P&P File Number Z19225

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MSW CAPITAL, LLC

Plaintiff

vs.

AZEEM H ZAIDI

Defendant

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: MONMOUTH COUNTY
SPECIAL CIVIL PART
DOCKET NO. DC-004774-12

Civil Action

PLAINTIFF'S BRIEF IN RESPONSE TO DEFENDANT'S OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

On The Brief:
Steven A. Lang, Esq.

Dated: July 9, 2012

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PRELIMINARY STATEMENT

MSW seeks to collect the amounts due on Defendant Azeem H. Zaidi's defaulted credit card account. MSW's proofs amply establish the three elements of its claim: (1) Defendant was the account debtor; (2) the balance due is $12,487.36; and (3) MSW owns the account. It was, therefore, incumbent upon Defendant to come forward with admissible evidence in the record that creates a material dispute as to MSW's proofs. Defendant failed to do so. To the contrary, he did not even attempt to deny that the account was his. He offered no proofs whatsoever that the amount MSW seeks is incorrect or that MSW does not own the account. Rather, he questioned the reliability of MSW's proofs. Those proofs, however, are cloaked with indicia of reliability. Defendant was, therefore, reduced to making specious legal argument. Those logic defying arguments are debunked below.

Simply put, Defendant's attempt to avoid payment of the debt he owes failed as a matter of law. MSW, therefore, respectfully asks the Court to grant its motion for summary judgment. It necessarily follows that Defendant's motion for summary judgment must be denied. Nonetheless, the arguments made in Defendant's cross-motion are so specious as to require a response.

PROCEDURAL HISTORY

On January 27, 2012, Pressler and Pressler, LLP ("Pressler") sent a letter to Defendant. The letter is addressed to "Azeem H. Zaidi". It was mailed to him at "21 Pueblo Ct., Morganville, NJ 077512007". Certification of Steven A. Lang (hereinafter the "Lang Cert.") ¶2, Exhibit "A".

The January 27, 2012 letter states that MSW had purchased Defendant's Chase-Wamu Account, account number 4185863460635816 (the "Account") and that the amount due thereon is $12,487.36

The United States Post Office did not return the January 27, 2012 letter. Lang Cert. ¶3.

Defendant did not respond to the January 27, 2012 letter. Lang Cert. ¶4.

MSW's complaint was filed on March 13, 2012. Lang Cert. ¶5.

Defendant called Pressler on April 5, 2012 to determine whether MSW would accept less than the amount due. At no point during that conversation did Defendant deny that the subject account was his or that the amount due thereon is $12,487.36 or that MSW owned the account. Lang Cert. ¶6.

Defendant filed a pro se answer to the complaint on April 16, 2012. The answer is dated April 17, 2012. Certification of Daryl J. Kipnis (hereinafter the "Kipnis Cert.") ¶2, Exhibit "A".

Pressler received Defendant's answer to the complaint on April 18, 2012. Lang Cert. ¶7.

Defendant did not serve any discovery demands. Kipnis Cert. ¶3.

Pressler served interrogatories on April 23, 2012. Kipnis Cert. ¶4, Exhibit "B".

Defendant served non-responsive answers to MSW's interrogatories on May 18, 2012. Kipnis Cert. ¶5, Exhibit "C".

Pressler served requests for admissions on April 23, 2012. Kipnis Cert. ¶6, Exhibit "D".

Defendant served non-responsive answers to MSW's requests for admissions on May 18, 2012. Kipnis Cert. ¶7, Exhibit "D".

MSW's summary judgment motion was filed and served June 14, 2012. Lang Cert. ¶8.

On June 25, 2012, Philip D. Stern, Esq. served a Substitution of Attorney dated June 21, 2012. Lang Cert. ¶9, Exhibit "B".

As of July 6, 2012, the June 21, 2012 Substitution of Attorney had not been filed on JEFIS. Lang Cert. ¶10.

Mr. Stern filed opposition to MSW's motion on June 25, 2012.

Defendant's opposition to MSW's motion consists of Defendant's June 21, 2012 certification and Mr. Stern's brief. Lang Cert. ¶11.

Defendant's opposition to MSW's motion was served on June 27, 2012. Lang Cert. ¶12.

Mr. Stern filed a motion for summary judgment on the morning of Friday, June 29, 2012. Lang Cert. ¶13. The Proof of Service filed therewith certifies that the motion had been hand delivered to Pressler. Lang Cert. ¶13, Exhibit "C". That certification is false.

Mr. Stern came to Pressler's office at approximately 4:00 p.m. on Friday, June 29, 2012 for a meeting with Pressler attorneys regarding another matter. The meeting ended at approximately 6:00 p.m. at which time Mr. Stern handed a copy of Defendant's motion to one of the Pressler attorneys. Lang Cert. ¶14.

THE FACTUAL BACKGROUND

The facts are uncomplicated. MSW acquired the Account on July 18, 2011 by assignment from Main Street Acquisition Corp. ("Main Street"). Main Street assigned all of its rights in the Account to MSW. July 6, 2012 Affidavit of Main Street's Vice President Paul Libretta (hereinafter the "Libretta Affidavit"; Supplemental Certification of MSW's managing member Lawrence A. Whipple (hereinafter the "Whipple Cert.) ¶¶3-5, Exhibit "A". No one has questioned MSW's ownership of the Account. Whipple Cert. ¶28.

Main Street owned the Account by virtue of a June 29, 2011 assignment from the original creditor, Chase Bank USA, N.A. ("Chase Bank"). Libretta Affidavit; Whipple Cert. ¶7, Exhibit "B". Chase transferred all of its rights, title and interest in the Account to Main Street. Whipple Cert. ¶7, Exhibit "B".

The Account was opened on August 14, 2004. Whipple Cert. ¶6; Kipnis Cert. ¶8, Exhibit "F". The last payment on the Account was made on June 7, 2010. Whipple Cert. ¶6, ¶8, ¶19, Exhibit "M"; Kipnis Cert. ¶8, Exhibit "F". That payment was in the amount of $300.00. Whipple Cert. ¶6, ¶19, Exhibit "M". The next payment was due on July 9, 2010. Whipple Cert. ¶19, Exhibit "M". Defendant failed to make that payment. Whipple Cert. ¶6, ¶20, Exhibit "N"; Kipnis Cert. ¶8, Exhibit "F". As required by Federal regulations, Chase Bank charged the account off six months later. Whipple Cert. ¶6; Kipnis Cert. ¶8, Exhibit "F". The charge off is reflected in the periodic Account statement for the last billing cycle, that being the period account statement for the billing cycle ending on January 12, 2011. Whipple Cert. ¶26, Exhibit "T". At the time Chase Bank charged off the Account, the balance due thereon was $12,487.36. Libretta Affidavit; Whipple Cert. ¶6, ¶26, Exhibit "T", Kipnis Cert. ¶8. MSW has not received any payments since it acquired the Account. Whipple Cert. ¶26.

LEGAL ARGUMENT

POINT I

Defendant Failed To Meet His Burden Of Demonstrating The Existence of Any Disputed Material Fact.

The foregoing proofs amply establish that the Account was Defendant's, that the amount owed thereon is $12,487.36 and that MSW owns the Account. The burden, therefore, shifted to Defendant to demonstrate that there is a dispute as to a material fact. Brill v. Guardian Life Ins. Co., 142 N.J. 520, 529 (1995). Defendant failed to do so. He offers no facts or other evidence of any kind. Indeed, it is Defendant's position that he need not provide any evidence. See Point V of Defendant's brief in opposition to MSW's motion (the "Opposition Brief"). That strategy is not as ill-conceived as one might think. There are simply no facts to rebut MSW's proofs. Defendant, therefore, can only offer only a general denial, specious legal arguments and an ill-conceived attempt to question the reliability of MSW's proofs. Each of these attempts to avoid payment of the debt is debunked below.

POINT II

Defendant Cannot Rely Upon A General Denial.

It is well established that a general denial set forth in an answer to a complaint "without factual support in tendered affidavits" is insufficient to defeat a motion for summary judgment. Petersen v. Township of Raritan, 418 N.J. Super. 125, 132 (App. Div. 2011). It is equally well established that conclusory, self-serving statements set forth in a certification cannot defeat a motion for summary judgment. Brae Asset Fund, L.P. v. Newman, 327 N.J. Super. 129, 134 (App. Div. 2011); Triffin v. Somerset Valley Bank, 343 N.J. Super. 73, 87 (2001).

Triffin is particularly instructive. Plaintiff Triffin was a purchaser of dishonored checks. He moved for summary judgment against the drawer of one such check, defendant Hauser Co.

Hauser's opposition to the motion relied on the general denials set forth in its pleadings as well as a self-serving certification that was devoid of any factual allegations.

Not surprisingly, the trial court granted Triffin's motion for summary judgment. In affirming that decision the Appellate Court rejected Hauser Co.'s attempted reliance on general denials in his pleadings and on a self-serving, bare bones conclusory certification. The Appellate Court stated:

> Hauser Co. provided no factual evidence tending to disprove [Triffin's proofs], relying instead on self-interested and conclusory statements. Consequently, the trial court did not err in finding that Hauser Co. had failed to provide any evidence of the invalidity of [Triffin's proofs].
>
> ...
>
> Consequently, the trial court properly held, as a matter of law that [Triffin] ... was entitled to enforce the checks.

There is no distinction between Hauser Co.'s lack of evidence to rebut Triffin's proofs and Defendant's lack of evidence to rebut MSW's proofs in the case at bar.

Specifically, the Opposition Brief proclaims that in his answer to the complaint, Defendant claimed to be without knowledge of the allegations set forth in the complaint "and on that basis generally and specifically denies the allegations". Opposition Brief, page 4 (emphasis added). Defendant, however, fails to explain how adding the term "specifically" somehow transforms a general denial into a basis for denying a summary judgment motion.

Defendant clearly recognizes his dilemma. In an attempt to create a factual dispute, Defendant certifies that he continues to deny the allegations of the complaint. The alleged "factual" basis for the denial is "Plaintiff's failure to provide proof that it owns the alleged account and proof that [Defendant] is indebted to Plaintiff in any amount." See ¶5 of Defendant's June 21, 2012 certification. Those bare bones, conclusory denials are likewise insufficient.

Moreover, Defendant's claim that MSW failed to provide proof is astonishing for two reasons. First, Defendant elected to forego serving discovery demands. Kipnis Cert. ¶3. He cannot complain that MSW failed to give him something he never requested; nor can he claim to be in need of discovery to rebut MSW's proofs. Adler Quality Bakery, Inc. v. Gaseteria, Inc., 35 N.J. 55, 72 (1960).

Second, the statement is false. Pressler provided proof of MSW's ownership of the Account and the amount due thereon on three separate occasions. By letter dated January 27, 2012, Pressler advised Defendant that MSW owns the Account and that the amount due thereon is $12,487.36. Those proofs were provided to Defendant again when he called Pressler's office after being served with the complaint to determine whether MSW would compromise its claim. Lang Cert. ¶6.[1] The letter informed Defendant of his right to request verification of the debt. Defendant chose to ignore the letter.[2] Proof of ownership and the amount due were provided in Mr. Whipple's April 23, 2012 certification in support of MSW's motion and the 18 periodic Account billing statements submitted therewith.

Defendant also claims that "Plaintiff clearly knew its claim of ownership was disputed based upon Defendant's response to Plaintiff's requests for admissions". See pages 7 and 8 of the Opposition Brief. That accusation is troubling to say the least.

Defendant's responses to MSW's request for admissions are attached as Exhibit "C" to Mr. Whipple's April 23, 2012 and as Exhibit "E" to Paragraph 7 of the Kipnis Cert. Request for admissions number 11 reads as follows:

> Do you admit that MSW Capital, LLC is the owner of

[1] Defendant's statements and the inferences to be drawn therefrom are admissible pursuant to the party-opponent exception to the hearsay rule, N.J.R.E. 803(b). *See e.g.* McDevitt v. Bill Good Builders, Inc., 175 N.J. 519, 530-531 (2003).

[2] It is not MSW's position that Defendant's failure to respond to the letter is an admission of liability.

CHASE-WAMU Account Number 4185863460635816.

Defendant neither admitted nor denied the request. Defendant responded as follows:

> Defendant objects to this request as the Plaintiff is asking for information as to the custody of an account belonging to a business of which the Defendant is neither an employee nor a custodian of records.

That response is, frankly, gibberish. Unfortunately, that response is typical of Defendant's responses to the remainder of the requests for admissions and his the responses to MSW's interrogatories.[3]

In sum, Defendant's general denial in his answer to complaint is insufficient to defeat MSW's right to summary judgment. That deficiency is not cured by regurgitating the general denial in a certification that is devoid of factual support. Petersen v. Township of Raritan, *supra*, 418 N.J. Super. at 132; Triffin v. Somerset Valley Bank, *supra*, 343 N.J. Super. at 87. Likewise, the deficiency is not cured by evasive, incomprehensible answers to discovery demands. Defendant, therefore, has failed to rebut any of MSW's proofs. Brill v. Guardian Life Ins. Co., *supra*, 142 N.J. at 540.

POINT III

Defendant's Version Of The Elements Of MSW's Claim Cannot Withstand Scrutiny.

Defendant's modern day version of Alice in Wonderland continues with a recitation of what Defendant proclaims to be the elements of MSW's claim. That recitation, however, bears no relationship to the governing law. Rather, Defendant seeks to revise the law of assignment. He compounds that error by attempting to apply contract law and the law to a claim involving a defaulted credit card account. Both arguments fail.

[3] MSW's interrogatories are attached as Exhibit "B" to ¶5 of the Kipnis Cert. Defendant's non-responses

A. Defendant Misunderstands The Law Relating To Assignments.

The Opposition Brief alleges that MSW failed to provide evidence "that the Account was ever sold, assigned or transferred to Plaintiff." One can only marvel at that claim. Specifically, in Paragraph 1 of his April 23, 2012 certification, MSW's managing member certifies that "Plaintiff is the present owner by purchase of Defendant's Chase-Wamu Account number 4185863460635816."

Defendant attempts to bootstrap his fundamentally flawed understanding of the elements of an enforceable "assignment" into an argument that MSW lacks standing. That argument is disposed of by the case upon which Defendant relies, Triffin v. Somerset Valley Bank, *supra*, 343 N.J. Super. 73.

Defendant's errors continue with the argument that MSW cannot now present proof of the assignment because it cannot raise a new issue in a reply brief. That contention, of course, ignores the fact that proofs of ownership and, hence, assignment, were presented in MSW's moving papers. Finally, the expanded version of the "assignment" point in Defendant's brief in support of his cross-motion argues that Article 9 of the Uniform Commercial Code, Secured Transactions, applies to an attempt to collect the amounts owed on a defaulted credit account. Each of the foregoing arguments is specious.

1. MSW's Proofs Amply Establish Its Ownership Of the Account.

Defendant argues that MSW must aver and prove that it owns the Account. Defendant concedes that MSW averred that it owns the Account. See page 7 of the Opposition Brief. Defendant nonetheless argues that MSW failed to prove its ownership. The difference between "averring" and "proving", however, is a distinction without merit.

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thereto are attached as Exhibit "C" to ¶6 of the Kipnis Cert.

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 he says it belonged to her husband, and that he 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, as noted above, MSW's managing member certified that MSW purchased the Account. That testimony is sufficient proof that MSW owns the Account.

Moreover, MSW's possession of the 18 Periodic Account billing statements evidences MSW's ownership of the Account. Various state and federal laws impose strict limits on the information that a credit card issuer can share with non-affiliated third parties. *See e.g.* 15 U.S.C. § 6801 of the Gramm-Leach-Bliley Act; 12 CFR §§ 1016.1 *et seq.* (Regulation P) *et seq.* and 12 CFR § 216. Given the restrictions imposed on an issuer's ability to share consumer information, especially account information, MSW's access to and possession of the periodic Account statements is significant indicia of its ownership of the Account. *See* Bergen v. Van Liew, 36 N.J. Eq. 637, 638-639 (E&A 1883) wherein it was held that that possession is presumptive evidence of ownership.

2. MSW Clearly Has Standing To Pursue The Debt.

Defendant's argument that MSW lacks standing to pursue the debt need not detain the Court for long. Ironically, the case on which Defendant relies held that the threshold for standing is low. Triffin v. Somerset Valley Bank, *supra*, 343 N.J. Super. 73. In rejecting the defendant's

argument that the plaintiff lacked standing, the Court held that 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 Court held that 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 MSW has standing to pursue the debt. MSW's desire to be paid the amounts Defendant owes provides a sufficient stake in the outcome of this litigation. MSW and Defendant are clearly adverse to one another. MSW, therefore, easily hurdles the low "standing threshold".

3. MSW's Claim That It Owns The Account Is Not New.

Equally specious is Defendant's claim that MSW did not provide proof of the assignment in its moving papers. Mr. Whipple's April 23, 2012 Certification disposes of that claim. Indeed, there is reason to question whether Defendant makes that argument in good faith. Specifically, not having conducted any discovery, Defendant did not know whether MSW presented all of its proofs in its moving papers. As is set forth in Defendant's brief in support of his cross-motion, his attorney suspected that those proofs might include the bills of sale in the chain of title. That suspicion is allegedly based upon Defendant's counsel's experiences in cases wherein a debt purchasers attempts to collect the amounts due on a defaulted credit card. MSW, of course, rejects that subterfuge.

Indeed, Defendant's Opposition Brief makes it clear that Defendant clearly knows that it is inappropriate to attempt to present facts in a brief. See page 15 of the Opposition Brief wherein Defendant cites Higgins v. Thurber, 413 N.J. Super. 1, 21 n. 19 (App. Div. 2010), *aff'd* 184 N.J. 415 (2011). Also see the Comment to R. 1:6-6 stating in relevant part: "Even more egregious is the attempted presentation of facts which are neither of record, judicially

cognizable, nor stipulated, by way of statements of counsel made in supporting briefs, memoranda and oral argument").

Defendant's cross-motion rests in large part upon the alleged albeit inadmissible experiences of Defendant's counsel. Defendant's cross-motion, therefore, must be denied irrespective of MSW's entitlement to summary judgment. Brill v. Guardian Life Ins. Co., *supra*, 142 N.J. at 540.

This Court need not decide whether MSW must provide the bills of sale to prove its claim. The two bills of sale are now before the Court. The July 18, 2011 Bill of Sale pursuant to which MSW acquired the Account from Main Street is attached as Exhibit "A" to ¶5 of the Whipple Cert. The Bill of Sale pursuant to which Main Street acquired the Account from Chase is attached as Exhibit "B" to ¶7 of the Whipple Cert. There can be no doubt that each of those documents is admissible.

It has long been the law in this state that proof need not be conclusive. A document is admissible if the proponent makes a prima facie showing that the document is genuine and authentic. In re: Blau's Estate, 4 N.J. Super. 343, 351 (App. Div. 1949). The law has not changed in the 63 years since In re: Blau's Estate was decided. *See e.g.* Konop v. Rosen, 425 N.J. Super. 391, 411 (App. Div. 2012). To the contrary, that sound precept is embodied in N.J.R.E. 901. Same provides:

> The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter is what its proponent claims.

Here, there is substantial evidence that the bills of sale are authentic and genuine. Chase Bank is the assignor on the Bill of Sale pursuant to which Main Street acquired the Account. Whipple Cert. ¶7, Exhibit "C". Main Street is the assignor on the Bill of Sale pursuant to which MSW acquired the Account. Whipple Cert. ¶5, Exhibit "A". The Account was included in the

portfolio of defaulted accounts that Main Street assigned to MSW. Libretta Affidavit; Whipple Cert. ¶¶3-5. The Seller Data that Main Street provided included a plethora of information relating to the Account. That information included Defendant's full name, his address, the Account Number, the date on which the Account was opened; the date on which the last payment on the Account was made and the date thereof; the date on which Chase bank charged off the Account and the balance due at that time. The reliability of that data is verified by the Libretta Affidavit, Defendant's January 25, 2012 credit report (Kipnis Cert. ¶8, Exhibit "F") and the 18 periodic Account billing statements MSW produced. (Whipple Cert. ¶¶8-26, Exhibits "C"-"T")

Each periodic Account statement identifies Chase Bank as the original creditor.[4] Each is addressed to Defendant at the address wherein he continues to reside. The $12,487.36 delinquent balance set forth on periodic Account statement for the last billing cycle (Whipple Cert. ¶26, Exhibit "T") matches the delinquent balance set forth in the Libretta Affidavit, the Seller Account Data (Whipple Cert. ¶6) and Defendant's January 25, 2012 credit report.

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[4] While Defendant does not dispute the fact that Chase Bank was the original creditor, he does deride MSW's designation of the original creditor as "Chase-Wamu". There is good reason for that designation. As is set forth in ¶15 of the Lang Cert., Chase Bank USA, NA is a subsidiary of JPMorgan Chase & Co. ("JP Morgan"). That relationship is documented in the Form 10-K that JPMorgan filed with United States Securities and Exchange Commission for the Fiscal Year ending December 31, 2008. That filed document is available to the public on the SEC website: www.sec.gov. The second paragraph of Part I, Item 1: Business, Overview in pertinent part provides:

> JPMorgan Chase's principal bank subsidiaries are JPMorgan Chase Bank, National Association ("JPMorgan Chase Bank, N.A."), a national banking association with U.S. branches in 17 states, and Chase Bank USA, National Association ("Chase Bank USA, N.A."), a national banking association that is the Firm's credit card–issuing bank.

On September 26, 2008 the Federal Deposit Insurance Corporation (the "FDIC") seized Washington Mutual Bank ("WAMU"). The FDIC sold all of WAMU's deposits and assets to Chase on September 28, 2008. The foregoing is reported in the Form 8-K JP Morgan filed with the United States Securities and Exchange Commission on September 28, 2008, a copy of which is attached as Exhibit "D" to ¶16 of the Lang Cert. The filed Form 8-K is available to the public for downloading on the FDIC's website www.fdic.gov./bank/individual/failed/wamu.html.

Defendant's January 25, 2012 credit report is inherently reliable. Federal laws highly regulate consumer credit reporting. *See e.g.* the Fair Credit Reporting Act 15 U.S.C. §1681*et seq.* The purpose of these regulations is succinctly stated therein.

15 U.S.C. §1681(a)(1) provides:

> The banking system is dependent upon fair and accurate credit reporting. Inaccurate credit reports directly impairs the efficiency of the banking system, and unfair credit reporting methods undermine the public confidence which is essential to the continued functioning of the banking system.

15 U.S.C. §1681(a)(3) provides:

> Consumer reporting agencies have assumed a vital role for investigating and evaluating consumer credit and other information on consumers.

Moreover, given the absence of any bona fide dispute as to the reliability of foregoing documents, they are admissible unfettered by what otherwise might have been applicable hearsay rules. *See* N.J.R.E. 101(a)(4). Same provides:

> "*Undisputed facts.* If there is no *bona fide* dispute between the parties as to a relevant fact... [i]n civil proceedings the judge may also permit that fact to be proved by any relevant evidence, and exclusionary rules shall not apply, except Rule 403 or a valid claim of privilege."

Since Defendant's musings as to the sufficiency of MSW's proofs are not sufficient to create a bona fide dispute, they are properly before the Court.

4. Defendant Was Not Entitled To Notice of The Assignment.

Although not raised in the Opposition Brief, Defendant's cross-motion argues that he was entitled to notice that the Account had been assigned. Once again Defendant is wrong.

The glaring deficiencies in Defendant's position include his attempt to rely on Article 9 of the Uniform Commercial Code. Same applies to secured transactions. It has no applicability whatsoever to assignments of defaulted credit card accounts. See, *e.g.* the Ninth Circuit Court of

Appeals unpublished opinion in Atlas Equity, Inc. v. Chase Bank USA, N.A., 403 Fed. Appx. 190, 192 (9th Cir. 2010).[5]

The body of applicable law makes it clear that notice of an assignment is not a condition precedent to an assignees right to collect a debt. See *e.g.* Hirsch v. Phily, 4 N.J. 408 (1950). There the court held that the 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)).

It nonetheless behooves an assignee to notify the obligor of the assignment. Until such time as the debtor receives notice, he is not obligated to pay the assignee and is entitled to credit for any post-assignment payments made to the assignor. Once notification is given, however, the obligor has the 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).

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 three-way dispute between a common carrier, the seller/consigner of shipped goods and the buyer/consignee of those goods over freight charges, the resolution of which depended upon whether the common law or the Interstate Commerce Act applied. While Transcon is an informative dissertation on an esoteric provision of the Interstate Commerce Act it has nothing to do with the ownership or assignments of personalty.

[5] A copy of the opinion is attached as Exhibit "E" to ¶17 of the Lang Cert.

K. Woodmere Associates, L.P. v. Menck Corporation, 316 N.J. Super. 306 (App. Div. 1998) is also irrelevant. There was no express assignment in that case. Rather, one party argued that the right to receive a refund of a performance bond had been equitably assigned to it. In stark distinction, MSW does not claim to be an equitable assignee. Rather, it is the owner of the Account by virtue of an express assignment.

In sum, there are no material issues of fact relating to MSW's ownership of the Account.

B. Defendant's Prodigious Use Of The Account Establishes His Obligation.

Defendant's parade of errors continues with the argument that MSW must prove each and every element of a breach of contract claim: acceptance, consideration, breach and causally related damages. See page 8 of the Opposition Brief. Once again, that argument and the applicable law are strangers to one another.

A credit card account is not a contract in the traditional sense. It is not a contract for services. It is an agreement between parties whereby the account holder agrees to reimburse the card issuer for payments made on his or an authorized users behalf. Novack v. Cities Service Oil Co., 149 N.J. Super. 542 (Law Div 1977) *aff'd* Novak v. Cities Service Oil Co., 159 N.J. Super. 400 (App Div 1978) *certif. den.* Novak v. Cities Service Oil Co., 78 N.J. 396 (1978). There the Court held that "the issuance of a credit card is but an offer to extend a line of open account credit. It is unilateral and supported by no consideration. The offer may be withdrawn at any time, without prior notice, for any reason or, indeed, for no reason at all, and its withdrawal breaches no duty -- for there is no duty to continue it -- and violates no rights. Acceptance or use of the card by the offeree makes a contract between the parties according to its terms. Id. at 547-548. (emphasis added, internal citations omitted).

Thus, each use of the credit card creates the contract. The agreement as to the terms of the purchase is made between the account holder and the merchant. The agreement between the card holder and the card issuer is that the card issuer will pay for authorized charges. Those charges are set forth in the periodic account billing statements.

Consumers have the right to dispute any entry on their billing statements which they believe was made in error within sixty days following their receipt of each statement. *See* 15 U.S.C. §1666(a) and 12 CFR § 226.13 (Regulation Z). Thus, a card holder that does not timely notify the card issuer of the right to dispute a debt is barred from there after claiming that the charge is invalid.

Here, the 18 periodic Account billing statements MSW produced evidence Defendant's prodigious use of the Account. The periodic Account statements for the period ending 08/12/09 through the period ending on 06/12/10 (Exhibits "C" through "M" of ¶¶9-19 of the Whipple Cert.) include charges for 22 purchases. Those statements also include credits for 10 payments.

Defendant had another opportunity to dispute MSW's ownership of the Account and/or that he owed $12,487.36 thereon when he called Pressler to determine if MSW would compromise the debt. He failed to do so. Lang Cert. ¶6.

In a final desperate attempt to avoid payment of the Debt, Defendant claims that there is no proof of the amount owed. That claim is predicated upon Defendant's interpretation of LVNV Funding, L.L.C. v. Colvell, 421 N.J. Super. 1 (App. Div. 2011). That interpretation defies logic.

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, LLC 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.[6]

There can be no doubt that the statement attached as Exhibit "T" to ¶26 of the Whipple Cert. is the periodic Account statement for the last billing cycle. Pursuant to Federal law, the original issuer of a credit card account is required to charge-off an account no later than the end of the calendar month in which the account becomes more than 180 days past due. *See* e.g. 65 Fed. Reg. 36,903 at 36904, a copy of which is attached as Exhibit "G" to ¶19 of the Lang Cert.

The last payment on the Account was made on June 7, 2011 in the amount of $300.00. See the periodic Account statement for the period ending 06/12/10 (Whipple Cert. ¶19, Exhibit "M").[7] As indicated thereon, Defendant's credit limit was $11,000.00. As further indicated thereon, a payment in the amount of $254.00 was due on 07/09/10. Defendant failed to make that payment. See the periodic Account statement for period ending 07/12/10 (Whipple Cert. ¶20, Exhibit "N"). As a result of that failure, Defendant exceeded his $11,000.00 credit limit, thereby

[6] In its moving papers MSW produced both the periodic Account statement for the last billing cycle (a copy of same is also attached as Exhibit "T" to ¶26 of the Whipple Cert.) and a computer generated report setting forth the information required by the second clause of R. 6:6-3(a).

putting the Account into default. The Account was charged off six months later. Whipple Cert. ¶26, Exhibit "T".

Notwithstanding that both LVNV Funding, LLC v. Colvell, *supra*, 421 N.J. Super. 1 and R. 6:3-3(a) expressly permit MSW to rely on the periodic Account statement for the last billing cycle, Defendant takes the position that MSW must identify every charge and every credit posted to the Account since it was opened in August 2004. That argument is specious and illogical as R. 6:6-3(a) only requires the identification of transactions, "if any, relating to the closing date of the [last billing cycle]".

In sum, MSW's production of the periodic Account statement for the last billing cycle 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. In the absence of rebuttal proof, MSW 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.

[7] The payment is noted on Defendant's January 25, 2012 credit report. Kipnis Cert. ¶8, Exhibit "F".

CONCLUSION

For the foregoing reasons, MSW respectfully submits that it has proven each and every element of its claim. Defendant failed to present any evidence to rebut any of those proofs. Thus, there is no bona fide dispute as to any element of its claim, MSW, therefore, should not be forced to endure a trial and respectfully asks the Court to grant its motion for summary judgment. It necessarily follows that Defendant's cross motion must be denied.

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Dated: July 9, 2012

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