

**American Express Travel Related Servs. Co., Inc. v  
Munilla Constr. Mgt., LLC**

2018 NY Slip Op 33264(U)

December 13, 2018

Supreme Court, New York County

Docket Number: 653874/2018

Judge: Joel M. Cohen

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY

PRESENT: HON. JOEL M. COHEN PART IAS MOTION 45

Justice

-----X INDEX NO. 653874/2018

AMERICAN EXPRESS TRAVEL RELATED SERVICES  
COMPANY, INC.

MOTION DATE 11/02/2018

Plaintiff,

MOTION SEQ. NO. 002

- v -

MUNILLA CONSTRUCTION MANAGEMENT, LLC,

DECISION AND ORDER

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35  
were read on this motion for SUMMARY JUDGMENT

Upon the foregoing documents

Plaintiff American Express Travel Related Services Company, Inc. seeks summary judgment against Defendant Munilla Construction Management, LLC in this credit card collection action. Specifically, Plaintiff seeks an Order granting it \$4,026,504.09 to which it claims to be entitled, reflecting an alleged unpaid balance of \$3,824,598.76 and associated late fees in the amount of \$201,905.00. There is no dispute that Defendant failed to pay outstanding credit card charges, but Defendant disputes (albeit in a conclusory way) the amount of money that remains due and owing. For the following reasons, Plaintiff's motion for Summary Judgment is Granted with respect to its claims for breach of contract and account stated and Denied with respect to its duplicative claim for unjust enrichment.

To obtain summary judgment, the moving party must make a *prima facie* showing of entitlement to judgment as a matter of law, through admissible evidence, eliminating all material issues of fact. CPLR. §3212(b); *Smalls v. AJI Indus., Inc.*, 10 N.Y.3d 733, 735 (2008); *JMD*

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*Holding Corp. v. Congress Fin. Corp.*, 4 N.Y.3d 373, 384 (2005); *Giuffrida v. Citibank Corp.*, 100 N.Y.2d 72, 81 (2003). If the moving party meets this standard, the burden shifts to the opposing party to rebut that *prima facie* showing by producing evidence, in admissible form, sufficient to require a trial of material factual issues. *Morales v. D & A Food Serv.*, 10 N.Y.3d 911, 913 (2008); *Hyman v. Queens County Bancorp, Inc.*, 3 N.Y.3d 743, 744 (2004).

Plaintiff seeks summary judgment on its three causes of action against Defendant: Breach of Contract; Account Stated; and Unjust Enrichment.

### ***Breach of Contract***

To establish a claim for breach of a contract, plaintiff must show the existence of a contract, that plaintiff performed, that defendants breached the contract, and that defendants' breach caused plaintiff to sustain damages. *Harris v. Seward Park Hous. Corp.*, 79 A.D.3d 425, 426 (1st Dep't 2010). Here, plaintiff has made a satisfactory *prima facie* showing of these four elements through the Affidavit of Richard Keir,<sup>1</sup> Plaintiff's Assistant Custodian of Records. In his Affidavit, Mr. Keir provides business records showing that Defendant opened an American Express Corporate Card account in April 2017. In doing so, Defendant signed an

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<sup>1</sup> Defendant takes issue with Plaintiff's submission of Mr. Keir's Affidavit. (Def. Memo in Opp at 4-5). Defendant argues because Mr. Keir based his Affidavit on his review of the files maintained by American Express as opposed to his personal knowledge, Mr. Keir's Affidavit is inadmissible to lay a foundation for the introduction of the Cardholder Agreement and invoices. That is incorrect. A custodian of records is not required to have personal knowledge of documents, their history, or specific content to satisfy the requirements for the documents to be admissible as business records. *Deleon v. Port Auth. Of N.Y. & N.J.*, 306 A.D.2d 146, 146 (1st Dep't 2003) ("[i]t is well settled that a business entity may admit a business record through a person without personal knowledge of the document, its history or its specific contents where that person is sufficiently familiar with the corporate records to aver that the record is what it purports to be and that it came out of the entity's files"). This court has previously found affidavits offered by Mr. Keir in similar circumstances to be acceptable for the purposes of introduction of documents. See, e.g., *American Express Travel Related Services Co. v. Hallmark Capital Group, LLC*, 2017 NY Slip Op 31369(U), 2017 WL 2778461 (Sup. Ct. N.Y. Co. 2017); *American Express Centurion Bank v. Weiss*, 2013 N.Y. Slip Op 32611(U), 2013 WL 5717122 (Sup. Ct. N.Y. Co. 2013); *American Express Travel Related Services Co., Inc. v. High Camp Supply, Inc.*, 2018 N.Y. Slip Op 32049(U), 2018 WL 3995978 (Sup. Ct. N.Y. Co. 2018).

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Application and Corporate Services Commercial Account Agreement. *Keir Affidavit*, ¶6; NYSCEF 27. Defendant used this card to make various purchases and/or take out cash advances. *Keir Affidavit*, ¶7. Plaintiff performed its obligations under the Agreement by extending credit to Defendant and billed Defendant each month for charges incurred. *Id.* at 7-8; Reply Memo at 6-7. Defendant failed to comply with its obligations under the Agreement, which states: “All payments must be made in accordance with the instructions on the company’s billing statement...”. NYSCEF 27.

Defendant fails to raise a triable issue of fact. It does not dispute that it entered into an Agreement with Plaintiff, that it incurred charges of \$3,824.598.76, or that it failed to repay this amount to Plaintiff.<sup>2</sup> Plaintiff has satisfactorily demonstrated its entitlement to judgment on its cause of action for breach of contract. See *MBNA Am. Bank, N.A. v Brenner*, 239 A.D.2d 566 (2<sup>nd</sup> Dep’t 1997) (summary judgment awarded when no *bona fide* issue of fact found to exist that the defendant and his wife applied for and were issued the subject credit card or that the balance accrued on the account was due to unauthorized use of the card.)<sup>3</sup>

### ***Account Stated***

To state a cause of action for account stated, the plaintiff must prove that an invoice was rendered showing a balance and that the receiving party failed within a reasonable time to dispute the account. *Morrison Cohen Singer & Weinstein, LLP v. Ackerman*, 280 A.D.2d 355,

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<sup>2</sup> Defendant seems to dispute only the delinquency fees and the status of a disputed September 2017 invoice, which are discussed in the next section (Account Stated).

<sup>3</sup> Plaintiff also seeks dismissal of Defendant’s Affirmative Defenses as conclusory and insufficient to defeat a motion for summary judgment. *S. J. Capelin Associates, Inc., v. Globe Manufacturing Corp.* 34 N.Y.2d 338, 342 (1974). Defendant does not address this argument in its opposition and, therefore, it is deemed conceded. *Gary v Flair Beverage Corp.*, 60 AD3d 413, 413 (1<sup>st</sup> Dep’t 2009).

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356 (1<sup>st</sup> Dep't 2001) (defendant's receipt and retention of law firm's retainer and monthly invoices without objection gave rise to an actionable account stated).

Here, the record shows, and Defendant does not dispute, that Defendant was sent monthly invoices since it opened its Corporate Card with Plaintiff in April 2017. The total outstanding balance owed to Plaintiff according to the July 2018 invoice is \$4,026,596.09.

While Defendant attempts to muddy the waters by claiming that Plaintiff failed to account for certain "disputes" regarding an invoice from *September 2017*, Defendant fails to note that the dispute was resolved by Defendant paying the September statement as presented *in full*. As such, the dispute upon which Defendant relies is irrelevant and does not raise a triable issue of fact. Reply Memo at 6-7; NYSCEF 28. *Coudert Brother v. Sylvia de Cuivas*, 247 A.D.2d 266, 267-67 (1<sup>st</sup> Dep't 1998) (summary judgment was properly granted to plaintiff on its cause of action for account stated where Defendant failed to object to invoices sent by plaintiff). The entirety of the unpaid balance sought by Plaintiff in this action arises from charges incurred *after February 2018*, well after the disputed September 2017 charge was paid in full. Reply Memo at 6-7; NYSCEF 28.

Finally, Defendant argues this motion is premature because the parties have not yet conducted discovery. However, the only issue Defendant deems seeks to explore is whether Plaintiff is entitled to certain delinquency fees that Defendant describes as "arbitrary" and thus improper. *Munilla Affidavit*, ¶6. Defendant seemingly overlooks section 17.4 of the Cardholder Agreement, which clearly sets forth the penalties for non-payment. Specifically, the Agreement provides for a late fee of \$39.00 for the first statement with a missed payment and thereafter the Account would accrue both late fees and delinquency charges to be assessed as the greater of \$39.00 or 2.99% of the balance subject thereto. NYSCEF 27, §17.4.

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Here, there are two separate delinquency charges assessed: a charge of \$84,996.22 assessed on June 28, 2018 for the unpaid balance of \$2,842,682.88 and a charge of \$116,831.11 assessed on July 28, 2018 for the unpaid balance of \$3,907,394.98. Both delinquency charges are 2.99% of the balance, in accordance with Section 17.4(b) and (c) of the Agreement. Defendant raises no genuine issue of material fact as to the calculation of these charges, which is a matter of straightforward arithmetic - 2.99% multiplied by \$2,842,682.88 equals \$84,996.22 (the June 2018 delinquency charge) and 2.99% multiplied by \$3,907,394.98 equals \$116,831.11 (the July 2018 delinquency charge).

In sum, Defendant has failed to refute Plaintiff's *prima facie* showing of entitlement to summary judgment on its claim for Account Stated.

### ***Unjust Enrichment***

Plaintiff's claim for unjust enrichment stems from the same transactions as its claim for breach of contract and seeks the same monetary damage. There is no dispute that a valid contract exists which governs Plaintiff's entitlement to recovery and Defendant's obligation to pay for its credit card usage. Accordingly, Plaintiff's claim for unjust enrichment is duplicative and must be dismissed. *Corsello v Verizon New York, Inc.*, 18 N.Y.3d 777, 790 (2012) (an unjust enrichment claim is not available where it simply duplicates, or replaces, a conventional contract or tort claim).

Therefore, it is:

**ORDERED** that Plaintiff's Motion for Summary Judgment on its First Cause of Action for Breach of Contract is Granted; it is further

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**ORDERED** that Plaintiff's Motion for Summary Judgment on its Second Cause of Action for Account Stated is Granted; it is further

**ORDERED** that Plaintiff's Motion for Summary Judgment on its Third Cause of Action for Unjust Enrichment is Denied;

**ORDERED** that Plaintiff's Motion for Summary Judgment dismissing Defendant's Affirmative Defenses is Granted; and it is further

**ORDERED** that the Clerk of the Court is directed to enter judgment in favor of Plaintiff and against Defendant in the amount of \$4,026,504.09, together with interest at the rate of 9% per annum from the date of this order is entered until the date the judgment is satisfied, together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs.

**HON. JOEL M. COHEN**  
J.S.C.

  
JOEL M. COHEN, J.S.C.

12/13/2018  
DATE

CHECK ONE:

CASE DISPOSED  
GRANTED  DENIED  
SETTLE ORDER  
INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION  
GRANTED IN PART  
SUBMIT ORDER  
FIDUCIARY APPOINTMENT

OTHER  
REFERENCE

APPLICATION:  
CHECK IF APPROPRIATE: