

American Express Bank, FSB v Kugelman
2012 NY Slip Op 31318(U)
May 4, 2012
Sup Ct, Nassau County
Docket Number: 11784/2011
Judge: Joel K. Asarch
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU: I.A. PART 13

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AMERICAN EXPRESS BANK, FSB,

Plaintiff,

DECISION AND ORDER

- against -

Index No.: 11784/2011

**NEIL KUGELMAN a/k/a NEIL C.
KUGELMAN and GOLDSPEED.COM, INC.,**

Original Return Date: 12/20/11
Motion Seq. No.: 001

Defendants.

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The following named papers numbered 1 to 6 were submitted on this Notice of Motion on February 9, 2012:

	<u>Papers numbered:</u>
Notice of Motion, Affirmation and Affidavit in Support	1-3
Memorandum of Law	4
Affirmations (2) in Opposition	5-6
Reply Affirmation	X

The motion by the Plaintiff for an Order pursuant to C.P.L.R. 3212 directing that summary judgment be entered against the Defendants, NEIL KUGELMAN a/k/a NEIL C. KUGELMAN and GOLDSPEED.COM, INC., and in favor of the Plaintiff, AMERICAN EXPRESS BANK, FSB, is decided as follows:

On August 11, 2011, the Plaintiff commenced the within action by filing the Summons and Complaint with the County Clerk of the County of Nassau. The Complaint alleges that the Defendants failed to pay charges incurred on a certain Open Line Card issued by the Plaintiff, AMERICAN EXPRESS BANK, FSB, to the Defendants, NEIL KUGELMAN a/k/a NEIL C. KUGELMAN and GOLDSPEED.COM, INC.. Thereafter, on or about November 6, 2010, the

Defendant NEIL KUGELMAN a/k/a NEIL C. KUGELMAN was served with a copy of the Summons and Complaint pursuant to C.P.L.R. 308(4). Proof of service was filed on August 15, 2011. On August 17, 2011, the Defendant GOLDSPEED.COM, INC. was served with process pursuant to BCL 306. The Defendants answered the Complaint on or about August 29, 2011. The Answer primarily denies knowledge or information sufficient to form a belief as to the truth of the majority of the allegations in the Complaint. Three affirmative defenses are raised – improper service on the two defendants and usury.

On a motion for summary judgment, the movant must establish his or her cause of action or defense sufficient to warrant a Court directing judgment in its favor as a matter of law. See Frank Corp. v. Federal Ins. Co., 70 N.Y.2d 966 (1988); Alvarez v. Prospect Hosp., 68 N.Y.2d 320 (1986); Rebecchi v. Whitmore, 172 A.D.2d 600 (2nd Dept. 1991). "The party opposing the motion, on the other hand, must produce evidentiary proof in admissible form sufficient to require a trial of material issues of fact" Frank Corp. v. Federal Ins. Co., *supra* at 967; see also GTF Mktg. v. Colonial Aluminum Sales, 66 N.Y.2d 965 (1985); Rebecchi v. Whitmore, *supra* at 601. The focus for the Court is on issue finding, not issue determining, Hantz v. Fishman, 155 A.D.2d 415 (2nd Dept. 1989).

In this instance, the Plaintiff has alleged that Defendants KUGELMAN and GOLDSPEED.COM, INC. applied for and received an American Express Open Line Card, permitting them to charge various items. Plaintiff further has alleged that by accepting and utilizing the card, the Defendants agreed to the terms and conditions of the Card Agreement (Garabedian affidavit, paragraph "18"). Monthly statements showing payments made, charges and fees incurred and items charged were sent to the Defendants without objection (Garabedian affidavit, paragraphs "20" and "21"). Attached to the moving papers are copies of American Express Open Line of Credit

statements covering the period from January 13, 2009 (with an opening balance of \$79,617.00) through June 10, 2011 (with an ending balance of \$50,316.11). The statements have both Defendants' names on them – to wit: Neil Kugelman and Goldspeed.Com, Inc. A copy of a Cardmember Agreement dated June 8, 2011, listing the company name (Goldspeed.com) and cardmember name (Neil Kugelman) is attached as Exhibit "1" to the moving papers. Plaintiff seeks judgment against the defendants on six causes of action (breach of contract, account(s) stated and unjust enrichment against each Defendant) in the principal sum of \$50,316.11, together with interest, costs and reasonable attorneys' fees.

In opposition to the moving papers, Defendant NEIL KUGELMAN states that it was his "understanding that the account was being set up for the Corporate Entity and was being mailed to my attention." He states that he does not recall signing any personal guarantee. As part of discovery in this proceeding, the Defendants sought copies of Agreements or Guarantees showing his liability (Exhibit "2" attached to opposing papers).

As a preliminary matter, the Defendants have raised two affirmative defenses in their Answer concerning a lack of personal jurisdiction due to improper service, and third affirmative defense based on alleged usury. CPLR 3211(e) states that where a defense of improper service is raised in an Answer, such defense "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 that time upon the ground of undue hardship." Here, the Defendants have made no such motion and thus, any claim of improper service has been waived by them. *See, e.g., DeSena v. HIP Hosp. Inc.*, 258 A.D.2d 555 (2nd Dept. 1999). Similarly, as Plaintiff is a federally chartered banking institution (Complaint, paragraph "1"), the usury defense on the calculation of interest must

similarly fail. The National Bank Act [12 U.S.C. §85] bars state law claims for usury.

Because summary judgment, if granted, deprives a litigant of a trial, such motions should be strictly scrutinized by the Court to determine if material triable issues of fact exist and if the movant has met its burden. If the movant fails to prove that there are no triable issues of fact, the Court should deny the motion and need not address the insufficiency of the responding papers. The burden lies with the movant to prove entitlement to summary judgment, Vitiello v. Mayrich Const. Corp., 255 A.D.2d 182 (1st Dept. 1998).

Here, the movant has failed to prove that there are no triable issues of fact against Defendant KUGELMAN. No documentation is attached to show that NEIL KUGELMAN was a signatory or cardmember under the Open Line Card Agreement. While a Cardmember Agreement is attached to the moving papers, there is nothing to show that NEIL KUGELMAN was a cardmember prior to June 2011 (during which the charges sued for herein were incurred). Based upon the papers submitted, this Court cannot find that NEIL KUGELMAN was a cardmember obligated to perform under the terms of the Agreement(s) in existence at the time the charges sought to be repaid were incurred. Whether NEIL KUGELMAN's name was on the statements to ensure his receipt of them or as a second cardmember is a triable issue of fact. See CPLR 3212(f).

Notwithstanding the foregoing, Plaintiff is entitled to summary judgment against Defendant GOLDSPEED.COM, INC. Defendant KUGELMAN has stated that "GOLDSPEED was the sole user of the account and paid from its account over one half million dollars to the Plaintiff" (Kugelman affirmation, paragraph "2"). Regardless of whether or not this corporation has ceased doing business, no triable issue of fact exists as to this Defendant's liability.

Therefore, the Court has considered the Complaint, the Answer, the Affidavit of Facts, and

the papers submitted both in support and in opposition to this motion, and finds that the Plaintiff (1) is entitled to summary judgment for the relief requested in the Complaint against Defendant GOLDSPEED.COM, INC. and to dismiss the three affirmative defenses raised by Defendant KUGELMAN, but (2) that Plaintiff has failed to make a *prima facie* showing for the relief requested in its Complaint at this time against Defendant KUGELMAN.

Accordingly, after due deliberation, it is

ORDERED, that the Plaintiff's motion for summary judgment on its First, Second and Third Causes of Action against Defendant NEIL KUGELMAN a/k/a NEIL C. KUGELMAN is **denied**, **except that** the three affirmative defenses contained in the Defendant's Answer are **dismissed** against Defendant KUGELMAN; and it is further

ORDERED, that the motion by the Plaintiff, AMERICAN EXPRESS BANK, FSB, for an Order pursuant to CPLR 3212 as against the Defendant GOLDSPEED.COM, INC. on its Fourth, Fifth and Sixth Causes of Action is **granted**, and the Court hereby awards the Plaintiff judgment in the principal sum of **\$50,316.11**, with interest to be calculated from April 5, 2011 (C.P.L.R. 5001(b)), together with costs and disbursements as taxed by the Clerk of the Court; and it is further

ORDERED, that the Clerk of the Court shall enter a Judgment in favor of the Plaintiff, AMERICAN EXPRESS BANK, FSB, and against Defendant GOLDSPEED.COM, INC. in accordance herewith; and it is further

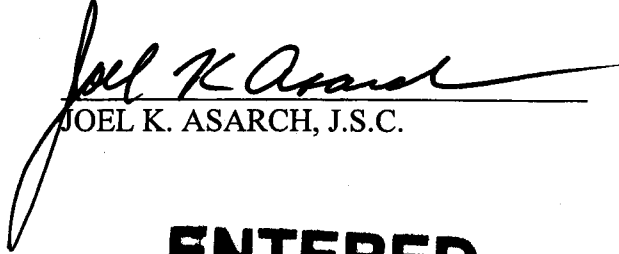
ORDERED, that counsel for the Plaintiff and counsel for the Defendant KUGELMAN shall appear in the DCM Part of this Court at 100 Supreme Court Drive, Mineola, New York on June 6, 2012 at 9:30 a.m. for a preliminary conference.

To the extent not granted herein, any other request for relief in the motion papers is **denied**.

The foregoing shall constitute the Decision and Order of this Court.

Dated: Mineola, New York
May 4, 2012

ENTER:



Handwritten signature of Joel K. Asarch in black ink, written over a horizontal line.

JOEL K. ASARCH, J.S.C.

Copies mailed to:
Jaffe & Asher, LLP
Attorneys for Plaintiff

Lewisohn & Lewisohn, Esqs.
Attorneys for Defendants

ENTERED
MAY 07 2012
NASSAU COUNTY
COUNTY CLERK'S OFFICE