VELOCITY INVESTMENTS, LLC,	:	IN THE COURT OF COMMON PLEAS OF LACKAWANNA COUNTY
Plaintiff	:	CIVIL ACTION – AT LAW
vs.	:	NO. 11 CV 6995
MICHAEL J. KAHANIC,	:	
Defendant	:	

ORDER

Defendant Michael J. Kahanic ("Kahanic") has filed preliminary objections to the complaint in this credit card collection action which has been instituted against him by Plaintiff Velocity Investments, LLC ("Velocity"). Kahanic's preliminary objections concern the adequacy of the documentation and averments that are required to support a debt collection complaint against a delinquent credit card debtor. In opposing the preliminary objections, Velocity contends that less demanding pleading requirements govern debt collection suits, such as the case *sub judice*, where the claim is characterized as an "account stated" rather than a breach of contract.

When considering preliminary objections, all material facts set forth in the complaint and any exhibits attached thereto are admitted as true, as well as all reasonable

inferences which may be drawn from those facts. Toney v. Chester County Hospital, 36 A.3d 83, 99-100 (Pa. 2011). Velocity avers that a non-party entity known as HSBC "furnished consumer credit" to Kahanic via a "Household Bank Gold credit card," and as proof of that alleged credit card agreement, Velocity has attached a "copy of the application" as Exhibit A. (Docket Entry No. 3, ¶4). The attached exhibit is a "Pre-Selected Gold Acceptance Certificate" that was ostensibly signed by Kahanic on March 18, 2004. (Id., Exhibit A). On the application, Kahanic's employer is identified as "[d]isabled," and the italicized statement above his signature indicates that by signing the certificate, Kahanic "agree[s] to all the additional terms and conditions on the reverse and on the enclosed Solicitation Disclosures." (Id.). However, neither the reverse side of the certificate nor the Solicitation Disclosures has been attached to the complaint. (Id.). The complaint fails to otherwise identify any of those "terms and conditions," such as the applicable interest rate or how any late payment charges and other fees will be calculated.

Velocity alleges that "HSBC provided to [Kahanic] monthly statements for the account including the billing statement attached hereto as Exhibit B." (Id., ¶6). The attached statement is dated February 15, 2010 and reflects a "new balance" of $1,543.10. (Id.). The statement identifies the "minimum payment" due as $55.00, the "past due amount" as $314.00, the "finance charge" as $38.79, and the "current payment due" as $498.10. (Id.). The statement describes the "payment due date" as March 12, 2010. (Id.). No other billing statements are attached to the complaint.

Velocity contends that "[b]efore HSBC provided Exhibit B, [Kahanic] had for many months made payments on account of the billing statement or retained the statement without payment." (Id., ¶7). According to Velocity, Kahanic's actions in that regard

"constituted an account stated between parties for the sum of $1,543.10 which sum reflects the Exhibit **A** statement balance less credits, if any, which were applied subsequent to the date of Exhibit **A**." (Id., ¶A) (emphasis added). As noted above, Exhibit A is the "Pre-Selected Gold Acceptance Certificate" reportedly signed by Kahanic and does not contain any alleged statement balances or credits. Velocity further avers that Velocity "purchased [Kahanic's] account and is now the holder and owner of the account." (Id., ¶9). Velocity has not attached any documentation evidencing that purported assignment or sale, nor has it averred the date or manner of that alleged assignment or sale. Nevertheless, Velocity "demands judgment against [Kahanic] for the sum of $1,543.10, and the costs of this action." (Id., p. 2).

Kahanic has filed preliminary objections raising several challenges pursuant to Pa.R.C.P. 1028(a)(2) and (3) for failure to conform to law or rule of court and insufficient factual specificity in a pleading. Citing Pa.R.C.P. 1019(i) which requires the pleader to attach a copy of any writing upon which a claim is based, Kahanic seeks to strike the complaint since it does not attach the complete credit card agreement or otherwise identify the "terms and conditions" that are referenced in the "Pre-Selected Gold Acceptance Certificate" which is attached to the complaint as Exhibit A. (Docket Entry No. 5, ¶1(a)). Kahanic also contends that Velocity violated Rule 1019(i) by neglecting to attach a copy of the assignment or sale of the account to Velocity. (Id.).

In addition to the alleged deficiencies under Rule 1019(i), Kahanic also asserts that Velocity has failed to comply with Pa.R.C.P. 1019(a) and (f) by adequately alleging the elements of a cause of action against him. Kahanic submits that since the application apparently signed by Kahanic identifies MasterCard as the other contracting party, Velocity

must allege how HSBC became a creditor of Kahanic. Kahanic maintains that the complaint runs afoul of Rule 1019(a) by not stating the date of the sale or assignment of Kahanic's account to Velocity or the entity or individual from whom it was acquired or assigned. Furthermore, based upon the mandate in Pa.R.C.P. 1019(f) that averments of time, place and items of special damage be specifically stated, Kahanic argues that the complaint contravenes Rule 1019(f) by neglecting to allege the dates of the credit card charges, the amounts of those charges, and a description of the items purchased. (Id., ¶¶1(B)-4). Kahanic submits that absent that basic information, the complaint must be stricken.[1] (Id., ¶¶4-5).

Velocity contends that Kahanic's arguments are misplaced since they relate solely to claims for breach of contract, whereas Velocity is advancing a cause of action for "account stated."[2] (Docket Entry No. 10, pp. 3-5). Relying upon Rush's Service Center, Inc. v. Genareo, 10 D. & C. 4th 445 (Lawrence Co. 1991), Velocity posits that it "is not required to itemize the account" and "need not individually set forth the items of which the account consists." (Docket Entry No. 10, p. 6 (quoting Rush's Service Center, supra, at 448)). Based upon that reasoning, Velocity avers "that the statement of account attached to the complaint as Exhibit A, absent proof that [Kahanic] objected to its correctness in a timely manner, is proof of [Velocity's] cause of action and is the only document necessary to

[1]Kahanic also challenged the validity of the verification signed by Velocity's counsel and affixed to the complaint, but that objection under Pa.R.C.P. 1024 was rendered moot by the substituted verification from Velocity's compliance manager. (Docket Entry No. 4).

[2] On the Civil Cover Sheet accompanying Velocity's complaint pursuant to Lacka. Co. R.C.P. 205.2(b), Velocity has identified this suit as a "Contract Case." (Docket Entry No. 3, p. 1).

support the account stated cause of action."[3] (Id., p. 8).

With respect to Kahanic's factual specificity challenge, Velocity responds that "the complaint sufficiently apprises [Kahanic] of the facts of its cause of action, and sets forth all of the elements needed to support the account stated." (Id.). Once again relying upon Rush's Service Center supra, Velocity argues that it is not necessary for the complaint to "specify the time and place of the original contract...or specify...the materials or supplies thereunder." (Id., p. 9 n. 5 (citing Rush's Service Center, supra.)). Following the completion of oral argument on April 26, 2012, Kahanic's preliminary objections were submitted for a decision.

(A) "ACCOUNT STATED" THEORY

Under Pennsylvania law, an "account stated" is "an account in writing, examined and accepted by both parties." Lytle, Campbell & Co., Inc. v. Somers, Fitler & Todd Co., 276 Pa. 409, 418, 120 A. 409, 412 (1923); Blue Mountain Environmental Management Corp. v. Chico's Enterprises, Inc., 190 Fed. Appx. 150, 153, 2006 WL 1949676, at * 2 (3d Cir. 2006). The gist of an account stated claim "consists of an 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." David v. Veitscher Magnesitwerke Actien Gesellschaft, 348 Pa. 335, 341-342, 35 A.2d 346, 349 (1944); EBC, Inc. v. Clark Building Systems, 2007 WL 4563518, at * 9 (W.D. Pa. 2007). With an "account stated," the "parties

[3]Velocity presumably intended to refer to Exhibit B since Exhibit A that is attached to the complaint is the "Pre-Selected Gold Acceptance Certificate" that was allegedly signed by Kahanic on March 18, 2004. (Docket Entry No. 3, Exhibit A).

agree to a consolidated statement of debt, give up their right to bring suit on any of the underlying debts, and create a duty to pay." Richburg v. Palisades Collection LLC, 247 F.R.D. 457, 465 (E.D. Pa. 2008) (citing Restatement (Second) of Contracts §282 (1981)).

A cause of action based upon "[a]n account stated is appropriate where the parties have an ongoing relationship and the substance of their conversations is averred in the complaint." Capital One Bank v. Clevenstine, 7 D. & C. 5th 153, 157 (Centre Co. 2009). An account stated "traditionally arises when two parties, who engage in a series of transactions with one another, come together to balance the credits and debits and fix upon a total amount owed," and "[t]his final tally, once assented to, becomes the 'account stated'...." Richburg, 247 F.R.D. at 464; L. R. McCoy & Co., Inc. v. Beiler, 2011 WL 925410, at * 3 n. 8 (E.D. Pa. 2011).

The hallmark of an account stated "is that both parties examine the amount and agree that the computed amount is correct." Richburg v. Palisades Collection LLC, 2007 WL 2745807, at * 2 n. 3 (E.D. Pa. 2007) (citing 29 Williston on Contracts §73:55 (4th Ed. 2007) and Restatement (Second) of Contracts §282 (1981)). *See also*, Ryon v. Andershonis, 42 D. & C. 2d 86, 88 (Schuylkill Co. 1967) ("Mutual assent to the correctness of the computation is essential to an account stated."). Acceptance of the written account may be manifested expressly or may be implied from the circumstances. Donahue v. City of Philadelphia, 157 Pa. Super. 124, 129, 41 A.2d 879, 881 (1945); Blue Mountain Environmental Management Corp., supra. A party's retention of a statement of account for an unreasonably long time, without objection, may be a manifestation of assent. Donahue, supra, at 128, 41 A.2d at 881; Blue Mountain Environmental Management Corp., supra. In

Clevenstine, supra, the court questioned the suitability of an account stated claim in modern credit card litigation and stated:

> An account stated theory may have been appropriate when credit card issuers gave cardholders fixed interest rates and charged very few fees. With the proliferation of credit cards over the past two decades, however, interest rates have varied and fees have increased in number and severity. It is unreasonable to expect the average debtor to understand the changing terms of a customer agreement such that he or she can object to any invoice received in a timely manner. For many, the first and only time they will consider what is in the "fine print" is when they fall behind on payments and find themselves in a position like the one in which defendant now finds herself.

Clevenstine, 7 D. & C. 5th at 157-58.

(B) ATTACHMENT OF WRITING UNDER Pa.R.C.P. 1019(i)

Kahanic's first objection relates to Velocity's failure to attach the entire credit card agreement, including its "terms and conditions," or the written assignment or sale of the account to Velocity. Based upon Rush's Service Center, supra, Velocity maintains that the only document which it is obligated to attach is the billing statement dated February 15, 2010 which is attached to the complaint as Exhibit B.

In Rush's Service Center, the defendant purchased diesel fuel on credit from the plaintiff during an eighteen month period and had an outstanding, unpaid balance which the plaintiff sought to collect. Defendant filed preliminary objections seeking to strike the complaint due to the lack of allegations regarding the "time and place of the contract" and an "itemization of materials and supplies sold under that contract." Rush's Service Center, 10 D. & C. 4th at 446. In disposing of the preliminary objections, the Lawrence County court distinguished between "a simple action in contract" from "a suit brought upon an account stated." Id., at 447. Citing Ryon, supra, and Fischer v. Hyland Davry Co., 56 Luz.

Leg. Reg. 255 (1966), the court reasoned that "[t]he necessary averments in a complaint based upon an account stated is that there had been a running account, that a balance remains due upon that account, that the account has been rendered unto the defendant, that the defendant has assented to the account, and a copy of said account is attached to the complaint." Id. There is no indication in Rush's Service Center that the defendant's account had been assigned or sold to the plaintiff or that the plaintiff was attempting to collect interest and late charges pursuant to any "terms and conditions" of the parties' earlier agreement.

In the ensuing two decades since Rush's Service Center, the Superior Court of Pennsylvania has addressed the type of documents that are required to be attached to pleadings, as well as the requisite specificity of the allegations to be set forth in complaints, that are filed in debt collection suits against credit cardholders. In the seminal decision in Atlantic Credit and Finance, Inc. v. Giuliana, 829 A.2d 340 (Pa. Super. 2003), *app. denied*, 577 Pa. 676, 843 A.2d 1236 (2004), the Superior Court held that in compliance with Pa.R.C.P. 1019(i), the plaintiff in a credit card collection action must attach to the complaint (1) a copy of the cardholder agreement, (2) a statement of account, and (3) evidence of the assignment of the account from the credit card issuer to the alleged assignee. Id., at 345. That tripartite pleading requirement remains the controlling standard in Pennsylvania. *See*, Discover Bank v. Stucka, 33 A.3d 82, 87 (Pa. Super. 2011); Commonwealth Financial Systems, Inc. v. Smith, 15 A.3d 492, 500-501 (Pa. Super. 2011).

Subsequent to Atlantic Credit and Finance, the trial courts in Pennsylvania have similarly interpreted Rule 1019(i) as obligating plaintiffs in credit card litigation to attach written proof of the assignment or sale of the debtor's account to the plaintiff. *See e.g.*,

Commonwealth Financial Systems v. Hartzell, 17 D. & C. 5th 176, 187 (Lawrence Co. 2010) ("Thus, the plaintiff has failed to attach the proper documents to establish that it received a valid assignment of the defendant's account, which violates Pa.R.C.P. 1019(i) and the prevailing case law precedent set forth in Atlantic Credit, Hilko Receivables [v. Haas, No. 10274 of 2009 (Lawrence Co. 2009)] and Worldwide Asset [Purchasing v. Stern, 153 Pitts. Leg. J. 111 (Alleg. Co. 2004)]."); Discover Bank v. Winfree, 11 D. & C. 5th 321, 324 (Adams Co. 2010) ("When a debt collection action is filed against a credit card holder, in order to comply with the requirements of Rule 1019, the plaintiff must attach to the complaint a copy of the cardholder agreement, a statement of account and, where applicable, the contract between the original creditor and assignee as evidence of the assignment."); Atlantic Credit & Finance, Inc. v. Spangler, 13 D. & C. 5th 339, 343 (Adams Co. 2010); ("Moreover, plaintiff's affidavit is insufficient to establish a lawful assignment between original creditor and plaintiff. In order to be lawful, assignments between creditors and collection agencies must be in writing. 18 Pa.C.S.A. §7311(a)(1). As this claim is based on an assignment, there must be some writing which in turn must be attached to the complaint."); Remit Corp. v. Miller, 5 D. & C. 5th 43, 46 (Centre Co. 2008) ("This court concurs with these holdings and determines Pa.R.C.P. 1019 requires that, in a credit card case based upon an assignment, the relevant assignments showing the chain of ownership for the account from originator to current holder must be attached to the complaint."). In addition to requiring writing proof of a valid assignment, the Lawrence County court, which also produced the Rush's Service Center holding cited by Velocity, further requires specific averments or attached documentation delineating the terms and conditions of the original credit card agreement. Hartzell, 17 D.& C. 5th at 183 ("Without

averments of the agreed upon terms, the amended complaint is clearly deficient pursuant to Pa.R.C.P. 1019(i) and the prevailing case law in similar situations to the current case."). Regardless of whether the debt collection suit is labeled as an "account stated" or breach of contract action, the plaintiff must attach the relevant writings which substantiate the elements of that cause of action.[4] *See*, Citibank (South Dakota) N.A. v. Ananiev, 13 D. & C. 5th 557, 559 (Monroe Co. 2010).

Although Velocity has attached the front cover of the "Pre-Selected Gold Acceptance Certificate" that was allegedly signed by Kahanic, it has not attached or averred "all the additional terms and conditions on the reverse" side of that certificate or those provisions which were contained "on the enclosed Solicitations Disclosures." (Docket Entry No. 3, Exhibit A). The account statement which Velocity has attached to the complaint reflects that Kahanic is being assessed interest at a rate of 29.99% per annum. (Id., Exhibit B). Since Velocity's proffered "account stated" includes interest charges at that rate, it is incumbent upon Velocity to attach the provision(s) in the cardholder agreement which authorizes the assessment of 29.99% interest. *See*, Hartzell, supra; Ananiev, supra. Thus, Velocity will be directed to file an amended complaint attaching the "terms and conditions" that were set forth on the reverse side of the "Pre-Selected Gold Acceptance Certificate" and in "the enclosed Solicitation Disclosures."

Furthermore, Velocity has not attached the written assignment or sale of Kahanic's

[4] To establish an account stated claim, "there must be a contract between the parties, that is, an express or implied promise by the debtor to the creditor." Target National Bank v. Kilbride, 10 D.& C. 5th 489, 492 (Centre Co. 2010) (quoting 15 Williston on Contracts §1862 at 566 (3d Ed. 1972)). For that reason, "an action for 'account stated' still sounds in contract just like an action for quasi-contract or unjust enrichment, and is no more 'independent' from contract actions generally than a negligence action is independent of tort actions generally." Richburg, 247 F.R.D. at 465.

account to Velocity and instead has baldly averred that "[Velocity] purchased [Kahanic's] account and is now the holder and owner of the account." (Id., ¶9). Velocity's complaint is clearly deficient in that it does not attach documentation of the relevant assignment or chain of ownership for Kahanic's account from the credit card issuer to Velocity. *See*, Atlantic Credit and Finance, supra; Winfree, supra; Remit Corp., supra. Was Velocity assigned or sold Kahanic's account by HSBC or was there another entity in the ownership chain from March 18, 2004 to the date of the filing of this lawsuit? Velocity's complaint is devoid of that material information. Based upon the foregoing precedent, Velocity must attach supporting documentation of its assignment or acquisition of Kahanic's account. Therefore, Kahanic's preliminary objections based upon Rule 1019(i) will be sustained and Velocity will be directed to file an amended complaint within twenty (20) days.

(C) SUFFICIENCY OF "ACCOUNT STATED" ALLEGATIONS

In a credit card action premised upon an "account stated" theory, "the complaint must include allegations which would support a finding that the cardholder has agreed to, or acquiesced in the correctness of the account." Ananiev, 13 D.& C. 5th at 559. At a minimum, "the plaintiff must state an allegation that the defendant 'assented to the correctness of the account submitted to him,' Kilbride, 10 D. & C. 5th at 492 (quoting Ryon, 42 D. & C. 2d at 87), and "something more than mere acquiescence by failure to take exception to a series of statements of accounts received in the mail is required." Id. (quoting Glass v. Ryan, 70 D.& C. 2d 251, 253 (Beaver Co. 1985)). *Accord*, Braverman Kaskey v. Toidze, 2011 WL 4851069, at * 4 (E.D. Pa. 2011) ("Under Pennsylvania law, [plaintiff's] allegation that [defendant] never contested its bills is not sufficient to show

acquiescence in the correctness of the account."). As the Centre County court in Clevenstine observed:

> Plaintiff has not set forth sufficient facts regarding defendant's agreement to the total amount due and it has not set forth facts which show, in addition to alleged receipt of monthly statements without objection, that defendant has agreed to pay the amount plaintiff claims is owed. Plaintiff appears to be relying on defendant's silence to prove acquiescence to an account stated. This is not a permissible use of the account stated. An account stated is more properly pled in a situation in which two equal, sophisticated parties have an ongoing business relationship. An account stated theory is not appropriate in a credit card account case."

Clevenstine, 7 D. & C. 5th at 157. *See also*, Ananiev, 13 D.& C. 5th at 559 ("Here, plaintiff claims that defendant's acquiescence exists in her failure to object to the monthly statements sent to her home. We find that plaintiff's reliance on those statements to aver defendant's agreement to the terms within such statements is self-defeating.").

Velocity's complaint merely avers that Kahanic received the account statement attached as Exhibit B and "retained the statement without payment." (Docket Entry No. 3, ¶7). Retaining a statement without payment is not tantamount to an assent to or acquiescence in the accuracy of the account amount. *See*, Ananiev, supra. On the contrary, the mere failure to lodge an objection to a single account statement is insufficient to constitute an acceptance of the amount owed, as is required for an account stated claim. *See*, Kilbride, supra; Clevenstine, supra; Glass, supra. Consequently, Kahanic's preliminary objections pursuant to Rule 1019(a) will be sustained and Velocity will be directed to file an amended complaint containing averments supporting Kahanic's assent to the correctness of the amount indicated in the account statement. However, since it is unnecessary for the plaintiff in an account stated suit to establish the nature of the original indebtedness or the items comprising the account, David, 348 Pa. at 341-342, 35 A.2d at

349, Kahanic's preliminary objections under Rule 1019(f) seeking the dates and amounts of the credit card charges and a description of the items purchased will be overruled.

AND NOW, this 1st day of May, 2012, upon consideration of the preliminary objections of Defendant Michael J. Kahanic pursuant to Pa.R.C.P. 1019(a), (f) and (i), the memoranda of law submitted by the parties and the oral argument of counsel on April 26, 2012, and based upon the reasoning set forth above, it is hereby ORDERED and DECREED that:

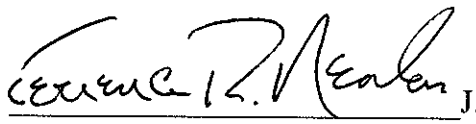
1. Defendant's preliminary objections based upon Pa.R.C.P. 1019(a) and (i) are SUSTAINED;

2. Within the next twenty (20) days, the plaintiff shall file an amended complaint which shall attach copies of (a) the documents relating to the assignment or sale of the defendant's account to the plaintiff, (b) the "terms and conditions on the reverse" side of the "Pre-Selected Gold Acceptance Certificate" signed by the defendant on March 18, 2004, and (c) the "terms and conditions" contained "on the enclosed Solicitations Disclosures" which accompanied the "Pre-Selected Gold Acceptance Certificate" signed by the defendant;

3. The amended complaint to be filed by the plaintiff shall include averments supporting the defendant's assent to the correctness of the account submitted by the plaintiff in accordance with Pennsylvania law; and

4. In all other respects, defendant's preliminary objections, including those preliminary objections based upon Pa. R.C.P. 1019(f), are OVERRULED.

BY THE COURT:



J.
Terrence R. Nealon

cc: *Written notice of the entry of the foregoing Memorandum and Order has been provided to each party pursuant to Pa. R. Civ. P. 236 (a)(2) and (d) by transmitting via electronic mail time -stamped copies to:*

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