

American Express Centurion Bank v Black
2010 NY Slip Op 32652(U)
August 31, 2010
Supreme Court, Nassau County
Docket Number: 16969/09
Judge: F. Dana Winslow
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SUAN

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. F. DANA WINSLOW,

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

AMERICAN EXPRESS CENTURION BANK,

Plaintiff,

INDEX NO.: 16969/09

- against -

MOTION DATE: 7/28/10

ANDREW BLACK,

MOTION SEQ. NO.: 001

Defendant.

The following papers read on this motion (numbered 1):

Notice of Motion.....1

The Court automatically adjourns all motions that are submitted, without opposition for one month, to determine whether or not there was either an administrative delay or excusable neglect. Such adjournment is made without prejudice to the moving party to have the merits of such an adjournment considered in the event that there is a subsequent submission.

This action arises out of defendant's alleged breach of a consumer credit card agreement. Plaintiff alleges that defendant was the holder of a Rewards Green Card (the "Black Card") enabling him to charge items to a Rewards Green Card Account (the "Black Card Account") and that there is due from defendant an amount of \$35,604.44. The Court notes that although the submitted statements of account refer to the card as a Green Card, plaintiff's motion papers, including the Complaint, identify the card as a Black Card. Plaintiff now moves for a default judgment pursuant to **CPLR §3215** based upon the failure of defendant to answer or appear within the requisite statutory time period. The motion is determined as follows.

The Complaint alleges that by accepting and using the Black Card, defendant agreed to all the terms and conditions set forth in the Agreement Between the Black Card Member and American Express Centurion Bank. In the Complaint, plaintiff alleges causes of action in breach of contract, account stated and unjust enrichment. In its Notice of Motion, however, plaintiff waives its causes of action for account stated and unjust enrichment and its claim for attorneys' fees.

In support of its motion, plaintiff has submitted (i) a copy of the Summons and Complaint filed on August 21, 2009; (ii) an ‘Affirmation of Facts in Support’ (although in affidavit form) of Angela Ramirez, an ‘Assistant Custodian of the Records’ for the American Express Litigation Unit, sworn to on March 18, 2010 (the ‘Ramirez Affidavit’); (iii) a standard form of an Agreement Between Cardmember and American Express Centurion Bank; (iv) a statement of account, dated March 3, 2009 showing a previous balance of \$36,177.22 and a new balance of \$36,854.44; a statement of account, dated April 2, 2009, showing a previous balance of \$36,854.44 and a new balance of \$35,604.44, reflecting a payment of \$1,259; a statement of account, dated May 3, 2009, showing a previous balance of \$35,604.44 and a new balance of \$35,996.12; and a statement of account dated, June 2, 2009, showing a previous and new balance of \$35,996.12; and (v) an affirmation of plaintiff’s counsel attesting to defendant’s failure to answer or appear

Plaintiff has also submitted (I) an affidavit of service, sworn to on September 9, 2009 (the ‘Affidavit’), attesting to service on September 8, 2009 of the summons and complaint on defendant at ‘59 Ridge Drive East Private House, Roslyn, NY 11576’ (the ‘Roslyn address’) pursuant to **CPLR §308(4)** followed by a subsequent mailing by first class mail to the Roslyn address denominated as defendant’s ‘last known residence, usual place of abode.’ The process server attempted personal service three times, on three different weekdays: Wednesday, 9/2/09 at 6:41 p.m.; Friday, 9/4/09 at 7:55 a.m.; and Tuesday, 9/8/09 at 2:30 p.m., the last being the date and time that the papers were affixed to the door; (ii) an affidavit of additional mailing, sworn to on September 25, 2009, attesting to an additional mailing of the summons by first class mail to defendant at the Roslyn address; and (iii) an Affidavit of Non-Military Service together with a Department of Defense military status report.

Upon the foregoing, the Court finds that there are multiple deficiencies in plaintiff’s application which preclude the granting of the relief requested. Such deficiencies include the following.

(1) The Court finds service insufficient to satisfy the diligence requirement of **CPLR §308(4)**. It is not clear that the attempts were made at a time when defendant could reasonably be expected to be home. At least two attempts and, perhaps three attempts, were made during normal working hours or at a time when defendant could reasonably be expected to be in transit to or from work. See **Earle v. Valente**, 302 AD2d 353; **Annis v. Long**, 298 AD2d 340. The Court does not, however, rest its determination solely upon the apparent lack of diligence. Equally troubling to the Court is the failure to demonstrate whether the Roslyn address is defendant’s actual dwelling place or usual place of abode. The Court notes initially that the person

purportedly spoken with was not sufficiently identified. The process server used the generic 'Jane' as the person's first name and identified her as a neighbor but does not indicate where she lived. Furthermore, "'Jane' Broder" purportedly reported that defendant lived at the Roslyn address but fails to indicate whether the Roslyn address was defendant's actual dwelling place or usual place of abode. The process server noted in the attestation of additional mailing that said address is defendant's "last known residence, usual place of abode" but failed to provide further clarification or the source of his knowledge other than 'Jane' Broder's statement that defendant "lived there." Consequently, it is not clear to the Court that the summons and complaint were served at the proper address. The Court also notes that the affidavits of service covering the additional mailing of the summons and service of the motion itself, include the notation "E 002F" in the Roslyn address;

(2) The Affidavit of Non-Military Service ("Military Affidavit") together with the Military Status Report generated from the Department of Defense - Manpower Data Center ("Status Report") constitute insufficient proof of defendant's non military status. The Military Affidavit and the Status Report are both dated May 7, 2010 whereas defendant's default purportedly occurred in or about January 2009. Furthermore, it strains credulity that the Department of Defense had no information indicating the status as to all branches of the Uniformed Services of an individual with as common a name as ANDREW BLACK. This calls into question the quality of the information provided by plaintiff to the Department of Defense. In the Military Affidavit, Susanne Tucci-Hyman, purportedly a representative of plaintiff, states in the most conclusory fashion that she provided the Department of Defense, Defense Manpower Data Center with "pertinent information" about defendant, which included "the date of birth and/or social security number." Plaintiff has failed to provide the Court with any evidence that demonstrates the accuracy of the information provided the Department of Defense; and

(3) The submitted proof of liability has failed to satisfy the Court as to the prima facie validity of the uncontested cause of action. **Joosten v. Gale**, 129 AD2d 531. Most fundamentally, the form of Agreement submitted is dated "7/09" whereas plaintiff proffers statements of account, purportedly referable to the Agreement, which are dated prior thereto (March, April, May and June of 2009). In addition, the earliest statement submitted by plaintiff (March 2009) shows a balance of \$36,177.22. The statements, without more, fail to establish evidence of an active account. There is no indication whether there was use of the Black Card or payments made on the account, other than the one payment of \$1,250 set forth in the statement dated April 2, 2009, leaving the Court to speculate as to when the default occurred. The Court notes that plaintiff has also submitted a 'Membership Rewards Monthly Statement and Program News' covering the statement period January 1, 2009 to January 31, 2009 showing a reduction in the number of reward points earned during that period which suggests that, as of January 2009, defendant was already in default. The affirmation of plaintiff's counsel stating that the statute of limitations has not expired does not sufficiently establish the default date. The Court notes that the most recent statement submitted by

plaintiff (June 2, 2009) reflects a balance owed of \$35,996.12 whereas the Ramirez Affidavit states that \$35,604.44 is due and owing on the Black Card Account as of August 21, 2009, with no indication that additional payments were made by defendant. The Court finds that the statements submitted by plaintiff fail to reflect use of the Black Card and payments on the account and, consequently, neither substantiate defendant's acceptance of the Black Card and use of the account, nor defendant's acceptance of his personal responsibility for the debt.

The Court notes that affiliates of plaintiff have submitted to this Court three additional applications covering different credit card accounts, dated this date, all of which demonstrate similar deficiencies in proof of the debt and of the particular defendant's non military status, as described above.

Finally, the use of the term Black Card when the statements of account clearly relate to a 'Rewards Green Card Statement of Account' raises suspicions especially in view of the fact that defendant's last name is Black.

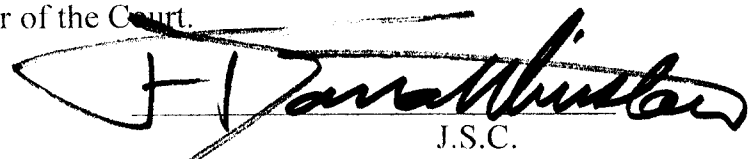
On the basis of the foregoing, it is

ORDERED, that plaintiff's motion for default judgment pursuant to **CPLR §3215** is **denied**.

Plaintiff shall serve defendant pursuant to **CPLR §308(1)** or **308(2)**, with a copy of this Order with notice of entry, and if pursuant to **(2)**, the affidavit of service shall identify the person of suitable age and discretion and his or her relationship to the person being served. Plaintiff shall submit proof of such service in any subsequent submission.

This constitutes the Order of the Court.

Dated: August 31 , 2010


J.S.C.

ENTERED

SEP 22 2010

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**