

IN THE COURT OF COMMON PLEAS OF VENANGO COUNTY, PENNSYLVANIA

PORTFOLIO RECOVERY ASSOCIATES, LLC :
 Plaintiff, :
 :
 v. :
 :
 JOYCE A. GILBERT, :
 Defendant. :

CV No 213-2012

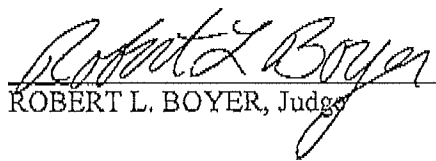
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 COMMON PLEAS COURT
 VENANGO COUNTY, PA
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 PROTHONOTARY AND
 CLERK OF COURTS

ORDER OF COURT

AND NOW, this 10 day of September, 2013, the court has before it the Preliminary Objections filed by the Defendant in the above-captioned matter. In accordance with the reasoning set forth in our Opinion of Court of the same date, Defendant's Preliminary Objections are, hereby, SUSTAINED in part, and DENIED in part.

Plaintiff is hereby afforded sixty (60) days from the date of this Order in which to file a Second Amended Complaint with this court or we shall dismiss with prejudice.

BY THE COURT


 ROBERT L. BOYER, Judge

cc: David Hull, Esq. 814-437-2774
 Robert N. Polas, Jr., Esq. 757-518-0860
 Prothonotary (P. Knupp)
 ✓ E. Rettinger KH

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OPINION OF COURT

AND NOW, this 10th day of September, 2013, the court has before it the Preliminary Objections filed by the Defendant in the above-captioned matter. The court heard argument from the parties on June 26, 2013. The court has considered the arguments of the parties, the briefs filed, together with the appropriate authorities, and now makes the following disposition of Defendant’s Preliminary Objections.

Procedural History

The Plaintiff, Portfolio Recovery Associates, LLC (“Portfolio”), instituted the present action by filing the initial Complaint on February 21, 2012. Portfolio seeks to recover the outstanding balance due on a delinquent credit card account allegedly taken out by Defendant, Joyce A. Gilbert (“Gilbert”). On April 12, 2012, Gilbert filed her Preliminary Objections. Subsequently, the parties agreed that Gilbert’s Preliminary Objections be sustained and in our Order of Court dated May 30, 2012, we granted Portfolio ninety (90) days in which to file an Amended Complaint. Portfolio filed its Amended Complaint on November 15, 2012. On May 10, 2013, Gilbert filed her

Preliminary Objections to the Amended Complaint.¹ On May 29, 2013, Gilbert praeciped this court for argument on her Preliminary Objections, which was then held on June 26, 2013.

Factual Background

The facts in this case are straightforward. Portfolio, a debt buyer and successor in interest to the original creditor, Capital One Bank, N.A. ("Capital One"),² is suing Gilbert to collect on an alleged credit card debt owed in the amount of \$3,379.57. Portfolio alleges that on or about October 18, 2004, Gilbert applied for, accepted, and used the credit card issued by Capital One for various purchases. Portfolio further alleges that periodically, under the terms of the credit card agreement, Gilbert was provided, without her objection, with account statements which showed credits and debits on the account, with a last payment being made on or about September 4, 2010. See *Amended Complaint*, Exhibit A. Portfolio's Amended Complaint further alleges accurate records of all debits and credits to the Account were maintained by Capital One and were then assigned to Portfolio.³ *Id.* ("Bill of Sale"). Moreover, in its attachment denoted as "Exhibit A," the Amended Complaint provides a Capital One Customer Agreement which defines various terms and their meanings. These terms, per Portfolio, were provided to Gilbert at the time she entered into the card agreement with Capital One.

On May 10, 2012, Gilbert filed Preliminary Objections asserting the following: (1) the Amended Complaint is legally insufficient, in that Portfolio failed to attach the writing evidencing the actual assignment of the account from Capital One to Portfolio;

¹ Gilbert also filed a brief in support of her Preliminary Objections on May 29, 2013.

² Capital One, a national banking association, is engaged in various types of banking businesses, including consumer lending through the issuance of credit cards.

³ Portfolio attaches copies of statements from April 15, 2010 through April 14, 2011. See *Amended Complaint*, Exhibit A.

(2) the Amended Complaint contains an improper verification; (3) the Amended Complaint is legally insufficient as it improperly pleads an Account Stated claim for damages without showing either an express or implied agreement that the Defendant owes the alleged amount; and (4) the Amended Complaint contains a claim for Unjust Enrichment which fails as a matter of law as such a claim does not apply when the relationship between the parties is founded upon a written agreement.

Analysis

Preliminary objections are essentially a challenge to the legal sufficiency of the complaint. *Guistra Development Co. v. Lee*, 631 A.2d 199 (Pa. 1993); *Clark v. Beard*, 918 A.2d 155 (Pa. Cmmw. Ct. 2007); Pa.R.C.P. 1028. In ruling on preliminary objections, the court must accept as true all well-pleaded facts in the complaint, as well as reasonable inferences therefrom. *Meier v. Maleski*, 648 A.2d 595 (Pa. 1994); *Torres v. Beard*, 997 A.2d 1242, 1245 (Pa. Cmmw. Ct. 2010). A preliminary objection in the nature of a demurrer requires the court to resolve the issues solely on the basis of the pleadings; no testimony or other evidence outside of the complaint may be considered to dispose of the legal issues presented by the demurrer. *Weiley v. Albert Einstein Medical Center*, 51 A.3d 202 (Pa. Super. Ct. 2012). Furthermore, a preliminary objection in the nature of a demurrer should be granted where the contested pleading is legally insufficient to support relief. *Cooper v. Church of St. Benedict*, 954 A.2d 1216, 1218 (Pa. Super. Ct. 2008).

Defendant's Preliminary Objection to Plaintiff's Failure to Attach Writings

The court will first address the question of whether Portfolio's failure to attach a copy of the alleged assignment from Capital One to Portfolio to its Amended Complaint

runs athwart of Pennsylvania Rules of Civil Procedure. In addition, Gilbert contends that the failure of Portfolio to attach to the Amended Complaint the so-called "Schumer Box" disclosures concerning interest rates, fees, and finance charges in the credit card agreement allegedly entered into between the parties also violates our rules of civil procedure.

Pennsylvania Rules of Civil Procedure require that when a pleading is based upon a writing that pleading shall specifically state if the agreement is oral or written. See Pa.R.C.P. 1019(h). When the agreement is written, such must be attached to the pleading. Pa.R.C.P. 1019(i). The overarching rationale for R. 1019 is to afford the adverse party the opportunity to know the material facts such that the party can prepare his case. See, *Landau v. Western National Bank*, 282 A.2d 335 (Pa. 1971); *Atlantic Credit and Finance v. Giulana*, 829 A.2d 340, 344-45 (Pa. Super. Ct. 2003). This court has previously stated that "[w]here the Plaintiff's cause of action includes an assignment of the Defendant's account, documents establishing a chain of title must be attached to the Complaint." *Portfolio Recovery Associates, LLC v. Brightbill*, Civ. No. 1607-2008, 7 (Venango County Ct. Cm. Pl. June 10, 2009).

In the case *sub judice*, Gilbert argues that while Portfolio has attached an Affidavit and a Bill of Sale, both of which reference an assignment, the party failed to attach a copy of the actual assignment upon which Portfolio asserts its right to sue on this account. Portfolio rebuts this contention stating that the Affidavit signed by their records custodian together with the Bill of Sale establishes its right as an assignee of Capital One

accounts to sue for the alleged delinquent account.⁴ Portfolio further asserts that Gilbert's account was one of those assigned to Portfolio as evidenced by the attached data load which, at argument, counsel for Portfolio termed a "screen capture" of the electronic file that showed Gilbert's information, various account information, as well as the balance owed. Taken together, the Affidavit, Bill of Sale and the screen capture, it is contended, adequately evidences that Gilbert's account was assigned to Portfolio, thus establishing compliance with Pa.R.C.P. 1019(h) and (i).

While we agree with counsel for Portfolio that the Bill of Sale evidences that an assignment was made from Capital One to Portfolio, we do not see evidence that the Sale File identified as 20110611PS53CP.SLDFLE1.TXT contained Gilbert's account.⁵ We are aware there is a screen capture of the Gilbert's account information, but we cannot see from the pleadings or attached exhibits that Gilbert's account was one of those included within that Sale File.

We now address the "Schumer Box" disclosures.⁶ We note that while Portfolio's pleadings attach a Capital One Customer Agreement which lays out and defines certain terms, we do not see any evidence of the "Schumer Box" disclosures as mandated under 12 C.F.R. § 226.5a, which provides that a party be informed of the interest rates, fees and finance charges inherent in the credit card agreement. These disclosures have been deemed a material part of the credit card agreement by our sister courts of common pleas

⁴ The Bill of Sale, included as an attachment to Portfolio's Amended Complaint, seems to be part of a larger document entitled "Forward Flow Receivable Sale Agreement" dated June 30, 2010, which was not included in the Amended Complaint.

⁵ The Bill of Sale, attached to the Amended Complaint, evidenced that Portfolio was assigned all the accounts within a certain Sale File identified as 20110611PS53CP.SLDFLE1.TXT pursuant to a Forward Flow Receivable Sale Agreement dated June 30, 2010.

⁶ The "Schumer Box" disclosures, found at Section 226.5a of Title 12 of the Code of Federal Regulations, also known as Regulation Z of the Truth in Lending Act, provides that written disclosures regarding interest rates, finance charges, and other fees be disclosed to consumers. These disclosures are to be set forth in tabular format and given to the consumer at the time he/she applies for a credit card.

under the rationale that such disclosures establish “the agreed-upon contract terms for the interest rates and fees.” *Unifund CCR Partners v. Vo*, April Term, 2008 No. 3966 (Phil. Ct. Cm. Pl., February 17, 2009); *Worldwide Asset Purchasing, LLC v. Stern*, 153 P.L.J. 111 (2004) (stating the complaint must include inter alia dates and amounts of interest charges that permit a party to calculate how the total amount of damages was arrived at). It is likely the “Schumer Box” disclosures are on the reverse side of the Capital One Platinum Invitation letter as it states at the bottom left corner of the application that “Important Disclosures” regarding “rate, fee, and other cost information” are located there but such is mere conjecture at this point for we cannot divine that which is not included in the pleadings.

Thus, Gilbert’s Preliminary Objections under Pa.R.C.P. 1019(h) and (i) as to the alleged assignment of her account and the non-inclusion of the “Schumer Box” disclosures are, hereby SUSTAINED.

***Defendant’s Preliminary Objection to Plaintiff’s Failure
to Attach Proper Verification***

Pennsylvania Rules of Civil Procedure 1024 states that all pleadings setting forth new allegations be verified by the pleading parties. See Pa.R.C.P. 1024(a) and (c). There are two exceptions to this rule when all the parties: (1) lack sufficient knowledge or information or (2) are outside the jurisdiction of the court and the verification of the pleading cannot be obtained within the required time for filing the pleading. See Pa.R.C.P. 1024(c)(1), (2). While the insistence upon a properly verified complaint under Pa.R.C.P. 1024 may seem technical, our superior court has stated no apology need be made for that. *Rupel v. Bluestein*, 421 A.2d 406, 414 (Pa. Super. Ct. 1980). The rules are clear and conformity to them easily satisfied. *Id.*

In the instant case, the verification to Portfolio's Amended Complaint is signed by Nicole J. Moore, identified as the Plaintiff's record custodian. At argument, Plaintiff's counsel stated that it was part of Ms. Moore's job to review the documents for the Plaintiff and to sign off on the accounts verifying their accuracy for debt collection purposes. While this may be the case, we noted to counsel that the rules make clear and our case law has held that when actions are filed by or against a corporation, the verification needs to be done by an officer of that corporation, such as the president, vice-president or treasurer. *See, Giulana*, 829 A.2d at 344-45. Where, as here, the verification is done by one who is not identified to be an officer of the corporation or an explanation made as to why the Amended Complaint could not be verified by an officer of the Plaintiff, we are constrained to agree with the Defendant that Ms. Moore's verification does not meet the requirements under R. 1024. Therefore, the Preliminary Objections as to the deficient verification shall be SUSTAINED.

*Defendant's Preliminary Objection to Plaintiff's Account
Stated Claim as being Legally Insufficient*

Our supreme court in *David v. Veitscher Magnesitwerke Actien Gesellschaft*, 35 A.2d 346, 349 (Pa. 1944), has previously defined an account stated as:

[A]n agreement to, or acquiescence in, the correctness of the account, so that in proving the account stated, it is not necessary to show the nature of the original transaction, or indebtedness, or to set forth the items entering into the account.

Id. (quoting *South Side Trust Co. v. Washington T. P. Co.*, 97 A. 450, 451 (Pa. 1916))

The Allegheny County Court of Common Pleas explained an account stated in this way:

An account stated has been defined as an account in writing, examined and expressly or impliedly accepted by both parties thereto, as distinguished from a simple claim or a mere summary

of accounts To produce an account stated, the account must be rendered, and the other party must accept, agree to, or acquiesce in the correctness of the account, under such circumstances as to import a promise of payment on the one side and acceptance on the other. In short, there must be a meeting of the minds, and there can be no account stated where the account rendered meets with general objection. Acceptance or acquiescence need not be manifested expressly, but may be implied from the circumstances. Where the debtor has had an opportunity to scrutinize the account, his silence is prima facie evidence of acquiescence in an account stated, but the rule is otherwise if the debtor makes a timely objection. *Something more than mere acquiescence by failing to take exception to a series of statements of account received in the mail is required to create an account stated.*

Target Nat'l Bank v. Samanez, AR07-009777, 2007 Pa. Dist. & Cnty Dec. (CP. Allegheny Cty., Dec. 19, 2007)(emphasis added).

In the case *sub judice*, Gilbert argues that the account stated claim is impermissible due to (1) unequal bargaining between the parties, and (2) the fact that the account stated requires a liquidated debt or fixed sum. Quite simply, we do not agree. Here, Gilbert did make charges and payments on this account through the September 2010 statement date, as evidenced by a past payment notation in the amount of \$52.00, on billing statement to be paid by the due date of October 11, 2010. See *Amended Complaint*, Exhibit A. To contend, as Gilbert does, that there was an unequal bargaining power between the parties is to dismiss the fact that she applied for, accepted, used, and made payments on this account. Clearly, the expenditures and payments made by Gilbert were more than mere acquiescence and constituted a meeting of the minds and an acceptance of the terms for she received the benefits—expenditures—that adhered in having the account. Furthermore, we note that contrary to Gilbert's argument that there is no liquidated or final "account stated," Portfolio's Amended Complaint does contain an attachment entitled "Statement of Account," which provides the charge off date, April

15, 2011, for the account and a fixed, final amount of \$3,379.57, the sum which is being sought in the case before us. See *Amended Complaint*, Exhibit A. Therefore, the Preliminary Objection as to the legal insufficiency of Portfolio's Account Stated Claim is, hereby, DENIED.

Defendant's Preliminary Objection to Plaintiff's Unjust Enrichment Claim as being Legally Insufficient

The Pennsylvania Rules of Civil Procedure provide that Preliminary Objections may be filed when a complaint is insufficient in its pleadings. Pa.R.C.P. 1028(a)(4). Moreover, our superior court has stated that where preliminary objections seek to dismiss a cause of action, such should be done only in cases where "it is clear and free from doubt that the pleader will be unable to prove facts legally sufficient to establish the right to relief" *Discover Bank v. Stucka*, 33 A.3d 82, 86 (Pa. Super. Ct. 2011). Furthermore, to sustain a claim for Unjust Enrichment a party "must show that [a defendant] wrongfully secured or passively received a benefit that would be unconscionable . . . to retain." *Roman Mosaic v. Vollrath*, 313 A.2d 305, 307 (Pa. Super. Ct. 1973) (distinguished on other grounds). Where one has not done something fraudulent, misleading or improper in connection with the contract, relief cannot be had under an Unjust Enrichment claim. *Id.* Finally, we note that such a claim is "inapplicable when the relationship between the parties is based upon a written agreement or express contract." *Id.*

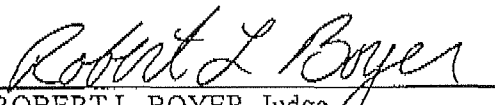
Here, Portfolio's Unjust Enrichment Claim will not survive Gilbert's Preliminary Objection for there is nothing in the record to suggest that Gilbert wrongfully obtained the credit card or used the card in a fraudulent manner thereby obtaining an unconscionable benefit. While there is evidence to suggest that payments on the card

ceased, such would be grounds for a Breach of Contract claim, not an action for Unjust Enrichment where one must needs show fraud. Finally, we note that our superior court has stated that an Unjust Enrichment claim does not apply in those situations where the parties' relationship is founded upon a written agreement. Such a situation clearly exists here as Portfolio argues that the relationship was formed via a written contract as shown by the Capital One Customer Agreement. See *Amended Complaint*, Exhibit A. Given the inapplicability of an Unjust Enrichment action where a written agreement exists and no fraud is alleged, we find the facts legally insufficient to support the Unjust Enrichment claim put forth by Portfolio. Accordingly, the Preliminary Objections as to Portfolio's Unjust Enrichment Claim are, hereby, SUSTAINED.

Conclusion

Thus, for the reasons stated above, the Court finds Defendant Gilbert's Preliminary Objections to Plaintiff Portfolio's Amended Complaint are SUSTAINED in part and DENIED in part.

BY THE COURT


ROBERT L. BOYER, Judge

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Prothonotary (P. Knupp)
✓ E. Rettinger *RM*