STATE OF MICHIGAN
CIRCUIT COURT FOR THE COUNTY OF SAGINAW
Consolidated Nos. 08-684-CZ-3, 08-1012-CK-3

THE ASSIGNEE-PLAINTIFF
COLLECTION CASES.

Civil Docket No. 08-684-CK-3

PALISADES COLLECTION, LLC
Plaintiff,

v

LEVADA TAYLOR,
Defendant.

Civil Docket No. 08-1012-CK-3

HUDSON & KEYSE, LLC
Assignee of Beneficial Company, LLC
Plaintiff,

v

JANICE GREGORY,
Defendant.

OPINION AND ORDER

[RESOLVING MOTIONS FOR SUMMARY DISPOSITION – ALL MOTIONS FOR SUMMARY DISPOSITION DENIED – ISSUES MUST BE RESOLVED BY TRIAL – BUSINESS-RECORDS QUESTION TO BE RESOLVED BY PRETRIAL BRIEFING.]

AT A SESSION OF SAID COURT, HELD AT THE COURTHOUSE IN THE CITY AND COUNTY OF SAGINAW, STATE OF MICHIGAN,

THIS 25 DAY OF MARCH, A.D. 2009.

BEFORE THE HONORABLE JANET M. BOES, CIRCUIT JUDGE.

I. PREFACE

In these two cases, which were consolidated for purposes of addressing pending motions for summary disposition, the Plaintiffs claim to be assignees of the rights in various debts said to have been incurred by the Defendants. The Court takes judicial notice of the economic era through which we have just passed, in which a popular practice was to sell debt, resell it, and resell it yet again. As these cases demonstrate, this creates some problems where a party claiming to be the real party in interest by virtue of an assignment seeks to recover against an alleged debtor who stands her ground and demands that plaintiff prove its case.

After reviewing all of the motions for summary disposition, the Court concludes that neither the Plaintiffs nor the Defendants have demonstrated the absence of a genuine issue of fact. Therefore, summary judgment must be denied, and these cases shall proceed to trial.

II. FACTS AND PROCEEDINGS

A. PALISADES COLLECTION, LLC v LEVADA TAYLOR

In Docket No. 08-684-CZ-3, Plaintiff Palisades Collection, LLC ("Palisades") seeks a money judgment against Defendant Levada Taylor ("Taylor") for unpaid balances on 3 credit cards that Taylor allegedly opened in 1985 with the "Original Creditor", Chase Manhattan Bank USA, N.A., "as successor through merger with Bank One"), "under the name of" First USA Bank NA. Palisades seeks judgment in the amount of **$54,924.58** as of October 20, 2008.[1] The 3 credit cards are identified by the last 4 digits of each card number.

The Complaint is accompanied by the Affidavit of Kim Kenney, who states: ① that affiant is Plaintiff's authorized representative; ② that the Affidavit is made "on personal knowledge"; ③ that affiant has "reviewed the file that is kept in the course of regularly conducted business activity"; ④ that the statements in the Complaint are "true and correct"; and that ⑤ "The total amount owed by Defendant to Plaintiff as of 2/19/2008 is $50942.91."

Neither the Complaint nor Affidavit allege, much less show by evidence, that Palisades Collection, LLC is successor by assignment to the rights of the Original Creditor.

Defendant Levada Taylor responded with her Answer and Affirmative Defenses, in which she states: ❶ she did have 3 credit card accounts "with Bank One", and that the final 4 digits of each account number match those set forth in the Complaint; ❷ admits as to all 3 accounts that "she has not paid her credit card balance in full"; ❸ admits that she is bound by whatever credit card agreement she had originally with Bank One; ❹ however, states that she is not in possession of that original contract "to determine the terms and conditions"; ❺ does not acknowledge that the Credit Card Agreement attached to the Complaint is the contract she had with Bank One, pointing out that the attachment to the Complaint does not reference any "particular account or debtor". Defendant further denies ❻ that she is indebted to Palisades Collection, LLC since Bank One never advised her that that it was conveying her accounts to Plaintiff, and furthermore, Palisades failed to properly plead "that it is the assignee with full

[1] This figure is taken from Palisades' proposed Judgment submitted to the Court on October 27, 2008.

rights to pursue this debt", and ❷ that Plaintiff failed to demonstrate chain of title between Bank One and itself by attaching documentation to the Complaint. Taylor states in her Affirmative Defenses that, absent a proper showing of chain of title, Palisades "is not the proper party in interest" and cannot pursue this collection case.

Following discovery, the parties brought *de facto* cross-motions for summary disposition. Plaintiff Palisades moved first, pursuant to MCR 2.116(C)(9) (failure to state a valid defense to claims) and (C)(10) (no genuine issue of fact and Palisades entitled to judgment as a matter of law). Plaintiff relied upon the Affidavit of Pam Harbaugh, who testifies: that she is Plaintiff's "Senior Pre-Judgment Litigation Paralegal" and custodian of the records; that those records include "contract and/or accounts that have been acquired by Plaintiff when the amounts owed under the contract and/or account to the original creditor are due and owing. There are no attachments to the Harbaugh Affidavit tending to bear out these conclusory assertions.

In response, Defendant Taylor submits that summary judgment for Plaintiff is not appropriate as Palisades fails to establish ① that it is the proper party in interest, as required by MCR 2.201(B)[2] or ② that the account balances claimed to be due are accurate. Taylor cross-moves for summary judgment of dismissal. Taylor contends: that she and the Plaintiff "have never transacted business directly" and are, legally-speaking, strangers to one another.

B. HUDSON & KEYES, LLC v JANICE GREGORY

Docket No. 08-1012-CK-3 is cut from similar cloth. In that case, Hudson & Keyes, LLC ("H & K") seeks recovery against Janice Gregory for the unpaid balance on a "consumer loan agreement" that Gregory allegedly entered into with Beneficial Company, LLC. Attached to the Complaint is the Affidavit of Brian E. Winch, Plaintiff's "Legal Desk Supervisor."[3] The Affidavit states or implies in relevant part: ① that, calculated through 11/30/2007, Gregory owes Plaintiff $19,605.05 plus interest at 21.80% of $10,034.88; ② that the indebtedness is based upon a "consumer loan" that Gregory had with Beneficial Company, LLC (not a party to this suit); ③ That Beneficial Company LLC assigned the debt to Hudson & Keyes, which "having purchased said debt, is the owner of said debt and is the proper party to bring this action."; ④ that Plaintiff "keeps regular books and records", which are under the affiant's supervision; ⑤ that the entries in those books "are made in the ordinary course of business"; and ⑥ that the books "show the Defendant is indebted to the Plaintiff in the manner and amount set forth herein".

The Court notes that the Complaint controverts the Affidavit in that the pleading (¶ 2) alleges that Gregory "entered into a consumer loan agreement with Plaintiff", while the Affidavit says that Gregory entered into such agreement with Plaintiff's Assignor, Beneficial Company, LLC. The Complaint further alleges that Gregory "is in the possession" of a copy of that loan agreement. The loan agreement Plaintiff is claiming under is not attached to the Complaint or Affidavit.

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[2] "An action must be prosecuted in the name of the real party in interest . . ."

[3] Plaintiff relies on the Winch Affidavit as one of two exhibits supporting its present Motion for Summary Disposition.

In her Answer to the Complaint, Gregory denies that she ever entered into any agreement with Plaintiff Hudson & Keyes. She admits she had an account with Beneficial in the past, but correctly points out that Plaintiff has failed to identify the specific account in question, by account number or otherwise. Plaintiff also fails to allege the assignment in its Complaint.

Plaintiff Hudson & Keyes moved for summary disposition pursuant to MCR 2.116(C)(10), contending that there is no genuine issue of fact requiring a trial, and that it is entitled to judgment in its favor.[4]

Although Plaintiff's papers are not a model of clarity, read as a whole, they appear to claim that the following facts exist without genuine dispute. ① Janice Gregory entered into a "Consumer Loan Agreement" with Beneficial Company, LLC. ② At some unspecified time, Gregory defaulted on making payments on the account. ③ At some unspecified time, Beneficial duly and properly assigned the account to Plaintiff-Assignee, Hudson & Keyes. ④ H & K thus stands in the shoes of original creditor Beneficial. ⑤ Gregory now owes H & K the same amount she would have owed Beneficial – principal unpaid balance, plus interest, plus costs and attorney fees.

As proof, Plaintiff attaches a copy of the Winch Affidavit originally filed with the Complaint (Pl Ex B). Plaintiff also attaches (Pl Ex A) a document entitled Personal Credit Line Account Agreement ("Agreement"). The Agreement, dated 8/6/1998, is between Janice Gregory and Household Finance Corporation.[5]

In response to Plaintiff's Motion, Defendant Gregory charges that Plaintiff's Complaint, Affidavit, Interrogatory Answers and other submissions are "self-contradictory and create multiple issues of fact by themselves". Gregory tenders three specific issues: ❶ Who is the original creditor? (Is it Household Finance Corporation, or Beneficial Company LLC?) ❷ When and where did an assignment of Gregory's account take place? (Noting that Interrogatory Answers #5 and #6 give different dates.) ❸ Precisely what debt is being assigned? (Alleging that none of Plaintiff's papers refer to Janice Gregory by name, or list a specific account number.)

III. LAW

The common law in Michigan, and elsewhere, agrees that a plaintiff seeking to recover by virtue of an assignment has the burden to show there was a valid assignment.[6] In

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[4] The prayer for relief found at the second page (unnumbered) of Plaintiff's Motion appears to be in error: it asks for judgment in the amount of $10,034.88, which is the alleged amount of interest due, as set forth in the Affidavit filed with the Complaint. In its Complaint (¶ 4), Plaintiff alleges that $30,805.79 is due and owing.

[5] This circumstance is problematic in itself. Plaintiff claims that the account was assigned to it by a limited liability company (LLC) named Beneficial Company. If Gregory entered into a credit contract with Household Finance Corporation, when and how did the LLC, Beneficial, acquire it? The Court takes judicial notice that corporations and limited liability companies are different forms of organizing business entities under the law.

[6] *See, e.g.*, 6 Am Jur 2d Assignments § 146 (collecting cases in n 1); 6 CJS Assignments § 147 (and nn 7-11).

the early case of *Weston v Card*[7], plaintiff sued for breach of warranty, which was "not the personal guaranty of the plaintiff", but of a company with which he was associated. Our Court wrote:

> "[Plaintiff] did not aver in his declaration [today's civil complaint], or prove on the trial, any assignment of the contract. In order to recover in his own name under this contract, the plaintiff should have averred and proved an assignment of the contract."

Similarly, in *Smith v Rowe*[8], the Washington Supreme Court states:

> An alleged assignee without proof of assignment cannot recover against obligor by whom assignment is denied. In an action by the assignee against the debtor the plaintiff must prove the material allegations in his complaint which are put in issue by the answer of the debtor. To recover on an assignment of a chose in action it is not only necessary that the plaintiff establish that there was a cause of action, but it is essential that plaintiff establish that the cause of action has been assigned to the plaintiff.
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> * * *
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> ". . . [W]here the fact of assignment is put in issue by the pleadings-as in the case at bar-proof of the assignment is essential to a recovery by the assignee. The burden of proof of the assignment is on the one claiming to be the assignee."

The Court's research uncovered some recent decisions from other jurisdictions that address the same, or similar, issues as those presented by the present cases.[9]

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[7] 96 Mich 373, 377-378; 56 NW 26 (1893). Despite its age, the decision is still good law in Michigan. *See, Jones v Turnage* 699 F Supp 795, 799-800 (N D Cal, 1988) (27-year-old caselaw did not have "limited shelf life"); *Cotler v Inter-County Orthopaedic Ass'n,* 530 F2d 536, 538 (CA 3, 1976) (relying upon cases decided in 1908 and 1973, observing that "The reasoning, although ancient is sound.")

[8] 3 Wash 2d 320, 322-323; 100 P2d 401 (1940). For a more recent application of the principle in that jurisdiction, *see, Unifund CCR Assignee of Providian v Ayhan,* 146 Wash App 1026; 2008 WL 2974639 (Wash App Div 2, 2008, unpublished) ("as a threshold matter, Unifund must establish its standing to sue Ayhan on the Providian debt by showing that it had purchased or been assigned Providian's rights under the contract as a matter of law.")

[9] In *MBNA America Bank, N.A. v Nelson,* 15 Misc 3d 1148; 841 NYS2d 826; 2007 WL 1704618 (NY City Civ Ct, 2007), the Court comments on the general factual backdrop for these assignment cases, stating, "The Court is aware of how the market for the sale of debt currently works, where large sums of defaulted debt are purchased, by a small number of firms, for between .04 and .06 cents on the dollar. . . . The entire industry is a game of odds." The Court noted that it was hoping to "persuade creditors, not simply to take more care in dotting their 'i's' and crossing their 't's' in their filings, but to assure a minimum level of due process to the respondents [i.e, the debtors]."

In a 2005 published decision, *Citibank (South Dakota), N.A. v Martin*[10], Judge Diane A. Lebedeff writes, "With great frequency, courts are presented with summary judgment motions by credit card issuers seeking a balance due from credit card holders which motions fail to meet essential standards of proof and form in one or more particulars . . ." The Court holds that a proper dispositive motion "must include an affidavit sufficient to tender to the court the original agreement", and that "the affidavit must demonstrate personal knowledge of essential facts or the judgment will be assailable, even if the defendant defaults." Furthermore, certain claims require "special proof", it being "essential" that a credit card assignee demonstrate its standing to sue. The opinion states:

> "It is the assignee's burden to prove the assignment" [citing cases]; and courts "are reluctant to credit a naked conclusory affidavit on a matter exclusively within the moving party's knowledge"; and "an assignee must tender proof of assignment of a particular account". Such a showing "can easily be made by an affidavit from an official of the credit card issuer" (emphasis added).[11]

In *MBNA America Bank, N.A. v Nelson,* 15 Misc 3d 1148; 841 NYS2d 826; 2007 WL 1704618 (NY City Civ Ct, 2007, unreported / table), the alleged assignee of a credit card debt sought sought to confirm an arbitration award against the original debtor. The opinion states:

> "It is imperative that an assignee establish its standing before a court, since "lack of standing renders the litigation a nullity." It is the "assignee's burden to prove the assignment" and "an assignee must tender proof of assignment of a particular account or, if there were an oral assignment, evidence of consideration paid and delivery of the assignment." Such assignment must clearly establish that Respondent's [the Debtor's] account was included in the assignment. A general assignment of accounts will not satisfy this standard and the full chain of valid assignments must be provided, beginning with the assignor where the debt originated and concluding with the Petitioner [i.e., the assignee-creditor]." [Citations omitted.]

In *Bullock v Worldwide Asset Purchasing, LLC,* 2008 WL 3159921 (Ky App, 2009, unpublished), the appeals court reversed a trial court's grant of summary judgment in favor of assignee-plaintiff Worldwide, which sued Bullock to collect on debts she had incurred by use of a Nextcard, Inc credit card.[12] The court agreed with Bullock that the alleged assignee-plaintiff had "failed to establish that she owed it a valid debt", when plaintiff attached to its complaint "inadequate" assignment documents, which did not list her name, account number,

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[10] 11 Misc 3d 219, 220; 807 NYS2d 284 (Civ Ct, New York County, 2005).

[11] *Citibank (South Dakota) N.A. v Martin,* 11 Misc 3d at 226, citing, in turn, *Citibank (South Dakota) N.A. v Jones,* 272 AD2d 815; 708 NYS2d 517 (NY App Div 3d Dept, 2000), *lv den,* 95 NY2d 764; 716 NYS2d 38; 739 NE2d 294 (2000).

[12] Ms. Bullock was proceeding *pro se*.

or the amount of her debt. The court held that the evidence proffered was "insufficient to warrant summary judgment."

The evidence deemed "insufficient" is similar to evidence before the Court in these cases. The documents presented by Worldwide recited that it had purchased all of Nextcard's "right, title and interest" in each of the accounts identified in "Exhibit B". However, Worldwide did not attach Exhibit B to show that Bullock's account was among those purchased. The Kentucky Court of Appeals laid down rules to govern similar future cases:

> "From a review of the record and from the nature of debt collection cases, in order to ensure that our courts are reaching the correct conclusion, Worldwide and other similarly situated plaintiffs must be required to prove three elements of a claim before a judgment can be entered against a defendant. Worldwide must produce a bill of sale listing the name and account number of the defendant; it must produce a document specifically detailing how it reached the principal and interest amounts that it is suing for; and it must produce documentary evidence that the defendant is in fact the person responsible for the debt. These requirements simply were not met in this case."

In *Rushmore Recoveries X, LLC v Skolnick,* 15 Misc 3d 1139; 841 NYS2d 823; 2007 WL 1501643 (NY Dist Ct, Nassau County, 2007) (unreported / table), the trial court likewise denied a motion for summary judgment brought by alleged assignee-plaintiff Rushmore, which claimed to have purchased the rights to a retail charge account agreement originally entered into between Skolnick and Citibank. Rushmore relied upon the Affidavit of Todd Fabacher, which appears to have been drawn in a pattern similar to the affidavits now before this Court in the *Taylor* and *Gregory* cases:

> "The Plaintiff attempts to support its motion with the affidavit of Todd Fabacher, who identifies himself as "an authorized and designated custodian of records for the plaintiff regarding the present matter." (Fabacher Affidavit 3/14/07, ¶ 1) Mr. Fabacher describes his duties as including "the obtaining, maintaining and retaining, all in the regular course of plaintiff's business, including obtaining records and documents from or through CITIBANK or any assignee or transferee previous to plaintiff, any and all records and documentation regarding the present debt." (Fabacher Affidavit 3/14/07, ¶ 1) While Mr. Fabacher attempts to portray himself as one who is "personally familiar with, and hav[ing] knowledge of, the facts and proceedings relating to the within action" (Fabacher Affidavit 3/14/07, ¶ 1), it is readily apparent from a reading of his affidavit that his claimed personal familiarity with this matter is taken from the documents and records ostensibly created by Citibank, and/or assignees who have preceded the Plaintiff, which have now

> come into the Plaintiff's possession. Clearly, Mr. Fabacher has no personal knowledge of the retail charge account agreement between the Defendant and Citibank."

The court held that Mr. Fabacher's assertions concerning what assignor Citibank's records showed did not fall with the business-records exception to the hearsay rule.[13] The evidence was also found insufficient to show "the chain of the assignments from Citibank down to the Plaintiff." Summary judgment was thus denied.

The plaintiff-assignee's motion for summary judgment was again denied in *Palisades Collection, LLC v Gonzalez*, 10 Misc 3d 1058; 809 NYS2d 482; 2005 WL 3372971 (NY City Civ Ct, 2005) (unreported / table), the court observing that

> "This case presents a set of facts and a pattern of evidentiary and pleading inadequacies commonly seen in . . . [this] Court."

In Note 1 to its decision, the New York court stated that

> ". . . [t]he cases similar to this one . . . include those seeking to collect on debts arising from credit cards, car purchase notes and similar consumer transactions, in which the debt has been assigned to a third party, and the debtor files an answer disputed the amount owed, or . . . the entire debt."

In that case, Palisades Collection, LLC sued Maria Gonzalez as the alleged assignee of AT & T Wireless, claiming that Gonzalez owed money on a cell phone contract.[14] In seeking summary judgment, Palisades

> " . . . relies exclusively on an affidavit executed by one of its employees, and various documents which appear to have been created by AT & T. Since the affiant neither has personal knowledge of the facts nor can attest to the genuineness or authenticity of the documents, plaintiff has not made out its prima facie case. Therefore, . . . [summary judgment] must be denied."

The court held that Palisades had failed to lay an adequate foundation for admission of business records of its assignor, AT & T, noting that affiant

> "does not claim to be familiar with AT & T's record keeping

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[13] The court quoted older New York decisions for the proposition that 'the mere filing of papers received from other entities, even if they are retained in the regular course of business, is insufficient to qualify the documents as business records . . ." (noting that the assignee-plaintiff was laboring under a "misconception" to the extent it believed otherwise).

[14] The Court is unaware as to whether this identically-named entity is the same Plaintiff before it in Docket No. 08-684-CZ-3. If so, then Plaintiff should be well aware of these issues.

> practices, but only with the method by which plaintiff maintains the accounts it purchases from others. The mere fact that plaintiff obtained the records from AT & T and then retained them is an insufficient basis for their introduction into evidence."

Finally, the court ruled that Palisades had failed to show that it was entitled to sue as assignee, in that its affiant stated that an assignment had occurred but failed to attach a copy of the assignment.

THE COURT'S ANALYSIS.

The Court concludes that neither the Plaintiffs, nor the Defendants, have met their burden on summary disposition to show the non-existence of a genuine issue of fact. The Motions and Cross-Motions for summary disposition are **DENIED.** Unless settled or dismissed, these cases must be resolved by the factfinder.[15] At trial, each Assignee-Plaintiff must present competent, admissible evidence sufficient to convince a reasonable factfinder by a preponderance of the evidence: ❶ that the Defendant entered into a contract with the original debtor; ❷ what the terms of the contract were; ❸ that Defendant's specific account was assigned; ❹ Plaintiff must show an unbroken chain of title; ❺ the amount of the debt and how the figure was calculated.

It is not clear that employees of Plaintiffs herein, if called as witnesses, will be able to lay a proper foundation for admission of records of Plaintiffs' alleged predecessors in interest. The decisions cited above were based upon law of other jurisdictions with respect to business records. It is not clear what the result might be under Michigan law, and the matter has not yet been briefed.

Under the Court's standard Pretrial Scheduling Order, evidentiary problems likely to arise at trial must be brought to the Court's attention for resolution prior to trial. If Plaintiffs wish to pursue their cases to trial, they are **ORDERED** to file and serve, within 30 days of the date of this Opinion and Order, a detailed Offer of Proof as to how they propose to prove the matters stated above, and their Michigan legal authority for admission of same. Within 14 days thereafter, Defendant, to the extent she objects to the evidence, shall file and serve a brief stating her legal authority and argument against its admission. Either party may then notice the matter for hearing on a Motion Day (Monday at 1:30 PM).

IT IS SO ORDERED.

Janet M. Boes
(P37714)

JANET M. BOES (P37714)
CIRCUIT COURT JUDGE

[15] Both of these cases are on the Court's nonjury docket.

A TRUE COPY OF THE FOREGOING SERVED UPON ALL PARTIES OF RECORD PURSUANT TO MCR 8.105(C), MCR 2.107(D) TO:

David A. Bader
Attorney for Plaintiff Palisades Collection LLC in No. 08-684-CZ-3;

Timothy E. Baxter
Attorney for Plaintiff Hudson & Keyse, LLC in No. 08-1012-CK-3

UAW Legal Services Plan
Michael C. Weiss & Carolyn Bernstein
Attorneys for Defendants in both cases

COUNTER-SIGNED:

Margo I. Ludium

DEPUTY CLERK

A TRUE COPY
Susan Kaltenbach, Clerk