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MSW CAPITAL, LLC, Plaintiff, vs. AZEEM H. ZAIDI, Defendant	**Superior Court of New Jersey** **Law Division - Special Civil Part** **Monmouth County** Civil Action Docket No. MON-DC-004774-12

BRIEF OF DEFENDANT, AZEEM H. ZAIDI, IN OPPOSITION TO PLAINITFF'S MOTION FOR SUMMARY JUDGMENT

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INTRODUCTORY STATEMENT AND PROCEDURAL HISTORY

The Complaint was filed on March 13, 2012. The Answer was filed on April 16, 2012. The Complaint alleges that Plaintiff is the successor to an account between Defendant and "CHASE-WAMU" (the alleged Original Creditor) and that the account is in default. Defendant denies the allegations.

In the Complaint, Plaintiff alleged, "It is now the owner of the defendant(s) CHASE-WAMU account number 4185863460635816 which is now in default" and alleged an amount due and owing from Defendant to Plaintiff. See Complaint ¶1.

Defendant asserted in his Answer that he is "without knowledge or information sufficient to form a belief as to the truth of the allegation[s] contained [in the Complaint], and on that basis ***generally and specifically denies the allegation[s]…and leaves the Plaintiff to provide proof.***" See Answer ¶1 (emphasis added). In short, Defendant is putting Plaintiff to its proofs.

With this opposition, Defendant submits his own Certification in which he denies any knowledge as to Plaintiff or its involvement with the alleged account. Defendant also certifies his denial of Plaintiff's ownership and the amount, if any, owed from Defendant to Plaintiff.

That, coupled with the fact that Plaintiff has failed to submit competent and admissible evidentiary support demonstrating ownership of the account and an amount owed from Defendant to Plaintiff, necessitates that Plaintiff's motion be denied as a matter of law.

RESPONDING STATEMENT AS PLAINTIFF'S STATEMENT OF MATERIAL FACTS

Under *R.* 6:6-1, the statement of material facts and the responding statement described in *R.* 4:46-2 are not required in the Special Civil Part.

Defendant's certification in support of this motion makes clear his denial of Plaintiff's ownership and the amount, if any, owed on the account from Defendant to Plaintiff.

LEGAL ARGUMENTS

POINT I: Summary Judgment Must Be Denied if All Elements of Plaintiff's Case are not Proven.

"A trial court's grant of a motion for summary judgment is appropriate when there is no issue of material fact.…Generally, we must consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party." *LVNV Funding, L.L.C. v. Colvell,* 421 *N.J. Super.* 1, 6 (App. Div. 2011) (citing *Brill v. Guardian Life Ins. Co. of Am.,* 142 *N.J.* 520, 540 (1995) and *R.* 4:46-2(c)).

While the motion court does not assess the 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. *Brill, supra,* 142 *N.J.* at 533-4 and 536.

Where a purchaser of defaulted consumer debts failed to submit evidence sufficient to sustain its burden of proof, the Appellate Division reversed the trial court's improvidently granted summary judgment because the plaintiff had

failed to submit admissible evidence to sustain its burden. *Colvell, supra,* 421 *N.J. Super.* 1 (App. Div. 2011). Here, like *Colvell,* the plaintiff is a debt buyer of someone else's account.

POINT II: The Elements of Plaintiff's Cause of Action.

Plaintiff alleges that it is the assignee of a claim based on an allegedly defaulted contractual relationship between Defendant and the Original Creditor, which may or may not include one or more intermediary debt buyers. Thus, Plaintiff must prove (1) its standing by establishing the assignment of that chose-in-action from the Original Creditor through any intermediate assignees to Plaintiff, and (2) the Original Creditor's contractual claim against Defendant.

A. Proof of Assignment.

Plaintiff provides no evidence that the account was ever sold, assigned, or transferred to Plaintiff. As such, Plaintiff has not even provided sufficient proof that it has standing, let alone grounds for summary judgment.

"[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.")

Proving the validity of the assignments not only addresses elements of Plaintiff's claim but establishes that Plaintiff has standing. If Plaintiff cannot establish each link in the chain of assignment from the Original Creditor to Plaintiff, then Plaintiff lacks a sufficient 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 should not adjudicate any issue until Plaintiff's standing has been resolved.

Stated conversely, if there is insufficient proof of assignment, then there is no dispute properly before the Court. Therefore, the Court should not address what, if any, liability Defendant may have with respect to the account if Plaintiff cannot prove ownership of the account. As standing is a threshold issue, it should be addressed prior to considering any other matter.

Plaintiff claims to be the assignee of the account. See Certification in Support of Summary Judgment ("Whipple Cert.") ¶1. Thus, even though Plaintiff ***avers*** it owns the account, to satisfy the requirements set forth in *Sullivan* it must also ***prove***, through all links in the chain of assignment, that it owns the account. Thus, Mr. Whipple's mere claim of ownership is insufficient as a matter of law.

Not only is proving ownership essential element to proving Plaintiff's case, but Plaintiff clearly knew its ownership was disputed based on Defendant's

response to Plaintiff's requests for admission. See Exhibit C of Plaintiff's Motion, Request for Admission #11.

In *Triffin v. Johnston, supra,* the Appellate Division affirmed a trial court's conclusion "that plaintiff had failed to satisfy his burden of proof with respect to the validity of the assignment, and entered judgment in favor of defendants." *Id.* at 547. If failing to satisfy the ***burden of proof*** as to assignment is grounds to dismiss a plaintiff's complaint at trial, such failure is sufficient to defeat Plaintiff's summary judgment motion.

Moreover, as Plaintiff has not presented any argument or evidence as to assignment in its motion, Plaintiff cannot do so in its reply brief. *Borough of Berlin v. Remington & Vernick Engineers,* 337 *N.J. Super.* 590, 596 (App. Div.), *certif. denied,* 168 *N.J.* 294 (2001) ("Raising an issue for the first time in a reply brief is improper"). Indeed, doing so would leave Defendant without the opportunity to be heard.

B. Elements Necessary to Prove a Breach of Contract.

To prove a contract claim, Plaintiff must provide proof of an offer, acceptance, consideration, breach and causally related damages. *Weichert Realtors v. Ryan,* 128 *N.J.* 427, 435 (1992).

Here, the contract 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).

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 or is in default, 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 evidences mutual assent to the purported terms.

Plaintiff must also prove acceptance which could be shown by Defendant's signature on the contract or by proof that Defendant had notice of the terms of the account and then proceeded to use the account.

Turning to breach and damages, Plaintiff must establish that each charge was authorized because the Truth in Lending Act imposes that burden on Plaintiff. 15 U.S.C. § 1643(b). Furthermore, under *Colvell, supra,* all the transactions and credits must be shown without resort to unsubstantiated previous balances.

There is no possible way to read *Colvell* except as requiring Plaintiff's proof of damages to include *all* account transactions and credits without reliance on an unsubstantiated total amount due or a charge off balance. The opinion is repeatedly interwoven with this theme.

> 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. [*Colvell, supra* at 3.]
>
> 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. [*Id.*]
>
> The information on this form was not complete as it did not list any transactions made by defendant or the billing cycle information. [*Id.* at 4.]
>
> Defendant argues that LVNV's computer generated report did not sufficiently meet the requirement set forth in *Rule* 6:6-3 governing default judgments because it does not contain any identification of transactions or credits in support of the balance listed. * * * The computer-generated statement does not comply with *Rule* 6:6-3(a) because it does not specify any transactions comprising the debt owed by defendant. [*Id.* at 6 and 7.]
>
> To collect on a revolving credit card debt, LVNV is required to provide the transactions for which payment has been made, any payments that have been made, the annual percentage and finance charge percentage rates and the billing cycle information. [*Id.* at 7-8.]

Consequently, Plaintiff's failure to lay the foundation for the admission of hearsay records which reflect all transactions and credits on the account is fatal to its ability to prove the damages element of its cause of action. Here, the earliest account statement provided has a payment due date of September 6, 2009 and a previous balance of $10,888.28. As this amount is completely unsubstantiated, Plaintiff has no basis for at least 85% of the $12,487.36 alleged in the complaint. Furthermore, as explained below, the account statements are entirely inadmissible.

POINT III: Plaintiff Must Present Competent and Admissible Evidence of Each Element.

"The determination whether there exists a genuine issue with respect to a material fact challenged requires the motion judge to consider whether the ***competent*** evidential materials presented, when viewed in the light most favorable to the non-moving party in consideration of the applicable evidentiary standard, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party." *Brill, supra,* 142 *N.J.* at 523 (1995) (emphasis added).

Those evidential materials must not only be "competent," but also admissible. "We have commented on numerous occasions that summary judgment motions must be supported by relevant and admissible evidence." *El-Sioufi v. St. Peter's Univ. Hosp.*, 382 *N.J. Super.* 145, 164 (App. Div. 2005) (citing *Sellers v. Schonfeld,* 270 *N.J. Super.* 424 (App. Div. 1993), where the Appellate Division reversed summary judgment because "the trial court improperly relied upon incompetent, inadmissible evidence." *Id.* at 429.)

In short, if a jury, viewing only the competent and admissible evidential materials – in the light most favorable to Defendant – could reasonably return a verdict for Defendant, summary judgment must be denied.

POINT IV: Plaintiff's Evidence Is Largely Incompetent and Inadmissible.

Determining the Competency and Admissibility of Plaintiff's Evidence

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.

Indeed, the courts have held, "If a party relies upon an affidavit to establish a fact required to demonstrate entitlement to summary judgment, the affidavit must be 'made on personal knowledge, setting forth only facts which are admissible in evidence to which the affiant is competent to testify.'" *Claypotch v. Heller, Inc.*, 360 *N.J. Super.* 472, 488 (App. Div. 2003) (citing *R.* 1:6–6; *Jeter v. Stevenson,* 284 *N.J. Super.* 229, 233 (App. Div. 1995); and *Sellers, supra,* 270 *N.J. Super. at* 427 (App. Div. 1993).

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.

It is difficult to imagine in a case such as this one – which involves an allegedly defaulted credit card account assigned by the original creditor – that there would be anyone with personal knowledge of the elements of Plaintiff's cause of action. Instead, if the facts can be proven at all, they would need to be through hearsay business records. Thus, it is essential for Plaintiff to submit the affidavits of witnesses who are competent to admit those records and that the proper foundation be laid.

The Specific Evidence Submitted by Plaintiff

Plaintiff's "evidence" consists of:

1. the Whipple Cert.,
2. a "Computer Generated Report of Financial Information,"
3. 18 purported monthly billing statements ("Exhibit A"),
4. Defendant's Answer ("Exhibit B"), and
5. Defendant's responses to discovery ("Exhibit C").

Mr. Whipple's affidavit is the only sworn statement through which Plaintiff can attempt to admit the records submitted with the motion.

While Mr. Whipple asserts that "all documents annexed hereto are true and accurate copies," he fails to specify which documents that refers to. Thus, we have no way of knowing which documents Plaintiff is seeking to admit through Mr. Whipple.

Fortunately, this turns out to be a moot point as Mr. Whipple cannot possibly lay the grounds for admission of any documents.

Mr. Whipple identifies himself as a Managing Director of Plaintiff, a role which purportedly instills him with personal knowledge – though we are left to guess as to the relevance and extent of that knowledge. He also asserts familiarity with Plaintiff's books and business, which are maintained electronically.

Mr. Whipple then claims that: (1) Plaintiff is the owner by Purchase of the account, (2) the account is in default, and (3) Defendant owes Plaintiff $12,487.36 plus interest on the account.

As previously explained, Mr. Whipple's assertion of purchase is woefully insufficient to establish Plaintiff's ownership of the account.

Mr. Whipple asserts no personal knowledge as to ***how*** Plaintiff's business records are created or maintained. He asserts neither that any records were made in the ordinary course of business nor that it was the regular practice of Plaintiff's business to make any records. Thus, Mr. Whipple cannot lay the grounds to admit any of Plaintiff's purported business records, including the "Computer Generated Report of Financial Information."

As Mr. Whipple asserts no personal knowledge as to the creation or maintenance of the business records of CHASE or WAMU, or the hybrid "CHASE-WAMU" which Plaintiff seems to have created, he is not competent to testify as to the status of the account or the amount owed, if any, on the account.

The conditions under which a credit card account would be considered "in default" would be specified in some sort of card agreement. Here, where Plaintiff neither submits a purported agreement nor asserts personal knowledge

as to the terms and conditions governing the account, Plaintiff has no competent or admissible evidentiary support for its assertion that the account is in default.

Furthermore, as Mr. Whipple asserts no knowledge as to the creation or maintenance of Chase's business records and the source of the monthly statements is not given, Exhibit A is entirely inadmissible.

Any allegations contained in the "Statement of Material Facts" or Plaintiff's brief are also inadmissible. "Attorney affidavits or certifications that are not based on personal knowledge constitute objectionable hearsay." *Higgins v. Thurber*, 413 *N.J. Super.* 1, 21 n.19 (App. Div. 2010), aff'd, 205 *N.J.* 227 (2011) citing *Gonzalez v. Ideal Tile Importing Co., Inc.*, 371 *N.J. Super.* 349, 358, *aff'd*, 184 *N.J.* 415 (2005) ("Even an attorney's sworn statement will have no bearing on a summary judgment motion when the attorney has no personal knowledge of the facts asserted"); see, also, *Wells Fargo Bank, N.A. v. Ford*, 418 *N.J.Super.* 592, 599 (App. Div. 2011).

POINT V: Defendant Need Not Submit Evidence To Defeat This Motion.

In *Celotex Corp. v. Catrett*, 477 *U.S.* 317 (1986), which the *Brill* court used in adopting the summary judgment standard for New Jersey, the Supreme Court upheld summary judgment for a defendant who submitted no evidential materials on the grounds that the defendant did not bear the burden of proof. Thus, in the present matter, Defendant can clearly defeat a summary judgment motion by Plaintiff without submitting evidential materials and Defendant's certification is more than sufficient.

CONCLUSION

For the foregoing reasons, Defendant, Azeem H. Zaidi, respectfully requests that the Court deny Plaintiff's Motion for Summary Judgment.

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Dated: June 25, 2012