

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR SUSSEX COUNTY

JAMES R. KLINEDINST,	:	C.A. No. S13A-07-004
Appellant,	:	
v.	:	
CACH, LLC, as assignee of MBNA Bank, N.A.,	:	
@830934,	:	
Appellee.	:	

MEMORANDUM OPINION

DECISION ON APPEAL - REVERSED AND REMANDED

DATE SUBMITTED: October 11, 2013

DATE DECIDED: January 10, 2014

Elwood T. Eveland, Jr., Esquire, 714 N. King Street, Suite 200, Wilmington, DE 19801, attorney
for Appellant

Patrick Scanlon, Esquire, 203 N.E. Front Street, Suite 101, Milford, DE 19963

GRAVES, J.

This is an appeal which James R. Klinedinst (“defendant”) has filed from a decision of

the Court of Common Pleas (“CCP”) granting summary judgment in favor of CACH, LLC, as assignee of MBNA Bank, N.A.@830934. (“plaintiff”). This is my decision reversing CCP’s decision and remanding the matter for further proceedings consistent with this decision.

The facts and procedural history appear below. In order to make this decision more concise, I point out, within this recitation of facts and procedural history, the problematical aspects of the case below and I make rulings regarding various issues. These problem areas and rulings are bolded for ease of reference.

Central to the decision in this matter is the legal premise that a plaintiff with an assignment has the burden to show the assignment in order to establish it is the proper party to bring the action.¹

On January 19, 2012, CACH, LLC filed a complaint against defendant in CCP. The complaint alleged the following. Defendant is in default for non-payment on an account which CACH, LLC owned; the original creditor and proof of ownership of the account appears in the attachment to the complaint; and defendant owes plaintiff \$31,988.30 in principal, plus interest. The attachment consists of a “Chain of Title Chart” and an account statement. The “Chain of Title Chart” purportedly establishes the title from MBNA to CACH, LCC. Attached to the “Chain of Title Chart” is Exhibit A, which is an Affidavit dated October 18, 2010, of Dennis Maradei (“Maradei’s Affidavit”). Maradei states as follows:

1. That Affiant is employed by Bank of America, NA successor in interest to Bank of America, in the position of Bank Officer and is duly authorized to make this affidavit.

¹*Citimortgage, Inc. v. Bishop*, 2013 WL 1143670, *4 (Del. Super. March 4, 2013); *Delaware Trust Company v. Everitt*, 140 A.2d 778, 782 (Del. Ch. 1958); *Dahlink Financial Corp. v. Bochniak*, 2012 WL 1415815 (Del. Com. Pl. March 13, 2012).

2. That FIA Card Services is a wholly owned subsidiary of Bank of America Corporation and is successor in interest to MBNA Bank NA, Fleet Bank, NA, and Bank of America Card Services.
3. That the original contract in this matter has been destroyed, or is no longer accessible to Affiant and that this Affidavit is to be treated as the original document for all purposes. If any originals are discovered, they will be submitted to the court for review.
4. That the statements made in this Affidavit are based on the computerized and hard copy books and records of Bank of America, which are maintained in the ordinary course of business, with the entries in them having been made at or near the time of the transaction record.
5. That account number [ending in 4118] also known as [account ending in 7551] also known as [... 0268] was opened on 8/26/1996 by JAMES KLINEDINST whose social security number is [...].
6. That there is due and payable from JAMES KLINEDINST as of 1/3/2010 the sum of \$31988.3 [sic] withstanding legally chargeable post charge-off interest, pursuant to the terms of the card member agreement with Bank of America.
7. That said agreement and account was, on 1/13/2010 sold, transferred and set over unto CACH, LLC, with full authority to do and perform all acts necessary for collection, settlement, adjustment, compromise or satisfaction of the said claim.
8. That as a result of the sale of said account, CACH, LLC, and/or its authorized agent, has complete authority to settle, adjust, compromise and satisfy same that Bank of America had no further interest in this account for any purpose.

9. That to the best of Affiant's knowledge, information and belief, there were no uncredited payments, just counterclaims or offsets against said debt when sold.

The affidavit mentions Bank of America; Bank of America, NA; MBNA Bank NA; Fleet Bank, NA; Bank of America Card Services; and FIA Card Services. In doing so, it creates confusion about what entity actually owned the account and/or whether several entities owned the account over the years. Additionally, the affidavit does not clearly establish what entity transferred the account to CACH, LLC. Furthermore, the affidavit states only that Maradei is a Bank Officer of Bank of America, NA. He does not in any way establish that he is a custodian of the records or that he is otherwise a "qualified witness"² who may provide information on the account in question. Thus, this affidavit lacks foundational requirements to make it admissible as a hearsay exception pursuant to Delaware Rules of Evidence, Rule 803(6).³ Plaintiff is unable to rely upon it to establish its

²*Trawick v. State*, 845 A.2d 505, 508-09 (Del. 2004); *Newport Disc, Inc. v. Newport Electronics, Inc.*, 2013 WL 5797350, * 4 (Del. Super. Oct. 7, 2013); *Delaware Acceptance Corporation v. Swain*, 2012 WL 6042644, * 3 (Del. Super. Nov. 30, 2012) (each case sets forth the foundational requirements for an "other qualified witness").

³DRE, Rule 803(6) provides:

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

6) Records of regularly conducted activity. A memorandum, report, record or data compilation, in any form, of acts, events, conditions, opinions or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record or data compilation, all as shown by the testimony of the custodian or other qualified witness, or by certification that complies with D.R.E. 902(11), D.R.E. 902(12) or a statute permitting certification, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation and calling of every kind, whether or not conducted for profit.

case for summary judgment.

Also attached to the complaint is an account statement for account number ending in 7551 dated December 2009. That statement proclaims: “For the complete terms and conditions of your account, consult your Credit Card Agreement. FIA Card Services is a tradename of FIA Card Services, N.A. This account is issued and administered by FIA Card Services, N.A.”

CCP’s Administrative Directive No. 2011-1, in effect at the time the complaint in this matter was filed, lists requirements which must be met where an assignee of a credit card account is the plaintiff. I set forth the requirements below and indicate whether plaintiff complied with those requirements.

- a. the caption shall name both the original creditor and the current assignee; **plaintiff did not comply.**
- b. the name of the original creditor and the last four digits of the original account number of the debt; **Maradei’s affidavit fails to name the original creditor or set forth the chain of title for the loan. His affidavit leads to the conclusion that several entities may have owned the debt.**
- c. the name of the current owner of the debt; **plaintiff complied with that requirement.**
- d. the full chain of the assignment of the debt, if the action is not filed by the original creditor; **as noted earlier, that requirement is lacking.**
- e. the amount claimed as currently owed, broken down by principal due at the time of default, interest, fees and other charges; **plaintiff complied with that requirement.**

The administrative directive required the following materials be attached to the complaint by the creditor:

- a. a copy of the original contract or other documentary evidence of the original debt; **plaintiff did not comply with that requirement;** and
 - b. a copy of the assignment or other documentary evidence establishing that the plaintiff/creditor is the owner of the debt. If the debt has been assigned more than once, then each assignment or other writing evidencing transfer of ownership
-

must be attached to establish an unbroken claim of ownership. Each assignment or other writing evidencing transfer of ownership must contain at least the last four digits of the original account number of the debt purchased and must clearly show the debtor's name associated with that account number. **Plaintiff did not produce any of this information.**

In paragraph 4 of the Administrative Directive, it is stated: "If it appears that a plaintiff has failed to comply with this Administrative Directive, the Court may, on motion or *sua sponte*, deny the entry of judgment, or withdraw entry thereof."

Defendant's first attorney filed a motion to dismiss because the complaint failed to comply with the Administrative Directive. In particular, defendant asserted:

In this case, the caption fails to name the original creditor in the caption as per the Directive. Moreover, the chain of assignment is incomplete because Bank of America FIA Card Services is apparently in the chain of assignment, but it is not listed in the chain of assignment attached to Plaintiff's complaint.

Despite significant noncompliance with the Administrative Directive, the CCP Commissioner found plaintiff was in substantial compliance with it and gave plaintiff 10 days to amend its complaint to identify the original creditor.⁴ Plaintiff thereafter filed an amended complaint. The only thing the amendment did was to show, in the caption, that CACH, LLC was the assignee of MBNA Bank, N.A. **Later information from plaintiff presents FIA Card Services, N.A. as the entity which transferred the account to CACH, LLC.**

Defendant thereafter filed an answer to the complaint. With regard to the assertion that CACH, LLC was the creditor for the obligation, defendant answered: "Unknown and therefore Denied." In answers to interrogatories, defendant was consistent in his positions that he was unaware of whether plaintiff owned the debt and that he never had any agreement with plaintiff.

A pretrial conference was held in this matter on March 7, 2013. The pretrial stipulation

⁴Commissioner's Report on Defendant's Motion to Dismiss dated May 11, 2012.

was filed on February 26, 2013. In that pretrial stipulation, defendant stated that he would “hold Plaintiff to its burden of proof that Plaintiff owns the alleged debt.” Defendant noted he expected “to file a Motion for Summary Judgment on the issue of Plaintiff’s ownership of the debt.” Plaintiff indicated it may file a summary judgment motion, dependent upon defendant’s discovery responses. An issue of law noted was: “Whether Plaintiff can produce evidence of ownership of the debt at issue.”

Plaintiff filed a motion for summary judgment on March 13, 2013. In connection with that motion, it produced, for the first time, information which attempted to establish the ownership history of the debt.⁵ The documents are as follows.

Exhibit A is the previously produced Maradei affidavit, which **I have ruled is inadmissible for summary judgment purposes.**

Exhibit B is the January 28, 2010, certification of Connie B. Smith, Assistant Secretary of FIA Card Services, National Association, a national banking association organized and existing under the laws of the United States of America and having its principal place of business in Wilmington, Delaware. She **certifies** that on January 30, 1991, MBNA America, National Association, changed its name to MBNA America Bank, National Association. On March 1, 2005, Fleet Bank (RI), National Association, merged into and under Bank of America, National Association (USA). On June 10, 2006, MBNA America Bank, National Association, changed its name to FIA Card Services, National Association. On October 20, 2006, Bank of America, National Association (USA) merged into and under the charter and title of FIA Card Services, National Association. **This is a “certification”, not an affidavit, and consequently, plaintiff**

⁵Defendant objected to the late production of this information which should have been produced much sooner in response to discovery requests.

may not use the information to support its summary judgment motion. In addition, this information creates even more questions about the debt's ownership and possible assignments to various entities.

Exhibit C consists of credit card statements for the account ending in 7551 at issue from January 2009 - December 2009.

Exhibit D is an affidavit of Catherine Potts dated March 12, 2013. Ms. Potts alleges as follows:

1. That I am a representative of the Plaintiff, CACH, LLC, ... and am authorized to make this Affidavit.
2. That CACH, LLC is the rightful owner of this account.
3. That one of my responsibilities is to serve as keeper of the books and records of CACH, LLC, which are kept in the ordinary course of business, with the entries in them having been made at or near the time of the occurrence.
4. That the attached Bill of Sale and Redacted Spreadsheet were found among the ordinary business records of CACH, LLC that pertain to the purchase of the portfolio of accounts that pertain to the credit card which is the subject to this action.
5. That the attached Bill of Sale and Redacted Spreadsheet constitute the Operative Document for the purchase of the account subject to this action.
6. That I have reviewed the books and records of CACH, LLC with respect to the indebtedness of James R. Klinedinst, Defendant, and the books and records reflect that as of March 4, 2013 there was a principal amount due of \$31,988.30, plus post-judgment interest at the rate of 5.50% per annum from the date of judgment, plus costs.

The referenced "Bill of Sale and Assignment of Loans" is dated January 20, 2010 ("1/20/10 Bill of Sale and Assignment of Loans") and is signed by Debra L. Pelliciaro, an Assistant Vice President of FIA Card Services, N.A. The Assignor is FIA Card Services, N.A. The 1/20/10 Bill of Sale and Assignment of Loans provides:

The undersigned Assignor ("Assignor") on and as of the date hereof hereby absolutely sells, transfers, assigns, sets-over, quitclaims and conveys to CACH, LLC, a Limited Liability Company organized under the laws of Colorado ("Assignee") without recourse and without representations or warranties of any type, kind, character or nature, express or implied, subject to Buyer's repurchase

rights as set forth in Sections 8.1 and 8.2, all of Assignor's rights, title and interest in and to each of the loans identified in the loan schedule ("Loan Schedule") attached hereto (the "Loans"), together with the right to all principal, interest or other proceeds of any kind with respect to the Loans remaining due and owing as of the Cut-Off Date applicable to such Loans as set forth in the Loan Sale Agreement pursuant to which the Loans are being sold (including but not limited to proceeds derived from the conversion, voluntary or involuntary, of any of the Loans into cash or other liquidated property).

As noted, the assignor is FIA Card Services, N.A., not MBNA Bank, N.A., the party named as the assignor in the caption to the complaint.

The Loan Schedule is attached. It shows the following. The "Charge Off Account Number" ends with 4118; the "Original Account Number" ends with 7551; and the primary name on the loan is James E. Klinedinst. Also on the loan schedule are the date when the account was opened (August 26, 1996), and the date when a payment last was made (May 5, 2009). Under the heading "Affinity" is listed "Bank of America". Under the heading "Legacy" is listed "MBNA".

Again, this information raises questions about the ownership history of the account with regard to the period(s) when entities other than FIA Card Services, NA owned the account. Because of questions surrounding the ownership of the debt, Potts' affidavit is not reliable. She cannot testify as to how the various parties in the chain of title up until FIA Card Services, N.A. maintained their records; i.e., she cannot testify that the records were made by or from information transmitted by a person with knowledge.⁶

In its motion for summary judgment, plaintiff made a number of arguments. It argued it had established the chain of ownership which ultimately led to the sale of the account from

⁶*Delaware Acceptance Corporation v. Swain*, 2012 WL 830563, **4, 7 (Del. Com. Pl. Jan. 31, 2012), *rearg. den.*, 2012 WL 1066357 (Del. Com. Pl. March 9, 2012), *aff'd*, 2012 WL 6042644 (Del. Super. Nov. 20, 2012).

MBNA Bank, N.A. to plaintiff. **This position is problematical because the actual assignor is FIA Card Services, NA. Furthermore, the admissible documents do not establish the chain of ownership from the original creditor, which apparently was MBNA America, National Association, through the various entities up until FIA Card Services, N.A. assigned the debt to CACH, LLC. Plaintiff also made the following argument which was deemed meritless in *Delaware Acceptance Corporation v. Swain*:⁷** The fact that the Plaintiff is in possession of the Bank of America statements which include the identifying account number and other consumer information is evidence that the plaintiff is the owner of the account given the severe penalties the Graham - Leach - Bliley Act imposes on financial institutions for disclosure of the account numbers to third parties who do not have ownership of the account. 15 U.S.C. § 6802 (d) (1999).

In his response to this motion, defendant asserted the following. His primary defense is that plaintiff does not have admissible evidence establishing ownership of the debt. The Maradei Affidavit attached as Exhibit A to the complaint states “that an account due and payable from the Defendant was, ‘on 1/13/2010 sold, transferred and set over unto CACH, LLC’.” Defendant argues that Delaware Rules of Evidence Rule (“DRE”) 1002 and the case of *Delaware Acceptance Corp.* render this affidavit inadmissible. **Furthermore, as I have ruled earlier, this affidavit is inadmissible because there is no information establishing that Maradei was a custodian or otherwise qualified witness who could testify in this matter.** Defendant also attacks the 1/20/10 Bill of Sale and Assignment of Loans because of the use of the word “loans” rather than “credit card accounts”. Of more substance is defendant’s argument that the 1/20/10 Bill of Sale and Assignment of Loans creates a question of fact by stating the date of the

⁷2012 WL 830563 at * 7. Plaintiff’s counsel here made this meritless argument in *Delaware Acceptance*.

assignment as January 20, 2010, which is in direct contradiction to Mardei's Affidavit stating the assignment took place on January 13, 2010.

Plaintiff thereafter submitted an affidavit of Jay Mills, dated April 2, 2013, in response to defendant's arguments. Mr. Mills asserts he is an authorized agent for CACH, LLC, and states:

1. In paragraph #3 of Defendant's Response to Plaintiff's Motion for Summary Judgment, the Defendant in this case objects that the Assignment refers to loans not credit cards. Based upon review of similar documentation and upon information and belief, Bank of America/F.I.A. Card Services, N.A.'s assignments typically refer to Assignments of "Loans" regardless of the exact nature of the debt.

2. In paragraph #4 of Defendant's Response to Plaintiff's Motion for Summary Judgment, Defendant points out that the Affidavit of Claim is dated 01/13/2010, whereas the Assignment is dated 01/20/2010. Based upon review of similar documentation and upon information and belief, Bank of America/FIA Card Services, N.A. purchase large Portfolios of accounts wherein review and execution of documentation may occur on different dates within a limited time period.

The difference in dates given for the assignment creates an issue of fact. There may have been a mistake in these dates.⁸ Or it is possible that testimony at trial would clarify that the date of the assignment may not necessarily have been the date of the transfer or that the assignment occurred after the date of the transfer.⁹ The point is, at this stage of the proceedings, contradictions regarding the date of the assignment exist. These contradictions would go to the weight of the evidence. Evidence cannot be weighed at the summary judgment stage.

The Commissioner issued findings of fact and recommendations on the pending motion dated May 2, 2013. **The Commissioner never directly addressed the problems raised by**

⁸See *Dahlink Financial Corp. v. Bochniak*, *supra*, at *4 (an affidavit named a creditor different from that named in the complaint; the Court ruled this mistaken information in the affidavit went to the weight of the evidence, not its admissibility.)

⁹See *Citimortgage, Inc. v. Bishop*, *supra*, at *3.

plaintiff's failure to establish the chain of title and corresponding assignments as well as those raised by the different dates attributed to the assignment. The Commissioner determined CACH, LLC's possession of the account information established the debt to CACH, LLC.

Defendant took exceptions thereto.

CCP issued its decision on July 11, 2013. The Court similarly found Potts' affidavit and the information attached thereto sufficient and concluded that plaintiff had established defendant owed CACH, LLC on this debt. **CCP's decision does not address the sole issue of whether plaintiff established it was the proper party to bring the suit without any questions of fact surrounding that issue.**

Defendant has appealed to this Court.

I quote from *Jackson v. Walgreens Corporation*,¹⁰ in setting forth the standard of review:

“When considering an appeal from the Court of Common Pleas, this Court sits as an intermediate appellate court.” FN4 In doing so, it is this Court's rule to “correct errors of law and to review the factual findings of the court below to determine if they are sufficiently supported by the record and are the product of an orderly and logical deductive process.” FN5 The Court of Common Pleas [sic] decision regarding summary judgment presents a question of law that is entitled to a *de novo* review by this Court.FN6 A decision granting summary judgment will be affirmed “if it appears that there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law.” FN7

FN4. *Acute Nursing, Inc. v. Westminster Village*, 2007 WL 1653509 (Del.Super.Mar.26, 2007) (citing *State v. Richards*, 1998 WL 732960 (Del.Super. May 28, 1998)).

FN5. *State v. Huss*, 1993 WL 603365 (Del.Super. July 14, 1993)).

FN6. *Newtowne Vill. Serv. Corp. v. Newtowne Rd. Dev. Co.*, 772 A.2d 172, 174–75 (Del.2001).

¹⁰2013 WL 2145938, *2 (Del. Super. May 15, 2013).

FN7. *Id.*

The standard for summary judgment is clear. Summary judgment may be granted only when no material issues of fact exist, and the moving party bears the burden of establishing the non-existence of material issues of fact.¹¹ Once the moving party meets its burden, then the burden shifts to the non-moving party to establish the existence of material issues of fact.¹² Where the moving party produces an affidavit or other evidence sufficient under Super. Ct. Civ. R. 56 in support of its motion and the burden shifts, then the non-moving party may not rest on its own pleadings, but must provide evidence showing a genuine issue of material fact for trial.¹³ If, after discovery, the non-moving party cannot make a sufficient showing of the existence of an essential element of his or her case, then summary judgment must be granted.¹⁴ If, however, material issues of fact exist or if the Court determines that it does not have sufficient facts to enable it to apply the law to the facts before it, then summary judgment is inappropriate.¹⁵

In this case, the sole issue was whether plaintiff established, without any issue of fact, its ownership of the debt and therefore, was entitled to summary judgment.

As my rulings and comments set forth above show, as of the time summary judgment was granted plaintiff did not establish all of the elements of its case which it would have to prove at trial. Plaintiff failed to produce undisputed, admissible evidence regarding the chain of title and

¹¹*Moore v. Sizemore*, 405 A.2d 679, 680 (Del. 1979).

¹²*Id.* at 681.

¹³Super. Ct. Civ. R. 56(e); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986).

¹⁴*Burkhart v. Davies*, 602 A.2d 56, 59 (Del. 1991), *cert. den.*, 112 S. Ct. 1946 (1992); *Celotex Corp. v. Catrett*, *supra*.

¹⁵*Ebersole v. Lowengrub*, 180 A.2d 467, 470 (Del. 1962).

which entity transferred the account to plaintiff. In fact, it does not appear that the correct plaintiff is named in the complaint, as the only document regarding the assignment indicates the assignor was FIA Card Services, N.A. It is plaintiff's burden to establish a clear line of title to the debt. Furthermore, questions regarding the date of the assignment exist. As noted earlier, the resolution of the contradictory dates issue must be determined by a fact finder and not decided as a matter of law.

Plaintiff and the court below focused on the fact that defendant owed the money. They did not focus on the requirements that plaintiff must meet in order to collect that debt. Administrative Directive 2011-1 outlined those requirements. Had plaintiff complied with that directive and had the court below enforced it, then substantial time and expense would have been saved in dealing with this case at hand.

For the foregoing reasons, CCP's decision granting summary judgment is REVERSED and the case is REMANDED to CCP for a trial.

IT IS SO ORDERED.