

**American Express Travel Related Servs.
Co., Inc. v Woodrow**

2008 NY Slip Op 31929(U)

June 23, 2008

Supreme Court, New York County

Docket Number: 0109097/2006

Judge: Judith J. Gische

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. JUDITH J. GISCHE

PART _____

Index Number : 109097/2006
AMERICAN EXPRESS TRAVEL
vs.
WOODROW, CHRISTOPHER
SEQUENCE NUMBER : # 002
DEFAULT JUDGMENT

INDEX NO. 109097-06

MOTION DATE _____

MOTION SEQ. NO. #002

MOTION CAL. NO. _____

_____ were 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

JUN 27 2008

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 6/23/08

J. Gische
HON. JUDITH J. GISCHE
J.S.C.

J.S.C.

Check one:

FINAL DISPOSITION

NON-FINAL DISPOSITION

REFERENCE

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

-----X
AMERICAN EXPRESS TRAVEL RELATED
SERVICES COMPANY, INC. and AMERICAN
EXPRESS CENTURION BANK,

Plaintiffs,

-against-

CHRISTOPHER WOODROW,

Defendant,

Decision/Order

Index No.: 109097/06

Seq. No. : 002

Present:

Hon. Judith J. Gische
J.S.C.

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

JUN 27 2008

Papers

Pltf's motion [d j/mt] w/JMC affirm, affid, exhs

COUNTY CLERK'S OFFICE
NEW YORK

Numbered

1

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

Plaintiffs American Express Travel Related Services Company, Inc. ("Travel Related") and American Express Centurion Bank ("Centurion Bank"), move to renew their prior motion for an order directing the Clerk of Court to enter a default judgment, pursuant to CPLR § 3215, in their favor against defendant Christopher Woodrow ("Woodrow"). The motion itself has been submitted to the court on default. The prior motion (motion sequence number 002) was denied in the court's decision and order dated March 17, 2008 (the "prior order").¹ Plaintiffs served the prior motion on Aaron

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¹ The prior order was incorrectly dated March 17, 2007. The court hereby corrects the date to March 17, 2008.

[* 3]

Boyajian, Esq., but there was no indication in the record that Attorney Boyajian was Woodrow's attorney. Since the court's prior denial was without prejudice, permission to renew is granted (CPLR § 2221 (d) (2); Foley v. Roche, 68 AD2d 558).

Plaintiffs made three separate but unsuccessful attempts to personally serve the summons and complaint on defendant at his dwelling place within the state of New York on July 6, July 7, and July 12, 2006. Despite due diligence, personal service could not be made, and plaintiffs resorted to service pursuant to CPLR § 308 (4). On July 12, 2006, Woodrow was served by affixing the summons and verified complaint to the door of his dwelling place. Such service was completed by mailing the summons and verified complaint to Woodrow's last known residence on that same day. Consequently, the court has acquired personal jurisdiction over Woodrow. Additionally, plaintiffs have filed proof of additional service, made on July 24, 2006, in compliance with CPLR § 3215 (g), and more than 20 days before entry of judgment.

Despite such notice, Woodrow has neither answered the complaint nor otherwise appeared in this action. His time to do so has expired and has not been extended by the court. Plaintiffs have proceeded within one year of Woodrow's default, and therefore, the court proceeds to consider the merits of plaintiffs' claim on default.

Plaintiff's motion is supported by the affidavit of Edmond Garabedian. Mr. Garabedian is the Custodian of Records for plaintiffs, and thus he has access to plaintiffs' business records in connection with Woodrow's credit card account. A copy of the cardmember agreement, which governs Woodrow's accounts maintained by plaintiffs, has been provided to the court, as well as the several account statements

[*4]
applicable to Woodrow's accounts, which exhibit the amounts due and owing by Woodrow.

Based upon the foregoing, Woodrow was the holder of an American Express Platinum Card ("Platinum Card") that enabled him to charge purchases and other items to an American Express Platinum Card Account ("Platinum Account") maintained by Travel Related. Plaintiffs aver that by accepting and using the Platinum Card, Woodrow agreed to all of the terms and conditions set forth in the undated contract ("Platinum Card Agreement") between Travel Related and Woodrow.

In connection with the Platinum Card Agreement, Centurion Bank maintained a deferred payment feature whereby Woodrow deferred payment of certain charges made to the Platinum Account by transferring those charges to a Sign & Travel Account ("S & T Platinum Account"). The Platinum Card Agreement governed the S & T Platinum Account as well.

Travel Related avers that Woodrow charged various items to the Platinum Account, for which payment was never made. Travel Related has sent monthly statements to Woodrow, but he has failed to make payments due thereon as of December 12, 2007. In addition, Centurion Bank claims that Woodrow has not made the required payments toward the balance on his S & T Platinum Account. Plaintiffs aver that there is currently due and owing on the Platinum Account \$21,378.04 and on the S & T Platinum Account \$42,166.17.²

² The amount stated in the complaint due and owing to Travel Related is \$22,053.49 and the amount due and owing to Centurion Bank is \$42,490.74. However, these amounts were reduced due to a payment by Woodrow in the amount of \$1,000.02 on or about December 18, 2006, as indicated in the affidavit of Edmond Garabedian.

[* 5]

Plaintiffs have asserted three causes of action related to each account, arising from Woodrow's defaults, to wit: breach of contract, unjust enrichment, and account stated.

Discussion

Since a default in answering the complaint constitutes an admission of the factual allegations therein, and the reasonable inferences which may be made therefrom (Rokina Optical Co., Inc. v. Camera King, Inc., 63 NY2d 728 [1984]), plaintiffs are entitled to entry of a default judgment in their favor, provided they otherwise demonstrate that they have a *prima facie* cause of action (Gagen v. Kipany Productions Ltd., 289 AD2d 844 [3d Dept 2001]).

Breach of Contract

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, 116 AD2d 694 [2d Dept 1986]). "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 Terminal Corp. v. New York State Dept. of Transportation, 93 NY2d 584 [1999]).

In this case, a contract was formed between each plaintiff and Woodrow. Plaintiffs performed by providing a credit line to Woodrow, however, Woodrow has defaulted under the Platinum Card Agreement by failing to make payments as they became due on each account. Therefore, plaintiffs have demonstrated a *prime facie*

cause of action for breach of contract. However, Travel Related's damages have not been established on this motion. Plaintiffs' complaint, the affidavit of Edmond Garabedian, and the credit card statements provided by plaintiffs in their motion, each state a different amount due and owing by Woodrow to Travel Related. Accordingly, Travel Related is only entitled to entry of a default judgment on the issue of liability for its breach of contract claim (the first cause of action).

Since the credit card statements do reflect the amounts claimed by Centurion Bank, Centurion Bank is entitled to entry of a default judgment on the fourth cause of action for breach of contract in the amount of \$42,166.74.

Unjust Enrichment

Plaintiffs' third and sixth causes of action alleging unjust enrichment must fail in the face of a valid contract (Clark-Fitzpatrick v. L.I.R.R., 70 N.Y.2d 382 [1987]), because plaintiffs have an adequate remedy at law. Therefore, the third and sixth causes of action are hereby severed and dismissed.

Account Stated

An account stated claim is established when an account has been rendered and no objection to the account has been made within a reasonable period of time (Gurney, Becker & Bourne, Inc. v. Benderson Development Co., 47 N.Y.2d 995 [1979]).

Judgment on the account stated claim is appropriate only if the plaintiff supports its claim for account stated with clear, itemized billing statements (Scheichet & Davis, P.C. v. Steinger, 583 N.Y.S.2d 407 [1st Dept 1992]). Then, the claim for account stated is established if the defendant fails to object to its correctness within a reasonable period

ORDERED that there be an inquest before a Special Referee who shall hear and determine the amount American Express Travel Related Services Company, Inc. may recover on the first cause of action from defendant Christopher Woodrow. Plaintiff American Express Travel Related Services Company, Inc. shall serve a copy of this order on the Office of the Special Referee, 60 Centre Street, Room 119, within ninety days, so that this matter may be scheduled and assigned. Failure to do so will result in a dismissal of this action for unreasonably failing to proceed with the prosecution of this action. CPLR § 3216; and it is further

ORDERED that the Clerk shall enter a money judgment in favor of Plaintiff American Express Centurion Bank, against defendant Christopher Woodrow on the fourth and fifth causes of action, totaling Forty Two Thousand One Hundred Sixty Six 17/100 (\$42,166.17), together with the costs and disbursements of this action; and it is further

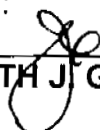
ORDERED that the third and sixth causes of action for unjust enrichment are hereby severed and dismissed, and the second cause of action for account stated by Travel Related is also hereby severed and dismissed.

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

This shall constitute the order, decision and judgment of the Court.

Dated: New York, New York
June 23 2008

So Ordered:


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

FILED
JUN 27 2008
COUNTY CLERK'S OFFICE
NEW YORK