

Citibank (S.D.), N.A. v Rahbar
2007 NY Slip Op 33568(U)
October 26, 2007
Supreme Court, New York County
Docket Number: 0102453/2006
Judge: Judith J. Gische
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: **JUDITH J. GISCHÉ, J.S.C.**

PART 10

Justice

Index Number : 102453/2006

CITIBANK (SOUTH DAKOTA), N.A.,

vs.

RAHBAR, KAY R.

SEQUENCE NUMBER : # 003

SUMMARY JUDGMENT

INDEX NO. 102453-06

MOTION DATE

MOTION SEQ. NO. #003

MOTION CAL. NO. _____

read on this motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

motion (s) and cross-motion(s) decided in accordance with the annexed decision/order of even date.

FILED

NOV 02 2007

NEW YORK COUNTY CLERK'S OFFICE

Dated: Oct 26, 2007

JUDITH J. GISCHÉ, J.S.C. *J.S.C.*

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 10

-----X
CITIBANK (SOUTH DAKOTA), N.A.,

Plaintiff,

-against-

KAY R. RAHBAR,

Defendant.
-----X

Decision/Order

Index No.: 102453/06

Seq. No. : 003

Present:

Hon. Judith J. Gische

J.S.C.

Recitation, as required by CPLR 2219 [a], of the papers considered in the review of this (these) motion(s):

Papers

Pltf's motion [SJ] w/EJD affirm in support, TC affid, exhs	1
Def's x-motion [SJ] w/EJS affirm in support, KR affid, exhs	2
Pltf's EJD affirm in supp and opp, exhs	3

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Upon the foregoing papers, the decision and order of the court is as follows:

The underlying action is for breach of contract by defendant for failure to make monthly payments pursuant to a credit card agreement. Plaintiff Citibank (South Dakota), N.A. now moves, pursuant to CPLR § 3212, for summary judgment in its favor and against defendant Kay R. Rahbar. Defendant cross moves for summary judgment dismissing the complaint.

Since issue has been joined, but note of issue has not yet been filed, summary judgment relief is available. Brill v. City of New York, 2 N.Y.3d 648 (2004). The court's decision follows.

Plaintiff is a National Banking Association, and is authorized to do business in New York. Plaintiff claims that the defendant, in person or by agent, made credit card

purchases and/or took money advances under a credit agreement (the "Agreement"), a copy of which it claims was furnished to defendant at the time the account was opened. Plaintiff claims that there remains a balance of \$38,756.59 due and owing under the Agreement (first cause of action). Plaintiff also claims that defendant is obligated for the legal fees incurred in prosecuting this action (second cause of action).

On this motion, plaintiff has provided the affidavit of Tara Cross ("Cross"), an employee of Citicorp Credit Services, which provides debt collection services to plaintiff, a copy of an unsigned credit card agreement, and many account statements. Cross maintains the computer records relating to Citibank account number 5424-1804-8422-1632 (the "Account") that was issued by plaintiff to defendant. Plaintiff claims that defendant failed or refused to repay the amount shown due and owing, \$38,756.59, on the monthly statements of account. Cross also claims that "[d]emand for payment was made on the defendant more than thirty (30) days prior to [November 21, 2006], for the amount due on the Account... and that amount has not been paid by defendant."

Plaintiff argues that the absence of any triable issue of fact entitles it to summary judgment for the amount due, together with interest and its reasonable attorneys fees and costs incurred in connection with the prosecution of this action.

Defendant, in her affidavit, denies ever making any charges or executing any agreement with plaintiff. She claims that on January 9, 2002, she was contacted by Academy Collection Services, who informed her that she owed \$14,248.17 to plaintiff under account number 5424-1804-8221-632. She claims that "[p]rior to this letter [she] never received any credit card, statements, made any charges, paid any bills or accepted any services in relation to the alleged accounts." Defendant thereafter

[* 4]

notified plaintiff "of the fraudulent charges." Defendant then claims she "did not hear back from the collection agency or [plaintiff] relating to their investigation until the commencement of the instant proceedings.

Defendant contends that Cross' affidavit is insufficient to support the instant motion because Cross cannot demonstrate that she has any "personal knowledge of essential facts." Defendant points to Cross' reference of "Ray R. Rahbar," not "Kay R. Rahbar," and claims that she is referring to someone other than the defendant. Defendant contends that "[o]nly one page of the plaintiff's numerous documents actually relate to account number 542418048221632" and that plaintiff has failed "to address or explain the relationship between the various other account numbers that are unrelated to the one for which the instant action was commenced." Defendant states "[p]laintiff has taken a gun shot approach to this matter by attaching pages of boilerplate unsigned credit card agreements and unrelated credit card statement without any explanation as to relationship of the documents."

Defendant also argues that the summons is defective because it "fails to comply with New York law," since it was not printed in both English and Spanish. Defendant further contends that plaintiff has failed "to properly set out any applicable interest rates" as required by Personal Property Law § 413 and 12 CFR § 226.9.

In further support of the motion and opposition to the cross motion, plaintiff's counsel, through his affirmation, submits that the account number discrepancy is merely due to distinctions between plaintiff's attorney's internal number and not the defendant's credit card number, which it maintains is 5424-1801-8712-5973 which was then replaced with a new card and account number, due to the expiration of

[* 5]

defendant's prior credit card of 5424-1801-6159-6827.

Discussion

On a motion for summary judgment, the proponent bears the initial burden of setting forth evidentiary facts to prove a *prima facie* case that would entitle it to judgment in its favor, without the need for a trial. CPLR 3212; Winegrad v. NYU Medical Center, 64 N.Y.2d 851 (1985); Zuckerman v. City of New York, 49 N.Y.2d 557, 562 (1980). Only if it meets this burden, will it then shift to the party opposing summary judgment who must then establish the existence of material issues of fact, through evidentiary proof in admissible form, that would require a trial of this action. Zuckerman v. City of New York, *supra*. If the proponent fails to make out its *prima facie* case for summary judgment, however, then its motion must be denied, regardless of the sufficiency of the opposing papers. Alvarez v. Prospect Hospital, 68 N.Y.2d 320 (1986); Ayotte v. Gervasio, 81 N.Y.2d 1062 (1993).

Granting a motion for summary judgment is the functional equivalent of a trial, therefore it is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue. Rotuba Extruders v. Ceppos, 46 N.Y.2d 223 (1977). The court's function on these motions is limited to "issue finding," not "issue determination." Sillman v. Twentieth Century Fox Film, 3 N.Y.2d 395 (1957).

When issues of law are raised in connection with a motion for summary judgment, the court may and should resolve them without the need for a testimonial hearing. Hindes v. Weisz, 303 A.D.2d 459 (2nd dept. 2003).

Since each party has moved for summary judgment, each bears the initial burden of establishing their respective motions or raising factual disputes that would

defeat the other movant's motion.

Breach of a credit card agreement is essentially a breach of contract action. The elements of a cause of action for breach of contract are: [1] formation of a contract between the parties; [2] performance by plaintiff; [3] defendant's failure to perform; and [4] resulting damage. Furia v. Furia, 166 A.D.2d 694 (2nd Dept. 1990). "To create a binding contract, there must be a manifestation of mutual assent sufficiently definite to assure that the parties are truly in agreement with respect to all material terms." Express Industries and Termianl Corp. V. New York State Dept. Of Transportation, 93 N.Y.2d 584 (1999).

There are several issues of fact in connection with plaintiff's claims which preclude the grant of summary judgment in favor of either party. There is a factual dispute about whether defendant executed any agreement with plaintiff and made charges thereunder.

The Cross affidavit does not support plaintiff's claims. Cross states she has "custody and control of computer records relating to the Citibank account number 5424-1804-8422-1632... that was issued to Ray R. Rahbar..." Even if Cross' affidavit contains a typographical error in connection with defendant's first name, the account number to which Cross testified to is different from that which is listed on many of the numerous statement of accounts provided by plaintiff, to wit, 5424-1801-8712-5973, 5424-1801-6159-6827. Of all account statements provided by plaintiff, only one (1) two-page document contains the account number referred to by Cross.

Plaintiff's tender of a copy of an unsigned Agreement as well as copies of credit card statements addressed to defendant at a P.O. Box location in Manhattan does not

unequivocally establish that defendant used the credit card and accepted the terms of the credit agreement. Defendant's contentions, that she never opened the account and never received a credit card nor any account statements, raise issues of credibility. Plaintiff has, therefore, failed to prove that defendant entered into and used the credit under the agreements with respect to the multiple accounts which form the basis for plaintiff's claims. Accordingly, plaintiff is not entitled to summary judgment.

Moreover, plaintiff's counsel's attempt to explain the relationship between account numbers 5424-1801-8712-5973 and 5424-1801-6159-6827 through his affirmation is inadmissible since it is not based on personal knowledge. Key Bank of Me. v Lisi, 225 AD2d 669, 669 [2d Dept 1996]. Nonetheless, plaintiff's counsel's explanation does not explain the relationship between the number about which Cross testified to and the numbers listed on a majority of the account statements provided on this motion.

While plaintiff has not prevailed on this motion, defendant has not established, as a matter of law, that she is entitled to summary judgment dismissing plaintiff's claims. The court rejects defendant's contention that CCA § 401 (d), which requires that "[t]he summons served in an action arising from a consumer credit transaction must be printed legibly in both Spanish and English," applies here. The CCA applies to New York's lower courts of civil jurisdiction and plaintiff's claims satisfy the jurisdiction amount for this court. Moreover, defendant has not argued that she does not understand English or that she even speaks Spanish.

The court similarly rejects defendant's claim that plaintiff has failed "to properly set out any applicable interest rates." Interest rates would be set forth in the terms of

the Agreements controlling the accounts and are clearly set forth on the account statements.


Accordingly, plaintiff and defendant's respective motion and cross motion for summary judgment on the complaint are hereby denied.

Any requested relief not expressly addressed herein has nonetheless been considered by the Court and is denied.

This shall constitute the decision and order of the Court.

Dated: New York, New York
October 26, 2007

So Ordered:



HON. JUDITH J. GISCHE, J.S.C.

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