COPY SENT

Legal Services of Northwest Jersey, Inc.
By: Richard A. Mastro 020771983
34 West Main Street, Suite 301
Somerville, NJ 08876
(908) 231-0840
Attorney for Defendant

F I L E D

Jun 30, 2014

Superior Court, NJ
Special Civil Part

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: Special Civil Part
SOMERSET COUNTY
DOCKET NO. DC 87-14

MIDLAND FUNDING LLC CURRENT ASSIGNEE,
[CITIBANK USA, NA, ORIGINAL CREDITOR]

Plaintiff

**Civil Action**

vs.

BRUCE THIEL

Defendant

**ORDER GRANTING SUMMARY JUDGMENT DISMISSING PLAINTIFF'S COMPLAINT WITH PREJUDICE AND ENTERING JUDGMENT FOR STATUTORY DAMAGES AND ATTORNEY'S FEES IN FAVOR OF DEFENDANT-COUNTERCLAIMANT**

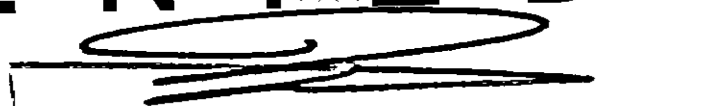
This matter opened to the Court on application of defendant, Legal Services of Northwest Jersey, Inc., Richard A. Mastro, Esq., appearing and on notice to plaintiff, Pressler & Pressler, LLP, and the Court having read the papers submitted and having considered the argument of counsel and for good cause shown;

It is on this 30th day of June 2014

ORDERED as follows:

1. Plaintiff's complaint is dismissed with prejudice.
2. Summary judgment is entered in favor of defendant and against plaintiff ~~in the amount of $__________ for violation of the Fair Debt Collection Practices Act.~~
3. ~~Plaintiff shall pay the sum of $__________ to Legal Services of Northwest Jersey, Inc., as reasonable attorney's fees pursuant to 15 U.S.C. 1692k(a)(3).~~

DENIED



x - Opposed

Honorable Hany A. Mawla, J.S.C.

See attached Statement of Reasons.

**The party receiving this order from the Court shall serve all parties with a copy of the Order within ten (10) days of the date hereof.**

**STATEMENT OF REASONS**

Plaintiff, Midland Funding LLC, as assignee of Citibank USA, N.A., initially filed its Complaint against Defendant, Bruce Thiel, for non-payment of his store credit card. The initial Complaint was filed in Union County on July 18, 2013. The matter was transferred to Somerset County on January 10, 2014. Plaintiff asserts it is entitled to a judgment for a Home Depot credit card balance that was used by Defendant to make purchases at Home Depot stores. Defendant made some payments on the account, but in or about 2008, he defaulted on the account. Defendant now makes this motion for summary judgment.

Defendant asserts that any claim for the balance on the account is barred by N.J.S.A. 12A:2-725. Defendant argues that pursuant to N.J.S.A. 12A:2-725, Plaintiff's entitlement to relief is barred because more than fours years have passed between the date of default, which he claims was in 2008, and the filing of the Complaint, which was July 18, 2013. Defendant also claims that the Fair Debt Collection Practices Act ("FDCPA") prohibits unconscionable means to collect or attempt to collect any debt, which includes pursuing time-barred lawsuits used to collect debts.

Relying on Sliger v. R.H. Macy & Co., 59 N.J. 465, 469 (1971), Defendant asserts that his transactions at Home Depot constitute a sale of goods because the store furnished him with goods that he then repaid at a later date. He also argues that even where a sale of goods is financed by a third party it still constitutes a sale of goods. Defendant claims that since the suit is for breach of a consumer's contract to repay, it is governed by the UCC's four-year statute of limitations. See Associated Discount Corp. v. Palmer, 47 N.J. 183, 187 (1966). Defendant asserts, "a deficiency suit is essentially an action to recover monies due for the sale of goods," and, therefore, the four year statute of limitations found in N.J.S.A. 12A:2-725 is applicable in

Defendant's case. Ford Motor Credit Co. v. Arce, 348 N.J. Super. 198 (App. Div. 2002). Defendant also relies on an unreported decision, which found that the four-year statute of limitations applies to goods bought on a store credit card and then repaid over time. See New Century Financial Services v. Anca McNamara, A-2556-12T1 (App. Div. 2014). Defendant argues that because the default on the contract occurred in 2008, and the deficiency begins when the breach occurs, the Complaint is barred by the statute of limitations.

Defendant denies Plaintiff's assertion that his $40 payment during the four-year statutory period tolls the time limit. And he denies making the payment because he had no bank account or means to make the payment at the time. Defendant claims that when a payment is made on an account due, it must appear that the payment is made as part of a larger debt and without acknowledgment of the larger debt "it will be deemed an admission of no more indebtedness than it pays." Deluxe Sales v. Hyundai Engineering, 254 N.J. Super. 370, 376 (App. Div. 1992) (citations omitted).

Defendant also asserts that, under the FDCPA, a debt collector is prohibited from filing time-barred lawsuits against debtors where the collector knows or reasonably should have known it was time-barred. Ramirez v. Palisades Collection LLC, Civ. No., 2008 U.S. Dist. Lexis 48722 (N.D. Ill. June 23, 2008). Defendant also claims that it violates the FDCPA when Plaintiff knows or should have known that their claim was barred by the statute of limitations. Defendant argues that even if Plaintiff claims that filing the Complaint was an unintentional error, the FDCPA is a strict liability statute and does not look to an attorney's intent when they filed the lawsuit. Since 15 U.S.C. § 1692(d)-(f) prohibits a debt collector "from engaging in any harassing, oppressive, or abusive conduct; […] making any false, deceptive or misleading representation; […] or using unfair or unconscionable means to collect any debt," Defendant argues that Plaintiff's Complaint

violates the FDCPA. Defendant is seeking a $1,000 statutory penalty for violating the FDCPA's prohibitions and attorney's fees.

In opposition, Plaintiff asserts that Defendant's motion is improper at this time because discovery has not yet been completed. It states that the parties are still in the process of responding to each other's discovery requests. Plaintiff also argues that under Brill v. Guardian Life Ins. Co., Inc., 142 N.J. 520, 529 (1995), the opposing party must come forward with evidence that creates a genuine issue of material fact; and Plaintiff claims they have shouldered this burden while Defendant has failed to show there is no genuine issues of material fact.

In reply, Defendant states that Plaintiff does not address the arguments made in support of his motion for summary judgment. Defendant reiterates that the applicable statute of limitations is four-years pursuant to N.J.S.A. 12A:2-725. Defendant also states that Plaintiff failed to acknowledge New Century Financial Services v. Anca McNamara, A-2556-12T1 (App. Div. 2014), an unpublished decision with a similar fact pattern to this matter, involving a store credit card for the sale of goods that was repaid over time. In that case, the Appellate Division ultimately relied on the four-year statute of limitations. Defendant also asserts that Plaintiff's attachments demonstrate a default as early as February 2009, proving he was in default for more than four years prior to the Complaint being filed.

Defendant argues that when he failed to make monthly payments that met the minimum amount due, he was in default. Defendant argues that our courts "have identified the accrual of the cause of action as the date on which the right to institute and maintain a suit first arose." Deluxe Sales v. Hyundai Engineering, 254 N.J. Super. 370, 376 (App. Div. 1992). And since the date when Defendant last made a payment that met the minimum payment occurred in February

2009, the statute of limitations begins to run then and now bars Plaintiff's cause of action under the four-year time limit.

R. 4:46-2(c) mandates that summary judgment be granted "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law." Judson v. Peoples Bank & Trust Co. of Westfield, 17 N.J. 67, 75 (1954). Summary judgment should be granted, therefore, only when no genuine issues of material facts are presented. Brill v. Guardian Life Ins. Co. Of America, 142 N.J. 520, 540 (1995). The Court must consider all pleadings filed with it to determine whether there is any genuine material issue. Judson v. Peoples Bank & Trust Co. of Westfield, supra, 17 N.J. at 74.

R. 4:46-2(b) provides that:

> [...] A party opposing the motion shall file a responding statement either admitting or disputing each of the facts in the movant's statement. Subject to R. 4:46-5(a), all material facts in the movant's statement which are sufficiently supported will be deemed admitted for purposes of the motion only, unless specifically disputed by citation conforming to the requirements of paragraph (a) demonstrating the existence of a genuine issue as to the fact. An opposing party may also include in the responding statement additional facts that the party contends are material and as to which there exists a genuine issue. Each such fact shall be stated in separately numbered paragraphs together with the citations to the motion record.

PRESSLER & VERNIERO, Current N.J. COURT RULES (GANN).

Plaintiff did not include a statement of material facts in its Certification pursuant to R. 4:46-2(b). Without a statement explaining which facts are disputed, all of Defendant's facts set forth in his Brief are deemed admitted. Additionally, Plaintiff has failed to allege facts that would allow this Court to determine that a genuine issue of material fact exists.

The Court finds that there is no genuine issue of material fact in the record before it. In Plaintiff's attachment, the Home Depot's Notice of Change of Terms that was enclosed with the

billing statement ending on January 20, 2009, states that a consumer "default[s] under this Agreement if [they] fail to pay the Minimum Payment Due by its due date." See Plaintiff's Attachment, Account Statement Closing Date January 20, 2009. This contractual language determines Defendant's date of default. The last qualifying payment made by Defendant was made on March 16, 2009 in the amount of $80.00, after which he entered default on his credit account. Although the record shows that Defendant made additional payments after this date, none of these additional payments were greater than or equal to the minimum payment due. And Defendant was still in default on his account according to the definition of default articulated in Home Depot's Notice of Change of Terms. Using the express definition of default, Defendant's default occurred when he failed to make a payment during the billing period closing on April 20, 2009.

N.J.S.A. 12A:2-725 provides that:

> (1) An action for breach of any contract for sale must be commenced within four years after the cause of action has accrued. By the original agreement the parties may reduce the period of limitation to not less than one year but may not extend it.
>
> (2) A cause of action accrues when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach. A breach of warranty occurs when tender of delivery is made, except that where a warranty explicitly extends to future performance of the goods and discovery of the breach must await the time of such performance the cause of action accrues when the breach is or should have been discovered.

"The Legislature has not specified when the cause of action shall be deemed to have accrued and the matter has therefore been left entirely to judicial interpretation and administration." Rosenau v. City of New Brunswick, 51 N.J. 130 (1968). When a retail store furnishes a consumer with a store-only charge card, the account has been held to be a sale of goods. See Sliger v. R.H. Macy & Co., 59 N.J. 465, 469 (1971). The Supreme Court of New Jersey has found even when a sale of goods is financed by a third-party, it is still a sale of goods

and the four-year statute of limitations pursuant to N.J.S.A. 12A:2-725 is applicable. See Associates Discount Corp. v. Palmer, 47 N.J. 183, 187 (1966) (finding a deficiency suit is an action to recover monies due for the sale of goods); see also Ford Motor Credit Co. v. Arce, 348 N.J. Super. 198 (App. Div. 2002). Defendant certified that the credit account was a contract for the sale of goods between Defendant and Home Depot. Because Plaintiff did not include a statement of material facts pursuant to R. 4:46-2(b) to allege otherwise, the Court finds that the credit account was a contract for sale of goods, between Defendant and Home Depot. Setting aside the lack of a counter statement of material facts itself, the facts in the record show that the credit account was only usable at Home Depot stores, and could not be used at any other kind of retailer. Defendant's credit account was a contract for sale of goods, between Defendant and Home Depot. Indeed, the terms and conditions articulated in the Account Statement with a closing date of December 18, 2008 state, in relevant part, that they apply to "purchases made on The Home Depot [...] Credit Card" and are "only valid for consumer accounts [...] and is not available on The Home Depot Rewards Mastercard." See Plaintiff's Attachment, Account Statement Closing Date December 18, 2008. Because Plaintiff furnished Defendant with goods, as opposed to a monetary loan, Defendant's credit account constitutes a contract for sale goods and the four-year statute of limitations is applicable. There is ample evidence to show that this was not a credit card for use elsewhere.

These terms and conditions of the statements present sufficient evidence to determine that the Home Depot account was a contract for the sale of goods. In oral argument, Plaintiff asserted that Home Depot offers consulting services for their products and as such the six-year statute of limitations should apply pursuant to N.J.S.A. 2A:14-1. However, "where a contract contemplates services as well as the sale of goods, the contract remains one for sale if those services were

merely incidental or collateral to the sale of goods." Tele-Radio Systems Ltd. v. De Forest Electronics, Inc., 92 F.R.D. 371 (1981) (quoting Triangle Underwriters, Inc. v. Honeywell, Inc., 604 F.2d at 743) (internal quotation marks omitted); see also Docteroff v. Barra Corp. of America, Inc., 282 N.J. Super. 230 (App. Div. 1995). The consulting services offered by Home Depot are, presumably, to entice a consumer to purchase Home Depot products for installation or after a consumer buys products to have them installed. Such services seem incidental and collateral to the sale of goods, which is Home Depot's main source of business. Even if this is not the case, there is no evidence that Defendant purchased services in this case. Thus the four-year statute of limitations pursuant to N.J.S.A. 12A:2-725 applies to Defendant's account.

Plaintiff asserted in oral argument that it is unfair for two different people to make the exact same purchase at Home Depot, one using the store credit card and the other using their American Express card and have different statute of limitations apply to them. Although two different statute of limitations may apply for the purchase of the same product, and the Court appreciates the attractiveness of such an argument, the law treats a store credit card issued for the purchase of goods differently than a credit card. See Sliger v. R.H. Macy & Co., 59 N.J. 465, 469 (1971); see also Tele-Radio Systems Ltd. v. De Forest Electronics, Inc., 92 F.R.D. 371 (1981); Docteroff v. Barra Corp. of America, Inc., 282 N.J. Super. 230 (App. Div. 1995).

Plaintiff initially filed their Complaint on July 18, 2013. In oral argument, Defendant conceded that suit was filed within four years of the last payment made. While the subsequent payments made may acknowledge that a debt is owed to Home Depot, it does not change the initial date of default on April 20, 2009, which is when the cause of action accrued. See Deluxe Sales v. Hyundai Engineering, 254 N.J. Super. 370, 376 (App. Div. 1992) (citations omitted). Despite Plaintiff filing only three months after the four-year statute of limitations expired, the

Court may not make an exception in this instance. See, e.g., Commissioners of Fire Dist. No. 9, Iselin, Woodbridge, N.J. v. American La France, 176 N.J. Super. 566 (App. Div. 1980); Biocraft Laboratories, Inc. v. USM Corp., 163 N.J. Super. 570 (App. Div. 1978). Therefore, the statute of limitations bars Plaintiff's cause of action.

Additionally, the Court may not extend the statute of limitations under Home Depot's contractual language. Home Depot's Notice of Change of Terms states that it "will not lose [its] rights under this Agreement because [it] delay[s] in enforcing them or fail[s] to enforce them." Plaintiff's Attachment, Account Statement Closing Date January 20, 2009. Even though Home Depot included this enforcement clause in their contract with Defendant, a retailer's contract may not, for public policy reasons, supersede New Jersey statutes. See, e.g., Turner v. Aldens, Inc., 179 N.J. Super. 596 (App. Div. 1981) (finding an agreement in a retail installment sales contract to be bound by Illinois law was unenforceable as contrary to New Jersey public policy).

Lastly, Plaintiff's argument that discovery remains incomplete is also insufficient to defeat summary judgment. The New Jersey Supreme Court has said that: "[g]enerally, we seek to afford 'every litigant who has a bona fide cause of action or defense the opportunity for full exposure of his case.'" Velantzas v. Colgate-Palmolive Co. Inc., 109 N.J. 189, 193 (1988); United Rental Equipment Co., Inc. v. Aetna Life & Cas. Ins. Co., 74 N.J. 92, 99 (1977) citing Robbins v. Jersey City, 23 N.J. 229, 240-41 (1957). However, discovery is not a *per se* barrier to summary judgment. Indeed "[a] party opposing summary judgment on the ground that more discovery is needed must specify what further discovery is required, rather than simply asserting a generic contention that discovery is incomplete." Trinity Church v. Lawson-Bell, 394 N.J. Super. 159 (App. Div. 2007). Plaintiff asserts that the parties are still in the midst of responding to each other's discovery requests and this motion is not yet ripe for consideration. However, it

does not specify what discovery is required or explain how the missing discovery would defeat summary judgment. Thus, this Court disagrees that the want of discovery on this issue would thwart summary judgment.

Defendant's motion for summary judgment also alleges a cause of action under the FDCPA, 15 U.S.C. § 1692. The FDCPA prohibits a debt collector from engaging in "any conduct the natural consequences of which is to harass, oppress or abuse any person in connection with the collection of a debt." 15 U.S.C. § 1692d. "The purpose of the [FDCPA is] to protect consumers from unfair, deceptive and harassing collection practices, while leaving collectors free to employ efficient, reasonable and ethical practices in pursuit of their profession." Graziano v. Harrison, 763 F.Supp. 1269, 1275 (D.N.J. 1991). When passing the FDCPA, Congress' intent was to prohibit abusive practices such as:

> obscene or profane language, threats or violence, telephone calls at unreasonable hours, misrepresentation of a consumer's legal rights, disclosing a consumer's personal affairs to friends, or neighbors, or an employer, obtaining information about a consumer through false pretenses, impersonating public officials and attorneys, and simulating legal process.

Beattie v. D.M. Collections, Inc., 754 F.Supp. 383, 394 (D. Del. 1991).

The Court finds that Plaintiff has not violated the FDCPA. As outlined in Beattie, the conduct that the FDCPA seeks to prohibit is not present in the record at bar. While the process of debt collection may be an unhappy event for a Defendant, Plaintiff did not engage in oppressive conduct that would warrant a FDCPA violation or sanctions. See Bieber v. Associated Collection Services, Inc., 631 F.Supp. 1410, 1417 (D. Kan. 1986) (stating that "some inconvenience [...] to the debtor is the natural consequence of debt collection).

For these reasons, Defendant's motion for summary judgment is granted and Plaintiff's Complaint is dismissed with prejudice. All other relief sought by Defendant is denied.