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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 SUPPORT OF 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.

This Motion challenges the sufficiency of Plaintiff's evidence to prove all elements of its claim.

STATEMENT AS TO FACTUAL ELEMENTS OF PLAINTIFF'S CLAIM

Under *R.* 6:6-1, the statement of material fact described in *R.* 4:46-2 is not required in the Special Civil Part.

This Motion pierces the pleadings and tests the sufficiency of Plaintiff's evidence. Plaintiff, who bears the burden of proof, is compelled to submit a record of admissible evidence to deny summary judgment. *Brill v. Guardian Life Insurance Co.*, 142 N.J. 520 (1995). Failing that, this Motion should be granted.

Where, as here, the defendant is challenging the sufficiency of plaintiff's evidence, the absence of an evidentiary record supports this motion; much the same as a trial motion to dismiss at the end of plaintiff's case. Indeed, *Brill* expressly states that the standards for summary judgment and for a motion to dismiss at the end of plaintiff's case are the same – the only difference is that summary judgment involves an evaluation of written submissions while a

motion at the end of plaintiff's case involves an evaluation of testimony and exhibits.

As explained in the Legal Arguments, below, Plaintiff's *prima facie* case must consist of admissible evidence addressing:

1. *Assignment:* For ***each*** assignment, Plaintiff must prove:
    a. The assignment clearly demonstrates the intent to transfer the assignor's rights in the account to the assignee;
    b. The account being transferred is described sufficiently to make it capable of being readily identified;
    c. The assignment is clear and unequivocal; and
    d. Defendant was given notice of the assignment.
2. *Breach of Contract.* Breach of contract consisting of evidence proving:
    a. the formation of a contract between the Original Creditor and Defendant;
    b. the terms of that contract;
    c. Defendant's material breach of a contractual term; and
    d. damages.

LEGAL ARGUMENTS

POINT I: The Summary Judgment Standard: If Plaintiff Fails to Produce Admissible Evidence as to Each Element, the Complaint Should Be Dismissed.

"Summary judgment procedure pierces the allegations of the pleadings to show that the facts are otherwise than as alleged." *Judson v. Peoples Bank & Trust Co. of Westfield*, 17 N.J. 67, 75 (1954). It thereby 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) (approved and adopted in *Brill, supra*).

This Motion puts Plaintiff to its proofs. Pursuant to *R.* 1:4-8(a)(3), by signing the Complaint, Plaintiff's attorney certified 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 compels Plaintiff to present that evidentiary support for judicial scrutiny.

Adopting the United States Supreme Court's summary judgment standard announced in *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), our 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, supra,* 142 N.J. 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. *Brill,* 142 N.J. at 533-4 and 536.

This case presents precisely the same type of summary judgment motion considered in *Celotex*. There, like here, 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***. Instead, the Court concluded that 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. In such a situation, there can be no genuine issue as to any material fact, since a complete ***failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial.*** 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. [*Celotex,* 477 U.S. at 322-3. (Emphasis added. Internal quotes omitted.).]

As such, Plaintiff must submit sufficient competent and admissible evidence to prove ***all*** essential elements of Plaintiff's case.

Here, Defendant – like the moving party in *Celotex* – has no obligation to submit evidence negating the factual elements of Plaintiff's cause of action. Nevertheless, Defendant submits a certification denying any personal knowledge about the alleged assignment of the account. See attached Certification of Azeem H. Zaidi ("Zaidi Cert"). While the Zaidi Cert was made in opposition to Plaintiff's summary judgment motion, it also serves to support this Motion.

Regardless of Defendant's certification, Plaintiff's failure to demonstrate evidence to get to a trier of fact mandates summary judgment.

Consequently, if Plaintiff is to defeat this Motion, it must submit its "evidentiary support" and demonstrate how it would be both admissible and sufficient to carry its burden of persuasion. In the absence of such materials, summary judgment should be granted dismissing the Complaint with prejudice. *Brill*, 142 N.J. at 533; and *R.* 4:46-5(a).

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) 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. Elements Necessary to Prove an Assignment.

"[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.")

Proof of Assignment is a Threshold Issue Determining Standing and Justiciability

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. As standing is a threshold issue, it should be addressed prior to considering any other matter.

Assignment of Contract Rights: An Abrogation of the Common Law

In *Sullivan*, like here, the chose-in-action arose from a claim that there was a contract in which the obligor agreed to pay money. Different partners sold their partnership's contractual right to different purchasers. When the later assignee sued the obligor, a defense was raised that the obligation was satisfied with the earlier assignee.

The *Sullivan* court explained that, at common law, assignments of personal contract rights were not recognized because there was no privity between the obligor and the assignee. Unlike covenants which run with the land where the obligee's right is assigned to each successive owner of the superior estate and the obligor's duty is delegated to the subsequent owners of the servient estate, contracts between people did not run to those not in privity. The assignment "was held to destroy the privity" except for "bills of exchange, promissory notes, and other instruments negotiable by the law merchant, or assignable by statute." *Id.* at 548.

Courts of equity, however, recognized a chose-in-action as property of the obligee and could require "the assignor to lend use of his name to the assignee for a suit at law." *Id.*

Thus, from an early time, the common law was abrogated by statute to recognize the right to sue at law in one's own name on an assigned chose an action. *Id.* at 600.

Sullivan upheld the defense. Critical to its reasoning was the fact that the assigned right was sufficiently described in the earlier assignment so that the parties could clearly understand that the right was assigned. The court held:

> Given a chose-in-action, legal in its nature, and coming within the purview of the act, and an instrument in writing which sufficiently describes that chose-in-action, and authoritatively makes known to all persons concerned that the subject-matter has been or is thereby transferred and made over by the owner to a designated assignee, accompanied by delivery of that instrument to the assignee, and notice to the debtor, the assignment is as complete at law as in equity. [*Id.* at 551.]

The Elements Necessary to Prove a Valid Assignment

The current enabling statute permitting the enforcement of assigned contract rights is *N.J.S.A.* 2A:15-1, which states that "all choses in action arising on contract are assignable." *Somerset Orthopedic Associates, P.A. v. Horizon Blue Cross and Blue Shield of New Jersey*, 345 N.J.Super. 410, 415 (App. Div. 2001).

Over the century since *Sullivan*, the law on assignment of a chose-in-action has remained essentially the same with four distinct elements being identified in the caselaw. Proof of these elements would leave little doubt that the obligee can satisfy the obligation to a person who was a complete stranger to the original transaction.

First is intent to assign. "A valid assignment must contain clear evidence of the intent to transfer the person's rights." *Berkowitz v. Haigood*, 256 N.J. Super. 342, 346 (Ch. Div. 1992); see, also, *Tirgan v. Mega Life & Health Ins.*, 304 N.J. Super. 385, 390 (Ch. Div. 1997); and *Costanzo v. Costanzo*, 248 N.J. Super. 116, 124 (Ch. Div. 1991).

Second 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)).

Third, the assignment must be stated clearly and unequivocally. "The assignment must be clear and unequivocal in order to be effective as to the obligor." *Berkowitz, supra,* 256 N.J. Super. at 346; see, also, *Tirgan, supra,* 304 N.J. Super. at 390.

Fourth, there must be notice to the obligor. "Obviously the obligor must be properly notified of the existence of the assignment." *Berkowitz, supra,* 256 N.J. Super. at 346; see, also, *Tirgan, supra,* 304 N.J. Super. at 390, *Jenkinson v. New York Fin. Co.*, 79 N.J. Eq. 247 (Ch. 1911), and, *Sullivan, supra,* 68 N.J.L. at 551. Notice is not required where the issue only concerns a dispute among the obligee and the obligee's alleged assignees. See, *Hirsch v. Phily*, 4 N.J. 408 (1950) (the obligor's duty to assignee does not arise until the obligor has been noticed but, as for the rights among assignor, assignee and subsequent assignees, notice to the obligor is not required), *In re Rosen,* 157 F.2d 997 (3d Cir. 1946) (same), and, *Moorestown Trust Co. v. Buzby,* 109 N.J. Eq. 409, 410 (Ch. 1932) (same). Where, as here, the issue concerns the *obligor*'s liability to an alleged assignee, ***notice is required.***

Caselaw is Consistent with the Uniform Commercial Code

The Uniform Commercial Code provides additional guidance on the elements of identifying the assigned right and notice to the obligee.

Article 9 of the Uniform Commercial Code applies to "a sale of accounts." N.J.S.A. 12A:9-109(a)(3). An "account" includes "a right to payment of a monetary obligation...arising out of the use of a credit or charge card or information contained on or for use with the card," and, consequently, applies

here. N.J.S.A. 12A:9-102(a)(2). Thus, the alleged obligation is an "account" which Plaintiff alleges to have been sold. A sale of accounts should not be confused with accounts which are assigned for collection purposes – which, at N.J.S.A. 12A:9-109(d)(5), are excluded from the Act's coverage – because there is no allegation that the account was assigned for that limited purpose as, for example, when accounts are place with a collection agency or law firm to pursue collection on behalf of the account's owner.

N.J.S.A. 12A:9-406(a) makes clear that an account debtor has no obligation to pay the assignee until receipt of notice of the assignment. That notice may be disregarded when, after a request, the assignee fails to "seasonably furnish reasonable proof that the assignment has been made." N.J.S.A. 12A;9-406(c). The Official Uniform Commercial Code Comments and 3 and 4 to 9-406 observe that *both* the notice of the assignment *and* the requested proof of assignment are ineffective unless they "reasonably identify the rights assigned." If ineffective, the obligor may satisfy the obligation by payment to the original creditor as if there had been no assignment. Thus, the UCC follows the common law requirements of notice and that the rights being assigned must be "readily identified." *K. Woodmere Associates, L.P., supra,* 316 N.J. Super. at 314.

Plaintiff's Proof of Assignment

Defense counsel's experience is that a debt buyer will frequently attempt to prove each assignment by submitting a copy of a "Bill of Sale" – although Plaintiff's prior summary judgment motion failed to submit any documentation regarding the assignment. In anticipation that Plaintiff might produce a Bill of

Sale, it is necessary to highlight some of the evidentiary problems with such a document:

1. The account is not "readily identified." The Bill of Sale does not identify the particular accounts being sold but, instead, refers to another source. If that other source is not produced or fails to "readily identify" Defendant's account, there is insufficient proof of a valid assignment.

2. The Bill of Sale may expressly state that it is without recourse and expressly disclaims all warranties and representations. It may even expressly disclaim any warranty of collectability or warranty of title. The disclaimers can undermine admissibility as it may render the document untrustworthy as a business record under *Evid.R.* 803(c)(6), or it can create sufficient ambiguity as to what was sold as to not be sufficient clear and unambiguous.

3. The Bill of Sale will likely be so intertwined with the written contract between assignor and assignee that terms of the Bill of Sale cannot be properly understood without that contract. Indeed, the Bill of Sale is frequently one exhibit to that contract. If that is the case here, Defendant objects to the admission of the Bill of Sale under *Evid.R.* 106 if the underlying contract is withheld. Furthermore, the absence of that contract renders the terms contained in the Bill of Sale as vague and ambiguous.

Thusfar, Plaintiff has not produced any assignment documents nor has Defendant received notice of any assignments of the account. See Zaidi Cert at ¶¶5-8.

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, all the transactions and credits must be shown without resort to unsubstantiated previous balances. *LVNV Funding, L.L.C. v. Colvell,* 421 *N.J. Super. 1* (App. Div. 2011)

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.

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

As Plaintiff bears the burden of proof, absent such proof, Defendant's right 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.

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.

Thus, for example, Plaintiff cannot admit periodic billing statements without a witness who provides the facts establishing his or her personal knowledge of facts establishing *competency*. Only after establishing the witness's competency, the witness can then proceed to lay the foundation for admission of the billing statements under an exception to the hearsay rule.

Consequently, "[a]ttorney 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).

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.

Indeed, Plaintiff must submit admissible evidence to have any hope of defeating this motion. "Inadmissible evidence may not be used to affect the outcome of a summary judgment motion." *Randall v. State,* 277 *N.J. Super.* 192, 198 (App. Div. 1994)

CONCLUSION

For the foregoing reasons, Defendant, Azeem H. Zaidi, respectfully requests that the Court grant the Motion for Summary Judgment dismissing the Complaint with prejudice.

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s/Philip D. Stern
PHILIP D. STERN

Dated: June 29, 2012