

**American Express Travel Related Serv. Co., Inc. v  
Connectiva Sys., Inc.**

2013 NY Slip Op 31521(U)

June 24, 2013

Sup Ct, New York County

Docket Number: 150674/12

Judge: Joan A. Madden

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Hon Joan A. Madden
HON. JOAN A. MADDEN Justice

PART 11

J.S.C.
American Express Travel Related
Services Co., Inc.
Connecting Systems Inc.

INDEX NO. 150674/2012
MOTION DATE
MOTION SEQ. NO. 002

The following papers, numbered 1 to , were read on this motion to/for

Notice of Motion/Order to Show Cause - Affidavits - Exhibits No(s).
Answering Affidavits - Exhibits No(s).
Replying Affidavits No(s).

Upon the foregoing papers, it is ordered that this motion is decided in accordance
with the annexed memorandum Decision & Order.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: June 24, 2013

HON. JOAN A. MADDEN J.S.C.

- 1. CHECK ONE: CASE DISPOSED
2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 11

----- X  
AMERICAN EXPRESS TRAVEL RELATED  
SERVICES COMPANY, INC.,

Index No. 150674/12

Plaintiff(s),

-against-

CONNECTIVA SYSTEMS, INC.,

Defendant(s).

----- X  
Joan A. Madden, J.:

Plaintiff American Express Travel Related Services Company, Inc. (“Amex”) moves for an order awarding summary judgment in favor of Amex against defendant Connectiva Systems, Inc. (“Connectiva”) on its complaint, asserting claims for 1) breach of contract, 2) account stated, and 3) unjust enrichment. Connectiva opposes the motion.

Background

Amex is a corporation organized and existing under the laws of the state of New York, whose principal place of business is located at 200 Vesey Street, New York, New York 10285. Connectiva is a foreign limited liability company, with a place of business located at 19 West 44<sup>th</sup> Street, Suite 611-12, New York, New York 10036.

On February 22, 2005, Connectiva completed an application for the American Express Commercial Card Program, which was signed by Mark Trudeau as president and CEO. Amex approved Connectiva for the program and provided the company with an American Express Corporate Card (the “Card”), extending charge privileges from Amex to the company and its employees. Mr. Trudeau also signed the Corporate Services Commercial Card Account Agreement (the “Agreement”) with Amex on the same date. The Agreement provided in relevant part:

“Upon prior financial and risk management approval, American Express agrees to establish in your name the American Express Account(s) selected by you in the Application and will issue the following: Corporate Cards, Corporate Purchasing Cards, Corporate Meeting Cards, Centrally Billed account numbers (collectively, “Commercial Cards”), to certain of your employees who are designated by you and who are authorized to incur expenses on your behalf (“Commercial Cardmembers”) in accordance with this Agreement.” (Pg. 1, Clause 1. Account Establishment).

“You are liable for payment to us of all Charges incurred from the date a Commercial Cardmember’s authority to incur expenses on your behalf is terminated through the date we receive notification from you of such termination.” (Pg. 1, Clause 3. Liability).

“We will send to the Company a monthly statement (“Statement”) listing all charges. Company agrees to pay us in full for all Charges upon its receipt of the Statement. Company is liable to us for payment in full for all Charges made by Company’s employees or agents, including without limitation, Charges which result from the unauthorized use or misuse of the Centrally Billed Account(s) by any person currently or formerly employed by Company or any person whom at any time was given access to an account number or authorization to use the Centrally Billed Account(s) by Company. Company must notify us of any alleged error or disputes within 60 days of the date such charges first appear on a statement.” (Pg. 5, Clause 25.2 Billing and Liability).

“The provisions of this Section may be enforced by any Court of competent jurisdiction, and the party seeking enforcement shall be entitled to an award of all costs, fees and expenses, including attorneys fees, to be paid by the party against whom enforcement is ordered.” (Pg. 4, Clause 23. Mediation/Arbitration).

Upon Connectiva’s request, Amex issued fourteen supplemental cards for named employees.

Amex sent monthly billing statements (the “Statements”) to Connectiva, which showed the balance due on the account. The bills were addressed in the employee’s name, followed by Connectiva Systems, Inc., 19 W. 44<sup>th</sup> Street, Ste. 611, New York, NY 10036. The Statements detailed the date, amount and merchant for each of the respective charges. The records reflect that payments were made on the accounts. On or around December 28, 2011, Amex suspended Connectiva’s account due to the company failing to remit the payment indicated by the statements. Amex alleges the total outstanding, overdue, and unpaid balance with respect to Connectiva’s account is \$104,236.02.

Amex moves for summary judgment based upon three causes of action: 1) breach of contract, 2) account stated, and 3) unjust enrichment.

Amex argues that summary judgment is warranted on its breach of contract claim based on the Agreement under which Connectiva agreed to pay for all items charged to its account. Amex asserts it is entitled to the sum of \$104,236.02, plus reasonable attorneys' fees, court costs and prejudgment interest as provided for in the Agreement.

Amex also seeks summary judgment based upon account stated, arguing that Connectiva received the monthly Statements without protest and neither objected, nor indicated that they were erroneous, and made payments on the accounts. Amex further argues it is entitled to summary judgment for unjust enrichment, as Connectiva benefited from the charges made to its account. Based upon this cause of action, Amex asks for an amount to be determined at trial, plus court costs, and interest.

In support of its motion, Amex submits the affidavit of its custodian of records, Edmond Garabedian. Garabedian states he has personal knowledge regarding Amex's recordkeeping. He states customer service representatives are responsible for cardmember contact, and that they electronically record the sum and substance of their contacts with cardmembers, including any billing disputes (Exhibit 1). Amex also submits the Corporate Application for the American Express Commercial Card Program, signed by Mark Trudeau as president and CEO of Connectiva on February 22, 2005, and the Corporate Services Commercial Card Account Agreement, signed in the same manner on the same date (Exhibits 2 and 3). Amex submits the Statements from the billing period closing on 11/22/11 and 12/22/11 for Connectiva's fourteen employee corporate cards (Exhibits 4-16).

In opposition, Connectiva argues that Amex's motion is premature, since no discovery has been conducted, and submits the affidavit of its president, chief executive officer and sole remaining employee, Avi Basu, who states that Connectiva is being wound down and he is overseeing the winding down process. He alleges Connectiva's records are in storage in Long Island, and he is in India indefinitely without access to the records.

Connectiva also argues that Amex's affidavit suggests the existence of unproduced documents showing that there was no account stated between Amex and Connectiva. In particular, Connectiva argues that Amex's failure to submit the entire electronic file with every statement from 2005 to 2011 precludes a grant of summary judgment. Connectiva further argues that Amex has not shown the existence of an account stated, since Amex has not provided evidence that Connectiva has an obligation to pay the bills sent to the fourteen employees. Connectiva further contends that Amex has not shown the existence of an express contract, as the contract provided by Amex is mis-numbered and incomplete.

Connectiva next argues that Amex has not provided sufficient proof to support its claim of unjust enrichment.

#### Discussion

On a motion for summary judgment, the proponent "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issue of fact from the case..." Winegrad v. New York Univ. Med. Ctr., 64 NY2d 851, 852 (1985). Once the proponent has made this showing, the burden of proof shifts to the party opposing the motion to produce evidentiary proof in

admissible form to establish that material issues of fact exist which require a trial.

Alvarez v. Prospect Hosp., 68 NY2d 320, 324 (1986).

Here, Amex had met its prima facie burden of demonstrating its entitlement to summary judgment on the breach of contract claim by submitting the Agreement, the Statements showing the unpaid balances, and the affidavit from its custodian of records stating that the balances on the Statements have not been paid.

Connectiva counters that the Agreement is incomplete or mis-numbered. A review of the Agreement submitted by Amex reveals the pages of the Agreement are consecutive, although the signature page is different as it was apparently faxed to or from Connectiva for Mr. Tradeau's signature. However, the signature page is labeled page eight of nine, and there is no page nine in the record, and Amex fails to submit a reply to explain this discrepancy.

In any event, Amex is entitled to summary judgment on its claim for an account stated. "An account stated is an agreement between the parties to an account based upon prior transactions between them with respect to the correctness of the separate items composing the account and the balance due, if any, in favor of one party over the other." Shea & Gould v. Burr, 194 AD2d 369, 370 (1<sup>st</sup> Dept 1993), quoting Chisholm-Ryder Co., Inc. v. Sommer & Sommer, 70 AD2d 429, 431 (4<sup>th</sup> Dept 1979). The essential element of an account stated is that the parties have reached an agreement as to the balance of the indebtedness. Interman Indus. Products, Ltd. v. R.S.M. Electron Power, Inc., 37 NY2d 151, 153-54 (1975); Newburger-Morris Co. v. Talcott, 219 NY 505, 512 (1916).

Partial payment or the failure of a party receiving an account to examine the statement and make all necessary objections may be deemed acquiescence to the

correctness of the balance owed. Morrison Cohen Singer v. Weinstein, LLP v. Waters, 13 AD2d 51, 52 (1<sup>st</sup> Dept 2004); Rosenberg Selsman Rosenzweig & Co., LLP v. Slutsker, 278 AD2d 145 (1<sup>st</sup> Dept 2000).

Here, Amex has established a prima facie case against Connectiva for an account stated based on monthly statements from the account at issue and the affidavit of its custodian of records, who states that Amex issued and sent monthly statements to Connectiva for their fourteen employees corporate cards under the employee name and the company's name employees at Connectiva's address, and that Connectiva never objected to the charges incurred. Moreover, under its Agreement with Amex, Connectiva is liable for its employees' corporate card bills under the written Agreement executed between the parties on February 22, 2005.

In opposition, Connectiva fails to raise a triable issue of fact as to the account statement claim as it does not deny that Amex sent monthly statements to Connectiva or state that it objected to the charges in such statements. Connectiva also does not deny that the Statements are accurate or reflect the balance due and owing. Furthermore, while Amex does not submit every statement sent to Connectiva, this failure is insufficient to raise a triable issue of fact as the balance due and owing is reflected in the Statements and in light of the uncontroverted statement by Amex's custodian of records that monthly statements were sent to Connectiva and Connectiva's failure to deny that it received such statements.

Next, Connectiva's argument that summary judgment is premature as it must obtain its records from its warehouse in India is unavailing particularly as Connectiva has failed to specify how these documents would assist in its defense of this action.

At the same time, however Amex is not entitled to summary judgment on its unjust enrichment cause of action. See generally, Cruz v McAneney, 31 AD3d 54, 59 (2d Dept 2006).

Finally, as Amex's claim for attorneys' fees is based on provisions in the Agreement, and summary judgment has not been granted on the breach of contract cause of action, Connectiva's liability for attorneys' fees cannot be determined at this time.

In view of the above, it is

ORDERED that motion by plaintiff American Express Travel Related Services Company, Inc. for summary judgment is granted on its second cause of action for an account stated; and it is further

ORDERED that plaintiff American Express Travel Related Services Company, Inc. is awarded judgment on the second cause of action in the amount of \$104,236.02 against defendant Connectiva Systems, Inc., together with interest as calculated by the Clerk, together with costs and disbursements as calculated by the Clerk upon submission of an appropriate bill of costs, the first cause of action is severed and the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that the action shall continue as to first cause of action (for breach of contract) and the third cause of action (for unjust enrichment); and it is further

ORDERED that the parties shall appear for a compliance conference on August 1, 2013 at 9:30 am in Part 11, room 351, 60 Centre Street, New York, NY.

DATED: June 24, 2013  
~~June 24, 2013~~

  
J.S.C.