

American Express v Lilach Floral Levy

2012 NY Slip Op 32762(U)

September 28, 2012

Supreme Court, Queens County

Docket Number: 13308/2010

Judge: Timothy J. Dufficy

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SHORT FORM ORDER

NEW YORK SUPREME COURT-QUEENS COUNTY

P R E S E N T : HONORABLE TIMOTHY J. DUFFICY
Justice

Part 35

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AMERICAN EXPRESS

Plaintiff,

-against -

LILACH FLORAL LEVY A/K/A LILACH LEVY
A/K/A LILAC LEVY A/K/A LILAC F. ARRANGE
AND LILAC ONE, INC. D/B/A LI LAC ONE,

Index No.:13308/2010
Motion Date: 5/10/12
Motion Cal. No.: 1
Motion Seq. 1

Defendants.

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The following papers numbered 1 to 15 were read on this motion by plaintiff **AMERICAN EXPRESS** for an order pursuant to CPLR 3212 granting summary judgment in its favor and against defendants **LILACH FLORAL LEVY A/K/A LILACH LEVY A/K/A LILAC LEVY A/K/A LILAC F. ARRANGE AND LILAC ONE, INC. D/B/A LI LAC ONE** as to the plaintiff's first through sixth causes of action in the complaint and the cross-motion by defendant for an order granting summary judgment in its favor and for an order pursuant to CPLR 3216 dismissing the plaintiff's complaint as against it.

PAPERS
NUMBERED

Notice of Motion-Affirmation-Exhibits.....	1-4
Memorandum of Law.....	5
Notice of Cross-Motion-Affirmation in Opposition-Exhibit.....	6-9
Affirmation in Reply and in Opposition to Defendants'	
Cross-Motion-Affidavit-Exhibit.....	10-13
Reply Affirmation.....	14-15

Upon the foregoing papers it is ordered that this motion by plaintiff **AMERICAN EXPRESS** for an order pursuant to CPLR 3212 granting summary judgment in its favor and against defendants **LILACH FLORAL LEVY A/K/A LILACH LEVY A/K/A LILAC LEVY A/K/A LILAC F. ARRANGE AND LILAC ONE, INC. D/B/A LI LAC ONE** as to the plaintiff's first sixth causes of action in the complaint and to award the plaintiff the costs and expenses of this action is denied. The cross-motion by defendants for an order granting summary judgment in its favor and for an order pursuant to CPLR 3216 dismissing the plaintiff's

MEMORANDUM

**SUPREME COURT : QUEENS COUNTY
PART 35**

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AMERICAN EXPRESS

Plaintiff,

-against -

**LILACH FLORAL LEVY A/K/A LILACH LEVY
A/K/A LILAC LEVY A/K/A LILAC F. ARRANGE
AND LILAC ONE, INC. D/B/A LI LAC ONE,**

Index No.:13308/2010

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Motion Seq. 1

Defendants.

-----X

In this action seeking damages for breach of a credit card contract plaintiff **AMERICAN EXPRESS** moves for an order pursuant to CPLR 3212 granting summary judgment in its favor and against defendants **LILACH FLORAL LEVY A/K/A LILACH LEVY A/K/A LILAC LEVY A/K/A LILAC F. ARRANGE AND LILAC ONE, INC. D/B/A LI LAC ONE (hereinafter “Levy and Lilac One”)** as to the plaintiff’s first six causes of action in the complaint, and the defendants cross-motion for an order granting summary judgment in their favor and for an order pursuant to CPLR 3216 dismissing the plaintiff’s complaint as against them based upon the plaintiff’s alleged failure to provide discover demands and its failure to establish any debt due.

The plaintiff claims that it has established its *prima facie* case entitling the plaintiff to summary judgment by demonstrating through indisputable documentary evidence that defendants Levy and Lilac One Lilac were given a Business Gold Rewards Card (“credit card”) to use and incurred eighty nine thousand eight hundred seventy-one dollars and forty cents (\$89,871.40) in credit charges. The plaintiff argues that it sent out monthly statements to defendants Levy and Lilac delineating the time, place and amount of each charge but that they failed to make any payments to the plaintiff.

The proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law by tendering legally sufficient evidence to

demonstrate the absence of any material issues of fact. Alvarez v. Prospect Hospital, 68 N.Y. 2d 320 (1986); Zuckerman v City of New York, 49 N.Y. 2d 557 (1980). In this breach of contract action the plaintiff must establish that a contract in fact existed between it and defendants Levy and Lilac One and that the defendants breached the terms of such contract. The plaintiff must provide sufficient documentary evidence to establish that monthly account statements were in fact delivered to and accepted without objection by the defendants and that they were the persons that incurred these debts.

To support its claim the plaintiff has provided a copy of the Business Charge Card Agreement (“Agreement”) issued to defendants Levy and Lilac One and copies of the Business Gold Rewards Card billing Statements dated March 2, 2009 through and including, February 14, 2010. The plaintiff maintains that it mailed these statements to the defendants as well as a demand for payment letter. Additionally, the plaintiff has also submitted an affidavit from R. Joshua Knurr an assistant custodian of records for American Express Bank, who states that he is an individual with personal knowledge who duly affirmed that these records were kept in the regular and ordinary course of the plaintiff’s business.

Based upon the documentary evidence submitted by the plaintiff the Court finds that the plaintiff has not made the requisite *prima facie* showing. Plaintiff is not permitted in its reply papers to introduce new evidence in support of its prima facie case (See, Exhibit 1 of plaintiff’s reply). Accordingly plaintiff’s motion for summary judgment is denied in its entirety.

In opposition to the plaintiff’s motion, the defendants cross-move for an order granting summary judgment in their favor and for an order pursuant to CPLR 3216 dismissing the plaintiff’s complaint as against them based upon the plaintiff’s alleged failure to provide discovery demands and its failure to sufficiently establish any debt due by the defendants. In support of their cross-motion, defendants Levy and Lilac submit a sworn affidavit dated January 28, 2012 and signed by defendant Lilac Levy, stating that he has objected to and continues to object to paying for items reflected on the billing statements for items he never purchased. He claims that he never used this credit card to make the purchases reflected in the billing statements and that the plaintiff has not submitted any actual receipts of the charges made to establish that the defendants were the

persons that did incur these expenses and that he should not be made to pay for those incurred charges. The defendant also states that he disputed these items and that the plaintiff should have, but failed to investigate his disputes. Defendant's motion for discovery is granted to the extent that plaintiff is ordered to provide discovery and answer within 60 days of service of this order with notice of entry or plaintiff will be precluded from offering evidence at trial.

Accordingly, the plaintiff's motion is denied and the defendants' cross-motion is granted to the extent indicated in the memorandum decision.

Dated: September 28, 2012

TIMOTHY J. DUFFICY, J.S.C.