

<b>Department Stores Natl. Bank v Quillio</b>
2013 NY Slip Op 32302(U)
September 30, 2013
Sup Ct, Albany County
Docket Number: 106-13
Judge: Joseph C. Teresi
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STATE OF NEW YORK  
SUPREME COURT

COUNTY OF ALBANY

DEPARTMENT STORES NATIONAL BANK,

Plaintiff,

-against-

DEBORAH T. QUILLIO,

Defendant.

**DECISION and ORDER**  
**INDEX NO. 106-13**  
**RJI NO. 01-13-110815**

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Supreme Court Albany County All Purpose Term September 19, 2013  
Assigned to Justice Joseph C. Teresi

**APPEARANCES:**  
Forster & Garbus, LLP  
Edward J. Damsky, Esq.  
*Attorney for Plaintiff*  
60 Motor Parkway  
P.O. Box 9030  
Commack, New York 11725

Deborah T. Quillio  
*Defendant, pro se*  
98 Park Avenue  
Latham, New York 12110

**TERESI, J.:**

Plaintiff commenced this breach of contract / account stated action seeking to recover the sum that it claims is past due (\$1,871.63) under the parties' credit card agreement. Issue was joined by Defendant and discovery is ongoing. Plaintiff now moves for summary judgment. Defendant opposes the motion. Because Plaintiff demonstrated its entitlement to judgment as a matter of law and Defendant raised no triable issue of fact, Plaintiff's motion for summary judgment is granted.

As is well established "summary judgment is a drastic remedy that should not be granted

where there is any doubt as to the existence of a triable issue.” (Napierski v Finn, 229 AD2d 869, 870 [3d Dept 1996], quoting Moskowitz v Garlock, 23 AD2d 943 [3d Dept 1965]).

The movant “bears the initial burden of demonstrating its entitlement to judgment as a matter of law” (Hickey v Arnot-Ogden Medical Center, 79 AD3d 1400 [3d Dept 2010]) “by proffering evidentiary proof in admissible form.” (DiBartolomeo v St. Peter's Hosp. of City of Albany, 73 AD3d 1326 [3d Dept 2010]; Alvarez v Prospect Hospital, 68 NY2d 320 [1986]). Only if the movant establishes their right to judgment as a matter of law will the burden then shift to the opponent of the motion to establish, by admissible proof, the existence of a genuine issue of fact. (Zuckerman v City of New York, 49 NY2d 557 [1980]).

Considering first Plaintiff’s motion for summary judgment on its account stated cause of action, it met its initial burden.

“An account stated is an agreement between parties to an account based upon prior transactions between them with respect to the correctness of the account items and balance due.” (Citibank (S. Dakota) N.A. v Jones, 272 AD2d 815 [3d Dept 2000], quoting Jim-Mar Corp. v Aquatic Constr., 195 AD2d 868 [3d Dept 1993]; J.B.H., Inc. v Godinez, 34 AD3d 873 [3d Dept 2006]). Such “[a]n agreement may be implied where a defendant retains bills without objecting to them within a reasonable period of time, or makes partial payment on the account.” (American Express Centurion Bank v Cutler, 81 AD3d 761, 762 [2d Dept 2011][emphasis added]; Branch Services, Inc. v Cooper, 102 AD3d 645 [2d Dept 2013]).

In support of its motion Plaintiff submitted the affidavit of Kenneth Scheer, a Litigation Support Manager with Macy’s Credit Operations, Inc. a servicer for Plaintiff. His affidavit set forth admissible factual assertions, as it was properly based upon his own knowledge and his

review of the Plaintiff's business records. (CPLR §4518). His submission of the parties' contract and each monthly "Account Statement" that Plaintiff sent to Defendant are similarly admissible. The initial Account Statement, from August 2004, showed a zero initial balance and thanked Defendant for opening a new account. The final Account Statement, which set forth a payment due date of December 8, 2012, reflected a balance owing of \$1,871.63. The intervening Account Statements document numerous partial payments; starting with Plaintiff's second Account Statement, dated September 14, 2004, and running through the Account Statement for the period ending July 8, 2012. Upon such partial payment proof Plaintiff duly established that an implied agreement had been stated. Moreover, Defendant made no claim that she objected to any of the charges reflected in the account statements or to any of the account statements themselves. Upon such record, Plaintiff duly established its entitlement to summary judgment on its account stated claim.

Plaintiff likewise demonstrated its entitlement to summary judgment on its breach of contract claim. With the Scheer affidavit and Account Statements discussed above, "[P]laintiff tendered sufficient evidence that there was an agreement, which the defendant accepted by her use of the credit card and payments made thereon, and which was breached by the defendant when she failed to make required payments." (Citibank (S. Dakota), N.A. v Brown-Serulovic, 97 AD3d 522, 524 [2d Dept 2012]; Citibank (S. Dakota) N.A. v Sablic, 55 AD3d 651 [2d Dept 2008]). Again, Plaintiff met its initial burden of proof.

With the burden shifted, Defendant raised no triable issue of material fact. Importantly, Defendant does not allege that she has repaid Plaintiff the full amount of credit that it extended to her. Instead, with conclusory and unsupported assertions, she challenges Plaintiff's standing,

claims she is entitled to mandatory arbitration, asserts that Plaintiff applied the wrong law and has violated the law. Defendant's averments, which "merely stat[e] conclusions, of fact or of law, are insufficient to defeat summary judgment." (Banco Popular N. Am. v Victory Taxi Mgt., Inc., 1 NY3d 381, 383-84 [2004], quoting Mallad Const. Corp. v County Fed. Sav. & Loan Ass'n, 32 NY2d 285 [1973][internal quotation marks omitted]). In addition, Defendant's claim that the Scheer affidavit is inadmissible is, as set forth above, incorrect. Lastly, Defendant seeks to avoid summary judgment by claiming that Plaintiff failed to comply with her discovery demands. Such assertion is unavailing however, because she made no "evidentiary showing suggesting that completion of discovery will yield material and relevant evidence." (Saratoga Assoc. Landscape Architects, Architects, Engrs. & Planners, P.C. v Lauter Dev. Group, 77 AD3d 1219, 1222 [3d Dept 2010], quoting Zinter Handling, Inc. v Britton, 46 AD3d 998 [3d Dept 2007]; Stoian v Reed, 66 AD3d 1278 [3d Dept 2009]).

Accordingly, Plaintiff's motion for summary judgment is granted.

This Decision and Order is being returned to the attorney for Plaintiff. A copy of this Decision and Order and all other original papers submitted on this motion are being delivered to the Albany County Clerk for filing. The signing of this Decision and Order shall not constitute entry or filing under CPLR §2220. Defendant is not relieved from the applicable provision of that section respecting filing, entry and notice of entry.

So Ordered.

Dated: September 30, 2013  
Albany, New York

  
JOSEPH C. TERESI, J.S.C.

**PAPERS CONSIDERED:**

1. Notice of Motion, dated July 18, 2013; Affirmation of Ronald Ferraro, dated July 18, 2013; Affidavit of Kenneth Scheer, dated April 17, 2013, with attached Exhibits A-D.
2. Affidavit of Deborah Quillio, dated August 20, 2013.
3. Affirmation of Ronald Ferraro, dated September 10, 2013, with attached Exhibits E.