

Capitol One Bank v Kampel

2008 NY Slip Op 32640(U)

September 18, 2008

Supreme Court, Nassau County

Docket Number: 20047/2007

Judge: Michele M. Woodard

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.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

-----X
CAPITOL ONE BANK,

Plaintiff,

-against-

WALTER KAMPEL, D/B/A KAY'S CARDS &
GIFTS, INC.,

Defendant.

MICHELE M. WOODARD
J.S.C.
TRIAL/IAS Part 16
Index No.: 20047/2007
Motion Seq. No.: 01

DECISION AND ORDER

-----X
Papers Read on this Motion:

- 1. Defendant's Notice of Motion.....01
- 2. Defendant's Memorandum.....XX
- 3. Plaintiff's Opposition.....XX
- 3. Defendant's Reply to Opposition.....XX

This Motion arises out of the Plaintiff's action seeking reimbursement from the Defendant, Walter Kampel, individually for alleged credit card charges incurred by the corporation on a small business account. The Plaintiff contracted a credit card agreement (hereinafter the "Agreement") with Kay's Cards & Gifts, Inc. (hereinafter "Kay's"), and sued Kay's and the Defendant individually when Kay's defaulted on its credit card payments. The Defendant moves for an Order seeking the following relief:

- 1. Granting him summary judgment against the Plaintiff pursuant to CPLR §3212 and dismissing the Plaintiff's Complaint
- 2. Pursuant to §130-1.1 of the Rules of the Chief Administrator, imposing sanctions and costs on the Plaintiff including reasonable attorney's fees incurred by the Defendant to defend this action and make and argue this motion.
- 3. In the alterative, pursuant to CPLR §§3124 and 3126 the Defendant requests that the Court compel the Plaintiff to comply with the Defendant's Notice for Discovery and Inspection dated January 8, 2008, or be precluded from offering any documentary evidence at trial in support of its Complaint.

The Defendant, Walter Kampel, alleges that the Plaintiff has improperly sued him personally for alleged credit card charges incurred by the Corporation, Kay's Cards & Gifts, Inc. (hereinafter "Kay's"). Kampel alleges that Kay's was originally formed and run by his ex-wife Kathleen Kampel (hereinafter "Kathleen") as allegedly evidenced by a copy of the Filing Receipt which is attached to the Defendant's Motion papers. Kampel maintains that at the time of Kay's formation, Kathleen was the president and

majority shareholder and he was the Secretary/ Treasurer and minority shareholder. Kampel maintains that the subject account was not established by nor managed by him in any capacity whatsoever. As evidenced by the Purchase and Security agreements which are attached to the Motion papers, Kampel argues that Kathleen was the sole signatory and that Kay's address was care of her. Kampel maintains that it was not until sometime after October 2005 when Kay's had closed that the Plaintiff's monthly statements bore his name, but were still mailed to Kay's former business address.

Kampel maintains that in a Notice for Discovery and Inspection dated January 8, 2008, which is annexed to the motion papers, he requested from the Plaintiff proof of his involvement with Kay's account. Kampel maintains that on or about March 31, 2008, counsel for the Plaintiff responded by forwarding him a series of six monthly statements for the period of January – July 2006; which are attached to the Motion Papers. The Defendant argues that he is entitled to summary judgment as the Plaintiff has failed to comply with the discovery requirements of CPLR §3122 in that the provided monthly statements were not sufficient enough to satisfy the Defendant's discovery request as they did not provide evidence of the Defendant's involvement with the subject account. The Defendant argues that in the event that the Court does not grant summary judgment in his favor, he requests that the Court preclude the Plaintiff from offering any documentary evidence at trial to: (a) support its claim for damages, (b) prove the existence of an agreement between the Plaintiff and the Defendant, (c) prove an account stated, or (d) prove that the Defendant is responsible for the debt of Kay's to the Plaintiff. The Defendant also urges the Court to award him the costs he incurred in making this motion including reasonable attorney's fees as the Plaintiff's Complaint is frivolous and thus subject to sanctions.

In opposition, the Plaintiff argues that because the subject account was opened in the name of a small business account and the Defendant alleged in his Affidavit that he was an officer of Kay's Cards and Gifts, the Defendant is responsible for the subject default. In furtherance of this argument, the Plaintiff maintains that pursuant to the subject Credit Card Agreement, the Defendant, as a person authorized to make use of the account, is liable for any charges incurred on the account. The Plaintiff argues that on a motion for Summary Judgment, the movant must set forth a prima facie showing of entitlement to Judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact. *Citing Alvarez v*

Prospect Hospital, 68 NY2d 320 (1986). In furtherance of the Plaintiff's contention that the Defendant is personally liable for the subject account, the Plaintiff argues that because the billing statements for the period of January – July 2006 were made out in the name of the Defendant, it is clear that the Defendant was listed on the subject account and is personally liable for the same. With respect to the Defendant's claim that the Plaintiff's action is frivolous and is therefore subject to sanctions, the Plaintiff urges the Court to deny this request as the Defendant is personally liable for the subject account. The Plaintiff alleges that it explained to counsel for the Defendants the reason for the delay in producing the discovery requests being that Discovery issues involving large national banks are often time consuming. However, the Plaintiff maintains that as billing statements became available, it forwarded copies of said documents to counsel for the Defendants. The Plaintiff requests that: (1) the Defendant's motion for Summary Judgment be denied, (2) the Defendant's request for the assessment of sanctions be denied, (3) the Defendant's motion to compel Discovery be denied, and (4) the costs and expenses of defending against the within motion be awarded to the Plaintiff.

In Reply to the Plaintiff's Opposition, the Defendant argues that the Plaintiff's Affirmation is insufficient in that an attorney's affirmation not made upon personal knowledge, merely repeats conclusory allegations of the Complaint and fails to tender proof in admissible form to establish the existence of a triable issue of fact is insufficient as a matter of law to defeat a motion for Summary Judgment. *Citing Zuckerman v City of New York*, 49 NY2d 557 (1980); *Vernette v Kenworth Truck Co.*, 68 NY2d 714 (1986); *Bua v South Shore Skating, Inc.*, 193 AD2d 774 (2d Dept 1993). The Defendant argues that said Affidavit is defective because it was served on June 6, 2008, less than the seven days advance service required by the Defendant's the Notice of Motion and CPLR §2214(b), and the copy served on the Defendant was unsigned. The Defendant alleges that the Summons and Complaint the Plaintiff annexed to its Opposition papers is different from the one served upon him, contains an inaccurate caption, and fails to offer any admissible evidence. Moreover, the Defendant alleges that the Customer Agreement attached to the Plaintiff's Opposition papers appears to be nothing more than a boilerplate copy of terms the Plaintiff uses for some customers. The Defendant argues that although the Plaintiff's Affirmation indicated that, "any person authorized to make use of the card is clearly stated in the first paragraph of the Agreement," nowhere in the Agreement are names set forth to indicate what parties are liable for said Agreement. Therefore, the Defendant argues that he cannot be held liable to the Agreement. The Defendant argues that it is absurd for the Plaintiff to contend that because it placed the Defendant's name on the monthly statements, he is now liable for said statements. The Defendant urges the Court to impose sanctions on the Plaintiff for bringing a frivolous lawsuit considering that the Plaintiffs have failed to comply with the Defendant's discovery requests and have had reasonable time to do so.

The Court finds that it appears from the Plaintiff's allegations that the within caption should read: the Defendant, Walter Kampel, as an individual, and the Defendant/Company, Kay's Cards and Gifts, Inc., separately. Nonetheless, the Defendant, Walter Kampel's, relief requested is granted for the following reasons. It is well settled that evidence sufficient to establish a prima facie case for summary judgment on the issue of a party's entitlement to payment of credit card debt are: "[the] credit card agreement [itself], monthly billing statements, and proof of nonpayment." See *Great Seneca Financial Corporation v Brown*, 18 Misc3d 140 (A) (1d Dept 2008) Citing *Citibank (South Dakota) N.A. v Roberts*, 304 AD2d 901 (2003). In this case, the Court finds that the Plaintiff has failed to provide the credit card agreement; therefore, rendering the Defendant incapable of submitting said agreement with the within motion. The Court finds that a party cannot bring an action against another without sufficient proof to substantiate its claim. The Court acknowledges that the Plaintiff has had substantial time to comply with the Defendant, Kampel's, discovery request that the Plaintiff forward him the subject credit card agreement, or proof which substantiates the Plaintiff's claim that he was involved with the subject account. The Court recognizes that the Customer Agreement which the Plaintiff attached to its Opposition papers does not appear to be the subject agreement which indicates the signatures of all parties to the same, but is rather a copy of boilerplate terms the Plaintiff uses for some customers. The Court finds that the only evidence which the Plaintiff provided which substantiates it's claim is that the series of seven monthly statements for the period of January 2006 – July 2006 are addressed to both Kay's Cards & Gifts, Inc. and Walter Kampel. The Court acknowledges that in order to defeat a motion for Summary Judgment, the party opposing the motion must assemble and lay bare affirmative proof to demonstrate the matters alleged are real and capable of being established at trial. *Northside Savings Banks v Sokol*, 183 AD2d 816 (2d Dept 1992); *Sikes v Chevron Cos.*, 173 AD2d 810 (2d Dept 1991). However, the Court finds that the seven monthly statements merely addressed to the Defendant, which the Plaintiff provided are not enough to defeat the within motion for Summary Judgment.

As such, it is

ORDERED, that the Defendant's motion for summary judgment is **GRANTED**. And the Plaintiff's Complaint is **dismissed**.

This constitutes the **DECISION** and **ORDER** of the Court.

DATE: September 18, 2008
Mineola, N.Y.

ENTERED

SEP 23 2008

NASSAU COUNTY
COUNTY CLERK'S OFFICE

ENTER:



HON. MICHELE M. WOODARD
J.S.C.
XXX