American Express Bank, FSB v Knobel
2016 NY Slip Op 31774(U)
September 23, 2016
Supreme Court, New York County
Docket Number: 162750/2014
Judge: Cynthia S. Kern
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 55

--X
AMERICAN EXPRESS BANK, FSB,

Plaintiff,

DECISION/ORDER
Index No. 162750/2014

-against-

STEVEN KNOBEL and M.M.J., INC.,

Defendants.

--X
HON. CYNTHIA KERN, J.:

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 breach of contract and account stated claims. 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 defendants' American Express Business Centurion Card account in the amount of $55,914.25. Defendant Steven Knobel ("Knobel"), individually and as authorizing officer for defendant M.M.J., Inc. ("M.M.J."), was the holder of an American Express Business Centurion Card (the "Credit Card") that he used to purchase goods and services for which he has allegedly failed to make payment when due. Pursuant to the Cardmember Agreement between plaintiff and defendants, plaintiff was entitled to charge defendants a late fee of $35.00 if defendants failed to pay the amount due on a monthly billing statement before the twentieth day after the next closing date and an additional late fee of the greater of $35.00 or 2.99% of any amount past due on each subsequent closing date that defendants failed to pay the amount due. Plaintiff charged defendants an initial late fee of $1,519.96 on November 16, 2013, consisting of the $35.00 fee and 2.99% of the amount past due, and additional late fees of $1,530.41 on December 6, 2013, $1,576.17 on January 7, 2014 and $1,623.29 on February 4, 2014, each representing 2.99% of the amount past due, after previous late fees were added (collectively the "late fees").

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.*

Plaintiff has demonstrated its *prima facie* entitlement to judgment as a matter of law on its breach of contract claim. To establish its entitlement to summary judgment on a breach of contract claim, a plaintiff must tender "sufficient evidence that there was a credit card agreement, which the defendant accepted by using the credit card and making payments thereon, and that the agreement was breached by the defendant when he failed to make required payments." *American Express Bank, FSB v. Scali*, 142 A.D.3d 517, 517 (2d Dept 2016).

In the present case, plaintiff has demonstrated its *prima facie* entitlement to judgment as a matter of law on its breach of contract claim by submitting a copy of the Cardmember Agreement between plaintiff and defendants, copies of the monthly Credit Card billing statements showing that defendants used the Credit Card and made payments thereon and the outstanding balance on the account and a copy of the final statement showing the outstanding balance on the account. Plaintiff has also submitted the affidavit of Mario D. Morales-Arias ("Morales-Arias"), an Assistant Custodian of Records, discussing the preparation and significance of these records.

In opposition, defendants have failed to raise a triable issue of fact. Defendants' argument that Knobel cannot be personally liable for the outstanding account balance because the Credit Card was a business card is without merit. The Cardmember Agreement states that it is made between plaintiff and the "Basic Cardmember," Knobel, and the "Company," M.M.J., and that Knobel and M.M.J. "agree, jointly and severally, to be bound by the terms of this Agreement." The Cardmember Agreement provides that Knobel

and M.M.J. "promise to pay all charges." Knobel accepted the terms of the Cardmember Agreement when he used the Credit Card.

Defendants' argument that plaintiff's motion for summary judgment should be denied as plaintiff has failed to provide defendants with any signed charge receipts so as to allow defendants to contest the validity of the charges listed in the monthly Credit Card billing statements is also without merit. Plaintiff is not required to submit signed charge receipts as part of its *prima facie* showing of entitlement to summary judgment on its breach of contract or account stated claims. Further, as the monthly Credit Card billing statements list the names of the vendors and the dates, amounts and brief descriptions of the charges, defendants should have sufficient information to contest the validity of the listed charges. However, defendants have not contested the validity of any particular charges.

Defendants' argument that Mitchell, Maxwell & Jackson, Inc. ("Mitchell"), rather than M.M.J., is the correct corporate cardholder and that plaintiff's motion for summary judgment should be denied on the ground that plaintiff has failed to join Mitchell pursuant to CPLR § 1001(a) is also without merit. The Cardmember Agreement names M.M.J. as the corporate cardholder and the monthly Credit Card billing statements and the final statement are addressed to M.M.J. None of the documentary evidence submitted by plaintiff refers to Mitchell.

Defendants' argument that the late fees are excessive and unenforceable under New York law is also without merit. Pursuant to 12 U.S.C. § 85, a national bank may charge the highest interest rate allowed by the state where the bank is located under federal law. *See Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735, 737 (1996) (holding that the statutory term "interest" encompasses late payment fees). Under federal law, a bank is located in the state where "its operations of discount and deposit are to be carried on" as designated in the organization certificate required pursuant to 12 U.S.C. § 22. *Marquette Nat. Bank of Minneapolis v. First of Omaha Service Corp.*, 439 U.S. 299, 309 (1978).

In the present case, the court finds that the late fee provision is enforceable. Pursuant to 12 U.S.C. § 85, plaintiff may charge the highest interest rate allowed by Utah law as plaintiff is a national bank located in Utah. Morales-Arias states in his affidavit that plaintiff is organized under the laws of Utah and has its

headquarters in Utah. Under Utah law, "[t]he parties to a lawful contract may agree upon any rate of interest for the loan or forbearance of any money, goods, or chose in action that is the subject of their contract." U.C.A. § 15-1.1. Further, Utah law specifically defines late fees on a credit card account as "interest." U.C.A. § 70C-1-106. Thus, the 2.99% late fee provision of the Cardmember Agreement, amounting to a rate in excess of 35% per annum, is allowed by Utah law.

Plaintiff has also demonstrated its *prima facie* entitlement to judgment as a matter of law on its account stated claim. "An account stated is an agreement between the parties 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, 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 (2d Dept 2005).

In the present case, plaintiff has demonstrated its *prima facie* entitlement to judgment as a matter of law on its account stated claim by submitting copies of the monthly Credit Card billing statements and final statement addressed and mailed to defendants between April 2012 and March 2014 and the affidavit of Morales-Arias, who states that plaintiff's "records do not reflect that the statement(s) were returned by the post office or that the Defendant objected to them." In opposition, defendants have failed to raise a triable issue of fact. Defendants do not establish or even allege that they objected to any of the charges.

Accordingly, plaintiff's motion for summary judgment is granted. The Clerk is hereby directed to enter judgment in favor of plaintiff and against defendants, jointly and severally, in the amount of $55,914.25, together with costs and disbursements. This constitutes the decision and order of the court.

DATE : 9/23/16

CSK

KERN, CYNTHIA S., JSC

HON. CYNTHIA S. KERN
J.S.C.