PHILIP D. STERN & ASSOCIATES, LLC
ATTORNEYS AT LAW
697 Valley Street, Suite 2d
Maplewood, NJ 07040
(973) 379-7500
Attorneys for Defendant, Ahlam Oughla

NEW CENTURY FINANCIAL SERVICES, INC., Plaintiff vs. AHLAM OUGHLA, Defendant.	**Superior Court of New Jersey** **Law Division** **Hudson County - Special Civil Part** Civil Action Docket No. DC-4244-12

Brief of Defendant, Ahlam Oughla in Support of Motion for Summary Judgment

INTRODUCTORY STATEMENT AND PROCEDURAL HISTORY

The Complaint was filed on February 16, 2012. The Answer was filed on March 20, 2012.

The Complaint alleges that Plaintiff is the successor to an account between Defendant and Credit One Bank, N.A. ("Credit One," the alleged Original Creditor) and that the account is in default. Defendant has denied the allegations.

Plaintiff filed a Motion for Summary Judgment on May 14, 2012. Defendant filed an objection on May 24, 2012.

On May 25, 2012, the court granted Plaintiff's motion and entered final judgment against Defendant.

Defendant now moves for reconsideration on Plaintiff's motion for summary judgment.

STATEMENT OF MATTERS OR CONTROLLING DECISIONS OVERLOOKED BY THE COURT OR AS TO WHICH THE COURT HAS ERRED

This Motion is filed pursuant to R. 4:49-2 which provides, in pertinent part:

> [A] motion for … reconsideration seeking to alter or amend a judgment or order shall be served not later than 20 days after service of the judgment or order upon all parties by the party obtaining it. The motion shall state with specificity the basis on which it is made, including a statement of the matters or controlling decisions which counsel believes the court has overlooked or as to which it has erred.

This Motion is submitted 20 days after the Order was filed, which is within the time prescribed by the Rule as the Order could not have been served any earlier than May 25.

"Reconsideration is a matter within the sound discretion of the Court, to be exercised in the interest of justice." *D'Atria v. D'Atria,* 242 N.J. Super. 392, 401, (Ch. Div. 1990). "Reconsideration should be utilized only for those cases which fall into that narrow corridor in which either 1) the Court has expressed its decision based upon a palpably incorrect or irrational basis, or 2) it is obvious that the Court either did not consider, or failed to appreciate the significance of probative, competent evidence." *Id.*

Defense counsel inquired of Chambers as to whether the reasons for the May 25, 2012 Order were in writing or placed on the record and was informed that everything was on the Order. The Order does not set forth any particular reasons so Defendant here addresses the two salient deficiencies in Plaintiff's Summary Judgment Motion:

1. The purported evidence submitted by Plaintiff is inadmissible as coming from an incompetent witness with no knowledge of virtually all of the facts asserted.
2. The motion record lacks evidence – admissible or otherwise – of the sale, transfer or assignment of the alleged account from the Original Creditor to *any* other entity.

LEGAL ARGUMENTS

Plaintiff alleges that it is the assignee of a claim based on an allegedly defaulted contractual relationship between Defendant and the Original Creditor, which appears to include intermediary debt buyers. Thus, Plaintiff must prove both the Original Creditor's contractual claim against Defendant, ***and*** the assignment of that chose-in-action from the Original Creditor through any intermediate assignees to Plaintiff. To succeed on summary judgment, Plaintiff must present sufficient evidential materials which, if presented at trial, would sustain Plaintiff's burden of persuasion. Given the multiple transfers alleged by Plaintiff, it is respectfully submitted that the Court may have overlooked that there was no evidence of any sale of the account by the Original Creditor and that the only witness was Plaintiff's employee who has no personal knowledge of any of the remote assignment transactions or the Original Creditor's records asserted to be the basis for Defendant's liability.

POINT I: Motion Record Fails to Evidence a Complete and Valid Chain of Assignment from Original Creditor to Plaintiff.

A. No Evidence of Assignment from Original Creditor

Although Plaintiff's Complaint and Summary Judgment Motion allege that Credit One is the Original Creditor, there is nothing in the motion record that evidences a sale, transfer, or assignment of the alleged account from Credit One to ***any entity***. Thus, any purported sale, transfer, assignment, purchase, or ownership of the account by any entity is completely unsubstantiated and without evidentiary support.

The earliest document purporting to evidence any sale, transfer, or assignment of the account is the "Assignment of Accounts and Bill of Sale" dated November 17, 2008. See Plaintiff's Summary Judgment Motion ("Plaintiff's SJM"), Exhibit A. The "Seller" in that transaction is MHC Receivables, LLC, an entity whose name appears nowhere else in Plaintiff's moving papers. However, there is no evidence to indicate that the account was ever sold, transferred, or assigned to MHC Receivables, LLC by the Original Creditor or any other entity, nor is there any representation made that MHC Receivables, LLC owns the alleged account.

As the first link in the chain of assignment is broken, the entire chain fails.

B. The Evidence Purported Demonstrating the Chain of Assignment is Inadmissible and Invalid

"[W]here 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) *aff'd (for reasons below)* 69 N.J.L. 452 (E.& A. 1903) (emphasis added). More than a century later, *Sullivan* remains the law. See, e.g., *Triffin v. Johnston*, 359 N.J. Super. 543, 550 (App. Div. 2003) ("It was plaintiff's burden to have demonstrated before the close of his proofs that the assignments were valid and enforceable.") Thus, Plaintiff assertion, even if under oath, that it owns the account is insufficient as a matter of law without also proving the assignment.

Proving a valid assignment concerns not only Plaintiff's entitlement to relief but establishes that Plaintiff has standing. If Plaintiff cannot establish the chain of assignment from the original creditor to Plaintiff, then Plaintiff has no stake in the litigation to create standing. "There is no distinction between a party in interest and standing in New Jersey." *Triffin v. Somerset Valley Bank*, 343 N.J. Super. 73, 80 (App. Div. 2001) "[T]he New Jersey Supreme Court has held that standing is an element of justiciability that cannot be waived or conferred by consent." *Id.* (internal quotes and citations omitted). Consequently, the Court cannot adjudicate Plaintiff's claims, let alone grant summary judgment, if Plaintiff lacks standing.

Over the century since *Sullivan*, the law on assignment of a chose-in-action has remained essentially the same. One of the essential elements is that the assigned right be properly described. "The subject matter of the assignment must be described sufficiently to make it capable of being readily identified." *K. Woodmere Associates, L.P. v. Menk Corp.*, 316 N.J. Super. 306, 314 (App. Div. 1998) (citing 3 *Williston, Contracts* (3 ed. Jaeger 1957) Section 404 at 4 and *Transcon Lines v. Lipo Chem., Inc.*, 193 N.J. Super. 456, 467 (Dist. Ct. 1983)).

The motion record – as it pertains to assignment – consists of four documents:

1. November 17, 2008 "Assignment of Accounts and Bill of Sale" from MHC Receivables, LLC ("Seller") to Sherman Originator, LLC ("Buyer") to LVNV Funding, LLC ("Subsequent Buyer").

a. The document indicates that the Seller is assigning "unsecured consumer credit card accounts which are described on computer files furnished by Seller to Buyer." Nowhere is Defendant's account identified.

b. The document is also inextricably intertwined with and "subject to the terms of" three other documents: (1) "Agreement for the Sale and Purchase of Chargeoff Receivables," (2) "First Amendment," and (3) "Second Amendment." The document cannot be understood without these other documents and Defendant objects to its admissibility under *Evid. R.* 106.

2. Undated "Declaration of Account Transfer" from Sherman Originator, LLC ("SOLLC") to LVNV Funding, LLC ("LVNV").

a. The document indicates that SOLLC is assigning "receivables in other assets…identified on Exhibit A, in the Receivable File dated ***November 11, 2008***" to LVNV (emphasis added). The "Exhibit A, Receivables File" which follows is dated ***November 17, 2008*** and identifies no specific accounts.

3. November 30, 2011 "Transfer and Assignment" from LVNV to Sherman Acquisitons, LLC ("SALLC").

a. The documents purports that LVNV is assigning "receivables and other assets…identified on Exhibit A, in the Receivable File dated November 30, 2011." The "Exhibit A, Receivables File"

dated November 30, 2011 identifies no specific account – and certainly not Defendant's account.

4. The November 30, 2011 "Exhibit 1, Bill of Sale and Assignment" from SALLC ("Assignor") to Plaintiff ("Assignee").

    a. The document purports that SALLC is assigning "charged-off receivables…described in the attached Appendix A" to Plaintiff. No Appendix A is provided. Again, nothing identifying Defendant's account.

    b. The document is also inextricably intertwined with the "Purchase and Sale Agreement" described in the document. Indeed the "[a]ssignment is made without recourse or warranty except as otherwise provided in the Agreement" and this document cannot be understood without the "Purchase and Sale Agreement." Defendant objects to the admissibility of this document under *Evid. R.* 106.

None of the purported assignments sufficiently describe the account "to make it capable of being readily identified." *K. Woodmere, supra.* Thus, Plaintiff has failed to demonstrate any chain of assignment proving that Plaintiff owns the account.

POINT II: The Character and Nature of Plaintiff's Evidence.

As Plaintiff bears the burden of proof, absent such proof, Plaintiff's motion for summary judgment should be denied. That motion can only be

granted 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); *cf., LVNV Funding, L.L.C. v. Colvell*, 421 N.J.Super. 1 (App. Div. 2011) (debt buyer's summary judgment motion rejected because it failed to submit sufficient admissible evidence to establish its claim based on a purchased credit card account).

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.

Presumably, proof of information about the alleged account derives from electronically stored records. In *Hahnemann University Hosp. v. Dudnick*, 292 N.J.Super. 11, 18 (App. Div. 1996), the Appellate Division held:

> A witness is competent to lay the foundation for systematically prepared computer records if the witness
> (1) can demonstrate that the computer record is what the proponent claims and
> (2) is sufficiently familiar with the record system used and
> (3) can establish that it was the regular practice of that business to make the record.

The only certification in the motion record is from Plaintiff's Business Development Manager, Marko Galic. Mr. Galic does not represent – and, presumably, could not represent – that he has personal knowledge sufficient to lay the foundation to admit into evidence any of the documents in Exhibits A and B of Plaintiff's motion – the alleged assignment documents and account records. Certainly, Mr. Galic could only speak to transactions to which Plaintiff was a party thereby rendering him incompetent to testify to prior assignment transactions and facts concerning the Capital One account.

Even the "Electronically Transmitted Information From Seller," which is annexed to Mr. Galic's certification, is inadmissible as Mr. Galic fails to make a representation that proves the document does actually contain electronically transmitted information from "seller" (whoever that may be) and Mr. Galic fails to represent that it was the regular practice of Plaintiff to make or maintain such a record.

CONCLUSION

For the foregoing reasons, Defendant, Ahlam Oughla, respectfully requests that the Court grant the Motion for Reconsideration, vacate judgment entered against Defendant, and deny Plaintiff's Motion for Summary Judgment.

Philip D. Stern & Associates, LLC
Attorneys for Defendant, Ahlam Oughla
s/Philip D. Stern

Dated: June 14, 2012 Philip D. Stern