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Short Form Order

NEW YORK STATE SUPREME COURT – QUEENS COUNTY
Present: HONORABLE BERNICE D. SIEGAL IAS TERM, PART 19
Justice

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American Express Centurion Bank,

Plaintiff,

-against-

Frank Roel,

Defendant.

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Index No.: 7817/09
Motion Date: 8/1/12
Motion Cal. No.: 2
Motion Seq. No.: 1

The following papers numbered 1 to 16 read on this motion for an order granting summary judgment pursuant to CPLR 3212, in the amount of $64,482.30 and b) the costs and disbursement of this action.

	PAPERS NUMBERED
Notice of Motion-Affidavits-Exhibits……...	1 - 4
Affirmation in Opposition…….	5 - 9
Reply……...	10 - 12
Supplemental Affirmation in Opposition…….	13 - 14
Reply to Supplemental Affirmation in Opposition……..	15 - 16

Upon the foregoing papers, it is hereby ordered that this motion is resolved as follows:

Plaintiff American Express Centurion Bank (hereinafter, "plaintiff") moves for an order pursuant to CPLR §3212 granting summary judgment in the amount of $64,482.30.

Facts

This is an action for plaintiff to recover the sum of $64,482.30 from defendant Frank Roel (hereinafter, "defendant"). Defendant was the basic cardholder member of an American Express

Centurion Bank credit card (hereinafter, the "Card"), and was responsible for paying all amounts charged to the Account. However, defendant defaulted in June of 2008 and then stopped making payments in August 2008. On March 18, 2009, plaintiff filed a summons and verified complaint.

Contentions

Plaintiff contends that defendant breached the cardmember agreement that was provided along with the Card, and that plaintiff owes the sum of $64,482.30. In opposition, defendant contends that plaintiff failed to offer any proof as to the accuracy of the amount of the debt owed by defendant and that defendant never entered into a signed contract with plaintiff agreeing to an interest rate in the amount of 29%. In response, plaintiff contends that, because the cardholder agreement between plaintiff and defendant became effective when plaintiff used the Card, a signed contract is unnecessary, and that, because plaintiff is a FDIC Bank, the interest rate charged can be higher than those allowed by New York state law. In its Supplemental Opposition, defendant additionally contends that he disputed the debt once plaintiff increased the interest rates. In its Response to the Supplemental Opposition, plaintiff objects to a supplemental opposition pursuant to CPLR §2214, contends that defendant asserts a new argument on his alleged objection to the interest rates, and explains how the interest rates were increased in compliance with the terms of the cardmember agreement and with the change in the terms of the account set forth in the November 2008 billing statement.

Plaintiff's motion for an order pursuant to CPLR §3212 granting summary is granted in its entirety as more fully set below.

Discussion

I.Standard for Summary Judgment

The Court of Appeals of New York has held that "[t]o grant summary judgment, it must clearly appear that no material and triable issue of fact is presented." (*Forrest v. Jewish Guild for the Blind*, 3 N.Y.3d 295, 314 [2004]; *Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395, 404 [1957]; *see also Gitlin v. Chirinkin*, 98 A.D.3d 561, 561 [2d Dep't 2012].) The moving party "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case." (*Winegrad v. New York University Medical Center*, 64 N.Y.2d 851, 853 [1985]; *see also Forrest*, 3 N.Y.3d at 315; *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, 324 [1986]; *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 [1980]; *Winter v. Black*, 95 A.D.3d 1208, 1208 [2d Dep't 2012].) If the moving party fails to make such prima facie showing, then denial is required "regardless of the sufficiency of the opposing papers." (*Alvarez*, 68 N.Y.2d at 324; *Wineguard*, 64 N.Y.2d at 853; *Winter*, 95 A.D.3d at 1208.) Once the moving party makes its prima facie showing, the burden then shifts to the opposing party to "'show facts sufficient to require a trial of any issue of fact'" to defeat the proponent's motion for summary judgment. (*Zuckerman*, 49 N.Y.2d at 562, quoting CPLR §3212[b]; *see also Alvarez*, 68 N.Y.2d at 324; *Guzman v. Strab Construction Corp.*, 228 A.D.2d 645, 646 [2d Dep't 1996].) However, evidentiary proof must be in admissible form, and cannot be "mere conclusions, expressions of hope or unsubstantiated allegations or assertions." (*Zuckerman*, 49 N.Y.2d at 562; *see also Gilbert Frank Corp. v. Federal Insurance Co.*, 70 N.Y.2d 966, 967 [1988]; *Javaheri v. Old Cedar Development Corp.*, 84 A.D.3d 881, 887 [2d Dep't 2011]).

II. Whether a Contract Exists Between Plaintiff and Defendant

The first issue is whether a contract exists between plaintiff and defendant. "The relationship between the issuer of a credit card and the holder and user of the credit card is contractual."

(*Citibank [South Dakota], N.A. v. Maniaci*, 23 Misc. 3d 1103(A) [Dist. Ct. Nassau County 2009], citing *Citibank [South Dakota], N.A. v. Sablic*, 55 A.D.3d 651, [2d Dep't 2008].) "It has been established that in the absence of a binding credit agreement, the 'issuance of the credit card constitutes an offer of credit, and the use of the credit card constitutes the acceptance of the offer of credit'." (*Citibank [South Dakota], N.A. v. Bryce*, 13 Misc. 3d 1227(A) [Sup. Ct. Monroe County 2006], quoting *Feder v. Fortunoff, Inc.*, 123 Misc. 2d 857, 859 [Sup. Ct. Nassau County 1984]; *see also American Express Centurion Bank v. Charlot*, 2010 WL 3235399 [Sup. Ct. N.Y. County 2010]; *Maniaci*, 23 Misc. 3d 1103(A).) Moreover, '[t]he terms of the contract are the credit card agreement." (*Maniaci*, 23 Misc. 3d 1103(A), citing *Brower v. Gateway 2000, Inc.*, 246 A.D.2d 246 [1st Dep't 1998].)

Here, in response to defendant's request to open an account, plaintiff issued defendant the Card and mailed the Card and cardmember agreement to defendant's provided address. Once defendant utilized the Card, his use constituted the acceptance of the offer of credit. Furthermore, the third sentence of the first paragraph of the cardmember agreement provides, in pertinent part, that "[w]hen you keep, sign[,] or use the Card issued to you . . . , or use the account associated with this Agreement (your "Account"), you agree to the terms of this Agreement." Thus, a contract exists between plaintiff and defendant; and plaintiff has established its prima facie showing. Defendant has failed to raise an issue of triable fact with its claim that a signed contract is needed for a contract to exist between plaintiff and defendant.

III. Whether Plaintiff Is Entitled to the Sum of $64,482.30

The second issue is whether plaintiff is entitled to the sum of $64,482.30, the alleged amount that defendant owes plaintiff on the Account. The Second Department held in *American Express Centurion Bank v. Gabay*, 94 A.D.3d 795 [2d Dep't 2012], that:

> plaintiff met its prima facie burden of establishing its entitlement to judgment as a matter of law, tendering evidence that it generated account statements for the defendant in the regular course of business, that it mailed those statements to the defendant on a monthly basis, and that the defendant accepted and retained these statements for a reasonable period of time without objection, and made partial payments thereon. (*American Express Centurion Bank*, 94 A.D.3d at 795, citing *American Express Centurion Bank v. Williams*, 24 A.D.3d 577, 577 [2d Dep't 2005]; *Citibank [South Dakota], N.A. v. Jones*, 272 A.D.2d 815, 816–17 [3d Dep't 2000]; *Sullivan v. REJ Corp.*, 255 A.D.2d 308, 308 [2d Dep't 1998].)

Here, plaintiff proffers the affidavit of Linda Salas ("Salas"), plaintiff's cardmember agreement with defendant, and defendant's credit card monthly statements from October 2007 until March 2009 as business records pursuant to CPLR §4518(a), which provides, in pertinent part, that

> [a]ny writing whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence or event, shall be admissible in evidence in proof of that act, transaction, occurrence or event, if the judge finds that it was made in the regular course of any business and that it was the regular course of such business to make it, at the time of the act, transaction, occurrence or event, or within a reasonable time thereafter.

In addition, "[a] proper foundation for the admission of a business record must be provided by someone with personal knowledge of the maker's business practices and procedures." (*Unifund CCR Partners v. Youngman*, 89 A.D.3d 1377, 1378 [4th Dep't 2011]; *West Valley Fire District No. 1 v. Village of Springville*, 294 A.D.2d 949, 950 [4th Dep't 2002]; *American Express Centurion v. Teitelbaum*, 36 Misc. 3d 1229(A) [Sup. Ct. Kings County 2012].)

Salas states in her affidavit that she had personal knowledge of the transactions and activities occurring in plaintiff's regular course of business affecting defendant's Account. Therefore, Salas's

affidavit is an admissible business record and is evidence proffered for plaintiff's prima facie showing of entitlement for summary judgment. In addition, because Salas's affidavit is an admissible business record and asserts that plaintiff's cardmember agreement with defendant and defendant's credit card monthly statements are accurate representations, both plaintiff's cardmember agreement with defendant and defendant's credit card monthly statements are admissible business records offered to establish plaintiff's prima facie showing. Therefore, plaintiff met its prima facie burden of establishing its entitlement to judgment as a matter of law with Salas's affidavit, plaintiff's cardmember agreement sent to defendant, and defendant's credit card monthly statements from October 2007 until March 2009 as evidence.

The main contention between plaintiff and defendant deals with how the sum of $64,482.30 was generated and why the interest rate increased from April 2008 until December 2008. Plaintiff explains in its Affirmation in Reply to Defendant's Supplemental Opposition to Plaintiff's Motion for Summary Judgment that, according to Section B in the cardmember agreement, the interest rate is the Prime Rate plus 9.99% and that, according to Section D in the cardmember agreement, the interest rate increases to the Prime Rate plus 21.99% upon default. "The terms of an agreement are to be interpreted in accordance with their plain meaning." (*Citibank [South Dakota], N.A. v. Maniaci*, 23 Misc. 3d 1103(A), citing *Greenfield v. Philles Records, Inc.*, 98 N.Y.2d 562, 569 [2002]; and *Tikotzky v. New York City Transit Authority*, 286 A.D.2d 493, 494 [2d Dep't 2001].) Interpreting these terms using its plain meaning shows that beginning on April 30, 2008, the Prime Rate was 5%; and once defendant defaulted in May 2008, the interest rate increased to the rate of 26.99%. In addition, on December 2009, defendant's interest rate increased to 27.99% in accordance with the change in the terms of the account set forth in the November 2008 statement, which

provided that the default rate was increasing to the Prime Rate plus 23.99%. This increased interest rate of 27.99% was only applied for one month, and the balance due at that time was $64,444.30. After January 2009, the only fee charges applied were late fees and this progressed only for two months, totaling to the amount requested of $64,482.30. Thus, the sum of $64,482.30 was computed within the plain meaning of the terms set forth in plaintiff's cardmember agreement with defendant; and plaintiff has established its prima facie showing of entitlement of summary judgment.

Defendant failed to raise an issue of triable fact on the computation of the sum of $64,482.30. Defendant proffered his affidavit in his Supplemental Affirmation in Opposition to Plaintiff's Motion for Summary Judgment asserting that defendant objected to plaintiff's statements sent to him once the interest rate drastically increased from 11.5% in May 2008 to 17.99% in June 2008 and then up to 26.99% in July 2008 and as high as 27.99% thereafter. However, defendant fails to submit evidence in admissible form buttressing his claim that he made contact with American Express regarding the increased interest rates. Rather, it appears as though defendant's affidavit presented feigned issues of fact designed to avoid the consequences of the within motion for Summary Judgment. On the contrary, Salas's affidavit asserts that according to her review of defendant's business records, plaintiff did not receive any notice from defendant regarding any dispute with respect to the amount due under the Account or any billing error or inaccuracy that remains unresolved. In addition, defendant asserts that he made no payments toward the Account's balance after June 2008. However, a review of these statements shows that defendant's statement is false. In fact, defendant made a payment of $2,300.00 on July 11, 2008, but, failed to make any payments from August 11, 2008 to March 12, 2009. Thus, defendant failed to raise an issue of fact as to how the sum of $64,482.30 was computed.

Conclusion

For the reasons set forth above, plaintiff's motion for summary judgment pursuant to CPLR §3212 is granted in the amount of $64,482.30.

This constitutes the decision and order of this court.

Dated: September 14 , 2012

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Bernice D. Siegal, J. S. C.