IN THE COUNTY COURT, SEVENTH JUDICIAL CIRCUIT,
IN AND FOR VOLUSIA COUNTY, FLORIDA.

**CASE NO. 2006-10917-CODL**
**DIVISION: 71**

LVNV FUNDING LLC as Assignee
of Household Bank (SB) NA.,

Plaintiff,

vs.

GINEVRA MOEHRLIN,

Defendant. /

**ORDER DENYING PLAINTIFF'S FINAL JUDGMENT AND CLOSING THE COURT'S FILE**

**THIS CAUSE** came before the Court on Plaintiff's request for Final Judgment and, after a review of the file and being fully advised in the premises, the court finds as follows:

The court cannot grant a final judgment for damages without proof of the debt. The Plaintiff filed a complaint for Breach of Contract, Account stated and Money Lent on May 25, 2006. The Defendant was served on June 2, 2006 and failed to appear at the pre-trial conference. As a result, a Default was entered on June 30, 2006. Plaintiff now seeks a Default Final Judgment for damages. A defaulted party has the right to rely upon the court to issue a judgment against them that conforms to the evidence. However, without evidence, the court has nothing with which to base a damage judgment. The court is charged with the responsibility to do justice. Given the effects of a judgment, the court has a mandate to enter a fair and just judgment in all cases. A court is not the forum for one party to gain an unfair advantage over the other simply because one party did not respond to a summons. The court will enter a judgment based on relief supported by the pleadings or substantive law applicable to them. This court finds the proof of damages lacking in the pleadings and attachments.

**FACTS AND CONCLUSIONS OF LAW**

With respect to the **default** judgment for failure to answer, the Rules of Civil Procedure provide for entry of **default** by either the clerk or the court. However, if it is necessary, the court may request an accounting to enable the court to enter judgment or to effectuate it. The court may receive affidavits, make references, or conduct hearings, as it deems necessary.

In Trawick's book on Practice and Procedure, he elaborated on the effect of a default judgment:

> A default admits liability as claimed in the pleading by the party seeking affirmative relief against the party in default. It operates as an admission of the truth of the well-pleaded allegations of the pleading, **except those concerning damages** [emphasis added]. It does not admit facts not pleaded, not properly pleaded or conclusions of law. Fair inferences will be made from the pleadings, but forced inferences will not. **The party seeking affirmative relief may not be**

> **granted relief that is not supported by the pleadings or by substantive law applicable to the pleadings** [emphasis added]. A party in default may rely on these limitations.

In *Samuels v King Motor Co. of Ft. Lauderdale*, 782 So.2d 489 (Fla. 4th DCA 2001), the Fourth District Court held that to state a cause of action, a complaint must allege sufficient ultimate facts to show that the pleader is entitled to relief. "Whether a complaint is sufficient to state a cause of action is an issue of law".

With reference to Plaintiff's count for Breach of Contract, in order to sustain the burden of proof for a Breach of Contract the Plaintiff must attach a copy of the contract to the complaint. Fla. Rules of Civ. Pro. 1.130, states in part-

> (a) *Instruments Attached.*. --All bonds, notes, bills of exchange, contracts, accounts, or documents upon which action may be brought or defense made, or a copy thereof or a copy of the portions thereof material to the pleadings, shall be incorporated in or attached to the pleading.

In the instant case, the Plaintiff failed to attach a copy of the contract or any document that would establish a contractual relationship between the parties. Plaintiff failed to attach an itemized statement of charges or a statement. Not only did the Plaintiff fail to attach a bill, statement or contact to the complaint, the Plaintiff has not attached ANYTHING to its affidavit or the complaint that has the Defendant's name or signature on it. In, *Samuel v. King Motors of Ft. Lauderdale* 782 So.2d 489 (Fla. 4th DCA 2001), where a complaint is based on a written instrument, the complaint does not state a cause of action until the instrument or an adequate portion thereof is attached to or incorporated in the complaint.

Additionally, with reference to the affidavit of proof provided by the Plaintiff in support of it's claim for damages, the court notes that the affidavit is prepared by the Plaintiff employee. As the Plaintiff is not the original creditor, the records they keep are hearsay when the documents upon which the affiant relied is not admitted into evidence or attached to the complaint or affidavit. (See, *Johnson v. State*, 691 So.2d 43 (Fla. 2nd DCA 1997), testimony (in person or by affidavit) of a witness on a business record is inadmissible hearsay if the record has not been admitted into evidence). Additionally, the Florida Supreme court in *Bolin v. State*, 736 So. 2d 1160 (Fla. 1999), held that the business records exception of the hearsay rule cannot be applied when the business record is not in evidence. Consequently, the affidavit is nothing more than inadmissible, contradictory hearsay. (Also see, *Hawkins v. State* 884 So. 2d 496 (Fla. 2DCA 2004).

Next, the court considers the Plaintiff's cause of action for Account Stated. The Plaintiff must establish a debtor/creditor relationship with the Defendant and established a course of business dealings between the parties. Additionally, it must be established that the Defendant was sent a statement and that the Defendant expressly or impliedly consented to the statement by failing to object. Consequently, there needs to be a copy of a statement and proof of mailing to establish a presumption of no objection. Then, the relationship between the parties and the usual course of business between them becomes a question of law. (See, *Martyn v. Arnold*, 18 So.2d 791 (Fla. 1985). For an account stated to exist, there

must be agreement between the parties that a certain balance is correct and due and an express or implicit promise to pay this balance. *Merrill-Stevens Dry Dock Co. v Corniche Exp.*, 400 So.2d 1286 (Fla. 3d DCA 1981). Also see, *Carpenter Contractors Of America, Inc. and R & D Thiel, Inc. v. Fastener Corp. Of America, Inc.*, 611 So.2d 564 (Fla. 4th DCA 1992). Here there was no evidence that the parties agreed on any balance due and owing.

Finally, without any documentation of a contractual relationship or of an account, the Plaintiff has not proven that the Defendant was ever lent any money. Therefore, it is

**ORDERED and ADJUDGED** that the Plaintiff has failed in its proof. Motion for Final Judgment is hereby **DENIED** and the case dismissed without prejudice. The Clerk is hereby instructed to close the court's file.

**DONE AND ORDERED** in chambers at DeLand, Volusia County, Florida, this _____ day of August, 2006.

SHIRLEY A. GREEN
County Court Judge

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