

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JORDAN BERMAN : CIVIL ACTION
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 v. :
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 NATIONS BANK OF DELAWARE, N.A. : NO. 97-6645

MEMORANDUM ORDER

Presently before the court is plaintiff's request for entry of default and default judgment.

It appears from the averments of plaintiff's counsel and the documentation appended to the request that, although he failed timely to file proof or note the date of service with the Clerk, plaintiff effected service of process on defendant on November 3, 1997 consistent Fed. R. Civ. P. 4(h)(1) and Pa. R. Civ. P. 404(2). See Reichert v. TRW, Inc., 561 A.2d 745, 752-53 (Pa. Super. 1989) (affirming viability of service by certified mail on corporations). Plaintiff avers that defendant regularly conducts business in the forum. It thus appears that the court has personal jurisdiction in this case. Defendant failed timely to appear, answer or otherwise defend in this case. In such circumstances, an entry of default by the Clerk is ordinarily appropriate.

The entry of a default judgment, however, is another matter. Before entering a judgment by default, a court must examine the complaint to determine whether the plaintiff has stated a cognizable claim. Such a judgment may be entered only for relief to which plaintiff is entitled based upon his factual allegations. See Wagstaff-El v. Carlton Press Co., 913 F.2d 56,

57 (2d Cir. 1990); Alan Neuman Productions, Inc. v. Albright, 862 F.2d 1388, 1392 (9th Cir. 1988), cert. denied, 493 U.S. 858 (1989); Patray v. Northwest Pub. Inc., 931 F. Supp. 865, 869 (S.D. Ga. 1996); Morales v. Farley, 1996 WL 698027, *4 (N.D. Ill. Oct. 30, 1996) (citing cases).

Plaintiff is asking for entry of a judgment against defendant in an amount of \$3,500 plus \$715.25 in attorney fees. The pertinent allegations in the complaint are as follow.

Plaintiff's address is in Plymouth Meeting, Pa. While traveling in Europe in May 1994, plaintiff purchased unspecified merchandise from a retail store for \$1,974.72 by using a credit card issued by defendant. Plaintiff received a monthly account statement from defendant which reflected an additional charge of \$381.74 for the cost of shipping this merchandise. In numerous telephone calls and letters to defendant, plaintiff "contested" this additional charge. Defendant continued to bill plaintiff for the \$381.74 plus interest. By November 1995, the contested charge plus accrued interest totaled \$1,900. On December 11, 1995, plaintiff sued defendant for this amount plus \$44 in costs and obtained a default judgment for \$1,944 from a district justice in Montgomery County. Defendant has refused to credit plaintiff's account for the amount of that judgment and has continued monthly to charge interest to his account which now consists only of the contested shipping charge and interest accrued thereon. Shortly before this suit was filed in October 1997, the balance on plaintiff's credit card statement had reached \$3,500.

Plaintiff is now suing for this amount. The court's subject matter jurisdiction is predicated solely on the presence of a federal question. Given the amount in controversy, no other basis for jurisdiction is apparent. Plaintiff asserts that his claim arises under 15 U.S.C. § 1666.

Plaintiff does not allege that the \$1,974.72 expressly included the cost of shipping or that he legitimately expected the merchandise to be shipped at no cost.

Plaintiff does not allege that defendant failed timely to acknowledge his protest or after reasonable investigation failed to advise him of the reason it believes the credit card statement was correct. See 15 U.S.C. § 1666(a). See also 15 U.S.C. § 1666(c) (creditor not prohibited from sending account statements with disputed charge plus finance charges).

Plaintiff does not allege where in Europe the transaction in question occurred, but it clearly was not in Pennsylvania or within 100 miles of Plymouth Meeting. See 15 U.S.C. § 1666i(a). See also 15 U.S.C. § 1666(e) (failure of creditor to comply with Act results in forfeiture of right to collect disputed amount and finance charges thereon only up to \$50).

Plaintiff does not allege that defendant has taken legal action to compel payment or that plaintiff has been deprived of any defense available to him against a claim for payment should one be asserted.

Plaintiff provides no information about what efforts he has taken to execute upon his state court judgment if he believes

it is valid, and offers no explanation of why he should receive a duplicative amount in the \$3,500 judgment he seeks from this court. In any event, he has not shown actual damages of \$3,500. Even if he had alleged a failure by defendant timely to respond and provide a written explanation, statutory damages would be limited to \$1,000. See 15 U.S.C. § 1640(a)(2)(A); Strange v. Monogram Credit Card Bank of Georgia, 129 F.3d 943, 946-47 (7th Cir. 1997).

Under the statutory scheme, it is ultimately for the creditor to determine whether a charge is valid. The statute does not provide a cause of action to any disappointed obligor for money damages in the amount of an uncollected disputed charge. A creditor who complies with the procedural requirements of the Act regarding an alleged billing error has no further legal responsibility.

Plaintiff has essentially alleged only that defendant has not removed a charge which plaintiff contests. Plaintiff has made no factual allegation to show a specific violation of § 1666. He is not entitled to the default judgment he seeks. He has failed to plead a claim on which relief may be granted. Indeed, the claim as pled is so insubstantial and immaterial that the presence of subject matter jurisdiction is questionable. See Kehr Packages, Inc. v. Fidelcor, Inc., 926 F.2d 1406, 1409 (3d Cir.), cert. denied, 501 U.S. 1222 (1991).

The complaint will be dismissed. Because plaintiff may be able in good faith to make factual allegations to support a § 1666 claim, the court will afford him thirty days to file an

amended complaint. In so doing, the court does not mean to suggest that the original complaint was filed within the one year statute of limitations. See 15 U.S.C. § 1640(e); Steimel v. Trans Union Corp., 1988 WL 46247, *3 (E.D. Pa. May 10, 1988) (limitations period runs from time creditor breaches duty to respond to billing complaint). Any amended complaint which asserts a viable claim arising from the conduct, transaction or occurrences which are the subject of the original deficient complaint, however, would relate back to the October 1997 filing date of that complaint. See Alpern v. UtiliCorp United, Inc., 84 F.3d 1525, 1542 (8th Cir. 1996); Colbert v. City of Philadelphia, 931 F. Supp. 389, 392 (E.D. Pa. 1996); Federal Leasing, Inc. v. Amperif Corp., 840 F. Supp. 1068, 1072 (D. Md. 1993); Bryn Mawr Hosp. v. Coatesville Elec. Supply Co., 776 F. Supp. 181, 186 (E.D. Pa. 1991).

ACCORDINGLY, this day of February, 1998, consistent with the foregoing, **IT IS HEREBY ORDERED** that the plaintiff's request for default judgment is **DENIED** and the complaint in the above action is **DISMISSED** without prejudice to plaintiff to file an amended complaint within thirty (30) days setting forth a viable federal claim if such can be done in good faith.

BY THE COURT:

JAY C. WALDMAN, J.