

**In the Associate Circuit Court
State of State**

Evil Company ,)	
Plaintiff,)	
)	Cause Number
vs.)	
)	
)	
Joe Consumer,)	
Defendant.)	

**DEFENDANT'S MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS
PLAINTIFF'S PETITION**

Defendant Joe Consumer brings this motion to dismiss plaintiff debt collector's suit because debt collector fails to state a claim upon which relief can be granted.

Background

Plaintiff debt collector has brought its claim against defendant in two counts: breach of contract and for account stated. In support of its claim of breach of contract it has alleged that that it is suing plaintiff on a debt (para. 2), that defendant owes money based on that debt (para. 3) and has refused to pay (para. 4), and that it, debt collector has been damaged thereby (para. 5). It has attached what is allegedly a copy of a single statement from a credit card account supposedly issued in plaintiff's name by a company unnamed in the petition, Bank One. In support of its claim for account stated, plaintiff has simply incorporated its allegations for breach of contract and renamed the claim as an account stated (para. 7). Because both counts of the petition are fatally flawed, the court must dismiss them.

Count I – Breach of Contract

Under New York law, in order to state a claim for breach of contract a plaintiff must allege the existence of a contract, its terms, a breach of those terms, and damages. *Citation*. Plaintiff's petition falls far short of this requirement. Plaintiff does allege a "credit card account" (para. 2) upon which defendant supposedly owes money, but it does not allege any terms of such agreement other than the

nebulous agreement “to repay” money advanced. Moreover, and crucially, it does not allege that plaintiff itself was a party to any such agreement. Nor does it allege any other fact that would give it standing to seek to enforce any such contract. An examination of the document attached, which is not verified, suggests it is a statement issued by a third party, unnamed in this action, Bank One. There is no basis stated in the petition for believing that Debt Collector has any right pursuant to this statement at all. Accordingly, the claim must be dismissed.

Plaintiff’s petition is similarly devoid of any statement as to how it arrived at the amount allegedly owed and no basis on which a court or defendant could determine how the amount arrived at in the statement or petition was reached. In order to prove money owed on an open account, which a credit card account is, a plaintiff must show the amounts sought to be collected and not merely an alleged total amount due. *Citation*. Plaintiff’s petition fails to do this completely.

Count II For Account Stated

Count II of the Petition merely incorporates the allegations of Count I by reference, adds an allegation that “defendant failed to object to plaintiff’s demands for payment,” and renames the action as one brought “for account stated.” No doubt this was intended to cover up for the fact that there are no allegations, much less evidence, supporting the amount plaintiff claims is owed. However, Count II is also fatally flawed and must be dismissed.

In the first place, like Count I, Count II also fails to show any standing on the part of plaintiff to bring this action. It is not, from the face of the supposed document attached to the petition, an actual party to any contract or account between defendant and any person. Nor are there any allegations, much less proof, of any such interest.

Secondly, an action for account stated is not merely an alternative version of breach of contract, a second bite at the apple for ingenious plaintiffs. Rather, it is a cause of action with its own requirements – none of which have been properly alleged here.

An action for account stated is an ancient form of action rooted in face-to-face, relatively

unsophisticated financial transactions. It presupposed a mutual knowledge and bargaining process regarding accounts, such that, after a bill was submitted and discussed, one could say that a separate accord had been reached.

Count II alleges that “Defendant’s failure to object” to the amount sought is the equivalent of an implied promise to pay and converts this count to an account stated. However, there are no allegations in the Complaint that plaintiff or its predecessor in interest regularly mailed statements to defendant – or that it ever did at all. The petition makes only the bare allegation that defendant had “failed to contest” the amount in unspecified, unnamed, unnumbered and entirely unidentified hypothetical statements. This does not meet the most basic pleading requirements of a claim for account stated. *See, e.g., Rush’s Service Center, Inc. v. Genareo, 10 Pa. D& C 4th 445, 447 (C.P. Lawrence 1991)*(petition must include averments that there had been a running account, a balance remains due, the account has been rendered to the defendant, and the defendant has assented to the account). Accordingly, plaintiff’s complaint fails to allege an account stated and must be dismissed.

Plaintiff Must Allege More Than Mere Silence to State a Claim under Account Stated

More fundamentally, even if plaintiff were to plead that it owned the debt and that it, or someone in privity to it had sent statements to defendant, more than mere silence is required to create an account stated claim in today’s reality. Traditionally, the law has recognized a claim for account stated where a plaintiff can show that the defendant promised to pay a stated amount of money which the parties had expressly agreed upon. *Target National Bank v. Samanez, supra at 6* (citations omitted). The doctrine was expanded to include an implied promise to pay. *Id.* To produce an account stated, the account must be rendered, and the other party must accept, agree to, or acquiesce in the correctness of the account. *Id.* (citations omitted). In some jurisdictions, the law is very explicit: there must be *something more than mere acquiescence by failing to take exception to a series of statements of account received in the mail to create an account stated. Id., and see, C-E Glass v. Ryan, 70 Pa. D&C.2d 251, 253 (C.P. Beaver 1975)*(finding that allegations did not state a cause of action for account

stated where they lacked anything “more than mere acquiescence by failure to take exception to a series of statements of accounts received in the mail).

The requirement that there be some additional showing other than mere silence before the law of account stated applies comports with reality and common sense. Account stated is, ultimately, a form of contract law based on a promise, express or implied, to pay an amount agreed upon. *See, 4 Standard Pennsylvania Practice 2d Sec. 22:17 at 303 (2001)*(footnotes omitted). Implying a credit card holder’s agreement based upon his or her failure to dispute a credit card bill is not warranted or justified where cardholders typically do not know, and cannot be expected to know, whether the amounts shown as “due” on a credit card statement are correct.

An interpretation of the law implied by plaintiff’s complaint would seem to be that a recipient of any invoice is estopped from requiring the party to prove the accuracy of the amount claimed in the invoice unless the recipient has contested the accuracy of the invoice upon which plaintiff’s complaint is based. Even if there are some situations in which this position may have merit, that is not the law in general, and it is without merit in credit card transactions because it is based on the assumption that the recipient, upon review of an invoice from a credit card issuer, can readily determine whether this is an amount that he or she owes.

That is not an accurate assumption in credit card transactions. Credit card holders 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. It is reasonable to assume that most credit card holders have never attempted to read the entire initial cardholder agreement. Furthermore, even if they attempted to do so, it is unlikely that they would fully understand what they have read. Also, most agreements provide that they can be amended by the card issuer upon fifteen days’ notice, and frequently the monthly statements are accompanied by amendments to the initial agreement that cannot be understood unless the credit card holder has access to and does review the initial agreement, subsequent amendments, and the newest amendment. This does not occur.

While the credit card holder, looking at the statement, can see the amount of the charges that were imposed, he or she is unlikely to know whether the charges are consistent with the writings governing the card holder's obligations. Consequently, he or she is not in a position to agree or disagree with the amount of the balance in any monthly statement that does not begin with a \$0.00 balance.

The above description of the cardholder and issuer relationship is consistent with the findings in a September 2006 108-page report prepared by the United States Government Accountability Office titled Credit Cards - Increased Complexity in Rates and Fees Heightens Need for More Effective Disclosures to Consumers, www.gao.gov, Document GAO-06-929(9/2006)(hereinafter, the "Report")(attached as Exhibit 1).

The portion of the Report titled "Results in Brief" states that disclosures are too complicated for many consumers to understand. *Id. at 4-6*. In addition, the disclosures are often poorly organized, burying important information in the text, and scattering information about a single topic in numerous places. *Id. at 6*. The design of the disclosures often makes the disclosures hard to read with large amounts of the text in small, condensed typefaces and poor, ineffective headings. *Id.*

Prior to 1990, most issues charged a fixed interest rate and imposed few other charges. Thus, furnishing an adequate disclosure was relatively easy. Today, credit cards feature complex pricing structures. *Id. at 13*. Most cards now assess one interest rate on balances from the purchases of goods, another on balances that are transferred from another credit card, and a third on balances that result from using the card to obtain cash. Also, the cards usually provide for payments to be allocated first to the balance assessed at the lowest interest rate. *Id. at 14-15, 27*.

In addition to having separate rates for the different transactions, the cards increasingly impose interest rates that vary periodically as market interest rates change. Issuers typically establish these variable rates by taking the prevailing level of a base rate, such as the prime rate, and adding a fixed percentage amount. They frequently reset the interest rates on a monthly basis. *Id. at 15*.

Most credit cards provide for a penalty fee, described as a late fee, which issuers assess when they do not receive at least a minimum required payment by the due date. Most of the cards have a tiered fee structure depending upon the amount of the balance held by the cardholder. *Id. at 19-20.*

Most issues also assess cardholders a penalty fee for exceeding the credit limit, with the over limit fee also involving the use of a tiered structure. *Id. at 20-21.* Cards frequently have total credit limits at a lesser limit for cash. *Id. at 22.* Also, issuers do not reject purchases during the sales authorization even though the transaction puts the cardholder over the card's credit limits, thereby exposing the card holder to an over limit fee and a higher interest rate. *Id. at 30.*

Many cards provide for higher interest rates to be assessed if cardholders make late payments or exceed the credit limit. *Id. at 24.* Many cards also provide for increased rates when cardholders fail to make payments to other creditors. *Id. at 24-25.*

Most of the cards also provide for the cardholder to pay fees for certain services (e.g., 3% of cash advance amounts, 3% of balance transfers from another creditor, 3% of purchases made in a foreign country). *Id. at 23.*

The Report concluded that the disclosures which provide information about the costs and terms of using credit cards had "serious weaknesses that likely reduce their usefulness to consumers;... The disclosures... were written at a level too difficult for the average consumer to understand and *had design features, such as text placement and font sizes, that did not conform to guidance for creating easily readable documents.* When attempting to use these disclosures, cardholders were often unable to identify key rates or terms and often failed to understand the information in the documents." *Id. at 33* (emphasis added).

The cause of action of an account stated is based on principles of contract law. There must be an express or implied agreement between the creditor and debtor that the debtor owes the amount set forth in the account. Credit card holders do not know whether the finance charges, fees, penalties and costs set forth in a monthly statement are permitted under the applicable credit card agreement. If

cardholders cannot be expected to know whether the information in the monthly statement accurately states what they owe, there cannot be an express or implied agreement that their silence means that they have agreed that the amount claimed is correct. *Target v. Samanez*, No. A.R.07 – 009777 (Dec. 19, 2007), at 15 (Attached as Exhibit 2).

Conclusion

Plaintiff has attempted to allege two counts against defendant, breach of contract and for account stated. Plaintiff's failure to plead an interest in the contract in dispute or the account for which it seeks payment is fatal to both counts of its action. Furthermore, even if plaintiff had shown an interest in the contract in dispute, to allege an account stated plaintiff must show something more than mere acquiescence to a bill sent by someone in privity to it. It must allege some set of facts properly giving rise to an inference of implied acceptance to an account familiar to and understood by the defendant. In this case, plaintiff did not even properly allege that statements had been sent to defendant, much less than any facts give rise to an implied acceptance of those statements. Accordingly, plaintiff's petition must be dismissed in its entirety.