

Ziscand v Eglevsky Ballet Co. of L.I.

2011 NY Slip Op 32636(U)

September 27, 2011

Sup Ct, Nassau County

Docket Number: 17685-08

Judge: Vito M. DeStefano

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SUPREME COURT - STATE OF NEW YORK

Present:

HON. VITO M. DESTEFANO,

Justice

TRIAL/IAS, PART 19
NASSAU COUNTY

ARTHUR C. ZISCAND,

Decision and Order

Plaintiff,

MOTION SUBMITTED:

July 22, 2011

-against-

MOTION SEQUENCE:04

INDEX NO. 17685-08

**THE EGLEVSKY BALLET COMPANY OF L.I.,
ALI POURFARROKH, FLEUR ISRAEL, JENNIFER
GRANET, HOLLY SEIRUP, JANE CECCARELLI
GRAISER, KAREN ARTINIAN, LINDA RATTI,
ZOYA JAKOWLEW AND HOLLY PINCUS,**

Defendants.

The following papers and the attachments and exhibits thereto have been read on this motion:

| | |
|---------------------------|---|
| Notice of Motion | 1 |
| Affirmation in Opposition | 2 |
| Reply Affirmation | 3 |

Plaintiff Arthur C. Ziscand was president of the Eglevsky Ballet Company of Long Island ("Ballet") from March 2001 through November 2005 (Plaintiff's Affidavit in Opposition at ¶ 3). In the Spring of 2004, the Plaintiff opened two credit card accounts, one with American Express and the other with Capital One FSB ("Capital One") in order to "financially assist" the Ballet (Affidavit in Opposition at ¶ 3). Although the Ballet's name was on each of the cards, and the monthly billing statements went to the address of the Ballet, the Plaintiff, whose name was also on the cards, was primarily responsible for the debt incurred thereon (Affidavit in Opposition at

¶¶ 3-5).¹

Debt was incurred on the credit cards during and after the Plaintiff's presidency. In June 2006, Plaintiff paid the outstanding American Express bill (Affidavit in Opposition at ¶ 9).² By letter dated August 3, 2006, the Plaintiff demanded payment from the Ballet, indicating that the Ballet "owed the amount of \$2,299.36 to American Express for their unauthorized use of [Plaintiff's] credit card" (Affidavit in Opposition at ¶ 16).³

In December 2007, the Plaintiff's personal bank account was restrained because of the outstanding amount owed on the Capital One account, which was approximately \$13,979.83 (Affidavit in Opposition at ¶ 7). The Capital One account debt was subsequently paid by the Ballet in November 2010 (Affidavit in Opposition at ¶ 8).⁴

Procedural History

In October 2008, the Plaintiff commenced the instant action against the Ballet and the individual members of the board of directors of the Ballet. In the first cause of action of the amended complaint, the Plaintiff asserts, *inter alia*, that the "Defendants failure to pay for the goods and services used for the Defendants' exclusive benefits" has resulted in damage to the Plaintiff's credit rating and creditworthiness (Ex. "A" to Motion at ¶ 19). Specifically, the Plaintiff alleges:

Defendants, without the knowledge consent or permission of Plaintiff engaged in the use of the Credit cards of Plaintiff.

¹ According to the Plaintiff "[b]oth cards were apparently opened under my social security number and it was, as I now understand, my credit card with the [Ballet] name on it (Affidavit in Opposition at ¶ 4).

² The Capital One Card was used maybe one or two times after the Plaintiff left the Ballet. It was the American Express card which was predominantly used after the Plaintiff's departure from the Ballet (Ex. "H" to Motion at p 69).

³ Notwithstanding Plaintiff's claim that he paid American Express \$2,299.36 (Affidavit in Opposition at ¶¶ 9, 16), the confirmation of payment from the collection agency indicates that \$1,749.36 was paid by the Plaintiff to satisfy the debt (Ex. "I" to Motion). In addition, Plaintiff admitted in a response to an interrogatory that he paid \$1,749.36 in connection with the American Express card.

⁴ The Capital One account went to a collection firm which commenced an action in District Court against the Plaintiff. The Plaintiff defaulted in that action purportedly because the summons and complaint were served upon the Ballet and the Ballet never informed Plaintiff of the action. The judgment of default was eventually vacated and the matter was settled (Ex. "G" to Motion).

That as a result of the non-authorized use of the Plaintiff's credit cards, Defendants ran up certain debts and purchases made on the behalf and for the exclusive use of the Defendants and/or the Defendant THE EGLEVSKY BALLET COMPANY OF L.I..

That the debt incurred by the use of the Plaintiff's personal credit cards by the Defendants, was without the permission and consent of Plaintiff, and without Plaintiff's knowledge.

That despite Defendants having received monthly statements from the various Credit card companies at the 999 Herricks Road, New Hyde Park, NY 11040 address, they continued to ignore same, and failed and or refused to notify Plaintiff of the outstanding debt and the Defendants' failure to pay same.

That despite continued demands for payment of same by Plaintiff from Defendants, Defendants have to date failed and or refused to make timely payments (Ex. "A" to Motion at ¶¶ 14-18).

The Plaintiff asserts fraud in the second cause of action and, more specifically,

That the Defendants despite having agreed to pay any and all amounts due and owing for the purchases made solely for the Ballet Company's benefit, have failed and or refused to do so.

That as a result of the Defendants having received the monthly statements for the debts that were incurred, secreted the information from Plaintiff and failed to notify him of the impending delinquencies, the Defendant caused Plaintiff serious and egregious damages to his credit rating, his reputation and has sustained great sums of money damages as a direct result.

That Defendant did continue to use the Plaintiff's various credit cards despite knowing that there was a continuing outstanding balance that had previously been ignored by Defendant's and the same would cause serious and protracted damages.

That as a result thereof and with malice aforethought, each of the Defendants did conspire and act in concert in order to defraud Plaintiff of the monies and debt incurred and to cause the Plaintiff great harm and damages to his credit and his reputation (Ex. "A" to Motion at ¶¶ 23-26).

On March 30, 2011, the Ballet served an offer of compromise upon the Plaintiff and offered \$1,776.84, plus statutory interest of 9% to settle the matter (Ex. "J" to Motion).⁵ The Plaintiff rejected the offer (Ex. "J" to Motion) and the Defendants thereafter moved for an order pursuant to CPLR 3212 granting them summary judgment dismissing the complaint. The court notes that the "wherefore clause" of the motion asks that the court dismiss the complaint "subject to payment to plaintiff of the American express debt of \$1,776.84, plus statutory interest".

Discussion

As noted, the Plaintiff asserts that the "debt incurred by the use of the Plaintiff's *personal* credit cards by the Defendants, was without the permission and consent of the Plaintiff, and without Plaintiff's knowledge" (Ex. "A" to Motion at ¶ 16) (emphasis added). However, the Plaintiff's deposition testimony, submitted in support of Defendants' motion, is replete with testimony that the cards were not Plaintiff's personal credit cards (Ex. "H" to Motion at pp. 71, 90). In addition, Plaintiff's deposition testimony as well as the affidavit of Jane Ceccarelli-Graiser, a member of the Ballet's board of directors, demonstrate that the purchases on the credit cards were made with the Plaintiff's consent.

In his responses to Defendants' interrogatories, the Plaintiff states that the damages he sustained include increased interest rates under the "universal default" principle, the inability to obtain a loan, and the restraint on Plaintiff's bank accounts (Ex. "D" to Motion at ¶ 10). However, given the Plaintiff's failure to provide discovery with respect to the damages claimed, and based on a stipulation between the parties, which has not been challenged by the Plaintiff, he is precluded from offering any evidence at trial as to these purported damages (Ex. "E" to Motion). Given the Plaintiff's failure to provide discovery with respect to his payment of the American Express bill, the stipulation also precludes him from offering any evidence at trial regarding his claim that he paid American Express \$2,299.36. Nevertheless, in light of the concession by the Defendants that they owe \$1,749.36 (though willing to pay the slightly higher amount of \$1,776.84) to the Plaintiff with respect to the American Express bill, and the relief requested in the "wherefore clause" of the motion, the court will search the record and grant summary judgment to the Plaintiff in this amount.⁶

⁵ As noted, the sum of \$1,749.36 is the amount received by the collection agency for the American Express debt (Ex. "I" to Motion) and the amount that the Plaintiff admitted he paid.

⁶The first cause of action in the complaint, though inartfully pleaded, alleging that the Defendants "ran up certain debts and purchases" * * * and that "they failed and or refused to * * * pay same" (Exhibit "A" to motion: Complaint at ¶s 15 and 18), sufficiently advances a claim of damages based on that indebtedness.

With respect to Plaintiff's cause of action based upon fraud, the Plaintiff's complaint fails to plead that claim with the required level of particularity (CPLR 3016[b]; *Sargiss v Magarelli*, 2 NY3d 527, 530 [2009] [circumstances constituting the wrong shall be stated in detail]; *Mahler v Campagna*, 60 AD3d 1009 [2d Dept 2009]; *Fink v Citizens Mortgage Banking Ltd.*, 148 AD2d 578 [2d Dept 1989] [plaintiff must allege each of the elements of fraud with particularity and must support each element with an allegation of fact in order to plead a *prima facie* case of fraud]). In any event, the Plaintiff's own deposition testimony demonstrates the absence of any intent by the Defendants to deceive him: the purchases made on the credit cards were with his consent and admittedly for the benefit of the Ballet; the Plaintiff saw the bills each month while he was president; and that the Plaintiff was aware that the bills were being mailed to the address of the Ballet (Ex. "H" to Motion at pp 71, 85, 101, 111-128).

Plaintiff's Request for Sanctions

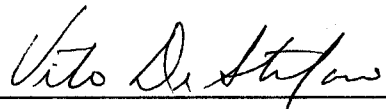
In opposing the Defendants' motion for summary judgment, the Plaintiff requests sanctions pursuant to 22 NYCRR 130-1.1(a) on the basis that "this action was compelled by defendants when they denied that they used plaintiffs credit cards for their benefit, continued to secret the monthly outstanding balances, and acted in a contemptuous manner when they attempted to conceal the fact that a lawsuit had been brought against the plaintiff" (Affirmation in Opposition at ¶15).

Initially, the court rejects the Defendants' argument that the Plaintiff's application for attorneys' fees (as a sanction) can't be made in opposition papers. The imposition of sanctions may be made either upon motion or on the court's own initiative, after a reasonable opportunity to be heard (22 NYCRR 130-1; *Citibank (S.D.) v Ousterman*, 279 AD2d 886 [3d Dept 2001] [notice requirements of 22 NYCRR 130 were satisfied by plaintiff's express request for sanctions in its response to defendant's cross motion]). Notwithstanding, the application for sanctions is denied as a matter of discretion and in the absence of a showing that Defendants' conduct was frivolous so as to warrant their imposition.

Based on the foregoing, it is hereby ordered that: the Defendants' motion for summary judgment is granted in part and the complaint is dismissed except that to the extent that it, in view of the pleadings, motion papers and concessions of the parties herein, advances a claim with respect to indebtedness arising from the use of the American Express card and which was subsequently paid by the Plaintiff, the court searches the record and grants summary judgment to the Plaintiff on this claim in the total amount of \$1,749.36, with interest from the date that payment of the debt was made by him, without any award being made for alleged damage to credit or creditworthiness; and the Plaintiff's application for sanctions is denied.

+This constitutes the decision and order of the court.

Dated: September 27, 2011



Hon. Vito M. DeStefano, J.S.C.

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NASSAU COUNTY
COUNTY CLERK'S OFFICE