

IN THE COURT OF COMMON PLEAS OF FAYETTE COUNTY, PENNSYLVANIA

CIVIL ACTION

CAVALRY PORTFOLIO SERVICES, :
LLC, as Assignee of Cavalry :
Investments, LLC, as Assignee of :
ECAST Settlement Corp., as :
Assignee of Fleet, :

Plaintiff, :

Vs. :

JEFFREY K. ROWAN and KIMBERLY :
J. ROWAN, :

Defendants. : NO. 1664 OF 2006 G.D.

FILED
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LANCE WINTERHALTER
PROTHONOTARY

OPINION and ORDER

WARMAN, J.

Presently before this Court for disposition are Preliminary Objections filed by the Defendants to the Plaintiff's Amended Complaint.

Defendants object pursuant to Pa.R.C.P. 1028(a)(2) that the pleading fails to conform to law or rule of court. Defendants contend that the plaintiff failed to attach a copy of the writings upon which the claim is based in violation of Pa.R.C.P. 1019(i). Defendants object pursuant to Pa.R.C.P. 1028(a)(3) that the Amended Complaint is lacking in specificity. Defendants also object pursuant to Pa.R.C.P. 1028(a)(5) that defendant as a foreign corporation lacks the capacity to sue.

BACKGROUND

This action is based upon an alleged credit card debt incurred by defendants. Plaintiff alleges that it is an assignee of the original creditor. According to the averments of the Complaint, plaintiff's predecessor, Fleet, issued to defendants a credit card under the terms of a written agreement in which plaintiff's predecessor agreed to extend to the defendants' use of its credit facilities in return for defendants' paying plaintiff's predecessor for the use of its credit facilities. Plaintiff avers that the defendants "received and accepted goods and merchandise and/or accepted services or cash advances" through the use of the credit card. It further avers "that all credits to which the defendant were entitled have been applied and there remains a balance due in the amount of \$16,221.73." Plaintiff also claims interest at the rate of 9.9% from June 30, 2003 and attorney's fees.

Plaintiff alleges that it is an assignee of the original creditor which it refers to as "Fleet." By reference to the caption it appears that plaintiff's claim against the defendants is based upon an assignment of the debt from Cavalry Investments, LLC, which in turn was an assignee of ECAST Settlement Corp., which in turn was an assignee of Fleet.

Plaintiff has not attached to the complaint any contract or agreement between Fleet and the defendants. The only attachment to the complaint is a two-page document which is not referenced in the Complaint

and is obviously incomplete. This document bears reference only to First North American National Bank an entity which appears to have no connection to this action.

DISCUSSION

In ruling on preliminary objections, this Court must accept as true all well-pleaded facts and all inferences reasonably deductible therefrom. Dorfman v. Pennsylvania Social Services Union Local 668 of the Service Employees International Union, 752 A.2d 933 (Pa.Cmwlth. 2000). However, we need not accept as true conclusions of law, unwarranted inferences from facts, argumentative allegations or expressions of opinion. Id. Turner v. Pennsylvania Board of Probation and Parole, 749 A.2d 1018 (Pa.Cmwlth. 2000).

Defendants in their brief in support of preliminary objections contend that plaintiff's failure to plead the various assignments and failure to attach copies thereof to their complaint is fatal to their successful recovery.

Pennsylvania Rules of Civil Procedure, Rule 1019 sets forth the requirements which must be adhered to when filing a Complaint. Pennsylvania remains a fact pleading, as opposed to notice pleading, jurisdiction. The complaint must contain the material facts on which the cause of action is based stated in concise and summary form. Pa.R.C.P. 1019(a). Material facts sufficient to meet the requirement of the rule, are

those that are essential to show the liability that is sought to be enforced. A complaint must do more than give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests. It should formulate the issues by fully summarizing the material facts. Baker v. Rangos, 229 Pa. Super. 333, 324 A.2d 498 (1974).

Pa.R.C.P. 1019(i) provides that when a claim is based upon a writing the pleader shall attach a copy of the writing, or the material part thereof, to its pleading. The Rule also provides that if the writing is not accessible to the pleader, it is sufficient to so state, together with the reason why it is not accessible; however, the pleader must also set forth the substance of the document in writing.

Each and every assignment of a debt is essential to the establishment of a claim asserted against the debtor. The plaintiff must demonstrate that it has standing to pursue the claim asserted in this action. Pa.R.C.P. 2002 provides that, with certain exceptions not applicable to this case, all actions shall be prosecuted by and in the name of the real party in interest. According to the observations of Goodrich-Amram, "Because the Rule [Pa.R.C.P. 2002] setting forth the requirement that actions be prosecuted by real parties in interest requires the facts of an assignment to be pleaded in a complaint, such an assignment is an essential part of the plaintiff's case and becomes a document upon which the plaintiff relies;

thus, this subdivision of the Rule [Pa.R.C.P. 1019(i)] requires its attachment as an exhibit." Goodrich-Amram 2d, Section 1019(i):1. The Superior Court, in an action involving the alleged assignment of a credit card debt, found that the plaintiffs failure to attach the writings establishing its right to judgment was fatal to the claims set forth in the complaint. Atlantic Credit and Finance v. Giuliani, 829 A.2d 340 (Pa. Super. 2003).

Plaintiff alleges in its Complaint that a copy of the assignment is not currently available as it is in the archives of the plaintiff. The court is not satisfied that plaintiff's possession of a document in its own archives renders it "not accessible" to plaintiff thereby excusing the requirement that the document be attached to the complaint as required by Rule 1901 (i). In any event, since plaintiff has failed to set forth in the complaint the substance or material parts of the assignment, we are satisfied that it has failed to establish that it has any rights as a creditor against the defendants.

Defendants also object that plaintiff failed to attach to the complaint any writing evidencing any contract between the alleged original creditor, Fleet, and defendants as required by Pa.R.C.P. 1901. As previously noted, there is attached to the complaint a two-page document. This document is not referenced or explained in the complaint. It is clear from a review of the document that is not complete, i.e., it is only a portion of a more voluminous credit card agreement. The only party referred to in the

document is Firth North American Bank, an entity which is not referred to in the complaint. It is clear to the Court that the defendants cannot respond to this unidentified, unexplained document.

Defendants also object that the complaint is lacking in specificity in that it fails to include any information as to the date or time period when the credit card was used, the total charges accumulated on the account, the interest due, the manner of calculation of interest, credits applied, or calculation of attorneys fees. We note that no statement of account was attached to the plaintiff's complaint. Pa.R.C.P. 1901(f) provides that "Averments of time, place and items of special damage shall be specifically stated." The complaint merely alleges that "All credits to which the defendant are entitled have been applied and there remains a balance due of \$16, 221.73." This allegation comes nowhere near to satisfying the requirements of Rule 1901.

We agree with the holding of Justice McEwen in Atlantic Credit and Finance v. Giuliani, supra. wherein he found that appellant's preliminary objections based upon failure to produce a cardholder agreement, statement of account and evidence of the assignment were clearly meritorious.

Defendants last Preliminary Objection requests that the Plaintiff's Amended Complaint be dismissed based on lack of capacity to sue. In its

Amended Complaint, Plaintiff alleges that it is a foreign corporation and is exempt from registering with the Secretary of the Commonwealth.

15 Pa.C.S.A. §4121(a) of the Foreign Business Corporation Law provides that "a foreign business corporation, before doing business in this Commonwealth, shall procure a certificate of authority to do so from the Department of State, in the manner provided in this subchapter. Defendants assert that pursuant to 15 Pa.C.S.A. §4141, the Plaintiff, as a foreign corporation, is prohibited from pursuing the present action against the Defendants since the Plaintiff has not complied with the requirements of the statute requiring registration with the Department of State. Section 4141 of the Foreign Business Corporation Law provides, in pertinent part, as follows:

(a) Right to bring actions or proceedings suspended. - A nonqualified foreign business corporation doing business in this Commonwealth within the meaning of Subchapter (B) (relating to qualification) shall not be permitted to maintain any action or proceeding in any court of this Commonwealth until the corporation has obtained a certificate of authority. ...

The question before the Court is whether the Plaintiff's actions in maintaining the present lawsuit against the Defendants constitutes "doing business" within the Commonwealth of Pennsylvania. Not all activities engaged in by a foreign corporation constitute doing business in this Commonwealth. 15 Pa.C.S. §4122 sets forth a non-exclusive list of activities

that, when engaged in by a foreign corporation, do not constitute "doing business" and therefore do not require the procuring of a certificate of authority. 15 Pa.C.S. §4122 provides, in pertinent part:

Section 4122. Excluded Activities

(a) General Rule. – Without excluding other activities that may not constitute doing business in this Commonwealth, a foreign business corporation shall not be considered to be doing business in this Commonwealth for the purposes of this subchapter by reason of carrying on in this Commonwealth any one or more of the following acts:

...

(8) Securing or collecting debts or enforcing any rights in property securing them.

15 Pa.C.S.A. §4122(a). The Committee Comment to this statute indicates as follows:

This section does not attempt to formulate an inclusive definition of what constitutes the transaction of business. Rather, the concept is defined in a negative fashion by subsection (a), which states that certain activities do not constitute the transaction of business.

...

A corporation is not "doing business" solely because it resorts to the courts of this Commonwealth to recover an indebtedness, enforce an obligation, recover possession of personal property, obtain the appointment of a receiver, intervene in a pending proceeding, bring a petition to compel arbitration, file an appeal bond, or pursue appellate remedies. ...

The present action was filed by the Plaintiff for the purpose of

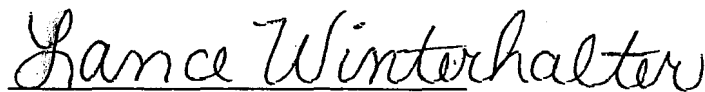
collecting a credit card debt allegedly owed by the Defendants. In maintaining the present action the Plaintiff is not "doing business" within the Commonwealth of Pennsylvania and therefore was not required to procure a certificate of authority for doing business from the, Department of State prior to commencing suit. Accordingly, Defendants' objection based on lack of capacity to sue is OVERRULED.

BY THE COURT:



RALPH C. WARMAN, JUDGE

ATTEST:



PROTHONOTARY

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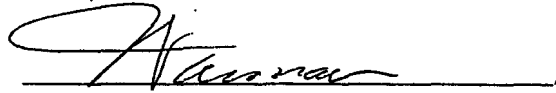
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ORDER

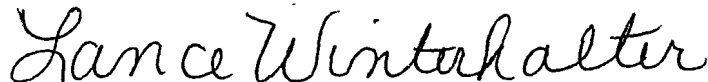
AND NOW, this 4th day of February, 2008, upon consideration of the Preliminary Objections filed by Defendants, following argument thereon, consideration of Defendants' brief (plaintiff failed to appear for argument and failed to submit its brief) and upon further consideration of the foregoing Opinion, it is hereby ORDERED and DECREED that the Preliminary Objections based on lack of capacity of sue is OVERRULED; Defendants' other Preliminary Objections are SUSTAINED. The Complaint filed by Plaintiff is

STRICKEN with leave to file an Amended Complaint within twenty (20) days of the date of this Order.

BY THE COURT:


_____, J.
RALPH C. WARMAN, JUDGE

ATTEST:



PROTHONOTARY