLA the sum of \$723.82 plus interest from 12/02/2011 to 02/14/2012 in the amount of \$0.73 for a total of \$724.55"

By filing the motion for summary judgment, Plaintiff failed to submit admissible "evidentiary support" that is sufficient to carry its burden of persuasion.

2. Plaintiff – Not Defendant- Must submit Evidence to support its claim.

Plaintiff, as the party bearing the burden of persuasion at trial, must present admissible evidence which, when viewed in Plaintiff's favor, could sustain its burden of persuasion as to each element of its cause of action. Brill, 142 N.J. at 533; and R. 4:46-5(a).

3. The Character and Nature of Plaintiff's Proofs.

As Plaintiff bears the burden of proof, absent such proof, Defendant's right to oppose to summary judgment should be recognized. That right can only be defeated by Plaintiff's submission of admissible evidence to establish every element of 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).

The standards 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 Plaintiff's predecessor, 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 (N.J. App. Div. Mar. 4, 2011).

The contract, if there is one, must be in writing. 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). Plaintiff's attempt to proceed without a written contract is equivalent to establishing Defendant's defense and claims under the Truth in Lending Act.

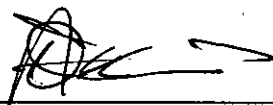
Even in the absence of federal law, Plaintiff cannot prove the basis for any finance or interest charges, late fees and other charges, payment due dates, or even whether Defendant breached an obligation, without a contract. Consequently, someone with the requisite personal knowledge must be able to identify the controlling contract and, in the absence of Defendant's signature, demonstrate what conduct 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 because 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*, there must be proof of the charges and payments substantiating the alleged balance and that proof must come from a competent witness.

Conclusion

For the aforementioned reasons, the defendant requests that the court deny the plaintiff's Motion for Summary Judgment dismissing the complaint with prejudice.

Dated 5/24/2012

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