Capital One Bank (USA), N.A. v Mebane
2011 NY Slip Op 33599(U)
December 20, 2011
City Court of Canandaigua
Docket Number: CV-000517-11CA
Judge: Stephen D. Aronson
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NEW YORK STATE
COUNTY OF ONTARIO
CITY OF CANANDAIGUA

CANANDAIGUA CITY COURT

CAPITAL ONE BANK (USA), N.A.,
Plaintiff,

-against-

WILLIAM T. MEBANE,

Defendant.

Index No. CV-000517-11/CA

DECISION ON MOTION FOR SUMMARY JUDGMENT

Presiding: Hon. Stephen D. Aronson

Appearances: Plaintiff: Cohen & Slamowitz, LLP, by Tiffany LaMar, Esq.
Defendant: *Pro se*

PROCEDURAL BACKGROUND

The summons and verified complaint of Capital One Bank (USA), N.A. (hereinafter "plaintiff") were filed in this court on July 1, 2011, followed shortly by an affidavit showing personal service on William T. Mebane (hereinafter "defendant") on July 11. The complaint alleges that defendant owes plaintiff $1,359.54, with interest from December 13, 2010.

On July 20, 2011, defendant filed an answer, which the court sent to plaintiff's attorneys. The answer did not deny that the defendant owed plaintiff money or dispute the amount owed. It consisted solely of contact information for an agency with which defendant is working to address the debt.

Plaintiff filed a notice of motion and motion for summary judgment on October 24, 2011. Defendant filed a responsive memorandum of law on October 31, 2011; attached thereto was an affidavit of the defendant, sworn to on October 31, 2011. Plaintiff filed a reply affirmation on

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November 15, 2011.

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Plaintiff submitted an affidavit of Angela Zalewski, an employee of its Recovery Division, showing that defendant applied for a credit card with plaintiff, that defendant used the card, that credit card statements were mailed to defendant, and that he failed to make payments. The statements submitted with the affidavit span the time from October 11, 2008 to December 11, 2010. They show that defendant's final payment of $50 was made on May 2, 2010. Plaintiff also submitted an affirmation of Attorney LaMar alleging that there is no triable issue of fact and that plaintiff is entitled to entry of judgment as a matter of law on the grounds of breach of contract and account stated. She alleges that plaintiff has set forth a prima facie showing of the debt and that defendant has failed to meet his burden of offering admissible proof sufficient to establish the existence of material issues of fact.

DEFENDANT'S RESPONSIVE AFFIDAVIT

The defendant admits that he owes some money on the account but disputes the amount owed. He requests a detailed accounting of purchases and payments. He seeks production of any signed written contract. He states that the complaint is not property verified and that the interest rates charged are usurious. The court would note that the account statements are annexed to the plaintiff's motion papers and show the charges and payments. The court would also note that the written contract is annexed to the motion papers; and, as indicated by plaintiff's representative, the contract is only sent to a prospective cardholder after an application has been approved. The defendant does not have to sign a contract. The defendant does not dispute this procedure in his

responsive affidavit. The defendant's assertions about the verification and incorrect rates are conclusory and do not create a question of fact.

DEFENDANT'S MEMORANDUM OF LAW

Defendant's memorandum attacks the sufficiency of the affidavit of Ms. Zalewski on the grounds that (1) she does not state how long she has worked for the plaintiff; (2) she does not show that she had personal knowledge of the transactions on defendant's credit card statements when they occurred; and (3) the affidavit is from Virginia and not New York, and therefore it must, according to CPLR § 2309, be accompanied by a "certificate of conformity" attesting that the oath was administered in accordance with the laws of either the Commonwealth of Virginia or the State of New York. Additional points made by defendant are that plaintiff's motion papers are deficient because they lack (4) a statement of the law of the state that governs the interest rate being charged by plaintiff so the court has assurance that it is not excessive; (5) a recitation of the terms of the original credit card agreement and an averment that the terms were mailed to the card holder, and/or a signed copy of the agreement; and (6) credit card statements prior to October 2008, at which point there was already a balance owed.

In the absence of any authority cited by defendant for his position that the length of affiant's tenure in the job must be stated in order for a plaintiff/creditor's affidavit to be sufficient, the court determines the first argument to be nonmeritorious.

As for the second allegation, CPLR § 3212(b) provides that the creditor's affidavit shall be signed by a person having knowledge of the pertinent facts. Defendant avers on page four of his memorandum–where he refers to the affiant as an employee of American Express rather than

Capital One–that "[Ms. Zalewski] definitely does not have personal knowledge of the transactions when the transactions occurred." He does not explain how he formed this opinion. Paragraph three of the affidavit actually states the opposite: "As part of my duties...I am personally familiar with the records...." Defendant cites *Citibank (South Dakota) N.A. v. Jones,* 272 AD2d 815 (3d Dept 2000) to bolster his argument. In that decision, summary judgment was upheld on appeal, since the defendant never disputed the fact that she received account statements, that she made purchases with the card, and that she owed the amount stated in the complaint. The Defendant here has similarly never disputed any of those matters.

Defendant's third point, that a certificate of compliance is required for an out-of-state affidavit, is a valid point. This is a requirement of CPLR § 2309(c). However, the defendant has not shown any prejudice due to this omission, nor is it a jurisdictional flaw. Plaintiff may cure this omission by subsequently serving and filing a certificate of compliance, and the court can choose to give it effect *nunc pro tunc*. (See *Nandy v. Albany Medical Center Hosp.,* 155 AD2d 833 [3d Dept 1989]; see also practice commentaries to CPLR § 2309.)

Defendant's fourth point is also correct. CPLR § 3212 does require a credit card issuer seeking summary judgment to provide a statement of the law governing its interest rate. The Plaintiff did not do this initially but has included such a statement in its reply affirmation.

In defendant's fifth point, he alleges that the plaintiff did not provide a recitation of the terms of the original credit card agreement and an averment that the terms were mailed to the card holder, and/or a signed copy of the agreement. These contentions have no merit where a copy of the Capital One Customer Agreement is appended to plaintiff's affidavit as exhibit A, and paragraph six of the affidavit states that the agreement was mailed to the defendant.

The sixth point concerns conclusory assertions about the absence of statements prior to October 2008. The defendant does not explain how this prejudices him, since he is not disputing the accuracy of the amount shown owing on the most recent statement filed by plaintiff from December 2010. The court notes that the entire period from October 2008 through December 2010 is covered by the statements provided. In the absence of any explanation why the statements are essential to defendant's defense, the court finds that the conclusory allegation about the absence of statements from prior to October 2008 is not a triable issue that can defeat a motion for summary judgment.

Finally, defendant's memorandum includes a lengthy, tangential discussion of the practice of "robo-signing," whereby large companies employ people to sign documents all day long, the contents of which they know nothing. Most of the cases cited deal with affiants who are employees of assignee banks and who are unable to authenticate documents that are from the original lenders. (See, e.g., *PRA III, LLC v. MacDowell*, 841 NYS2d 822 (NY Civ Ct 2007.) This discussion is out of place in this case, where we are dealing with the original bank and with an affiant who has sworn that she is an employee of that bank and that she has personal familiarity with defendant's account records.

PLAINTIFF'S REPLY AFFIRMATION

Plaintiff responds to defendant's attacks on the sufficiency of Ms. Zalewski's affidavit by reiterating that Ms. Zalewski is an agent of the plaintiff, not of an assignee, and that her affidavit states that the ground for her belief is a review of the records, electronic data, and account-specific information belonging to Capital One Bank that pertain to the defendant.

As for the credit card agreement, plaintiff points out that the defendant consented to a binding agreement with the plaintiff by using the card as documented in the statements of his account and by his own admissions (see *Bank of America v. Jarczyk,* 268 B.R. 17 [W.D. N.Y. 2001]). It also points out that defendant's failure to object to the amount due within 60 days of the date of any of his statements supports a cause of action by plaintiff for an account stated (see, e.g. *Citibank (South Dakota) N.A. v. Runfola,* 283 AD2d 1016 [4th Dept 2001]; *Citibank (South Dakota) N.A. v. Poynton,* 187 Misc 2d 397 [2d Dept 2000]). Plaintiff argues further that a creditor is not required to produce a signed copy of the credit card agreement for a summary judgment motion in a cause of action for an account stated because the account stated is independent of the original obligation (see *Sherman Acquisition Ltd Partnership v. Thomas,* 8 Misc 3d 1230(A), 801 NYS2d 781 [NY Sup App Term 2005}; *Capital One, FSB v. Spierer,* WL 32083120 at 2-3 [NY Sup App Term 2002]). The court notes that the complaint does not contain a cause of action for an account stated but only for the breach of an agreement.

In response to defendant's fourth argument above, plaintiff includes in the affirmation the statement that in Virginia, where Capital One is located, a bank "may impose finance charges . . . at such rates and in such amounts and manner as the borrower has agreed" (Virginia Codified Laws § 6.2-309). It points out that defendant consented to plaintiff's 16.9% interest rate by using the credit card.

The court notes that as a national bank, Capital One has the right to charge the going rate in its home state even if that rate is higher than the New York rate (see National Bank Act, 12 USC § 85). The fact that the current rate in New York happens to be 16% (3 NYCRR 4.1) is irrelevant since plaintiff is a national bank. The court notes further that the 16.9% interest rate is

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shown on each of the statements submitted with plaintiff's motion papers and that the Capital One Customer Agreement states at the top of the third page: "We will charge Interest Charges and Fees to your Account as disclosed to you in your Statements. . . ."

FINDINGS AND CONCLUSIONS

(1) The court finds Ms. Zalewski's affidavit to be legally sufficient and that the defendant's affidavit contains, for the most part, only conclusory allegations..

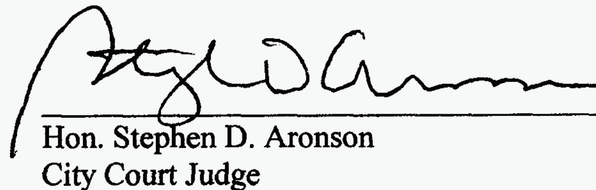
(2) The court finds that plaintiff has supplied the required basis in Virginia law for its interest rate.

(3) The court finds that plaintiff erred in failing to include in its summary judgment motion papers a certificate of conformity for the out-of-state affidavit pursuant to CPLR § 2309(c). The court finds, however, that this defect is not jurisdictional and can be cured without prejudice to defendant.

Based upon the memoranda, affirmations, affidavits, and exhibits filed by both parties in this matter, this court determines that there are no material issues of fact that are in controversy.

Plaintiff's motion for summary judgment is hereby granted, contingent upon receipt by the court of the certificate of conformity mentioned above and of proof of its service upon defendant no later than February 1, 2012. The order submitted by plaintiff granting its summary judgment motion will be signed by the court if and when this contingency is met.

December 20, 2011



Hon. Stephen D. Aronson
City Court Judge