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

CITIBANK, N.A.	CASE NUMBER:
Plaintiff	50-2020-CC-005756-XXXX-MB
v.	
EVAN S. GUTMAN,	**DEFENDANT'S SECOND MOTION FOR RECONSIDERATION OF COURT ORDER GRANTING PLAINTIFF'S MOTION**
Defendant, Pro Se	**TO DISMISS COUNTERCLAIM**

Defendant Evan Gutman, JD, CPA, MOVES the Court for Reconsideration of its Order Granting Plaintiff's Motion to Dismiss his Counterclaim on the following grounds :

1. The Court was Procedurally Barred from ruling on the Motion to Dismiss, because it had not yet ruled upon Plaintiff's Motion to Extend Discovery; no hearing was scheduled on the Motion to Extend, and Plaintiff had not timely responded to Discovery requests.

2. The Court based its Order upon an incorrect assertion the Counterclaim was predicated only upon conduct within the litigation. The Counterclaim is based upon sufficiently well-pled ultimate facts, occurring both prior to and during the litigation. In considering this issue, the Court failed to resolve inferences in favor of the Counterclaim as it was required to do. See Mosby v Harrell, 909 So.2d 323 (2005).

3. Florida's Litigation Privilege has been largely reformulated since 2017 based upon the Florida Supreme Court's opinion in Debrincat v Fischer, 217 So.3d 68 (2017); and its subsequent interpretation by the Federal Eleventh Circuit Court of Appeals in Sun Life Assurance Company of Canada v Imperial Premium Finance, LLC 904 F.3d 1197 (2018). Based upon such, litigation privilege should not be applied by the Court to Plaintiff and their debt collector attorneys illegal conduct.

BACKGROUND FACTS

On January 28, 2022, Judge April Bristow (formerly assigned to this case) granted Plaintiff's Motion to Dismiss Defendant's Counterclaim in a Non-Final Order (Exhibit 1). On March 15, 2022, Defendant submitted a Motion for Reconsideration of Judge Bristow's erroneous Order. Two days later, on March 17, 2022, Judge Bristow issued an Order Granting in Part and Denying in Part, the Motion for Reconsideration (Exhibit 2). Specifically, she

acknowledged that her prior Order was in Error to the extent it erroneously indicated a Contract was not attached to the Counterclaim. Defendant pointed out Plaintiff incorrectly alleged in their Motion to Dismiss that Defendant had not attached the Contract, when in fact the record clearly indicates it was attached as an Exhibit. Notwithstanding her admitted error, Judge Bristow stood by her decision to dismiss the Counterclaim in a Non-Final Order. Subsequently, Judge Bristow was apparently reassigned by Chief Judge Kelley from the Civil Division to the Criminal Division for unknown reasons. Defendant now hereupon, files this Second Motion for Reconsideration of Judge Bristow's erroneous decision and presents applicable argument below.

ARGUMENT

A trial court always has inherent discretionary power to Reconsider any order entered prior to the rendition of final judgment in the cause. (See Panama City General Partnership v Godfrey Panama City Investment, LLC, 109 So.3d 291, First DCA (2013) citing City of Hollywood v Cordasco, 575 So.2d 301, 302 (Fla. 4th DCA 1991); and Monte Campbell Crane Co. Inc. 510 So.2d 1104 (Fla. 4th DCA 1987).) Additionally, denial of a motion for reconsideration is reviewable for abuse of discretion. (See Panama City General Partnership v Godfrey Panama City Investment, LLC 109 So.3d 291, First DCA (2013). Defendant now addresses each of the grounds warranting reconsideration and thereupon Denying Plaintiff's Motion to Dismiss the Counterclaim.

1. The Court was Procedurally Barred from even ruling on the Motion to Dismiss, because it had not yet ruled upon Plaintiff's Motion to Extend Discovery; no hearing was scheduled on the Motion to Extend, and Plaintiff had not timely responded to discovery requests.

The Court incorrectly based its Order of dismissal, upon an assertion the mere filing of a Motion to Extend discovery, automatically extends the discovery response time, even if the

Motion to Extend is not ruled upon. Such an assertion effectively rewrites discovery rules promulgated by the Florida Supreme Court. Specifically, Defendant's Opposition to the Motion to Dismiss, asserted even if the Court determined Plaintiff's Motion for Extension warrants consideration; procedurally the existence of that motion not yet ruled upon, precluded granting the Motion to Dismiss at the January hearing. Put simply, Defendant understands Florida judicial policy requires that to rule upon a motion, a hearing is required. If Defendant's understanding is correct, since there had not yet been a hearing on the Motion to Extend, it could not be granted at that time. Additionally, since the ruling upon the Motion to Extend may be determinative of the ultimate issue of liability due to the Requests for Admissions, its' pendency precluded granting the Motion to Dismiss five months ago in January, 2022. **FN 1**

2. The Court based its Order upon an incorrect assertion it was predicated only upon conduct within the litigation. The Counterclaim is based upon sufficiently well-pled ultimate facts, occurring both prior to and during the litigation. In considering this issue, the Court failed to resolve inferences in favor of the Counterclaim as it was required to do. See Mosby v Harrell, 909 So.2d 323 (2005).

Judge Bristow's Order of Dismissal also incorrectly asserts Defendant's FCCPA claim was based "entirely on the predicate act of Citibank filing an account stated cause of action" and "relates solely to the conduct occurring during the suit" (Page 4 of Court's Order). That is not correct. The claim is predicated both upon conduct occurring prior to the litigation and also conduct during the litigation.

FN 1 - The Discovery requests (including Requests for Admission) were served by Defendant on July 1, 2021. As of January 5, 2022, the date of the hearing on the Motion to Dismiss, Plaintiff had not submitted any substantive response and only filed a Motion to Extend. Plaintiff attempting to diffuse the significance of this egregious procedural irregularity submitted substantive responses after the hearing on February 15, 2022, seven and a half months after service of the requests. As of July 1, 2022, the Court has still not yet ruled on the Motion to Extend, although Plaintiff's Counsel has Unilaterally Set a Hearing for the matter on July 7, 2022. Defendant's contention is the Motion to Extend was obviously filed for the purpose of delay. Whether the Motion to Extend is granted or not at this late stage (based upon Plaintiff's "post-hoc" submissions), the existence of the Motion to Extend in January, 2022 on the date of the hearing for their Motion to Dismiss precluded granting the Motion to Dismiss at that time.

Defendant pointed this out at oral argument and cited Moise v OLA Condominium Association Inc., 314 So.3d 708 (2021) for the premise that conduct occurring prior to a litigation is not barred by litigation privilege. Specifically, Paragraph 2 and Paragraph 4 of the general allegations of the Counterclaim state in part as follows (emphasis added):

> "2. Plaintiff's **attempt to collect amounts** from Defendant based upon "unjust enrichment constitutes illegal acts and conduct by Plaintiff and Plaintiff's Counsel. . . .
>
> **. . .**
>
> 3. Plaintiff's **attempt to collect amounts** from Defendant based upon legal claim of "Account Stated" constitutes illegal act and conduct by Plaintiff and Plaintiff's Counsel."

The phrase "attempt to collect amounts" is not limited to Plaintiff's filing of the Complaint. It also incorporates conduct prior to the litigation, and therefore is not barred by litigation privilege. To the extent the Court had any doubt regarding the interpretation of the phrase "attempt to collect amounts" Defendant was legally entitled to have all "inferences" based upon the allegations resolved in his favor. This point is clearly delineated in Mosby v Harrell, 909 So.2d 323 (Fla. App. First DCA) (2005) where the Court wrote as follows (emphasis added):

> "As the factual foundation for its ruling on a motion to dismiss a complaint for failure to state a cause of action, a court may consider only the factual allegations set forth in the complaint, **must accept those allegations as true**, and **must resolve in the plaintiff's favor all inferences** that might be drawn from those allegations."
>
> Mosby v Harrell, 909 So.2d 323 (Fla. APp. First DCA)(2005

Those "inferences" include Defendant's allegation that the objectionable conduct included "collection efforts" prior to the litigation. Thus, whereas Judge Bristow incorrectly asserted in her Order that "The circumstances present in Moise are not remotely similar to the circumstances present here," (Page 4 of Order of Dismissal) **an objective analysis with appropriate inferences , confirms the circumstances are almost "precisely identical."**

3. Florida's Litigation Privilege has been largely reformulated since 2017 based upon the Florida Supreme Court's opinion in Debrincat v Fischer, 217 So.3d 68 (2017); and its subsequent interpretation by the Federal Eleventh Circuit Court of Appeals in Sun Life Assurance Company of Canada v Imperial Premium Finance, LLC 904 F.3d 1197 (2018). Based upon such, litigation privilege should not be applied by the Court to Plaintiff and their debt collector attorneys' illegal conduct.

In Sun Life Assurance Company of Canada v Imperial Premium Finance, LLC, 904 F.3d 1197 (2018), the Federal 11th Circuit Court of Appeals wrote extensively about Florida's litigation privilege and the impact of the Florida Supreme Court's decision in Debrincat v Fischer, 217 So.3d 68 (2017). Sun Life indicates the Florida Supreme Court has substantially retreated from its over-expansive view of litigation privilege previously delineated in Echevarria v Cole, 950 So.2d 380 (2007). Although Echevarria, has not been expressly overruled, it appears to have been overruled "Sub Silentio" or at least substantially modified based upon the 11th Circuit's interpretation of Debrincat. Similarly, numerous Florida Appellate opinions have declined to apply the privilege to egregious conduct. It certainly no longer protects all conduct during the course of a proceeding (much less before the proceeding). Defendant quotes the 11th Circuit's opinion at length in Sun Life, supra at 904 F.3d 1218 – 1220, (emphasis added):

> "**1. Florida's Litigation Privilege**
>
> Sun Life contends that it cannot be sued for filing its declaratory judgment claim because its act of filing a lawsuit is absolutely immune from liability under Florida's litigation privilege. At its most basic level, Florida's litigation privilege "provides legal immunity for actions that occur in judicial proceedings." Echevarria, McCalla, Raymer . . . 950 So.2d 380, 383 (Fla. 2007). **Because the filing of a lawsuit is an "action that occurs in a judicial proceeding" id., Sun Life contends that its filing of its declaratory judgment claim is protected by the privilege. The district court ultimately disagreed. . . . We are in accord with the district court.**
>
> Florida adopted its litigation privilege to protect testifying witnesses against defamation suits premised on statements they made in open court. See Myers v Hodges, 53 Fla. 197, 44 So. 357, 361-362 (1907). The concern was with chilling robust courtroom testimony. . . .
>
> **. . .**
>
> Although at its inception the privilege offered immunity only from actions sounding in defamation . . . . the Florida Supreme Court has significantly expanded the privilege. . . . **In Echevarria, the Court expanded the privilege beyond the tort context to hold immune from suit a party facing claims that its litigation conduct violated a statute.** . . .
>
> **. . .**

> **Echevarria, however, is not the Court's latest word on Florida's litigation privilege. In Debrincat v Fischer, 217 So.3d 68 (Fla.2017), the Court receded somewhat from the broad language in Echevarria. . . . It concluded that the litigation privilege does not provide immunity from claims for malicious prosecution, ...** Debrincat, 217 So.3d at 70.
>
> **After Debrincat**, and despite the broad formulations in Levin and Echevarria, **we do not think that the Florida Supreme Court is of the view that the litigation privilege offers per se immunity against any and all causes of action arise out of conduct in judicial proceedings**. See id. **Rather, the applicability of the privilege must be assessed in light of the specific conduct for which the defendant seeks immunity**. In this case, therefore, we must ask whether Florida's litigation privilege would immunize a defendant from a breach of contract claim where the act that allegedly breached the contract was the filing of a lawsuit.
>
> **. . .**
> **We are further persuaded by Debrincat, which made plain that the litigation privilege should not be applied in novel ways that serve to "eviscerate" long-standing sources of judicially available recovery**. . . . "

Thus, after Debrincat (in contrast to Echevarria), it appears the Florida Supreme Court's position was certain **"acts"** during the course of a judicial proceeding are not protected by litigation privilege, including malicious prosecution claims (i.e. claims without legal basis). In the instant case, Defendant's Counterclaim is predicated in part upon the assertion Plaintiff has been filing massive numbers of meritless claims which it knows are frivolous. They are using litigation privilege as a "SWORD" to file meritless claims, rather than the "SHIELD" for which it was intended in the seminal case of Myers v Hodges, 44 So. 357 (1907) to promote, rather than hinder fair adjudications. This ultimate fact allegation in the counterclaim is more closely aligned with Debrincat (litigation privilege does not apply to malicious prosecution actions), than the holding in Echevarria that the privilege applies to all "acts." Defendant contends where a Plaintiff's conduct indicates they are intentionally utilizing litigation privilege as a "SWORD" to undermine the fairness of the trial process, the Court should hold litigation privilege does not apply. A holding by this Court along such lines would be in conjunction with the overall intent and function of litigation privilege, as delineated by the Federal 11th Circuit in Sun Life, supra.

It is one thing for Judges to grant themselves Absolute Judicial Immunity (which does have some legitimate justification) because otherwise unethical attorneys would unfairly

preclude them from fulfilling their duty to render fair litigations. On the other hand, the dilemma becomes much more complex when those same Judges start extending immunity to commit illegal acts, in the form of a doctrine called "Litigation Privilege" to debt collector attorneys. By "Sharing" and "Extending" their Immunity to commit illegal acts, the Judiciary jeopardizes the legitimacy upon which their own entitlement to immunity may be based.

It is said Judicial Power is at a ZENITH when judging others, but at a NADIR when Judging itself. Whether titled as "Absolute Judicial Immunity" or "Litigation Privilege" as provided to debt collector attorneys, the immunity was intended to function as a "SHIELD" against unjustified reprisal. It was never intended to function as the "SWORD" by which debt collector attorneys have turned it into a blank check to file frivolous lawsuits on a massive scale, and then also engaging in illegal conduct secure in the knowledge they could assert, "litigation privilege allows us to do whatever we want because we have immunity from the law."

Since Debrincat, Florida Appellate Courts have declined to apply litigation privilege to a wide variety of conduct. See Miller v Henderson Machine, Inc., 310 So.3d 44 (Fla 4th DCA 2020) ("trial court had authority to protect the proper administration of justice" by declining to apply litigation privilege); Hollander v Fortunato, 305 So.3d 344 (Fla. 3rd DCA 2020) ("litigation privilege does not apply under these circumstances, where respondent alleged in the trial court that petitioners violated section 559.72 . . . by sending threatening collection letters demanding payment") ; Pace v Bank of New York Mellon Trust, 224 So.3d 342 (Fla 5th DCA 2017) ("Bank's process server's alleged comments to the tenants are not covered by absolute immunity under the litigation privilege"); Inlet Beach Capital Investments v The Enclave at Inlet Beach Owners Assocaition, Inc.,236 So.3d 1140 (Fla. 1st DCA 2018) (Debrincat not limited to situations where a party is added to the litigation) ; Estape v Seidman, 269 So.3d 565 (Fla. 4th DCA 2019) ("statutory grant of confidentiality prevails over the litigation privilege, a common law doctrine").

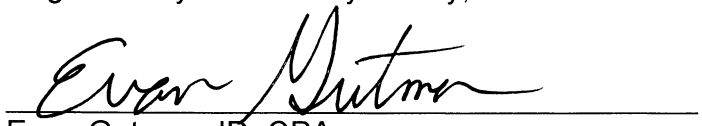
As indicated by Miller and Estape, the Fourth District DCA appears particularly receptive to declining to apply litigation privilege to egregious conduct. This comports with the Federal 11th Circuit's interpretation of Debrincat, and the diminished application of Echevarria. Courts now seem to be focusing on the type of conduct engaged in; its' egregious nature; whether justice and the dignity of the Court would be furthered or hindered; whether the privilege as a common law doctrine nullifies statutory rights; and whether it is asserted in good faith.

In the instant case, Defendant has asserted in his counterclaim Plaintiff engaged in illegal conduct on a massive scale by filing lawsuits they know are meritless, and also regarding collection efforts prior to instituting this litigation. Accordingly, Plaintiff is not acting in good faith; they are hindering justice; insulting the dignity of the court; unnecessarily burdening judicial resources; and seeking to nullify Defendant's legitimate statutory rights.

Based on the foregoing, Defendant asserts the Court should not apply litigation privilege to Plaintiff's conduct and should adopt the analysis of Sun Life, supra. Lastly, as previously stated, Defendant is legally entitled to all inferences in favor of the Counterclaim and the pled facts should be accepted as true. That means, for purposes of considering the Motion to Dismiss, the Court is required to accept as true the allegation Plaintiff has been filing massive numbers of meritless lawsuits throughout Florida.

Upon Reconsideration, Defendant requests the Motion to Dismiss be DENIED.

Submitted humbly and graciously this 1st day of July, 2022.



Evan Gutman JD, CPA
Member State Bar of Pennsylvania
Member District of Columbia Bar
1675 NW 4th Avenue, #511
Boca Raton, FL 33432
561-990-7440

CERTIFICATE OF SERVICE

I Evan Gutman, hereby Certify a true copy of the foregoing was sent electronically and via US Mail on this 1st day of July, 2022 addressed as follows to :

Adams and Reese LLP
Attn: Chantal M. Pillay, Esq.
100 N. Tampa Street, Suite 4000
Tampa, Florida 33602

DATED this 1st day of July, 2022.

Evan Gutman CPA, JD
Member State Bar of Pennsylvania
Member District of Columbia Bar
Admitted to Federal Sixth Circuit Court of Appeals
Admitted to Federal Ninth Circuit Court of Appeals
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EXHIBIT 1(a)

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 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 allege 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 pursing 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 I), Unfair and

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 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[es] 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' 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 purse 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 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 additional 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 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 01/28/2022 April Bristow County Judge

502020CC005756XXXXMB 01/28/2022
April Bristow
County Judge

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EXHIBIT 1(f)

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EXHIBIT 2(a)

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 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

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 03/17/2022
April Bristow County Judge
ADMINISTRATIVE OFFICE OF THE COURT

50-2020-CC-005756-XXXX-MB 03/17/2022
April Bristow
County Judge

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