

American Express Centurion Servs. Corp. v Ozawa

2009 NY Slip Op 32465(U)

October 14, 2009

Supreme Court, New York County

Docket Number: 107969/08

Judge: Judith J. Gische

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

JUDITH J. GISCHKE, J.S.C.

PRESENT: _____
Justice

PART 10

Index Number : 107969/2008
AMERICAN EXPRESS CENTURION
VS.
OZAWA, NORIKO
SEQUENCE NUMBER : 001
SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

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
OCT 26 2009
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 10/14/09

JUDITH J. GISCHKE, 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
AMERICAN EXPRESS CENTURION SERVICES
CORP.,

Plaintiff,

-against-

NORIKO OZAWA,

Defendant.
-----X

Decision/Order

Index No.: 107969/08
Seq. No. : 001

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	Numbered
Pltf's n/motion (CPLR § 3212) w/EG affid in support, exhs 1

-----X

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

This is an action to recover amounts charged to a credit card account. Plaintiff moves, pursuant to CPLR § 3212, for summary judgment on the complaint against the defendant. Although there is due proof of service of the instant motion, the defendant has not served any opposition thereto. Accordingly, the motion is considered on default.

Issue has been joined. Since note of issue has not yet been filed, summary judgment relief is available. Brill v. City of New York, 2 NY3d 648 (2004).

The following facts are based upon the complaint, as well as the affidavit of Edmond Garabedian, an authorized agent of plaintiff with knowledge based upon plaintiff's records. An American Express credit card, bearing account # 373711032604002, was issued to the defendant upon the defendant's specific request.

The defendant agreed to pay for the charges to the defendant's card account by use thereof. Plaintiff has provided a copy of the underlying credit agreement, as well as statements of the defendant's account. Defendant incurred unpaid charges in the sum of \$32,286.32. No portion of this balance has been paid despite due demand thereof.

Plaintiff's complaint asserts two causes of action against the defendant: [1] breach of the credit agreement; and [2] account stated. The defendant's answer contains general denials and a claim that financial hardship prevents has prevented him from settling his account with plaintiff.

Discussion

On a motion for summary judgment, it is the movants' burden to set forth evidentiary facts to prove its *prima facie* case that would entitle them to judgment in their favor, without the need for a trial. Only if this burden is met, must the party opposing the motion then demonstrate, by admissible evidence, the existence of a factual issue requiring a trial of the action, or tender an acceptable excuse for his/her failure so to do. CPLR § 3212; Winegrad v. NYU Medical Center, 64 NY2d 851 (1985); Zuckerman v. City of New York, 49 NY2d 557, 562 (1980). Where, however, the proponent fails to make out its *prima facie* case for summary judgment, then the motion must be denied, regardless of the sufficiency the opposing papers. Alvarez v. Propect Hospital, 68 N.Y.2d 320 (1986); Ayotte v. Gervasio, 81 NY2d 1062 (1993). When issues of law are the only issues 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 AD2d 459 (2d Dept 2003).

The elements of a cause of action for breach of contract are: (1) formation of a

[* 4]

contract between the parties; (2) performance by plaintiff; (3) defendant's failure to perform; and (4) resulting damage. Furia v. Furia, 116 A.D.2d 694 (2d Dept 1986).

An account stated represents an agreement between the parties reflecting amounts due on prior transactions. Jim-Mar Corp. v. Aquatic Constr., 195 AD2d 868 (3d Dept. 1993), *lv. denied* 82 NY2d 660 (1993). Where either no account has been presented or there is any dispute regarding the correctness of the account, the cause of action fails. M & A Const. Corp. v. McTague, 21 AD3d 610 (3rd Dept. 2005).

Plaintiff's claims establish a *prima facie* cause of action for account stated and breach of the credit agreement against the defendant. The plaintiff's issuance of a credit card to the defendant was an offer of credit, and the defendant's use of the credit card constitutes an acceptance of the offer to bind the parties. Feder v. Fortunoff, 474 NYS2d 937 (1984). The defendant's answer with its general denials does not, as a matter of law, raise a triable issue of fact sufficient to defeat summary judgment. Winegrad v. NYU Medical Center, *supra*. Economic hardship does not relieve a defendant from liability for breach of contract. Pettinelli Elec. Co. Inc. V. Board of Ed. of City of New York, 56 AD2d 520 (1997). The court has not authority to compel plaintiff to participate in defendant's debt consolidation plan. There is no term in the credit agreement which would obligate the plaintiff to do so. Accordingly, plaintiff is entitled to summary judgment on the complaint, and a money judgment against the defendant for \$32,386.32 plus interest thereon from the date of default, 6/23/07. CPLR § 5001.

Conclusion

In accordance herewith, it is hereby:

ORDERED that plaintiff's motion for summary judgment is granted in its entirety;
and it is further

ORDERED that the clerk shall enter a money judgment in favor of plaintiff and
against the defendant Noriko Ozawa, in the sum of Thirty Two Thousand, Two Hundred
Eighty Six and 32/100 Dollars (\$32,286.32) on the first and second causes of action.

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 14, 2009

So Ordered:



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

FILED
OCT 26 2009
COUNTY CLERK'S OFFICE
NEW YORK