

American Express Bank, FSB v Yin Kat Yong

2012 NY Slip Op 30996(U)

April 9, 2012

Supreme Court, Nassau County

Docket Number: 14810-11

Judge: Timothy S. Driscoll

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**SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER**

Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

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AMERICAN EXPRESS BANK, FSB,

**TRIAL/IAS PART: 16
NASSAU COUNTY**

Plaintiff,

**Index No: 14810-11
Motion Seq. No. 1
Submission Date: 2/27/12**

-against-

**YIN KAT YONG A/K/A Y.K. YONG A/K/A
YIN K. YONG and UNITED EXPRESS AGENCY
CORP.,**

Defendants.

-----x

The following papers having been read on this motion:

- Notice of Motion, Amended Notice of Motion,
Affirmation in Support and Affidavit....x**
- Affirmation in Opposition.....x**
- Affirmation in Response.....x**
- Supplemental Affirmation in Further Support.....x**

This matter is before the Court for decision on the motion filed by Defendants Yin Kat Yong (“Yong”) and United Express Agency Corp. (“United”) (“Defendants”) on November 15, 2011 and submitted on February 27, 2012. For the reasons set forth below, the Court grants the motion to the extent that the Court dismisses the Complaint as to Defendant Yong, but will permit Plaintiff to file an amended complaint to address the issues raised herein. Plaintiff is directed to file and serve the amended complaint within thirty (30) days of the date of this Order.

BACKGROUND

A. Relief Sought

Defendants move for an Order, pursuant to CPLR § 3211(a)(7), dismissing the Complaint.

Plaintiff American Express Bank, FSB (“American Express” or “Plaintiff”) opposes Defendants’ motion.¹

B. The Parties’ History

The Complaint (Ex. A to Wang Aff. in Resp.) alleges as follows:

At all relevant times, Yong and United were the holders of an American Express Plum Card (“Plum Card”) that enabled them to charge items to an American Express Business Plum Card Account (“Account”). The Complaint contains the account number of the Account, which has been redacted for security reasons.

At all relevant times, Yong and United were card members on the Account, and thus are responsible for paying all amounts charged to the Account. By accepting and using the Plum Card, Yong and United agreed, jointly and severally, to all of the terms and conditions set forth in the Agreement between Cardmember and American Express (“Agreement”). The Agreement was provided to Yong and United with the Plum Card. The terms and conditions of the Agreement include the following: 1) Yong and United agree to be jointly and severally liable for all amounts charged to the Account; 2) Yong and United agree, jointly and severally, that the “Minimum Amount Due” as defined in the Agreement for all charges to the Account is due by the payment due date reflected on the monthly billing statements mailed by or on behalf of American Express; 3) Yong and United agreed, jointly and severally, that American Express may impose late fees, in amounts set forth in the Agreement, on all unpaid amounts; and 4) Yong and United agreed, jointly and severally, that upon default, as defined in the Agreement, they would pay all reasonable costs, including attorney’s fees, incurred by American Express in collecting the balance due and in protecting itself from any harm it may suffer as a result of any such default.

The Complaint alleges, further, that Yong and United used the Plum Card to charge various items to the Account for which payment was never made. American Express sent monthly statements (“Statements”) to Yong and United which showed the balance due on the Account. In violation of the Agreement, Yong and United have failed to make the payments owed to American Express and, as a result, American Express suspended Yong and United’s charging privileges on the Account. The current aggregate balance with respect to the Account is \$342,144.34.

¹ Although Plaintiff’s counsel did not obtain the Court’s permission to submit a sur-reply with respect to the motion, the Court will, in its discretion, consider the sur-reply.

The Complaint contains six (6) causes of action: 1) breach of contract with respect to Yong's Account, 2) account stated with respect to Yong's Account, 3) unjust enrichment with respect to Yong's Account, 4) breach of contract with respect to United's Account, 5) account stated with respect to United's Account, and 6) unjust enrichment with respect to United's Account.

In support of Defendants' motion, Yong affirms that he was employed by United, and the Plum Card was a card that was used specifically for United, a business corporation. He affirms, further, that the Plum card was not used, in any capacity, as a personal credit card and that he did not personally guaranty the Plum Card. He also affirms that he did not sign any contract personally guaranteeing the payment of the Plum Card, and did not agree to be personally, jointly or severally liable under the Agreement.

Plaintiff opposes Defendants' motion, submitting that Defendants' argument that Plaintiff is attempting to pierce the corporate veil reflects a misreading of the Complaint. The Complaint does not allege that Yong signed a contract agreeing to be personally liable for United's Obligations. Rather, Plaintiff submits, the Complaint alleges that, by applying for, accepting and using the Account, Yong agreed to all of the terms and conditions in the Agreement.

In reply, Defendants submit that Plaintiff has failed to provide, and the record does not contain, evidence that would permit the inference that Yong should be held personally liable for the balance on the Account.

C. The Parties' Positions

Defendants submit that they have demonstrated their right to dismissal of the Complaint in light of the fact that the Complaint fails to establish a cause of action against Yong who is not, individually, a party to the Agreement. Defendants also argue that, pursuant to CPLR § 3211(c), the Court may treat this as a motion for summary judgment, and Defendants have failed to provide any evidence supporting the conclusion that Yong is personally liable for the balance on the Account.

Plaintiff opposes Defendants' motion submitting that the allegations in the Complaint, which include the allegation that Yong and United agreed to be jointly and severally liable for the amounts charged to the Account, state a cause of action. Plaintiff also asks that, if the Court determines that Plaintiff has not sufficiently pleaded a cause of action against either Defendant, it be granted permission to re-plead.

RULING OF THE COURT

A. Standards of Dismissal

A motion interposed pursuant to CPLR § 3211 (a)(7), which seeks to dismiss a complaint for failure to state a cause of action, must be denied if the factual allegations contained in the complaint constitute a cause of action cognizable at law. *Guggenheimer v. Ginzburg*, 43 N.Y.2d 268 (1977); *511 W. 232nd Owners Corp. v. Jennifer Realty Co.*, 98 N.Y.2d 144 (2002). When entertaining such an application, the Court must liberally construe the pleading. In so doing, the Court must accept the facts alleged as true and accord to the plaintiff every favorable inference which may be drawn therefrom. *Leon v. Martinez*, 84 N.Y.2d 83 (1994). On such a motion, however, the Court will not presume as true bare legal conclusions and factual claims which are flatly contradicted by the evidence. *Palazzolo v. Herrick, Feinstein*, 298 A.D.2d 372 (2d Dept. 2002).

B. Relevant Causes of Action

A cause of action for breach of contract requires allegations of the existence of a contract, plaintiff's performance under the contract, defendant's breach of the contract and resulting damages. *JPMorgan Chase v. J.H. Elec. of New York, Inc.*, 69 A.D.3d 802, 803 (2d Dept. 2010).

For an action on an account stated, where the parties have agreed that the defendant owes the plaintiff a certain amount of money on an account, the plaintiff must prove that 1) there has been an accounting of the alleged debt; 2) there is a specific balance due to the plaintiff by the defendant; 3) the defendant expressly or impliedly promised to pay the plaintiff; and 4) the defendant has not paid. *See Bock v. Breindel*, 5 A.D.2d 1007 (2d Dept. 1958); *Tridee Assoc., Inc. v. Board of Educ. of City of New York*, 22 A.D.3d 833 (2d Dept. 2005); *United Consolidated Industries v. Mendel's Auto Parts, Inc.*, 150 A.D.2d 768 (2d Dept. 1989).

The essential inquiry in any action for unjust enrichment is whether it is against equity and good conscience to permit the defendant to retain what is sought to be recovered. Such a claim is undoubtedly equitable and depends upon broad considerations of equity and justice. Generally, courts will determine whether 1) a benefit has been conferred on defendant under mistake of fact or law; 2) the benefit still remains with the defendant; and 3) the defendant's conduct was tortious or fraudulent. *Paramount Film Distributing Corp. v. New York*, 30 N.Y.2d 415, 421 (1972). An unjust enrichment claim is not available where it simply duplicates, or replaces, a conventional contract or tort claim. *Corsello v. Verizon New York, Inc.*, 2012 N.Y.

LEXIS 583, * 19 (2012).

C. Leave to Amend

Leave to amend is to be freely given, absent prejudice or surprise directly resulting from the delay in seeking leave, unless the proposed amendment is palpably insufficient or patently devoid of merit. *Aurora Loan Services, LLC v. Thomas*, 70 A.D.3d 986, 987 (2d Dept. 2010), citing CLR § 3025(b); *Lucido v. Mancuso*, 49 A.D.3d 220, 222 (2d Dept. 2008).

D. Application of these Principles to the Instant Action

The Court notes that the Complaint does not contain a copy of the Agreement, or set forth specific language from the Agreement that reflects the parties' intention that Yong be responsible for charges on the Account which is a business account. In addition, the Complaint does not set forth facts explaining why, if Yong is not liable for the charges pursuant to the terms of the Agreement, there is a basis to hold him liable under the theory of unjust enrichment or account stated. Moreover, although Defendants have suggested that the Court convert their motion to one for summary judgment, Defendants also have not provided documentation in support of their contention that there is no basis to hold Defendant Yong liable for the charges on the Account.

In light of the foregoing, the Court grants Defendants' motion to dismiss the Complaint as to Defendant Yong. The Court will, however, permit Plaintiff to file an amended complaint. Plaintiff is directed to file and serve the amended complaint within thirty (30) days of the date of this Order.

Counsel for the parties are directed to appear before the Court for a Preliminary Conference on June 13, 2012 at 9:30 a.m.

ENTER

DATED: Mineola, NY
April 9, 2012


HON. TIMOTHY S. DRISCOLL
J.S.C.

ENTERED
APR 11 2012
NASSAU COUNTY
COUNTY CLERK'S OFFICE