

American Express Centurion Bank v Lynch
2010 NY Slip Op 31348(U)
April 15, 2010
Sup Ct, NY County
Docket Number: 113651/09
Judge: Judith J. Gische
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. JUDITH J. GISCHE
J.S.C.
Justice

PART 10

Index Number : 113651/2009
AMERICAN EXPRESS CENTURION BANK
VS.
LYNCH, SEAMUS
SEQUENCE NUMBER : 001
DEFAULT JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. 001
MOTION CAL. NO. _____

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

FILED
APR 22 2010
NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: 4/15/10

HON. JUDITH J. GISCHE 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
BANK,

Plaintiff,

-against-

SEAMUS LYNCH

Defendant.

-----X

Decision/Order

Index No.: 113651/09
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/m (3215) w/JMC affirm, EG affid, exhs	1

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 § 3215, for entry of a default judgment against the defendant. Although there is due proof of service of the underlying summons and verified complaint, as well as the instant motion, the defendant has not opposed or otherwise appeared in this action within the time provided for in the CPLR. Defendant's time to do so has not been extended by the court. Plaintiff has also filed proof of additional service in compliance with CPLR § 3215 [g]. Therefore, the defendant has defaulted in this action and the motion will be considered without opposition.

Plaintiff is entitled to a default judgment against the defendant, provided it otherwise demonstrates that it has a *prima facie* cause of action. Gagen v. Kipany Productions Ltd., 289 A.D.2d 844 (3d Dept. 2001). The defendant's 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 N.Y.2d 728 (1st Dept. 1984).

Plaintiff alleges that the defendant was the holder of a Centurion Bank Rewards Gold Card (the "Card") that enabled him to charge items to a Centurion Bank Rewards Gold Card Account, Account No. 3715-763718-11001 (the "Account"). By accepting and using the Account, the defendant agreed to all of the terms and conditions set forth in the agreement between defendant and plaintiff (the "Agreement"). Under the Agreement dated February 10, 2007, defendant agreed to be responsible for paying all amounts charged to the Account by either himself or any additional cardmember or additional account user. Defendant also agreed to pay a minimum amount according to monthly billing statements, and if defendant failed to make the minimum payment, plaintiff was entitled to charge a late fee.

The complaint contains three causes of action, to wit: [1] breach of contract; [2] account stated; and [3] unjust enrichment.

Plaintiff has provided the affidavit of Edmond Garabedian, the Custodian of Records for the plaintiff. Mr. Garabedian states that as of September 28, 2009, \$86,710.18 was due and owing from defendant on the Account. Plaintiff has provided statements of defendant's account reflecting defendant's indebtedness.

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 (2d Dept. 1990).

An account stated represents an agreement between the parties reflecting amounts

due on prior transactions. Jim-Mar Corp. v. Aquatic Constr., 195 A.D.2d 868 (3d Dept. 1993), *lv. denied* 82 N.Y.2d 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 A.D.3d 610 (3d Dept. 2005).

Based on the foregoing, plaintiff has established a *prima facie* cause of action for breach of contract and account stated against the defendant. Accordingly, plaintiff is entitled to entry of default judgment against the defendant on its first and second causes of action. However, plaintiff's cause of action for unjust enrichment must fail in the face of a valid contract. Clark-Fitzpatrick v. L.I.R.R., 70 N.Y.2d 382 (2d Dept. 1987). Plaintiff is entitled to a money judgment in the amount of \$86,710.18 with interest from September 28, 2009, the date the amount was due and owing.

Legal Fees

In general, each party to a litigation is required to pay its own legal fees, unless there is a statute or an agreement providing that the other party shall pay same. AG Ship Maintenance Corp. v. Lezak, 69 N.Y.2d 1 (2d Dept. 1986). Here, the Agreement expressly provides that defendant is liable to pay plaintiff "all reasonable costs, including reasonable attorney's fees" Plaintiff has not yet provided a bill of costs or an affidavit attesting to the fees incurred and the reasonableness thereof. The court, therefore, refers the issue of what plaintiff may recover from defendant for its reasonable attorneys fees, costs, and disbursements to hear and determine. Plaintiff is hereby directed to serve a copy of this decision and order upon the Office of the Special Referee so that this reference can be assigned.

Conclusion

In accordance herewith, it is hereby:

ORDERED that plaintiff's motion for entry of a default judgment against defendant, Seamus Lynch, is granted on the first and second causes of action; and it is further

ORDERED that the third cause of action for unjust enrichment is hereby severed and dismissed; and it is further

ORDERED that the clerk shall enter judgment in favor of plaintiff and against defendant, Seamus Lynch, in the sum of eighty-six thousand seven hundred ten dollars and eighteen cents (\$86,710.18); and it is further

ORDERED that interest shall run from September 28, 2009, at the statutory rate; and it is further

ORDERED that the issue of what plaintiff may recover from defendant for its reasonable attorneys fees, costs, and disbursements is hereby referred to a Special Referee to hear and determine; and it is further

ORDERED that any requested relief not expressly addressed herein has nonetheless been considered by the court and is denied; and it is further

ORDERED that this shall constitute the decision and order of the court.

Dated: New York, New York
April 15, 2010

So Ordered:



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

FILED
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NEW YORK
COUNTY CLERK'S OFFICE