

American Express Bank, FSB v Polo

2017 NY Slip Op 32454(U)

November 17, 2017

Supreme Court, New York County

Docket Number: 159201/2016

Judge: Robert D. Kalish

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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: Hon. ROBERT D. KALISH
Justice

PART 29

AMERICAN EXPRESS BANK, FSB,

INDEX NO. 159201/2016

Plaintiff,

MOTION DATE 9/19/17

MOTION SEQ. NO. 001

- v -

DEBORAH E POLO,

Defendant.

The following papers, numbered 8-15 and 18 were read on this motion for summary judgment.

Notice of Motion – Proposed Order – Memorandum of Law in Support –
Affirmation in Support – Exhibits A-B – Affidavit of Facts – Affidavit of
Service

Nos. 8-15

Affirmation in Opposition

No. 18

Motion by Plaintiff American Express Bank, FSB pursuant to CPLR 3212 for summary judgment against Defendant Deborah E. Polo is granted.

BACKGROUND

Plaintiff brought this action to collect a credit card debt. Plaintiff allegedly entered into a credit agreement with Defendant on July 9, 2014 to open an American Express Business Gold Rewards Card account. (Hernandez aff, exhibit A, at 1.) Plaintiff allegedly sent Defendant a credit card and cardmember agreement. (Aff of Hernandez ¶ 7.) The cardmember agreement lists the “Company” name for the credit card as “Art of Mac Inc” and the “Basic Cardmember” name as “Deborah Polo.” (Hernandez aff, exhibit A, at 1, 4.) According to the cardmember agreement, use of the credit card constitutes acceptance of the cardmember agreement, and both “[t]he Basic Cardmember and the Company [are] jointly and severally liable for all [c]harges made on the [a]ccount.” (Aff of Hernandez ¶ 5; Hernandez aff, exhibit A, at 4.) Plaintiff alleges that Defendant used the card and made payments on the card. Plaintiff further

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

alleges that the account was cancelled on or around March 21, 2016 with \$32,993.85 due and owing. (Hernandez aff, exhibit C.)

Plaintiff commenced this action against Defendant on November 1, 2017 by e-filing a summons and complaint. (Affirmation of Bann, exhibit A.) Defendant filed her answer on December 19, 2016. Plaintiff served the instant motion upon Defendant on July 20, 2017. Defendant served her opposition to the instant motion upon Plaintiff on September 14, 2017.

DISCUSSION

“To obtain summary judgment it is necessary that the movant establish his cause of action or defense sufficiently to warrant the court as a matter of law in directing judgment in his favor, and he must do so by tender of evidentiary proof in admissible form.” (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980] [internal quotation marks and citation omitted].) “Once this showing has been made, the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution.” (*Giuffrida v Citibank Corp.*, 100 NY2d 72, 81 [2003].) “On a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party.” (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012] [internal quotation marks and citation omitted].) In the presence of a genuine issue of material fact, a motion for summary judgment must be denied. (*See Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]; *Grossman v Amalgamated Hous. Corp.*, 298 AD2d 224, 226 [1st Dept 2002].)

A cause of action for breach of contract requires allegations of “the existence of a contract, the plaintiff’s performance under the contract, the defendant’s breach of that contract, and resulting damages.” (*JP Morgan Chase v. J.H. Elec. Co. of NY, Inc.*, 69 AD3d 802, 803 [2d Dept 2010].)

On the instant motion, Plaintiff presents adequate proof of the facts constituting its claim by means of its affidavit of facts. Plaintiff has shown prima facie that Defendant entered into an agreement to use the account by using the card on the account, made payments on the account, and owes \$32,993.85 on the account. As such, Plaintiff has met its prima facie burden for the purposes of the instant summary judgment motion, and the burden shifts to Defendant, who fails to raise a genuine issue of material fact.

Defendant's opposition to the instant motion takes the form of a cross-motion to dismiss on CPLR 305 (a) grounds. Specifically, Defendant argues—and Plaintiff makes no reply in response in the papers—that Plaintiff's summons should have recited "the county where the consumer credit transaction took place." (Affirmation of Polo ¶ 3.) CPLR 305 (a) provides, in relevant part:

"The summons in an action arising out of a consumer credit transaction shall prominently display at the top of the summons the words "consumer credit transaction" and, where a purchaser, borrower or debtor is a defendant, shall specify the county of residence of a defendant, if one resides within the state, and the county where the consumer credit transaction took place, *if it is within the state.*"

(Emphasis added.) The purpose of this provision is to avoid tactics by a creditor to set venue in a locality that is inconvenient to a debtor-defendant. CPLR 503 (f) restricts proper venue to either the "residence of a defendant, if one resides within the state or the county where such transaction took place, if it is within the state." [A] failure to comply with the technical requirements of CPLR 305 (a) does not warrant dismissal unless there is a showing of prejudice caused by such defect." (*Cruz v New York City Hous. Auth.*, 269 AD2d 108, 109 [1st Dept 2000].)

Here, Plaintiff's summons does prominently display at the top the text "CONSUMER CREDIT TRANSACTION" and does specify Defendant's county of residence, New York County, as the basis of venue. (Compl, at 1.) In her answer, Defendant admits that she resides in New York County. (Ans ¶ 2.)

While CPLR 305 (a) does, as Defendant points out, require that a summons in an action arising out of a consumer credit transaction specify the county where the consumer credit transaction took place, it need only do so "if it is within the state," a clause that Defendant omits from her reply papers. It may be that the transaction or transactions at issue took place in New York County, which is denoted on the summons as the county of venue and of Defendant's residence. It may be that the transactions took place outside of New York State. In either case, Plaintiff has complied fully with CPLR 305 (a). If the transaction did take place within New York State, as venue is proper in Defendant's county of residence, Defendant admits she is a resident of New York County, and venue is in fact in New York County, "[d]efendant [has] failed to show any prejudice whatsoever." (*Cruz* at 109.) As such, the cross-motion by Defendant to dismiss the complaint based on a defect in Plaintiff's summons pursuant to CPLR 305 (a) is denied.

Defendant’s remaining opposition in its papers to the instant motion alleges that the instant motion is defective because Plaintiff failed to serve a copy of the Request for Judicial Intervention (“RJI”) upon Defendant by mail. (Affirmation of Polo ¶ 6; NYSCEF, Index No 159201/2016, Doc 17.) Defendant’s counsel opted out of participation in electronic filing in the instant action. (NYSCEF, Index No 159201/2016, Doc 6.) The RJI is an administrative form used by the court system and contains no information material to the judgment of this Court. That Plaintiff has not served this administrative form upon Defendant is a mere irregularity. Further, while the Court might ordinarily include the RJI as among the papers read on the motion, the Court has not read the RJI on the instant motion.

CONCLUSION

Accordingly, it is


ORDERED that Plaintiff American Express Bank, FSB’s motion pursuant to CPLR 3212 for summary default judgment against Defendant Deborah E. Polo is granted; and it is further

ORDERED that the Clerk is directed to enter judgment in favor of Plaintiff in the amount of \$32,993.85, plus court costs and statutory interest from the date of the filing of this order with notice of entry; and it is further

ORDERED that Plaintiff serve a copy of this decision and order with notice of entry upon the Clerk of the Court and upon Defendant within 20 days of the issuance of this decision and order.

The foregoing constitutes the decision and order of the Court.

Dated: November 17, 2017
New York, New York

 J.S.C.
HON. ROBERT D. KALISH

- 1. Check one:.....
 - 2. Check if appropriate:..... MOTION IS:
 - 3. Check if appropriate:.....
- CASE DISPOSED NON-FINAL DISPOSITION
 - GRANTED DENIED GRANTED IN PART OTHER
 - SETTLE ORDER SUBMIT ORDER
 - DO NOT POST FIDUCIARY APPOINTMENT REFERENCE