

**SPG Advance, LLC v American Express Travel
Related Servs. Co., Inc.**

2022 NY Slip Op 33503(U)

October 5, 2022

Supreme Court, New York County

Docket Number: Index No. 652035/2021

Judge: Verna L. Saunders

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT:	<u>HON. VERNA L. SAUNDERS, JSC</u>	PART 36
	<i>Justice</i>	
	-----X	
		INDEX NO. <u>652035/2021</u>
		MOTION SEQ. NO. <u>002</u>

SPG ADVANCE, LLC D/B/A TIGER CAPITAL GROUP,
Plaintiff,

- v -

AMERICAN EXPRESS TRAVEL RELATED
SERVICES COMPANY, INC.,
JOHN K. LANE, in his capacity as the
receiver of American Heritage Billiards,
LLC, JOHN DOE, ABC CORPORATION, and
KEY BANK NATIONAL ASSOCIATION,
Defendants.

**DECISION + ORDER ON
MOTION**

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 002) 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93
were read on this motion to/for DISMISSAL.

The facts of this case are as follows. Pursuant to a revenue purchase agreement dated February 27, 2020 (“agreement”) (NYSCEF Doc. No. 44, *agreement*), non-party American Heritage Billiards (“American Heritage”) agreed to sell, assign, and transfer to plaintiff its right, title, and interest in \$679,500.00 in future revenue in exchange for a purchase price of \$500,000.00. Plaintiff asserts it fulfilled its obligation under the agreement. However, although American Heritage agreed to deliver to plaintiff a 25% share of its daily revenue until the revenue purchase price was paid in full, American Heritage failed to remit payments to plaintiff in accordance with the agreement. The unpaid balance due, inclusive of fees allowed by the agreement, is \$535,235.00.

The parties entered into a security agreement granting plaintiff a security interest in and lien upon certain collateral (NYSCEF Doc. No. 44 at 5, *security agreement*). On or about March 3, 2020, in accordance with the agreement, plaintiff perfected its security interest with respect to American Heritage by filing a UCC-1 financing statement with the Ohio Secretary of State (NYSCEF Doc. No. 46, *UCC financing statement*).

On or about May 19, 2020, K&M Recovery Group (“K&M”), a collection agency engaged by plaintiff, provided notice to defendant AMERICAN EXPRESS TRAVEL RELATED SERVICES COMPANY, INC. (“American Express” or “AMEX”), an account debtor, pursuant to Article 9-406 of the UCC (“American Express UCC Lien Notice”), “to hold in reserve all funds payable to [American Heritage] as of the date of th[e] notice” and “direct all funds owed by [it] on behalf of [American Heritage], or collected by [it] on behalf of [American Heritage] . . . until the outstanding balance of \$535,235.00 has accrued.” The American Express UCC lien notice was facsimiled to American Express by Ekaterina Marciante (“Marciante”) on or about May 19, 2020 (NYSCEF Doc. No. 48, *fax confirmation*) and, on or about May 26, 2020,

Marciante confirmed that American Express received said notice and that a restraint had been placed on American Heritage's American Express account. American Express allegedly confirmed that plaintiff's American Express UCC lien notice was the first UCC lien request it received for American Heritage and that a check would be forthcoming.

According to plaintiff, on or about June 25, 2020, upon information and belief, John Doe, acting on behalf of ABC Corporation and holding himself or herself out to be a representative of K&M, contacted and informed American Express that K&M was sending a release letter to American Express to release the hold placed pursuant to the American Express UCC lien notice, for the purpose of preventing, obstructing, or otherwise interfering with plaintiff's rights under the UCC pursuant to its lien notice to recover the restrained funds. On July 1, 2020, counsel for plaintiff informed American Express that it had no intention to release the UCC lien notice and demanded that the restrained funds be disbursed (NYSCEF Doc. No. 49, *July 2020 notice*).

Plaintiff also alleges that, upon information and belief, defendant KEYBANK NATIONAL ASSOCIATION ("KeyBank") claims a priority lien position over plaintiff with respect to American Heritage, which it disputes, arguing that American Heritage defaulted on its agreement with plaintiff before defaulting on its agreement with KeyBank. It further claims that "even where [KeyBank] alleges an earlier default, such default is merely a 'technical default' under the [UCC] because [KeyBank] failed to take any action on the default and allowed American Heritage to retain[] possession of the collateral in question, thereby waiving its right to recover under the [UCC] pursuant to [plaintiff's] earlier action on default under the [UCC], as evidenced by [plaintiff's] earliest-in-time American Express UCC Lien Notice."

On June 30, 2022, KeyBank filed a complaint against American Heritage (and other parties), in an action captioned *KeyBank National Association v American Heritage, LLC, et al.*, Case No. CV-20-934277, in the Court of Common Pleas, Cuyahoga County, Ohio, and moved for the appointment of a receiver to preserve and liquidate all of the assets of American Heritage. John K. Lane ("Lane") was appointed the receiver for American Heritage (NYSCEF Doc. No. 50, *order appointing receiver*).¹ Lane later filed a turnover motion, seeking court approval of disbursement of the American Express funds to the receivership and then to KeyBank as the priority security interest holder relating to the funds held by American Express. The court approved, without objection, said disbursement, and directed American Express to pay the net funds to the receiver and it authorized and directed the receiver to pay the net funds to KeyBank. It further held that, "provided AMEX makes the payment . . ., all persons or entities (including, without limitation, K&M, Tiger, are hereby barred and prohibited from seeking to recover from AMEX and any of its affiliates the Gross Funds, the Net Funds, or any other amount relating to the Agreement." Plaintiff, despite interposing an answer in the Ohio action (NYSCEF Doc. No. 74, *notice of appearance and answer*), raised no objection to the turnover order (NYSCEF Doc. No. 51, *turnover order*).

By April 5, 2021, American Express distributed the net funds to the receivership in accordance with the turnover order and, on April 9, 2021, Lane authorized KeyBank to withdraw from the receivership account the amount of \$203,321.95 (NYSCEF Doc. No. 70 ¶ 19-20, *Lane's affidavit*).

¹ The action was discontinued as against Lane (NYSCEF Doc. No. 59).

In its amended complaint, plaintiff seeks a declaration that plaintiff has a lawful and legal right to the restrained funds (first and second cause of action); a declaration that KeyBank and/or ABC Corporation waived their right to the restrained funds (third cause of action); a disbursement of the funds from the defendant in possession of those funds, based on replevin; (fourth cause of action); as well as, damages against John Doe and ABC Corporation based on tortious interference (fifth cause of action) (NYSCEF Doc. No. 43, *amended complaint*).

KeyBank now moves, pursuant to CPLR 3211(a)(1), (4), (5) and/or (7), for dismissal of all causes of action set forth in the amended verified complaint or, alternatively, for a stay of this action, pursuant to CPLR 3211(a)(4) and CPLR 2201. Specifically, KeyBank argues that the amended complaint should be dismissed pursuant to CPLR 3211(a)(5) because plaintiff's claims are barred by collateral estoppel, comity, and res judicata. KeyBank contends that, in a now disposed action in Supreme Court, New York County, captioned *SPG Advance, LLC d/b/a Tiger Capital Group v. Key Bank National Association*, Index No. 652645/2020, wherein plaintiff sought to collect from an account receivable held by Costco — one of American Heritage's account debtors, this court (Masley, J.) rejected the identical claims raised in this litigation when it dismissed the action. Furthermore, KeyBank maintains that plaintiff is precluded from challenging KeyBank's right to possession of the American Express funds given the final, unappealable American Express turnover order in the Ohio action. Said order, claims KeyBank, "specifically determined that KeyBank has the superior right to immediately possess the [AMEX] [f]unds and prohibited the [p]laintiff from taking any action to collect those [f]unds."

In the alternative, KeyBank argues that there is a pending federal District Court case in the Eastern District of New York that warrants a stay of this action. In the case captioned *SPG Advance, LLC d/b/a Tiger Capital v. American Heritage Billiards, LLC, et al.*, Case No. 2:20-cv-03440, Lane seeks to invalidate the agreement as a disguised criminally-usurious loan. Annulment of the agreement *ab initio* would, in essence, render this entire action moot. Thus, should the court decline to dismiss the action, KeyBank insists that, at the very least, a stay is warranted pending the outcome of the federal litigation.

In opposition to the motion, plaintiff argues, *inter alia*, that "the central legal issue addressed in the earlier [Supreme Court] action was whether a junior lien holder could foreclose on collateral where the senior lien holder failed to act, or refused to act, on a debtor's default" but that it was appealing this decision.² Plaintiff does not dispute that KeyBank has a senior priority lien position, but nevertheless claims that KeyBank is not entitled to the American Express restrained funds due to waiver. Plaintiff states: "Tiger Capital's position on appeal, among others, is that because KeyBank's 'default status' against American Heritage changed between the filing of Tiger Capital's earlier action and oral argument, the issue of whether KeyBank waived its right to collect on the collateral was not properly before the earlier court and therefore was not properly briefed or considered." It also claims that applicable law and public policy favor collection and foreclosure of a security lien by a junior lien holder, where a superior lien holder either refuses to act, or has no right of action, under the UCC on its security lien.

² On October 26, 2021, the Appellate Division, First Department issued a decision and order on the appeal (NYSCEF Doc. No. 93).

Plaintiff also seeks, in a purported “cross-motion”, leave to file a proposed second amended complaint “alleging, upon information and belief, that KeyBank tortiously interfered with [its] UCC notice to American Express by threatening American Express with legal action should American Express comply with [plaintiff’s] lawfully served UCC lien notice.” (NYSCEF Doc. No. 84, *memorandum in opposition to motion and support of cross motion*).

In reply, KeyBank argues, among other things, that plaintiff fails to address the arguments regarding collateral estoppel, res judicata, comity, and full faith and credit by reason of the Ohio receivership order, the turnover order, and this court’s prior decision. Plaintiff also fails to show that “a plain reading of the 4th Amendment [of its credit and security agreement] clearly evidences the fact that [American Heritage] acknowledged defaulting under KeyBank’s Credit Agreement since at least May 4, 2020 and that KeyBank was not waiving or curing those defaults, or its ability to enforce its rights under the Credit Agreement and the UCC at any time.” KeyBank also argues that the purported cross-motion seeking to amend the complaint is procedurally defective insofar as it was not brought by notice of cross-motion. (NYSCEF Doc. No. 91, *memorandum of law in reply*).

CPLR 3211(a)(5) provides that a party may move for judgment dismissing one or more causes of action asserted against them on the ground that the cause of action may not be maintained because of collateral estoppel. The doctrine of collateral estoppel “precludes a party from relitigating in a subsequent action or proceeding an issue clearly raised in a prior action or proceeding and decided against that party or those in privity, whether or not the tribunals or causes of action are the same.” (*Ryan v New York Tel. Co.*, 62 NY2d 494, 500 [1984].) The doctrine applies where “(1) the issues in both proceedings are identical, (2) the issue in the prior proceeding was actually litigated and decided, (3) there was a full and fair opportunity to litigate in the prior proceeding, and (4) the issue previously litigated was necessary to support a valid and final judgment on the merits.” (*Conason v Megan Holding, LLC*, 25 NY3d 1, 18 [2015].)

Here, KeyBank has established its entitlement to dismissal of the action based on collateral estoppel. To the extent plaintiff argues this action is not precluded by this court’s prior decision and order, arguing that the issue of waiver was not addressed in the opinion, the argument of waiver has since been dispelled by the decision and order from the Appellate Division, First Department, dated October 26, 2021. The Appellate Division modified, on the law, the prior Supreme Court decision, “solely to declare that [KeyBank] has a superior, present, and legal right under its first-position perfected UCC security interest to collect and possess all personal property and assets of nonparty American Heritage . . . , notwithstanding plaintiff’s allegations of its own junior and subordinate lien.” Addressing the core contention raised by plaintiff in this action, to wit, that KeyBank waived its security rights in connection with its loan to American Heritage, the Court clearly stated: “[c]ontrary to plaintiff’s contentions, the Fourth Amendment to the Credit Agreement between [KeyBank] and American Heritage, in which [KeyBank] and American Heritage acknowledged numerous Events of Default by American Heritage under the Credit Agreement but agreed to allow the loan to continue to maturity on May 31, 2020, and other documentary evidence shows that defendant never waived any of its security rights in connection with its loan to American Heritage.” (NYSCEF Doc. No. 93). The Appellate Division further held that “any right that plaintiff might have had to collect from . . . funds payable to American Heritage and apply them to the outstanding balance of its loan to

American Heritage was extinguished when defendant filed the Ohio action seeking to collect on its security interest.” Insofar as the Appellate Division has addressed plaintiff’s alleged entitlement to funds from American Heritage and has rejected the same, dismissal is warranted. Additionally, this court notes that plaintiff does not dispute KeyBank’s contention that, despite having the opportunity to do so, plaintiff failed to raise any objection to the Ohio court’s turnover order approving KeyBank’s entitlement to the American Express funds. Thus, the claims raised in the complaint, premised on the issue of plaintiff’s alleged superior right to the subject funds, which has already been litigated and decided, are precluded by the doctrine of collateral estoppel (see CPLR 3211[a][5]). Therefore, the action is dismissed.

This court notes that plaintiff’s purported motion to amend the complaint is procedurally defective insofar as no notice of cross-motion was filed. Nevertheless, the motion is denied in accordance with the court’s reasoning above. All other contentions have been considered and are either without merit or need not be addressed given the findings above. It is hereby

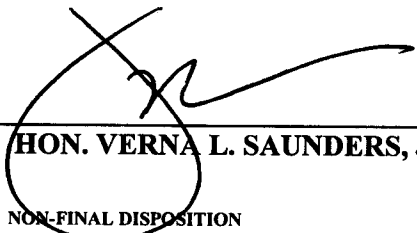
ORDERED that defendant KEY BANK NATIONAL ASSOCIATION’s motion seeking dismissal of the amended complaint is granted and the action is dismissed in its entirety; and it is further

ORDERED that plaintiff’s purported cross-motion for leave to amend is denied; and it is further

ORDERED that, within twenty (20) days after this decision and order is uploaded to NYSCEF, counsel for defendant KEY BANK NATIONAL ASSOCIATION shall serve a copy of this decision and order, with notice of entry, upon all parties, as well as, on the Clerk of the Court, who shall enter judgment accordingly; and it is further

ORDERED that service upon the Clerk of the Court shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the “E-Filing” page on the court’s website at the address www.nycourts.gov/supctmanh).

October 5, 2022



HON. VERNA L. SAUNDERS, JSC

CHECK ONE:

CASE DISPOSED
GRANTED

DENIED

NON-FINAL DISPOSITION
GRANTED IN PART

OTHER