CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK

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CAVALRY SPV I, LLC AS ASSIGNEE OF
CITIBANK, N.A.,

Index No.: CV-009001-20NY

Plaintiff

Motion Date: April 28, 2021

-against-

DORA H KING,

Defendant.

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HILARY GINGOLD, J.

The following papers numbered 1 to 8 were read on plaintiff Cavalry SPV I LLC's ("Cavalry"), (as assignee of Citibank, N.A. ["Citibank"]) motion seeking summary judgment pursuant to CPLR 3212 and, further, for an order pursuant to CPLR 3211(b), dismissing the affirmative defenses asserted in defendant Dora H King's ("King") answer. Also read was King's cross-motion seeking similar relief pursuant to CPLR 3212, granting summary judgment dismissing the complaint on the grounds that the statute of limitations had expired.

PAPERS
NUMBERED

Notice of Motion- Affirmation- Exhibits…….. 1-3
Cross-Motion-Affidavit-Affirmation-Exhibits……..4-7
Reply……..8

Cavalry commenced this action on July 21, 2020 by filing a summons and complaint alleging breach of contract for failure to make payments on a Citibank credit card in the amount of $4,663.41, the debt of which Cavalry purchased from Citibank. Issue was joined by King's filing of an answer on September 23, 2020. In her answer, King sets forth the following affirmative

defenses: partial or full payment of the debt; incorrect/excessive assessment of debt; statute of limitations expired; violation of good faith and fair dealing; and finally, unconscionability.

In support of the motion, Cavalry provided the notarized Affidavit of Facts and Sale of Account by CitiBank, N.A.[1] executed by Amy Hanneman. Hanneman avers that she is an employee of Cavalry; however, she fails to set forth with any specificity, how she is authorized to provide the affidavit, whether it be in a job description or by title. She indicates that she has personal knowledge of the records produced and that they were produced in the regular course of business without delineating how she gained that knowledge or how she knew they were produced.

Plaintiff also submitted a Bill of Sale and Assignment that purports to be between Citibank, N.A. and Cavalry SPV I, LLC. The Bill of Sale refers to an "Exhibit 1" as proof that King's account was included in the sale. Cavalry also provided copies of two Citibank statements from February 17, 2015 and March 17, 2015 indicating that King's account ended in 8205, the same account that appears to be referenced in the Affidavit of Facts and Sale of Account by Citibank, N.A. An additional document is submitted with the statements containing King's name, account number and the same account ID listed on the Bill of Sale and Assignment, indicating a payment was rendered on July 18, 2014. Cavalry further submitted a notarized Affidavit of Facts and Purchase of Accounts by Debt Buyer Plaintiff as proof that Cavalry purchased King's account on November 27, 2019.

Plaintiff's Motion

Plaintiff moves pursuant to CPLR 3212 for summary judgment. The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law (s*ee Winegrad v N.Y. Univ. Med. Ctr*., 64 NY2d 851 [1985]). Where the moving

[1] Attached to the Affidavit is a Certificate of Conformity as to the out-of-state notary.

party has demonstrated its' entitlement to summary judgment, the opponent must demonstrate by admissible evidence the existence of an issue of fact requiring a trial of the action or provide an acceptable excuse for their failure so to do (s*eeZuckerman v City of New York*, 49 NY2d 557 [1980]).

A plaintiff establishes a prima facie entitlement to summary judgment on its cause of action to recover damages for breach of contract by providing evidence that there was an agreement, which "defendant accepted by his use of the credit card and payments made thereon, which was breached by the defendant when he failed to make the required payments" (*see Citibank (South Dakota), N.A. v Keskin*, 121 AD3d 635 [2nd Dept 2014]). Plaintiff, as a subsequent owner of the outstanding credit card debt, establishes its' standing by submitting evidence of the assignment of the debt that forms the basis for this action (*see Palisades Collection, LLC v Kedik*, 67 AD3d 1329, 1330 [4th Dept 2009] ["to establish standing to sue, plaintiff was required to submit admissible evidence that Discover assigned its interest in defendant's debt to plaintiff."]; G*emini Asset Recoveries, Inc./Cohen and Slamowitz, LLP v Portoff,* 23 Misc3d 139(A)[App Term, 1st Dept 2009]; *CACH LLC v George*, 56 Misc3d 591, 592 [NY Dist Ct 2017] ["In assigned debt cases, a plaintiff-assignee must establish standing to pursue a claim by submitting proof in admissible form of a complete chain of assignment beginning with the original creditor."]). "An assignment of a security interest conveys to the assignee all rights and interests of the secured party-assignor, including the right to seek payment of the secured obligation or to recover the collateral (*Rockland Lease Funding Corp. Inc. v Waste Mgt. of New York Inc*., 245 AD2d 779, 779 [3d Dept 1997]).

Proof of King's underlying debt obligation was shown by the self-authenticating Citibank account statements provided by Cavalry, demonstrating that King owed $4,663.41 to Citibank, N.A. (*see Portfolio Recovery Assoc., LLC v. Lall*, 127 AD3d 576 [1st Dept 2015]). Notably, King

does not deny the debt is hers, but rather, contends that she paid all or part of the debt. "The issuance of a credit card constitutes an offer of credit ... [and] acceptance of the offer ... [is the] use of the card by the holder." (*Feder v Fortunoff, Inc*., 114 A.2d 399 [2d Dept 1985]). "The absence of an underlying agreement, if established, [does] not relieve defendant of [her] obligation to pay for goods and services received on credit (Citibank (S.D.) N.A. v Roberts, 304 AD2d 901, 902 [3d Dept 2003]; Discover Bank v Witt, 62 Misc 3d 139(A) [App Term, 11th and 13th Jud Dists 2019]; *Capital One Bank (USA), N.A. v Stewart*, 60 Misc3d 132(A) [App Term, 11th and 13th Jud Dists 2018]). Thus, as in the instant matter, even in the absence of any agreement, the statements alone, which show that defendant used the card, is sufficient to establish the obligation to pay and the breach of such obligation.

Defendant's First, Second, Fifth, Sixth and Seventh Affirmative Defenses

Cavalry also moves, pursuant to CPLR 3211(b), for an order dismissing all affirmative defenses. "In moving to dismiss an affirmative defense pursuant to CPLR 3211 (b), the plaintiff bears the heavy burden of showing that the defense is without merit as a matter of law. The allegations set forth in the answer must be viewed in the light most favorable to the defendant, and the defendant is entitled to the benefit of every reasonable intendment of the pleading, which is to be liberally construed. Further, the court should not dismiss a defense where there remain questions of fact requiring a trial"[internal citations omitted] (*Granite State Ins. Co. v Transatlantic Reins. Co.*, 132 AD3d 479 [1st Dept 2015]). However, "'allegations consisting of bare legal conclusions, as well as factual claims either inherently incredible or flatly contradicted by documentary evidence' are not presumed to be true and accorded every favorable inference" (*Biondi v Beekman Hill House Apt., Corp.*, 257 AD2d 76 [1st Dept 1999]). Conclusory assertions of wrongdoing with

no factual specificity are insufficient to survive a motion to dismiss (*see Bank of Am., N.A. v 414 Midland Ave. Assoc., LLC*, 78 AD3d 746 [2nd Dept 2010]).

Defendant's first, second, fifth, sixth and seventh affirmative defenses are merely conclusory assertions (*see* CPLR 3013; *Commissioners of the State Ins. Fund v. Ramos*, 63 AD3d 453 [2009]). King's first affirmative defense is that she paid all or part of the debt owed to Cavalry; King's second affirmative defense is that she disputes the amount of the debt; King's fifth affirmative defense is that the debt is excessive and would unjustly enrich plaintiff; King's sixth affirmative defense is that Cavalry violated the duty of good faith and fair dealing; and King's seventh affirmative defense is that the claim arises from an unconscionable contract. These affirmative defenses are "plead only bare legal conclusion[s] without supporting facts" (*Id*).

Defendant's Third Affirmative Defense

King's third affirmative defense is that Cavalry lacks standing. To the extent that King acknowledged the debt in her answer and the credit card statements provided by Cavalry are self-authenticating, Cavalry has established a debt is owed. As already discussed, Cavalry has otherwise established it had standing to commence the action.

Defendant's Fourth Affirmative Defense

King's fourth affirmative defense is that Cavalry commenced this action after the statute of limitations expired. The crux of King's argument is that pursuant to CPLR 202, South Dakota's six-year statute of limitations and tolling statute should apply to the instant action. Defendant contends there was no statewide tolling in South Dakota due to Covid-19, thus, the statute of limitations expired on July 18, 2020, six years after King's partial payment on July 18, 2014. In opposition, Cavalry contends that Governor Andrew Cuomo's Executive Orders, which tolled the

statute of limitations in New York during the height of the Covid-19 pandemic from March 20, 2020 through November 3, 2020 are applicable; and thus, its' action was timely commenced.

"CPLR 202 requires our courts to 'borrow' the statute of limitations of a foreign jurisdiction where a nonresident's cause of action accrued, if that limitations period is shorter than New York's" (*Global Fin. Corp. v Triarc Corp.*, 93 NY2d 525 [1999]). "When a nonresident sues on a cause of action accruing outside New York, CPLR 202 requires the cause of action to be timely under the limitation periods of both New York and the jurisdiction where the cause of action accrued. This prevents nonresidents from shopping in New York for a favorable Statute of Limitations" (*Id.* at 528[internal citations omitted]*).*

Generally, under CPLR 202, the entire statute of limitations period under New York law, including all relevant extensions and tolls, is compared with the foreign state's statute of limitations period, including its' tolls and extensions, and New York tolls are not superimposed on the foreign period (*see* NY Practice by David Siegel, p. 95). The primary purpose of CPLR 202 is to prevent forum shopping by nonresident plaintiffs seeking to take advantage of a more favorable statute of limitations in New York (*see Portfolio Recovery Assocs., LLC v King*, 14 NY3d 410 [2010]).

Both New York and South Dakota's statute of limitations are six years (*see* SDCL § 15-2-13[1] & CPLR § 213). However, New York tolled the statute of limitations from March 20, 2020 through November 3, 2020 as a result of the Covid-19 pandemic pursuant to Governor Cuomo's Executive Orders whereas South Dakota did not implement a unified statewide position on civil matters, leaving it up to individual local jurisdictions to determine the issue of tolling.

Under New York law, on March 20, 2020, Governor Andrew Cuomo issued Executive Order, 202.8, entitled "Temporary Suspension and Modification of Laws Relating to the Disaster

Emergency" invoking his authority under section 29 of Article 2-B of the Executive Law, which amongst many things, tolled the time to commence a civil action.

Two days later, the Chief Administrative Judge of New York prohibited the filing of any new matters in New York State courts except for those deemed essential (*see* CAJ Marks AO/78/20 issued Mar. 22, 2020; *see People of State of N.Y. ex rel. Nevins v Brann*, 67 Misc3d 638 [Queens County 2020]). It was not until May 25, 2020, that New York first resumed electronic filing of nonessential matters, limited to cases with represented parties filed and served electronically and June 10, 2020, that judges and chambers staff in New York City began to return to the New York State courts. On October 5, 2020, Governor Cuomo issued Executive Order 202.67, which extended the suspension of time to commence any new non-essential actions until November 3, 2020.

At the onset of Covid-19, the Supreme Court of South Dakota issued an order dated March 13, 2020 declaring the existence of a judicial emergency pursuant to Covid-19 as per SDCL 16-3-11 through 15. SDCL 16-3-14, states that "An order declaring a judicial emergency may suspend, toll, extend, or otherwise grant relief from deadlines, time schedules, or filing requirements imposed by otherwise applicable statutes, rules, or court orders…." Pursuant to this Order, presiding judges of South Dakota's districts were "authorized to adopt, modify and suspend court rules and orders and to take further actions concerning court operations as warranted to address the spread of Covid-19 in their areas (*see* Order Declaring Judicial Emergency Covid-19 Disease 3/12/2020)."

New York Executive Orders tolling the statute of limitations are applicable to the instant action, commenced in New York, during the height of the global Covid-19 pandemic. Due to the dire public health emergency, the likes of which had not been seen world-wide in over a hundred

years, the people of New York were ordered to quarantine and stay home for months. It was not only unsafe to file a new action in New York City but impossible to do so. While South Dakota did not issue a statewide tolling of statute of limitations, it did issue an order declaring a judicial emergency, permitting districts to suspend court rules as necessary due to the spread of Covid-19.

Since the time to commence actions had been tolled by the executive orders in New York when this action was commenced, the court deems this timely (*see Am. Tr. Ins. Co. v Advanced Comprehensive Lab. Llc,* 2021 NY Slip Op 30836[U][NY County 2021]; Kugel v Broadway 280 Park Fee LLC v The City of New York, et al, 2021 NY Slip Op 31801[U][NY County 2021]).

Defendant's Cross-Motion

King cross-moved pursuant to CPLR 3212 for summary judgment on the grounds that the applicable South Dakota statute of limitations expired prior to the commencement of the action. As discussed above, this action was timely filed as per the New York Executive Orders issued in response to the Covid-19 pandemic, which tolled the statute of limitations from March 20, 2020 through November 3, 2020.

CONCLUSION

Accordingly, it is ORDERED that the branch of plaintiff's motion pursuant to CPLR 3212 for summary judgment is granted in its entirety, and it is further

ORDERED that defendant's cross-motion for summary judgment is denied.

This constitutes the Decision and Order of this Court.

Dated: New York County, New York
June 28, 2021

Hilary Gingold, J.C.C.