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MIDLAND FUNDING, LLC,  
Plaintiff,

vs.

CHERYL E. WILLIAMS,  
Defendant.

**SUPERIOR COURT OF NEW JERSEY  
LAW DIVISION - MORRIS COUNTY  
SPECIAL CIVIL PART**

Civil Action  
Docket No. DC-004044-11

**DEFENDANT'S MEMORANDUM  
IN REPLY TO PLAINTIFF'S OPPOSITION  
TO DEFENDANT'S SUMMARY  
JUDGMENT MOTION**

This plaintiff-debt buyer's opposition to this summary judgment motion is as deficient as the debt buyer's opposition in *New Century Financial Services, Inc., vs. David Shaler*, MRS-L-001265-10. In both cases, the debt buyer relied on a hearsay certification of its counsel. Although *Shaler* involved a different debt buyer and a different defendant, counsel for plaintiff and defendant are the same. In *Shaler*, the Honorable Robert J. Brennan, J.S.C. decided that opposition to defendant's summary judgment motion in the form of a certification from plaintiff's counsel was insufficient.

"There is no certification here, or affidavit, from [the original creditor] that would speak to any of the issues in terms of its relationship with [the Defendant]. In fact, there's no certification at all offered by the plaintiff, except for a hearsay certification of Counsel." Transcript of Decision Excerpt at page 5 (copy of the transcript is attached). Judge Brennan stated further, "We have the certification of Counsel, which attaches certain documents. But Counsel's certification, of course, is hearsay, and does not establish anything as a matter of a record upon which a Court can rely in terms of a motion for summary judgment." *Id.* Judge Brennan's decision was consistent with *Sellers v. Schonfeld*, 270 N.J. Super. 424 (App. Div. 1993), where the Appellate Division rejected counsel's attempt to admit documents under his own certification:

There is nothing that suggests the certifying attorney had any firsthand knowledge concerning the exhibits or facts contained therein. The documents were at best hearsay, once of more removed. One who has no knowledge of a fact except for what he has read or for what another has

told him cannot provide evidence to support a favorable disposition of a summary judgment. *See Pressler, Current N.J. Court Rules, comment on R. 1:6-6* (1994), and the cases cited therein.

*Sellers* at 428-29.

Thus, the opposition here fails to submit any admissible evidence.

Instead, Plaintiff raises specious arguments which misconstrue the purpose of the summary judgment motion. For the reasons set forth in Defendant's Motion, Plaintiff, bearing the burden of persuasion, could have defeated this motion only by showing that there is admissible evidence to establish its *prima facie* case. Therefore, summary judgment should be granted dismissing the complaint.

Plaintiff fails to recognize that the Rules expressly allow for summary judgment motions prior to filing an answer. As an answer precedes discovery, the Rules anticipate that an early summary judgment motion could be filed prior to any discovery. *See R. 4:6-1(a)* incorporated by *R. 6:3-1*. Plaintiff has not identified what discovery it needs. To the contrary, by signing the Complaint, Plaintiff's counsel certified that he conducted a reasonable investigation and concluded that there was evidentiary support for the each factual allegation. *R.1:4-8*. Plaintiff should not be heard to argue that it lacks evidence.

Plaintiff makes a ridiculous argument about timing of this Motion and the Independence Day holiday which supposedly prevented submitting a certification from Plaintiff. This Motion was not mailed, however, until Tuesday, July 5 – *after* the July 4th holiday weekend. Plaintiff could have sought to avail itself of a continuance under *R. 4:46-5(a)* by providing the requisite affidavit – it has not done so. In addition, Plaintiff offers no explanation as to the absence of an affidavit from the original creditor, Chase, as Plaintiff must satisfy the same evidentiary burden as Chase would have if it still owned the account.

Finally, in *LVNV Funding, LLC., v. Colvell*, A-1313-10T3, \_\_ A.3d \_\_, 2011 WL 2682826 (App. Div. July 12, 2011), the Appellate Division announced that a debt buyer's proof which fails to satisfy the requirements for obtaining a default judgment also fails to establish a debt buyer's *prima facie* case.

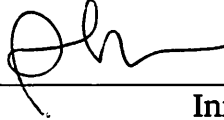
A creditor must prove more than merely the total amount remaining unpaid. Instead, as required to obtain a default judgment by Rule 6:6-3(a), the creditor must set forth the previous balance, and identify *all* transactions and credits, as well as the periodic rates, the balance on which the finance charge is computed, other charges, if any, the closing date of the billing cycle, and the new balance." [Slip Op. at 2 (emphasis added).]

Plaintiff's submission does not satisfy the *Colvell* standard and, therefore, is insufficient to defeat this Motion.

**CONCLUSION**

For the foregoing reasons and those set forth in Defendant's Motion, Defendant respectfully requests that the Court grant his Motion for Summary Judgment.

Philip D. Stern & Associates, LLC  
Attorneys for Defendant, Cheryl E. Williams



Dated: July 21, 2011

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Inna Ryu

SUPERIOR COURT OF NEW JERSEY  
LAW DIVISION, CIVIL PART  
MORRIS COUNTY  
DOCKET NO. MRS-L-001265-10  
A.D. # \_\_\_\_\_

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NEW CENTURY FINANCIAL  
SERVICES, INC.,

Plaintiffs,

vs.

DAVID SHALER,

Defendant.

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TRANSCRIPT  
OF  
DECISION  
EXCERPT

Place: Morris County Courthouse  
Washington & Court Streets  
Morristown, New Jersey 07963

Date: March 18, 2011

B E F O R E:

HONORABLE ROBERT J. BRENNAN, J.S.C.

T R A N S C R I P T O R D E R E D B Y:

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## The Court - Decision

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1 THE COURT: This is the matter of New Century  
2 Financial Services, Inc. versus Shaler. The Docket  
3 Number is MRS-L-1265-10.

4 Appearances please?

5 MS. PHIEFER: Good morning, Your Honor.  
6 Leslie Phiefer, from Pressler and Pressler,  
7 representing the plaintiff, New Century Financial  
8 Services.

9 THE COURT: Thank you.

10 MR. STERN: May it please the Court, Philip  
11 Stern, on behalf of Defendant, David Shaler.

12 THE COURT: Thank you both, please be seated.  
13 (Motion for summary judgment not transcribed)

14 THE COURT In this action New Century  
15 Financial Services, the plaintiff, seeks to recover  
16 from the defendant, David Shaler, on a debt allegedly  
17 incurred by Mr. Shaler to Citibank on a revolving  
18 credit card. That -- in the terminology of the  
19 parties, or at least the plaintiff, the debt was  
20 charged off in 2006, I believe, in the approximate  
21 amount of \$17,000, I think.

22 And subsequently, conveyed by Citibank to  
23 Sherman Acquisition, LLC, in a -- what is -- what is  
24 referred to as a pool of charged off debts incurred by  
25 consumers on revolving credit cards issued by the bank.

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1 Sherman in turn assigned the -- the obligation to the  
2 plaintiff.

3 There was kind of a sub-assignment path  
4 through Sherman, which is not an issue raised by the  
5 defendant in this case. So, we needn't -- we needn't  
6 review the assignments within Sherman, or the  
7 assignment within Sherman. It's enough to refer to  
8 Sherman as a single entity. And there was then an  
9 assignment by Sherman, as I say, to the plaintiff.

10 The defendant here seeks summary judgment  
11 because the -- on a legal basis, not disputing the  
12 debt, but disputing -- disputing -- well, disputing the  
13 debt, in a manner of speaking. But the real attack  
14 here is on the adequacy of the proofs that New Century  
15 would offer in support of its claim.

16 The -- the defendant argues that there's no  
17 admissible evidence of a formation of a contract  
18 between Citibank, the issuer of the card, and Mr.  
19 Shaler. There's no admissible evidence that Shaler  
20 breached. That the debts and -- the debits and credits  
21 assigned -- I'm sorry -- associated with the alleged  
22 account, including fees, charges and interest. There's  
23 no admissible evidence establishing that. Or the  
24 purchase by Sherman of Shaler's account, which was, as  
25 I say, a pool.

1 There is -- there is no certification here,  
2 or affidavit, from Citibank that would speak to any of  
3 the issues in terms of its relationship with Shaler.  
4 In fact, there's no certification at all offered by the  
5 plaintiff, except for a hearsay certification of  
6 Counsel.

7 So, in opposition to a motion for summary  
8 judgment under Rule 446, the defendant -- I'm sorry,  
9 the plaintiff has not set forth a statement disputing  
10 the material facts set forth in the plaintiff's  
11 statement of material facts. We have the certification  
12 of Counsel, which attaches certain documents. But  
13 Counsel's certification, of course, is hearsay, and  
14 does not establish anything as a matter of a record  
15 upon which a Court can rely in terms of a motion for  
16 summary judgment.

17 What we do have are certain discovery  
18 responses, including the deposition testimony of the  
19 plaintiff's client services manager, Marko Galic. And  
20 Mr. Galic testified, in part, as follows. And this is  
21 attached to the plaintiff's moving papers, at page 22  
22 line 2.

23 Question. "Has New Century obtained any  
24 affidavits from either Sherman Financial or the  
25 original creditor which assert the accuracy of the

1 statements in this case?"

2 Answer: "No."

3 Page 22 line 23.

4 Question: "Do you have any information as to  
5 whether these statements were actually mailed to Mr.  
6 Shaler?" That is to say the billing statements. The  
7 statements we're all familiar with in terms of credit  
8 card statements.

9 The answer was: "I do not."

10 Page 28 line 4. "D-2 is a bill of sale and  
11 assignment from Sherman Acquisitions, LLC to New  
12 Century Financial Services."

13 The next question was: "What is D-3?"

14 Answer: "It's a bill of sale assignment from  
15 Citibank South Dakota to Sherman Originator, LLC."

16 Question: "What is D-4?"

17 Answer: "D-4 is an affidavit from a Sherman  
18 director, Jon Mazzoli, that states Sherman  
19 Acquisitions, LLC, LVNV Funding, LLC, and Sherman  
20 Originator, LLC, are all subsidiaries under Sherman  
21 Financial Group, LLC."

22 Page 29 line 14.

23 Question: "In D-2 is there anything in that  
24 that identifies Mr. Shaler's account?"

25 The answer: "No."

1 Page 30 line 8.

2 Question: "What information are you aware of  
3 that connects Mr. Shaler's account to the pool of debts  
4 that's reflected in D-2?"

5 Answer: "The list of accounts that --  
6 arrived with this bill of sale."

7 And he says further at page 30, starting at  
8 line 25. "With -- with -- within in -- with each  
9 purchase there's a purchase and sale agreement." And  
10 I'm omitting -- I'm skipping down to line 4. "A  
11 company by an electronic spreadsheet with a list of  
12 accounts."

13 At page 36 line 16.

14 Question: "Is there any information that New  
15 Century has with respect to Mr. Shaler's debt that came  
16 from anyone other than the Sherman financial Group?"

17 Answer: "No."

18 Page 35 line 23.

19 Question: "All of the information that New  
20 Century Financial has with respect to Mr. Shaler's  
21 account came from the Sherman Financial Group;  
22 correct?"

23 Answer: "Yes."

24 Page 37 line 24. "Exhibit D-6 is an account  
25 statement." And then there's a question at page 38

1 line 8.

2 Question: "Do you know whether D-6 is a  
3 duplicate of what was actually mailed to Mr. Shaler?"

4 Answer: "Yes."

5 Question: "Was it an exact duplicate?"

6 Answer: "That's what we were told."

7 Question: "When you say that's what we were  
8 told, by whom would that -- by whom would you have been  
9 told that?"

10 Answer: "By Sherman."

11 At page 40 line 23. "D-3 was identified as a  
12 bill of sale assignment from Citibank to Sherman." And  
13 at page 41 the question was asked.

14 Question: "Is there anything in D-3 which  
15 identifies Mr. Shaler's account?"

16 The answer: "No."

17 Page 44 line 16.

18 Question: "So, it would be fair to say that  
19 D-3 does not necessarily reflect Sherman's purchase of  
20 Mr. Shaler's account?"

21 Answer: "A specific document, no."

22 Question: "Are you aware of any specific  
23 document which would reflect Sherman's purchase of Mr.  
24 Shaler's account?"

25 Answer: "No."

1 Bottom of page 47 line 25.

2 Question: "D-3 recites a sale or assignment  
3 between whom and whom?"

4 Answer: "Between Citibank and Sherman."

5 Question: "And this D-2 reflects the same  
6 between whom and whom?"

7 Answer: "From Sherman Acquisition to New  
8 Century Financial."

9 Question: "And where does New Century  
10 Financial get the information, the specific  
11 information, with regard to Mr. Shaler's account?"

12 Answer: "From the list of accounts, the  
13 spreadsheet."

14 Answer: "This bill of sale is part of the --  
15 " oh, I'm sorry, now I'm down on 48:16. "This bill of  
16 sale is part of the purchase and sale agreement. The  
17 purchase and sale agreement contains the bill of sale  
18 on the spreadsheet."

19 Page 49 line 8 -- line 9.

20 Question: "How do you get -- and how do you  
21 get provided with that, with D-3?"

22 Answer: "This comes along with a sale for  
23 each account that we purchase. If Sherman purchased it  
24 from another entity we get the full chain of title at  
25 the time of purchase."



1 Question at line 16: "The reason you get  
2 this is to show Mr. Shaler's account went from Citibank  
3 to Sherman, and then from Sherman to New Century?"

4 Answer: "Correct."

5 At page 50 he says he gets certain  
6 information from Sherman Acquisitions, and that's the  
7 spreadsheet.

8 Question: "In what form, mail or electronic  
9 form?"

10 Answer: "We get it in both CD and  
11 electronically."

12 Question: "And what is it that you're  
13 looking at that has that information?"

14 Answer: "The electronic spreadsheet."

15 That's at page 50 from line 1 to line 7. And  
16 at the same page line 13. "Citibank provided to  
17 Sherman -- they get whatever Citibank provided to  
18 Sherman, account number, origination date, date of  
19 charge off, the consumer's social security number,  
20 address, any information they have."

21 Page 51 line 5.

22 Question: "From where do you get this  
23 personal information, specifically about Mr. Shaler?"

24 Answer: "From Sherman." And at line 10 on  
25 page 51. "Obtained from the sale and purchase

1 agreement that was on the CD."

2 Page 58 line 25.

3 Question: "There is a Microsoft Excel --  
4 Excel spreadsheet in New Century Financial's computers  
5 named SHER20.xls?"

6 Answer: "That's correct."

7 Question: "And in that spreadsheet would be  
8 the debtor placement information for Mr. Shaler's  
9 account?"

10 Answer: "Correct."

11 And finally, at page 64 line 7 -- oh, I don't  
12 need that. Page 66 line 3.

13 Question: "You're making an assumption based  
14 upon looking at D-3 and D-2 that the information that  
15 Sherman provided you was information that it obtained  
16 from Citibank?"

17 Answer: "Correct."

18 Question: "Your knowledge about what  
19 information Sherman obtained is just based on making  
20 that assumption between -- assumption from the two  
21 documents, D-3 and D-2?"

22 Answer: "Yes. And the fact that in our  
23 purchase and sale agreement with Sherman Financial, any  
24 purchase and sale agreement with Sherman that we've had  
25 in the past, they represent all that information

1 transferred is accurate and true."

2 Other documentation that we have includes  
3 Plaintiff's responses to Defendant's document request,  
4 Exhibit 4 in Plaintiff's -- Defendant's original moving  
5 papers. And there is a request for the purchase  
6 agreement under which Plaintiff purchased the accounts.  
7 And the response is a refusal to produce, an objection,  
8 because that's irrelevant, according to the plaintiff.  
9 In supplemental interrogatories -- that we don't need  
10 either.

11 So, it's clear that Mr. Galic, from his  
12 deposition testimony, has no first hand information  
13 about the establishment of the relationship between  
14 Citi and Shaler. Whether he received -- whether he  
15 actually used this card, and whether he incurred  
16 obligations, and whether those obligations were not  
17 paid.

18 All of that is by way of hearsay information  
19 received from Sherman, which in turn received it from  
20 -- from Citi. The -- the defendant's position here is  
21 that there is an absence of competent evidence that  
22 would be offered by the -- by the plaintiff.

23 As I've said, the plaintiff relies first on a  
24 hearsay affidavit of certification of Counsel, which  
25 does not establish anything. Attached to it are -- is

1 the bill of sale assignment from Citibank to Sherman,  
2 which recites conveyance of certain accounts, as well  
3 as the bill of sale from Sherman to the plaintiff,  
4 which refers to a charged off accounts described in  
5 appendix A, which is a spreadsheet.

6 And that portion of the spreadsheet that  
7 refers to Mr. Shaler is attached there, but there's  
8 nothing that authenticates any of this. There are also  
9 a number of credit card statements attached to  
10 Counsel's certification, but they are not  
11 authenticated. In spite of Plaintiff's argument that  
12 803C6 would make them admissible under the business  
13 records exception to the hearsay rule, they cannot be  
14 authenticated by Counsel.

15 They still must be authenticated. They  
16 cannot simply be -- be described as business records  
17 without the appropriate authentication.

18 The plaintiff also relies on a brief, a sur  
19 reply brief that attaches a number of credit card  
20 statements, and the same bill of sale and assignments.  
21 But that establishes nothing more. And part of the  
22 spreadsheet, that establishes nothing more than the  
23 original certification.

24 Now, the -- and Counsel, Plaintiff argues  
25 that it is sufficient, that a -- I'm sorry. That under

1 Moran versus Joyce, 125 N.J.L. 558 at 560, 1941, it --  
2 that a debtor is -- I'm sorry -- that one can own the  
3 debt of another. But that doesn't answer the question  
4 of -- of whether the owner of the debt establishes the  
5 debt through competent evidence.

6 And here, there must be competent evidence  
7 that establishes the existence of the account, the  
8 charges and payments under the account that resulted in  
9 the account balance claimed by the assignee, and a  
10 valid assignment.

11 And even if we assume there is a valid  
12 assignment here, which is not authenticated anywhere,  
13 we -- except perhaps in Mr. Galic's testimony. But  
14 even assuming that we have a valid assignment, we don't  
15 have competent evidence of the existence of the debt,  
16 and the charges and payments under the account that  
17 resulted in the account balance claimed by the  
18 assignee.

19 All of this must be established by competent  
20 evidence of one with knowledge of the information being  
21 conveyed. Without that competent evidence, which has  
22 not been set forth here, in any form, in opposition to  
23 the defense motion for summary judgment, the Court is  
24 left with no alternative but to dismiss the complaint  
25 with prejudice for failure to establish the -- the

1 cause of action.

2 There is no establishment of the validity of  
3 these records through evidence Rule 803C6, or any other  
4 way. So, for all of these reasons, the Court grants  
5 the motion of the defendant for summary judgment  
6 dismissing the plaintiff's complaint with prejudice.

7 Counsel, thank you both very much. We'll  
8 send you copies of the order.

9 MS. PHIEFER: Thank you, Judge.

10 MR. STERN: Thank you, Your Honor.

11 (Proceedings concluded)  
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CERTIFICATION

I, Rachel Healy, the assigned transcriber, do hereby certify the foregoing transcript of proceedings at the Morris County Superior Court, on March 18, 2011, Digitally Recorded, Index No. 11:52:12 to 12:06:46, is prepared to the best of my ability and in full compliance with the current Transcript Format for Judicial Proceedings and is a true and accurate compressed transcript of the proceedings as recorded.

Rachel Healy (KH)  
Rachel Healy

594  
AOC Number

KLJ Transcription Service  
Agency

March 29, 2011  
Date

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