

American Express Centurion Bank v Tolentino

2010 NY Slip Op 31168(U)

April 14, 2010

Sup Ct, Nassau County

Docket Number: 15932/09

Judge: F. Dana Winslow

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SCM

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. F. DANA WINSLOW,

Justice

AMERICAN EXPRESS CENTURION BANK,

**TRIAL/IAS, PART 5
NASSAU COUNTY**

Plaintiff,

INDEX NO.: 15932/09

-against-

MOTION DATE: 2/23/10

**MARIA L. TOLENTINO A/K/A MARIA
TOLENTINO,**

**MOTION SEQ. NOS.: 001,
002**

Defendant.

The following papers having been read on the motion (numbered 1-3):

Notice of Motion.....1
Affirmation in Opposition.....2
Notice of Cross Motion.....3

This is an action by AMERICAN EXPRESS CENTURION BANK (“plaintiff”) to recover the sum of \$42,397.41 plus attorneys’ fees, court costs and prejudgment interest, allegedly due on a credit card issued to defendant MARIA L. TOLENTINO A/K/A MARIA TOLENTINO (“TOLENTINO”). Plaintiff moves for summary judgment pursuant to CPLR §3212, and cross moves for an Order to change the caption to reflect TOLENTINO’s current name. The motions are determined as follows.

The complaint alleges that by accepting and using the credit card, TOLENTINO agreed to all the terms and conditions set forth in the Agreement Between Cardmember and American Express Centurion Bank (the “Agreement”). Plaintiff alleges causes of action in breach of contract, account stated and unjust enrichment. In her answer, TOLENTINO admits, *inter alia*, that (1) she was the holder of the credit card at issue which enabled her to charge items to an American Express Personal Card Account (the “Account”); (2) she “agreed to pay at least the minimum amount due by the due date for all items personally charged or authorized by her to the Account as outlined in the [Agreement]”; and (3) she received statements from plaintiff.

In support of its motion, plaintiff has submitted a copy of the Summons and Complaint filed on August 10, 2009, the Answer of TOLENTINO filed on September 4, 2009, counsel's Memorandum of Law, and the Affidavit in Support of Edmond Garabedian, a "Custodian of the Records," of plaintiff, sworn to on September 18, 2009 (the "Garabedian Affidavit"), and exhibits thereto. Plaintiff has also submitted an affidavit of service, sworn to on August 11, 2009, attesting to service of the summons and complaint on TOLENTINO at "1529 Caryl Ct., Elmont, NY 11003," pursuant to **CPLR §308(2)** by serving "Chris Deprado, her husband", described as a person of suitable age and discretion. The Court finds this sufficient to satisfy the requirements of **CPLR §308(2)**. In any event, TOLENTINO did not raise the issue of improper service in her answer nor move to dismiss on that ground within 60 days thereafter. Accordingly, any challenge to personal jurisdiction has been waived. **CPLR 3211(e)**.

Turning to the merits of plaintiff's *prima facie* case against TOLENTINO, plaintiff has submitted the Garabedian Affidavit as documentary evidence that TOLENTINO accepted and used the credit card pursuant to the Agreement [Motion Exhibit 1 to the Garabedian Affidavit], and was issued monthly billing statements addressed to TOLENTINO [Motion Exhibit 2 to the Garabedian Affidavit].

The proffered Agreement relating to use of the credit card is a general form of agreement – undated, unsigned, and containing no information that links it to the particular account in question. However, copies of the monthly statements submitted by plaintiff are evidence of an active credit card account. The submitted statements were addressed to TOLENTINO and were issued from January 2008 through and including May 2009. They reflect use of the card and payments on the account from December 2007 through December 2008. The earliest statement submitted by plaintiff has a closing date of January 7, 2008 and reflects a beginning balance of \$37,414.31.

The Court finds that plaintiff has demonstrated *prima facie* entitlement to judgment on liability as a matter of law on its breach of contract cause of action. *See CPLR 3212(b); Zuckerman v. City of New York*, 49 NY2d 557. The burden thus shifts to TOLENTINO to demonstrate the existence of a genuine issue of material fact. *Id.* In opposition, TOLENTINO submits her affidavit, sworn to on December 7, 2009, wherein she admits that she opened the account in 2000 and used it periodically. TOLENTINO argues, however, that (i) plaintiff's motion is premature on grounds that plaintiff never responded to her Notice of Discovery and Inspection; (ii) the Agreement submitted and relied upon by plaintiff is not signed by TOLENTINO and was not in effect at the time TOLENTINO opened her account; (iii) although TOLENTINO opened her account in 2000, plaintiff only submits as proof of the amount claimed, seventeen monthly statements beginning in January 2008; (iv) the Garabedian Affidavit fails to state facts specific to TOLENTINO;

and (v) TOLENTINO has had periodic disputes with plaintiff with regard to certain charges and fees made on the account. TOLENTINO also avers that she stopped using the account “toward the end of 2008” but that plaintiff continued to demand greater minimum payments. TOLENTINO further claims that she intended to “pay down the balance owed on undisputed charges and fees.”

With respect to TOLENTINO’s argument that the proffered Agreement was not in effect at the time she opened her account, plaintiff presents the affidavit of Joshua Knurr, Esq. (“Knurr”), Assistant Custodian of Records for plaintiff, sworn to on February 18, 2010, wherein he states that if there are changes to cardmembers’ agreements, cardmembers are notified of that fact in their monthly billing statements. In support, Knurr refers to TOLENTINO’s statement of account, with a closing date of March 9, 2008, which states in bold face on the first page, “See page 4 for a Notice of Changes to Your Agreement.” Knurr also refers to a provision in the Agreement which provides that plaintiff may change the terms of the Agreement at any time. Knurr avers that card members are frequently notified of such changes on the first page of their monthly billing statements.

With respect to TOLENTINO’s claim that she has disputes with plaintiff as to the amount of charges and fees in arrears, plaintiff argues that TOLENTINO fails to offer evidence of any such disputes. The Garabedian Affidavit states that it is the practice of plaintiff to provide notice of any dispute at the top of a card member’s monthly statement, and in many instances, a temporary credit is given while plaintiff investigates the disputed charge. Plaintiff argues, that in this case, none of TOLENTINO’s monthly statements reflects any dispute.

The Court finds that TOLENTINO has failed to come forth with evidence to raise an issue of fact regarding her liability other than conclusory allegations that she objected to charges to her account periodically and that the proffered Agreement was not applicable to her. However there are shortcomings in plaintiff’s proof as the amount claimed due and owing. The Court has examined the monthly billing statements attached to plaintiff’s motion as Exhibit 2 to the Garabedian Affidavit, and finds that said statements fail to sufficiently demonstrate the amount of principal and interest due from TOLENTINO. The Court is unable to verify the total amount, including finance charges, to which plaintiff is entitled.

Furthermore, the Court grants plaintiff’s cross motion to amend the caption in the form attached as Exhibit 1 to the cross motion, to reflect TOLENTINO’s statement in her affidavit that she changed her name to Lynnette Tolentino de Prado, and is currently known as Lynnette de Prado.

The Court has examined the parties' remaining contentions and find them to be without merit.

On the basis of the foregoing, it is

ORDERED, that plaintiff's motion for summary judgment on liability pursuant to CPLR §3212 is **granted**; and it is further

ORDERED, that plaintiff's cross motion to change the caption to reflect TOLENTINO's current name in the form attached as Exhibit 1 to plaintiff's cross motion, is **granted**; and it is further

ORDERED, that counsel for all parties in the above-referenced matter shall appear for a hearing on **Thursday April 29, 2010 at 2:30 p.m.** in Supreme Court, 100 Supreme Court Drive, Part 5. The parties must contact chambers one day before the scheduled hearing to confirm that there is no trial or other conflict.

This constitutes the Order of the Court.

Dated: *4/14*, 2010

[Signature]
J.S.C.

ENTERED
MAY 05 2010
NASSAU COUNTY
COUNTY CLERK'S OFFICE