

American Express Centurion Bank v Charlot

2010 NY Slip Op 32116(U)

July 29, 2010

Sup Ct, NY County

Docket Number: 105217-09

Judge: Judith J. Gische

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

HON. JUDITH J. GISCHE

PRESENT: _____

PART 10

Justice

Index Number : 105217/2009

AMERICAN EXPRESS CENTURION BANK

vs.

CHARLOT, MARILYN

SEQUENCE NUMBER : 001

DEFAULT JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

in 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 IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION.

FILED

AUG 03 2010

NEW YORK COUNTY CLERK'S OFFICE

JUL 29 2010

Dated: 7/29/10

HON. JUDITH J. GISCHE *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-

MARILYN CHARLOT,

Defendant.
-----X

Decision/ Order

Index No.: 105217-09
Seq. No.: 001

PRESENT:

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

FILED
AUG 03 2009
NEW YORK
COUNTY CLERK'S OFFICE

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

Papers

Pltf's n/m [§ 3215] w/ AM affirm, proof of service

Numbered

.....1

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

This is an action to recover amounts charged by defendant to two credit card accounts in her name. Presently before the court is plaintiff, American Express Centurion Bank's ("plaintiff") motion for entry of a default judgment against defendant, Marilyn Charlot ("defendant") pursuant to CPLR § 3215.

Plaintiff has properly filed proof of service of the summons and complaint. Defendant was served on April 25th, 2009 by Darryl Green, a process server who attached a copy of the summons and complaint to the door of defendant's home. Green made two attempts to personally serve defendant with the summons and complaint on two different days at different times before attaching the summons and complaint to defendant's door on his third attempt. Service was completed on April 28th, 2009 when an additional copy of the summons and complaint was mailed to defendant's home. Pursuant to CPLR § 3215(g), another copy of the summons and complaint was sent by regular first class mail to defendant's home on May

9th, 2009. Plaintiff has verified that defendant is not on active duty with any branch of the United States military. Plaintiff contends that although defendant was served the summons and complaint, she has not answered the complaint, appeared in this action or moved for an extension of her time to do so. On April 22nd, 2010, a copy of the motion for entry of default judgment was mailed to defendant's home. Plaintiff has complied with CPLR § 3215(c), filing the motion within one year of the defendant's default. Despite such service and additional notice, defendant has defaulted in appearing in this action and also in opposing this action. Therefore, plaintiff seeks entry of a default judgment against defendant.

To be granted a default judgment, the party making the claim must present proof of the facts showing the default and the amount due either by affidavit or verified complaint. Zelnik v. Bidermann Indus., Inc. 242 A.D.2d 227 (1st Dept. 1997). Plaintiff is entitled to default judgment when the defendant has "failed to appear, plead or proceed to trial of an action reached and called for trial." CPLR § 3215(a). A defaulting defendant is deemed to admit to all the factual allegations contained in the complaint "and all reasonable inferences that follow from them." Woodson v. Mendon, 100 N.Y.2d 62 (2003).

The following is established by the sworn affidavit of J. Hurte, the Custodian of Records for American Express Centurion Bank.

Plaintiff issued two credit cards, an American Express Gold Card ("Gold Card") and an American Express Triumph Blue Classic card ("Blue Card") to defendant (the "Cards"), which enabled her to make charges to two separate accounts. Both cards are linked to the same account with the last five digits, 71008 used for identification purposes in this action (the "Account"). As the basic cardmember, defendant was obligated to pay all the expenses charged to this account, pursuant to the terms and conditions set forth in the agreement between plaintiff and defendant (the "Agreement"). The plaintiff's issuance of [two] credit

card[s] 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, 123 Misc.2d 857 (N.Y. Sup. 1984). The Agreement also states that defendant is responsible for paying a "minimum amount due" as indicated in the monthly billing statements and is subject to a delinquency fee if the minimum is not paid. Defendant is also obligated to pay all reasonable costs, including attorneys' fees upon "defaulting" on her account with American Express. Plaintiff alleges that defendant owes a total of \$25,839.86 on her account; \$13,493.09 on her Gold Card and \$12,346.77 on her Blue Card.

The complaint alleges four causes of action. For the Gold Card, plaintiff alleges a breach of contract. Plaintiff has withdrawn its second and third causes of action. For the Blue Card, plaintiff alleges: [1] breach of contract; [2] account stated; and [3] unjust enrichment. J. Harte states that as of March 10th, 2010, \$25,839.86 was due on the Account. Plaintiff has mailed a statement to the defendant dated on April 14th, 2009 showing the outstanding balance due, reflecting defendant's indebtedness.

The four elements required of a cause of action for a breach of contract include: [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. 1986).

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 (3rd Dept. 1993), *lv. Denied* 82 N.Y.2d 660 (1993). It assumes the existence of some indebtedness between the parties. Grinnell v. Ultimate Realty, L.L.C., 38 A.D.3d 600 (2d Dept. 2007). 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 (3rd Dept. 2005).

A required element for finding unjust enrichment is the receipt by one party of money or benefit to which it is not entitled, at the expense of another. Abacus Federal Savings Bank v. Lim, 2010 WL 2813453 (1st Dept. 2010). However, a claim for unjust enrichment can only be made in the absence of any agreement. Goldman v. Metropolitan Life Ins. Co., 5 N.Y.3d 561 (2005). Since this matter is controlled by contract, plaintiff cannot justify this cause of action. See Clark-Fitzpatrick, Inc. v. Long Island R.R. Co., 70 N.Y.2d 382 (1987). Therefore, this claim is hereby severed and dismissed

Plaintiff has established a prima facie cause of action for breach of contract and account stated against the defendant. Therefore, plaintiff is entitled to entry of a default judgment on the first, fourth, and fifth causes of action in the amount alleged. The clerk shall enter a money judgment in the principal amount of \$25,839.86 with interest from August 1st, 2009.

Generally, parties involved in an action are responsible for payment of all legal fees and costs incurred and cannot recover the same from an opposing party unless there is an agreement, contract, or statute that provides otherwise. Hooper Associates, Ltd. V. AGS Computers, Inc., 74 N.Y.2d 487 (1989). Here, the Agreement provides that the defendant upon "defaulting" on her account is responsible for paying plaintiff's attorneys' fees and "all reasonable costs". Plaintiff has not provided the court with any basis on which to calculate reasonable attorneys' fees. Therefore, the court refers the issue of what reasonable attorneys' fees plaintiff may recover from defendant to a Special Referee who shall hear and determine the issue. Plaintiff is hereby directed to serve a copy of this decision to the Office of the Special Referee so that this reference can be assigned.

Conclusion

In accordance herewith, it is hereby:

ORDERED that plaintiff American Express Centurion Bank's motion for default judgment against defendant Marilyn Charlot on the first, fourth, and fifth causes of action is granted; and it is further

ORDERED that plaintiff has withdrawn its second and third causes of action from consideration and it is hereby severed; and it is further

ORDERED that plaintiff's sixth cause of action for unjust enrichment is severed and dismissed; and it is further

ORDERED that the clerk shall enter judgment in favor of plaintiff American Express Centurion Bank against defendant Marilyn Charlot, in the sum of twenty-five thousand eight hundred and thirty-nine dollars and eighty-six cents (\$25,839.86), plus interest from August 1st, 2009; and it is further


ORDERED that the issue of what plaintiff may recover from defendant for its reasonable attorneys' fees 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 and is hereby expressly denied; and it is further

ORDERED that this constitutes the decision and order of the court.

Dated: New York, New York
July 29th, 2010

So Ordered:



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

FILED
AUG 03 2010
NEW YORK
COUNTY CLERK'S OFFICE