

**IN THE COURT OF COMMON PLEAS OF CARBON COUNTY, PENNSYLVANIA
CIVIL ACTION - LAW**

DISCOVER BANK,	:	
	:	
Plaintiff	:	
	:	
vs.	:	No. 11-2590
	:	
PATTI L. WINTERS,	:	
	:	
Defendant	:	
David J. Apothaker, Esquire		Counsel for Plaintiff
Anthony Roberti, Esquire		Counsel for Plaintiff
Patti L. Winters		Unrepresented

MEMORANDUM OPINION

Matika, J. – March 2012

Before the Court is Discover Bank’s (“Plaintiff”) Motion for Summary Judgment against Patti L. Winters (“Defendant”) based on a default in payment on a credit card account. The salient facts of record are set forth below.

Defendant applied for and received a credit card issued by Plaintiff in 2005. The account went into default with an unpaid balance of \$10,266.86. Plaintiff instituted this action against Defendant to recover the unpaid balance of the account, but attached only a “Statement of Account” to the Complaint showing the amount still owed on the account to which Defendant is still liable. Defendant disputes the balance owed.

Plaintiff now files a Motion for Summary Judgment claiming Defendant owes the remaining balance on the account and that there is no genuine issue of material fact or law to send this case to trial. In support of and accompanying its motion, Plaintiff attached a copy of Defendant’s signed credit application, a copy of the Card Member Agreement with a *2010 copyright date*, and copies of all account statements dating from December 13, 2005, showing a balance of \$0.00 to December 31,

2010, with the amount due on the account of \$10,266.86. Plaintiff now requests this Honorable Court to grant its Motion for Summary Judgment based on the pleadings and the documents accompanying the Motion. For the reasons that follow, Plaintiff's Motion for Summary Judgment is denied.

Pennsylvania Rules of Civil Procedure, Rule 1019(i) states that where a "claim or defense is based upon a writing, the pleader shall attach a copy of the writing, or the material part thereof, but if the writing or copy is not accessible to the pleader, it is sufficient so to state, together with the reason, and to set forth the substance in writing." Pa.R.C.P. 1019(i). In a credit card default action, a creditor must "attach the writings which assuredly establish [the creditor's] right to a judgment." *Atlantic Credit & Finance, Inc. v. Guiliana*, 2003 PA Super. 259, 829 A.2d 340, 345 (Pa. Super. 2003). Alternatively, in the event the creditor does not attach the requisite documents due to the lack of accessibility to the pleader, it is sufficient to set forth such an averment in the complaint together with the reasons for its inaccessibility. This the Plaintiff has not done.

In the case before the Court, Plaintiff submitted a copy of a Card Member Agreement with a copyright date of 2010, five years after the Defendant opened the account and was issued a credit card from Plaintiff. There has been no explanation as to why the initial Card Member Agreement had not been produced, or whether this particular Card Member Agreement was even in effect during the time the charges were incurred. The agreement submitted by the Plaintiff for consideration by the Court was nothing more than a generic card member agreement, which does not provide any relationship relating to the contract allegedly entered into by Plaintiff and Defendant in 2005.

Our sister courts previously addressed this situation. In *Target National Bank v. Killbridge*, 10 Pa. D. & C. 5th 489 (Centre Cty., 2010) and *World Wide Asset Purchasing LLC v. Stern*, 153 Pitts. Leg. J. 111 (Allegheny Cty., 2004), unsigned card agreements that failed to identify the same date the agreement was commenced or whether it was an undated agreement in effect was

determined insufficient to satisfy the requirements set forth in Pa.R.C.P. 1019(i). Furthermore, as in *Commonwealth Financial Systems v. Hartzell*, 2010 WL 5943551 (Pa. Com. Pl. Oct. 19, 2010), the Court held that “[P]laintiff has not provided any indication that the terms set forth in the card agreement with the copyright date of [2010] contains the identical terms and conditions agreed upon by the [D]efendant (when application was made) or whether the [D]efendant had accepted these updated terms.” Without averment or proof of the agreed upon terms there are no contractual terms for the Court to enforce and thus there is a genuine issue of fact for this case to be tried by the Court. Further, the failure to produce the original Card Member Agreement establishes a valid defense to the action. Accordingly, Plaintiff’s inability to produce the original Card Member Agreement or state why the original agreement cannot be provided creates a genuine issue of material fact or law and thus Plaintiff’s Motion for Summary Judgment must be denied.