

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

D35489
Y/kmb

_____AD3d_____

Submitted - May 31, 2012

REINALDO E. RIVERA, J.P.
RANDALL T. ENG
PLUMMER E. LOTT
JEFFREY A. COHEN, JJ.

2011-06797

DECISION & ORDER

Citibank (South Dakota), N.A., respondent, v
Rachel Brown-Serulovic, appellant.

(Index No. 7313/09)

Hanig & Schutzman, LLP, Poughkeepsie, N.Y. (Adrienne Odierna of counsel), for
appellant.

Rubin & Rothman, LLC, Islandia, N.Y. (Eric S. Pillischer of counsel), for respondent.

In an action to recover the outstanding balance due on a credit card, the defendant
appeals from an order of the Supreme Court, Rockland County (Alfieri, J.), entered May 31, 2011,
which granted the plaintiff's motion for summary judgment on the complaint.

ORDERED that the order is reversed, on the law, with costs, and the plaintiff's
motion for summary judgment on the complaint is denied.

In this action to recover the outstanding balance of \$24,493.62 due on a credit card,
the plaintiff alleged causes of action to recover damages for breach of contract and to recover on an
account stated. The plaintiff moved for summary judgment on the complaint. The Supreme Court
granted the motion, the defendant appeals, and we reverse.

“An account stated is an agreement between parties to an account based upon prior
transactions between them with respect to the correctness of the account items and balance due”
(*Fleetwood Agency, Inc. v Verde Elec. Corp.*, 85 AD3d 850, 851, quoting *Jim-Mar Corp. v Aquatic
Constr.*, 195 AD2d 868, 869; see *American Express Centurion Bank v Cutler*, 81 AD3d 761, 762).
“An agreement may be implied where a defendant retains bills without objecting to them within a
reasonable period of time, or makes partial payment on the account” (*American Express Centurion
Bank v Cutler*, 81 AD3d at 762; see *Landau v Weissman*, 78 AD3d 661, 662).

July 5, 2012

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CITIBANK (SOUTH DAKOTA), N.A. v BROWN-SERULOVIC

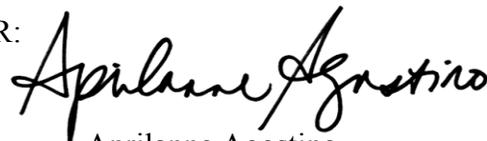
Here, the plaintiff failed to make a prima facie showing of its entitlement to judgment as a matter of law on the cause of action to recover on an account stated. The plaintiff did not submit sufficient evidence to establish that the defendant retained the account statements without objecting to them within a reasonable period of time. While an employee who reviewed the plaintiff's records stated by affidavit that the credit card statements were mailed to the defendant on a monthly basis, she failed to aver that the defendant retained these statements for a reasonable period of time without objecting to them (*see American Express Centurion Bank v Cutler*, 81 AD3d at 762). The plaintiff also submitted three checks as evidence of partial payments on the account statements. Two of these checks, however, were for payment of the full amount owed on the account at the time and predated the disputed charges. The third check, in the sum of \$300, only reflected a small proportion of the debt owed at the time, approximately \$19,000, and by itself, did not create an inference of assent (*see Landau v Weissman*, 78 AD3d at 662; *Construction & Mar. Equip. Co. v Crimmins Constr. Co.*, 195 AD2d 535). Accordingly, the plaintiff failed to establish its entitlement to judgment as a matter of law on its cause of action to recover on an account stated (*see Raytone Plumbing Specialties, Inc. v Sano Constr. Corp.*, 92 AD3d 855, 856; *American Express Centurion Bank v Cutler*, 81 AD3d at 762; *Citibank [SD] N.A. v Goldberg*, 24 Misc 3d 143[A], 2009 NY Slip Op 51735[U] [2009]).

The plaintiff made a prima facie showing of entitlement to judgment as matter of law on its cause of action to recover damages for breach of contract (*see Citibank [S.D.] N.A. v Sablic*, 55 AD3d 651, 652). The plaintiff tendered sufficient evidence that there was an agreement, which the defendant accepted by her use of the credit card and payments made thereon, and which was breached by the defendant when she failed to make required payments (*id.*; *see Feder v Fortunoff, Inc.*, 114 AD2d 399; *FIA Card Servs., N.A. v DiLorenzo*, 22 Misc 3d 1127[A], 2009 NY Slip Op 50305[U] [2009]). However, the defendant, in opposition, tendered evidence that she objected to charges with the plaintiff, inaccuracies allegedly resulted from the defendant being mistaken for a similarly named individual, and that the defendant raised the alleged inaccuracies with the credit reporting agencies. Therefore, the defendant raised a triable issue of fact on the cause of action to recover damages for breach of contract (*see Zuckerman v City of New York*, 49 NY2d 557, 562).

Accordingly, the plaintiff's motion for summary judgment on the complaint should have been denied.

RIVERA, J.P., ENG, LOTT and COHEN, JJ., concur.

ENTER:



Aprilanne Agostino
Clerk of the Court