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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

REPLY BRIEF OF DEFENDANT, AZEEM H. ZAIDI, IN SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

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INTRODUCTORY STATEMENT

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

To defeat this motion, Plaintiff needed to not only submit "evidentiary support," but also 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 v. Guardian Life Ins. Co. of Am.*, 142 *N.J.* 520, 533 (1995) and *R.* 4:46-5(a).

Plaintiff has failed to meet the burden to defeat this motion.

As previously explained, three essential components of Plaintiff's case are

1. *Ownership of the account*: Plaintiff, by its own admission, seeks to collect on a debt allegedly owed by Defendant to a third party. As such, Plaintiff must prove, through competent and admissible evidence, a valid chain of assignment from the original creditor to Plaintiff.

2. *Amount owed on the account*: Plaintiff must prove the balance owed on the account.

3. *Liability of Defendant*: Plaintiff must prove that Defendant is the account debtor by demonstrating the formation of an agreement between Defendant and the original creditor under which Defendant became obligated to pay some amount to the original creditor.

Plaintiff's lack of competent and admissible evidentiary support as to any one of these elements is sufficient to grant Defendant's motion for summary judgment.

LEGAL ARGUMENTS

POINT I: Plaintiff Must Submit Admissible Evidence To Defeat Defendant's Motion.

Before evaluating Plaintiff's purported evidential materials in light of the burden of proof, the court should determine the competency and admissibility of those materials. "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) (citing *R.* 1:6-6). *Brill* emphasizes that evidence submitted in opposition to summary judgment should not blindly accepted but, instead, requires evaluation of "competent evidential materials," specifically:

> We hold that when deciding a motion for summary judgment under Rule 4:46-2, 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." [*Id.* at 523 (emphasis added).]

The Court Rules reflect these rulings. Under *R.* 4:46-5(a), a party opposing summary judgment "must respond by affidavits meeting the requirements of *R.* 1:6-6." Rule 1:6-6 requires that such affidavits be "***made on personal knowledge, setting forth only facts which are admissible in evidence to which the affiant is competent to testify*** and which may have annexed thereto certified copies of all papers or parts thereof referred to therein."

POINT II: The Inadmissibility of Plaintiff's Evidence.

Although Defendant's motion brief outlined, in detail, what Plaintiff needed to submit to defeat this Motion, Plaintiff's opposition falls well short.

Instead, Plaintiff submits an opposition wrought with inadmissible certifications, affidavits and documents.

A. Certification of Steven A. Lang, Esq.

Plaintiff's counsel, Steven A. Lang, Esq., submits his own certification ("Lang Cert.").

"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, *Deutsche Bank Nat. Trust Co. v. Mitchell*, 422 N.J. Super. 214, 225 (App. Div. 2011) *Wells Fargo Bank, N.A. v. Ford*, 418 *N.J.Super.* 592, 599 (App. Div. 2011) ("A certification will support the grant of summary judgment only if the material facts alleged therein are based, as required by Rule 1:6–6, on 'personal knowledge.'").

First, in ¶6, Mr. Lang details a phone conversation between Defendant and one or more individuals from Plaintiff's counsel's office. Lang Cert. ¶6. Mr. Lang makes no indication that he was a party to this call, and as such one can

only assume that he is relying on someone else's account of the call or else a recording or transcript. Whatever the case, it is certainly outside Mr. Lang's personal knowledge.

Although Mr. Lang is undoubtedly aware that a settlement offer or negotiation is not admissible prove of liability under *Evid.R.* 408, Mr. Lang's express purpose is to do just that – turn Defendant's inquiry about settlement into an admission by silence as to liability, the amount due, and Plaintiff's ownership.

Next, in ¶¶15 and 16, Mr. Lang certifies to the relationships between Chase Bank USA, NA and JPMorgan Chase & Co., and between Washington Mutual Bank and JPMorgan Chase & Co. Mr. Lang expresses no personal knowledge of that relationship, the protocols or conditions which govern those relationship, or the mechanisms through which that relationship functions – nor is it likely that he has such knowledge. Furthermore, Mr. Lang's testimony as to what he read in a document is hearsay. Thus, the most Mr. Lang can do is point to those documents and then the Court can evaluate their admissibility – but it is improper for him to be certifying to the truth of statements contained in those documents.

B. Certification of Daryl J. Kipnis.

Plaintiff's counsel, Daryl J. Kipnis, Esq. also submits his own certification ("Kipnis Cert.").

Again, "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).

His Certification primarily attaches exhibits. He includes two unreported decisions, a copy of Defendant's Answer to the Complaint, and discovery – all of which is appropriate. See, Kipnis Cert. ¶¶2-7, 9-10 and Exhibits A-E, G-H.

Mr. Kipnis also attaches a redacted "Credit Report" which is inadmissible hearsay. The Report does not identify the credit reporting agency. Moreover, the credit report is merely information provided to Mr. Kipnis by a credit reporting agency of data provided by third parties. It is wrought with multiple levels of hearsay and, therefore, is inadmissible. *Evid.R.* 802. Kipnis Cert. ¶8 and Exhibit F.

C. Supplemental Certification of Lawrence A. Whipple, Jr.

Plaintiff contends that Defendant's account was sold by Chase Bank to Main Street Acquisition Corp. who sold it to Plaintiff. The Supplemental Certification of Lawrence A. Whipple, Jr. ("Whipple Supp. Cert.") appears to be submitted to provide proof of those assignments and to prove the amount due through billing

statements. The Certification is composed entirely of inadmissible hearsay – all of the facts asserted in the Certification were told to Mr. Whipple by others.

Mr. Whipple indicates that his knowledge concerning the alleged acquisition of Defendant's account is based on records and he identifies "the July 18, 2011 Bill of Sale and Assignment" which he attaches as Exhibit A. Whipple Supp. Cert., ¶5. That Exhibit is one page. It states that all capitalized terms have the meanings set forth in a "Purchase and Sale Agreement" and that the Seller, Main Street, assigns to Purchaser, MSW, "all of the Seller's rights…to the Purchased Accounts and any claims arising out of the Purchased Accounts described in the Agreement and contained in the Sale File provided to the Purchases on July 18, 2011." As the Agreement was not provided, it is impossible to determine the meaning of the capitalized terms "Purchased Accounts" or "Sale File." Consequently, Mr. Whipple could not possible know that Defendant's account was purchased based on "the July 18, 2011 Bill of Sale and Assignment." Furthermore, the lack of the Agreement compels Defendant to further object to Exhibit A under the doctrine of completeness articulated in *Evid.R.* 106.

In ¶6, Mr. Whipple readily admits that the information he has about the account was provided to MSW by Main Street – which is patently inadmissible hearsay. *Evid.R.* 802.

In ¶7, Mr. Whipple asserts that Exhibit B is "a true copy of the June 29, 2011 Bill of Sale" representing a transaction between Chase Bank USA, N.A. and Main Street Acquisition Corp. Certainly, Mr. Whipple has no personal knowledge of that

transaction. His only knowledge came from what someone told him about Exhibit B. Again, rank hearsay.

Neither of the Bills of Sale (i.e., Exhibits A or B) identify Defendant's account. Indeed, Exhibit B reflects an assignment of 8,842 accounts – a number so great that it is virtually impossible for someone to have personal knowledge about each included account. Hence, resort must be made to records identifying the accounts – but those records have not been produced. As an essential element to prove a valid assignment is the identification of the account being assigned, Plaintiff cannot prove a prima facie case.

Next, Mr. Whipple attempts to present 18 periodic statements. Whipple Supp. Cert., ¶¶9 – 26 (Exhibits C – T). He asserts that they are each a "true copy" but concedes, in ¶8, that they were provided to him by Main Street. Mr. Whipple does not assert familiarity with Chase's billing systems or record creation processes. Thus, he is incompetent to even identify these documents. See, *Hahnemann University Hosp. v. Dudnick*, 292 *N.J.Super.* 11, 18 (App. Div. 1996). All Mr. Whipple can say is that these are documents given to him by Main Street – and that is insufficient to admit the documents. Thus, there is no testimony from anyone satisfying any of the requirements for admission as a business record under Evid.R. 803(c)(6).

D. The Libretta Affidavit

Plaintiff also submits an affidavit from Paul Libretta (hereinafter "Libretta Affidavit"), Vice President of Main Street Acquisition Corp. Again, the document is full of inadmissible assertions.

Mr. Libretta's affidavit is dubious to begin with as he asserts that the account originated with Chase. Plaintiff's motion already asserts the account was opened with Washington Mutual Bank and subsequently acquired by JPMorgan Chase & Co. Moreover, like Mr. Whipple, Mr. Libretta could have personal knowledge as to each of the 8,842 accounts supposedly sold to Main Street. Instead, his knowledge must have come from documents which have not been identified or produced.

Mr. Libretta boldly asserts the amount due on the account and that Defendant is the account debtor. As the employee of a third party debt buyer that allegedly purchased the account from Chase, Mr. Libretta cannot possibly have personal knowledge regarding the account. Any such information Mr. Libretta asserts would, at best, have come from Chase who, in turn, received its information from either Washington Mutual Bank or the Federal Deposit Insurance Corporation. Thus, Mr. Libretta cannot provide competent or admissible evidence as to the account.

Mr. Libretta's assertion that the account was assigned to Plaintiff and certain rights attached to that assignment is also inadmissible. His knowledge could only have come from documents which have not been identified or produced. The "Bill of Sale and Assignment" provided by Mr. Whipple (Whipple Supp. Cert. ¶5 and Exhibit A) expressly refers to a separate Purchase and Sale Agreement which has

not been provided but which defines terms used in the Bill of Sale and which expresses the conditions under which Main Street sold "Purchased Accounts" "without recourse and without representations or warranties including, without limitation, warranties as to collectability." Furthermore, there is no indication that Mr. Libretta has personal knowledge of the transaction.

Again, information about the two alleged sales – one from Chase to Main Street and the other from Main Street to Plaintiff – could only come from records and the records satisfying the requirements necessary to prove a valid assignment have not been submitted. The statements by proffered witnesses which are not supported by admissible records are incompetent and cannot be relied on to defeat an otherwise valid summary judgment motion.

POINT III: Plaintiff's "Evidence," Even If Admissible, Is Insufficient To Prove Assignment.

A. Necessary Elements Of A Valid Assignment.

Even if Plaintiff's submissions were deemed admissible for consideration, they would inevitably fail as they are not sufficient to prove each element of a valid assignment. In his motion brief, Defendant detailed four necessary elements of a valid assignment:

1. The assignment must contain clearly demonstrate the intent to transfer the assignor's rights in the account to the assignee;

2. The account being transferred must be described sufficiently to make it capable of being readily identified;

3. The assignment is clear and unequivocal; and

4. Defendant was given notice of the assignment.

The obvious purpose of these elements is to ensure that the obligor can know with certainty to whom his or her obligation can be satisfied. When those elements are satisfied, the assignment "authoritatively makes known to all persons concerned that the subject-matter has been or is thereby transferred." *Sullivan v. Visconti,* 68 N.J.L. 543, 551 (Sup Ct. 1902) *aff'd (for reasons below)* 69 N.J.L. 452 (E.& A. 1903). These requirements avoid the problems when the assignor – whether fraudulently or unwittingly – attempts to assign a right to multiple assignees, as occurred in *Sullivan* and *Jenkinson.*

For simplicity's sake, Defendant limits his discussion here to point two, the sufficient description and identification of the account.

As noted in Defendant's motion brief, "[t]he 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)).

Plaintiff attempt to distinguish *K. Woodmere* and *Transcon* is unpersuasive. Consider that *Berkowitz v. Haigood,* 256 *N.J. Super.* 342 (Ch. Div. 1992), using the same citations as in *K. Woodmere,* applied the same standard to the express assignment of the proceeds from a judgment:

> A valid assignment must contain clear evidence of the intent to transfer the person's rights and 'the subject matter of the assignment must be described sufficiently to make it capable of being readily

identified.'[*Berkowitz, supra,* at 346 (citations and internal quotes omitted).]

The purported assignments here, like the one in *Berkowitz,* deal with the express assignment of a receivable. Thus, Plaintiff's prima facie case must include proof that Defendant's account was readily identified in each assignment. Failing such proof, summary judgment should be granted for Defendant.

B. The Chain of Assignment.

Ignoring the involvement of the Federal Deposit Insurance Corporation, Plaintiff's opposition seems to indicate four distinct assignments of the account. If any link in the chain is broken, the entire chain collapses and leaves Plaintiff without proof of assignment and ownership.

1. Washington Mutual Bank to JPMorgan Chase & Co;
2. JPMorgan Chase & Co. to Chase Bank USA, NA;
3. Chase Bank USA, NA to Main Street Acquisition Corp.; and
4. Main Street Acquisition Corp. to Plaintiff.

Washington Mutual Bank to JPMorgan Chase & Co.

The only thing close to "evidence" of this transfer is the hearsay certification of Mr. Lang. Lang Cert ¶16. Even if one considered this admissible evidence of the sale and assignment of assets from Washington Mutual Bank, there is nothing to prove that the alleged account was readily identified as being part of the transaction or that the account was even part of Washington Mutual Bank's assets at the time the sale and assignment occurred.

JPMorgan Chase & Co. to Chase Bank USA, NA

Plaintiff makes a point of attempting to prove that Chase Bank USA, NA is a "subsidiary" of JPMorgan Chase & Co., whatever that means. Lang Cert ¶15. Even if Mr. Lang's certification were competent and admissible proof of that relationship, they are not one and the same.

As separate entities, any transfer or assignment of assets from one to the other must be accomplished properly. Here, Plaintiff provides no evidence that the account ever left JPMorgan Chase & Co. or how it ever arrived at Chase Bank USA, N.A.

Chase Bank USA, NA to Main Street Acquisition Corp.

This assignment is purportedly demonstrated by the "Bill of Sale" attached as Exhibit B to the Whipple Supp. Cert. As already mentioned, there is no evidence that the account was ever assigned to Chase Bank USA, NA. Indeed, the Bill of Sale expressly disclaims Chase Bank USA's "representation of or warranty of title." Moreover, the "Bill of Sale" does not identify any specific accounts being transferred. Rather, those accounts are identified in the "Final Data File." Plaintiff did not submit that File; thus, this assignment is invalid because the account cannot be "readily identified."

Main Street Acquisition Corp. to Plaintiff

This assignment is purportedly evidenced the "Bill of Sale and Assignment" attached as Exhibit A to the Whipple Supp. Cert. As with the "Bill of Sale," the document makes no reference to any specific accounts being transferred. Instead, it says that the "Purchased Accounts" being assigned are "described in the [Purchase

and Sale Agreement] and contained in the Sale File." As neither document is attached, this assignment is similarly invalid because the account cannot be "readily identified."

POINT IV: Plaintiff Must Provide Proof Of Assignment.

In the face of its own evidentiary shortcomings with respect to assignment, Plaintiff argues that it needs merely to testify "I own the account." This ludicrous argument relies on an absurd misreading of caselaw.

In his motion brief, Defendant cited *Sullivan v. Visconti*, 68 N.J.L. 543, 550 (Sup Ct. 1902) *aff'd* 69 N.J.L. 452 (E.& A. 1903). "[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." [Emphasis added].

Plaintiff shamelessly dismisses *Sullivan* by arguing that the difference between "aver" and "prove" is "a distinction without merit." See Plaintiff's Opposition, page 9. There is a great divide between allegations and evidence. For this reason, the "[s]ummary 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). Simply put, Plaintiff must prove assignment and not merely allege assignment.

Plaintiff again twists *Sullivan* by asserting that Plaintiff need not submit written proof of any assignment. See Plaintiff's Opposition, pages 10-11.

Sullivan did state that a chose-in-action assignment does not have to be in any particular form and need not be in writing. However, ***proof*** of assignment

cannot ignore the assignment's form. Here, the documents submitted with the Whipple Supp. Cert. indicate at least two written assignments. As such, those assignments must be proved in the same form.

Plaintiff then dusts off *Hance's Adm'rs v. Waln,* 53 *N.J. Eq.* 660 *aff'd sub nom Waln v. Hance's Adm'rs,* 53 *N.J. Eq. 660* (E.&A. 1895). Though it provides a thought-provoking exercise in digesting the legal writing style of the era, it has no bearing on the present matter.

In that case, the administrators of Mr. Hance's estate sued Hance's daughter, Mrs. Waln, over personal property they claimed belonged to Hance but came into Mr. Waln's possession prior to Hance's death. After Hance's death, his administrators went to both the Hance homestead farm and the Waln farm to inventory Hance's property and included the personal property in question in their inventory. Neither of the Walns objected to the inclusion of the property in the inventory. Mrs. Waln entered into an agreement with the administrators wherein she would keep the property and pay the estate its appraised value.

After Mr. Waln's death, Mrs. Waln claimed that the property never belonged to Hance and, by virtue of inheriting it after her husband's death, she owed nothing to Hance's estate.

There was no dispute between the parties as to whether William Waln owned the personal property in question. Moreover, the court found that the Walns failure to object to the inclusion of the property in the administrators' inventory estopped any claims of Mr. Waln's ownership after that point in time. Thus, that decision does not aid Plaintiff.

Next, Plaintiff cites *Lubinsky v. Court of Common Pleas of Passaic County*, 15 N.J. Misc. 183 (Sup. Ct. 1937) which is equally inapposite. The case involved a claim to property following an execution and the trial court granted a directed verdict for plaintiff because all the testimony as to ownership was in plaintiff's favor. The case has nothing to with assignments and what proofs are necessary. The same is true for *Moran v. Joyce*, 125 N.J.L. 558 (Sup. Ct. 1941) aff'd, 127 N.J.L. 562 (1942).

Finally, Plaintiff argues that its possession of periodic account statements is evidence of ownership. Plaintiff cites *Bergen v. Van Liew*, 36 *N.J. Eq.* 637 (1883). Unsurprisingly, the case fails to support Plaintiff's argument. Instead, it held that physical possession of tangible, personal property is presumptive evidence of ownership – the proverbial "possession is nine tenths of the law." *Id.* at 639. Here, a chose-in-action is an intangible claim to payment which, unlike a promissory note, is not certificated or memorialized by a tangible instrument. Possession of copies of alleged account statements simply does not prove ownership.

POINT V: Defendant is Entitled to Summary Judgment As A Matter of Law.

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).

As already noted in Defendant's brief, summary judgment 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*).

The fact that Defendant never propounded discovery requests on Plaintiff is irrelevant. By signing the Complaint, Plaintiff's counsel certified unequivocally that the complaint's "factual allegations have evidentiary support." *R.* 1:4-8(a)(3). In effect, this Motion puts Plaintiff to its proofs requiring it to come forward with that evidentiary support.

Counsel could have suggested – but did not – that discovery might be needed by asserting that "specifically identified allegations … are either likely to have evidentiary support or they will be withdrawn or corrected if reasonable opportunity for further investigation or discovery indicates insufficient evidentiary support." *Id.* As a result, Plaintiff should not be heard to argue that it needs discovery before it is prepared to demonstrate evidentiary support for its allegations.

Plaintiff's issues with Defendant's responses to discovery are both unfounded and irrelevant. The time to raise such issues and seek relief was during the discovery period. Plaintiff chose not to do so and should not be heard as to any complaints regarding Defendant's discovery responses.

The courts have held 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 at 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***." *Celotex Corp. v. Catrett*, 477 *U.S.* 317, 322-23 (1986). (Emphasis added).

Plaintiff's failure of proof concerning assignment entitles Defendant to summary judgment as a matter of law.

CONCLUSION

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

Philip D. Stern & Associates, LLC
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s/Philip D. Stern
PHILIP D. STERN

Dated: July 11, 2012