

**Breuer v American Express Bank, FSB**

2014 NY Slip Op 31698(U)

June 30, 2014

Sup Ct, NY County

Docket Number: 155739/13

Judge: Manuel J. Mendez

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MANUEL J. MENDEZ  
*Justice*

PART 13  
155739/13

LIEB BREUER and SAM'S DISTRIBUTION, LLC,

INDEX NO. ~~155739/13~~ 3  
MOTION DATE 05-28-2014  
MOTION SEQ. NO. 001  
MOTION CAL. NO. \_\_\_\_\_

Plaintiffs,

-against-

AMERICAN EXPRESS BANK, FSB, AMERICAN EXPRESS  
COMPANY, and AMERICAN EXPRESS TRAVEL RELATED  
SERVICES COMPANY, INC.,

Defendants.

The following papers, numbered 1 to 9 were read on this motion for Summary Judgment and Cross motion for Summary Judgment.

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

1-2, 3-4

5-6, 7-8

9

Cross-Motion:  Yes  No

Upon a reading of the foregoing cited papers, it is Ordered that plaintiffs' motion for summary judgment is denied, and defendants' cross-motion for summary judgment is granted.

On June 17, 2011, plaintiffs purchased 2,958 units of Bluetooth headsets for a total purchase price of \$138,996.42 from Amazon.com LLC (herein "Amazon"). Plaintiffs purchased the units from Amazon using their American Express Credit Card (herein "Card") and defendants (herein "AMEX") paid Amazon. With Amazon's consent, plaintiffs returned 2,569 of the 2,958 units for a total refund of \$129,717.31. Amazon refunded \$37,307.54 on the Card leaving a balance due and owing from Amazon to plaintiffs of \$83,410.26. Plaintiffs commenced an action against Amazon on October 24, 2012 due to Amazon's refusal to refund the full amount due.

As of April 18, 2012, plaintiffs' Card statement had a balance of \$110,468.39 (herein "Debt") and AMEX placed the Card account in collections. On July 24, 2012, AMEX commenced an action to collect on the Debt. On October 18, 2012, while the collection action was pending, Amazon refunded \$83,410.26 (herein "Refund") to the Card and AMEX applied the Refund to the Debt leaving a \$27,058.13 balance due and owing on the Card. Plaintiffs attempted to have the Refund issued directly to them in the form of a check, but Amazon refused and instead issued the Refund in the form of a credit on the Card's statement.

On November 8, 2012, after the Refund had posted on the Card's account statement, the parties entered into a settlement agreement (herein Settlement) in which AMEX released plaintiffs from the collection action in exchange for \$20,000 divided into twelve (12) monthly payments. At the time the parties entered into the Settlement, the amount due on the Card was \$27,058.13. On November 15, 2012 and December 6, 2012, plaintiffs' counsel wrote AMEX requesting a check in the amount of the Refund claiming that the Refund was a payment to plaintiffs, and not a refund.

AMEX refused to make the payment requested and on June 21, 2013 plaintiffs filed the instant action asserting causes of action for breach of contract and conversion. Plaintiffs now move for summary judgment arguing that the Settlement released plaintiffs from the \$110,468.39 collections action in exchange for the \$20,000 settlement amount.

AMEX opposes the instant motion and cross moves for summary judgment arguing that giving plaintiffs the Credit would create a windfall because plaintiffs never paid the Debt on the Card while they disputed the charges with Amazon. AMEX asserts that at the time the Settlement was executed the balance was \$27,058.13 and Amex bargained for a \$20,000 settlement, although the Settlement states plaintiffs are released from the Debt in exchange for \$20,000. Amex further contends that pursuant to the Card's agreement, AMEX has the sole discretion to apply payments and credits to outstanding balances on the Card in any order it sees fit.

In order to prevail on a motion for summary judgment, the proponent must make a prima facie showing of entitlement to judgment as a matter of law, through admissible evidence, eliminating all material issues of fact (Klein v. City of New York, 81 N.Y. 2d 833, 652 N.Y.S. 2d 723 [1996]). Once the moving party has satisfied these standards, the burden shifts to the opponent to rebut that prima facie showing, by producing contrary evidence, in admissible form, sufficient to require a trial of material factual issues (Amatulli v. Delhi Constr. Corp., 77 N.Y. 2d 525, 569 N.Y.S. 2d 337 [1999]).

The elements of a breach of contract claim "include the existence of a contract, the plaintiff's performance thereunder, the defendant's breach thereof, and resulting damages (Harris v. Seward Park Housing Corp., 79 A.D.3d 425, 426, 913 N.Y.S.2d 161, 162 [1<sup>st</sup> Dept., 2010] citing to, Morris v. 702 E. Fifth St. HDFC, 46 A.D.3d 478, 850 N.Y.S.2d 6 [1<sup>st</sup> Dept., 2007] ). "An account stated is an agreement between parties as to an account and the correctness of account items and a specific balance due on them" (White Plains Cleaning Services, Inc. v. 901 Properties, LLC, 94 A.D.3d 1108, 1109, 942 N.Y.S.2d 636, 638 [2<sup>nd</sup> Dept., 2012] citing to, Stephan B. Gleich & Assoc. v. Gritsipis, 87 A.D.3d 216, 223, 927 N.Y.S.2d 349 2<sup>nd</sup> Dept., 2012]). An account stated may be expressed or implied "when a

party has retained billing statements without rejecting them or objecting to them within a reasonable time under circumstances evincing assent” (Id.).

The Settlement states AMEX releases plaintiffs from the Debt in exchange for \$20,000, but at the time the Settlement was entered into the account stated had a balance due and owing of \$27,058.13. Plaintiffs do not argue or submit any evidence that they paid AMEX for the Debt while plaintiffs disputed the charges with Amazon, nor do plaintiffs object to the correctness of the account stated. Plaintiffs do not make a prima facie showing of entitlement to judgment as a matter of law. Plaintiffs’ argument focuses exclusively on the Settlement, but plaintiffs do not dispute that when they opened the Card they agreed to the Card’s terms. Plaintiffs do not deny that they knew the Refund had posted on the account stated of the Card prior to the Settlement.

In opposition to plaintiffs’ motion and in support of its cross motion, AMEX submits a copy of the Card’s agreement which states “subject to applicable law, we will apply and allocate payments and credits among features and charges on your account in any order and manner determined by us in our sole discretion ... You agree that we have the unconditional right to exercise this discretion in a way that is most favorable or convenient to us.” AMEX submits an affidavit from Edmond Garabedian, a Manager and Records Custodian at AMEX. Garabedian states AMEX applied the Refund from Amazon to the remaining Debt on the Card “because it [AMEX] paid Amazon.com for these outstanding monies. Plaintiffs never provided the funds for these charges to American Express.”

AMEX makes a prima facie showing of entitlement to judgment as a matter of law. AMEX submits evidence eliminating all issues of material fact. AMEX proves it paid Amazon for plaintiffs’ purchase, plaintiffs did not reimburse AMEX for their payment to Amazon, and that when AMEX received the Refund it applied the amount to the amount due on the Card pursuant to the Card’s agreement.

AMEX is entitled to summary judgment on the conversion claim. “Conversion is the ‘unauthorized assumption and exercise of the right of ownership over goods belonging to another to the exclusion of the owner's rights” (Towbin v. Towbin, 117 A.D.3d 607, 986 N.Y.S.2d 119, 121 [1<sup>st</sup> Dept., 2014] citing to, State of New York v. Seventh Regiment Fund, 98 N.Y.2d 249, 259, 746 N.Y.S.2d 637, 774 N.E.2d 702 [2002]). AMEX makes a prima facie showing that plaintiffs had no right of ownership to the Refund, therefore, the conversion claim fails. Plaintiffs do not make a sufficient showing requiring a trial of material factual issues on either of the causes of action.

Accordingly, it is ORDERED that plaintiffs' motion for summary judgment is denied, and it is further,

ORDERED, that defendants' cross motion for summary judgment is granted, and it is further,

ORDERED, that the Complaint and Counterclaims are dismissed, and it is further,

ORDERED that the Clerk of Court enter judgment accordingly.

ENTER: MANUEL J. MENDEZ  
J.S.C.

Dated: June 30, 2014

  
\_\_\_\_\_  
MANUEL J. MENDEZ  
J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE