IN THE COURT OF COMMON PLEAS FOR THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

MIDLAND FUNDING LLC,	)	
	)	
Plaintiff,	)	**C.A. No. CPU4-10-007831**
	)	
	)	
v.	)	
	)	
ANITRA JOHNSON,	)	
	)	
Defendant.	)	
	)	

Submitted: December 16, 2011
Decided: January 26, 2012
Amended: February 1, 2012

UPON CONSIDERATION OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT
GRANTED.

Hillary Velduis, Esq. and Seth Yeager, Esq., Lyons, Doughty & Veldhuis, P.A., 15 Ashley Place, Suite 2B, Wilmington, DE 19804, Counsel for Plaintiff.

Ms. Anitra Johnson, P.O. Box 9703, Wilmington, DE 19809, *Pro Se* Defendant.

ROCANELLI, J.

Introduction

This matter comes before the Court upon Plaintiff Midland Funding LLC's ("Plaintiff") Motion for Summary Judgment against Defendant Anitra Johnson ("Defendant") pursuant to Court of Common Pleas Civil Rule 56. The parties presented their arguments before this Court on November 4, 2011. The Court reserved decision and ordered Plaintiff to produce additional documentation within 45 days establishing chain of title of the disputed account, as well as an explanation of its billing practices.

On December 16, 2011, Plaintiff filed its supplemental response to the Court's Order responsive to this Court's inquiry as to chain of title/ownership and the integrity of the billing practices. The Court reviewed both parties' submissions. No further oral argument is necessary. For the reasons set forth below, the Court finds that no genuine issue of material fact exists as to either liability or damages and, therefore, Plaintiff's Motion for Summary Judgment is hereby **GRANTED.**

Facts and Procedural History

This is a debt collection action. On December 16, 2010, Plaintiff filed a complaint against Defendant seeking recovery of the balance owed after Defendant defaulted on a Chase MasterCard credit card account. No exhibits are appended to the Complaint. While no chain of assignment is alleged, documents submitted with Plaintiff's dispositive motion reveal that the original issuer of the credit card at the heart of this action was Washington Mutual Bank ("WaMu"). WaMu merged its banking operations with Chase in September 2008. WaMu accounts folded into Chase, with a seamless transition evidenced by the billing statements. In March 2010, Chase in turn sold Defendant's

account as part of a bundle of debts to a third party purchaser, Midland Funding, LLC, for collection against Defendant. Plaintiff seeks the principal balance owed, attorneys' fees, interest and costs of suit.

On May 27, 2011, the Court granted an enlargement of time to perfect service as Defendant had moved to a new address. On June 28, 2011, Defendant was personally served.

On July 18, 2011, Defendant filed an Answer to the Complaint. Defendant denied liability and damages. She specifically denied any contractual relationship with the Plaintiff.

On July 27, 2011, Plaintiff propounded discovery. The docket does not reflect that Defendant responded to said discovery. No motion to compel was filed.

On October 6, 2011, Plaintiff moved for summary judgment. On November 2, 2011, Defendant filed a response.

Both parties appeared at the hearing held November 4, 2011. Following colloquy on the Court's perceived deficiencies inherent in Plaintiff's submission, Plaintiff was ordered to produce within 45 days documents establishing chain of title/ownership of Defendant's account from WaMu to this Plaintiff. The Court further demanded an explanation as to the integrity of the billing practices as it appeared from the submitted billing statements that Chase continued to bill Defendant 13 days after Chase allegedly sold Defendant's account to Midland on March 10, 2010. The Court memorialized that verbal ruling by written order dated November 10, 2011.

By letter dated December 16, 2011, Plaintiff submitted the following documents for the Court's review: (1) a cover letter with a detailed response to the three prongs of the Court's inquiry; (2) a Federal Deposit Insurance Company ("FDIC") Press Release dated September 25, 2008 announcing the Chase acquisition of WaMu; (3) an Affidavit of Sale by the Attorney-In-Fact for Chase dated December 1, 2011 affirming that Defendant's account was sold to Plaintiff on March 10, 2010; and (4) billing statements confirming default on the account and the date Defendant's charging privileges were revoked.

While Defendant responded to the initial motion, she did not file any supplemental response to Plaintiff's December 16th supplemental submission. For the record, the Court did not mandate any formal response by Defendant.

Contentions of the Parties

Plaintiff now moves this Court for summary judgment arguing that no genuine dispute as to any material fact exists as to Defendant's liability on this debt. Plaintiff submitted documents to verify liability on the account and standing to sue. Plaintiff also tendered documents corroborating the debt alleged. Accordingly, Plaintiff contends that it is entitled to judgment as a matter of law.

Conversely, Defendant contests the integrity and the admissibility of the affidavits, as well as the billing statements, submitted by Plaintiff in support of its motion. Defendant objects to these documents on the grounds that they constitute hearsay, and thus should not be considered by the Court absent a proper foundation. Defendant did not

file any competing affidavits or other evidence challenging the trustworthiness or propriety of the subject affidavits.

The Law

Summary judgment is appropriate where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."[1] The moving party bears the burden of meeting this exacting standard.[2] The Court must view the evidence in a light most favorable to the non-moving party.[3] If the proponent properly supports its claims, the burden shifts to the non-moving party to establish the existence of material issues of fact.[4] Where the moving party produces an affidavit or other evidence sufficient under the Rules of Civil Procedure, and the burden shifts, Rule 56(e) states that the non-moving party may not rest on her own pleadings, but must provide evidence showing a genuine issue of material fact for trial.[5] Summary judgment will be denied if, after viewing the evidence in a light most favorable to the non-moving party, there are material facts in dispute or if judgment as a matter of law is not appropriate.[6]

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[1] Ct. Com. Pl. Civ. R. 56(c); *Burkhart v. Davies*, 602 A.2d 56, 59 (Del. 1991); *Moore v. Sizemore*, 405 A.2d 679, 680 (Del. 1979).
[2] *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986); *Moore*, 405 A.2d at 680.
[3] *Burkhart*, 602 A.2d at 59.
[4] Ct. Com. Pl. Civ. R. 56(e); *Moore*, 405 A.2d at 681.
[5] Ct. Com. Pl. Civ. R. 56(e); *Celotex Corp.*, 477 U.S. at 322-23.
[6] *Storm v. NSL Rockland Place LLC*, 898 A.2d 874, 879-80 (Del. Super. 2005).

Discussion

The Court must determine whether any issue of material fact exists as to Defendant's liability for the debt alleged. The Court thoroughly reviewed all submissions in this case as well as the relevant exhibits appended thereto. The Court finds that Plaintiff has met its burden of proof that no genuine issue of material fact exists as to liability or damages in this case. As such, Plaintiff is entitled to judgment as a matter of law.

With respect to the issue of liability, no genuine issue of material fact exists as to Defendant's liability for the debt alleged. Plaintiff established chain of title and its right to sue on the account as a matter of law. Further, Plaintiff's collective submissions conclusively demonstrate Defendant's default and ensuing liability.

A. Plaintiff established as a matter of law that it is a proper party in interest.

As a threshold matter, the Court must address whether Plaintiff is the proper party in interest to collect on this debt. Absent proof of ownership, Plaintiff's claim must fail. Defendant does not dispute that she had a credit card with either WaMu or Chase. Rather, Defendant's focus lies on whether this Plaintiff, as an alleged third party purchaser of the debt, has a legal right to collect upon the debt, pointing specifically to the integrity of the supporting documents to establish said rights to collect.

At oral argument, the Court shared its concern as to perceived gaps in the chain of title in the documents proffered by Plaintiff as proof of ownership. In a supplemental response to the Court's inquiry, Plaintiff filled in those gaps. The Court is thus satisfied

that Plaintiff met its burden of proof that it possesses a legal right to pursue collection efforts upon Defendant's delinquent account.

The first leg of assignment pertains to the transfer from WaMu to Chase. In its proffer, Plaintiff provided a federal regulatory press release dated September 25, 2008 by the FDIC which confirms that Chase acquired the WaMu banking operations prior thereto.[7] The Court agrees with Plaintiff's position that Delaware Uniform Rule of Evidence ("DRE") 201 authorizes it to take judicial notice of the facts related to the bank acquisition contained in the subject press release.[8] Further, Defendant does not dispute the WaMu merger. Indeed, the last WaMu billing statement to Defendant was dated March 2009. The April and May 2009 billing statements were sent directly from Chase to Defendant. It appears to be a seamless transition in the monthly billing, and Defendant made payment on both bills. Accordingly, Plaintiff established as a matter of law that Chase acquired Defendant's account in the 2008 bank merger.

As to the second leg of the assignment – the baton pass from Chase to this Plaintiff -- the Court reviewed a Bill of Sale dated March 5, 2010 executed by the Team Leader (name illegible) for Chase Bank USA, NA and J. Brandon Black, President of Midland Funding LLC. That Bill assigns rights, title and interest to a "final data file," which was

[7] *See* Exhibit A to Plaintiff's supplemental submission filed with the Court on December 16, 2011.

[8] DRE 201(b) authorizes this Court to take judicial notice of any fact that is "not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Subsection (d) mandates that the Court take judicial notice where it is "requested by a party and supplied with the necessary information." Otherwise, it is discretionary. DRE 201(c). Judicial notice may be taken at any stage of the proceeding. DRE 201(f).

not attached. Defendant's account is not specified. No redacted account summary or log was included.

To cure this deficiency, Plaintiff appended Exhibit B to its supplemental submission which is an Affidavit of Christina Paperman, the Attorney-In-Fact for Chase, dated December 1, 2011. Ms. Paperman's Affidavit states that review of the Chase records "made at or near the time of the occurrences . . . , or from information transmitted by, a person having knowledge of those matters, and kept in the ordinary course of Chase's business." This affirmation demonstrates that Defendant had a credit card account with Chase, account ending in 5717. She further attests that this account was "sold and transferred to Midland Funding, LLC on or about March 5, 2010" thereby closing a gap.

Moreover, a third document, a sworn Affidavit executed by Erin Degel on September 28, 2011, a legal specialist with Midland Credit Management, Inc., was reviewed. By her Affidavit, Ms. Degel testifies as to her personal knowledge of the account records maintained on Plaintiff's behalf. In paragraph 1 of her Affidavit, she confirms that Plaintiff purchased Defendant's account "XXXX5717" from Chase and that Plaintiff is the "current owner" of the debt. She further states that she reviewed the records pertaining to Defendant's account and that she is authorized to make the Affidavit. Ms. Degel also affirmed the balance due as of November 7, 2011 on this account.

The thrust of Defendant's argument is that said affidavits and billing statements constitute inadmissible hearsay and thus may not be considered by the Court. Defendant

specifically complains that the affidavits do not explain the basis for the affiant's personal knowledge about the "business practices and procedures of the originating creditors from which the documents offered as proof are taken." At paragraph 3 of Defendant's opposition, citing New York authority, she argues that the "witness must demonstrate personal knowledge of the business practices and procedures pursuant to which the document was made."[9] While she does not couch it as such, in essence she avers that the circumstances surrounding the preparation of the disputed documents cast doubt on their reliability mandating exclusion. This Court disagrees. The records are admissible pursuant to DRE 803(6), the business records exception to the hearsay rule.

Under Delaware law, an out-of-court "memorandum, report, record or data compilation" of an act or event is admissible under DRE 803(6), the business records exception, (1) if the record was "made at or near the time" of the act or event (2) "by, or from information transmitted by, a person with knowledge," (3) if the record is kept "in the course of a regularly conducted business activity" and (4) if it was the regular practice of the business activity to make a record of the act or event.[10] Even where these elements are met, the Court retains discretion to exclude the statement "where the method of

[9] Defendant specifically cites an affidavit of "Linda Gutierrez" whom she alleges is employed by this Plaintiff, and she lifts a quote from a purported affidavit by this individual on the subject of "proof" of indebtedness" "I do not have personal knowledge concerning all of the information in said responses but I am informed and believe that all the information set forth for which I lack personal knowledge is true and correct." The Court observes that no such affidavit is contained in the Court record -- the only affiants in the record before *this* Court are Erin Degel of Midland Credit Management, Inc. and Christina Paperman, who is the Chase Attorney-In-Fact.

[10] DRE 803(6); *Brown v. Liberty Mutual Ins. Co.,* 774 A.2d 232, 238-39 (Del. 2001) (citing DRE 803(6)).

preparation of the record or the source of the information 'indicate[s] [a] lack of trustworthiness.'"[11] In short, the business records exception rests on "indicia of trustworthiness."[12]

The Court recognizes that Defendant raises a valid concern, but she does not proffer any good faith basis to support her contention.[13] No discovery was taken by Defendant. She herself failed to respond to Plaintiff's discovery, including Requests for Admission. Moreover, she offers no reasoned analysis as to why this Court should rule in her favor. Instead, Defendant appears to bootstrap her argument questioning the reliability of the affidavits, one of which she erroneously maintains is part of the record before this Court, to unrelated New York litigation. Her contentions are unsupported and conclusory. Mere speculation will not create a genuine issue of material fact to defeat a motion for summary judgment.

Examination of the billing statements reveals that they appear to have been produced, transmitted, received, and held by a regularly conducted business, as a matter

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[11] *Brown*, 773 A.2d at 238-39 (citing DRE 803(6)).

[12] *Brown*, 773 A.2d at 239-240; *see also Worldwide Asset Purchasing LLC, assignee of Direct Merchants Bank, NA, LLC v. Kevin Vanauken*, Commissioner Whitmore Maybee, C.A. No. 06-02-097 (Del. Com. Pl. Sept. 5, 2007) (Commissioner's Report on Plaintiff's Motion for Summary Judgment).

[13] It is true that the courts provide self represented litigants a degree of latitude in presenting their cases. *Buck v. Cassidy Painting, Inc.*, 2011 WL 1226403, at *2 (Del. Super. Mar. 28, 2011) (citing *Draper v. Med. Ctr of Del.*, 767 A.2d 796, 799 (Del. 2001)). However, as the Delaware Supreme Court has held, "[t]here is no different set of rules for *pro se* plaintiffs, and the trial court should not sacrifice the orderly and efficient administration of justice to accommodate an unrepresented plaintiff."[13] Indeed, "`self-representation is not a blank check for defect.´" *Sloan v. Segal*, 2008 WL 81513, at *7 (Del. Ch. Jan. 3, 2008) (citing *Quereguan v. New Castle County*, 2006 WL 2925411, at *4 (Del. Ch. Sept. 20, 2006)).

of regular practice, and that the entries made on the statements were made contemporaneously with the actions reported therein. Moreover, the statements were integrated into Plaintiff's records and relied upon in the conduct of its day-to-day operations. These circumstances lead to the conclusion that the source of the information had personal knowledge of the information transmitted in the statements.[14] Circumstantial evidence may be used to establish foundation testimony.[15] Moreover, "it is not fatal that the foundation witness did not . . . prepare the record or supervise its preparation, observe the process, nor . . . is it necessary that [the foundation witness] have any firsthand information about its preparation."[16] Accordingly, this Court finds that the records submitted by Plaintiff are trustworthy and satisfy the requirements of the business record exception to the hearsay rule. Plaintiff thus met its burden to show that it is the rightful owner of the Defendant's account "XXXX5717."

As this Court finds that chain of title has been conclusively established, the Court now turns its attention to the question of whether any genuine dispute of material fact exists as to Defendant's liability on this account.

B. Plaintiff established Defendant's liability on this account as a matter of law.

The Court observes that Plaintiff's initial and supplemental submissions do not contain a copy of the original Account Agreement. Plaintiff submitted the billing

[14] *Brown*, 774 A.2d at 239; *Worldwide Asset Purchasing LLC, assignee of Direct Merchants Bank, NA, LLC*, C.A. No. 06-02-097 at 2.
[15] *Worldwide Asset Purchasing LLC, assignee of Direct Merchants Bank, NA, LLC*, C.A. No. 06-02-097 at 2 (citing DRE 901(b)(4) and 4 Mueller and Kirkpatrick, Federal Evidence 2nd, § 445))
[16] *Id.*

statements, which each included an insert regarding "Important Payment Information," such as the billing rights summary. The statements also include notifications of changes to the Account Agreement. However, as stated *infra*, this point is moot as Defendant does not appear to dispute that she received a WaMu MasterCard and that she made purchases on that account. Rather, she denies a contractual relationship with this Plaintiff, which circles back to the issue of ownership. For the record, this Court observes that absence of the original solicitation or agreement shall not be an impediment and/or fatal to Plaintiff's dispositive motion.[17] Moreover, "[u]se of the credit card would constitute acceptance of the terms in the Agreement."[18]

As evidence of default, Plaintiff submitted a comprehensive collection of billing statements from October 2008 through March 2010. The statements contain Defendant's name, current address at the time and account number "XXXX5717." Defendant's last payment on the account was in the amount of $ 60.00 in May 2009. The records reflect that no further payments were made. The November 2009 statement reflects notification to Defendant that her charging privileges had been revoked for non-payment.[19]

Plaintiff also submitted the sworn Affidavits of Christina Paperman of Chase and Erin Degel of Midland. Ms. Degel's Affidavit affirms the balance owed on the account as of November 7, 2010. Ms. Paperman's Affidavit states that the records reflect that the last payment Chase received on the account was made July 20, 2009, which is

[17] *Grasso v. First USA Bank*, 713 A.2d 304, 308 (Del. Super. 1998).
[18] *Id.* at 309.
[19] *See* Plaintiff's Exhibit E submitted to the Court on December 16, 2011. This statement was also affixed to Plaintiff's original motion for summary judgment filed October 6, 2011.

corroborated by the billing statement for the period June 27, 2009 through July 26, 2009. Defendant paid $ 793.08. Defendant made no other payments after July 2009.

Based upon the foregoing, this Court finds that no genuine issue of material fact exists as to Defendant's liability on this account as a matter of law. Defendant was issued a credit card, which she does not deny. The billing statements demonstrate that Defendant made purchases on that account. The statements confirm her name, current address at the time and account number. She made regular payments on that account until July 2009. Defendant defaulted on that account as of September 20, 2009. Defendant failed to submit any evidence to the contrary. Accordingly, Plaintiff established Defendant's liability as a matter of law.

C. **Plaintiff established its claim for damages as a matter of law.**

The Court now turns its attention to the issue of damages, and whether Plaintiff established that it is entitled to damages in the amount alleged as a matter of law.

By its motion, Plaintiff seeks $ 4,472.60, which is comprised of the following: $ 3,468.46 in principal balance owed on the account[20]; $ 310.45 in pre-judgment interest at 5.5% from February 28, 2010 to October 5, 2011; and attorneys' fees in the amount of $ 4,472.60. As stated *infra,* no contract was attached which defined the rights of the creditor upon default, including pre-judgment interest or attorneys' fees. The billing

[20] The last billing statement with an "opening/closing" date of January 27, 2010 through February 26, 2010 -- showing a payment due date of March 23, 2010 – reflects an outstanding balance of $ 3,468.46. Penalty fees and "purchase interest" at a rate of 29.99% are integrated into that final outstanding balance.

statement inserts do not contain that language.[21] Further, counsel failed to submit an Affidavit of Attorneys' Fees. Defendant did not contest the issue of damages alleged in her opposition.

Plaintiff submitted two forms of evidence to corroborate the amount alleged. The billing statements reflect that as of date that Chase revoked her charging privileges for non-payment, Defendant owed a balance of $ 3,017.95, which includes late fees and finance charges. As of the January 27/February 26, 2010 statement, advising that the account was scheduled to be written off as a bad debt, Defendant owed a balance of $ 3,468.46.

The Affidavit of Chase Attorney-In-Fact Christina Paperman verifies that as of March 5, 2010, Defendant owed a balance of $ 3,468.46. Moreover, the Affidavit of Erin Degel affirms that the records on the Chase account reflect a balance owed of $ 3,468.46 as of November 7, 2010. Thus, the billing statements together with the affidavits corroborate the debt alleged. Moreover, Defendant never challenged the amount of the damages alleged.

Based upon review of the collective billing statements and the sworn affidavits, this Court concludes that judgment should be entered for the Plaintiff in the amount of the principal sum demanded, $ 3,468.46. Defendant has failed to disclose any evidence to this Court which would demonstrate the existence of a genuine issue of fact for trial. Notwithstanding this ruling, the Court finds that Plaintiff failed to meet its burden of

[21] 10 *Del. C.* § 3912.

proof that any contractual right existed to recover pre-judgment interest and/or attorneys' fees.

Conclusion

WHEREFORE, the Court concludes that Plaintiff met its burden that no genuine issue of material fact exists as to either liability or damages in this case. As no genuine issue of material fact exists, Plaintiff is entitled to judgment as a matter of law. Judgment is hereby **GRANTED** in favor of Plaintiff against Defendant in the amount of **$ 3,468.46.**

The Court further finds that Plaintiff failed to produce any evidence of a contractual right to pre-judgment interest and/or recovery of attorneys' fees in the event of default. Plaintiff did not submit an Affidavit for Attorney's Fees. Consequently, Plaintiff's claims for pre-judgment interest at a rate of 5.5% from February 28, 2010 to October 5, 2011, as well as its claim for attorneys' fees, are **DENIED**.

NOW, THEREFORE, this 24th day of January, 2012, judgment is hereby entered in favor of Plaintiff against Defendant in the amount of **$ 3,468.46** with post-judgment interest to accrue at the legal rate.

IT IS SO ORDERED.

Andrea L. Rocanelli

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The Honorable Andrea L. Rocanelli