

Superior Court of the State of California
For the County of San Bernadino

Heartless Debt Collector,)
Plaintiff,)
vs.) Case No. CIVDS XXXXXX
Joe Consumer,)
Defendant)

DEMAND FOR BILL OF PARTICULARS
PROPOUNDED BY DEFENDANT
JOE CONSUMER TO PLAINTIFF HEARTLESS DEBT COLLECTOR

DEMAND IS HEREBY MADE UPON YOU pursuant to California Code of Civil Procedure Sec. 454 to furnish to defendant Joe Consumer, within ten days hereafter, a bill of particulars setting forth the items and details of the account on which the cause of action of plaintiff's complaint is based, including

- The Agreement and/or contract of the relevant account
- All terms or conditions applying to the relevant account
- Documentation relating to plaintiff's ownership of the account
- List of items for which payment is being sought
- List of dates associated with each item, transaction, or service
- List of charges per item, transaction or service
- All payments made upon the relevant account by defendant
- Means by which the plaintiff determined the amount owed and for what.

Dated _____

DEFENDANT

(Sample) Meet and confer letter

Dear [attorney for Heartless Debt Collector]

On [date], Defendant sent to Plaintiff a request for a Bill of Particulars pursuant to CCP Sec. 454. On May 24, 2012, Plaintiff responded to Defendant's demand for Bill of Particulars by contending that a Bill of particulars is inapplicable to plaintiff's causes of action and that defendant has full access to all the documents in question.

As a preliminary matter, plaintiff's objection to Defendant's Bill of Particulars is not well taken. Plaintiff has alleged a cause of action for breach of contract. A Bill of Particulars is appropriate under this legal theory as plaintiff concedes in ultimately responding. *See, Distefano v. Hall (1963) 218 Cal. App. 2d 657, 677* ("Section 454 has received a fairly broad interpretation and has been construed to cover almost any kind of contract action for a money claim made up of more than one item.").

While plaintiff has alleged that defendant is aware of all the charges and "presumably has access to all the documents relating to his demand for a bill of particulars," these supposed facts are in dispute. Defendant has denied knowledge or possession of the records or transactions. Arguing that a defendant has full knowledge of every alleged debt would defeat the purpose of Section 454, which requires that, when a plaintiff is suing on an account it must provide a bill of particulars upon written demand.

Please provide the Bill of Particulars as requested within five (5) days of receipt of this letter.

Or

Dear [attorney for Heartless Debt Collector]

On [date], Defendant sent to Plaintiff a request for a Bill of Particulars pursuant to CCP Sec. 454. On [date] plaintiff responded to the request for the bill of particulars.

Your response is not sufficient. Plaintiff has not provided an itemization of the account showing all charges and credits thereto. It has not provided the underlying contract referred to in the complaint. Nor has it provided any contract of assignment of the claim at issue in this litigation. Such basic information is required to prove plaintiff's claim, and without it defendant is unable to understand plaintiff's claim or prepare adequately for trial.

Please provide a complete response within 10 days or defendant will move the Court for an order precluding Plaintiff from offering any such evidence at trial.

Superior Court of the State of California
For the County of San Bernadino

Heartless Debt Collector,)
Plaintiff,)
) Case No. CIVDS XXXXXX
vs.)
)
Joe Consumer,)
Defendant)

DEFENDANT JOE CONSUMER’S MEMORANDUM IN SUPPORT OF HIS MOTION
TO EXCLUDE EVIDENCE OR FOR FURTHER BILL OF PARTICULARS

Background

Plaintiff Heartless Debt Collector is suing defendant, Joe Consumer, on a credit account that Heartless allegedly owns, and defendant allegedly owes. Plaintiff seeks \$X, which it apparently has derived by totaling some unknown and unspecified charges. Defendant is not aware of the account and has denied plaintiff’s petition in his answer.

Pursuant to his right under California Code of Civil Procedure Sec. 454, defendant made demand for a Bill of Particulars. Plaintiff objected to this request, claiming that it’s cause of action does not give defendant to a right to a bill of particulars and claiming that all the necessary documents were “presumably within defendant’s knowledge and possession,” but, “without waiving its objections” provided a completely unresponsive and inadequate document consisting of three (3) statements purporting to show an existing balance on the account.

After negotiations and defendant’s good faith effort to resolve differences, but plaintiff’s adamant refusal and failure to provide the required response, defendant brings this motion seeking an order excluding evidence of plaintiff’s claims or, in the alternative, requiring plaintiff to furnish a further bill of particulars.

Plaintiff’s Claim against Defendant is within the Ambit of Section 454

California Code of Civil Procedure, Sec. 454 states in relevant part as follows:

It is not necessary for a party to set forth in a pleading the items of an account therein alleged, but he must deliver to the adverse party, within ten days after a demand thereof in writing, a copy of the account, or be precluded from giving evidence thereof.

Applicability of this statute and its requirements have been liberally interpreted, and they plainly encompass plaintiff’s claims of money lent against defendant. *See, Distefano v. Hall (1963) 218 Cal. App. 2d 657, 677* (“Section 454 has received a fairly broad interpretation and has been construed to cover almost any kind of contract action for a money claim made up of more than one

item.”). *And see, Moya v. Northrup, 10 Cal. App. 3d 276, 280 (1970)* (requiring a bill of particulars in a money lent or paid claim). The purpose of the statute is to make it possible for a defendant to understand the claims being brought against it and to prepare for trial.

Defendant’s demand for a bill of particulars falls squarely within both the language and purpose of Sec. 454, and plaintiff’s boilerplate objection that it does not has no merit.

Section 454 does not support plaintiff’s claims that it should be relieved of its responsibility to provide a bill of particulars simply because it has alleged defendant owed the money and “presumably” has the records it would need to supply the information requested. Suits on account always share the feature that the plaintiff is alleging that it lent money or provided goods and services to a defendant for which it has been unpaid. To allow plaintiff’s objection, based on an inference that a defendant must have the records supporting a plaintiff’s claim because the plaintiff has sued the defendant would be to read Section 454 out of existence entirely.

The Federal Trade Commission has sued on large debt collector for deceptive practices alleging that it had collected as much as 80% or more of its revenues from people who never owed the debt, and there have been several stories recently of a debt collection firm (from India) harassing and suing people for money they did not owe. One purpose of Section 454 is to require plaintiffs claiming to be owed money to have records or at least knowledge of the particulars of accounts on which they bring suit.

In *Burton v. Santa Barbara Nat. Bank, 247 Cal. App. 2d 426 (Dist. 2, 1966)* plaintiff alleged that over the course of several years it had collected contingent liabilities owed defendant “at [the defendant’s] request.” Upon request, the trial court required plaintiff to provide a bill of particulars itemizing all the accounts alleged to have been collected upon and to allow inspection of all books accounts and records of services allegedly rendered by plaintiff. *Id. at 429*. Plaintiff failed to provide the information ordered, arguing that

because of the fact that the books and records pertaining to the operation of the business are not now in possession and to his best knowledge are in the possession of Defendant or its agents, he is not able to give an exact breakdown of all the services rendered on each contract. *Id. at 430*.

The Court of Appeals in *Burton* found that this claim was “no real showing... that the necessary records are actually in defendant’s possession.... Plaintiff even failed to take advantage of the discovery devices, ordered by the court, to determine such fact.” *Burton* then held that this response was so far short of the mark as to be utter noncompliance, finding that “the paper delivered was no bill of particulars at all, and did not pretend to be.” *Id. at 434*. The court found that this was the sort of lack of response justifying the penalty of precluding of evidence to prove the claim, and, accordingly, the court affirmed the trial court’s order to that effect. Notably the court found that:

Plaintiff sued in a common count for services rendered in an amount certain; he did not state these matters to be on information and belief, and he verified his complaint. We can only assume that the account alleged and the items of which it consists are within plaintiff’s knowledge. *Id.*

This same state of affairs exists in the case at bar. Plaintiff made its allegations in no uncertain terms, and accordingly it should be able to state the basis of its claims in detail, and its excuses for not providing a bill of particulars are obviously not well taken. Plaintiff’s claims, like the plaintiff’s claims

in Burton, that it is “conducting ongoing investigation” should not be tolerated at all – it should have made these investigations prior to instituting suit and verifying the amounts supposedly owed.

The Information Provided in Plaintiff’s Response to Demand for Bill of Particulars was not a Bill of Particulars at all

The requirement for a bill of particulars is a “copy of the account.” See Sec. 454, *supra*. While the statute does not precisely define “the account,” the courts have routinely required plaintiffs to provide the particulars of every transaction implying or supporting liability. *See, e.g., Burton, supra at 429*, (plaintiff ordered to provide “the dates when the services were rendered, the time consumed in the rendering of the said services, and the specific charges of the said services as allotted to the dates when the services were purportedly rendered”). *And see Butler Bros. v. Connolly, 204 Cal. App. 2d 22, 24-25 (Dist. 4, 1962)*(allegation that defendant, as manager of plaintiff’s store intentionally and systematically gave false accountings and destroyed some records not enough to overcome its obligation to provide a further bill of particulars, but providing 417 specifically identified falsified items along with sheet and line number in inventory along with a full explanation as to why some records could not be provided as well as the defendant’s modus operandi of falsification and the testimony of a witness as to instructions to falsify inventory was a sufficient bill of particulars in view of all the circumstances).

The bill of particulars is treated as an amplification of the pleadings, and at trial plaintiff is limited to the items and amounts specified in its bill of particulars. No additional items can be shown. *Baroni v. Musick* 3 Cal. App. 2d 419, 421 (1934).

Plaintiff’s response to defendant in the case at bar was no bill of particulars at all. It did not identify any specific transactions, costs, bills, fees or charges at all. Instead, it provided only three statements purportedly showing that defendant owed a liquidated sum equal to \$X. There were no particulars at all. At trial, plaintiff must prove that it lent the specific amounts of money constituting its claim against defendant to defendant at his request. Nothing in the response to the demand for bill of particulars addresses a single item supposedly lent. In the words of the *Burton* court, *supra at 434*, “the paper delivered was no bill of particulars at all, and did not pretend to be.” In such cases the extreme penalty provided by the section, of precluding evidence to prove the claim, is applicable. *Id.*

If the Court Does Not Issue an Order Precluding Evidence, It Should Order the Plaintiff to Provide a Further Bill of Particulars

If for any reason the court does not issue an order precluding the giving of evidence in support of plaintiff’s claims, it should at least require the plaintiff to give a further bill of particulars in which it specifically identifies:

- The Agreement and/or contract of the relevant account
- All terms or conditions applying to the relevant account
- Documentation relating to plaintiff’s ownership of the account
- List of items for which payment is being sought
- List of dates associated with each item, transaction, or service
- List of charges per item, transaction or service
- All payments made upon the relevant account by defendant
- Means by which the plaintiff determined the amount owed and for what.

This information is necessary to give defendant reasonable notice of the items constituting plaintiff's claims so that she may prepare for trial. Anything short of this would make possible, or even likely, the embarrassment it was the statute's purpose to prevent. *See, e.g., McCarthy v. Mt. Tecarte Land & Water Co., 110 Cal. 687, 692.*

Conclusion

Defendant requests an Order precluding plaintiff from presenting any evidence of its claims against defendant. The statute and case law contemplate such a remedy where a plaintiff does not provide a bill of particulars in response to demand, or where that response indicates either a lack of good faith in the premises or such lacks of diligence as to constitute gross neglect. *See, Burton, supra* at 435. If the court is not yet prepared to preclude plaintiff from introducing evidence, then it should require plaintiff to provide a further bill of particulars which provides the information sought in defendant's demand for a bill of particulars and for such other, and additional, relief this court deems meet and proper in all the circumstances.

[signed and served]

Superior Court of the State of California
For the County of San Bernadino

Heartless Debt Collector,)
Plaintiff,)
vs.) Case No. CIVDS XXXXXX
Joe Consumer,)
Defendant)

DEFENDANT JOE CONSUMER’S MOTION TO EXCLUDE EVIDENCE OR FOR
FURTHER BILL OF PARTICULARS FROM PLAINTIFF HEARTLESS DEBT
COLLECTOR

COMES NOW Defendant, Joe Consumer, and moves this court for an order excluding evidence of its claims or, in the alternative, requiring plaintiff to furnish a further bill of particulars for the reasons stated below.

1. Plaintiff debt collector is suing defendant on an account allegedly owned by it and on which defendant allegedly owes money. Defendant has denied owing the money.
2. On [date], defendant sent plaintiff her Request for Bill of Particulars seeking:
 - The Agreement and/or contract of the relevant account
 - All terms or conditions applying to the relevant account
 - Documentation relating to plaintiff’s ownership of the account
 - List of items for which payment is being sought
 - List of dates associated with each item, transaction, or service
 - List of charges per item, transaction or service
 - All payments made upon the relevant account by defendant
 - Means by which the plaintiff determined the amount owed and for what.

See, Attached, Exhibit A [the demand for bill of particulars].
3. On [date], plaintiff sent defendant a response to the Request for Bill of Particulars (1) objecting to the applicability of the right to a bill of particulars under California law, and (2) claiming that defendant “presumably” has all the information sought by the demand, but (3) “subject to these objections,” including three (3) electronically produced statements from a credit card account purporting to bear defendant’s name and purporting to show a balance owed of X dollars. Plaintiff stated that “further investigations were being conducted and information would be provided to defendant when such investigations revealed any information. **See, Attached, Exhibit B** [the response to the demand for bill of particulars].
4. Plaintiff’s document is so grossly inadequate and unresponsive as to amount to no response at

all, or to be grossly negligent. Accordingly, defendant requests an order that plaintiff be precluded from providing evidence on these claims at trial, as provided in the California Code of Civil Procedure, Sec. 454. *Burton v. Santa Barbara Nat. Bank*, 247 Cal. App. 2d 427, 433 (Dist. 2, 1966), citing, e.g., *Elmore v. Tingley*, 78 Cal. App. 460, 467, 470, 248 P. 706, and *Id. at 434* (the paper delivered was no bill of particulars at all, and... amounted to a total and unqualified noncompliance with the demand. In such case the extreme penalty provided by the section, of precluding the giving of evidence to prove the claim, is applicable,” citing *Banchemo v. Coffis*, 96 Cal. App. 2d 717, 216 P.2d 151, *Graham v. Harmon*, 84 Cal 181, 185, 23 P. 1097, and others.

5. Notwithstanding the immediate right to seek exclusion, defendant sent plaintiff a “meet and confer” letter in a good faith attempt to resolve the dispute. *See Attached, Exhibit C* [meet and confer]. This letter requested plaintiff withdraw its meaningless objection, since the right to a bill of particulars is plainly applicable in this case. *See, Distefano v. Hall*, 218 Cal. App. 2d 657, 677 (“Section 454 has received a fairly broad interpretation and has been construed to cover almost any kind of contract action for a money claim made up of more than one item.” And it further requested a meaningful response to the request within five (5) days of the date of the letter.
6. Plaintiff’s response to defendant’s letter was to refuse to withdraw its objections, but again to offer only the same statements and material. *See Attached, Exhibit D*.
7. Given plaintiff’s intransigence, defendant brings this motion for an Order precluding plaintiff from presenting any evidence on its claim or, in the alternative, for an Order requiring plaintiff to provide a further bill of particulars which provides the information sought in defendant’s demand for a bill of particulars.

Wherefore, defendant requests an Order precluding plaintiff from presenting any evidence of its claims against defendant or requiring plaintiff to provide a further bill of particulars which provides the information sought in defendant’s demand for a bill of particulars and for such other, and additional, relief this court deems meet and proper in all the circumstances.

[signed and served]