

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2012 CA 1672

DISCOVER BANK, ISSUER OF THE DISCOVER CARD

VERSUS

JACINTA M. RUFFIN, A/K/A JACINTA WINSLOW

Judgment Rendered: APR 26 2013

On Appeal from the
City Court of Thibodaux and Ward Two Parish of Lafourche,
State of Louisiana
Trial Court No. 15716

The Honorable Mark D. Chiasson, Judge Presiding

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Discover Bank

BEFORE: GUIDRY, CRAIN, AND THERIOT, JJ.

CRAIN, J.

The defendant in this collection suit, Jacinta M. Ruffin, a/k/a Jacinta Winslow, appeals the judgment of the City Court of Thibodaux denying her objection of no right of action and granting summary judgment awarding principal, interest, and attorney fees to Discover Bank, Issuer of the Discover Card. For the reasons that follow, we affirm.

FACTS

Discover Bank instituted suit against Ruffin seeking to collect the outstanding balance on her Discover Card, which totaled \$6,000.11, together with legal interest, attorney fees, and costs. Ruffin filed a general denial and Discover Bank moved for summary judgment. Ruffin responded with a “Motion to Dismiss on Grounds of No Right of Action,” wherein she alleged that the actual party appearing before the court was not Discover Bank, but a professional debt collector, and nothing in the record established the debt collector’s right to recover a debt allegedly owed to Discover Bank. The City Court denied the objection of no right of action and granted Discover Bank’s motion for summary judgment. Ruffin now appeals.

DISCUSSION

Ruffin contends the City Court erred in denying her objection of no right of action and granting summary judgment. She argues that the affidavits of record reveal that an entity identifying itself as DB Servicing Corporation initiated this suit and that DB Servicing Corporation has not established that it has standing to bring this suit or act on behalf of Discover Bank.

An action can only be brought by a person having a real and actual interest that he asserts. La. Code Civ. Pro. art. 681. The function of an objection of no right of action is to determine whether the plaintiff belongs to the class of persons

to whom the law grants the cause of action asserted in the suit. *Reese v. State, Dept. of Public Safety & Corrections*, 03-1615 (La. 2/20/04), 866 So. 2d 244, 246. The objection assumes that the petition states a valid cause of action for some person and tests whether the plaintiff has an interest in judicially enforcing the right asserted. *Francis v. Francis*, 11-2116 (La. App. 1 Cir. 6/13/12), 97 So. 3d 1091, 1093, *writ denied*, 12-1635 (La. 7/24/12), 93 So. 3d 582. The question is simply whether the plaintiff has a right to sue the defendant. *Niemann v. Crosby Development Co., L.L.C.*, 11-1337 (La. App. 1 Cir. 5/3/12), 92 So. 3d 1039, 1046. Evidence supporting or controverting an objection of no right of action is admissible, and in the absence of evidence to the contrary, the averments of fact in the pleadings will be taken as true. *Niemann*, 92 So. 3d at 1046. Whether a plaintiff has a right of action is a question of law and is reviewed *de novo* on appeal. *Eagle Pipe and Supply, Inc. v. Amerada Hess Corp.*, 10-2267 (La. 10/25/11), 79 So. 3d 246, 256.

The petition names Discover Bank as the plaintiff. The City Court correctly recognized that by asserting an objection of no right of action, Ruffin challenged the authority of the named plaintiff to sue Ruffin to collect the alleged debt. The entire suit record was submitted as evidence. The record establishes that Discover Bank extends credit by issuing Discover Cards, and that Ruffin owes a principal amount of \$6,000.11 on her Discover Card. Discover Bank has a right of action to bring this collection suit and the City Court correctly denied Ruffin's objection.

While not disputing Discover Bank's right of action, Ruffin argues that Discover Bank is only the named plaintiff, and that suit was actually instituted by DB Servicing Corporation. Ruffin's allegations relate to the affidavits filed into the record in which account managers for DB Servicing Corporation attest that DB Servicing Corporation is the servicing affiliate for Discover Bank and maintains

the records on Discover Card accounts. These affidavits establish the plaintiff, Discover Bank, as the owner of the delinquent account, DB Servicing Corporation as the servicing affiliate with knowledge of the amounts due, and the principal amount due of \$6,000.11. The affidavits do not suggest that DB Servicing Corporation filed suit for Discover Bank.

Ruffin argues that the affidavits contain unsubstantiated hearsay. She does not argue that the affidavits are not competent evidence that should not have been considered in determining whether Discover Bank met its burden of proof. *See*, La. Code Civ. Pro. art. 967. Neither did she file a motion to strike the affidavits or otherwise present her challenge to the trial court. The inadequacy of an affidavit is a formal defect that is deemed waived if not timely objected to in the court below. *Klohn v. Louisiana Power & Light Co.*, 394 So. 2d 636, 637 (La. App. 1 Cir. 1980), *writ denied*, 399 So. 2d 612 (La. 1981). Thus, to the extent Ruffin's appellate brief can be construed to challenge consideration of the affidavits in support of the motion for summary judgment, the objection is deemed waived.

After *de novo* review of the record, we find that summary judgment was appropriately granted.

CONCLUSION

For the reasons set forth herein, we affirm the judgment of the City Court. Costs of this appeal are assessed to Jacinta M. Ruffin, a/k/a Jacinta Winslow.

AFFIRMED.