

American Express Bank, FSB, v Almonte

2010 NY Slip Op 32554(U)

September 14, 2010

Supreme Court, New York County

Docket Number: 117390/09

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 : 117390/2009
AMERICAN EXPRESS BANK FSB
VS.
ALMONTE, ELENA
SEQUENCE NUMBER : 001
SUMMARY JUDGMENT

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

FILED
SEP 15 2010
NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: 9/14/10

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

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE
 SUBMIT ORDER/JUDG. SETTLE ORDER /JUDG.

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 10

-----x
AMERICAN EXPRESS BANK, FSB,

Plaintiff,

-against-

ELENA ALMONTE AND ,
ALCO CORPORATE SERVICES, INC.,

DefendantS.
-----x

Decision/Order

Index No.: 117390/09
Seq. No. : 001

Present:
Hon. Judith J. Gische
J.S.C.

FILED

SEP 15 2010

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

Papers	Numbered
Pltf's n/m (3212) w/JH affid, exhs	1

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

Plaintiff moves for summary judgment. The motion was served upon defendants' attorneys. The matter was, thereafter, adjourned by stipulation two times. At the time the motion was submitted to the Court, however, no opposition had been interposed. The motion is, therefore, considered on default. Issue has been joined and the motion is made within the time period allowed under the CPLR. Brill v. City of New York, 2 N.Y.3d 648 (2d Dept. 2004).

Plaintiff is entitled to summary judgment against the defendant, provided it otherwise demonstrates that it has a *prima facie* cause of action. See: Gagen v. Kipany Productions Ltd., 289 A.D.2d 844 (3d Dept. 2001).

The complaint contains three causes of action, to wit: [1] breach of contract; [2]

account stated and [3] attorneys fees.

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).

Plaintiff provided defendants with a Business Palatinum Credit Card. The custodian of documents for plaintiff has provided the Court with a copy of a Business Platinum Card Agreement ("agreement"). The agreement, however, does not show that it was signed by either of the defendants. Plaintiff has also provided the Court with copies of monthly statement sent to both defendants for the period beginning March 18, 2009 through October 6, 2009. These statements show that regular charges were made on the credit cards and that some, but not all payments were made on the outstanding balance. By accepting and using the credit card, defendants agreed to all of the terms and conditions set forth in the agreement.

Based on the foregoing, plaintiff has established a *prima facie* cause of action for breach of contract and account stated against the defendants. Accordingly, plaintiff is entitled to summary judgment, against the defendants on its first and second causes of

action. Plaintiff is entitled to a money judgment in the amount of \$106,880.93 with interest from October 31, 2009 at the statutory rate.

Plaintiff also seeks attorneys fees in the amount of \$26,720.23. 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 defendants, upon "defaulting" on the account is responsible for paying all of plaintiff's reasonable costs, including attorneys fees. Plaintiff has not provided the court with any proof regarding the value of the legal services provided and/or a basis to conclude that the amount sought bears any reasonable relationship to services provided. Therefore, the court refers the issue of what reasonable legal fees plaintiff may recover from defendant to a Special Referee to hear and determine the matter.

Conclusion

In accordance herewith, it is hereby:

ORDERED that plaintiff's motion for summary judgment against defendants, Elena Almonte and Alco Corporate Services, Inc., is granted on the first and second causes of action; and it is further

ORDERED that the clerk shall enter judgment in favor of plaintiff and against defendants, Elena Almonte and Alco Corporate Services, Inc., jointly and severally, in the sum of One Hundred six thousand eight hundred eighty dollars and ninety three cents (\$106,880.93) together with statutory interest from October 31, 2009 until entry of judgment and it is further

ORDERED that the issue of what reasonable legal fees plaintiff may recover from defendant to a Special Referee to hear and determine the matter; plaintiff is directed to file a copy of this decision with the Special Referees's office so that this matter may be calendared, 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
September 14, 2010

So Ordered:



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

FILED
SEP 15 2010
NEW YORK
COUNTY CLERK'S OFFICE