

American Express Bank, FSB v Smalls

2013 NY Slip Op 32820(U)

November 4, 2013

Supreme Court, New York County

Docket Number: 152402/2013

Judge: Cynthia S. Kern

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SUPREME COURT OF THE STATE OF NEW YORK
CYNTHIA S. KERN J.S.C. NEW YORK COUNTY

Index Number : 152402/2013
AMERICAN EXPRESS BANK, FSB
vs
SMALLS, PATRICIA
Sequence Number : 001
SUMMARY JUDGMENT

PART _____

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

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

is decided in accordance with the annexed decision.

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

Dated: 11/4/13

CK, 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

CYNTHIA S. KERN J.S.C. NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 55

-----X
AMERICAN EXPRESS BANK, FSB,

Plaintiff,

-against-

PATRICIA SMALLS a/k/a PATRICIA A SMALLS,
individually and d/b/a PERS ACCTG TOTAL SVS
and PERS ACCTG TOTAL SVS,

Defendants.
-----X

Index No. 152402/2013

DECISION/ORDER

HON. CYNTHIA KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for : _____

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	<u>1</u>
Answering Affidavits and Cross Motion.....	<u>2</u>
Replying Affidavits.....	<u> </u>
Exhibits.....	<u>3</u>

Plaintiff commenced the instant action seeking to collect on an allegedly overdue credit card account. Plaintiff now moves for an order pursuant to CPLR § 3212 granting it summary judgment on its breach of contract, account stated and unjust enrichment claims. For the reasons set forth below, plaintiff's motion is granted.

The relevant facts are as follows. This is a credit card collection action to recover the allegedly outstanding balance due on defendants' American Express Business Cash Rebate Card account in the amount of \$35,509.47. Plaintiff alleges in its complaint that defendant Patricia Smalls ("Ms. Smalls"), individually and as authorizing officer for defendant PERS ACCTG TOTAL SVS, was the holder of an American Express Business Cash Rebate Card (the "Credit Card") that she used to purchase goods and services for which she has failed to make payment on

when it became due. Accordingly, plaintiff commenced the instant action asserting claims for breach of contract, account stated and unjust enrichment to recover the allegedly outstanding balance on defendants' account. Plaintiff now moves for summary judgment on all three claims.

On a motion for summary judgment, the movant bears the burden of presenting sufficient evidence to demonstrate the absence of any material issues of fact. *See Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986). Once the movant establishes a *prima facie* right to judgment as a matter of law, the burden shifts to the party opposing the motion to "produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim." *See Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980). However, "mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient" to defeat summary judgment. *Id.* Summary judgment should not be granted where there is any doubt as to the existence of a material issue of fact. *Id.*

In the present case, plaintiff has demonstrated its *prima facie* entitlement to judgment as a matter of law on its account stated claim and defendants have failed to raise a triable issue of fact. "An account stated is an agreement between the partes 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 or the other." *Herick, Feinstein LLP v. Stamm*, 297 A.D.2d 477 (1st Dept 2002) (quoting *Chrisholm-Ryder Co. v. Sommer & Sommer*, 70 A.d.2d 429, 431 (4th Dept 1979)). It is well settled that "[e]ither retention of bills without objection or partial payment may give rise to an account stated" entitling the moving party to summary judgment in its favor. *Morrison Cohen Singer and Weinstein, LLP v. Waters*, 13 A.D.3d 51, 52 (1st Dept 2004); *see also American Express Centurion Bank v. Williams*, 24 A.D.3d 577 (2nd Dept 2005).

Here, plaintiff has made out its *prima facie* case for an account stated by presenting copies of the monthly credit card billing statements mailed to defendants between June 2012 and February 2013, which show that defendants continued to make partial payments on their account with plaintiff up until the final statement leaving a remaining balance of \$35,509.47. Additionally, plaintiff presents the affidavit of one of its employees who attests that “[t]here is no record of defendant[s] ever asserting a valid unresolved objection to the balance shown as due and owing on the monthly statements provided to defendant[s].” Taken together, these documents clearly establish plaintiff’s right to judgment on its account stated claim.

In opposition, Ms. Smalls has failed to raise a triable issue of fact. Ms. Smalls does not dispute the receipt of the monthly statements or their accuracy. Instead, the only defense Ms. Smalls provides in opposition to plaintiff’s motion is her own conclusory affidavit wherein she attests that this court should deny summary judgment on the ground that “she is not a New York State Resident and do[es] not have an unincorporated business called or do[ing] business as PERS ACCTG TOTAL SVS.” However, this contention is without merit. As an initial matter, Ms. Smalls does not put forth any evidence to refute plaintiff’s process server’s affidavit of service demonstrating that personal service was effectuated on her in New York on March 20, 2013. Additionally, the monthly billing statements annexed to plaintiff’s moving papers are explicitly addressed to “PATRICIA A SMALLS, PERS ACCTG TOTAL SVS.” Accordingly, as Ms. Smalls was personally served with process in New York, individually and on behalf of PERS ACCTG TOTAL SVS, this court has jurisdiction over defendants.

Accordingly, plaintiff’s motion for summary judgment on its account stated claim is granted. Additionally, as plaintiff has established its account stated claim, the court need not reach the merits of plaintiff’s breach of contract and/or unjust enrichment claims. The Clerk is

