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July 2, 2012

FILE VIA JEFIS

Honorable Martha T. Royster, J.S.C.
Hudson County Superior Court
Administration Building, Chambers 806
595 Newark Avenue
Jersey City, NJ 07306

Re: NEW CENTURY FINANCIAL SERVICES, INC. v. AHLAM OUGHLA
Docket No. HUD-DC-004244-12; P&P File Number O48924

Dear Judge Royster:

By Order dated May 25, 2012, Your Honor granted Plaintiff New Century Financial Services, Inc.'s ("NCFSI") motion for summary judgment. Please accept this brief on behalf of NCFSI in opposition to Defendant Ahlam Oughla's motion for reconsideration of that Order.

It is well established that a motion for reconsideration "should be granted only under very narrow circumstances." Fusco v. Board of Educ. of City of Newark, 349 N.J. Super. 455, 462 (App. Div.), *certif. den.*, 174 N.J. 544 (2002). There are three such narrow circumstances: (1) the Court has expressed its decision based upon a palpably incorrect or irrational basis; (2) it is obvious that the Court either did not consider, or failed to appreciate the significance of probative, competent evidence; D'Atria v. D'Atria, 242 N.J. Super. 392, 401 (Ch. Div. 1990); and (3) the movant seeks to have the Court consider new or additional information that could not have been provided in the first application. Cummings v. Bahr, 295 N.J. Super. 374, 384 (App. Div. 1996).

Defendant does not claim to be presenting new information or arguments that she could not have previously presented. Rather, she seems to contend both that the decision is palpably incorrect or

irrational and that the Court overlooked probative, competent evidence, *i.e.* the Court simply got it wrong. That argument cannot withstand the slightest scrutiny.

As was established in NCFSI's motion for summary judgment, it is the present owner of Defendant's defaulted credit card account with Credit One Bank ("Credit One"), account number 4447 9621 4582 8657 (the "Account"). In her opposition to NCFSI's motion, Defendant argued, albeit incorrectly, that NCFSI had not established its ownership of the Account. Her brief in support of the motion for reconsideration sets forth the same specious argument, this time in greater detail.

Significantly, Defendant does not offer a shred of evidence to dispute the fact that NCFSI is the owner of the Account. Rather, she attempts to create the impression that there were numerous transfers of the Account from and to unrelated entities prior to NCFSI's acquisition of the Account. That attempt must fail.

NCFSI acquired the Account from Sherman Acquisition, LLC ("Sherman") on November 30, 2011. The complete chain of title is attached as Exhibit "A" to ¶5 of the Statement of Material Facts annexed to the May 11, 2011 certification of NCFSI's Business Development Manager, Marko Galic, (hereinafter the "May 11, 2011 Galic Cert."). The chain includes the November 30, 2011 Bill of Sale from Sherman. A copy of the Bill of Sale is attached also as Exhibit "A" to ¶3 of Mr. Galic's June 25, 2012 Certification (hereinafter the "June 25, 2012 Galic Cert."). The so-called multiple assignments were simply internal transfers among those Sherman entities. June 25, 2012 Galic Cert., ¶¶4-6, Exhibit "B".

Defendant's expanded brief questions why Credit One is not mentioned in the chain of title. The relationship between NCFSI's assignor, MHC Receivables, LLC and Credit One is set forth in the accompanying Affidavit of Jon Mazzoli.

Of greater importance, Defendant's "chain of title" argument is palpably incorrect at best and irrational at worst. It ignores the fact that Mr. Galic's testimony is without more sufficient proof of NCFSI's ownership of the Account.

It has long been the law of this state that proof of ownership sufficient to prevail on a claim may be presented solely by testimony alone. Indeed, the testimony of an individual as to a claim of right to property is competent proof of such fact. *See* Waln v. Hance's Adm'rs, 53 N.J. Eq. 668 (Sup. Ct. 1895). There the court held:

> But in her testimony she says it belonged to her husband, and that she never claimed to have owned it. This testimony from her own lips must forever settle this branch of the case against her... I found above, according to the testimony of Mrs. Waln herself, that this personal property was the property of William Waln, her husband.

Similarly, in Lubinsky v. Court of Common Pleas of Passaic County, 15 N.J. Misc. 183 (Sup. Ct. 1937), the court held that the unrebutted testimony of a person claiming ownership was sufficient as a matter of law to support the entry of judgment in the claimant's favor. Lubinsky involved a levy on personal property. The plaintiff claimed that he, rather than the judgment debtor owned that property. In affirming a verdict in favor of the plaintiff/claimant, the court stated:

> The testimony as to ownership was all in his favor and the circumstances which the prosecutor claims to be suspicious and to the contrary, were not sufficient to justify submission of the case to the jury. The judgment is affirmed, with costs.

Id. at 184. *See also* Moran v. Joyce, 125 N.J.L. 558 (Sup. Ct. 1941), *aff'd*, 27 N.J.L. 562 (E&A 1942) (uncontroverted testimony without counter evidence was sufficient as a matter of law to support a ruling that the claimant owned the property at issue).

Defendant's reliance on Sullivan v. Visconti, 68 N.J.L. 543 (Sup Ct. 1902), *aff'd* 69 N.J.L. 452 (E&A 1903) is misplaced. There, the court held that no particular form of proof is necessary to prove the assignment of an intangible. The court stated:

> The policy of this state, from an early period, has been liberal with respect to assignments of choses in action.
>
> . . .

> It is indeed, settled that 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. [citation omitted].
>
> But there is nothing in this rule that prescribes or makes necessary any particular form of assignment.
>
> . . .
>
> But it was long ago held by this court that an assignment of a chose in action, in order to be valid at law, does not even require to be in writing. [citation omitted].

Id. at 550.

Here, NCFSI's representative Marko Galic avers that NCFSI owns the Account. That testimony without more is evidence that NCFSI does indeed own the Account. It was, therefore, incumbent on Defendant to dispute that claim. Meeting that burden required Defendant to direct the Court's attention to competent evidence in the record that would rebut NCFSI's proofs, thereby creating a material issue of fact to be decided by the trier-of-fact. Brill v. Guardian Life Ins., 142 N.J. 520, 540 (1995). Defendant failed to do so. NCFSI, therefore, was and remains entitled to summary judgment. Moreover, the documentary evidence amply supports NCFSI's claim.

The information NCFSI received when it acquired the Account is attached to the May 11, 2012 Galic Cert. As set forth therein, the Account was opened on October 25, 2007. The last payment on the Account was made on March 2, 2008. The Account was charged off on October 5, 2009, at which time the balance due was $723.82. Other evidence verifies the accuracy of that information.

NCFSI produced the periodic account statement for the last billing cycle. May 11, 2012 Galic Cert., Statement of Material Facts, Exhibit "B"; June 25, 2012 Galic Cert., ¶9; Exhibit "D". NCFSI obtained that statement from Sherman. June 25, 2012 Galic Cert., ¶10. The periodic account statement for the last billing cycle shows a balance of $723.82. It identifies Defendant as the Account holder. It was sent to 109 66th Street #2, West New York, New Jersey 07093-3106. That is the same address to which the Court Clerk mailed the summons and complaint. See the second, third and fourth items in JEFIS.

There is no doubt that that is Defendant's address. She provides it on her answer to the complaint. See the seventh item on JEFIS.

One need look no further than Defendant's credit history reports to verify the accuracy of the Account data NCFSI received. The original creditor reported the Account both when it was still active and after it had been charged off. See ¶2, Exhibit "A" and ¶3, Exhibit "B" of the Certification of Steven A. Lang, respectively. That information comports with the Account data.

What does Defendant offer to rebut NCFSI's proofs? Nothing. To the contrary, as was established in NCFSI's moving papers, Defendant has never denied that the Account was hers. She has never claimed that NCFSI does not own the Account. She has never denied that the balance due on the Account is $723.82. She does not claim that anyone else has attempted to collect the debt. Thus, NCFSI was and remains entitled to summary judgment. Brill v. Guardian Life Ins. Co., *supra*, 142 N.J. at 540. NCFSI nonetheless responds to the remainder of Defendant's flawed analysis of the law.

Defendant's modern version of the *Emperor's New Clothes* proclaims that NCFSI's proof that she owes $723.82 does not satisfy the requirements of LVNV Funding, L.L.C. v. Colvell, 421 N.J. Super. 1 (App. Div. 2011). In the light most favorable to Defendant, that proclamation is palpably incorrect if not irrational.

In Colvell, the trial court granted the creditor's motion for summary judgment. The creditor's motion relied upon a computer-generated report. The appellate court reversed because in support of its motion for summary judgment, LVNV Funding relied solely on a computer generated report. In making that determination, the appellate court expressly relied on R. 6:3-3 (a). That rule in pertinent part provides:

> If plaintiff's records are maintained electronically and the claim is founded on an open-end credit plan as defined in 15 U.S.C. § 1602(i) and 12 C.F.R. § 226.2(a)(2), **a copy of the periodic statement for the last billing cycle** as prescribed by U.S.C. § 1637(b) and 12 C.F.R. § 226.7, **or** a computer-generated report setting forth the previous balance, identification of transactions and credits, if any, periodic rates, balance on which the

> finance charge is computed, the amount of the finance charge, the annual percentage rate, other charges, if any, the closing date of the billing cycle, and the new balance, if attached to the affidavit, shall be sufficient to support the entry of judgment. (emphasis added).

R. 6:6-3(a) thus provides two separate and distinct mechanisms for obtaining a default judgment. The first clause of the Rule allows the creditor to rely on the periodic statement for the last billing cycle. In the absence of that statement, the second clause allows the creditor to rely on a computer-generated report that sets forth the required information.

Here, NCFSI produced the periodic account statement for the last billing cycle. That periodic account statement is sufficient proof of the amount of the debt for purposes of a motion for summary judgment. LVNV Funding v. Colvell, *supra*, 421 N.J. Super. at 6.[1] In the absence of rebuttal proof, NCFSI is entitled to summary judgment. Brill v. Guardian Life Ins. Co., *supra*, 142 N.J. at 540; Moran v. Joyce, *supra*, 125 N.J.L. at 558; Lubinsky v. Court of Common Pleas of Passaic County, *supra*, 15 N.J. Misc. at 183; Sullivan v. Visconti, *supra*, 68 N.J.L. at 550; Waln v. Hance's Adm'rs, *supra*, 53 N.J. Eq. at 668.

Defendant's misreading of the law is further evidenced in her recitation of the law of assignments. She contends that in order for an assignment to be effective, the obligor must be notified of the assignment. Since Defendant does not claim that she did not receive notice, the relevance of that argument escapes NCFSI. Moreover, neither the common law nor Article 9 of the Uniform Commercial Code requires any such notice. As to the common law, see Hirsch v. Phily, 4 N.J. 408 (1950). The court held that a debtor's receipt of notice of the assignment is of importance only in those cases where the question "is one of priority between different assignees". Id. at 414-415 (citing Cogan v. Conover Mfg. Co. 69 N.J. Eq. 809 (E&A 1906)). As the inapplicability of Article 9 of the Uniform Commercial Code see Ninth Circuit Court of Appeals unreported opinion in Atlas Equity, Inc. v. Chase Bank USA, N.A.,

[1] The production of the periodic account statement for the last billing cycle disposes of Defendant's argument that NCFSI must also prove that she breached a contract with the original creditor.

403 Fed. Appx. 190, 192 (9th Cir. 2010), holding Article 9 of the Uniform Commercial Code applies to secured transactions. It does not apply to sales of delinquent credit card accounts.[2]

A prudent assignee nonetheless notifies the obligee of the assignment. Until such notice is given, a debtor: (a) is not obligated to pay the assignee and (b) is entitled to credit for any post-assignment payments made to the assignor. Once notification is given, however, the obligee is under a duty to pay the assignee. Spilka v. South America Mgrs., 54 N.J. 452, 462 (1969); Burke v. Hoffman, 28 N.J. 467, 473-474 (1958); Russell v. Fred G. Pohl, Co., 7 N.J. 32, 40 (1951); Tirgan v. Mega Life Health Ins., 304 N.J. Super. 385 (Ch. Div. 1997); Berkowitz v. Haigood, 256 N.J. Super. 342 (Law Div. 1992); Costanzo v. Costanzo, 248 N.J. Super. 116, 121 (Law Div. 1991).

In any event, the foregoing precepts are not relevant to this case. Defendant does not claim that she is entitled to credit for a payment she made to someone other than NCFSI prior to the assignment; nor does she claim to have made a payment to NCFSI.

Defendant's attempt to rely on Transcon Lines v. Lipo Chem., Inc., 193 N.J. Super. 456, 467 (Dist. Ct. 1983) must also fail. That case did not involve issues of disputed assignments or disputed claims of ownership. The issue was a dispute between a common carrier ("Transcon"), the seller/consigner of shipped goods ("Pizante") and the buyer/consignee ("Lipo") over freight charges, the resolution of which depended upon whether the common law or the Interstate Commerce Act applied. While Transcon is an interesting dissertation on an esoteric provision of that Act, the case has nothing whatsoever to do with the ownership or assignments of personalty.

Similarly, Defendant fails to understand that the issue in K. Woodmere Associates, L.P. v. Menck Corporation, 316 N.J. Super. 306 (App. Div. 1998) has no relationship to any issue in the case-at-bar. K. Woodmere did not involve a dispute between an assignee and an obligor. Rather, the dispute was between two entities, each of which claimed to be entitled to receive a refund of cash performance bonds that a

[2] A copy of the opinion is attached as Exhibit "C" to ¶4 of the Certification of Steven A. Lang.

developer ("Kaplan") had posted with a municipality to secure completion of two development projects. Id. at 309. The issue there was whether the subject assignment contemplated the transfer of the right to receive that refund. In the case at bar, no one can seriously be heard to say that the agreement between the debt seller (Sherman) and the debt purchaser (NCFSI) did not contemplate an assignment of the accounts being sold.

Equally specious is Defendant's claim that NCFSI lacks standing to collect the debt. Ironically, the case on which Defendant relies held that the threshold for standing is low. Triffin v. Somerset Valley Bank, 343 N.J. Super. 73 (App. Div. 2001). A party who has "a sufficient stake and real adverseness with respect to the subject matter of the litigation" has standing to sue. Id. at 81. It, therefore, is not surprising that the plaintiff, a bulk purchaser of dishonored checks, had standing to pursue his claims.

Application of Triffin to the case-at-bar leaves no doubt that NCFSI has standing to pursue the debt. NCFSI's desire to be paid the amounts it is owed provides a sufficient stake in the outcome of this litigation. NCFSI and Defendant are clearly adverse to one another. NCFSI, therefore, easily hurdles the low "standing threshold".

In conclusion, Defendant has failed to establish that the Court overlooked any law or evidence when it granted NCFSI's motion for summary judgment. To the contrary, NCFSI was and remains entitled to summary judgment. Given that entitlement, NCFSI should not be forced to undergo a trial. Brill v. Guardian Life Ins. Co., *supra*, 142 N.J. at 540. NCFSI, therefore, respectfully asks the Court to deny Defendant's motion for reconsideration.

Respectfully submitted,

PRESSLER and PRESSLER, LLP

Steven A. Lang

SAL:abm

cc: New Century Financial Services, Inc. (via e-mail only w/encs.)
Philip D. Stern, Esq. (via e-mail and regular mail w/encs.)