

IN THE COURT OF COMMON PLEAS OF SCHUYLKILL COUNTY
CIVIL ACTION-LAW

LVNV FUNDING, LLC,
Plaintiff

vs.

 JOHNS,
Defendant

: NO. S-2095-10
:
:
:
:
:
:
:

2010 NOV -5 P 1:16
SCHUYLKILL COUNTY
17901

Michael F. Ratchford, Esq. - for the Plaintiff
Gregory T. Artim, Esq. - for the Defendant

OPINION

Domalakes, J.

The matter before the Court is the Defendant's (hereinafter 'Johns') Preliminary Objections To Plaintiff's Complaint. The Preliminary Objections are in the nature of a Demurrer for Legal Insufficiency and Motion for a More Specific Pleading. Johns has filed a Memorandum of Law in Support of Preliminary Objections To Plaintiff's Complaint. The Plaintiff, LVNV Funding, LLC. (hereinafter 'LVNV') has filed a response to and a written argument in opposition to the Preliminary Objections.

The allegations of the Complaint are summarized by the Court as immediately hereafter set forth. LVNV is a Delaware corporation with a principal place of business in Greenville, South Carolina. Johns is an adult individual residing in Schuylkill County, Pennsylvania. At relevant times, LVNV was engaged in the business of debt purchase and collection. Johns

made application for and received a credit card issued to him by Citibank with the account number of [REDACTED]. This credit card account was sold by Citibank to LVNV for valuable consideration, and all rights pursuant to the account were assigned to LVNV. The use of the Citibank credit card was subject to the terms and conditions of a Cardmember Agreement, a copy of which was sent to Johns accompanied by the credit card. A copy of the Cardmember Agreement had been requested from Citibank, and would be provided upon receipt. (The Court would note parenthetically that a copy of a Cardmember Agreement is attached to the Complaint.) Johns used the Citibank credit card with the aforesaid account number to make purchases, cash advances, and/or balance transfers. The use of the card in this way constituted acceptance of the terms and conditions and subjects Johns to those terms and conditions. Johns was mailed monthly account statements relative to his use of the credit card. Johns defaulted under the terms of the Cardmember Agreement by failing and refusing to make monthly payments on the account as they became due. Johns last made payment on January 13, 2008. The principal amount due and owing when the debt was charged-off was \$15,331.87, and according to the account agreement, any unpaid balance is subject to an interest contract rate of 6%. The total amount due and owing with interest is \$17,217.06.

Johns, as noted, filed Preliminary Objections to the Complaint. Those are summarized by the Court as immediately hereafter set forth. Johns notes that LVNV filed the Complaint

against him requesting damages in the amount of \$17,217.06. LVNV has failed to attach any documentation regarding the credit account in violation of Pa.R.C.P. 1019. Johns alleges that this claim is based upon a signed written contract but that LVNV has not attached a copy of the contract to the Complaint. Johns further alleges that LVNV has failed to attach to the Complaint any writing that he has agreed to the terms and conditions of the agreement between Johns and Citibank, the original creditor, also in violation of Pa.R.C.P. 1019. The terms and conditions attached to the Complaint are unsigned and are dated 1999. LVNV has failed to state as to when the account was started, so he has no way of knowing whether this is a copy of the terms and conditions applicable to the account. Also, the terms and conditions has a stamp on the first page indicating 'Unifund July 18, 2002'. Upon information and belief, the foregoing document was used many times on many cases for many other debt buyers. LVNV has failed to attach to its Complaint a complete written assignment from Citibank to it confirming that Johns' account was included in the lot sale(s) in violation of Pa.R.C.P. 1019. The Complaint has claims for money allegedly owed but fails to specifically account for the purported sums due and for the amounts in dispute and payments made, again in violation of Pa.R.C.P. 1019. LVNV has failed to attach any monthly account statements for the alleged account. The Complaint fails to set forth the dates and types of notices that were given to Johns concerning his alleged default prior to commencement of suit and fails to set forth the date of the

alleged default on the account. Finally, Johns notes that the Complaint is not verified by a party, in violation of the Pennsylvania Rules of Civil Procedure.

LVNV, in its response, argues that its Complaint does satisfy the appropriate procedural rules and that it has set forth with particularity the allegations against Johns and attached the cardmember agreement which is the writing that governs in this case. LVNV argues further that it has set forth with particularity the amount owed, the date the account became delinquent, its right to collect the debt, and attached the cardmember agreement which is the writing under Pa.R.C.P.1019(i) that governs in this case.

Both parties have cited case law both appellate and from Pennsylvania Trial Courts in support of their respective positions. The Court deems it appropriate that it first be guided by an appellate decision in our Commonwealth which comes closest to the issue at hand. In the case of *Atlantic Credit and Finance, Inc. v. Giuliana*, 829 A.2d 340 (Pa.Super.), the Court wrote:

The second preliminary objection of appellants was that appellee had failed to attach to the complaint any writing evidencing any contract between GM and appellants as required by Pa.R.C.P.No. 1019, despite the averment that it had purchased the contractual rights of GM Card and despite appellee's claims that it was entitled to counsel fees and the exorbitant interest rates set forth in the terms of the GM Card contract.

Rule 1019(i) of the Pennsylvania Rules of Civil Procedure requires that where a 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.
Pa.R.C.P.No. 1019(i) (emphasis supplied).

We find that the failure to attach the writings which assertedly establish appellee's right to a judgment against appellants in the amount of \$17,496.27, based on an alleged debt it allegedly purchased for substantially less than \$9,644.66, is fatal to the claims set forth in appellee's complaint. Thus, the preliminary objection of appellants based on failure to produce a cardholder agreement and statement of account, as well as evidence of the assignment, establishes a meritorious defense.

The *Atlantic* Court remanded the above case to the trial court with instructions that the motion to strike complaint should be granted without prejudice to the plaintiff to file an amended complaint.

Considering the above case, this Court is impressed with a decision of the Dauphin County Court, which applied and was guided by the *Atlantic* decision when confronted with a similar issue as here. In the case of *Atlantic Credit v. Wylie*, 124 Dau. C.R. 163 (2010), the trial court ordered the creditor, on a similar fact pattern to the case at bar, to amend its Complaint to sufficiently allege its breach of contract action, including doing the following:

1. attaching the credit card contract or agreement, relevant terms and conditions of the purported agreement and any other relevant documents that would verify the existence of an alleged credit card contract;
2. sufficiently alleging the relevant dates during which the contract and any applicable terms and conditions applied to Defendant's contract;
3. setting forth the date(s) of Defendant's alleged default prior to commencement of suit;

4. including a current Statement of Account, itemizing principal balance, interest and/or any other alleged charges, including copies of monthly statements issued to Defendant throughout the entirety of the alleged agreement.

This Court does not deem it appropriate in this case to grant the Demurrer of Johns. The Complaint does have attached to it a card member agreement which becomes operable when the debtor uses the card. It does not have to be signed and does meet the requirements as noted above. However, there is not attached to the Complaint any evidence of an alleged assignment nor any statements of monthly accounts to the debtor. The debtor is not able to defend against charges he has allegedly made on the account and has not paid, without having such evidence. The foregoing decisions appear to be clear that these statements of account are part of the writings that should be attached to a complaint. The Court would further agree that the verification of the Complaint is defective in that Pa.R.C.P. 1024(c) provides in relevant part:

The verification shall be made by one or more of the parties filing the pleading unless all the parties (1) lack sufficient knowledge or information, or (2) are outside the jurisdiction of the court and the verification of none of them can be obtained within the time allowed for filing of the pleading. In such cases, the verification may be made by any person having sufficient knowledge or information and belief and shall set forth the source of the person's information as to matters not stated upon his or her own knowledge and the reason why the verification is not made by a party.

The Preliminary Objection here is well taken. The verification signed by counsel does not comply with the Rule. Although an attorney may verify a complaint, the Rule, in its entirety, must

be followed, and an attorney may verify only in those cases in which the conditions enumerated in the Rule are present. *Monroe Contract Corp. v. Harrison Square, Inc.*, 405 A.2d 954 (Pa.Super. 1979).

Accordingly, the Court enters the following:

IN THE COURT OF COMMON PLEAS OF SCHUYLKILL COUNTY
CIVIL ACTION-LAW

CLERK OF COURT
SCHUYLKILL COUNTY
17901
NOV - 5 P 1:16

LVNV FUNDING, LLC,
Plaintiff

: NO. S-2095-10
:
:
:
:
:
:

vs.

██████████ JOHNS,
Defendant

Michael F. Ratchford, Esq. - for the Plaintiff
Gregory T. Artim, Esq. - for the Defendant

ORDER

AND NOW, this 5th day of November, 2010, the Defendant's Preliminary Objection in the nature of a Demurrer is OVERRULED and DISMISSED. The Defendant's Preliminary Objection in the nature of a Motion to Require the Plaintiff To File an Amended Complaint due to legally insufficient original Complaint is SUSTAINED, and the Motion is GRANTED. IT IS ORDERED THAT on or before the 29th day of November, 2010, the Plaintiff shall file an Amended Complaint fully complying with the pleading requirements of the Pennsylvania Rules of Civil Procedure. The Plaintiff shall:

1. attach a copy of the credit card contract or agreement, relevant terms and conditions of the purported agreement

- and any other relevant documents that would confirm the existence of an alleged credit card agreement;
2. sufficiently allege the relevant dates during which the contract and any applicable terms and conditions applied to Defendant's contract;
 3. set forth the dates(s) of Defendant's alleged default and what notice, if any, was given to Defendant concerning Defendant's alleged default prior to commencement of suit;
 4. include a current Statement of Account, itemizing principal balance, interest and/or charges, including copies of monthly statements issued to Defendant over the entirety of the alleged agreement;
 5. have a signed verification attached to the complaint fully in compliance with the Pennsylvania Rules of Civil Procedure.

If the Plaintiff fails to abide by this Order, or fails to explain its inability to do so, the Court will entertain a Motion To Dismiss the action with prejudice.

BY THE COURT,

Donaldson, J. J.