

Pride Acquisitions LLC v Benson

2012 NY Slip Op 33065(U)

December 19, 2012

Sup Ct, Westchester County

Docket Number: 59416/11

Judge: Lester B. Adler

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To commence the statutory time period for appeals as of right (CPLR §5513(a)), you are advised to serve a copy of this order, with notice of entry upon all parties.

SUPREME COURT: STATE OF NEW YORK
COUNTY OF WESTCHESTER
-----X

PRIDE ACQUISITIONS LLC,

Plaintiff,

-against-

SHORT FORM ORDER

DOROTHY L. BENSON,,

Defendant.
-----X

Index No.: 59416/11

ADLER, J.

The following papers numbered 1 to 14 were read on plaintiff's motion for summary judgment (see CPLR §3212):

Papers Numbered

Notice of Motion; Affirmation of Robert A. Meyerson, Esq.;	
Exhibits; Affidavit of William Denniger; Exhibits	1-10
Affidavit in Opposition of Dorothy L. Benson	11
Affirmation of Guy R. Fairstein, Esq.	12
Memorandum of Law in Opposition	13
Reply Affirmation of Karishma Patel, Esq.	14

Plaintiff commenced this action for breach of contract and account stated seeking to recover the balance on a credit card issued to defendant by Chase Bank USA, N.A., which allegedly assigned the debt to plaintiff. Plaintiff now moves for summary judgment.

In order to prevail on a motion for summary judgment, the moving party “must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact” (*Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324, 508 N.Y.S.2d 923, 501 N.E.2d 572 [citations omitted]). Failure to make that initial showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v. New York University Med. Ctr.*, 64 N.Y.2d 851, 853, 487 N.Y.S.2d 316, 476 N.E.2d 642). However, once this showing has been made, the burden shifts to the party opposing the motion to “produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he [or she] rests his [or her] claim or must demonstrate an acceptable excuse” for his or her failure to do so (*Zuckerman v. City of New York*, 49 N.Y.2d 557, 560, 427 N.Y.S.2d 595, 404 N.E.2d 718). In making this determination, the evidence must be viewed in the light most favorable to the non-moving party (*Pearson v. Dix McBride*, 63 A.D.3d 895, 883 N.Y.S.2d 53, 53), and inferences that may be drawn therefrom must be accepted as true (*Dykeman v. Heht*, 52 A.D.3d 767, 769, 861 N.Y.S.2d 732).

In order to establish its prima facie entitlement to summary judgment on its causes of action for breach of a credit card agreement an account stated, plaintiff was required to submit sufficient admissible evidence to establish the existence of an agreement to extend credit, use of the card, retention of the statements without objection, payments on the account, and a subsequent breach of the agreement to pay the credit card debt (see *Citibank (South Dakota) v. Sablic*, 55 A.D.3d 651, 652, 865 N.Y.S.2d 649; *Citibank (S.D.) v. Roberts*, 304 A.D.2d 901, 757 N.Y.S.2d 365). Although

plaintiff has submitted copies of statements allegedly sent to defendant plaintiff has failed to lay a proper foundation for the admission of these documents as business records pursuant to CPLR §4518(a) (see *Velocity Invs., LLC v. Cocina*, 77 A.D.3d 1306, 909 N.Y.S.2d 853; *Rushmore Recoveries X, LLC v. Skolnick*, 15 Misc. 3d 1139(A), 841 N.Y.S.2d 823).¹

Plaintiff further seeks to sustain its prima facie burden of demonstrating entitlement to judgment as a matter of law by using its notice to admit (see *Midland Funding, LLC v. Loreto*, 34 Misc. 3d 1232(A), 950 N.Y.S.2d 492). "The purpose of a notice to admit is only to eliminate from the issues in litigation matters which will not be in dispute at trial. It is not intended to cover ultimate conclusions, which can only be made after a full and complete trial" (*HSBC Bank USA, N.A. v. Halls*, 98 A.D.3d 718, 721, 950 N.Y.S.2d 172, quoting *Sagiv v. Gamache*, 26 A.D.3d 368, 369, 810 N.Y.S.2d 481 [internal quotations omitted]). Plaintiff herein cannot rely on defendant's failure to respond to defendant's notice to admit (see CPLR §3123[a]), since the notice to admit seeks the admission of contested ultimate issues regarding the debt allegedly owed to plaintiff (*HSBC Bank USA, N.A. v. Halls*, 98 A.D.3d at 721; *Nacherlilla v. Prospect Park Alliance, Inc.*, 88 A.D.3d 770, 930 N.Y.S.2d 643 [admissions sought to be relied on "at the heart of the controversy"]; *Morreale v. Serrano*, 67 A.D.3d 655, 886 N.Y.S.2d 910).

Lastly, plaintiff has failed to submit evidence to establish the date defendant was notified of the assignment (see *Caprara v. Charles Court Assocs.*, 216 A.D.2d 722, 627 N.Y.S.2d 836; *Cach, LLC v. Fatima*, 32 Misc. 3d 1231 [A], 936 N.Y.S.2d 58). In the

¹Notwithstanding the lack of a proper foundation for the admission of this hearsay evidence, plaintiff has failed to even submit a copy of the credit card agreement.

absence of such proof, defendant cannot be charged with breaching a duty to Chase's alleged assignee (*Id.*).

Even assuming that plaintiff sustained its prima facie burden, defendant has raised issues of fact regarding the sufficiency of plaintiff's evidence purporting to establish its standing to sue (see *Cach, LLC v. Sliss*, 28 Misc. 3d 1230[A]).

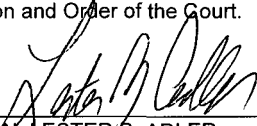
Accordingly, it is hereby

ORDERED, that plaintiff's motion for summary judgment is DENIED; and it is further

ORDERED, that the parties are directed to appear in the Preliminary Conference Part on January 31, 2013 at 9:30 a.m.

The foregoing constitutes the Decision and Order of the Court.

Dated: White Plains, New York
December 19, 2012



HON. LESTER B. ADLER
SUPREME COURT JUSTICE

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