

**IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY,
PENNSYLVANIA**

**FIRST NATIONAL BANK OF OMAHA,
Plaintiffs**

vs.

**DENNIS M. HOLT,
Defendant**

:
: **NO. CV-21-1238**
:
:
:
: **CIVIL ACTION –**
: **Preliminary Objections**

OPINION AND ORDER

Before the Court are Defendant’s Preliminary Objections to Plaintiff’s Second Amended Complaint. For the reasons set forth below, the Preliminary Objections are sustained in part and overruled in part.

I. Factual Background

The Second Amended Complaint alleges that the Plaintiff and Defendant entered into a retail installment agreement on or about August 9, 2018, and the account number issued ended in 1187. This credit card debt collection action arises out of Defendant’s alleged failure to make full payment of the amount of \$6,336.95 owed on his credit card account. Also attached to the Amended Complaint are Defendant’s credit card statements, a template cardholder agreement, and an additional document with information about interest rates and fees.

II. Procedural Background

Plaintiff’s Complaint was filed on December 13, 2021, and Defendant’s Preliminary Objections were filed December 30, 2021. Plaintiff filed a Response to the Preliminary Objections on January 24, 2022, and argument was held on February 22, 2022, with Nicholas J. Raker, Esquire, participating by telephone on behalf of the Plaintiff and Kristian Villegas, Esquire, appearing on behalf of the

Defendant. On March 2, 2022, this Court entered an Order sustaining Defendant's preliminary objection pursuant to Pa.R.C.P. 1028(a)(2), as the agreement attached to the Complaint referenced a "Schedule" which contained terms such as how minimum payments and interest rates are calculated. The Plaintiff's counsel confirmed that the "Schedule" is a separate document and this Court, after finding that the interest rate and fees were material terms of the agreement, ordered the Plaintiff to file an Amended Complaint within 20 days which contained an averment of the specific interest rate and fees pertinent to the cardholder agreement or attached as an exhibit the separate "Schedule" referenced in the cardholder agreement.

On March 22, 2022, the Plaintiff filed an Amended Complaint. On April 11, 2022, the Defendant again filed Preliminary Objections to the Amended Complaint. Argument on the Preliminary Objections was held on August 8, 2022. By Order dated August 9, 2022, Defendant's Preliminary Objections were sustained in part and overruled in part, as the Preliminary Objection pursuant to Pa.R.C.P. 1028(a)(3) was previously litigated. Plaintiff was granted twenty (20) days to file a Second Amended Complaint which evidences the Defendant's contractual agreement to pay interest, either in the form of (1) an averment of the specific interest rate and fees pertinent to the initial cardholder agreement or (2) attaches as an exhibit the full separate "Rates and Terms Schedule" referenced in the cardholder agreement (See Section 8, which indicates that the APRs (and their daily periodic rates) in effect on your account are listed in the Schedule) and additional disclosure. Plaintiff was cautioned that failure to follow this directive

may result in the loss of the Plaintiff's ability to proceed on claims involving the collection of interest charged on the alleged purchases.

On August 29, 2022, Plaintiff filed a Second Amended Complaint. On September 21, 2022, Defendant filed Preliminary Objections to Plaintiff's Second Amended Complaint. Argument was held on October 28, 2022, with Plaintiff's counsel Nicholas Raker, Esquire, participating by telephone and Defendant's counsel Kristian Villegas, Esquire, appearing in person.

III. Discussion

a. Failure to Conform to Rule of Court – Pa.R.C.P. 1028(a)(2)

Defendant's first Preliminary Objection falls under Pa.R.C.P. 1028(a)(2), "failure of a pleading to conform to law or rule of court or inclusion of scandalous or impertinent matter." Rule 1019 of the Pennsylvania Rules of Civil Procedure states that "[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 or copy is not accessible to the pleader, it is sufficient so to state, together with the reason, and to set forth the substance in writing." Pa.R.C.P. 1019(i). Here, the Defendant previously argued that the cardmember agreement attached to the Complaint did not include the specific or material terms, including fees or interest that will be charged. The agreement attached to the Complaint referenced a "Schedule" which is a separate document that contains terms such as how minimum payments and interest rates are calculated. The Court agreed that the interest rate and fees are material terms of the agreement and therefore must be attached to the Complaint pursuant to Pa.R.C.P. 1019(i). The Plaintiff was

Ordered to File an Amended Complaint within 20 days which included this information.

The Amended Complaint filed on March 22, 2022, contained an Exhibit A which was the Cardmember Agreement attached to the original Complaint, as well as a 1 page document which was purportedly the “Schedule.” Defendant’s Preliminary Objection to the Amended Complaint indicated that the complete writing containing the material terms was not attached. After reviewing the Amended Complaint and the exhibits thereto, this Court found that the document which Plaintiff included in addition to the Cardmember Agreement appeared to be a disclosure about interest rates and charges and fees but still did not provide ample evidence of the Defendant’s contractual agreement to pay a specific interest rate. The Defendant’s counsel noted that there was a notation at the bottom of the additional materials included in the Amended Complaint indicating that it was page 2 of 2, but that there was no page 1 of 2 attached. The Court noted that the last sentence on the additional document states “[t]his disclosure together with the Rates and Terms Schedule and accompanying Cardmember Agreement, govern your credit card account with us and are referred to collectively as the ‘Agreement.’” The Amended Complaint lacked the “Rates and Terms Schedule” referenced in the disclosure, and that document likely included material terms related to the contractual obligation of the Defendant. The Court found that the “Rates and Terms Schedule” was not attached to the Amended Complaint as required in this Court’s Order of March 2, 2022, and therefore the Preliminary Objection was sustained.

Plaintiff's Second Amended Complaint has attached as an exhibit the eight page Cardmember Agreement which is immediately followed by a document which indicates that it is "Page 1 of 2," and the Interest Rates and Charges disclosure that was also attached to the Amended Complaint and labeled "Page 2 of 2." Plaintiff argues that the document labeled "Page 1 of 2" provides an explanation of how the Defendant's contractual obligation to pay a specific interest rate is calculated. The Court finds this argument problematic for multiple reasons. Initially, the Court notes that this document bears a date of August 11, 2022, which is well after the Plaintiff and Defendant entered into the credit agreement. There is no proof that this document was included in the original cardmember agreement provided to Defendant. Further, the cardmember agreement, either with or without the additional document labeled "Page 1 of 2" still does not list specific rates of interest.

Plaintiff has now had three opportunities to rectify the deficiency in its Complaint by providing ample evidence of Defendant's contractual obligation to pay a specific rate of interest. Accordingly, the Defendant's Preliminary Objection to the Plaintiff's Second Amended Complaint is **SUSTAINED**. As a result, if Plaintiff is successful on either its claim for breach of contract or unjust enrichment, any interest on purchases will be capped at the legal rate of interest in Pennsylvania.

b. Failure to Provide Verification of Documents – Pa.R.C.P. 1024(a)

Defendant also raised a Preliminary Objection to Plaintiff's Second Amended Complaint for the alleged failure to conform to a rule of civil procedure. Defendant argues that the verification attached to Plaintiff's Second Amended

Complaint is not in conformity with Pa.R.C.P. 1024(a), which requires that every pleading be verified by a person with knowledge of the factual averments or denials made therein. Defendant objects to the verification signed by Joseph C. Guenther, Recovery Representative of First National Bank of Omaha, because it contains the term “he/she is authorized to make this verification on behalf of the Plaintiff.” Defendant argues that this language does not indicate whether the signor has the sufficient knowledge or information and belief to satisfy the legal standard for verification.

The Court finds that Defendant’s objection is without merit. “A pleading may be verified upon personal knowledge as to a part and upon information and belief as to the remainder.” Pa.R.C.P. 1024(a). The verification attached to Plaintiff’s Second Amended Complaint indicates not only that Joseph C. Guenther is authorized to make the verification on behalf of the Plaintiff, but also that the “statements made in the foregoing Civil Action are correct to the best of his/her information and belief.” This Court finds that the verification satisfies the rules of civil procedure and therefore Defendant’s preliminary objection is **OVERRULED**.

ORDER

AND NOW, this 23rd day of **November, 2022**, upon consideration of Defendant’s Preliminary Objections to the Second Amended Complaint and Plaintiff’s response thereto, and for the reasons set forth above, Defendant’s Preliminary Objection with respect to Pa.R.C.P. 1028(a)(2) is **SUSTAINED**. If the Plaintiff is successful on either of its claims, any interest charged shall be limited to the legal rate of interest in Pennsylvania. Defendant’s Preliminary Objection

pursuant to Pa.R.C.P. 1028(a)(3), is **OVERRULED** as the Court finds that the verification attached to the Second Amended Complaint sufficiently conforms to the Pennsylvania Rules of Civil Procedure. Defendant shall file an Answer to Plaintiff's Second Amended Complaint within **twenty (20)** days of the date of this Order.

BY THE COURT,

Ryan M. Tira, Judge

RMT/jel

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