American Express Travel Related Servs. Co., Inc. v High Camp Supply, Inc.
2018 NY Slip Op 32049(U)
August 17, 2018
Supreme Court, New York County
Docket Number: 657504/2017
Judge: Andrew Borrok

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK
Part 57

----------x

AMERICAN EXPRESS TRAVEL RELATED SERVICES COMPANY, INC.

Plaintiff(s) **Index no. 657504/2017**

-against-

DECISION/ORDER
Motion Sequence No. 1

HIGH CAMP SUPPLY, INC.

Defendant(s)

----------x

Recitation, as required by CPLR §2219(a), of the papers considered on the review of this motion for summary judgment and cross motion to dismiss the action for improper service

PAPERS	NUMBERED
Notice of Motion and Affidavits and Exhibits Annexed	**1**
Notice of Cross Motion and Affidavits in Support and in Opposition to the Motion and Exhibits Annexed	**2**
Replying Affidavits and Exhibits Annexed	

Upon the foregoing cited papers, the Decision/Order on this motion is as follows:

The motion for summary judgment is granted and judgment is entered in favor of American Express Travel Related Service Company, Inc. (**Amex**), High Camp Supply Inc.'s (the **Defendant**) cross-motion to dismiss and for leave to file an amended answer is denied.

The Relevant Facts and Circumstances

The Defendant is a California corporation formed in May, 2014, by Susan Hanson and Margaret Wells and incorporated by Erik Smith, Ms. Well's husband. The Defendant is in the business of distributing gardenias to high end clientele. Mr. Smith was the Chief Operating Officer, Chief Financial Officer, and Secretary and Ms. Hanson was a Director of the Defendant.

Amex issued a credit card (the **Amex Account**) to the Defendant pursuant to an American Express Commercial Account Program Commercial Account Application (the **Amex Credit Card Application**), dated January 28, 2015, signed by Erik Smith, as President of the Defendant. Ms. Hansan alleges that she was not aware of the Amex Account until April, 2015.[1] The account fell into arears and as of December13, 2016, $420,943.44 was due and owing. According to Richard Kier, an Assistant Custodian of Records of Amex, as of March 29, 2018, $544,968.44 was due and owing.[2]

The Motion for Summary Judgment

Summary Judgment should be granted when the movant presents evidentiary proof in admissible form that there are no triable issues of material fact and that there is either no defense to the cause of action or that the cause of action or defense has no merit. CPLR § 3212(b). The burden is initially on the movant to make a prima facie showing of entitlement to judgment as a matter of law tendering sufficient evidence in admissible form to demonstrate the absence of any material fact. Alvarez v Prospect Hosp., 68 NY2d 320, 324 (1986). Once the showing has been made, the burden shifts to the opposing party to produce evidence in admissible form sufficient to establish the existence of a material issue of fact which requires a trial. Alvarez v. Prospect Hosp., 68 NY2d 320, 324 (1986) citing Zuckerman v. City of New York, 49 N.Y.2d 557, at 562, 404 N.E.2d 718, 427 N.Y.S.2d 595 (1980).

In support of its motion, Amex submitted the Amex Credit Card Application for this account. Paragraph 3.3 of AMEX Credit Card Application makes clear:

[1] Affidavit of Susan Hansan, dated June 9, 2018, ¶9, in Support of Cross-Motion.
[2] Affidavit of Richard Kier, dated March 30, 2018, ¶9, in Support of Motion.

> Company shall be liable for payment to Amex of all Charges incurred from the date a Commercial Cardmember's authority to incur expenses on its behalf is terminated through the date that Amex receives notification from Company of such termination.

In other words, charges incurred by an officer of the Defendant are valid charges of the Defendant until Amex receives notification that the officer's authority to incur charges on behalf of the Defendant have been terminated. In addition, Amex submits the accounts statements in the name of the Defendant showing a balance of $420,943.44 as of December 13, 2016 and an affidavit from Mr. Kier explaining that $544,968.44 was due as of March 29, 2018. Therefore, Amex has met its burden of coming forward with evidence that it is entitled to summary judgment. In opposition, the Defendant alleges that Ms. Hanson one of the Defendant's principals was not aware of the charges incurred by Mr. Smith on behalf of the Defendant and that such charges were neither authorized nor proper charges of the Defendant but were in fact unauthorized charges for Mr. Smith's own personal use. Significantly, the Defendant does not submit any evidence that notification was sent to Amex that Mr. Smith's authority to incur charges on behalf of the Defendant. Therefore, although the Defendant and/or Ms. Hanson may have claims against Mr. Smith, these allegations do not raise a material issue of fact as to whether Amex is entitled to summary judgment. Accordingly, the Plaintiff's motion for summary judgment is granted.

The Cross Motion is Denied in its Entirety

(A) Service was Proper

The Defendant cross moves to dismiss the action arguing that service which was effected on Mr. Smith was not proper because Ms. Hanson was designated as the agent for service of process in the corporate filings with the State of California. The argument however is unavailing.

CPLR §311(a)(1) provides that service upon a corporation may be made by delivery to an officer, director, managing or general agent, or cashier or assistant cashier or to any other agent authorized by appointment or by law to receive service.

Inasmuch as service was effected on Mr. Smith, the Chief Operating Officer, Chief Financial Officer, and Secretary of the Defendant, service of process was proper. Accordingly, this branch of the Defendant's cross motion is denied.

(B) Leave to File the Amended Answer is Denied

CPLR 3025(b) provides that leave to amend pleadings should be freely granted. However, leave should not be granted if the amended pleading is palpably insufficient or patently devoid of merit. MBIA Insurance Corporation v. Greystone & Co., Inc., 74 A.D.3d 499, 901 N.Y.S.2d 522 (Mem), 2010 N.Y. Slip Op. 04867 (1st Dept. 2010).

The Proposed Amended Answer seeks to add an affirmative defense of lack of privity, a counterclaim for unjust enrichment and a counterclaim for breach of contract. The problem however is that the affirmative defense and counterclaims are devoid of merit.

Lack of Privity

The Defendant's Proposed Amended Answer seeks to argue that inasmuch as these were Mr. Smith's charges and not the charges of the Defendant, there is a lack of privity between Amex and the Defendant. The problem with this affirmative defense however is that it is undisputed that (i) the Amex account was in the name of the Defendant, (ii) Mr. Smith was the Chief Operating Officer, Chief Financial Officer, and Secretary of the Defendant and therefore had the authority to bind the Defendant, (iii) no notification was sent to Amex terminating Mr. Smith's authority to incur charges on behalf of the Defendant and (iv) the charges were incurred in the Defendant's name and on the Defendant's Amex account (albeit allegedly for his personal use).

Unjust Enrichment

The counterclaim for unjust enrichment asserts that because the Defendant did not receive the benefits of the charges, any judgment against it would unjustly enrich the Plaintiff. This argument is also unavailing. Amex seeks in this action to recover moneys paid out to cover charges on the Defendant's Amex account incurred by an officer with authority to bind the Defendant. The fact that the Defendant or an officer of the Defendant may have diverted the money to an officer of the Defendant and whether the Defendant may have a cause of action against such officer is wholly irrelevant.

Breach of Contract

The defendant argues that pursuant to Paragraph 3.2(a)(i) of AMEX Credit Card Application, the Amex Application indicates that the Defendant shall not be liable

for charges incurred which are personal in nature and did not benefit the Defendant.

> ***Subject to the terms of Section 3.3 (Liability for Unauthorized Use)*** *(emphasis added)* for Amex Accounts that have been approved by Amex on the basis of "Combined Liability," Company and each Commercial Cardmember shall be jointly and severally liable for all Charges incurred by the Commercial Cardmember (except for cash advances which shall be Full Corporate Liability as set forth in Section 3.2(b) below); provided, however, that Company shall not be liable for Charges (i) incurred by the Commercial Cardmember that are personal in nature and which did not accrue a benefit to the Company for legitimate business purposes or (ii) for which Company has reimbursed the Commercial Cardmember.

The problem with this argument is that it overlooks the express language of Paragraph 3.2(a) -- i.e., that Paragraph 3.2(a) is subject to the provisions of Paragraph 3.3. And, as discussed above, Paragraph 3.3 indicates that the Defendant is liable for payment of all charges incurred until Amex receives notification of the termination of the cardmember authority to incur charges on behalf of the company. Inasmuch as the counterclaim does not allege that any such notification was ever tendered, it is also patently devoid of merit.

Therefore, the cross motion is denied in its entirety.

Accordingly, the Clerk of the Court should enter Judgment favor of the Plaintiff and against the Defendant, High Camp Supply Inc., a California corporation with principal executive offices at 2904 Octavia Street, San Francisco, CA 94123, in the sum of $544,968.44, without interest, plus the costs of this action as taxed by the Clerk of the Court.

August 17, 2018

HON. ANDREW BORROK
J.S.C.

Hon. Andrew Borrok