American Express Travel Related Servs. Co., Inc. v Hallmark Capital Group, LLC
2017 NY Slip Op 31369(U)
June 26, 2017
Supreme Court, New York County
Docket Number: 158751/2014
Judge: Kathryn E. Freed

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. KATHRYN E. FREED, J.S.C. **PART** 2
Justice

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AMERICAN EXPRESS TRAVEL RELATED SERVICES COMPANY, INC.,

Plaintiff,

- v -

HALLMARK CAPITAL GROUP, LLC,

Defendant.

INDEX NO. 158751/2014

MOTION DATE

MOTION SEQ. NO. 002

DECISION AND ORDER

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The following e-filed documents, listed by NYSCEF document number 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26

were read on this application to/for Summary Judgment

Upon the foregoing documents, it is

ordered that the motion is **granted**.

In this action seeking to collect monies allegedly overdue on credit card accounts issued to defendant Hallmark Capital Group, LLC, plaintiff, American Express Travel Related Services Company, Inc., moves, pursuant to CPLR 3212, for summary judgment on claims of breach of contract, account stated, and unjust enrichment. The motion, which is unopposed, is **granted.**

Factual and Procedural Background:

Plaintiff commenced this action to recover the allegedly outstanding balance of $274,551.91 owed to it by defendant for charges incurred on a corporate card account opened by

defendant in November of 2013 with account numbers ending in 1000, 1001, 1002, 1003, 1008, 1009, 2002 and 2008.[1] In this action, commenced by the filing of a summons and complaint on September 9, 2014 (Hoefs Aff., at Ex. 1; NYSCEF Doc. 1), plaintiff alleges that defendant failed to make payments on its accounts when such payments were due, as required by the Corporate Services Commercial Account Agreement ("the Account Agreement") between the parties, a copy of which is annexed to plaintiff's motion. Ex. A to Kier Aff. In its complaint, plaintiff alleged as first, second and third causes of action breach of contract, account stated, and unjust enrichment, respectively. Id.

Defendant joined issue by service and filing of its answer on or about October 31, 2014. NYSCEF Doc. 4. Counsel for defendant thereafter moved to be relieved as attorney for defendant and counsel's application was granted by order dated and entered March 29 and 30, 2016, respectively. NYSCEF Doc. 13. Defendant did not retain new counsel since that time.

Legal Conclusions:

On a motion for summary judgment, the movant bears the initial burden to tender proof in admissible form demonstrating entitlement to judgment as a matter of law and the absence of material issues of fact, at which point the burden shifts to the party opposing the motion to establish the existence of a triable issue of fact. *See Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 (1986). The "[f]ailure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers." *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985).

Plaintiff has established its entitlement to summary judgment on its claim for breach of contract. In doing so, plaintiff had the burden of tendering "sufficient evidence that there was a

[1] Plaintiff waives its right to pre-judgment interest and, by this motion, discontinues its claim for attorneys' fees.

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 [it] failed to make the required payments." *American Express Bank, FSB v Scali*, 142 AD3d 517, 517 (2d Dept 2016).

Here, plaintiff established its entitlement to summary judgment as a matter of law on its breach of contract claim by submitting Kier's affidavit, and by annexing thereto a copy of the Account Agreement between plaintiff and defendant and copies of the monthly billing statements reflecting that defendant used the credit card, made payments on the accounts, and setting forth the final balance on the accounts. Exs. A and B to Kier Aff. The statements, which referenced, inter alia, defendant's name, address, account numbers, and transactions conducted during the relevant period, the balance owed and the payments received, were self-authenticating and a proper foundation for these business records was laid by Kier. *See Capital One Bank (USA) v Koralik*, 51 Misc3d 74, 76-77 (citations omitted) (App Term 1st Dept 2016).

Additionally, plaintiff established its prima facie entitlement to summary judgment 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." *Herrick, Feinstein LLP v Stamm*, 297 AD2d 477, 477 (1st Dept 2002), quoting *Chisholm-Ryder Co. v Sommer & Sommer*, 70 AD2d 429, 431 (4th Dept 1979). It has long been held 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. *Jaffe v Brown-Jaffe*, 98 AD3d 898, 899 (1st Dept 2012), quoting *Morrison Cohen Singer and Weinstein, LLP v Waters*, 13 AD3d 51, 52 (1st Dept 2004).

In this case, plaintiff demonstrated its prima facie entitlement to summary judgment as a matter of law on its account stated claim by submitting copies of the monthly credit card billing statements mailed to defendant between November 28, and November 28, 2014 (Ex. B to Kier Aff.), as well as the affidavit of Kier, who states that "[t]here is no record of [d]efendant ever asserting a valid unresolved objection to the balance shown as due and owing on the monthly statements provided to [d]efendants." Kier Aff., at par. 8-9.

Plaintiff has failed to establish that it is entitled to summary judgment on its unjust enrichment claim since it concedes in its complaint (Ex. 1 to Hoefs Aff., at pars. 3, 4, 10-14) that it had an express contract with defendant. *See Douglas Elliman, LLC v East Coast Realtors, Inc.*, 149 AD3d 544, 544 (1st Dept 2017), citing *Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 388 (1987). However, since plaintiff recovers herein the full amount demanded in its complaint, this cause of action is dismissed as academic.

Therefore, in accordance with the foregoing, it is hereby:

ORDERED that the motion by plaintiff American Express Travel Related Services Company, Inc. seeking summary judgment on its complaint as against defendant Hallmark Capital Croup, LLC is granted as to plaintiff's first and second causes of action sounding in breach of contract and account stated, respectively; and it is further

ORDERED that the Clerk is hereby directed to enter judgment in favor of plaintiff and against defendant in the amount of $274,551.91 on plaintiff's first two causes of action, together with costs and disbursements; and it is further

ORDERED that plaintiff's third cause of action sounding in unjust enrichment is dismissed as academic; and it is further

ORDERED that plaintiff, within 20 days of the posting of this order to NYSCEF, shall serve a copy of the same, with notice of entry, on defendant; and it is further

ORDERED that this constitutes the decision and order of the court.

6/26/2017
DATE

HON. KATHRYN E. FREED, J.S.C.

CHECK ONE:	X	CASE DISPOSED			NON-FINAL DISPOSITION		
	X	GRANTED		DENIED	GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		DO NOT POST			FIDUCIARY APPOINTMENT		REFERENCE