

Case No. (Not Yet Assigned)

In the Supreme Court of the United States

EVAN S. GUTMAN, JD, CPA
Petitioner

v

CITIBANK, N.A.
Respondent

On Petition for a Writ of Certiorari
to the 4th District Court of Appeals of the State of Florida

PETITION FOR A WRIT OF CERTIORARI

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Petitioner, Pro Se
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Member State Bar of Pennsylvania
Admitted to Federal Sixth Circuit Court of Appeals
Admitted to Federal Ninth Circuit Court of Appeals

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(i)

QUESTION PRESENTED

1. Does a State Supreme Court infringe upon the Due Process and Equal Protection Clause Rights of a Litigant in both the Civil and Criminal Context in every single case in the State, by expressly holding in written terms that any Illegal Tortious Act committed within the context of a judicial proceeding is entitled to Absolute Immunity under the doctrine of Litigation Privilege ?

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JURISDICTION

The jurisdiction of this Court is invoked under 28 USC 1257(a). On July 20, 2023 the Fourth District Court of Appeal in Florida issued a "PER CURIAM. Affirmed." decision without a written opinion. (See App-1) On August 11, 2023, the Fourth District Court of Appeal issued its Final MANDATE (See App-2). Under Florida law, a per curiam affirmance without a written opinion cannot be appealed to the State Supreme Court. See Fla.Rule App. 9.030(a)(2).

Jurisdiction and review by Petition for Writ of Certiorari filed with the U.S. Supreme Court is therefore available and this Court has exercised such Jurisdiction in the past. See Hobbie v Unemployment Appeals Commission of Florida, 480 U.S. 136, Footnote 4 (1987) where this Court granted Certiorari and directly Reversed Florida's Fifth District Court of Appeal, writing as follows in Footnote 4 on the jurisdiction issue.

"The Fifth District Court of Appeal issued an order stating: "PER CURIAM. AFFIRMED." App.6. See 475 So.2d 711 (1985). Under Florida law, a per curiam affirmance issued without opinion cannot be appealed to the State Supreme Court. See Fla.Rule App.Proc. 9.030(a)(2)(A)(i-iv). Hobbie therefore sought review directly in this Court."

Accordingly, this Court has Jurisdiction pursuant to 28 USC 1257(a) to directly review the Fourth DCA Per Curiam decision.

CONSTITUTIONAL AND STATUTORY
PROVISIONS INVOLVED

The Fourteenth Amendment to the U.S. Constitution provides:

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The First Amendment to the U.S. Constitution provides in relevant part:

"Congress shall make no law . . . prohibiting . . . the right of the people . . . to petition the Government for a redress of grievances."

STATEMENT OF THE CASE

A. GENERAL SUMMARY and FACTS

The fundamental question in this case is whether a State Supreme Court infringes upon the Due Process and Equal Protection Clause Rights of a Litigant in every single case in the State, by expressly holding in no uncertain written terms that any Illegal Tortious Act committed within the context of a judicial proceeding is entitled to Absolute Immunity. Such a premise is precisely what the Florida Supreme held in the case of Echevarria, McCalla, Raymer, Barrett & Frappier v Cole, 950 So.2d 380 (Fla. 2007). And the case remains as binding precedential law in Florida Courts, notwithstanding its repudiation 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). So far as Petitioner knows, no State other than Florida in this Nation has adopted a holding regarding litigation privilege as egregious to basic human values and decency as the Florida Supreme Court in Echevarria.

Echevarria is directly inimical to the U.S. Supreme Court's holding in Chambers v Baltimore & Ohio Railroad Company, 207 U.S. 142, 148-149 (1907), where this Court held the right to sue and defend in the court is the alternative of force and lies at the foundation of orderly government in an organized society. Echevarria irrationally eliminates that right to the extent of all illegal tortious conduct engaged in within the context of a judicial proceeding. Put simply, it gives attorneys absolute

immunity to engage in any illegal tortious conduct within the context of a judicial proceeding.

The facts of this case and how Echevarria impacted upon it are as follows. Citibank filed a lawsuit against Petitioner on July 8, 2020 pertaining to an alleged credit card debt for \$ 11,292.15. Petitioner filed a Counterclaim asserting Citibank was filing meritless unjust enrichment lawsuits against multitudes of citizens, precluded by law because they know a written contract exists. Thus, Citibank was filing thousands of lawsuits against impoverished citizens even though they had full and complete knowledge the suits were meritless.

Citibank filed a Motion to Dismiss the Counterclaim primarily asserting it was barred by litigation privilege in Florida, predicated upon Echevarria. On January 28, 2022 after hearing argument, Judge April Bristow issued an Order granting Citibank's Motion to Dismiss primarily on the ground of litigation privilege (App-3). Petitioner filed a Motion for Reconsideration and on March 17, 2022 Judge Bristow issued an Order Granting the Motion in Part, but also Denying it in part (App-4). Particularly, she maintained the ground litigation privilege barred the Counterclaim. Notwithstanding, during hearings, she seemed to be developing a sensitivity and appreciation for points Petitioner presented. Shortly after she made her sensitive and supportive statements, Chief Judge Kelley of the Palm Beach Court, transferred Judge Bristow out of the Civil Division and thus she was off the case. ^{FN 1}

FN 1 - In a companion case, Discover Bank, N.A. v Evan Gutman, Palm Beach Judge Cymonie Rowe rendered a key ruling in favor of Petitioner on his Counterclaim. She was then

promptly transferred out of the Civil Division, by Chief Judge Karla Marx (Chief Judge Kelley's predecessor). It was then assigned to Judge G. Joseph Curley, Jr. who excluded Petitioner from a key ZOOM hearing (even though Petitioner was present) resulting in dismissal of his Counterclaim. Petitioner filed a Motion to Disqualify Judge Curley who granted such, but the Counterclaim has not yet been reinstated.

During the litigation, as well as the companion cases of Discover Bank, N.A. v Evan Gutman; and also Calvary SPV I, LLC as Assignee of Citibank, N.A. v Evan Gutman, Petitioner was pitted against five prominent Florida law firms. The five law firms combined had about 25 - 30 attorneys working against Petitioner who took them all on single-handedly, as they committed a wide variety of illegal tortious acts. However, since the illegal tortious acts they committed were within the context of the litigation, the attorneys were determined to be "Absolutely Immune" for their illegal conduct. It would be impossible to delineate the multiplicity of violations of the law the debt collector attorneys committed, without detracting from the main issue challenged herein, which is Florida's litigation privilege itself. That said, much of their illegal conduct is published on Petitioner's two websites at **www.gutmanvaluations.com** and **www.heavensadmissions.com**.

Judge James Sherman was then assigned to the case and Petitioner's research indicated his experience focused on supporting creditor rights. Accordingly, Petitioner moved to disqualify Judge Sherman before he ruled on a single motion. Judge Sherman granted the Motion and recused himself.

Judge Edward Garrison was then assigned to the case. Significant friction developed between Petitioner and Judge Garrison and Petitioner filed a Motion to Disqualify, which was Denied. Judge Garrison proceeded to have an illegally scheduled trial in violation of FRCP 1.440, since the case was not even "At Issue" as required under Florida law. Accordingly, Petitioner did not attend the trial and instead opted to take the matter up on appeal.

Judge Garrison entered Judgment against Petitioner, who appealed. Citibank then filed a Motion for Attorney Fees and Petitioner filed a Second Motion to Disqualify Judge Garrison, which was also denied. Ultimately, Judge Garrison entered a Judgment for Legal Fees and Costs in the amount of \$ 31,315.50, in addition to the alleged credit card debt of \$ 11,292.15.

On appeal, Petitioner's appellate brief focused on 4 grounds. One was judicial disqualification; one was the illegal setting of the trial since the case was not even "At Issue" as required by FRCP 1.440; one was the unconstitutionality of Palm Beach County Rule 4; and one was the issue of litigation privilege, the sole matter challenged herein. It is the most important of all because it affects every single case in Florida, thereby depriving litigants of fair and impartial adjudications on a massive widescale basis.

On July 20, 2023 the Fourth District Court of Appeal of Florida issued a "PER CURIAM. Affirmed" decision without rendering a comment or written opinion on any issue. (App-1). Petitioner had repeatedly pointed out in multiple pleadings (consistently citing In Re Oliver, 333 U.S. 257, 271

(1948)) that appeals are often a "**Cloak**" rather than a "**Check**" upon illegal trial court behavior.

Petitioner declined to Request a Rehearing opting instead to Petition this Court since it involves a matter of public importance affecting every case in Florida and now likely the entire Nation. On August 11, 2023 the 4th DCA issued the Final MANDATE for the "PER CURIAM" decision (App-2).

B. ARGUMENT

A STATE SUPREME COURT INFRINGES UPON THE DUE PROCESS AND EQUAL PROTECTION CLAUSE RIGHTS OF A LITIGANT IN BOTH THE CIVIL AND CRIMINAL CONTEXT IN EVERY SINGLE CASE IN THE STATE BY EXPRESSLY HOLDING IN WRITTEN TERMS THAT ANY ILLEGAL TORTIOUS ACT COMMITTED WITHIN THE CONTEXT OF A JUDICIAL PROCEEDING IS ENTITLED TO ABSOLUTE IMMUNITY UNDER THE DOCTRINE OF LITIGATION PRIVILEGE.

In Echevarria, McCalla, Raymer, Barrett & Frappier v Cole, 950 So.2d 380 (Fla. 2007) the Florida Supreme Court held in no uncertain express written terms the commission of any illegal tortious act occurring within the context of a judicial proceeding is entitled to "Absolute Immunity." Specifically, the Court wrote as follows:

"The litigation privilege applies across the board to actions in Florida, both to common-law causes of action, those initiated pursuant to a statute, or of some other origin. "Absolute immunity must be afforded to any act occurring during the course of a judicial proceeding . . . so long as the act has some relation to the proceeding."

Ecchevarria, McCalla, Raymer, Barrett & Frappier v Cole, 950 So.2d 380, 384-385 (Fla. 2007)

Ecchevarria violates one of this Court's most important legal principles, which is that peaceful litigation is the alternative to "Force." By doing so, Ecchevarria deprives litigants of due process, equal protection and fair and impartial adjudications in violation of the 14th Amendment. Specifically, this Court wrote in the time-honored case of Chambers v Baltimore & Ohio Railroad Company, 207 U.S. 142 (1907) as follows (emphasis added) :

"The right to sue and defend in the courts is the **alternative of force**. In an organized society **it is the right conservative of all other rights**, and lies at the foundation of orderly government."

Chambers v Baltimore & Ohio Railroad Company, 207 U.S. 142, 148-149 (1907)

Echevarria, substantively eliminates the right of a citizen to seek redress by peaceful litigation for commission of any illegal tortious act occurring within the context of litigation. Once that right to peacefully obtain redress by litigation is eliminated by the Judiciary; then pursuant to Chambers, the uncivilized alternative is what remains. Thus, by Echevarria, the Florida Supreme Court places at risk the physical safety of citizens in Florida. It simply can not be allowed to remain as binding law and should be overturned to sustain a civilized society.

So far as Petitioner knows, there is no other State in this nation with a scope of "litigation privilege" as far -reaching as Echevarria. Typically, litigation privilege is limited to defamation and nothing more. While some States may have gone beyond defamation, the concept in Florida that litigation privilege and absolute immunity apply to every single illegal tortious act committed during the course of a judicial proceeding is irrational.

In Sun Life Assurance Company of Canada v Imperial Premium Finance, LLC, 904 F.3d 1197 (2018), the Federal Eleventh Circuit Court of Appeals wrote extensively about Florida's litigation privilege. Specifically, the Federal Court asserted the Florida Supreme Court had retreated from its view of litigation privilege in Echevarria. However, Echevarria, continues to remain as binding law in Florida State Courts. Notwithstanding Sun Life, the Florida Supreme Court has refused to Overrule Echevarria. It is consistently followed by State trial court and appellate judges. Since the Federal Eleventh Circuit's opinion is predicated upon Federal law, it is only persuasive and not binding authority

in State Courts. The Florida State Courts continue to rely upon and consistently apply the morally atrocious holding of Ecchevaria.

In the instant case, Petitioner's Counterclaim asserted illegal acts by debt collector attorneys including the filing of massive numbers of meritless lawsuits against impoverished individuals. It was dismissed on the basis of litigation privilege in reliance on Echevarria. Essentially, the Court's concept was even if all their lawsuits were meritless, it doesn't really matter since that type of illegal conduct is entitled to absolute immunity. Thus, the debt collector attorneys are utilizing litigation privilege as promulgated in Echevarria, as a "SWORD," rather than as "SHIELD." In the seminal case of Myers v Hodges, 44 So. 357 (1907), litigation privilege was intended to function only as a "Shield," with respect to defamation actions.

With the foregoing in mind, it is appropriate to examine exactly what Absolute Judicial Immunity or its extension to Non-Judicial individuals pursuant to "Litigation Privilege" really is. Under Florida law and Federal law, Judges are entitled to Absolute Immunity for commission of intentional malicious acts. In the case of Laura M. Watson v Florida Judicial Qualifications Commission, No. 17-13940 (11th Cir. Federal Court of Appeals, August 15, 2018) the Eleventh Circuit described Absolute Immunity as follows (emphasis added):

"Absolute immunity can cover even wrongful or **malicious** acts. . . ."

Black's Law Dictionary defines the term "Malicious" as follows (emphasis added):

"Malicious. Characterized by, or involving, malice, having, or done with **wicked, evil** or mischievous intentions or motives. . . ."

Thus, absolute immunity by definition provides immunity for one to commit "Wicked" and "Evil" acts. While such is well-established for Judges, it becomes problematic when that absolute immunity is "Shared" with people who are not Judges. In the instant case, that includes particularly debt collector attorneys committing illegal acts within the context of litigation.

Providing anyone with an exemption from the law is a "Dicey" public relations endeavor. The concept may work well when buried in an Appellate opinion, because few people read appellate opinions. But, the concept falls apart when publicized and the citizenry starts understanding what Judges are really doing. If and when Nonattorneys realize that Judges allow themselves to commit "Wicked" and "Evil," acts, and then also "Share" that ability with others who aren't even Judges, they probably won't be too pleased. It unavoidably diminishes faith and confidence in the Judiciary.

The dilemma becomes more complex when those same Judges extend immunity to commit illegal acts, in the form of a "Litigation Privilege" to all debt collector attorneys. By "Sharing" their Absolute Immunity with selected individuals, the Judiciary jeopardizes the legitimacy upon which they themselves are entitled to such immunity.

It is said Judicial Power is at a ZENITH when judging others, but at a NADIR when Judging itself. Whether titled as "Absolute Immunity" or its variant of "Litigation Privilege" as provided to debt collector attorneys, the immunity was intended to function as a "SHIELD." 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 against impoverished individuals.

In the instant case, Petitioner's counterclaim alleged Plaintiff engaged in illegal conduct on a massive scale by filing lawsuits they know are meritless. Accordingly, Citibank and its attorneys were not acting in good faith, they are hindering justice, insulting the dignity of the court, unnecessarily burdening limited judicial resources, and seek to nullify legitimate statutory rights.

This Court is now vested with authority to legitimately hold the Florida Supreme Court Justices relinquished their own absolute judicial immunity by "Sharing" it with all attorneys, including debt collector attorneys. The conception of Absolute Immunity in Echevarria, places the Florida Judiciary in a position where it is promoting and condoning illegal conduct on a broad-sweeping basis by its own express, written words.

It is also a legitimate argument that Florida Supreme Court Justices are no longer entitled to absolute judicial immunity themselves for the following reason. By "Sharing" their Absolute Immunity with Non-Judicial individuals, the Justices substantively abandoned their position as Judges. Having abandoned their position, they lost their own absolute judicial immunity.

Another reason Echevarria is so morally and legally reprehensible is because its' holding is an express abandonment of the State Supreme Court's sworn duty to uphold the law. More specifically, the Court expressly stated they will support absolute immunity for Non-Judicial individuals to commit any illegal tortious act within the context of a judicial proceeding. So far as Petitioner knows, there is no precedent in any other State asserting Courts should overtly decline to apply the law to illegal conduct within the context of litigation. Litigation privilege has historically been applied to defamation actions, and that's it. Not all illegal tortious acts.

The impact is that in Florida the appellate process is largely a mere Sham, similar to the "Shell Game" the Connivers on 42nd Street in New York played in the 1970s. It is a "**Cloak**" and not a "**Check**" upon illegal trial court behavior just as this Court stated in In Re Oliver, 333 U.S. 257, 271 (1948) writing (emphasis added):

"Without publicity, all other checks are insufficient, in comparison of publicity, all other checks are of small account. Recordation, **appeal**, whatever other institutions **might present themselves in the character of checks, would be found to operate as cloaks rather than checks.** . . . as checks only in appearances."

In Re Oliver, 333 U.S. 257, 271 (1948)

REASONS FOR GRANTING THE WRIT

Pursuant to Rule 10(c) of this court, a state court of last resort has decided an important question of federal law that has not been, but should be settled by this court. The Florida Supreme Court decided attorneys are entitled to absolute immunity for any illegal tortious act committed within the context of a judicial proceeding. The effect is judicial absolute immunity is being "Shared" with Non-Judicial individuals selected by the State Supreme Court Justices pursuant to an artificially created judicial doctrine known as "Litigation Privilege."

Effectively, this creates two classes of Non-Judicial citizens as follows. The first class consists of citizens who are not Judges and who are bound by the law. The second class consists of citizens who are also not Judges, but who are exempt from obeying the law. The impact is the Florida Supreme Court has expressly abandoned in no uncertain terms, its duty and obligation to uphold the law.

The average Nonattorney does not know about legal doctrines pertaining to Jurisdiction; Statutory Construction; Civil Procedure; Criminal Procedure; the Rooker-Feldman doctrine; Younger Abstention; principles of Federalism; Judicial Disqualification; Indirect Civil Contempt versus Direct Contempt; Strict construction versus Liberal construction; the Anti-Injunction Act; Unauthorized Practice of Law, State Bar Moral Character Standards; or other legal doctrines. **But, there is one thing they do all know.** People know when they are getting "SCREWED" to state the matter bluntly. It's an innate type of legal knowledge everyone is born with

and requires no legal training. Every ghetto kid, impoverished family, homeless person, abused spouse, abused child, disabled person, streetwalker, drug addict, crime victim, police officer or defendant in a jail cell for a crime they didn't commit has that legal knowledge. It's a unique type of legal knowledge everyone has. And when people realize they must obey the written law, while debt collector attorneys are granted "Absolute Immunity" pursuant to "Litigation Privilege" every one of them will know they are getting "Screwed" by the Judiciary, which falsely purported disengenuously to protect them.

Petitioner asserts Echevarria contravenes this Court's opinion in Chambers, by eliminating the option to seek redress thru peaceful litigation. Instead, Echevarria favors the alternative option presented in Chambers, and thus diminishes the probability of sustenance of a civilized society. It also encroaches upon the ability of Prosecutors and Police Officers to fulfill their legal duties of upholding the law. One must think it would be rather frustrating to be a Prosecutor or Police Officer seeking to enforce the law, only to be told by a Judge that while Police Officers have only "Qualified Immunity," ; Debt Collector Attorneys have "Absolute Immunity" with respect to All Illegal Tortious Acts they commit within a litigation. Petitioner believes such irrationality would tend to set law enforcement officials against the Judiciary.

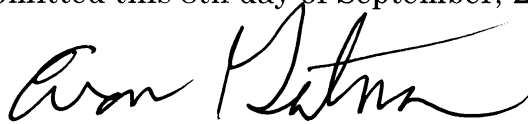
Petitioner notes he has been a CPA for about 38 years dating back to his initial licensure in Arizona; and a licensed Attorney for about 28 years dating back to his licensure in Pennsylvania in 1995. Petitioner has never been convicted of any crime in

his life, has never been subjected to any ethical discipline by any licensing agency, and has never even had a single ethical complaint ever filed against him to a licensing agency in either his capacity as a CPA or Attorney. This Petition will be made available on Petitioner's websites at **www.gutmanvaluations.com** and at **www.heavensadmissions.com** as soon possible.

This case presents an exceptional opportunity for this Court to Unite the Conservative Right with the Liberal Left of the Nation. It also presents a fantastic opportunity for this Court to reestablish its' own Supremacy over all State Supreme Courts, rather than being viewed as a mere Philosophical Advisory Board as many State Supreme Courts have historically given "Short Shrift" to its opinions.

For the foregoing reason, Petitioner requests the Writ of Certiorari be granted.

Submitted this 8th day of September, 2023.



Evan Gutman JD, CPA
Petitioner Pro Se
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

1675 NW 4th Avenue, Apt. 511
Boca Raton, FL 33432
561-990-7440

App-1

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.**

App-2

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

App-3(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

App-3(b)

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

App-3(c)

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).

App-3(d)

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 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’

App-3(e)

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

App-3(f)

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. Gutman's 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 breached. "[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

App-4(a)

**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

App-4(b)

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

App-5(a)

**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 rile, and the Court being otherwise fully advised in the premise, it is

App-5(b)

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

App-6(a)

**IN THE COUNTY COURT OF THE FIFTEENTH
JUDICIAL CIRCUIT
IN AN 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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