

IN THE COURT OF COMMON PLEAS
OF LEBANON COUNTY, PENNSYLVANIA

CIVIL ACTION – LAW

CACV OF COLORADO, LLC,	:	
Plaintiff,	:	
	:	
v.	:	No. 2006-01750
	:	
MARY GANGAWAY,	:	
Defendant	:	

ORDER OF COURT

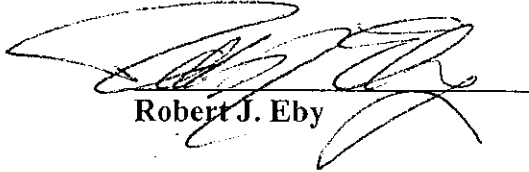
AND NOW, to wit, this 1st day of February, 2010, upon careful consideration of Defendant’s Preliminary Objections to Plaintiff’s Complaint, Plaintiff’s Response thereto, the legal memoranda submitted by the parties in support of their respective positions and the record of this case, we hereby direct as follows, consistent with the attached Opinion:

1. Defendant’s Preliminary Objection challenging the legal sufficiency of the Complaint on the basis that an attached statement of account reflects that no balance is due and owing on the debt alleged is overruled.

2. Defendant’s Preliminary Objection challenging the legal sufficiency of the Complaint on the basis that the Complaint fails to establish that Plaintiff is a real party in interest with standing to bring this action is sustained. Plaintiff is afforded twenty (20) days from the date of this Order to file an Amended Complaint establishing its standing to bring this cause of action as a real party in interest.

3. Defendant's Preliminary Objection challenging the specificity of Plaintiff's Complaint is overruled.

BY THE COURT:

 , S.J.
Robert J. Eby

RJE/jw

pc: Benjamin R. Bibler, Esq. (Regular Mail at Weltman, Weinberg and Reis Co., L.P.A., 1400 Koppers Building, 436 Seventh Avenue, Pittsburgh, PA 15219)
Loren A. Schrum, Esq. (Regular Mail at Reilly, Wolfson, Sheffey, Schrum and Lundberg, 1601 Cornwall Road, Lebanon, PA 17042)

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Plaintiff,	:	
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v.	:	No. 2006-01750
	:	
MARY GANGAWAY,	:	
Defendant	:	

APPEARANCES:

BENJAMIN R. BIBLER, ESQUIRE **For Plaintiff**
Weltman, Weinberg and Reis Co., L.P.A.

LOREN A. SCHRUM, ESQUIRE **For Defendant**
Reilly, Wolfson, Sheffey, Schrum and Lundberg

OPINION BY EBY, S.J., FEBRUARY 1, 2010:

Before the Court are Defendant's Preliminary Objections to Plaintiff's Complaint. On September 21, 2006, Plaintiff filed a Complaint against Defendant alleging that Plaintiff is the owner of a credit card account opened by Defendant, Defendant failed to make all payments when due on the balance incurred using the credit card and the balance due and owing on the account as of July 6, 2005 was \$7,175.03. Plaintiff seeks judgment in that principal amount plus finance charges and costs.

On October 11, 2006, Defendant filed Preliminary Objections to Plaintiff's Complaint. Defendant raised the following Preliminary Objections to Plaintiff's Complaint:

- I. Plaintiff's Complaint fails to state a cause of action upon which relief may be granted, as the statement of account attached to the Complaint fails to reflect that any balance is due and owing; and

- II. Plaintiff's Complaint fails to state a cause of action upon which relief may be

granted, as there is no indication in the Complaint that Plaintiff has standing to bring this cause of action.

On December 4, 2006, Plaintiff filed its Response to Defendant's Preliminary Objections. However, neither party filed a praecipe for disposition of Defendant's Preliminary Objections, nor does it appear that any disposition of Defendant's Preliminary Objections ever occurred or that an amended complaint ever was filed.

On April 29, 2009, Plaintiff filed a Motion for Summary Judgment. That Motion was listed for disposition through Argument Court. On August 5, 2009, Defendant filed a Motion to Strike Plaintiff's Motion for Summary Judgment, arguing that the pleadings had not yet closed, thereby rendering Plaintiff's Motion for Summary Judgment premature. On August 28, 2009, this Court issued an Order and Opinion granting Defendant's Motion to Strike Plaintiff's Motion for Summary Judgment. Further, we directed that Defendant's Preliminary Objections be listed for disposition through the next available term of Argument Court.

Accordingly, Defendant's Preliminary Objections subsequently were listed for disposition. In the legal memoranda submitted by Defendant in support of her Preliminary Objections, Defendant additionally objected to the Complaint on the basis that it was insufficiently specific. Although challenging the fact that the statement of account attached to the Complaint failed to reflect that any balance was due and owing in her Preliminary Objections pleading, Defendant did not challenge the specificity of the Complaint in her Preliminary Objections pleading. However, in Plaintiff's legal memoranda submitted in opposition to Defendant's Preliminary Objections, Plaintiff did not object to Defendant's challenge to the specificity of the Complaint that was raised in

Defendant's legal memoranda on the ground that this challenge was not included in the Preliminary Objections pleading. Further, Plaintiff addressed the substance of Defendant's objection to the specificity of the Complaint in its legal memoranda. As such, we will consider Defendant's challenge to the specificity of the Complaint in spite of the fact that it was not raised in the actual Preliminary Objections pleading.

In Defendant's first Preliminary Objection, Defendant argues that Plaintiff's Complaint fails to state a claim upon which relief may be granted, as the statement of account attached to the Complaint reflects that no balance is due and owing on the account. Pa.R.C.P. Rule 1028(a)(4) provides that any party to a pleading may file a preliminary objection on the basis of legal insufficiency of the pleading (demurrer). A preliminary objection in the nature of a demurrer tests the legal sufficiency of the pleading. *Pennsy Supply, Inc., v. Am. Ash Recycling Corp.*, 895 A.2d 595, 599 (Pa.Super. 2006), citing *Hospodar v. Schick*, 885 A.2d 986, 988 (Pa.Super. 2005). The question presented by a demurrer is whether, on the facts averred, the law says with certainty that no recovery is possible. *Mistick, Inc., v. Northwestern Nat'l Cas. Co.*, 806 A.2d 39, 42 (Pa.Super. 2002), citing *Ham v. Sulek*, 620 A.2d 5, 9 (Pa.Super. 1993). In evaluating a demurrer, the court must accept as true all material averments of the pleading and may sustain the demurrer only if the law will not permit recovery. *Mistick, Inc.*, at 42, citing *Mellon Bank, N.A., v. Fabinyi*, 650 A.2d 895, 899 (Pa.Super. 1994). Where any doubt exists as to whether a demurrer should be sustained, it must be resolved in favor of overruling the demurrer. *Mistick, Inc.*, at 42, citing *Ham* at 9.

Plaintiff seeks to recover under a Breach of Contract theory of liability. A cause of action in Breach of Contract is established by pleading: (1) the existence of a contract,

including its essential terms; (2) a breach of a duty imposed by the contract; and (3) resultant damages. *Pennsy Supply, Inc.* at 600, citing *Corestates Bank, N.A., v. Cutillo*, 723 A.2d 1053, 1058 (Pa.Super. 1999). With her Preliminary Objection on this point, Defendant does not challenge Plaintiff's establishment of the existence of a contract, the essential terms of the contract or a breach of a duty owed pursuant to the contract. Rather, Defendant challenges whether Plaintiff has established damages resulting from the breach alleged in light of the fact that the statement of account attached to the Complaint reflects that no balance was due and owing on the account in May of 2003.

Where there is an inconsistency between averments in a complaint and documents attached thereto, the latter will prevail. *McCoy v. Home Ins. Co.*, 84 A.2d 249, 251 (Pa.Super. 1951), citing *Cohen v. Carol*, 35 A.2d 92, 93 (Pa.Super. 1943). Further, the court is not bound to accept as true any averments in a complaint that are in conflict with exhibits that are attached to the complaint. *Jenkins v. County of Schuylkill*, 658 A.2d 380, 383 (Pa.Super. 1995), citing *Philmar Mid-Atlantic, Inc., v. York Street Associates II*, 566 A.2d 1253, 1254 (Pa.Super. 1989).

In this case, Plaintiff avers in its Complaint that the balance due and owing on the account was \$7,175.03 as of July 6, 2005. (Complaint at paragraph 4). Plaintiff goes on to reference a statement of account attached to its Complaint as exhibit 1. The attached statement of account from May of 2003 indicates that a credit was given for a charge-off adjustment in the amount of \$4,264.97 and reflects the balance due and owing on that date was \$0.00. While at first blush it may appear that the averments of the Complaint and the contents of the attached statement of account are in conflict, the attached statement of account and the Complaint reference different periods of time. The

statement of account is dated May of 2003, while the Complaint alleges a balance of \$7,175.03 as of July 6, 2005. The fact that there may not have been a balance owed by Defendant in May of 2003 does not mean that no balance was owed in July of 2005. While Plaintiff's reasoning for attaching to its Complaint a statement of account from May of 2003 reflecting no balance due and owing resulting from a "charge-off" is unclear, the attached statement of account is not in conflict with the averments of the Complaint, as it indicates the balance at a period of time over two (2) years earlier than the balance referenced in Plaintiff's Complaint.

Moreover, the fact that an amount may have been "charged-off" by a creditor does not mean that the debtor is no longer liable for the debt that was incurred and "charged-off." When a creditor "charges off" an account, the creditor treats an amount owed to it that originally was recorded as an asset as a loss or an expense. Black's Law Dictionary 212 (5th ed. 1979). A "charge off" allows a creditor to write off an uncollected balance due as bad debt. However, it does not relieve the debtor of the obligation to pay the debt, which is still owed to the creditor. In this case, even if the amount of \$4,264.97 was "charged off" in May of 2003, the fact that a "charge off" occurred does not relieve Defendant of the obligation to repay that debt. Rather, it merely means that Plaintiff no longer was required to count the debt owed by Defendant as an asset for accounting purposes. Accordingly, the fact that the statement of account attached to the Complaint reflects that the balance was "charged off" does not mean that no balance was left due and owing by Defendant to Plaintiff. Since the Complaint alleges a balance due and owing on July 6, 2005 in the amount of \$7,175.03 and the statement of account attached to the Complaint does not conflict with this averment, Plaintiff has

sufficiently set forth the balance due and owing as a result of the breach alleged in its Complaint. We will overrule Defendant's Preliminary Objection on this point.

In Defendant's next Preliminary Objection, Defendant argues that Plaintiff's Complaint is legally insufficient because there is no averment in the Complaint that confers standing upon Plaintiff to bring the action against Defendant. Defendant argues that the statement of account and credit card agreement attached to the Complaint indicate that the credit card account was issued from MBNA America, not Plaintiff. Defendant submits that Plaintiff failed to attach any documentation of an assignment of the interest of MBNA America to Plaintiff and failed to aver any such assignment of MBNA America's interest in the account to Plaintiff. For these reasons, Defendant argues that Plaintiff's Complaint fails to state a cause of action upon which relief may be granted.

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 this case, Plaintiff avers in its Complaint that it is the owner of the credit card

account upon which it is seeking to recover. However, all documentation attached to the Complaint reflects that the credit card account was issued by MBNA America. None of the attached documents reflect that Plaintiff has any interest in the account. Moreover, Plaintiff fails to set forth in its Complaint any averments detailing how it acquired any interest in the account or the manner in which it became entitled to recover on any balance owed on the account. Since Plaintiff's Complaint fails to establish that Plaintiff is a real party in interest with standing to recover upon the debt alleged to be due, Plaintiff's Complaint fails to state a cause of action upon which relief may be granted.

We note that Plaintiff attached to its Brief in Opposition to Defendant's Preliminary Objections an affidavit wherein the affiant affirms that the account was sold to Plaintiff on May 6, 2003, Plaintiff has full authority to perform any acts necessary for collection of the balance due and that Bank of America, formerly MBNA America, has no further interest in this matter. The affidavit setting forth Plaintiff's interest to recover upon the account was not attached to Plaintiff's Complaint. The Court of Common Pleas of Pike County previously addressed the propriety of attaching a document that should be attached to a complaint to a document other than the complaint. In *Goldman v. Schlanger*, 49 Pa. D. & C. 2d 225 (Pa.Com.Pl. 1970), defendant filed a preliminary objection to plaintiff's complaint because plaintiff failed to attach to its complaint a copy of the document upon which plaintiff's cause of action was based. Plaintiff attempted to remedy this defect by attaching a copy of the document to its response to defendant's preliminary objection. The court held that plaintiff's attachment of the document to its response to the preliminary objection was not a proper remedy by which to correct the defect, explaining:

“This was not a proper method to correct the pleading defect. Pa.R.C.P. 1019(h) requires that a pleading state specifically whether any claim or defense set forth therein is in writing. If so, the pleader is required to attach a copy thereof to the pleading. The complaint is not in conformity with this rule. The proper procedure is to file an amended pleading....”

Goldman at 230-231. Further, factual averments in a brief that is filed either in support of or in opposition to a pleading that does not itself contain the factual averments cannot properly be considered by the trial court in ruling upon the merits of the pleading. *Scopel v. Donegal Mut. Ins. Co.*, 698 A.2d 602, 606 (Pa.Super. 1997), citing *Erie Indem. Co. v. Coal Operators Cas. Co.*, 272 A.2d 465, 466-467 (Pa. 1971).

In this case, Plaintiff failed to attach the affidavit detailing the manner in which it acquired an interest to recover upon the account to its Complaint. Inclusion of the affidavit as an attachment to its Brief in Opposition to Defendant’s Preliminary Objection was not a proper remedy for its failure either to aver the manner in which it acquired its interest to recover the debt alleged or to attach documents that would establish the same. Therefore, the fact that Plaintiff appended an affidavit to its Brief explaining its standing to bring this cause of action fails to remedy Plaintiff’s failure to establish the same in its Complaint. Since the Complaint and the documents attached thereto fail to establish that Plaintiff is a real party in interest with standing to collect upon any balance alleged to be due on the account, we agree with Defendant that Plaintiff’s Complaint fails to state a cause of action upon which relief may be granted. For these reasons, we will sustain Defendant’s Preliminary Objection on this point and will afford Plaintiff twenty (20) days to file an Amended Complaint that remedies this defect.

Defendant last argues that Plaintiff’s Complaint is insufficiently specific, as it simply alleges that Defendant owes a balance but fails to state why or how the debt came

into being. Further, Defendant argues that the attached documents fail to establish that any money is due and owing.

Rule 1028(a)(3) provides that any party to a pleading may file a preliminary objection on the basis of insufficient specificity of the pleading. Pa.R.C.P. Rule 1019(a) requires that the material facts upon which a cause of action or defense is based must be stated in a concise and summary form. In determining a challenge to the specificity of a complaint, the court must consider whether the complaint is sufficiently clear to inform the defendant with accuracy and completeness of the specific basis upon which recovery is sought so that the defendant may know without question the grounds upon which to make his or her defense. *Rambo v. Greene*, 906 A.2d 1232, 1236 (Pa.Super. 2006), citing *Ammlung v. City of Chester*, 302 A.2d 491, 498 n. 36 (Pa.Super. 1973).

In its Complaint, Plaintiff alleges that Defendant requested that a credit card account be opened with Plaintiff and made use of the credit card to incur a balance of \$7,175.03 as of July 6, 2005. Plaintiff further alleges that Defendant failed to pay the balance despite demand from Plaintiff to do so and avers damages in the amount of \$7,175.03, finance charges and costs. Plaintiff attached a copy of the credit card agreement and amendments thereto by MBNA America.¹

A review of these averments reveals that the Complaint states how the debt came into being, as it alleges that Plaintiff used the credit card to incur a balance of \$7,175.03 as of July 6, 2005. It is true that the Complaint does not allege the specific purchases or

¹ As stated above, Plaintiff will be required to file an Amended Complaint setting forth its standing as a real party in interest to recover upon the debt alleged. For purposes of addressing Defendant's challenge to the specificity of the allegations regarding the debt alleged, we assume that Plaintiff has established its standing as a real party in interest.

cash advances made that comprise the balance alleged to be due. However, a complaint need not cite evidence, only those facts that are necessary for the defendant to prepare a defense. *Dep't of Transp., v. Bethlehem Steel Corp.*, 380 A.2d 1308, 1313 (Pa.Cmwlt. 1977). The specific charges comprising the debt alleged are not essential to enable Defendant to prepare her defense. This is especially so in light of the fact that Defendant is the individual who is alleged to have utilized the credit card to incur the 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 made by Plaintiff or that the balance stated by Plaintiff in its Complaint is correct, Defendant should allege the balance she believes to be due, if any, in light of the charges and payments she made upon the account. Defendant has, or should have, independent, personal knowledge of whether she utilized the credit card, made all 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 of the Complaint. Moreover, account statements detailing all of the charges and the payments made upon the account are of an evidentiary nature and may be obtained by Defendant through discovery. Since the Complaint apprises Defendant of the manner in which the balance was incurred so that Defendant is able to prepare her defense, the allegations of the Complaint are sufficiently specific to withstand Defendant's Preliminary Objection. Accordingly, we will overrule Defendant's Preliminary Objection on this point.

We will enter an appropriate Order.