

**IN THE CIRCUIT COURT OF THE 18TH JUDICIAL CIRCUIT
OF FLORIDA, IN AND FOR BREVARD COUNTY**

CITIBANK (SOUTH DAKOTA), N.A.

CASE NO. 05-2010-CA-XXX

Plaintiff,

v.

Jane Doe,

Defendant.

DEFENDANT'S MOTION TO DISMISS

COMES NOW, Defendant, Jane Doe (“Defendant”), by and through her counsel, Lillian Clover, and pursuant to Florida Rules of Civil Procedure sections 1.210, 1.130 and 1.140, hereby submits this Motion to Dismiss Plaintiff’s Complaint brought by Citibank (South Dakota), N.A. (“Plaintiff”), and in support thereof states:

**I
RELEVANT FACTS**

1. Plaintiff, as named in the caption is “Citibank (South Dakota), N.A.”. In the body of the Complaint, the Plaintiff does not state any other name that it is known by, nor does it explain the capacity in which it brings this action, including the type of entity that it is or whether it is authorized to do business in the State of Florida.

2. In Count 1, “Account Stated”, Plaintiff references as an exhibit a billing statement which is attached to the Complaint as Exhibit “A”. Exhibit “A” to the Plaintiff’s Complaint is an unsigned, single-sheet paper that does not state the identities of either the obligor or obligee, nor does it reference the named Plaintiff. This document purports to represent an interest charge in the amount of 28.99%.

3. Exhibit “A” to Plaintiff’s Complaint does not show items for which a debt is due, nor does it show the time of accrual of each item, nor does it show the amount of each item of debt.

4. The Plaintiff failed to attach a copy of the contract which allegedly exists between the Plaintiff and the Defendant.

II

MOTION TO DISMISS

5. A. Standard of Review

Florida Rules of Civil Procedure section 1.410 provides in part:

(b) How Presented. Every defense in law or fact to a claim for relief in a pleading shall be asserted in the responsive pleading, if one is required, but the following defenses may be made by motion at the option of the pleader: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a cause of action, and (7) failure to join indispensable parties. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. The grounds on which any of the enumerated defenses are based and the substantial matters of law intended to be argued shall be stated specifically and with particularity in the responsive pleading or motion. Any ground not stated shall be deemed to be waived except any ground showing that the court lacks jurisdiction of the subject matter may be made at any time. No defense or objection is waived by being joined with other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, the adverse party may assert any defense in law or fact to that claim for relief at the trial, except that the objection of failure to state a legal defense in an answer or reply shall be asserted by motion to strike the defense within 20 days after service of the answer or reply.

6. The function of a motion to dismiss a complaint is to raise as a question of law the sufficiency of the facts alleged to state a cause of action. *Connolly v. Sebco, Inc.*, 89 So. 2d 482 (Fla. 1956). For the purpose of a motion to dismiss, the Court is required to accept as true all well-pleaded allegations of the complaint. *Brown v. First Federal Savings and Loan*, 160 So.2d 556 (Fla. 1st DCA 1964). However, the Court is not required to accept as true allegations that are inconsistent with law. *Brown*, 160 So. 2d at 563. (“Semantics cannot be employed for the

purpose of refuting facts clearly shown to exist or used to create a fictional relationship, one that otherwise would have no existence in the law.”) The pleading must be construed against the pleader in determining whether the necessary allegations have been stated. *Matthews v. Matthews*, 122 So. 2d 571 (Fla. 2d DCA 1960).

7. **B. Dismissal is appropriate when supporting documents are not attached to the Complaint.**

Florida Rule of Civil Procedure 1.130(a) provides in pertinent part: “All bonds, notes, bills of exchange, contracts, accounts, or documents upon which action may be brought or defense made, or a copy thereof or a copy of the portions thereof material to the pleadings, shall be incorporated in or attached to the pleading.” A motion to dismiss for failure to state a cause of action must be granted if the document on which the complaint is based is not attached. See *Walters v. Ocean Gate Phase I Condo*, 925 So 2d 440, 443-44 (Fla 5th DCA 2006); *Safeco Ins. Co. of America v. Ware*, 401 So.2d 1129 (Fla. 4th DCA 1981). A party who makes a claim or defense based on a written instrument must attach a copy of the instrument to the pleading in which the claim or defense is raised. *Jeff-Ray Corp. V. Jacobson*, 566 So.2d 885 (Fla. 4th DCA 1990). The note to Fla. R.Civ.P. Form 1.932, *Open Account*, requires that a copy of the account showing items, time of accrual of each, and amount of each must be attached. The note to Fla. R.Civ.P. Form 1.933, *Account Stated*, requires that a copy of the account showing items, time of accrual or each, and amount of each must be attached.

8. The single-page document Plaintiff attached to its Complaint as Exhibit “A” is not a contract, it is not signed by either the Plaintiff or the Defendant, nor does it describe the obligor or the obligee, and it fails to contain a complete listing of the account showing items, time and amount of each as prescribed by Form 1.932 and 1.933. The Complaint does not have attached *any* alleged contract that would govern the alleged dealings between the Plaintiff and the Defendant.

9. **C. Dismissal is appropriate when capacity has not been alleged.**

Plaintiff's Complaint should be dismissed because Defendant fails to allege capacity pursuant to Florida Rules of Civil Procedure, § 1.120(a) and § 1.110(b) "Capacity to sue" is an absence or a legal disability which would deprive a party of the right to come into court. 59 Am.Jur.2d Parties, § 31, (1971). This is in contrast to "standing" which requires that a party have a sufficient interest in the outcome of litigation to warrant the court's consideration of it's position. *Keehn v. Joseph C. Mackey and Co.*, 420 So.2d 398 (Fla. App. 4 Dist., 1982).

10. Plaintiff's Exhibit "A" to the Complaint demonstrates that a different entity from the named Plaintiff is the possible real party in interest. Plaintiff has not identified what it (the Plaintiff) is, whether it is authorized to do business in the State of Florida or on who's behalf it is acting, if it is acting on another's behalf.

11. **D. Dismissal is appropriate for lack of standing.**

Florida Rule of Civil Procedure 1.210(a) provides in pertinent part:

Every action may be prosecuted in the name of the real party in interest, but a personal representative, administrator, guardian, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party expressly authorized by statute may sue in that person's own name without joining the party for whose benefit the action is brought.

12. When exhibits are inconsistent with the Plaintiff's allegations of material fact as to who the real party in interest is, such allegations cancel each other out. *Fladell v. Palm Beach County Canvassing Board*, 772 So.2d 1240 (Fla. 2000); *Greenwald v. Triple D Properties, Inc.*, 424 So. 2d 185, 187 (Fla. 4th DCA 1983); *Costa Bella Development Corp. v. Costa Development Corp.*, 441 So. 2d 1114 (Fla. 3rd DCA 1983). Florida Rule of Civil Procedure 1.130(b) provides in pertinent part: "Any exhibit attached to a pleading shall be considered a part thereof for all purposes."

13. The Plaintiff's Complaint fails to contain sufficient facts to establish who the Plaintiff is and its relationship to the Defendant, if any, and the legal basis for its claims in each of the Counts. Plaintiff relies upon Exhibit "A" to the Plaintiff's Complaint for its basis for this action, which document identifies an entity different from the named Plaintiff. This is in direct

conflict with the allegations that the Plaintiff is the real party in interest. Plaintiff has not alleged that it is the successor in interest to the alleged creditor or that it is acting as an agent of the creditor. Plaintiff has failed to establish itself as the real party in interest and has failed to state a cause of action.

14. **E. Dismissal is appropriate for usurious interest.**

Florida's anti-usury statute is set out in Florida Statute 687. Florida Statutes section 687.071(7) states that an extension of credit in excess of 25% is illegal and "No extension of credit made in violation of any of the provisions of this section shall be an enforceable debt in the courts of this state." Florida Statutes section 687.0304(2) requires credit agreements to be in writing and provides that there can be no action upon the agreement if it is not in writing.

15. Florida Statutes section 687.04 provides in part:

Any person, or any agent, officer, or other representative of any person, willfully violating the provisions of s. 687.03 shall forfeit the entire interest so charged, or contracted to be charged or reserved, and only the actual principal sum of such usurious contract can be enforced in any court in this state, either at law or in equity; and when said usurious interest is taken or reserved, or has been paid, then and in that event the person who has taken or reserved, or has been paid, either directly or indirectly, such usurious interest shall forfeit to the party from whom such usurious interest has been reserved, taken, or exacted in any way double the amount of interest so reserved, taken, or exacted.

16. Exhibit "A" to Plaintiff's Complaint states that the interest rate being charged is 28.99%, which is in excess of the statutorily permitted interest rate. Plaintiff failed to attach to its Complaint a contract between the Plaintiff and the Defendant which would support its allegations. The Complaint should be dismissed on the grounds that the rate of interest charged by Plaintiff is usurious and for the failure to attach a copy of the contract to the Complaint.

17. **F. Dismissal is appropriate for failure to allege the credit card was issued in response to a request or application therefor.**

15 U.S.C. §1642 states:

No credit card shall be issued except in response to a request or application therefor. This prohibition does not apply to the issuance of a credit card in renewal of, or in substitution for, an accepted credit card.

18. Exhibit “A” to Plaintiff’s Complaint states that the alleged debt is a “Mastercard”. Plaintiff has failed to allege that the credit card was issued in response to a request for an application or the renewal of or in substitution for an accepted credit card, requiring dismissal.

19. **G. Dismissal is appropriate for the Creditor's failure to notify the debtor of an assignment.**

Florida Statutes section 559.715 states:

Assignment of consumer debts.--This part does not prohibit the assignment, by a creditor, of the right to bill and collect a consumer debt. However, the assignee must give the debtor written notice of such assignment within 30 days after the assignment. The assignee is a real party in interest and may bring an action in a court of competent jurisdiction to collect a debt that has been assigned to such assignee and is in default.

20. Exhibit “A” to the Plaintiff’s Complaint indicates the creditor is a different entity from the Plaintiff, which suggests that the alleged debt has been assigned to the Plaintiff. The Complaint fails to allege notice of an assignment in violation of Florida Statute Section 559.715, requiring dismissal.

21. **H. Dismissal is appropriate when the debtor demands verification of the debt and the Plaintiff fails to verify said debt.**

15 USC 1692g(a) states:

Notice of debt; contents

Within five days after the initial communication with a consumer in connection with the collection of any debt, a debt collector shall, unless the following information is contained in the initial communication or the consumer has paid the debt, send the consumer a written notice containing:

- (1) the amount of the debt;
- (2) the name of the creditor to whom the debt is owed;

(3) a statement that unless the consumer, within thirty days after receipt of the notice, disputes the validity of the debt, or any portion thereof, the debt will be assumed to be valid by the debt collector;

(4) a statement that if the consumer notifies the debt collector in writing within the thirty-day period that the debt, or any portion thereof, is disputed, the debt collector will obtain verification of the debt or a copy of a judgment against the consumer and a copy of such verification or judgment will be mailed to the consumer by the debt collector; and

(5) a statement that, upon the consumer's written request within the thirty-day period, the debt collector will provide the consumer with the name and address of the original creditor, if different from the current creditor.

22. 15 USC 1692j states:

Furnishing certain deceptive forms

(a) It is unlawful to design, compile, and furnish any form knowing that such form would be used to create the false belief in a consumer that a person other than the creditor of such consumer is participating in the collection of or in an attempt to collect a debt such consumer allegedly owes such creditor, when in fact such person is not so participating.

23. F.S. 559.72(9) provides (in pertinent part):

Prohibited practices generally. In collecting consumer debts, no person shall:

(9) Claim, attempt, or threaten to enforce a debt when such person...assert(s) the existence of some other legal right when such person knows that the right does not exist.

24. The FCCPA applies to anyone attempting to collect a consumer debt unlawfully. Florida Statutes section 559.72 "includes all allegedly unlawful attempts at collection consumer claims." *Seaton Jackson v. Wells Fargo Homemortgage, Inc.*, 12 Fla. L. Weekly Supp. 188 (Fla. 6th Circuit 2004) citing *Williams v. Streeps Music Co., Inc.*, 333 So. 2d 65 (Fla. 4th DCA 1976)

25. Plaintiff states in its Complaint at paragraph 5 that Plaintiff rendered billing statements to Defendant seeking reimbursement for those payments; a copy of the final statement

showing the balance due is attached as Exhibit “A”; Defendant did not object to the statement (sic)1.

26. Exhibit “A” to Plaintiff’s Complaint is a deceptive “form” that Plaintiff admits it used to provide the notice required by 15 USC 1692g(a). That form clearly does not comport with the requirements of 15 USC 1692(g)(a) as the name on the statement of the alleged creditor is different from the name of the Plaintiff; it does not notify the Defendant that unless the debt is disputed it will be deemed valid by the debt collector; it does not notify the Defendant that she has 30 days in which to dispute the debt in writing and obtain verification thereof; and it does not state that if the creditor is different from the “original” creditor, that the creditor will provide the original creditors name and address to the Defendant. Plaintiff’s Exhibit “A” to its Complaint clearly violates the express terms of 15 USC 1692g(a) and consequently, F.S. 559.72(9), requiring dismissal.

III
CONCLUSION

WHEREFORE, Defendant respectfully requests that this Honorable Court grants this Motion to Dismiss and award Defendant attorney’s fees and costs for having to bring the present motion, along with all such other relief as the court deems just and proper.

Certificate of Service

I hereby certify that a true and correct copy of the foregoing has been furnished by U.S. Mail, this ___ day of August, 2022, to

George Gingo FBN 875933

1 15 USC 1692(g)(c) states:

Admission of liability

The failure of a consumer to dispute the validity of a debt under this section may not be construed by any court as an admission of liability by the consumer.

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