

STATE OF VERMONT

SUPERIOR COURT
Orange Unit

CIVIL DIVISION
Docket No. 158-7-09 Oecv

Unifund CCR Partners
Plaintiff

v.

Alfred Jenkins
Defendant

DECISION ON MOTIONS FOR SUMMARY JUDGMENT

In this collection action involving two credit cards, both parties have moved for summary judgment.

Legal Standard

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, referred to in the statements required by Rule 56(c)(2), show that there is no genuine issue as to any material fact and that any party is entitled to judgment as a matter of law." V.R.C.P. 56(c)(3). The party moving for summary judgment has the burden of demonstrating that no genuine issue of material fact exists and that he is entitled to judgment as a matter of law. *Price v. Leland*, 149 Vt. 518, 521 (1988). The non-moving party has the burden of setting forth specific facts showing a genuine dispute for trial. V.R.C.P. 56(e). The purpose of summary judgment is to "pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial." *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986) (citation omitted). Summary judgment is mandated where the non-moving party fails to make a showing sufficient to establish the existence of an element essential to his or her case, and on which she has the burden of proof at trial. *Poplaski v. Lamphere*, 152 Vt. 251, 254-55 (1989); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

The moving party sometimes fails to meet its burden of demonstrating that no genuine issue of material fact exists. When that happens, it "does not automatically indicate that the opposing party has satisfied his burden and should be granted summary judgment on the other motion." 10A Wright, Miller & Kane, Federal Practice and Procedure: Civil 3d § 2720. It usually means only that the motion for summary judgment should be denied. Rule 56(c) authorizes courts to consider whether judgment may be entered against the moving party based on the undisputed facts, but only when there are no genuine issues of fact. *Endres v. Endres*, 2008 VT 124, ¶ 10. "Before summary judgment will be granted it must be clear what the truth

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is and any doubt as to the existence of a genuine issue of material fact will be resolved against the movant." 10A Federal Practice and Procedure, *supra*, at § 2727.

In cases where the parties have filed cross-motions for summary judgment, the court must rule on each party's motion "on an individual and separate basis, determining, for each side, whether a judgment may be entered in accordance with the Rule 56 standard." 10A Federal Practice and Procedure, *supra*, at § 2720. "Both motions must be denied if the court finds that there is a genuine issue of material fact." *Id.*

Plaintiff's Motion for Summary Judgment

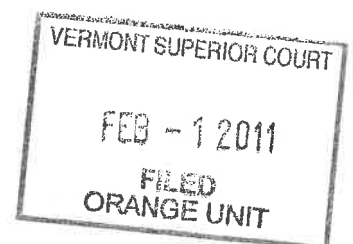
Plaintiff asserts that Defendant has admitted the debtor-creditor relationship in his answer and by virtue of partial payment has waived the right to contest the amounts claimed to be due on each of the claimed cards.

In his answer, Defendant claimed he lacked sufficient knowledge to admit or deny the existence of the accounts which Plaintiff claims are due from Defendant. The lack of knowledge upon which to base a different answer is given the effect of a denial under Vermont Rule of Civil Procedure 8(b). As a result, Defendant has not admitted the debtor-creditor relationship in his answer as Plaintiff asserts.

Plaintiff relies on Defendant's responses to requests for admission in an effort to establish the lack of any disputes issues of material fact. However, review of the responses indicates that Defendant at best admitted partial payments on some credit card statements. Clearly, however, Defendant denied the existence of the debt(s) (Requests to Admit #3 & #7).

The Plaintiff appears to be relying upon the doctrine of account stated in support of its assertion that Defendant has agreed to the amounts due. The Court is skeptical on the availability of the account stated doctrine in credit card transactions. Nonetheless, for account stated to apply the Plaintiff must show either an express or implied agreement by the Defendant to the amount of the debt. The Court does not agree that partial payment on a credit card statement is an express or implied assent to the debt stated on the statement especially in light of the multiple interest rates, fluctuating rates, fees and penalties often contained on such statements. In such circumstances, more than mere silence from the cardholder is necessary to establish assent. Nothing more has been shown here.

Defendant challenges the admissibility of certain documents and evidence relied upon by Plaintiff in support of its motion for summary judgment. Because that motion is met with contested facts it will be denied. It is not necessary therefore, for the Court to consider the admissibility of the contested evidence at this juncture. However, at merits the Plaintiff will be required to support its claim by admissible evidence, which may include proper business records and not a record created specially for this litigation in the guise of a regularly kept business record.



Because there are material facts in dispute, Plaintiff is not entitled to summary judgment in its favor. *Baldwin v. Upper Valley Services, Inc.* 162 Vt. 51 (1994).

Defendant's Motion for Summary Judgment

Defendant challenges Plaintiff's claims through a cross motion for summary judgment asserting that Plaintiff has not established standing to pursue these claim. Standing is necessary in order for the Court to have subject-matter jurisdiction. *Bischoff v. Bletz*, 2008 Vt 16 (2008).

In this case there are two accounts at issue, an account originally through Chase Bank, and an account originally through First USA.

Plaintiff's complaint alleges that the First USA account and the Chase account have both been acquired by Plaintiff. Plaintiff has submitted a bill of sale from Chase to Unifund Portfolio A, LLC and in turn from Unifund Portfolio A to Plaintiff. Plaintiff has not submitted any evidence of a sale or assignment from First USA to Chase, Unifund Portfolio A or to Plaintiff.

Defendant claims these assignments or sales must fail as to Defendant because those documents do not specifically mention Defendant's account in any business record. However, for purposes of summary judgment review, Plaintiff has shown a chain from Chase to Plaintiff with respect to the Chase account allegedly in Defendant's name.

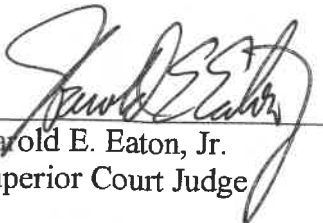
Plaintiff has not, however, produced any evidence of how Plaintiff has any standing with respect to the First USA account. Absent any showing of standing on behalf of the Plaintiff, Defendant is entitled to judgment in his favor on that claim. *Bischoff v. Bletz*, 2008 Vt. 16 (2008).

Order

Plaintiff's Motion for Summary Judgment is **DENIED**.

Defendant's Motion for Summary Judgment is **GRANTED** as to Count II and to Count III insofar as it pertains to sums from the First USA account and **DENIED** as to Count I and the remainder of Count III.

Dated at Chelsea this 1st day of February, 2011.



Harold E. Eaton, Jr.
Superior Court Judge

