

American Express Centurion Bank v Innis

2010 NY Slip Op 32409(U)

August 18, 2010

Sup Ct, NY County

Docket Number: 100365/10

Judge: Eileen A. Rakower

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

PRESENT: HON. EILEEN A. RAKOWER
Justice

PART 15

American Express

INDEX NO. 100365110

- v -

MOTION DATE _____

Ennis, Roy

MOTION SEQ. NO. 01

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

1
2

Cross-Motion: Yes No

FILED

AUG 23 2010

NEW YORK
COUNTY CLERK'S OFFICE

Upon the foregoing papers, it is ordered that this motion

**MOTION IS DECIDED IN ACCORDANCE WITH
THE ACCOMPANYING MEMORANDUM DECISION.**

Dated: 8/18/10

[Signature]
HON. EILEEN A. RAKOWER

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER / JUDGE

SETTLE ORDER / JUDGE

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

-----X
AMERICAN EXPRESS CENTURION BANK,

Plaintiff,

Index No.
100365/10

Seq No.: 001

- against -

ROY INNIS AND NEW YORK CHAPTER OF CORE, INC.,

FILED Decision and
Order
AUG 23 2010
NEW YORK
COUNTY CLERKS OFFICE

Defendants.

HON. EILEEN A. RAKOWER, J.S.C.

Plaintiff brings this action for breach of a credit card agreement and account stated as against defendant Roy Innis. Plaintiff brings an action for unjust enrichment as against Mr. Innis and defendant New York Chapter of Core, Inc. ("Core"). Plaintiff now moves for summary judgment on the complaint in the amount of \$83,101.71 plus interest from June 28, 2007, the date the card was cancelled by plaintiff. Counsel for Mr. Innis and Core submits an "affirmation" in response to the motion.

Plaintiff, in support of its motion, submits: the pleadings, a copy of the "Agreement Between Gold Cardmember and American Express Centurion Bank" and credit card statements addressed to Roy Innis at 3RD FL 817 Broadway New York, NY 10003-4709. Plaintiff asserts that defendants do not dispute the terms of the agreement, and made payments on the account. Defendants contend that the instant motion should be denied because an action involving the same account, was previously in front of Justice Eileen Bransten, and was dismissed by her for failure to state a cause of action. Defendants point out that plaintiff re-submits the same complaint that was dismissed.¹

¹While the complaint is largely the same, the new complaint is brought by a different plaintiff and names both Mr. Innis and CORE as defendants, as opposed to the previous action, which named only Mr. Innis.

The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law. That party must produce sufficient evidence in admissible form to eliminate any material issue of fact from the case. Where the proponent makes such a showing, the burden shifts to the party opposing the motion to demonstrate by admissible evidence that a factual issue remains requiring the trier of fact to determine the issue. The affirmation of counsel alone is not sufficient to satisfy this requirement. (*Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]). In addition, bald, conclusory allegations, even if believable, are not enough. (*Ehrlich v. American Moninger Greenhouse Mfg. Corp.*, 26 N.Y.2d 255 [1970]). (*Edison Stone Corp. v. 42nd Street Development Corp.*, 145 A.D.2d 249, 251-252 [1st Dept. 1989]).

Initially, Justice Bransten specifically stated in her decision:

The court denied plaintiff's motion for Summary Judgment and found that the complaint in this matter failed to state a cause of action as against the stated defendant herein [Innis] and for that reason the court dismissed the complaint without prejudice.

When a complaint is dismissed without prejudice, or if it is not decided on the merits, "the doctrine of res judicata does not bar the timely commencement" of another action. (*Avins v. Federation Employment and Guidance Service, Inc.*, 67 AD3d 505 [1st Dept. 2009]).

In order to establish its right to judgment as a matter of law for breach of a credit card agreement and account stated, plaintiff must show the "existence of an agreement to extend credit to the defendant, the issuance of credit cards at the defendant's address, his use of credit cards, his retention of account statements, or payments on the account." (see *PRA III, LLC v. Gonzalez*, 54 AD3D 917 [2nd Dept. 2008]). Here, plaintiff submits a copy of the agreement wherein it states:

When you keep, sign or use the Card issued to you (including any renewal or replacement Cards), or you use the account associated with this Agreement (your "Account"), you agree to the terms of this Agreement. The words "you," "your" and "yours" mean the person who applied for the Account and the person to whom we address billing statements, as well as any person who agrees to be liable on the Account

. . . "We," "our" and "us" refer to American Express Centurion Bank, the issuer of your Account.

Plaintiff also submits multiple credit card statements addressed to Roy Innis, including statements showing payments on the account.

Plaintiff has submitted evidence in admissible form which shows that Roy Innis was bound by a credit agreement with plaintiff, and subsequently defaulted on such agreement. Defendants fail to submit any proof in opposition.

Plaintiff fails to meet its burden with regard to CORE. Plaintiff submits no evidence in admissible form which would establish that CORE "accepted and retained" goods without paying for them, as alleged in plaintiff's third cause of action.

Wherefore it is hereby

ORDERED that plaintiff's motion for summary judgment is granted as against defendant Roy Innis; and it is further

ORDERED that plaintiff's motion as against CORE is denied; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment in favor of plaintiff and against defendant Roy Innis, in the sum of \$83,101.71, together with interest at the statutory rate of 9% from June 28, 2007 until the date the judgment is paid, together with costs and disbursements as taxed by the Clerk in the amount of \$ _____, for a total amount of \$ _____; and it is further

ORDERED that the portion of the plaintiff's action that seeks the recovery of attorneys' fees is severed and the issue of the amount of reasonable attorneys' fees plaintiff may recover against defendants is referred to a Special Referee to hear and report; and it further

ORDERED that counsel for the plaintiff shall, within 30 days from the date of this order, serve a copy of this order with notice of entry, together with a completed

information sheet,² upon the Special Referee Clerk in the Motion Support Office (Room 119M), who is directed to place this matter on the calendar of the Special Referee's Part for the earliest convenient date.

This constitutes the decision and order of the court. All other relief requested is denied.

DATED: August 18, 2010



EILEEN A. RAKOWER, J.S.C

FILED
AUG 23 2010
NEW YORK
COUNTY CLERK'S OFFICE

²Copies are available in Rm. 119M at 60 Centre Streets and on the Court's website at www.nycourts.gov/supctmanh.