DISTRICT COURT OF NASSAU COUNTY
FIRST DISTRICT: CIVIL PART 2

CACH LLC

Plaintiff(s),

Present:
Hon. Michael A. Ciaffa

- against -

Index No. 4381/11

CAY FATIMA a/k/a CAY MARSHALL

Defendant(s).

The following papers have been considered by the Court on this motion: submitted August 2, 2011

Papers Numbered

Notice of Motion, Affirmation & Exhibits Annexed..... 1 - 2
Affirmation in Opposition.....
Reply Affirmation.....

In this action by the alleged assignee of a consumer debt allegedly owed by defendant upon a "Bank of America" credit card account, the plaintiff, CACH, LLC, seeks summary judgment against the defendant.

The sufficiency (or insufficiency) of plaintiff's moving papers will be determined under "well settled standards." See DNS Equity Group Inc. v. Elizabeth Lavalle, 2010 NY Slip Op 50298 (Dist Ct Nassau Co.). The basic requirements are succinctly set forth in cases such as Rushmore Recoveries X, LLC v. Skolnick, 2007 NY Slip Op 51041 (Dist Ct Nassau Co.), Citibank, N.A. v. Martin, 11 Misc3d 219 (Civ Ct NY Co.), and Palisades Collection, LLC v. Gonzalez, 2005 NY Slip Op 52015 (Civ Ct NY Co.).

In order to obtain summary judgment -- a "drastic remedy"-- the moving party "must first make a showing of entitlement to judgment as a matter of law,... tendering evidentiary proof in admissible form." Rushmore Recoveries X, LLC v. Skolnick, supra. Conclusory affidavits, or affidavits from persons who lack personal knowledge of the facts, will not suffice. Palisades Collection, LLC v. Gonzalez, supra. If the movant relies upon documentary evidence, in the form of business records, an evidentiary foundation for their consideration must be provided. Palisades Collection, LLC v. Gonzalez, supra.

Mere submission of documents without authentication is inadequate. Palisades Collection, LLC v. Gonzalez, supra.

In cases involving assigned debt claims, the movant faces several additional and particular burdens. Since an assignee stands in the shoes of the original creditor, the assignee must meet the same evidentiary standards as an original creditor. These include "an affidavit sufficient to tender to the Court the original agreement, as well as any revision thereto, and the affidavit must aver that the documents were mailed to the cardholder." Citibank v. Martin, supra. "The same affidavit typically advances copies of credit card statements which serve to evidence a buyer's subsequent use of the credit card and acceptance of its terms." Id. If plaintiff's lawsuit includes an "account stated" claim, the plaintiff must "demonstrate mailing of the account" or provide other proof of its receipt. Id.

Employees and agents of the assignee typically cannot provide such proof through their own affidavits since they lack personal knowledge of the assignor's business and record-keeping practices. See Rushmore Recoveries X, LLC v. Skolnick, supra; Palisades Collection, LLC v. Gonzalez, supra. Before an original creditor's documents can be considered as proof "in admissible form," the documents must be properly authenticated by a knowledgeable individual. Palisades Collection, LLC v. Gonzalez, supra.

Finally, assigned debt claimants must submit satisfactory proof, in proper evidentiary form, to establish their rights as an assignee and the defendant's lawful indebtedness to it under the law of assignment. "It is the assignee's burden to prove the assignment." Citibank v. Martin, supra. It must further prove that the defendant's particular account was included in the assignment. Id. If plaintiff's evidence respecting a particular account is contained in an electronic spreadsheet, any reproductions must satisfy applicable business record foundational requirements. See Palisades Collection, LLC v. Kedik, 67 AD3d 1329 (4th Dept 2009).

The plaintiff must also prove that the defendant was given notice of the assignment, including proof in evidentiary form of "the date defendant was notified of the

assignment." See Caprara v. Charles Court Assoc., 216 AD2d 722, 723 (3d Dept. 1995); DNS Equity v. Lavalle, supra; CACH, LLC v. Smith, index no. 29236/08, decision dated April 29, 2009 (Dist Ct Nassau Co.). Absent such proof, the debtor cannot be charged with breaching "a duty to pay the debt to the creditor's assignee." CACH, LLC v. Smith, supra, quoting Tri City Roofers, Inc. v. Northeastern Industrial Park, 61 NY2d 779, 781 (1984).

Movant's failure to satisfy each of the foregoing requirements requires denial of its motion. See Palisades Collection, LLC v. Gonzalez, supra.

Applying the foregoing caselaw standards, plaintiff's moving papers fail to make a prima facie evidentiary showing of entitlement to judgment, as a matter of law, upon its assigned debt claim. Among other defects, the "Cardholder Agreement" annexed to the moving affidavit of plaintiff's custodian of records (Peter Huber) is undated, incomplete, and lacks a proper business record foundation (CPLR 4518). Notably, no proof is submitted from a representative of Bank of America who has personal knowledge of the subject agreement and its issuance to defendant. To the contrary, the only affidavit from a bank representative (Dennis Maradei) asserts that the "original contract in this matter has been destroyed, or is no longer accessible..."

The February, 2010 credit card statement annexed to the Huber affidavit likewise lacks a proper business record foundation from a bank representative. Furthermore, in the face of defendant's answer, denying that the amount claimed ($3,326.51) is "true and accurate," the correctness of the amount cannot be conclusively established without additional evidence showing how that amount was calculated. Instead of such proof, plaintiff merely submits a generic boilerplate affidavit from Mr. Maradei, claiming such amount was "due and payable." It is apparent that his assertion is not made upon the affiant's personal knowledge. Rather, his statement respecting the amount of defendant's alleged indebtness is allegedly "based on the computerized and hard copy books and records" of Bank of America. However, no copies of the referenced "books and records" are submitted. Nor does plaintiff submit the usual set of bank credit card statements typically issued monthly, showing defendant's credit card charges, payments, fees, etc. In

the absence of such evidence, the Court cannot find that plaintiff met its burden of proof respecting the amount of the alleged indebtedness.

Moreover, even if plaintiff were to prove defendant's indebtedness to Bank of America, its proof respecting the alleged assignment of the indebtedness is riddled with contradictions and questions. According to the Maradei affidavit, defendant's account was sold by Bank of America to CACH, LLC. But the actual "Bill of Sale and Assignment" submitted by Huber refers only to the sale of certain unspecified "loans" identified in a "loan schedule." No competent proof is provided that defendant's credit card account debt was intended to be treated as one of those "loans." To the extent plaintiff purports to rely upon excerpts from an electronic spreadsheet, which purportedly was part of the assignment, no proper foundation evidence has been submitted by the plaintiff. Furthermore, the assignor of the "loans" is identified as "FIA Card Services, N.A." Defendant's account was issued by Bank of America, not FIA Card Services. Although FIA Card Services allegedly is "a wholly owned subsidiary of Bank of America Corporation" (according to Maradei), plaintiff makes no effort to explain how and when the bank's subsidiary (a separate corporate entity) acquired the right, title and interest to convey defendant's alleged indebtedness to CACH, LLC.

Additionally, the Maradei affidavit references, without explanation, three different account numbers. Only one is listed on the February 2010 bank statement. The complaint, in turn, lists a different account number. Apparently, different account numbers were assigned to the account after a "charge off" by the bank. The significance of the "Charge off" is not explained. In some circumstances, a "charge off" may trigger an obligation to issue an IRS form 1099-C to the debtor, which is treatable as income. Absent clarification of the "charge off," the bank's ability to "assign" the "charged off" debt is open to question. See, e.g. Discover Bank v. Kitva, index no. 15445/10, decision dated March 29, 2011 (Dist Ct Nassau Co.), citing In re Welsh, 2006 WL 3859233 (Bankr Ct ED Pa 2006), quoting In re Crosby, 261 BR 470, 474 (Bankr Ct Kan 2001) ["The actual (or at least potential) tax consequences of the form make it inequitable to allow the [creditor] to enforce its claims against the debtors."]

Finally, plaintiff neither alleges nor proves that notice of the assignment was given to the defendant. Nor does plaintiff address whether it purchased the assignment for principal and illegal purpose of bringing suit upon it (see Judiciary Law §489), in the hope of obtaining a windfall profit. See DNS Equity Group, supra; cf MVB Collision, Inc. v. Allstate Ins. Co., 25 Misc 3d 168 (Dist Ct Nassau Co.).

For all these reasons, plaintiff's motion is DENIED. The merits of plaintiff's claim, therefore, remain to be proven. The case, accordingly, shall proceed to arbitration as provided in the Court rules.

So Ordered:

Michael A Ciaffa

District Court Judge

Dated: August 3, 2011

cc: Daniels & Norelli, P.C.
Cay Fatima a/k/a Cay Marshall