

Citibank (S.D.), N.A. v Zaharis
2011 NY Slip Op 33285(U)
October 18, 2011
Supreme Court, Queens County
Docket Number: 20670/10
Judge: Allan B. Weiss
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Defendant's cross motion to dismiss the complaint or to set down the matter for a traverse hearing is denied. CPLR 3211(e) provides that "an objection that the summons and complaint...was not properly served is waived if, having raised such an objection in a pleading, the objecting party does not move for judgment on that ground within sixty days after serving the pleading, unless the court extends the time on the ground of undue hardship". As the within cross motion was not served until July 2, 2011, well past the relevant 60 day period, defendant has waived his objections to the service of the summons and complaint.

Furthermore, no undue hardship exists here as defendant's allegations are insufficient to establish that the service of the summons and complaint were defective. Contrary to defendant's assertion, plaintiff was not required to serve defendant with a copy of the credit card agreement and monthly statements at the time it served the summons and complaint. Defendant could have, but failed to serve, demands for discovery following the service of the pleadings.

That branch of defendants' cross motion which seeks leave to serve an amended answer is denied, as defendant has failed to set forth additional or subsequent transactions or occurrences, (CPLR 3025[b]) and has failed to submit a copy of his proposed pleadings.

Citibank now seeks an order granting summary judgment in its favor on its claims to recover amounts allegedly due in a credit card it issued to defendant Spiro Zaharis in connection with account number ending in 8759. Citibank does not state whether it seeks to recover on it first or second cause of action.

It is well settled that "[o]n a motion for summary judgment pursuant to CPLR 3212, the proponent must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Sheppard-Mobley v King*, 10 AD3d 70, 74 [2004], *affirmed as modified*, 4 NY3d 627 [2005], *citing Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). "Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers" (*Sheppard-Mobley v King*, *supra*, at 74; *Alvarez v Prospect Hosp.*, *supra*; *Winegrad v New York Univ. Med. Ctr.*, *supra*). Once the movant's burden is met, the burden shifts to the opposing party to establish the existence of a material issue of fact (*Alvarez v Prospect Hosp.*, *supra*, at 324). The evidence presented by the opponents of summary judgment must be accepted as true and they must be given the benefit of every reasonable inference (*see, Demishick v Community Housing Management*

Corp., 34 AD3d 518, 521 [2006], citing *Secof v Greens Condominium*, 158 AD2d 591 [1990]).

In support of its motion, Citibank has submitted an affidavit from Jennifer Shepherd, an employee of Citicorp Credit Services Inc.(USA), a subsidiary of Citibank(CCSI). She states that CCSI services credit card accounts owned by Citibank, and that it maintains and records information in Citibank's records as they relate to credit card accounts owned by Citibank. Ms. Shepherd states that she is the custodian of records for CCSI and Citibank, and avers to having knowledge of and access to the Citibank credit card account number ending in 8759, including the name and address of the debtor; that the debtor applied for, and was issued, the credit card account; the account's history of charges representing extensions of credit, finance charges, fees imposed, payments made and credits received; and the outstanding balance due on the account.

Ms. Shepherd states that Citibank's records reflect that Mr. Zaharis used or authorized the use of the subject account for the purposes of obtaining extensions of credit to purchase goods and services, and/or cash advances; that he was provided with periodic billing statements for the account describing the amount due(except for months in which no statement may have been required); that Zaharis eventually failed to make timely payments on the account in accordance with the terms of the card agreement and as requested on periodic billing statements; and that the last payment received by Citibank and posted to the account was on June 3, 2009; and that Zaharis is presently in default.

Ms. Shepherd attaches to her affidavit copies of statement transactions including the last periodic billing statement sent to Zaharis, which she avers are true and correct business records reflecting information created and maintained by Citibank or its affiliates, and states that a balance of \$67,331.36 is presently due on said account. Ms. Shepherd states that demand for payment was made more than 30 days before making this affidavit, that the amount of the debt remains due and owing, and that there are no set offs, credits or allowances due from Citibank to Zaharis. She also states that Zaharis does not claim to be an active member of the military and has not requested a reduction in the interest rate on this account to 6% pursuant to the Service Member's Civil Relief Act.

Ms. Shepherd states that Citibank is a national bank located in Sioux Falls, South Dakota. Ms. Shepherd's affidavit bears a Missouri jurat and was notarized in Missouri on February 8, 2011, and is accompanied by a certificate of conformity(see CPLR 2309[c];

Real Property Law §299-a; *Citibank (South Dakota) N.A. v Martin*, 11 Misc 3d 219[2005]). Plaintiff has also submitted a copy of a Missouri document with respect to the Missouri notary.

Citibank has submitted copies of credit card statements for account ending in 8759, ranging from October 2006 to "December 8-January 2010". The credit card statements contain information to the effect that the credit card account ending in 8759 is a business account in the name of Spiro Zaharis, Axis Interior Design, and that separately numbered credit cards were issued to, and used by, two of the business' employees, Spiro Zaharis and Melani Zaharis. These monthly statements are addressed to Spiro Zaharis and Axis Interior Design, 4030 Francis Lewis Boulevard, Bayside, New York, and set forth a customer service address in Sioux Falls, South Dakota and a return address for payment in Columbus, Ohio.

The affidavit Ms. Shepherd, an employee of Citicorp Credit Services, Inc. is sufficient to lay a foundation for plaintiff's business records with respect to the monthly credit card statements (see CPLR 4518). Contrary to defendant's objections, there is no requirement that an affidavit be dated, or that it be notarized on the same page as the final paragraph of Ms. Shepherd's numbered paragraphs.

With respect to the first cause of action, the relationship between the issuer of a credit card holder and use of the credit card is contractual (*Citibank [South Dakota] N.A. v Sablic*, 55 AD3d 651 [2008]). The issuance of a credit card constitutes an offer of credit and the use if the card constitutes an acceptance of the offer (*Feder v Fortunoff, Inc.*, 114 AD2d 399[1985]; *Citibank [South Dakota], N.A.*, 23 Misc 3d 1103A [2009]; *Empire National Bank v Monahan*, 82 Misc 2d 808 [1975]). The terms of the contract are the credit card agreement (*Brower v Gateway 2000, Inc.*, 246 AD2d 246 [1998]). Plaintiff in support of its prima facie case for breach of the credit card agreement has submitted a sample copy of the card agreement which bears a 2009 copyright. According to the documentary evidence, charges to the subject credit card account commenced in October 2006. Plaintiff, however, has failed to tender a copy of the original agreement, as well as any revisions thereto. Plaintiff has also failed to establish that the card agreement and any such revisions were mailed to the defendant card holder (see generally, *Citibank (South Dakota) N.A. v Martin*, 11 Misc 3d 219 [2005].) Plaintiff's request for summary judgment in its first cause of action for breach of contract, therefore is denied.

With respect to the cause of action for an account stated, the evidence submitted is insufficient to establish when a demand was

made on the defendant for payment of the amount allegedly owed. Although plaintiff has submitted copies of certain monthly the credit card statements showing an unpaid balance, it has failed to establish that these statements were actually mailed to the defendant. It is noted that although the complaint recites that a demand for payment was made, it does not allege when such a demand was made, or the manner in which is made. Ms. Shepherd's affidavit merely recites that a demand for payment was made, without setting forth any details as to the date and manner of the demand. Therefore, that branch of the motion which seeks summary judgment on the second cause of action for an account stated, therefore, is denied.

Finally, with respect to both the first and second causes of action, the plaintiff has failed to meet its burden of establishing, prima facie, its entitlement, under New York and federal law, to the interest and penalties sought in the monthly statements. Citibank, as a national bank may charge credit card customers the higher of the rate permitted by the bank's home state or of the home state of the bank's customer(see 12 USC §85). As of May 2009, the monthly statements assessed interest charges which accrued at an annual rate of 29.99%, and monthly late fees were also added to the balance. Citibank's moving papers, however, fail to explain why it should be entitled to a money judgment which includes interest rates and fees that significantly exceed New York's criminal usury rate of 25% (Penal Law § 190.40), and effectively double the permissible civil rate on loans and debts subject to New York law (see *Citibank [SD] N.A. v Hansen*, 28 Misc 3d 195[2010]; *Citibank (South Dakota)N.A. v Mahmoud*, 19 Misc 3d 1141[A][2008]).

Accordingly, plaintiff's motion for summary judgment is denied in its entirety.

Dated: October 18, 2011

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J.S.C.