

**IN THE COURT OF COMMON PLEAS OF CARBON COUNTY, PENNSYLVANIA
CIVIL DIVISION**

CITIBANK, N.A.,	:	
	:	
Plaintiff	:	
	:	
v.	:	No. 11-2753
	:	
LAWRENCE E. WING, JR.,	:	
	:	
Defendant	:	
Trenton S. Farmer, Esquire		Counsel for Plaintiff
Michael S. Greek, Esquire		Counsel for Defendant

CITIBANK, N.A.,	:	
	:	
Plaintiff	:	
	:	
v.	:	No. 11-2440
	:	
PAMELA J. FETCH,	:	
	:	
Defendant	:	
Derek C. Blasker, Esquire		Counsel for Plaintiff
David A. Martino, Esquire		Counsel for Defendant

MEMORANDUM OPINION

Serfass, J. - May 16, 2012

Here before the Court are Defendants' preliminary objections to the complaints in the above-captioned actions seeking recovery on alleged credit card defaults which were filed by Plaintiff, Citibank, N.A. (hereinafter referred to as "Plaintiff"). Because the complaints are virtually identical, with both being based upon an account stated theory of recovery, and because Defendants' preliminary objections in each case

raise noncompliance with the pleading requirements of Pennsylvania Rule of Civil Procedure 1019, we have addressed the issues raised in one consolidated memorandum opinion. For the reasons that follow, Defendants' preliminary objections are sustained.

I. CITIBANK, N.A. V. LAWRENCE E. WING, JR.

FACTUAL AND PROCEDURAL BACKGROUND

On November 17, 2011, Plaintiff filed a complaint seeking a judgment against Lawrence E. Wing Jr. (hereinafter referred to as "Defendant") for the sum of four thousand, two hundred thirty-nine dollars and twenty-eight cents (\$4,239.28) plus litigation costs. The complaint alleges that Defendant obtained an extension of credit in the form of a Sears credit card account from Citibank (South Dakota), N.A., a successor in interest to Citibank, N.A. Plaintiff further alleges that it maintained accurate records of all debits and credits to Defendant's account, that Plaintiff was provided monthly statements setting out the previous balance and any debits or credits for that billing period, and that for many months Defendant either made payments on the account or retained his statements without making a payment. Plaintiff attached one such monthly statement to its complaint, setting forth a "New Balance" of four thousand, two hundred thirty-nine dollars and twenty-eight cents (\$4,239.28) with a payment due date of August

9, 2011 (Plaintiff's Exhibit 1). Plaintiff alleges that Defendant retained that statement without making payment, and argues that through his prior conduct of either making payments on the account balance or retaining such statements, Defendant manifested his assent to the balance due. As a result, Plaintiff claims that an account stated for the sum of four thousand, two hundred thirty-nine dollars and twenty-eight cents (\$4,239.28) exists between the parties.

The account statement attached by Plaintiff is not dated, although it does specify July 9, 2011 as the date a thirty-five dollar (\$35.00) late fee was assessed and July 13, 2011 as the "Statement Closing Date" and the date that one hundred five dollars and eighty-two cents (\$105.82) in interest was charged to the account, as well as setting out the aforementioned August 9, 2011 due date. No transactions other than the late fee and the interest charge are enumerated; the four thousand, two hundred thirty-nine dollars and twenty-eight cents (\$4,239.28) balance is represented as being the sum total of a four thousand, ninety-eight dollars and forty-six cents (\$4,098.46) "Previous Balance" plus the aforementioned charges. The second page of the statement, under the heading "How We Calculate Your Balance Subject to Interest Rate," indicates the following:

We use a daily balance method (including current transactions) to calculate interest charges. To find out more information about the balance computation method and

how the resulting interest charges were determined, contact us at the "Call us at" number on the front. (Plaintiff's Exhibit 1).

On December 29, 2011, Defendant filed preliminary objections to the complaint. In his first objection, Defendant claims that because Plaintiff failed to attach a cardholder agreement or application identifying Defendant as the account holder, and because the statement attached as Plaintiff's Exhibit 1 did not provide a breakdown of charges, payments, items purchased, or interest, the complaint is in violation of Pennsylvania Rule of Civil Procedure 1019(i), which requires that a claim based on a writing must attach a copy of that writing.

Defendant's second objection is that the complaint was pled with insufficient specificity in that it failed to include a breakdown of dates, purchases, charges and interest, failed to attach account statements attributable to Defendant and failed to attach a cardholder agreement setting forth the basis for Plaintiff's right to charge interest and fees. Defendant argues that these failures constitute violations of Pennsylvania Rule of Civil Procedure 1019 (a)'s requirement that material facts be stated in a concise summary form and Pennsylvania Rule of Civil Procedure 1019(f)'s requirement that averments of time, place and items of special damages be specifically stated. Because this information was not included in the statement attached by

Plaintiff, Defendant argues that he would have had no ability to dispute any alleged credit card charges, interest, cash advances or balance transfers. Defendant argues that the complaint should be stricken for failure to comply with a law or rule of court and for insufficient specificity; in the alternative, Defendant asks this Court to direct Plaintiff to file a more specific pleading.

On January 18, 2012, Plaintiff filed its "Response to Defendant's Preliminary Objections." Plaintiff emphasizes that its complaint is based upon an account stated cause of action and not a breach of contract theory, and argues that, as a consequence, it has no obligation to attach a cardholder agreement. Plaintiff argues that the only writing upon which the complaint relies is the account statement which is attached as Exhibit 1, and that the basis for the account stated is the implied agreement formed by numerous prior transactions between the parties.

DISCUSSION

An account stated is "an account in writing, examined and accepted by both parties." Robbins v. Weinstein, 17 A.2d 629, 634 (Pa. Super. 1941) (citing Leinbach v. Wolle, 61 A. 248 (Pa. 1905)). The acceptance may be either express or implied by the circumstances, as long as there is some allegation to support a finding that it exists. Id. Where one party retains a

statement of account for an unreasonably long amount of time without objection, a court may find an implied agreement as to the amount shown in that statement. Donahue v. City of Philadelphia, 41 A.2d 879, 881 (Pa. Super. 1945). "The mere rendering an account does not make it a stated account," however; rather, the statement becomes an account stated "if the other party receives it, admits the correctness of the items, claims the balance, or offers to pay it." Toland v. Sprague, 37 U.S. 300, 301, 9 L. Ed. 1093 (1838).

Thus, to properly plead a complaint based on an account stated, a plaintiff must allege that there has been a running account, that a balance remains due, that the account has been rendered upon the defendant, and that the defendant has accepted the account, and a copy of said account must be attached to the complaint. Rush's Service Center, Inc. v. Genareo, 10 Pa. D.&C.4th, 445, 447 (C.P. Lawrence 1991). The statement of the account must show that a balance remains due and that the plaintiff has mailed monthly statements to the defendant setting forth the details of the defendant's account. Citibank v. Ambrose, 13 Pa. D.&C.5th 402 (C.P. Adams 2010).

Because the requirements for pleading an account stated are flexible and contextual, rather than mechanical and rigid, a central issue in determining whether an account stated has been properly established is whether or not the allegations in the

pleading support a determination, under the circumstances, that there has been express or implied assent to the account on the part of the Defendant. Courts of Common Pleas in this Commonwealth have dealt with the question in various ways, but have generally held that this requires "something more than mere acquiescence by failure to take exception to a series of statements of accounts received in the mail." C-E Glass v. Ryan, 70 Pa. D.&C.2d 251, 253 (C.P. Beaver 1975). Clearly, "mutual assent to the correctness of the computation is essential to an account stated." Ryan v. Andershonis, 42 Pa. D.&C. 2d 86, 88 (C.P. Schuylkill 1967).

A complaint for a balance due on a credit card account was found to be insufficient to state a claim based on an account stated when the complaint attached a single billing statement and alleged that the defendant had made "many payments" on the account. Citibank (S.D.) N.A. v. Knepp, 19 D.&C.5th 333 (C.P. Clearfield 2010). The court held in the Knepp case that "merely receiving a statement in the mail and not objecting to its contents is not acquiescing." Id. at 336. The plaintiff's allegation that the defendant had made payments was insufficient, because there was no indication how many payments were made, on what dates, or with what regularity. The court noted that such information could be vital in determining whether the defendant had manifested assent, since a payment

made after the billing statement was rendered would be a much stronger indication than if the payments were made six months before the statement date. Id. at 336-37.

Where a plaintiff credit provider's complaint alleged an account stated based on a closing statement that showed a previous balance due plus a late fee incurred during the billing cycle, the Court of Common Pleas of Allegheny County rejected the argument that this was sufficient to support a finding of an account stated because the complaint did not include "factual allegations that would support a finding of an express or implied agreement that the cardholder will pay the amount set forth in the statement." Target National Bank v. Samanez, 156 P.L.J. 76, 78 (C.P. Allegheny 2007). In Samanez, the Honorable R. Stanton Wettick, Jr. concluded that in a credit card transaction, it is inaccurate to assume that the recipient of an invoice will be able to determine the accuracy of the amount claimed therein, because "[c]redit cardholders who do not pay the full amount of the new balance usually do not know whether any charges, other than the charges for purchases and cash withdrawals, are correct." Id. at 78-79. Citing a report of the United States Government Accountability Office regarding credit card rates and fees, the court explained that few cardholders read their entire cardholder agreement, and even those who do are unlikely to understand it fully due to the complicated

process of determining interest and charges.¹ Id. at 79-80. The court therefore rejected the position that the defendant was estopped from requiring proof of the balance due unless they contested the accuracy of the invoice. Id. at 78-79. Where its complaint did not allege an express agreement between the parties, the plaintiff was required to allege facts which would support a finding of an implied agreement. Id. at 80.

In the particular case of credit card companies, "the fluidity of interest rates and charges, compounded by the complexity of the agreements, makes it very difficult for an average cardholder to affirmatively understand and agree to the amount at issue." Capital One Bank (U.S.A.), N.A. v. Clevestine, 7 D.&C. 5th 153, 157-58 (C.P. Centre 2009). If cardholders cannot be expected to understand whether the information in their monthly statements accurately reflects what they owe, there cannot be an express or implied agreement that their silence means they have assented to the correctness of the amount claimed. Samanez, 156 P.L.J. at 80.

In this case, Defendant raises two objections: first, that Plaintiff was required to attach a cardholder agreement and did not; and second, that the complaint was insufficiently specific as to the basis for the alleged balance due to Plaintiff.

¹ See *Credit Cards - Increased Complexity in Rates and Fees Heightens Need for More Effective Disclosures to Consumers*, U.S. Government Accountability Office, Document GAO-06-929 (9/2006), www.gao.gov/products/GAO-06-929.

Plaintiff argues with respect to Defendant's first objection that, because the complaint is based upon an account stated cause of action, Plaintiff is not required to attach a cardholder agreement. Plaintiff argues with respect to the second objection that Defendant's assent is evident by his prior conduct; to wit, his practice of either making payments or retaining statements without rendering payment.

We reject both of these arguments. Plaintiff was required to plead sufficient facts to establish an account stated in accordance with the standards set forth above. The complaint alleges that a running account exists between the parties, that Defendant owes a balance due on that account, and that Defendant received notice of the balance. To properly plead an account stated, the complaint must also allege Defendant's acquiescence to the correctness of the account.

In the absence of a cardholder agreement setting forth the terms and conditions applicable to Defendant's alleged obligation to Plaintiff, there is insufficient support for Plaintiff's claim that an account stated exists for the amount alleged in the complaint. The essence of an account stated is that the statement or statements, and Defendant's acquiescence thereto, establish that Defendant is in agreement as to the accuracy of the account. Without attaching a cardholder agreement articulating the terms to which Defendant has

allegedly acquiesced, Plaintiff cannot recover based on an account stated subject to those terms. To recover the specific amount of money it alleges that Defendant owes, Plaintiff must document that Defendant acquiesced to paying that specific amount. In order to do so, because the amount includes various fees and interest charges, the Plaintiff must attach to the complaint a cardholder agreement delineating the rights and obligations of Defendant with respect to those fees and charges.

Plaintiff has merely alleged that Defendant retained account statements and made payments of some amount at some time in the past. This does not support a finding that there was a meeting of the minds between the parties that established a debt of four thousand, two hundred thirty-nine dollars and twenty-eight cents (\$4,239.28) owed by Defendant to Plaintiff. As discussed above, a failure to object to an account statement is generally an insufficient indicator of assent for the purposes of determining that an account stated exists.

Because a credit card account is the subject of the allegations here, as discussed in Samanez, there is even less reason to assume that by simply failing to challenge the account statement attached to the complaint, Defendant acquiesced to its correctness. Defendant could not have determined from the information provided in the statement that a mistake had been made in calculating his balance. To determine that the balance

was incorrectly calculated, he would have been required to understand what calculations had been made in determining his interest charges in the first place. That information was not contained in the statement he received; he would have had to call the listed phone number and inquire. Under the circumstances, we cannot find that Defendant assented to the balance due listed in that statement.

Similarly, Plaintiff's allegation that Defendant has made payments on the account in the past falls short of what is required to plead an account stated. As was the case in Knepp, the complaint here offers no averments as to when the alleged payments were made, how often, or in what amounts. While in certain circumstances an allegation of regular payments by Defendant could support a finding that there was an agreement between the parties, we cannot find that those circumstances exist where the allegation is only that some number of payments were made, and certainly not where there is no allegation to support a finding that Defendant assented to the accuracy of the stated balance in particular.

CONCLUSION

For the foregoing reasons, this Court concludes that the complaint filed by Plaintiff does not plead sufficient facts to demonstrate an account stated, and we will sustain Defendant's preliminary objections accordingly.

I. CITIBANK, N.A. V. PAMELA J. FETCH

The complaint filed in this action is nearly identical to the complaint filed in Citibank, N.A. v. Lawrence E. Wing, Jr.

It is alleged that Pamela J. Fetch (hereinafter referred to as "Defendant") obtained extensions of credit from Citibank, N.A. by means of a Citi Mastercard. It is further alleged that defendant made or authorized certain purchases and, as of April 5, 2011, owes nine thousand, eight hundred ninety dollars and ninety-nine cents (\$9,890.99) on the account. Plaintiff claims that it maintained accurate records of all debits and credits to the subject account. According to the complaint, Defendant was provided with monthly account statements and assented to the account balance through prior conduct by either making payments on the account or retaining the statements without making payment. Plaintiff attaches to the complaint only the April 5, 2011 account statement indicating a previous balance of nine thousand, six hundred twenty-six dollars and fifty-three cents (\$9,626.53), an interest charge of two hundred sixty-four dollars and forty-six cents (\$264.46), and a new balance of nine thousand, eight hundred ninety dollars and ninety-nine cents (\$9,890.99).

Defendant has filed preliminary objections alleging that the complaint fails to attach a running statement of account, a copy of the credit application and a copy of the cardholder agreement. For the reasons that we sustained Defendant's preliminary objections in Citibank, N.A. v. Lawrence E. Wing, Jr. as set forth hereinabove, we also sustain Defendant's preliminary objections to the complaint filed in this action.

BY THE COURT:

Steven R. Serfass, J.

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Plaintiff	:	
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v.	:	No. 11-2753
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LAWRENCE E. WING, JR.,	:	
	:	
Defendant	:	
Trenton S. Farmer, Esquire		Counsel for Plaintiff
Michael S. Greek, Esquire		Counsel for Defendant

ORDER OF COURT

AND NOW, to wit, this 16th day of May, 2012, upon consideration of Defendant's "Preliminary Objections to Plaintiff's Complaint" dated December 29, 2011, the briefs of counsel, and oral argument thereon, and in accordance with our Memorandum Opinion of this same date, it is hereby

ORDERED and DECREED that Defendant's Preliminary Objections are **SUSTAINED**. Plaintiff is granted thirty (30) days from the date of this Order within which to file an Amended Complaint pursuant to our Memorandum Opinion or the above-captioned case will be dismissed with prejudice.

BY THE COURT:

Steven R. Serfass, J.

**IN THE COURT OF COMMON PLEAS OF CARBON COUNTY, PENNSYLVANIA
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CITIBANK, N.A.,	:	
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Plaintiff	:	
	:	
v.	:	No. 11-2440
	:	
PAMELA J. FETCH,	:	
	:	
Defendant	:	
Derek C. Blasker, Esquire		Counsel for Plaintiff
David A. Martino, Esquire		Counsel for Defendant

ORDER OF COURT

AND NOW, to wit, this 16th day of May, 2012, upon consideration of Defendant's "Preliminary Objections to Plaintiff's Complaint" filed on November 15, 2011, the briefs of counsel, and oral argument thereon, and in accordance with our Memorandum Opinion of this same date, it is hereby

ORDERED and DECREED that Defendant's Preliminary Objections are **SUSTAINED**. Plaintiff is granted thirty (30) days from the date of this Order within which to file an Amended Complaint pursuant to our Memorandum Opinion or the above-captioned case will be dismissed with prejudice.

BY THE COURT:

Steven R. Serfass, J.