

American Express Centurion Bank v Weiss
2013 NY Slip Op 32611(U)
October 10, 2013
Supreme Court, New York County
Docket Number: 152473/2013
Judge: Cynthia S. Kern
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: CYNTHIA S. KERN
J.S.C.
Justice

PART

Index Number : 152473/2013
AMERICAN EXPRESS CENTURION
vs
WEISS, BONNIE
Sequence Number : 001
SUMMARY JUDGMENT

INDEX NO.

MOTION DATE

MOTION SEQ. NO.

The following papers, numbered 1 to , were read on this motion to/for

Notice of Motion/Order to Show Cause — Affidavits — Exhibits No(s).

Answering Affidavits — Exhibits No(s).

Replying Affidavits No(s).

Upon the foregoing papers, it is ordered that this motion is

is decided in accordance with the annexed decision.

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

Dated: 10/10/13

eK
CYNTHIA S. KERN
J.S.C.

- 1. CHECK ONE: [X] CASE DISPOSED [] NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: [] GRANTED [] DENIED [] GRANTED IN PART [] OTHER
3. CHECK IF APPROPRIATE: [] SETTLE ORDER [] SUBMIT ORDER
[] DO NOT POST [] FIDUCIARY APPOINTMENT [] REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 55

-----X
AMERICAN EXPRESS CENTURION BANK,

Plaintiff,

-against-

BONNIE WEISS a/k/a BONNIE A. WEISS,

Defendant.
-----X

Index No. 152473/2013

DECISION/ORDER

HON. CYNTHIA KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for : _____

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	<u>1</u>
Answering Affidavits and Cross Motion.....	<u>2</u>
Replying Affidavits.....	<u> </u>
Exhibits.....	<u>3</u>

Plaintiff commenced the instant action seeking to collect on an allegedly overdue credit card account. Plaintiff now moves for an order pursuant to CPLR § 3212 granting it summary judgment on its claims for breach of contract, account stated and unjust enrichment and dismissing defendant’s counterclaims on the ground that they fail to state a cause of action. For the reasons set forth below, plaintiff’s motion is granted.

The relevant facts are as follows. This is a credit card collection action to recover the allegedly outstanding balance due on defendant’s American Express credit card account in the amount of \$372,861.10. Plaintiff alleges in its complaint that defendant was the holder of an American Express Credit Card (the “Credit Card”) that she used to purchase goods and services and has failed to make payment for such good and services when it became due. Additionally, plaintiff alleges that by accepting and using the Credit Card, defendant agreed to all the terms and

conditions set forth in the agreement provided to defendant upon issuance of the Credit Card and she is now in default of agreement by failing to pay the outstanding balance. According to the Credit Card billing statements annexed to plaintiff's moving papers, plaintiff sent monthly billing statements to defendant detailing the balance due on her account and the amount defendant was to remit to defendant each month. Defendant admits that she used the card to obtain goods and services and does not dispute any of the alleged charges. However, defendant denies receipt of any cardmember agreement or other contract.

Plaintiff commenced the instant action asserting causes of action for breach of contract, account stated and unjust enrichment. Defendant answered and asserted three unlabeled counterclaims. In her first counterclaim defendant alleges an agreement between the parties that "consisted of an unlimited line of credit which had never been restricted, restrained or reduced regardless of the amount charged in any particular period" and that plaintiff breached this agreement by cancelling defendant's line of credit without cause or giving notice. In her second counterclaim, plaintiff alleges that she is entitled to a setoff due to the acts of the plaintiff and seeks judgement against plaintiff for a right to setoff in addition to any court costs. Finally, in the third counterclaim, defendant alleges that plaintiff violated General Business Law § 601(6) by continuing to make harassing calls to defendant and unrelated third parties regarding defendant's alleged debt. Plaintiff now moves for summary judgment on all of its claims and an order dismissing defendants' counterclaims for failure to state a cause of action.

On a motion for summary judgment, the movant bears the burden of presenting sufficient evidence to demonstrate the absence of any material issues of fact. *See Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986). Once the movant establishes a *prima facie* right to judgment as a matter of law, 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 rests his claim.” See *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980). However, “mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient” to defeat summary judgment. *Id.* Summary judgment should not be granted where there is any doubt as to the existence of a material issue of fact. *Id.*

In the present case, as an initial matter, plaintiff has demonstrated its *prima facie* entitlement to judgment as a matter of law on its account stated claim and defendant has failed to raise a triable issue of fact. “An account stated is an agreement between the partes to an account based upon prior transactions between them with respect to the correctness of the separate items composing the account and the balance due, if any, in favor of one party or the other.” *Herick, Feinstein LLP v. Stamm*, 297 A.D.2d 477 (1st Dept 2002) (quoting *Chrisholm-Ryder Co. v. Sommer & Sommer*, 70 A.d.2d 429, 431 (4th Dept 1979)). It is well settled that “[e]ither retention of bills without objection or partial payment may give rise to an account stated” entitling the moving party to summary judgment in its favor. *Morrison Cohen Singer and Weinstein, LLP v. Waters*, 13 A.D.3d 51, 52 (1st Dept 2004); see also *American Express Centurion Bank v. Williams*, 24 A.D.3d 577 (2nd Dept 2005).

Here, plaintiff has made out its *prima facie* case for an account stated by presenting copies of the monthly credit card billing statements mailed to defendant between January 2012 and April 2013, which show that defendant continued to make partial payments on her account with plaintiff up until the final statement leaving a remaining balance of \$372,861.10. Additionally, plaintiff presents the affidavit of one of its employees who attests that “[t]here is no record of defendant ever asserting a valid unresolved objection to the balance shown as due and owing on the monthly statements provided to defendant.” Taken together, these documents

clearly establish plaintiff's right to judgment on its account stated claim.

In opposition, defendant has failed to raise a triable issue of fact. Defendant does not dispute the extension of credit, the receipt of the monthly statements or their accuracy. Indeed, defendant admits in her affidavit that she "utilized the card to purchase oil and other supplies." Accordingly, as it is undisputed that defendant retained the credit card statements without objection and made several partial payments on the account, plaintiff is entitled to summary judgment on its account stated claim.

To the extent that defendant argues that the credit card billing statements put forward by plaintiff are inadmissible, such contention is without merit. The essential elements necessary to make out a plaintiff's *prima facie* claim for an account stated "can easily be made by an affidavit from an official of the credit card issuer." *Citibank (South Dakota), N.A. v. Martin*, 11 Misc.3d 219, 226 (N.Y. Civ. Ct. 2005) (citing *Citibank (South Dakota) N.A. v. Jones*, 272 A.D.2d 815 (3rd Dept 2000)). Here, plaintiff presents the affidavit of Richard Keir who is an Assistant Custodian of Records for plaintiff and attests to having personal knowledge of plaintiff's regular practices and procedures with respect to the cardmember account records created and maintained by plaintiff. Accordingly, contrary to defendant's contention, this affidavit is sufficient to introduce the credit card billing statements.

Additionally, defendant's contention that a material issue of fact exists as to whether plaintiff has committed usury is without merit as defendant has failed to present evidence of a usurious rate or identified evidence not yet in the record that is needed to establish usury. Defendant contends that there is a strong likelihood that the rates of interest charged by the plaintiff over the course of its alleged contractual relationship with defendant were usurious under New York law. However, as an initial matter, contrary to defendant's contention it is not

clear that New York law applies to the parties credit card agreement as plaintiff is a nationally insured banking institution and pursuant to the National Bank Act it is generally entitled to charge its customers the maximum permissible interest charges from its home state, which is Utah. *See* 12 U.S.C. § 85; *see also Smiley v. Citibank*, 517 U.S. 735 (1996); *Citibank (South Dakota), N.A. v. Hansen*, 28 Misc.3d 195 (N.Y. Civ. Ct. 2005). Nonetheless, it is immaterial on this motion which state law is applicable as the only interest rate charged by plaintiff that was identified by defendant was the rate of 15.24 percent, which is permitted under either New York or Utah law. *See* 3 N.Y.C.R.R. 4.1; Utah Statutes § 70C-2-101. Accordingly, defendant has failed to present evidence raising a material issue of fact precluding summary judgment.

Additionally, the portion of plaintiff's motion seeking summary judgment dismissing defendant's counterclaims is granted without opposition. Defendant's three unlabeled counterclaims consist of nothing more than general and conclusory legal allegations without any factual support and defendant has failed to present any evidence or argument in response to plaintiff's motion in her opposition papers in order to sustain her alleged claims. Indeed, defendant fails to specify a law or cause of action that would entitle her to any relief in her first two counterclaims. As to the final counterclaim, alleging violation of New York General Business Law § 601(6), defendant has failed to identify one act of plaintiff that would amount to a violation of this section.

Accordingly, plaintiff's motion for summary judgment is granted to the extent that plaintiff is entitled to judgment on its account stated claim and defendant's counterclaims are hereby dismissed. As plaintiff has established its account stated claim, the court need not reach the merits of plaintiff's breach of contract and unjust enrichment claims and defendant's opposition thereto at this time. The Clerk is directed to enter judgment in favor of plaintiff and

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against defendant in the amount of \$372,861.10, together with costs and disbursements. This constitutes the decision and order of the court.

Dated: 10/10/13

Enter: CK
J.S.C.

CYNTHIA S. KERN
J.S.C.