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IN THE COURT OF COMMON PLEAS
OF LEBANON COUNTY, PENNSYLVANIA

CIVIL ACTION – LAW

CACH, LLC,
Plaintiff,

v.

PAUL G. ABBOTT,
Defendant

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No. 2008-00409

ORDER OF COURT

AND NOW, to wit, this 15th day of March, 2010, upon careful consideration of Defendant's Preliminary Objections to Plaintiff's Second Amended Complaint, the legal memoranda submitted by the parties in support of their respective positions and the record of this case, we hereby direct as follows, consistent with the attached Opinion:

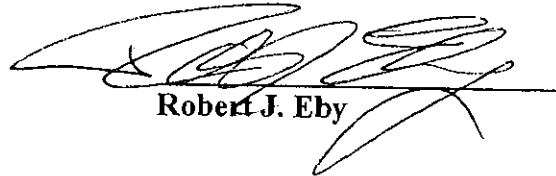
I. Defendant's Preliminary Objection asserting that the Second Amended Complaint does not conform to law or to rule of court as a result of Plaintiff's failure to attach to the Second Amended Complaint a copy of the agreement upon which the claim is based is sustained. Plaintiff is afforded twenty (20) days from the date of this Order to file a Third Amended Complaint that includes a copy of the agreement or the material part of the agreement, or, if a copy of the agreement is not available, a statement that the agreement is not accessible to Plaintiff, the reason it is not so accessible and the substance of the agreement.

II. Defendant's Preliminary Objection asserting that the Second Amended Complaint does not conform to law or to rule of court as a result of Plaintiff's failure to attach a copy of the document establishing its ownership of the account in

question is sustained. Plaintiff is afforded twenty (20) days from the date of this Order to file a Third Amended Complaint setting forth its standing to bring this cause of action as a real party in interest with the requisite degree of specificity.

III. Defendant's Preliminary Objection asserting that the Second Amended Complaint does not conform to law or to rule of court as a result of Plaintiff's failure to attach monthly statements of account to the Second Amended Complaint is overruled.

BY THE COURT:

 , S.J.
Robert J. Eby

RJE/jw

pc: Kimberly F. Scian, Esq. (Regular Mail at Apothaker & Associates, P.C., 520 Fellowship Road C306, Mount Laurel, NJ 08054)
John R. Abbott, Esq. (Regular Mail at 1231 Lancaster Avenue, Suite B, Berwyn, PA 19312)

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**CACH, LLC,
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v.

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No. 2008-00409

APPEARANCES:

**KIMBERLY F. SCIAN, ESQUIRE
Apothaker & Associates, P.C.**

For Plaintiff

JOHN R. ABBOTT, ESQUIRE

For Defendant

OPINION BY EBY, S.J., MARCH 15, 2010:

Before the Court are Defendant's Preliminary Objections and New Matter to Plaintiff's Second Amended Complaint. On February 28, 2008, Plaintiff filed a Complaint against Defendant alleging that Defendant failed to make payments as required for goods and services provided by Plaintiff. Plaintiff sought judgment in the principal amount of \$4,101.57, attorney's fees and costs. On March 24, 2008, Defendant filed an Answer to the Complaint.

On May 7, 2008, Plaintiff filed a Motion to Amend its Complaint, which was granted by the Court on May 8, 2008. Plaintiff was afforded twenty (20) days in which to file an Amended Complaint, and an Amended Complaint subsequently was lodged. In the Amended Complaint, Plaintiff alleged that Defendant failed to make payments as due on a balance incurred by Defendant using a credit card issued by Providian Bank.

Plaintiff alleged that it purchased the credit card account in question. On August 17,

2009, Defendant filed Preliminary Objections and New Matter to Plaintiff's Amended Complaint. On August 27, 2009, Plaintiff filed its Reply to Defendant's New Matter.

On September 3, 2009, Plaintiff filed a Second Amended Complaint asserting essentially the same facts purported in the Amended Complaint but now seeking judgment in the principal amount of \$4,380.53, attorney's fees and costs. On November 5, 2009, Defendant filed the Preliminary Objections and New Matter currently before the Court.¹ Defendant lodges the following Preliminary Objections to Plaintiff's Complaint:

I. The Second Amended Complaint does not conform to law or to rule of court because Plaintiff failed to attach to its Second Amended Complaint a copy of the writing upon which its claim is based;

II. The Second Amended Complaint does not conform to law or to rule of court because Plaintiff failed to attach to the Second Amended Complaint a copy of the document establishing its ownership of the account in question; and

III. The Second Amended Complaint does not conform to law or to rule of court because Plaintiff failed to attach all monthly statements of account to the Second Amended Complaint.

Defendant's Preliminary Objections subsequently were listed for disposition through Argument Court. Defendant timely submitted legal memoranda in support of his Preliminary Objections. On December 30, 2009, Plaintiff lodged untimely legal memoranda in opposition to Defendant's Preliminary Objections. Defendant has not moved to strike Plaintiff's legal memoranda on the basis of its untimeliness. In fact, Defendant filed a Reply to Plaintiff's legal memoranda in which Defendant does not assert or mention the untimeliness of Plaintiff's legal memoranda. Therefore, we will

¹ In the New Matter filed with Defendant's Preliminary Objections, Defendant avers that Plaintiff's claim is barred by the statute of limitations and the doctrine of laches. These are defenses which appropriately should be pled as New Matter in an Answer to a Complaint, not included with Preliminary Objections to a pleading. As such, we take no action with regard to the New Matter that was lodged by Defendant with the Preliminary Objections that are currently before the Court.

consider Plaintiff's legal memoranda in ruling upon Defendant's Preliminary Objections despite its untimeliness.

In his first Preliminary Objection, Defendant argues that Plaintiff's claim is based upon the breach of an agreement governing the use of a credit card that was issued to Defendant. Defendant argues that Plaintiff was required pursuant to Pa.R.C.P. Rule 1019(i) to attach a copy of the agreement upon which its claim is based to its pleading. Since Plaintiff failed to do so, Defendant argues that Plaintiff's Second Amended Complaint fails to conform to law or to rule of court.

Any party to a pleading may file preliminary objections on the basis that the pleading fails to conform to law or to rule of court. Pa.R.C.P. Rule 1028(a)(2). Pa.R.C.P. Rule 1019 sets forth the required contents of a pleading. Rule 1019 provides, in relevant part:

“(h) When any claim or defense is based upon an agreement, the pleading shall state specifically if the agreement is oral or written.

(i) When any claim or defense is based upon a writing, the pleader shall attach a copy of the writing, or the material part thereof, but if the writing or copy is not accessible to the pleader, it is sufficient so to state, together with the reason, and to set forth the substance in writing.”

In situations in which a pleading does not specify whether the agreement upon which a claim is based was written or oral, the inference is that the agreement was oral.

Denlinger, Inc., v. Agresta, 714 A.2d 1048, 1051 (Pa.Super. 1998), citing *Harvey Probbler, Inc., v. Kauffman*, 124 A.2d 699, 700 (Pa.Super. 1956).

In this case, Plaintiff avers in the Second Amended Complaint that a credit card was issued to Defendant and that Defendant failed to make all payments as required. Plaintiff fails to indicate whether the credit card was issued pursuant to a written or an

oral agreement. However, in its legal memoranda, Plaintiff avers that its claim is based upon a breach of a written agreement. Accordingly, Plaintiff was required pursuant to Rule 1019(i) to attach a copy of the agreement or the material part thereof to the Complaint, or if the agreement was not available, to state that the agreement was not available, the reason why it was not available and the substance of the agreement.

Plaintiff argues that it has complied with the requirements of Rule 1019(i) by attaching a copy of the application for the credit card completed by Defendant to the Second Amended Complaint. The application appended to the Second Amended Complaint, titled "Personal Invitation," contains an area for the provision of personal information by the applicant, as well as a signature line for the applicant. Above the personal information area and signature line, the following language appears, "I have read and agree to the Terms and Conditions on the reverse side of the letter." However, the reverse side of the application attached to the Second Amended Complaint is blank. The application, while relevant to establishing acceptance of the offer lodged, is not the writing upon which the alleged breach is based. In fact, the application itself references the terms and conditions of the agreement on the reverse side of the application, and Plaintiff failed to attach the writing setting forth those terms and conditions to the Second Amended Complaint.

Plaintiff also attached four (4) statements of account to the Second Amended Complaint, none of which set forth the terms governing the issuance and the use of the credit card. Accordingly, the fact that Plaintiff appended a copy of the credit card application and four (4) statements of account does not relieve Plaintiff of the obligation to attach the agreement or the material part of the agreement to its pleading, or in the

absence of the written agreement, to state in its pleading that the agreement is unavailable, the reason the agreement is unavailable and the substance of the agreement. For these reasons, we will sustain Defendant's Preliminary Objection on this point and will afford Plaintiff twenty (20) days in which to file a Third Amended Complaint remedying this defect if it is able to do so.

In its next Preliminary Objection, Defendant argues that the Second Amended Complaint fails to conform to law or to rule of court, as Plaintiff has not included with its Second Amended Complaint a copy of the document establishing its ownership of the account that originally was issued by Providian Bank. Defendant argues that the establishment of Plaintiff's ownership of the account is especially important because other parties have asserted ownership of the account in question.

Pa.R.C.P. Rule 2002(a) provides that all actions shall be prosecuted by and in the name of the real party in interest. To qualify as a real party in interest, a party must not merely have an interest in the result of the action but must be in such command of the action that the party legally is entitled to give a complete acquittal or discharge to the other party upon performance. *Dep't of Transp., v. Pennsylvania Power and Light Co.*, 383 A.2d 1314, 1316 (Pa.Cmwlth. 1978), citing *Spires v. Hanover Fire Ins. Co.*, 70 A.2d 828, 831 (Pa. 1950). An assignee may sue as the real party in interest in an action, but the assignee first must trace in its pleading the derivation of its cause of action from the assignor. *Remit Corp., v. Miller*, 5 Pa. D. & C. 5th 43, 47 (Pa.Com.Pl. 2008), citing *Brown v. Esposito*, 42 A.2d 93, 94 (Pa.Super. 1945). In *Brown, supra*, the Pennsylvania Superior Court explained the necessity of a plaintiff specifically establishing in its

pleading the derivation of any cause of action from a former real party in interest as follows:

“Under Rule 2002, ...the original owner of the cause of action is not named; the assignee becomes the legal plaintiff and he is pleading his own interest in the cause of action. It is obvious, therefore, that the real party in interest must show in his pleading how he acquired that interest. ‘The pleading of the plaintiff must show affirmatively that he is the real party in interest.’ The derivation of the title to the cause of action must be alleged affirmatively as a fact, so that the defendant may require proof of the assignment if he so desires. ‘This subdivision [Rule 2002(a)] also requires the plaintiff to trace in his statement of claim the derivation of his cause of action from his assignor or indemnitee, while the defendant, in his affidavit of defense, may challenge the plaintiff’s claim that he is the present owner of the cause of action.’ When suit is brought against the defendant by a stranger to his contract, he is entitled to proof that the plaintiff is the owner of the claim against him. This protection must be afforded the defendant. Otherwise, the defendant might find himself subjected to the same liability to the original owner of the cause of action, in the event that there was no actual assignment.

“In the instant case, the plaintiffs failed to allege the assignment in any pleading. They were not required to set out this assignment verbatim or attach a copy of the assignment as an exhibit to their pleadings. It would have been sufficient if they had stated the fact and date of the assignment and the parties thereto. But here the fact of the assignment appears nowhere on the record. The only suggestion of the assignment appears in the ex-parte affidavit of the plaintiffs in the clause, ‘...said lease having been lawfully and duly assigned to the plaintiff.’ This is not an affirmative allegation of fact in a pleading, susceptible of proof. In our opinion, it is insufficient upon which to base the plaintiffs’ claim against defendant.”

Brown at 94 (citation omitted).

In this case, Plaintiff avers that Defendant applied for and received a credit card issued by Providian Bank. The statement of account attached to the Second Amended Complaint dated January 25, 2005 purports to be issued by Providian Processing Svcs. The other three (3) statements of account attached to the Second Amended Complaint purport to be issued by Washington Mutual Card Services. Plaintiff avers in its Second

Amended Complaint that it purchased this account and presently owns and holds the account. Plaintiff does not identify the party from whom it purchased the account or the date when it purchased the account. Further, Plaintiff failed to append any documents to the Second Amended Complaint tracing the manner in which it became the real party in interest on a credit card account that initially was issued by Provident Bank and later was being collected by Washington Mutual Card Services. While Plaintiff is not required to state the terms of any account purchase or assignment verbatim or even to attach copies of the documents evidencing the same to its pleading, Plaintiff must specify in its pleading the manner in which it became the real party in interest to recover on a credit card account in which documents attached to the pleading establish the interest of other parties in the account, including a statement as to each assignment and/or purchase, the dates any such purchases and/or assignments occurred and the parties to the purchases and/or assignments. For these reasons, we will sustain Defendant's Preliminary Objection on this point and will afford Plaintiff twenty (20) days in which to file a Third Amended Complaint that remedies the above-stated defect if it is able to do so.

In Defendant's final Preliminary Objection, Defendant argues that the Second Amended Complaint does not comply with Rule 1019(i) because Plaintiff failed to attach all of the monthly statements of account to the Second Amended Complaint. As explained above, the writing creating the legal obligation upon which Plaintiff's claim is based is the written agreement setting forth the terms and the conditions of the use of the credit card. Plaintiff will be required to attach a copy of that agreement or the material part of that agreement to its Third Amended Complaint or to state that the agreement is unavailable, the reason for its unavailability and the material part of the agreement.

Account statements reflecting all activity on the account in question cannot be said to be the documents that are alleged to have created the legal obligation that Plaintiff alleges Defendant breached. Documents that are not the basis of an action need not be attached to a pleading, even though the documents may be introduced as part of the evidence at trial. *Rosenthal & Rosenthal, Inc., v. Fairy Mills, Inc.*, 18 Pa. D. & C. 3d 364, 366 (Pa.Com.Pl. 1981), citing *Teitelbaum and Teitelbaum v. Miller*, 53 Schuyl. 131 (Pa.Com.Pl. 1957). While undoubtedly of evidentiary value as to the underlying facts and circumstances of Plaintiff's claim, monthly statements of account do not constitute the legal foundation for the action. Since the monthly account statements have relevant evidentiary value, Defendant certainly may obtain copies of the monthly statements of account through the use of discovery. However, because the monthly statements of account do not form the basis for this action, Plaintiff was not required by Rule 1019(i) to attach them to its pleading.

Moreover, Defendant is the individual who is alleged to have utilized the credit card to incur a balance and to have failed to make all payments as due pursuant to the parties' agreement. In the event that Defendant does not agree with the allegations stated by Plaintiff or that the balance stated by Plaintiff is correct, Defendant should allege the balance he believes to be due, if any, in light of the charges and the payments he made upon the account. Defendant has, or should have, independent, personal knowledge of whether he utilized the credit card alleged, made all of the payments as required and incurred the balance alleged, and whether the balance averred by Plaintiff is accurate so as to be able to respond intelligently to the allegations set forth in the pleading. For these reasons, Plaintiff's failure to attach all monthly statements of account associated the

credit card in question to its Second Amended Complaint does not violate the requirements of Rule 1019(i). We will overrule Defendant's Preliminary Objection on this point.