

American Express Co. v Rivas

2010 NY Slip Op 33154(U)

November 3, 2010

Supreme Court, New York County

Docket Number: 117369/08

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 : 117369/2008
AMERICAN EXPRESS CO.
vs.
RIVAS, JULIO
SEQUENCE NUMBER : 001
DEFAULT JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

his 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

NOV 09 2010

NEW YORK
CLERK'S OFFICE

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

Dated: NOV 03 2010

HON. JUDITH J. GISCHE *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 CO.,

Plaintiff,

-against-

JULIO RIVAS a/k/a JULIO RIVAS JR,

Defendant.

-----X

Decision/Order

Index No.: 117369/08

Seq. No. : 001

Present:

Hon. Judith J. Gische

J.S.C.

F I L E

NOV 09 2010

**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 | Numbered |
|----------------------------------------------------------|-----------------|
| Pltf's n/m (3215) w/AMM 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 by defendant to a credit card account. Plaintiff moves, pursuant to CPLR § 3215, for entry of a default judgment against the defendant. Plaintiff was served at his residence through his relative, a person of suitable age and discretion, on April 18, 2009 and through mail on April 22, 2009. Plaintiff inquired of the relative whether defendant is in active military service and ascertained that he is not. 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 seeks a default judgment *nun pro tunc*, since its motion is made more than one year after the date of defendant's default. Pursuant to CPLR § 3215(c), "if the plaintiff fails to take proceedings for the entry of judgment within one year after the default, the court shall not enter judgment but shall dismiss the complaint as abandoned, without costs, upon its own initiative or on motion, unless sufficient cause is shown why the complaint should not be dismissed." See Kay Waterproofing Corp. v. Roy Realty Fulton, 23 A.D.3d 624, 625 (2d Dept. 2005).

Plaintiff alleges that a timely application for judgment was submitted to the court but rejected by the clerk because it failed to provide a copy of the account stated. Plaintiff states that it, consequently, needed additional time to locate the requested material and prepare a motion for a default judgment. Here, plaintiff has established sufficient cause, as plaintiff explains in factual detail a valid reason for why it could not bring a default motion within one-year.

Plaintiff alleges that the defendant was the holder of a Business Gold Card (the "Card") that enabled him to charge items to an Business Gold Card Account, Account No. xxxx-xxxx9-41002 (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, 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 two causes of action, to wit: [1] breach of contract; and [2] account stated.

Plaintiff has provided the sworn affidavit of Edmond Garabedian, plaintiff's Records Custodian. Garabedian states \$39,790.82 is due and owing from defendant on the Account, plus interest. Plaintiff has provided a statement 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 cause and second causes of action. The clerk shall enter a money judgment in the amount of \$39,790.82 with interest at the statutory rate, from June 13, 2009, the date the invoice states the amount is

due and owing.

Conclusion

In accordance herewith, it is hereby:

ORDERED that plaintiff's motion for entry of a default judgment against defendant, JULIO RIVAS a/k/a JULIO RIVAS JR, is granted; and it is further

ORDERED that the clerk shall enter judgment in favor of plaintiff, AMERICAN EXPRESS CO., and against defendant, JULIO RIVAS a/k/a JULIO RIVAS JR, in the sum of Thirty-Nine Thousand, Seven Hundred Ninety Dollars and 82/100 Cents (\$39,790.82); and it is further


ORDERED that interest shall run from June 13, 2009, at the statutory rate; 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
November 3, 2010

So Ordered:



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

FILED
NOV 09 2010
NEW YORK
COUNTY CLERK'S OFFICE