

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

Alert Services, Inc., d/b/a Alertpay,)

)

Plaintiff,)

)

v.)

C.A. No. 12C-09-155 JRJ

)

Phoenix Payment Systems, Inc.,)

d/b/a Electronic Payment Exchange,)

)

Defendant.)

Date Submitted: December 19, 2012

Date Decided: January 16, 2013

Upon Defendant's Motion to Strike Demand for Affidavit of Defense:

GRANTED

Brett D. Fallon, Esquire, Morris James LLP, 500 Delaware Avenue, Suite 1500,
P.O. Box 2306, Wilmington, Delaware, 19899-2306. Attorney for the Plaintiff.

Kurt M. Heyman, Esquire (argued) and Melissa N. Donimirski, Esquire, Proctor
Heyman LLP, 300 Delaware Avenue, Suite 200, Wilmington, Delaware, 19801.
Attorneys for Defendant.

Jurden, J.

I. INTRODUCTION

Before the Court is “Defendant’s Motion to Strike Demand for Affidavit of Defense.”¹ Defendant maintains that 10 *Del. C.* § 3901 is inapplicable to this action because the alleged debt is not readily ascertainable from the face of the written instrument executed by the parties. In opposition, Plaintiff maintains Section 3901 is applicable because Plaintiff seeks the recovery of a “book account.” For the reasons that follow, Defendant’s motion is **GRANTED**.

II. BACKGROUND

Plaintiff Alert Services, Inc. d/b/a Alertpay (“ASI”) asserts two claims against Defendant Phoenix Payment Systems, Inc. d/b/a Electronic Payment Exchange (“EPX”), one based in contract and one based in tort, seeking to recover \$504,575.13. ASI and EPX entered into an agreement (the “Agreement”) for the processing of electronic debit transactions to bank accounts of ASI’s clients.² Pursuant to the Agreement, ASI established a reserve fund to be held by EPX while the Agreement remained in force. EPX provided monthly statements

¹ *Alert Services, Inc. v. Phoenix Payment Sys., Inc.*, C.A. No. 12C-09-155 JRJ (Del. Super. Nov. 5, 2012) (Trans. ID 47554849) (hereinafter “Motion”).

² See Complaint at Exhibit A (“Buyerwall Electronic Transaction Processing Agreement”), *Alert Services, Inc. v. Phoenix Payment Sys., Inc.*, C.A. No. 12C-09-155 JRJ (Del. Super. Sept. 20, 2012) (Trans. ID 46551393) (hereinafter “Complaint”).

reflecting the amount held in reserve. The last statement, dated March 31, 2012, received after EPX terminated the agreement, reflected a balance of \$504,575.13.³

III. DISCUSSION

The question presented is whether the term “book accounts,” as used in Section 3901, encompasses ASI’s claim for the \$504,573.13. If so, then ASI’s demand for an Affidavit of Defense is proper; if not, the Defendant’s Motion to Strike should be granted.

Section 3901(a) provides:

In all actions upon bills, notes, bonds or other instruments of writing for the payment of money or for the recovery of book accounts, . . . the plaintiff may specifically require the defendant . . . to answer any or all allegations of the complaint by an affidavit setting forth the specific nature and character of any defense and the factual basis therefore

The purpose of § 3901 is to assure speedy disposition of claims of the type specified in the statute by permitting defenses only in those instances where the defendant states under oath that he believes he has a valid defense and sets forth the defense.⁴ The Court exercises caution and strictness in considering whether to

³ See Complaint ¶ 14. See also Plaintiff’s Memorandum Response to Defendant’s Motion to Strike Demand for Affidavit of Defense at 2, *Alert Services, Inc. v. Phoenix Payment Sys., Inc.*, C.A. No. 12C-09-155 JRJ (Del. Super. Dec. 13, 2012) (Trans. ID 48414393) (hereinafter “Response”).

⁴ *Cannery, LLC v. Covak, Inc.*, 2009 WL 582763 at *1 (Del. Super. Feb. 27, 2009), citing *First Fed. Sav. and Loan Ass’n v. Damngo Corp.*, 310 A.2d 880, 882 (Del. Super. 1973); *Miller v. Master Home Builders, Inc.*, 239 A.2d 696, 697 (Del. Super. 1968).

grant relief under Section 3901.⁵ And in close cases, it has been the Court’s policy to resolve the doubt in favor of the defendant.⁶

A “book account” is defined as:

a detailed statement, kept in a book, in the nature of a debit and credit, arising out of contract or some fiduciary relation”⁷

The “mere fact that a plaintiff carries a claim on its books does not alone establish liability on the part of [a] defendant.”⁸ There is a critical distinction between a “book account” and a special contract. Section 3901 is irrelevant if the claim is based on the latter.⁹ Section 3901 applies only when an action is based on an unconditional promise to pay a sum, certain,¹⁰ and the instrument constituting the subject matter of the suit is “clear, unambiguous and readily understandable from a fair and impartial observance.”¹¹ Where the debt is not readily ascertainable from the face of the instrument, Section 3901 does not apply.¹²

⁵ See *Holland v. Univ. Life Co.*, 180 A. 328, 330 (Del. Super. 1935); see also *Damnco*, 310 A.2d at 883 (“The statute is technical in nature Nothing in the statute or current Rules of this court indicates an intention to depart from the strict requirements which have prevailed.”).

⁶ *Holland*, 180 A. at 330 (“ . . . it has been the settled policy of this court, where a doubt exists, whether arising from the particulars of the affidavit of demand . . . to resolve the doubt in favor of the defendant.”).

⁷ *Chrysler Corp. v. Airtemp Corp.*, 426 A.2d 845, 848 (Del. Super. 1980), quoting 1 C.J.S. Account at 574 (1936).

⁸ *Chrysler Corp.*, 426 A.2d at 848.

⁹ See *Ayers v. D. F. Quillen & Sons., Inc.*, 188 A.2d 510, 511 (Del. 1963).

¹⁰ *Union Park Pontiac, Inc. v. Transit Freeze Corp.*, 171 A.2d 69, 70 (Del. Super. 1961) (While Section 3901 has been updated since *Union Park* (see *Elmwood Fed. Sav. Bank v. Forest Manor Estates, Inc.*, 621 A.2d 354 (Del. Super. 1992)), the law for which it is cited remains sound).

¹¹ *H.F. Aviation & Dev. Ltd. v. Art World Indus., Inc.*, 1993 WL 258716, at *1 (Del. Super. June 28, 1999). See also *Lamson v. Habbart*, 43 A.2d 249, 250 (Del. 1945) (Like *Union Part*, Section 3901 has been updated since *Lamson*. And like *Union Park*, the law for which *Lamson* is cited remains sound.).

¹² See *Selly v. Fleming Coal Co.*, 180 A. 326, 327-28 (Del. Super. 1935); *Hance Hardware Co. v. Howard*, 8 A.2d 26, 29 (Del. Super. 1939).

EPX argues that ASI's claim is outside the purview of § 3901 because the parties' agreement is a contract for the provision of services, not a bill, note, bond or other instrument of writing for the payment of money. EPX maintains that the parties' agreement does not reflect any amount (or debt) actually due, i.e. a sum certain, but rather, merely "sets forth special terms governing the working relationship between the parties by which Defendant would provide certain electronic debit transaction services."¹³ In short, EPX maintains that § 3901 cannot apply where the amount of the alleged debt incurred is not evident from the face of the underlying instrument. In response, ASI argues that EPX's arguments are largely premised on cases which do not involve "book accounts," and that the two § 3901 cases cited by EPX¹⁴ which do involve book accounts are distinguishable.¹⁵

In *McNulty*, WSFS sued defendant for savings account overdrafts and demanded an affidavit of defense, claiming its action was for the recovery of a "book account." The instrument giving rise to the liability was WSFS' Rules and Regulations for checking and money market accounts. The defendant in *McNulty* argued that § 3901 did not encompass the overdraft because there was no stated amount of indebtedness, and there were no specific documents on which a clear

¹³ See Motion at 3.

¹⁴ *Wilmington Savings Fund Soc'y, FSB v. McNulty*, 1998 WL 737986 (Del. Super. Aug. 13, 1998); *Ayers v. D.F. Quillen & Sons*, 188 A.2d 510 (Del. 1963).

¹⁵ See Response at 3.

debt or account was stated, only the rules and regulations regarding overdrafts.¹⁶ After carefully reviewing prior cases involving § 3901 and its predecessor, § 4648 of the 1935 Delaware Code, the Court in *McNulty* agreed with the defendant stating:

When examined together, these cases and the statutory language enable usage of § 3901 where the debt incurred is specific in dollars and clear and can be readily ascertained¹⁷

The Court in *McNulty* held that § 3901 was inapplicable because the WSFS Overdraft Rules and Regulations stated “no specific original sum,” and there was no “certain ability to demand payment coupled with the original financial obligation undertaken.”¹⁸

In the case *sub judice*, the document upon which ASI relies for its claim is the Agreement. The Agreement does not state a sum certain or an exact amount due. Rather, it sets forth terms by which EPX agreed, *inter alia*, to provide certain electronic debit transaction services for ASI.¹⁹ The debt allegedly incurred is not specifically stated in the document underlying ASI’s claim. As in *McNulty*, the

¹⁶ *McNulty*, 1998 WL 737986 at *3.

¹⁷ *Id.* See e.g., *Union Park Pontiac, Inc. v. Transit Freeze Corp.*, 171 A.2d 69, 70 (Del. Super. 1961) (Section 3901 applies only where the action is “based on an unconditional promise to pay a sum of money . . . and the sum must be certain.”); *Lamson v. Habbart*, 43 A.2d 249, 250 (Del. 1945) (“[I]n the case of suit on an instrument of writing, [the] liability must be shown on the instrument Implicit in the procedure of judgment on affidavit of demand is the evident or *prima facie* liability of the named defendant to the named plaintiff.” (emphasis added)); *Hance Hardware Co. v. Howard*, 8 A.2d 26, 29 (Del. Super. 1939) (Section 3901 applies only when there is “no issue that could arise that would create in the Court’s mind a question as to the true amount due.”).

¹⁸ *McNulty*, 1998 WL 737986 at *3. As the Court in *McNulty* aptly noted, the issue was not whether the defendant might be contractually obligated to pay WSFS for overdrafts, but rather, whether WSFS could utilize § 3901 and require the defendant to file an affidavit of defense.

¹⁹ See Complaint at Exhibit A, ¶ 2.

issue here is not whether EPX may be contractually obligated to pay ASI the monies held in the reserve account, but whether ASI can utilize § 3901 and require EPX to file an affidavit of defense.²⁰ The Court is mindful that Delaware courts exercise “caution and strictness” in considering whether to grant relief under § 3901. In close cases, and where there is a form of contract, § 3901 is only properly invoked where there is an “underlying specific sum of indebtedness.”²¹

In *Ayers v. D.F. Quillen & Sons*,²² the plaintiff provided labor, material, and supervision for the construction of a building owned by defendants. Plaintiff argued that ledger sheets indicating the charges made against defendants’ account constituted a book account. Defendants disagreed, arguing that the entries indicated a “special contract,” not a book account. The Court in *Ayers* held that the ledgers demonstrated a “special contract” rather than a book account and thus § 3901 was inapplicable.²³ ASI argues that *Ayers* is distinguishable because the ledgers at issue in *Ayers* were maintained by the *plaintiff*, not by the defendant. The Court disagrees that *Ayers* is inapposite. *Ayers* makes clear that section 3901 does not apply to “special contracts,” and simply attaching “book entries” does not bring special contracts within the scope of § 3901.²⁴

²⁰ See *McNulty*, 1998 WL 737986 at *3 (“... the issue is whether [sic] WSFS can invoke § 3901 not whether ... [defendant] may otherwise be contractually indebted.”).

²¹ *Id.*

²² 188 A.2d 510 (Del. 1963).

²³ *Id.* at 512.

²⁴ *Id.*

Here, the amount of the alleged debt incurred is not evident from the face of the Agreement. The Agreement reflects no amount actually due, but rather, it sets forth the manner in which EPX will utilize the Automated Clearing House at the United States Federal Reserve to provide service to ASI. The fact that EPX, and not ASI, maintained the ledger does not make ASI's claim one for the recovery of "book accounts." Nor does the fact that the last monthly statement issued by EPX before it terminated the Agreement states the exact amount held in the reserve fund make this claim a "book account" subject to § 3901.²⁵

VI. CONCLUSION

For the reasons stated above, 10 *Del. C.* § 3901 does not apply here and, therefore, Defendant's Motion to Strike Demand for Affidavit of Defense is **GRANTED**. Defendant shall respond to the Complaint within 7 days.

IT IS SO ORDERED.

Jan R. Jurden, Judge

²⁵ *Lamson v. Habbart*, 43 A.2d 249, 250 (Del. 1945) ("... in the case of suit on an instrument of writing, this liability must be shown on the instrument sued upon."); *See McNulty*, 1998 WL 737986 at *3, discussing *Edsall v. Rockland Paper Co.*, 194 A.115 (Del. Super. Aug. 17, 1937) ("... the point is there never was an underlying acknowledgment of a specific indebtedness such [as] a sum certain, note or bill.").