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**DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA
FOURTH DISTRICT**

EVAN S. GUTMAN,

Appellant,

v.

CITIBANK, N.A.

Appellee,

No. 4D22-2821

[July 20, 2023]

Appeal from the County Court for the
Fifteenth Judicial Circuit, Palm Beach County;
Edward A. Garrison, Judge; L.T. Case No.
502020CC005756.

Evan S. Gutman, Boca Raton, pro se.
Donald A. Mihokovich of Adams and Reese, LLP,
Tampa, for appellee.

PER CURIAM.

Affirmed.

GROSS, GERBER AND LEVINE, J.J., concur.

* * *

**Not final until disposition of timely filed
motion for rehearing.**

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M A N D A T E
from DISTRICT COURT OF APPEAL OF THE
STATE OF FLORIDA FOURTH DISTRICT

This cause having been brought to the Court by appeal, and after due consideration the Court having issued its opinion;

YOU ARE HEREBY COMMANDED that such further proceedings be had in said cause as may be in accordance with the opinion of this Court, and with the rules of procedure and laws of the State of Florida.

WITNESS the Honorable Mark W. Klingensmith, Chief Judge of the District Court of Appeal of the State of Florida, Fourth District, and seal of the said Court at West Palm Beach, Florida on this day.

DATE: August 11, 2023
CASE NO.: 22-2821
COUNTY OF ORIGIN: Palm Beach
T.C. CASE NO.: 502020CC005756

STYLE: EVAN S. GUTMAN v CITIBANK, N.A.

/s/ LONN WEISSBLUM
LONN WEISSBLUM, Clerk
Fourth District Court of

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IN THE COUNTY COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT IN
AND FOR PALM BEACH COUNTY,
FLORIDA

COUNTY CIVIL DIVISION: RF
CASE NO.: 50-2020-CC-005756-XXXX-
MB

CITIBANK N.A.,

Plaintiff/Petitioner

vs.

EVAN S GUTMAN,

Defendant/Respondent.

**ORDER GRANTING PLAINTIFF/COUNTER-
DEFENDANT'S MOTION TO DISMISS
COUNTERCLAIM WITHOUT PREJUDICE**

THIS CAUSE came before the court on January 5, 2022 on Plaintiff/Counter-Defendant, Citibank, N.A.'s ("Citibank"), Motion to dismiss Defendant / Counter-Plaintiff, Evan Gutman's, Counterclaim. Upon consideration of the Motion, Mr. Gutman's response in opposition, the argument presented by the parties, and

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all relevant law, the Court GRANTS the Motion for the following reasons.

Citibank initiated this action by filing a two count complaint against Mr. Gutman alleging causes of action for account stated and unjust enrichment based on Mr. Gutman's alleged failure to pay a credit card. Mr. Gutman then filed his answer and affirmative defenses as well as a Counterclaim. In his Counterclaim, Mr. Gutman generally alleged that he disputed the alleged debt with Plaintiff before plaintiff filed suit and, therefore, asserted that Citibank was wrongfully pursuing a cause of action against him for account stated. He also alleged that the alternative count of unjust enrichment claim was improper because there was a written contract between the parties. (Counterclaim at ¶ 1-4). Based on these general allegations, Mr. Gutman alleged claims for violation of Florida Consumer Collection Practices Act (Fla. Stat. § 559.72) (Count 1), Unfair and Deceptive Acts and practices (Deceptive Acts and practices (Fl. Stat. 501.204), Breach of Contract, Good Faith and Fair Dealing (Count III), Negligence (Count IV), and Gross Negligence (Count V).

Citibank moved to dismiss Mr. Gutman's counterclaim, on several grounds, including that Mr. Gutman's counterclaim fails to plead ultimate facts that support the claims and instead only states conclusions of law, and that Mr. Gutman's counterclaims are barred by the litigation privilege. The motion was set for hearing by Attorney Chantal Pillay, who appeared in the case after the initial

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complaint was filed via a notice of appearance filed on August 13, 2021.

Mr. Gutman filed a response in opposition to the motion dismiss, arguing that Ms. Pillay lacked authority to set the hearing on Citibank's motion as Ms. Pillay had not substituted in as counsel.¹ He also argued that Citibank's motion was moot based on Citibank's failure to timely respond to requests for admissions. Neither of these arguments have merit. Florida Rule of General Practice and Judicial Administration 2.505(e) outlines six ways an attorney may appear for a party in an action or proceeding. Per subsections 2.505(e)(3), one way is indeed by an order of substitution of counsel, and Mr. Gutman is correct that there is no order of substitute of counsel reflected in the docket in this case. But, an order of substitution is not the only way to make an appearance—an attorney may also properly appear in a matter by simply filing a notice of appearance. Fla. R. Gen. Prac. & Jud. Admin. 2.505(e)(2). As Ms. Pillay filed a notice of appearance in this matter, she is properly before the Court as counsel of record.

Mr. Gutman's claim regarding the mootness of the counterclaim *vis a vis* Citibank's purported technical admissions to his outstanding requests for admissions also lacks merit: before the deadline for filing its responses, Citibank filed a motion for extension of time to respond. See Fla. R. Civ. P. 1.090(b)(1)(A).

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¹ The Court notes that Mr. Gutman appeared to be relying on an outdated version of Rule 2.505 in support of his argument on this point.

Turning to the merits of Citibank's Motion, the court agrees with Citibank that the counts alleged in Mr. Gutman's counterclaim are not only deficient from a pleading standpoint, but are also are barred by the litigation privilege, the independent tort, and other procedural rules.

To begin with, each of the causes of action alleged in Mr. Gutman's counterclaim are shotgun style—they simply allege a legal conclusion (e.g. the “) without pleading any ultimate facts. This is improper. Fla. R. Civ. P. 1.110(b).

Second, many of Mr. Gutman's claims are subject to dismissal for other reasons as well, starting with Mr. Gutman's FCCPA count, which as pled is barred by the litigation privilege. “Florida law recognizes the principle of the litigation privilege in Florida, which essentially provide[s] legal immunity for actions that occur in judicial proceedings.” *Echevarria, McCalla, Raymer, Barrett & Frappier v. Cole*, 950 So. 2d 380, 383 (Fla. 2007). This privilege extends to all causes of action, including those based on a statute such as the FCCPA. *Id.* Here, Mr. Gutman's FCCPA count against Citibank as pled is based exclusively on Citibank's conduct in filing the instant lawsuit against Mr. Gutman. Counterclaim at ¶ 4 (“Plaintiff's attempt to collect amounts from Defendant based on a legal claim of ‘Account Stated’

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constitutes illegal acts and conduct by Plaintiff and Plaintiff's Counsel."). This is the exact scenario the litigation privilege protects against. *See, Gaisser v. Portfolio Recovery Associates, LLC*, 571 F. Supp. 2d 1273 (S.D. Fla. 2008) (Florida litigation privilege barred claim brought under Florida Consumer Collections Practices Act (FCCPA) by consumer against collection agency, stemming from alleged improper filing of state-court debt collection action, since filing of state suit clearly related to judicial proceeding). Mr. Gutman's reliance on *Moise v. Ola Condo. Ass'n, Inc.*, 314 So. 3d 708, 710 (Fla. 3d DCA 2021) as argued at the hearing is misplaced. In that case, the Third DCA held that the litigation privilege was not a bar to a defendant's counterclaim against a condominium association based on the circumstances of the case. Those circumstances were that the condominium association was seeking to foreclose a lien for unpaid assessments. In its counterclaim brought under the FDCPA, defendant alleging that, although the association and the attorney knew the association sold its rights to enforce unpaid assessments to a third party and did not have the right to pursue the debt, the association and its attorney nonetheless engaged in collections practices, filed a lien and then initiated the suit. The where the defendant alleged that the association sent engaged in collection efforts, filed a lien, and demanding payment of assessments pursuant to a declaration despite knowing that it had assigned its rights to collect on the assessments to a third party. The circumstances present in *Moise* are not

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remotely similar to the circumstances present here. Unlike in *Moise*, where the defendant/counter-plaintiff sued for conduct that took place outside a litigation (e.g. collections efforts and the filing of a lien on debt to which the collector had no authority to collect), as outlined above, Mr. Gutman's FDCPA count as pleaded is based entirely on the predicate act of Citibank filing an account stated cause of action against him. Accordingly, as Mr. Gutman's claim that the FCCPA has been violated relates solely to the conduct occurring during the suit, the claim is barred by the litigation privilege.

Mr. Gutmans' remaining claims are also defective. In Count III, Mr. Gutman pleads breach of contract, but failed to attach a copy of said contract. Fla. R. Civ. P. 1.130(a). In that count Mr. Gutman also alleges breach of duty of good faith and fair dealing with respect to the purported contract, but in addition to failing to attach the contract, also failed to allege which provision of the contract was reached. "[A] claim for breach of the implied covenant of good faith and fair dealing cannot be maintained under Florida law absent an allegation that an express term of the contract has been breached." *Ins. Concepts & Design, Inc. v. Healthplan Services, Inc.*, 785 So. 2d 1232, 1234 (Fla. 4th DCA 2001).

While simultaneously alleging breach of contract, Mr. Gutman also alleged causes of action for negligence and gross negligence. Under the independent tort doctrine, an alleged tort must be independent from a contractual breach. *Prewitt*

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Enterprises, LLC v. Tommy Constantine Racing, LLC, 185 So. 3d 566, 569 (Fla. 4th DCA 2016) (noting that, even considering the Florida' Supreme court's 2013 ruling in *tiara* on the economic loss rule, "a tort still must be independent from a contractual breach under the common law"). *See also Peebles v. Puig*, 223 So. 3d 1065, 1068 (Fla. 3d DCA 2017) (when a contract is breached, the parameters of a plaintiff's claim are defined by contract law, rather than by tort law). In Counts IV and V, Mr. Gutman failed to allege any acts independent of those he alleged constituted a breach of contract. Indeed, Mr. Gutman's negligence and gross negligence claims are based on Citibank's alleged breach of the duties of "good faith and fair dealing," which is the same allegation that forms the basis for Mr. Gutmans' breach of contract claim.

For all of the foregoing reasons, it is hereby **ORDERED** that Citibank's Motion to Dismiss Mr. Gutman's counterclaims is **GRANTED** without prejudice. Mr. Gutman may file an amended counterclaim within 14 days from the date of this Order.

DONE and ORDERED in Palm Beach County, Florida.

502020CC005756XXXXMB 1/28/22

/s/ April Bristow County Judge

502020CC005756XXXXMB 1/28/22

April Bristow - County Judge

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**IN THE COUNTY COURT OF THE FIFTEENTH
JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY,
FLORIDA**

**CITIBANK, N.A.
DIVISION RF**

COUNTY CIVIL

Plaintiff,

Case No. 2020-005756-CC

v.

EVAN S. GUTMAN

Defendant

**ORDER GRANTING IN PART AND DENYING
IN PART DEFENDANT'S MOTION FOR
RECONSIDERATION OF COURT ORDER
GRANTING PLAINTIFF'S MOTION TO
DISMISS COUNTERCLAIM**

THIS CAUSE came before the Court on Defendant/Counter-Plaintiff, Evan Gutman's Motion for Reconsideration of Court Order granting Plaintiff's Motion to Dismiss Counterclaim. Upon consideration of the Motion and pursuant to Local Rule 6, it is hereby

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ORDERED that the Motion is **GRANTED** to the extent the Court granted Plaintiff/Counter-Defendant's Motion to Dismiss Count III based on Defendant/Counter-Plaintiff's failure to attach the referenced contract and Defendant/Counter-Plaintiff's breach of contract count was based on the Card Member Agreement attached to the Counterclaim as Exhibit 2. **The Motion is DENIED in all other respects.** As the Court's basis for granting Plaintiff's Motion on Count III was not solely based on the failure to attach a contract, this ruling does not alter the Court's ultimate conclusion or entitle Defendant/Counter-Defendant to any additional relief.

The Court also notes that the deadline for Defendant/Counter-Plaintiff to file an amended Counterclaim expired prior to the date Defendant filed the subject Motion for Reconsideration. This Order does not in any way extend the time since passed deadline.

DONE AND ORDERED in Chambers, at West Palm Beach, Palm Beach County, Florida.

50-2020-CC-005756-XXXX-MB 3/17/2022
/s/ April Bristow County Judge

50-2020-CC-005756-XXXX-MB
3/17/2022
April Bristow
County Judge

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**IN THE COUNTY COURT IN AND FOR
PALM BEACH COUNTY, FLORIDA**

COUNTY CIVIL DIVISION: "RL"
CASE NO.: 50-2020-CC-005756-XXXX-MB

CITIBANK, N.A.

Plaintiff,

v.

EVAN S. GUTMAN

Defendant

**ORDER DENYING SECOND MOTION
FOR RECONSIDERATION OF COURT
ORDER GRANTING PLAINTIFF'S
MOTION TO DISMISS COUNTERCLAIM**

THIS CAUSE came before this Court for review on July 19, 2022. Based upon review of the Second Motion for Reconsideration of Court Order granting Plaintiff's Motion to Dismiss Counterclaim, a complete review of the court file, and the Court being otherwise fully advised in the premise, it is

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ORDERED AND ADJUDGED that the
Second Motion for Reconsideration of Court Order
Granting Plaintiff's Motion to Dismiss Counterclaim
is DENIED.

DONE AND ORDERED in Chambers, at
West Palm Beach, Palm Beach County, Florida.

50-2020-CC-005756-XXXX-MB 7/19/2022
Edward A. Garrison County Judge

/s/ Edward A. Garrison

50-2020-CC-005756-XXXX-MB 7/19/22
Edward A. Garrison
County Judge

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**IN THE COUNTY COURT OF THE FIFTEENTH
JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA**

CITIBANK, N.A.

Plaintiff,

Case No. 2020-005756-CC

v.

EVAN S. GUTMAN

Defendant

FINAL JUDGMENT

THIS CAUSE having been tried before this Court on September 15, 2022 and the Court having reviewed the pleadings, heard testimony, taken evidence, and being otherwise fully advised in the premises, the Court:

FINDS, ORDERS AND ADJUDGES that:

1. That on September 15, 2022, Plaintiff, Citibank, N.A. presented the testimony of Judy Delage, an employee and Assistant Vice President of Citibank, N.A., who provided uncontroverted testimony and entered into evidence exhibits,

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including, but not limited to, monthly account statements sent to Defendant, Evan S. Gutman, detailing the amounts owed. Defendant, Evan S. Gutman, failed to appear at trial and failed to present any evidence contradicting Citibank, N.A.'s testimony and documentary evidence.

2. That based upon the testimony and evidence presented, Plaintiff, Citibank, N.A., is entitled to a Final Judgment in its favor on Count I of the Complaint for account stated. The Court finds that Plaintiff is owed the principal amount of \$ 11,292.15 as of July 15, 2019, \$ 1,521.27 in pre-judgment interest from July 16, 2019 until the date of trial, September 15, 2022, for a total amount owed of \$ 12,813.42, exclusive of taxable costs and attorneys' fees. The Court notes that the statutory pre-judgment interest between July 15, 2019 and September 15, 2022 fluctuated from a high of 6.89% to a low of 4.25% with the current rate being 4.75%. For the ease of calculating the pre-judgment interest, Citibank has used only the lowest rate of 4.25% and has waived the right to recover any further pre-judgment interest.

3. Therefore, Plaintiff, Citibank, N.A., with a mailing address of 701 NE 60th Street, N., Sioux Falls, South Dakota, shall have and recover against Defendant, Evan S. Gutman, with the last known mailing address of 1675 NW 4th Avenue, #511, Boca Raton, FL 33432 the grand total of \$12,813.42 that shall bear interest at the statutory rate of 4.75%, for which let execution issue.

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4. The Court reserves jurisdiction to award taxable costs and attorneys' fees upon proper motion.

DONE AND ORDERED in Chambers, at
West Palm Beach, Palm Beach County, Florida.

50-2020-CC-005756-XXXX-MB 9/19/2022
Edward A. Garrison County Judge

/s/ Edward A. Garrison

50-2020-CC-005756-XXXX-MB 9/19/22
Edward A. Garrison
County Judge

Copies to:

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