HSBC Bank USA v Brisk
2013 NY Slip Op 33501(U)
December 31, 2013
Supreme Court, Kings County
Docket Number: 500098/09
Judge: Noach Dear

At an IAS Term, Part SCCCDP, of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 141 Livingston Street, Brooklyn, New York, on the 15th day of October 2013.

PRESENT:

HON. NOACH DEAR,

A.J.S.C.

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HSBC BANK USA,

Plaintiffs,

DECISION AND ORDER

-against-

SOLOMON BRISK; S BRISK INC,

Defendants,

_____ x

Recitation, as required by CPLR §2219 (a), of the papers considered in the review of this Order to Show Cause:

Papers	**Numbered**
Moving Papers and Affidavits Annexed	1, 2
Answering/Cross-Moving Papers and Supplement	_____
Reply Papers	_____

Upon the foregoing cited papers, the Decision/Order on this Motion is as follows:

Plaintiff, HSBC BANK USA, NA, moves this Court for an Order pursuant to CPLR 3212 granting it summary judgment against the individual Defendant in this action sounding in breach of a credit card agreement and account stated. Plaintiff further seeks to have Defendant's counterclaims dismissed.

I. Plaintiff's Claims

"[T]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence [in admissible form] to

demonstrate the absence of any material issues of fact" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986] [citations omitted]; *Morreale v Serrano*, 67 AD3d 655 [2d Dept 2009] [citations omitted]). "Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers" (*Winegrad v N.Y. Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985] [citations omitted]). In this regard, plaintiff failed to establish its prima facie case with proof in admissible form (*Young Hee Kim v Handelsman*, 48 AD3d 459 [2d Dept 2008]).

In support of its motion, plaintiff offered the affidavit of Carolyn Rex, an Assistant Vice President of Plaintiff. While the employee of a company handling the plaintiff's records may lay the foundation for the plaintiff's records to be in admitted into evidence, Ms. Rex's affidavit was insufficient (CPLR 4518[a]; *Andrew Carothers, M.D., P.C. v Geico Indem. Co.*, 79 AD3d 864 [2d Dept 2010]). Ms. Rex's conclusory testimony failed to demonstrate that he was familiar with the particular record-keeping procedures of the plaintiff (*see West Val. Fire Dist. No. 1 v Village of Springville*, 294 AD2d 949, 950 [4th Dept 2002]; *Palisades Collection, LLC v Kedik*, 67 AD3d 1329 [4th Dept 2009]).

Further, with respect to the documents, she failed to establish that entrant was under a business duty to record the event and that the informant was also under a contemporaneous business duty to report the information as well (*Hochhauser v Elec. Ins. Co.*, 46 AD3d 174, 180 [2d Dept 2007]). Thus, the plaintiff failed to establish its prima facie case with proof in admissible form (*see e.g. Harrison v Bailey*, 79 AD3d 811, 813 [2d Dept 2010]; *see also Lodato v Greyhawk North America, LLC*, 39 AD3d 494 [2d Dept 2007]; *see also Corsi v. Town of Bedford*, 58 AD3d 225, 229 [2d Dept 2008] [citations omitted]; *see also Education Resources Institute, Inc. v. Piazza*, 17 AD3d 513, 515 [citations omitted]).

With respect to the account statements plaintiff failed to establish their mailing (*Westchester Med. Ctr. v N.Y. Cent. Mut. Fire Ins. Co.*, 81 Ad3d 929 [2d Dept 2011]; *Mid City Const. Co., Inc. v Sirius America Ins. Co.*, 70 AD3d 789 [2d Dept 2010]). Thus, the claim was not established as a matter of law (*Residential Holding Corp. v Scottsdale Ins. Co.*, 286 AD2d at 680; *Simplex Grinnell, LP v Manor*, 59 AD3d 610 [2d Dept 2009]; *Westchester Med. Ctr. v N.Y. Cent. Mut. Fire Ins. Co.*, 81 AD3d 929 [2d Dept 2011]).

Defendant has also raised issues of fact as to whether he signed as a guarantor. While certain portions of the agreement appear to unequivocally show that he did, others such as the whited out portions and the different hand-writings raise issues that would best be addressed at trial.

Accordingly, plaintiff failed to establish its entitlement to judgment as a matter of law for breach of contract and account stated (*PRA III, LLC v Gonzalez*, 54 AD3d 917 [2d Dept 2008]).

II. Defendant's Counterclaims

Plaintiff seeks to have Defendant's counterclaims dismissed but barely addresses them in its motion papers and reply (and, to the extent that it does, seems confused.) Defendant did not address the counterclaims at all in his opposition. As Plaintiff argues that Defendant filed to state a claim, however, the Court will address the counterclaims.

A. First Counterclaim

The first counterclaim appears to be for harassment[1] – they called him a lot attempting to collect a debt and threatened to use garnishment, if necessary. However, NY does not recognize a common law cause of action for harassment (*Santoro v Town of Smithtown*, 40 AD3d 736, 738 [2d

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[1]To the extent that Defendant meant a different cause of action, it is insufficiently pled and dismissed on that ground.

Dept 2007]). Thus, this counterclaim is dismissed.

B. Nuisance

Defendant seeks actual and punitive damages on the basis of "nuisance." Defendant appears to misunderstand the tort of "private nuisance." "The elements of a private nuisance cause of action are an interference (1) substantial in nature, (2) intentional in origin, (3) unreasonable in character, (4) with a person's property right to use and enjoy land, (5) caused by another's conduct in acting or failure to act" (*Aristides v. Foster*, 73 A.D.3d 1105 [2d Dept 2010]). Even were all of Defendant's allegations in his answer taken as true, he has not stated a claim for "nuisance" on which relief can be granted. Thus, this counterclaim is dismissed.

C. Intentional Infliction of Emotional Distress

While intentional infliction of emotional distress is indeed a cause of action, even were all of Defendant's factual allegations taken as true, he has not sufficiently pled this claim. (*See Capellupo v Nassau Health Care Corp.*, 97 AD3d 619, 623 [2d Dept. 2012]).

D. GBL 349

Defendant asserts that Plaintiff's conduct violated NYGBL §349. As pled, this claim is not a viable cause of action (*See North State Autobahn, Inc. v Progressive Ins. Group Co.*, 102 AD3d 5 [2d Dept. 2012]) and it too is dismissed.

E. Fifth Counterclaim

That Plaintiff left voicemail messages for him and, thus, trespassed on his chattel is also not a viable cause of action as pled herein and is also dismissed (*See Restatement (Second) Torts §217 et*

seq.)

Based on the above it is hereby

ORDERED that Plaintiff's Motion for Summary Judgment is **DENIED;** it is further

ORDERED that Defendant's first through fifth counterclaims are dismissed; it is further

ORDERED that this case is set for a conference in front of this Court, at 141 Livingston Street, Room 1101, Brooklyn, New York,11201 on January 6, 2013 at 9:30 AM.

The foregoing constitutes the decision and order of the Court.

ENTER:

Hon. Noach Dear, A.J.S.C.