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Citibank (South Dakota) v. Opitz

CITIBANK (SOUTH DAKOTA), N.A., Plaintiff,
v. RALPH D. OPITZ, Defendant
Court of Common Pleas of the 39th Judicial District of Pennsylvania,
Fulton County Branch
Civil Action — Law, No. 207-2010-C

*Foreign Corporation, Doing Business, Certificate of Authority, Exemptions; Consumer Credit, In General, Credit Cards, In General, Causes of Action, Account Stated, Elements; Pleading, Exhibits, Written Instruments or Copies Thereof Filed with Pleading; Costs, Persons Liable, Amount, Rate, Items, Record Costs versus Actual Costs*

1. Pennsylvania law requires that a foreign corporation procure a certificate of authority from the Department of State prior to doing business in the Commonwealth. 15 Pa. C.S.A. §§4121(a), 4141(a) (2010).

2. The registration statute contains an exemption from its requirements for institutions including national banking associations and federal savings and loan associations engaging in activities similar to those conducted by banking institutions, saving associations or credit unions. 42 Pa. C.S.A. §4101(b).

3. If a corporation is engaged in business in Pennsylvania without a certificate of authority when one is required, the corporation lacks standing to bring suit in a court of the Commonwealth.

4. An account stated is an account in writing, examined and expressly or impliedly accepted by both parties thereto as distinguished from a simple claim or a mere summary of accounts.

5. An action in account stated requires a contract between the parties, an express or implied promise by the debtor to the creditor.

6. To maintain a cause of action, the account must be rendered, and the other party must accept, agree to, or acquiesce in the correctness of the account. Consent of the debtor must be direct and unconditional.

7. Silence has been found prima facie evidence of a debtor's acquiescence to the amount of an account stated where there was opportunity to scrutinize the account and silent acquiescence for a reasonable time thereafter.

8. A prima facie showing of assent may be rebutted by submitting facts explaining the silent retention, including that the party failing to object was absent from home, suffering from illness, or expected shortly to see the other party, or that the parties had already come to a disagreement when the account was rendered.

9. To correctly plead a cause of action in account stated, the Complaint must allege the status of the account with enough specificity to allow a defendant to determine what items he will admit and which he will choose to contest. An itemized statement which includes at least dates of transactions, amounts, and items purchased, fees and finance charges should be submitted.

10. Pennsylvania Rules of Civil Procedure dictate that when a suit is brought based on an agreement, and the agreement is in writing, the pleader must attach a copy of the writing to the Complaint.

11. Pennsylvania appellate courts have required a signed, current copy of the cardholder agreement and statement of account to be attached to the Complaint in an account stated action.

12. In the instant case, the Plaintiff makes claims for costs of the action, fees associated with the account, interest on the amounts spent by the Defendant as well as on the fees charged, and for amounts due in finance charges, but has not provided any basis for claims to any of these amounts. The statement of account attached as an exhibit to the Complaint, without any itemization of past purchases, fees, or finance charges, does not contain all the information required to

validly plead a cause of action in account stated under Pennsylvania jurisprudence.

13. The law is clear that no recovery for counsel fees from the adverse party to a cause is permitted absent express statutory allowance of the same or clear agreement by the parties or some other established exception.

14. 42 Pa. C.S.A. §1726 allows a party to recover the record costs associated with the action if it prevails on the merits, which are costs like filing fees associated with proceeding in court. Actual costs including transcript costs, witness fees, and the costs of preparation and consultation are not recoverable.

Appearances:

Burton Neil, Esquire, *Counsel for Plaintiff*

Robert K. Lascher, Esquire, *Counsel for Defendant*

OPINION

Van Horn, J., September 17, 2010

Statement of the Case

On June 7, 2010, Citibank (South Dakota), N.A. ("Plaintiff"), filed a Complaint against Ralph D. Opitz ("Defendant") requesting payment of an outstanding credit card balance in the amount of two thousand two hundred and thirty nine dollars and sixty nine cents ($2,239.69), along with the costs of bringing action. The Complaint alleges that a consumer credit card was furnished to the Defendant, who used the card while the Plaintiff kept running accounts of the activity in the account. Plaintiff alleges that statements were sent to the Defendant, who either paid such amounts due or retained the statements without objection. The Complaint requests payment of the outstanding balance.

Service was properly made upon the Defendant on June 11, 2010, by the Fulton County Sheriff. On July 12, 2010, the Defendant, through counsel, filed preliminary objections and a brief in support of the same. On August 9, 2010, the Plaintiff filed Answer to the preliminary objections, as well as a brief in support of the answer. Following a review of the case file, this Court determined a hearing upon the preliminary objections is unnecessary to their disposition and the issues raised have been sufficiently explored in the briefs submitted by the parties. Following a review of the applicable law and the entirety of the file, the Court now resolves the preliminary objections by this Opinion and Order of Court.

Discussion

**I. Preliminary Objections Generally**

The Rules of Civil Procedure authorize preliminary objections on several grounds. See Pa.R.C.P. 1028(a) (2010). In ruling upon such objections, the Court must "accept as true all well-pleaded material facts set forth in the complaint and all inferences fairly deducible from those facts." See Christ the King Manor v. Dep't of Public Welfare, 911 A.2d 624, 633 (Pa. Commw. Ct. 2006). The Court need not accept unwarranted inferences, conclusions of law, argumentative allegations or expressions of opinion. See, e.g., Krentz v. Consolidated Rail Corp., 910 A.2d 20, 26 (Pa. 2006). To sustain a preliminary objection, it must clearly appear the law will not permit any recovery, and all doubt must be resolved in favor of the non-moving party. See Christ the King Manor, 911 A.2d at 633. In the case of preliminary objections in the nature of a demurrer, the Court may sustain only where it is clear and free from doubt that the law will not permit recovery under the facts alleged. See Price v. Brown, 680 A.2d 1149, 1151 (Pa. 1996). Additionally, in such cases, the salient facts must be derived solely from the complaint. See Connor v. Archdiocese of Philadelphia, 975 A.2d 1084, 1085-86 (Pa. 2009).

**II. Authorization of Citibank to Do Business and Bring Action in Pennsylvania**

The Defendant first objects to the Complaint alleging it fails to state that Plaintiff is authorized to do business in the Commonwealth. As an entity which is not so authorized is precluded from bringing any action in a Pennsylvania court, Defendant alleges the Plaintiff lacks standing to bring suit upon the credit card. The Defendant maintains the Plaintiff must affirmatively plead Plaintiff's authorization to conduct business in the state. In response, Plaintiff points to Paragraph three (3) of the Complaint, in which it alleges it "is a national banking association, engaged in various types of banking business including consumer lending through the issuance of credit cards." (Compl. ¶3). The Plaintiff believes no further specificity is required.

We agree. Pennsylvania law requires that a foreign corporation procure a certificate of authority from the Department of State prior to doing business in the Commonwealth. See 15 Pa.C.S.A. §§4121(a), 4141(a) (2010). The statute contains an exemption from its requirements for institutions including national banking associations and federal savings and loan associations engaging in activities "similar to those conducted by banking institutions, saving associations or credit unions." 42 Pa. C.S.A. §4101(b). Further, under the statute, several activities are explicitly excluded from the definition of "doing business." See 15 Pa. C.S.A. §4122(a). If these exclusions do not apply, and it is determined a corporation is engaged in business in Pennsylvania without a certificate of authority, the corporation lacks standing to bring suit in a court of the Commonwealth. See 15 Pa. C.S.A. §4141(a). Preliminary objection due to such lack of capacity to sue is authorized under the Rules of Civil Procedure. See Pa. R.C.P. 1028(a)(5).

Whether a corporation is "doing business" in Pennsylvania is a question of fact, resolved case by case. See University of Dominica v. Pennsylvania College of Podiatric Medicine, 446 A.2d 1339, 1341 (Pa. Super. Ct. 1982). In disposing of preliminary objections, the Court must accept as true all well pled facts from the Complaint. The Court therefore is obligated to accept as true the assertion by the Plaintiff that it is a "national banking association" exempted from the registration requirements. (Compl. ¶3); (Answer to Preliminary Objections ¶1). The Defendant has provided no reason, nor any evidence, which would cause the Court to refuse to accept such assertion. Additionally, the Defendant seems to object to the failure of the Plaintiff to **state** they are authorized to conduct business, rather than asserting the Plaintiff **actually** lacks such authorization. While indeed preliminary objection may be made where a pleading is insufficiently specific, the Court believes the statement in paragraph three (3) is sufficient to allege standing on the part of the Plaintiff.

**III. Cause of Action in Account Stated** *1. Generally*

Plaintiff has asserted that a cause of action in account stated does not require the attachment of any writings under Rule 1019, such cause of action having been sufficiently pled without documentary support. The Defendant alleges that the lack of a writing to support the relief requested is a fatal defect apparent from the face of the Complaint. To determine whether, as Defendant maintains, the Plaintiff is required to attach a writing to the Complaint, and what, if any, writings are required, the Court will examine decisional law elucidating the pleading required to properly set forth a cause of action in account stated.

Generally, an account stated is an account in writing, examined and expressly or impliedly accepted by both parties thereto as distinguished from a simple claim or a mere summary of accounts. See Capital One Bank (U.S.A.)N.A. v. Clevenstine, 7 Pa. D. & C. 5th 153, 156, No. 2008-4139, 2009 WL 1245043 (Centre Co. Jan. 31, 2009); Leinbach v. Wolle, 61 A. 248 (Pa. 1905). In order to establish an account stated claim, "there must be a contract between the parties…an express or implied promise by the debtor to the creditor." Target National Bank v. Kilbride, 10 Pa. D. & C. 5th 489, 492, No. 2009-4291, 2010 WL 1435304 (Centre Co. Feb. 5, 2010).

To maintain a cause of action, the "account must be rendered, and the other party must accept, agree to, or acquiesce in the correctness of the account." Id. See also, Leinbach v. Wolle, 61 A. 248 (Pa. 1905). The cause of action is appropriate in cases of an ongoing relationship between the parties, where the substance of their relations is averred in the complaint. See Clevenstine, 7 Pa. D. & C. 5th at 157. Traditionally, this cause of action was based upon a promise by a debtor to pay a stated amount of money which the parties expressly agreed was owed, in satisfaction of a preexisting debt. See 29 WILLISTON ON CONTRACTS 4TH 73:55.

To correctly plead a cause of action in account stated, the Complaint must first allege the status of the account, though Pennsylvania counties are divided as to the degree of specificity with which these facts must be pled. For instance, in Centre County, the Court has held a Defendant is entitled to know the dates of individual transactions, their amounts, and the items allegedly purchased. See Remit Corp. v. Miller, 5 Pa. D. & C. 5th 43, 48, No. 2007-4647, 2008 WL 4491523 (Centre Co. Aug. 15, 2008). Cf. Marine Bank v. Orlando, 25 Pa. D. & C. 3d 264, No. 1392-A-1981, 1982 WL 425 (Erie Co. April 7, 1982) (citing the primary function of pleadings to formulate issues and restrict proof at trial to those issues as reason to require accurate statement of individual transactions, amounts thereof, and fees and charges). In adopting this view, Courts acknowledge that the Rules of Civil Procedure require only items of special damages to be specifically stated, but that most courts also require general damages to be particularized as far as possible if requested by preliminary objection. See Orlando, 25 Pa. D. & C. 3d at 268. The defendant must be allowed to determine what items he will admit and which he will choose to contest, requiring "at the least" that dates of transactions, amounts, and items purchased be set forth. Id. at 269.

Such specificity is generally achieved by attaching to the Complaint a sufficient number of billing statements dating from the opening of the account setting forth the individual charges and fees accumulated by the consumer. See Clevenstine, 7 Pa. D. & C. 5th at 156. Some trial courts have not required that the Plaintiff set forth a breakdown of **each** interest charge, payment and item purchased, as such a detailed enumeration is not explicitly required by law. See American

Express Centurion v. Decker, 9 Pa. D. & C. 5th 299, 302, No. 2009-2517, 2009 WL 5248844 (Centre Co. Sept. 17, 2009). According to such cases, the Defendant must only be placed on notice of what the Plaintiff intends to prove at trial, asserting a claim for repayment of the debt accumulated by the Defendant. Id. at 308 (citing Weiss v. Equibank, 460 A.2d 271, 274-75 (Pa. Super. Ct. 1983)). See also Capital One Bank (U.S.A.) N.A. v. Spicer, No. 2009-774 (Centre Co. August 6, 2009) (finding complaint sufficient where statements attached to complaint began at time period showing outstanding balance of over one thousand dollars beginning in 2006).

Yet even where Courts do not require that each charge be enumerated, preliminary objections have been sustained due to a lack of complete information, including the date the account became delinquent. E.g., Decker, 9 Pa. D. & C. 5th at 302. The majority of courts do seem to require an itemized statement, especially where claims are made not only for items purchased, but also for fees and finance charges. In the cases cited by the Plaintiff, while itemized statements of account were not required for the entirety of the life of the agreement, the Courts did generally require the majority of the transactions be set forth individually. E.g., I-R Equipment Corp. v. Wesex Corp., 50 Pa. D. & C. 746, 749, No. 5, 1970 WL 8982 (Mercer Co. December 21, 1970) (holding complaint with copy of account book attached sufficient though each entry did not contain complete description of transaction); Ryon v. Andershonis, 42 Pa. D. & C. 2d 86, 88, No. 527, 1967 WL 8749 (Schuylkill Co. March 13, 1967). In I-R Equipment, the cases analyzed by the trial court all involved actions on account stated, with the original books of entry attached to the Complaint. See I-R Equipment Corp., 50 Pa. D. & C. at 748-50. Though credit card transactions are different than traditional account stated actions, the equivalent disclosure would be to attach a significant number of statements setting forth the majority of the items of damage claimed.

Additionally, to properly plead a cause of action in account stated, the plaintiff must state an allegation in the pleadings that the defendant has assented to the correctness of the account submitted to him. See Capital One Bank (U.S.A.)N.A. v. Clevenstine, 7 Pa. D. & C. 5th 153, 156, No. 2008-4139, 2009 WL 1245043 (Centre Co., Jan. 30, 2009). Indeed, this has been described as the "most essential element" of a complaint in account stated: "the parties' agreement to the accuracy and correctness of the account." Citibank (South Dakota) N.A. v. King, 2 Pa. D. & C. 5th 60, 62-63, No. 2007-3412, 2007 WL 4967502 (Centre Co. November 9, 2007). See also Restatement, Contracts §422 (mutual assent to correctness of computation is essential to an account stated action).

Pennsylvania trial courts have recently experienced a division as to whether such acquiescence may be based on silence or failure to object to statements sent in the mail, or if it requires something more on the part of the Defendant. See, e.g., Clevenstine, 7 Pa. D. & C. 5th at 156 (account stated is inappropriate in credit card debt case where acquiescence based on silence, must show agreement to pay amount based on more than receipt of mailed statements without objection). But see King, 2 Pa. D. & C. 5th at 63 (credit card company can plead account stated when debtor assents to account by failing to object to credit card statement); Target Nat. Bank v. Guida, 11 Pa. D. & C. 5th 363, 366-67, No. 2990-5199, 2010 WL 2307351 (Centre Co. March 12, 2010) (defendant who never raised objection to value of account, continued to make payments toward balance, impliedly consented to amount of account stated meriting grant of judgment on the pleadings).

Traditionally, courts found silence does constitute prima facie evidence of a debtor's acquiescence to the amount of an account stated where there was opportunity to scrutinize the account and silent acquiescence for a reasonable time thereafter. See Pierce v. Pierce, 48 A. 689, 691 (Pa. 1901). The Pennsylvania Supreme Court has stated that "the consent of the debtor must be direct and unconditional, and must appear in some way," as consent is an essential part of the cause of action. Id. Further, assent by a debtor that the amounts stated are correct is not conclusively established by retention. See id. Rather, such can be explained and the prima facie assent rebutted by showing facts explaining the silent retention, including that the party failing to object "was absent from home, suffering from illness, or expected shortly to see the other party, or that the parties had already come to a disagreement when the account was rendered." Id.

In requiring more than silent receipt of mailed statements, Centre County Common Pleas Judge Pamela A. Ruest wrote that the theory "may have been appropriate when credit card issuers gave cardholders fixed interest rates and charged very few fees." Clevenstine, 7 Pa. D. & C. 5th at 157-58. However, the Court wrote that with "the proliferation" of different providers, "interest rates have varied and fees have increased in number and severity" making it "unreasonable to expect the average debtor to understand the changing terms of a customer agreement" and object to an invoice received in a timely manner. Id. at 158. Judge Ruest acknowledged that realistically, the first and only time a debtor may consider the "fine print" is when they have fallen behind on payments and face a suit requesting the sum totals of increased interest rates and late fees. Id.

In C-E Glass, the Court stated that where assent is inferred from a "mere lapse of time" case law revealed a "course of dealing" where "rendering of account is an accepted method of adjustment over a period of time," involving "an extended

series of transactions" between the parties. C-E Glass v. Ryan, 70 Pa. D. & C. 2d 251, 254, No. 1770-1974, 1975 WL 16632 (Beaver Co. July 24, 1975). Further, mutual agreement has not been found where there is no allegation a defendant has assented to the correctness of a submitted account, and on the contrary he has refused to pay. See Ryon v. Andershonis, 42 Pa. D. & C. 2d 86, No. 527, 1967 WL 8749 (Schuylkill Co. March 13, 1967).

On the other hand, in American Express Centurion v. Decker, the Court determined that the complexity of the terms of an agreement and the enforceability of agreements imposed upon unsophisticated credit card users was an issue of fact, unsuited for disposition by preliminary objection. See American Express Centurion v. Decker, 9 Pa. D. & C. 5th 299, 310-11, No. 2009-2517, 2009 WL 5248844 (Centre Co. Sept. 17, 2009). The Decker court seemed to feel that the question of whether the defendant has assented to an account stated is better dealt with later, so that preliminary objection on such ground may not be sustained. However, where a defendant clearly objects to the amounts set forth by a plaintiff, that a prima facie cause of action for account stated has not been established. See Target National Bank v. Kilbride, 10 Pa. D. & C. 5th 489, 491-92, No. 2009-4291, 2010 WL 1435304 (Centre Co. Feb. 5, 2010). Thus, in Kilbride, the Court found that because "more than merely failing to respond to statements received in the mail is required to demonstrate a defendant's assent" preliminary objections should be granted. Id. at 493. In King, the Court stated that agreement as to the amount of an account stated can be implied from "retention without objection by one party for an unreasonably long time of a statement of account." Citibank (South Dakota) N.A. v. King, 2 Pa. D. & C. 5th 60, 63, No. 2007-3412, 2007 WL 4967502 (Centre Co. November 9, 2007) (citing Donahue v. City of Philadelphia, 41 A.2d 879, 881 (Pa. Super. Ct. 1945)) (complaint in King stated "defendant had for many months made payments on account of the billing statement or retained statement without payment.").

In the instant matter, the Complaint contains the language approved of in King stating the Defendant retained the statements, and made payments to the account, thereby assenting implicitly to the amounts requested as damages. Without the filing of an Answer, it is unknown whether the Defendant does, in fact, assent to the amounts charged or disputes the account. Further information is required to determine whether, as in King, the receipt of the statements of account without objection does in fact constitute acquiescence to the amount claimed. Without even the date the account became delinquent, or a statement of the amounts claimed for purchases, and the amounts which constitute late payment fees or finance charges, the Court cannot determine whether the amount of the account has been accepted by the Defendant. Thus, it seems that more information is required to place the Defendant on notice of the claim against which he must defend, and that some writing is required to give proper notice of the basis of the claim.

*2. Application of Rule 1019 to Actions in Account Stated*

The Pennsylvania Rules of Civil Procedure dictate that when a suit is brought based on an agreement, and the agreement is in writing, the pleader must attach a copy of the writing to the Complaint. See Pa. R.C.P. 1019(h), (i) (2010). If the writing is not available, the reason therefore must be stated and the substance of the writing set forth in the pleading. See id. at (i). Under the Rules, any written agreement qualifies as a "writing." See id., Cmt. In considering the requirements for a proper cause of action in account stated, it is clear to the Court that there are indeed writings which form the basis of the Plaintiff's cause of action. Further, it is clear that these writings contain vital information without which the merits of the Plaintiff's claim cannot be determined. Thus, though the Plaintiff claims that since the action is not in contract, any writings forming its basis need not be attached to the Complaint, such assertion is clearly false in light of the decisional law in the Commonwealth. Further, the writings are indeed necessary to properly inform the Defendant of the claim against which he must defend.

In Atlantic Credit Finance, Inc. v. Guiliana, the Plaintiff sued on an assigned debt from a GM Credit Card account. See Atlantic Credit Finance v. Guiliana, 829 A.2d 340, 343 (Pa. Super. Ct. 2003). The complaint alleged the contractual rights to the GM Card had been purchased by the Plaintiff, the amount due, and claimed counsel fees and payment of what the Court called "exorbitant interest rates." Id. at 344. The Superior Court found that the failure to attach writings establishing the right to a judgment of over seventeen thousand (17,000) dollars for a debt purchased for less than nine thousand five hundred (9,500) dollars was a fatal defect. See id. at 345. The Court stated that "evidence of the assignment" as well as the "cardholder agreement and statement of account" should have been attached to the Complaint. Id.

Other cases have similarly granted preliminary objections where a credit card agreement is not attached to the Complaint. See American Express Centurion v. Decker, 9 Pa. D. & C. 5th 299, 302, No. 2009-2517, 2009 WL 5248844 (Centre Co. Sept. 17, 2009) (sustaining objection to complaint where credit card agreement was not attached and no explanation for the omission was provided); Worldwide Asset Purchasing L.L.C. v. Stern, 153 Pitts. L.J. 111 (2005); FIA Card Services, N.A. v. Kirasic, 156 Pitt L.J. 39 (2007) (citing Stern for proposition that when claim involves one period of time where initial terms and conditions of card agreement apply and later period with amended terms applying, complaint must contain original and amended terms and dates applicable along with documentation allowing defendant to calculate

damages).[1]

Further, the agreement attached must be a signed, current copy of the agreement at issue. See, e.g., Capital One Bank (U.S.A.)N.A. v. Clevenstine, 7 Pa. D. & C. 5th 153, 156, No. 2008-4139, 2009 WL 1245043 (Centre Co. Jan. 30, 2009) (attaching unsigned, undated copy of seven year old agreement is not sufficient); Capital One Bank (U.S.A.) N.A. v. Spicer, No. 2009-774 (Centre Co. August 6, 2009) (copy of card holder agreement must be attached to complaint); Target National Bank v. Kilbride, 10 Pa. D. & C. 5th 489, 491, No. 2009-4291, 2010 WL 1435304 (Centre Co. Feb. 5, 2010) (citing Guiliana as reaffirmation by Superior Court that creditor must attach writings establishing right to judgment).

In support of the claim such writings are unnecessary, Plaintiff cites decisional law promulgated in the 1970s.[2] However, more recent decisions in the Courts of Common Pleas support the Defendant's assertion that the cardholder agreement and statements showing the total amounts claimed are now generally required.

Furthermore, the Plaintiff's citation to Ryon, where preliminary objections to the lack of a statement of account attached to an account stated Complaint were sustained, as providing support for their position, is patently false. In Ryon, the Court held "Defendant is entitled to a more informative statement of the account, with items not issued eliminated, and debits and credits properly identified, itemized and segregated." Ryon v. Andershonis, 42 Pa. D. & C. 2d 86, 88, No. 527, 1967 WL 8749 (Schuylkill Co. March 13, 1967). Indeed, in Ryon, the Court found there had been no assent by the Defendant to the amount of the account stated, and sustained all objections to the complaint finding it "merely a demand for a lump sum without adequate supporting data." Id. The Ryon Court thus required both the cardholder agreement and a current statement of account to be attached to the complaint. See id.

In the instant case, the Plaintiff makes claims for costs of the action, fees associated with the account, interest on the amounts spent by the Defendant as well as on the fees charged, and for amounts due in finance charges. (Compl. Exhibit A.) Because it does not provide any basis for claims to any of these amounts, the statement of account embodied in Exhibit A does not contain all the information required to validly plead a cause of action in account stated under Pennsylvania jurisprudence. In Giuliana, the Superior Court stated that the failure to attach writings including a cardholder agreement and statement of account was fatal to a creditor's action, especially where such a large proportion of the claimed damages were "additional sums, bearing no relationship to the outstanding debt," for "overcharges" and "late fees." Atlantic Credit and Finance Inc. v. Guiliana, 829 A.2d 340, 344 n. 3 (Pa. Super. Ct. 2003). Here, the Court is at a loss to determine what proportion of the account stated constitutes such unrelated, additional sums, and which portion constitutes amounts for actual purchases. An itemized accounting of expenditures, costs and fees from the date the account was opened is required to make such a determination.

The cardholder agreement should specify what amounts are allowable for fees, and finance charges. The agreement which authorizes the taking of such fees is certainly a basis of the cause of action, and certainly vital to the amount of damages claimed. The Defendant is indeed entitled to request the cardholder agreement be attached to the Complaint, so as to allow him to calculate the damages and determine which, if any, items are disputed and which are assented to as valid obligations. Moreover, itemized statements of account will allow the Defendant to accept or dispute the amounts claimed, and the Court would be more able to discern whether the statements had been retained without objection for a "reasonable time."

Finally, the Plaintiff should have such documents easily at its disposal. The Court cannot imagine why such vital pieces of evidence were not simply attached to the Complaint in the first place. Given the disingenuous citations provided by the Plaintiff, and the lack of recent decisional law in support of their position, the Court believes documentary evidence establishing the right to recovery is vital to the continuation of the instant action. As such, this preliminary objection is sustained in the attached Order of Court, which requires Plaintiff submit a full statement of account, and the cardholder agreement as attachments to an amended complaint.

**IV. Costs and Counsel Fees**

The dispute over damages seems to have been precipitated by the language utilized by the Plaintiff in the Complaint. Plaintiff "demands judgment against the defendant for the sum of $2,239.69, and the costs of this action." (Compl. ¶8). Defense counsel clearly believed the request included the cost of attorney's fees. However, Plaintiff avers in its brief that no damages are sought for attorney's fees. Indeed, the law is clear that "no recovery for counsel fees from the adverse party to a cause" is permitted absent "express statutory allowance of the same…or clear agreement by the parties…or some other established exception." Shanks v. Alderson, 582 A.2d 883, 885 (Pa. Super. Ct. 1990); 42 Pa. C.S.A. §1726(a)(1) ("attorney's fees are not an item of taxable costs"). Citing Shanks, the Court in Decker held that absent attachment to the Complaint of a copy of the credit card agreement authorizing recovery of attorney fees, there was no basis for such a recovery by the Plaintiff. See American Express Centurion v. Decker, 9 Pa. D. & C. 5th 299, 311, No. 2009-2517, 2009

WL 5248844 (Centre Co. Sept. 17, 2009). Here, as the agreement is not attached, there is no way to discern whether such costs are authorized thereby.

Plaintiff cites 42 Pa. C.S.A. §1726 for the proposition that it is entitled to the costs associated with the action if it prevails on the merits. Indeed, the section liberally allows the prevailing party to recover costs from the unsuccessful one, a rule that does in fact stem from English Common Law. See Zelenak v. Mikula, 911 A.3d 542, 544 (Pa. Super. Ct. 2006). There is a distinction, however, between record costs like filing fees, and actual costs, such as transcript costs and witness fees. See id. Record costs, the cost of proceeding in court, are the only costs recoverable. See id. The costs of preparation, consultation, or fees generally are not. See id. at 544-45.

In any case, as all other litigants, if Plaintiff succeeds on the merits, recovery of the record costs of the action will be permitted.

Conclusion

Accepting as true the well pleaded facts of the Complaint, the Court is constrained to dismiss the first preliminary objection of the Defendant. In alleging its status as a national banking corporation, engaged in banking activities, the Plaintiff has sufficiently set forth the basis of its capacity to bring suit. So too does the Plaintiff, as other litigants, have the right to recover the record costs of the action if eventually successful on the merits of the claim. However, as the Plaintiff has failed to sufficiently plead a cause of action in account stated by reason of its failure to provide an updated and accurate statement of account, and the documents which support such an accurate accounting, the Court must sustain the second preliminary objection in the nature of a demurrer. The Plaintiff must attach to an amended complaint the documents supporting its right to recovery.

ORDER OF COURT

September 17, 2010, after consideration of Defendant's Preliminary Objections, Plaintiff's response thereto, briefs submitted by counsel, and having reviewed the applicable law, it is hereby ordered:
1. Defendant's first Preliminary Objection, based on the failure of the Plaintiff to state it is authorized to do business in Pennsylvania, is hereby denied.
2. Defendant's Preliminary Objections in the nature of a demurrer due to the failure to attach the written agreement of the parties to the Complaint and properly plead a cause of action in account stated is granted, with leave granted to Plaintiff to file an Amended Complaint.
3. Defendant's preliminary objection based on the request by the Plaintiff for the cost of action is hereby denied, as the request by the Plaintiff was for permissible record costs rather than counsel fees.
4. Plaintiff is directed to file an amended complaint within twenty (20) days of notice of entry of this Order.

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[1] In Kirasic, the plaintiff initially claimed more than twenty two thousand (22,000) dollars, reducing the request to only amounts for cash advances and purchases set forth in invoices which could be documented after preliminary objections were sustained. Id.

[2] Further cases cited in support of the Plaintiff's assertions are inapposite. For instance, in I.W. Levin and Co., cited in support of the claim that a litigant who is party in a writing may not require it to be attached to a Complaint, deals with a claim based on newspaper advertisements. See I.W. Levin and Co., Inc. v. Oldsmobile, 8 Pa. D. & C. 3d 361 (Com. Pl. 1978) (Plaintiff did not allege a contract, advertisements that are basis of fraud claims are not within scope of Rule 1019, and car dealership would have copies of ads in its possession as party placing them).