

# Franklin County Legal Journal

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Designated by Order of the Court for the publication of court and other legal notices, the Franklin County Legal Journal (USPS 378-950), 100 Lincoln Way East, Chambersburg, Franklin County, PA 17201-2291, contains reports of cases decided by the various divisions of the Franklin County Branch of the Court of Common Pleas of the 39th Judicial District of Pennsylvania and selected cases from other counties.

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**Bank of America, Plaintiff v. Justin R. Hand, Defendant**  
Court of Common Pleas of the 39th Judicial District of Pennsylvania,  
Franklin County Branch, Civil Action No. 2020 - 775

**HOLDING:** The Defendant’s preliminary objection related to the Plaintiff’s failure to plead whether the alleged agreement between the parties was oral or written is sustained. The Defendant’s preliminary objection related to the Plaintiff’s failure to attach a copy of the agreement to the *Complaint* is sustained. The Defendant’s preliminary objection related to an account stated theory as a basis for Plaintiff’s action is overruled.

**HEADNOTES**

*Standard of Review of Preliminary Objections*

1. When ruling upon preliminary objections, the Court must accept as true all well-pleaded allegations of material fact as well as all reasonable inferences deducible therefrom. The Court is not required to accept as true any conclusions of law or expressions of opinion. In or der sustain preliminary objections, it must appear with certainty that the law will not permit recovery, and any doubt should be resolved by refusal to sustain them. *Allegheny Sportsmen’s League v. Ridge*, 790 A.2d 350, 354 (Pa. Cmwlth. 2002).

*Pleading – Defenses in a credit card debt case*

2. A creditor’s failure to produce an assignment of account, cardholder agreement, and statement of account establishes a meritorious defense in a credit card debt collection case. *Commonwealth Financial Systems, Inc. v. Smith*, 15 A.3d 492, 501 (Pa. Super. 2011); *Atlantic Credit and Finance, Inc. v. Giuliana*, 829 A.2d 340, 345 (Pa. Super. 2003).

*Pleading – Exhibits in a credit card debt case*

3. A plaintiff does not need to produce a signed cardholder agreement if the plaintiff instead attaches a copy of an agreement and alleges it is the actual agreement between the parties. *Discover Bank v. Stucka*, 33 A.3d 82, 87 (Pa. Super. 2011).

4. A single account statement is insufficient to permit recovery. *Atlantic Credit and Finance, Inc. v. Giuliana*, 829 A.2d 340, 345 (Pa. Super. 2003).

5. Seven years’ worth of account statements is sufficient to permit recovery. *Discover Bank v. Stucka*, 33 A.3d 82, 87 (Pa. Super. 2011).

*Pleading – Complaint*

6. A complaint must “inform[] the defendant with accuracy and completeness of the specific basis on which recovery is sought so that he may know without question upon what grounds to make his defense.” *Rambo v. Greene*, 906 A.2d 1232, 1236 (Pa. Super. 2006).

**Appearances:**

Joel M. Flink, Esquire *for Plaintiff*

Erik M. Helbing, Esquire *for Defendant*

## OPINION

Before Zook, J.

The above captioned matter is before the Court on Defendant's *Preliminary Objections to the Plaintiff's Complaint (PO)*, filed August 23, 2021.

### **I. PROCEDURAL HISTORY**

Plaintiff filed its *Complaint in a Civil Action (Complaint)* on February 21, 2020. In the *Complaint*, Plaintiff asserts Defendant was the holder of a credit card or other consumer finance account issued to the Defendant by the Plaintiff, Defendant used the account for purchases, Defendant breached the account agreement by failing to make payments, and the account has an outstanding balance of \$5,762.15. *See Complaint*, ¶¶ 2-5.

Defendant filed the *PO* and a *Brief in Support of Preliminary Objections to the Plaintiff's Complaint* concurrently on August 23, 2021. Plaintiff filed a *Brief in Opposition to Defendant's Preliminary Objections to Plaintiff's Complaint* on August 23, 2021. Defendant filed a *Praeceptum to List for Argument* on August 23, 2021. By *Order* dated August 27, 2021, the Court dispensed with oral argument<sup>1</sup> and deemed the *PO* submitted for decision. This matter is ready for decision.

### **II. THE OBJECTIONS**

Defendant raises three preliminary objections. First, Defendant objects the *Complaint* fails to comply with Pa.R.C.P. No. 1028(a)(2). This rule permits a preliminary objection for failure of a pleading to conform to law or rule of court or inclusion of scandalous or impertinent matter. *See PO*, ¶¶ 3-11. Defendant cites Pa.R.C.P. No. 1019(h), which provides “[w]hen any claim or defense is based upon an agreement, the pleading shall state specifically if the agreement is oral or written.” *See PO*, ¶ 5. Defendant asserts an agreement between Plaintiff and Defendant must exist, as it would be impossible for Plaintiff to prevail in the instant action without an oral or written agreement. *See PO*, ¶¶ 6-7. Defendant asserts the Plaintiff did not plead whether the agreement was oral or written, in violation of Rule

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<sup>1</sup> See Pa.R.C.P. No. 211.

1019(h). *See PO*, ¶¶ 8-9.

Second, Defendant objects that the *Complaint* fails to comply with Pa.R.C.P. No. 1019(i).<sup>2</sup> *See PO*, ¶¶ 12-19. Defendant asserts Plaintiff violated Rule 1019(i) by failing to attach a copy of the written agreement to the *Complaint* or averring a copy of the agreement was unavailable. *See PO*, ¶¶ 15-18. Defendant brings this objection to the extent Plaintiff's claim is based upon a written agreement. *See PO*, ¶ 13.

Third, Defendant objects the *Complaint* fails to comply with Pa.R.C.P. No. 1028(a)(4). *See PO*, ¶¶ 20-23. Pa.R.C.P. No. 1028(a)(4) permits a preliminary objection based on "legal insufficiency of a pleading (demurrer)." Defendant objects to the extent Plaintiff asserts a claim under an "account stated" theory. *See PO*, ¶ 21. Defendant argues it is legally improper for Plaintiff to pursue an account stated theory when attempting to collect a credit card debt because Defendant cannot "intelligently assent" to the accuracy of amounts in credit card statements. *See PO*, ¶ 22.

### III. CONCLUSIONS OF LAW

[W]hen ruling upon preliminary objections, the Court must accept as true all well-pleaded allegations of material fact as well as all reasonable inferences deducible therefrom. The Court is not required to accept as true any conclusions of law or expressions of opinion. In order to sustain preliminary objections, it must appear with certainty that the law will not permit recovery, and any doubt should be resolved by refusal to sustain them.

*Allegheny Sportsmen's League v. Ridge*, 790 A.2d 350, 354 (Pa. Cmwlth. 2002) (internal citations omitted).

#### *A. Whether Plaintiff Specified if the Agreement was Written or Oral*

Pa.R.C.P. No. 1028(a) provides the grounds upon which parties may file preliminary objections. According to Rule 1028(a)(2), a party may file preliminary objections to a pleading based on the "failure of a pleading to conform to law or rule of court or inclusion of scandalous or impertinent matter."

Defendant asserts the *Complaint* does not conform to Pa.R.C.P. No. 1019(h) and thereby is objectionable under Pa.R.C.P. No. 1028(a)(2). *See PO*, ¶¶ 3-11. According to Defendant, for Plaintiff to prevail an agreement must exist between Plaintiff and Defendant; obviously, it must be either

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<sup>2</sup> See Pa.R.C.P. No. 1028(a)(2).

written or oral. *See PO*, ¶ 6.

Pa.R.C.P. No. 1019(h) provides, in relevant part, “[w]hen any claim or defense is based upon an agreement, the pleading shall state specifically if the agreement is oral or written.” Plaintiff asserts its claim as a result of an alleged breach of an agreement. *See Complaint*, ¶ 3. Therefore, Plaintiff must specifically plead whether the alleged agreement was oral or written. Here, Plaintiff failed to do so. *See Complaint*, ¶¶ 1-7. Therefore, the *Complaint* does not conform to a rule of court, namely Pa.R.C.P. No. 1019(h). Defendant’s preliminary objection under Pa.R.C.P. No. 1028(a) will be sustained.

### *B. Whether Plaintiff Attached a Copy of the Written Agreement*

Defendant asserts the *Complaint* does not conform to Pa.R.C.P. No. 1019(i) and is thereby objectionable under Pa.R.C.P. No. 1028(a)(2). *See PO*, ¶¶ 12-19. Defendant brings this objection to the extent Plaintiff’s claim is based on a written agreement. *See PO*, ¶ 13.

Pursuant to Pa.R.C.P. No. 1019(i), “[w]hen any 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 is unavailable to the pleader, “it is sufficient so to state, together with the reason, and to set forth the substance in writing.” If Plaintiff’s claim(s) are sourced from a written agreement, Plaintiff did not attach a copy of the written agreement between Plaintiff and Defendant. Further, and if written, Plaintiff did not explain why a copy was not attached. *See Complaint*, ¶¶ 1-7. Therefore, Rule 1019(i) is not satisfied; the *Complaint* is objectionable under Pa.R.C.P. No. 1028(a) (2). Defendant’s objection will be sustained.

### *C. Demurrer*

Pa.R.C.P. No. Rule 1028(a)(4) permits a party to file a preliminary objection seeking a demurrer. Defendant brings his objection to the extent Plaintiff’s claim is based on an “account stated” theory.<sup>3</sup> *See PO*, ¶ 21. Defendant argues it is legally improper to pursue an account stated theory in an action to collect a credit card debt because Defendant cannot verify the accuracy of information contained in credit card statements. *See PO*, ¶ 22.

Trial courts are split on whether an account stated theory is a proper theory upon which to collect a credit card debt. *See, e.g., Capital One Bank (USA) NA v. Clevestine*, 7 Pa. D. & C. 5th 153, 157 (Centre County 2009)

<sup>3</sup> An account stated theory requires “an account in writing, examined and accepted by both parties.” *Robbins v. Weinstein*, 17 A.2d 629, 634 (Pa. Super. 1941).

(holding “[a]n account stated theory is not appropriate in a credit card account case”), and *Citibank (South Dakota) N.A., Bank v. Ananiev*, 13 Pa. D. & C. 5th 557, 559 (Monroe County 2010) (holding “an action can be based on the theory accounts stated” at the preliminary stages in a credit card debt case). Defendant cites to trial court cases for the elements of an account stated theory. See *Rush’s Service Center Inc. v. Genareo*, 10 Pa. D. & C. 4th 445, 447 (Lawrence County 1991). However, Defendant did not object that Plaintiff insufficiently pled an account stated theory; his objection is only that this theory is not permitted in credit card cases as a matter of law. See *PO*, ¶¶ 21- 22. In the absence of appellate authority holding credit card debt cases cannot be pursued under an account stated theory, this Court is inclined to overrule the objection at this stage.

#### IV. CONCLUSION

Plaintiff failed to plead whether the agreement between Plaintiff and Defendant was oral or written. Defendant’s first objection will be sustained. If written, Plaintiff did not attach a copy of the agreement to the *Complaint*. Defendant’s second objection will be sustained. In the absence of appellate authority holding that a credit card debt case cannot be sustained on an account stated theory, Defendant’s third objection will be overruled.

An appropriate order follows.

#### ORDER

**AND NOW**, this 23rd day of September, 2021, on the forgoing *Opinion*, **IT IS HEREBY ORDERED**:

1. The Defendant’s preliminary objection related to the Plaintiff’s failure to plead whether the alleged agreement between the parties was oral or written is **SUSTAINED**;
2. The Defendant’s preliminary objection related to the Plaintiffs failure to attach a copy of the agreement to the *Complaint* is **SUSTAINED**;
3. The Defendant’s preliminary objection related to an account stated theory as a basis for Plaintiff’s action is **OVERRULED**;
4. The Plaintiff is granted twenty (20) days to file an *Amended Complaint*.

Notice of this judgment shall be given pursuant to Pa.R.C.P. No. 236.