

**Colorado Capital Asset Mgt. Corp. v
Vigneaux**

2007 NY Slip Op 31704(U)

June 11, 2007

Supreme Court, Greene County

Docket Number: 0020061/1511

Judge: Joseph C. Teresi

Republished from New York State Unified Court
System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for
any additional information on this case.

This opinion is uncorrected and not selected for official
publication.

STATE OF NEW YORK
SUPREME COURT COUNTY OF GREENE
COLORADO CAPITAL ASSET
MANAGEMENT CORP

Plaintiff,

-against-

DECISION and ORDER
INDEX NO. 1151/06
RJI NO. 19-07-2905

KATHERINE M. VIGNEAUX,

Defendant.

Supreme Court Albany County All Purposes Term, May 10, 2006
Reassigned to Justice Joseph C. Teresi

APPEARANCES:

Daniels & Norelli, PC
Attorneys for Plaintiff
Seth H. Schwartz., Esq. of Counsel
900 Merchants Concourse
Suite 400
Westbury, New York 12442

Kathryn M. Vigneaux
Pro Se Defendant
62 Minnerly Road
Coxsackie, New York 12051

TERESI, J.:

The plaintiff moves for summary judgment pursuant to CPLR 3212 and seeks the dismissal of defendant's answer. The defendant opposes the motion and alleges questions of fact exist that precludes summary judgment.

The plaintiff commenced this action to recover the sum of \$7,991.14 which represents the balance on a Visa credit card owned by the defendant plus interest. The plaintiff contends the defendant made payments on the account. The plaintiff alleges the plaintiff was billed monthly. The plaintiff contends an account stated was created as the defendant never disputed the validity of the balance owed or notified the plaintiff of any defenses, claims or offsets of the balance due.

Defendant's Answer consisted of a letter which denied the balance owed to the plaintiff. In opposition to the motion the defendant challenges the amount due, claims the charges are fraudulent and alleges she was a victim of identity theft.

On a motion for summary judgment, the movant must establish by admissible proof, the right to judgment as a matter of law. See, Alvarez v Prospect Hospital, 68 NY2d 320 (1986); Gilbert Frank Corp. v Federal Insurance Co., 70 NY2d 966 (1988). The burden shifts to the opponent of the motion to establish by admissible proof, the existence of genuine issues of fact. See, Zuckerman v City of New York, 49 NY2d 557 (1980). It is well established that on a motion for summary judgment, the court's function is issue finding, not issue determination. See, Sillman v Twentieth Century-Fox Film Corp., 3 NY2d 395 (1957), and all evidence must be viewed in the light most favorable to the opponent to the motion. See, Crosland v. New York City Transit Auth., 68 NY2d 165 (1986).

In opposing a motion for summary judgment, one must produce evidentiary proof in admissible form . . . mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient (Zuckerman v City of New York, *supra*, 562). It is incumbent upon the non-moving party to lay bare her proof in order to defeat summary judgment. See, O'Hara v Tonner, 288 AD2d 513 (3rd Dept. 2001). Mere conclusory assertions, devoid of evidentiary

fact, are insufficient to raise a genuine triable issue of fact on motion for summary judgment as is reliance upon surmise, conjecture or speculation. See, Banco Popular North America v. Victory Taxi Management, Inc., 1 NY3d 381 (2004).

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 account items and the balance due. See, Jim-Mar Corp. v. Aquatic Construction, 195 AD2d 868 (3rd Dept. 1993), lv denied 82 NY2d 660 (1993).

Plaintiff's motion for summary judgment is granted. From the facts presented, the plaintiff is entitled to summary judgment as a matter of law. The plaintiff has made a *prima facie* showing of its entitlement to summary judgment by documenting the credit card agreement, the charges to the credit card, partial payments and a default. The defendant has offered no documentary evidence to raise any issue of fact precluding summary judgment. The receipt and retention of an account, without objection within a reasonable period of time, coupled with an agreement to make partial payment, gives rise to an account stated entitling the moving party to summary judgment in its favor. See, Biegen v. Paul K. Rooney, P.C., 269 AD2d 264 (1st Dept. 2000), lv denied 95 NY2d 761 (2000).

All papers, including this Decision and Order are being returned to the attorneys for the plaintiff. The signing of this Decision and Order shall not constitute entry or filing under CPLR 2220. Counsel are not relieved from the applicable provision of that section respecting to filing, entry and notice of entry.

So Ordered.

Dated: Albany, New York
June // , 2007


Joseph C. Teresi, J.S.C.

PAPERS CONSIDERED:

1. Notice of Motion dated February 16, 2007;
2. Affidavit of Jim Scorposki dated February 12, with attached exhibits A-E;
3. Notice of Opposition of Kathryn Mae Vigneaux dated April 11, 2007;
4. Affirmation of Seth M. Schwartz, Esq. dated April 24, 2007 with attached exhibits A & B;