

<b>Bank of Am., N.A. v Figueroa</b>
2020 NY Slip Op 34338(U)
December 23, 2020
Supreme Court, Kings County
Docket Number: 508773/2019
Judge: Francois A. Rivera
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At an IAS Term, Part 52 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 23rd day of December 2020.

HONORABLE FRANCOIS A. RIVERA

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BANK OF AMERICA, N.A.,

Plaintiff,

**DECISION & ORDER**

Index No. 508773/2019

- against -

TERON FIGUEROA,

Defendant.

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Recitation in accordance with CPLR 2219 (a) of the papers considered on the notice of motion of plaintiff Bank of America, N.A (hereinafter BANA), filed on February 15, 2020, under motion sequence number one for an order pursuant to CPLR 3212 granting summary judgment in its favor against defendant Teron Figueroa (hereinafter Figueroa) on its action for breach of a credit card agreement. The motion is unopposed.

- Notice of Motion
- Affidavit in Support
- Affirmation in Support
- Exhibits A-F

**BACKGROUND**

On April 18, 2019, BANA commenced the instant action for damages due to breach of a credit card agreement by filing a summons and complaint with the Kings County Clerk’s office. Figueroa joined issue by a verified answer dated May 19, 2019. The complaint alleges the following salient facts. Figueroa maintained a credit card with

the plaintiff. Figueroa agreed to make payments for the goods and services charged and for any cash advances made upon the account. Figueroa failed to make the payments pursuant to the agreement and \$43,210.91 is now due and owing to BANA.

## LAW AND APPLICATION

There is no opposition to the instant motion. However, a summary judgment motion should not be granted merely because the party against whom judgment is sought, failed to submit papers in opposition to the motion, i.e., defaulted (*Liberty Taxi Mgt., Inc. v Gincherman*, 32 AD3d 276, 278 n [1st Dept 2006], citing *Vermont Teddy Bear Co., v 1-800 Beargram Co.*, 373 F3d 241 [2nd Cir 2004] [the failure to oppose a motion for summary judgment alone does not justify the granting of summary judgment. Instead, the...court must still assess whether the moving party has fulfilled its burden of demonstrating its entitlement to judgment as a matter of law and that there is no genuine issue of material fact]; see *Cugini v System Lumber Co., Inc.*, 111 AD2d 114 [1st Dept 1985]).

It is well established that summary judgment may be granted only when it is clear that no triable issue of fact exists (*Alvarez v Prospect Hospital*, 68 NY2d 320 [1986]). The burden is upon the moving party to make a prima facie showing that he or she is entitled to summary judgment as a matter of law by presenting evidence in admissible form demonstrating the absence of material facts (*Guiffirda v Citibank*, 100 NY2d 72 [2003]).

A failure to make that showing requires the denial of the summary judgment motion, regardless of the adequacy of the opposing papers (*Ayotte v Gervasio*, 81 NY2d 1062 [1993]). If a prima facie showing has been made, the burden shifts to the opposing party to produce evidentiary proof sufficient to establish the existence of material issues of fact (*Alvarez*, 68 NY2d at 324).

Although not denominated as such, the complaint set forth a single cause of action for breach of a credit card agreement. The only sworn testimony pertaining to Figueroa's alleged breach of the credit card agreement was the affidavit of Wendy Parnell, an officer of BANA (hereinafter Parnell).

Parnell's affidavit consisted of four numbered paragraphs setting forth certain allegations of fact. Parnell claimed personal knowledge of the alleged facts based on personal knowledge of the business practices and procedures of BANA in creating its records and based on her review of those records. Parnell has averred, among other things, that BANA and Figueroa entered into a credit agreement. By that agreement Figueroa agreed to pay BANA for all goods, services and cash advances provided pursuant to the agreement. Parnell stated that true and accurate copies of the agreement and seven notices of changes to the applicable terms and conditions of the account were annexed and collectively marked as Exhibit A. Parnell also claimed that the last payment in good and collected funds, if any, was made by Figueroa on or about August 24, 2018, on which date the total amount of \$150.00 was paid. Parnell stated that Figueroa was in default and that a demand for payment had been made. Parnell stated that true and

accurate copies of the monthly billing statements for the agreement from closing date May 14, 2015 through closing date April 14, 2018 were attached and collectively, marked as Exhibit B and that a true and accurate copy of an access check drawn against the account was annexed and marked as Exhibit C.

Parnell did not allege that the agreement and the seven notices of changes to the applicable terms and conditions of the account that were annexed as exhibit A to her affidavit were mailed to Figueroa. Nor did Parnell allege that any of the billing statements that were annexed as exhibit B to her affidavit were mailed to the defendant. There is no other evidence in BANA's motion papers addressing whether these aforementioned documents were mailed to Figueroa. Consequently, BANA did not establish mailing of the agreement, its amendments, or the billing statements to Figueroa.

Absent evidence that the billing statements were mailed to Figueroa, BANA cannot establish prima facie entitlement to judgment as a matter of law on the cause of action to recover on an account stated (*Morrison Cohen Singer & Weinstein, LLP v Brophy*, 19 AD3d 161, 162 [2nd Dept 2005]). In any event, the instant complaint did not plead a claim for an account stated.

Similarly, absent evidence that the amendments to the credit card agreement were mailed to Figueroa, BANA may not establish its prima facie entitlement to judgment as a matter of law on the breach of contract cause of action (*Bank of Am., N.A. v Ball*, 188 AD3d 974 [2nd Dept 2020]; *Citibank [S.D.], N.A. v Zaharis*, 2011 N.Y. Slip Op

33285[U], [Sup Ct, Queens County]; *Citibank [S.D.], N.A. v Martin*, 11 Misc3d 219, 223  
[Civ Ct, N.Y. County]).

**CONCLUSION**

The motion of Bank of America for an order pursuant to CPLR 3212 granting summary judgment in its favor against defendant Teron Figueroa on its action for breach of a credit card agreement is denied.

The foregoing constitutes the decision and order of this Court.

ENTER:



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J.S.C.