

American Express Centurion Bank v Simon
2014 NY Slip Op 31785(U)
July 10, 2014
Supreme Court, New York County
Docket Number: 113089/2010
Judge: Doris Ling-Cohan
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SUPREME COURT OF THE STATE OF NEW YORK - NEW YORK COUNTY

PRESENT: Hon. DORIS LING-COHAN, Justice

PART 36

AMERICAN EXPRESS CENTURION BANK,
Plaintiff,

-against-

ANNETTE SIMON,
Defendant.

INDEX NO. 113089/2010
MOTION DATE
MOTION SEQ. 003
MOTION CAL.NO.

The following papers, numbered 1 - 4 were considered on this motion for summary judgment:

<u>PAPERS</u>	<u>NUMBERED</u>
Notice of Motion/Order to Show Cause, — Affidavits — Exhibits (& Memo of Law)	<u>1, 2, 3</u>
Answering Affidavits — Exhibits	<u>4</u>
Replying Affidavits	_____
Cross-Motion: <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No	_____

FILED

JUL 11 2014

**NEW YORK
COUNTY CLERK'S OFFICE**

Upon the foregoing papers, it is ordered that this motion for summary judgment is granted, to the extent set forth below.

BACKGROUND

Plaintiff American Express Centurion Bank ("Amex") moves for summary judgment in its favor and against defendant Annette Simon in the amount of \$34,918.94, with pre-judgment interest, plus costs and disbursements.

Plaintiff issued to defendant an American Express Optima Triumph Gold Rewards card ("Amex Gold" card) in April 2000 and American Express Optima Triumph card ("Amex Triumph" card) in July 1996, and defendant subsequently incurred charges to the subject accounts. Plaintiff alleges that respective agreements containing the terms and conditions governing the use of each credit card were mailed to defendant with the cards. Plaintiff asserts that defendant used the credit card accounts to pay for various goods and services and/or obtain

cash advances and, consistent with its standard business practices, plaintiff transmitted monthly billing statements to defendant. Aff of plaintiff's Assistant Custodian of Records, ¶ 8. Subsequently, defendant defaulted in making the payments due on the credit card accounts pursuant to the terms of the cardmember agreements for the Amex Gold and Amex Triumph accounts. *Id.* at ¶ 9. Plaintiff alleges that, as of June 14, 2013, the balance on the Amex Gold account was \$22,539.26, and \$12,379.68 on the Amex Triumph account, totaling to \$34,918.94 for both accounts. *Id.* Plaintiff now moves for summary judgment, arguing that there are no issues of fact, as it is clear that defendant received the cards, used the cards subject to their respective terms and conditions, incurred charges, and has not made full payment on the accounts.

DISCUSSION

“[T]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact.” *Ayotte v Gervasio*, 81 NY2d 1062, 1063 (1993), quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 (1986). Upon the presentation of a prima facie case by the movant, the burden then shifts to the motion's opponent to offer evidentiary facts sufficient to raise a triable issue of fact. *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). “Mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient.” *Id.*

The motion for summary judgment is granted as plaintiff has established its prima facie entitlement to judgment as a matter of law on its account stated claim and defendant has failed to raise a triable issue of fact. “[A]n account stated is an account balanced and rendered, with an

assent to the balance express or implied; so that the demand is essentially the same as if a promissory note had been given for the balance.” *Parker Chapin Flattau & Klimpl v Daelen Corp.*, 59 AD2d 375, 377 (1st Dept 1977) (internal quotation marks and citations omitted). An account stated may be established by “either retention of bills without objection or partial payment may give rise to an account stated.” *Morrison Cohen Singer and Weinstein, LLP v Waters*, 13 AD3d 51, 52 (1st Dept 2004) (citations omitted).

Here, plaintiff presented copies of the monthly credit card billing statements mailed to defendant between May 2010 and October 2010 for the Amex Gold card account, and between April 2010 and September 2010 for the Amex Triumph card account. Such statements show that defendant made sporadic partial payments on both accounts, as well as defendant’s purchases and cash advances on such accounts, leaving a remaining total balance of \$34,918.94 for both accounts. In addition, plaintiff has submitted an affidavit of its Assistant Custodian of Records, Richard Kier, who attests that “[t]here is no record of Defendant ever asserting a valid unresolved objection to the balance shown as due and owing on the monthly statements provided to Defendant.” Aff of Richard Kier, ¶ 8. As plaintiff has submitted admissible evidence that it generated statements for the defendant in the regular course of business, that it mailed those statements to the defendant on a monthly basis, and that the defendant accepted such account statements and retained them without objecting within a reasonable amount of time, plaintiff has established its prima facie case for an account stated. *See American Express Centurion Bank v Williams*, 24 AD3d 577, 577 (2d Dept 2005); *see also Geron v DeSantis*, 89 AD3d 603, 604 (1st Dept 2011); *Stephanie R. Cooper, P.C. v Robert*, 78 AD3d 572, 573 (1st Dept 2010).

In opposition, defendant does not raise a triable issue of fact. While defendant alleges that plaintiff has not established it actually sent the credit card statements to her or how they were sent, defendant does not specifically contend that she did not receive the statements. Contrary to defendant's contention, plaintiff, through Mr. Keir's affidavit, met its burden to establish that it mailed the statements to the defendant on a monthly basis. Aff of Richard Kier, ¶ 8; see *Citibank (South Dakota) N.A. v Jones*, 272 AD2d 815, 817 n 1 (3d Dept 2000) (finding plaintiff presented specific evidence that monthly statements were mailed to defendant based on affidavit of plaintiff's manager which specifically stated that it was the regular practice of plaintiff's business to send customers monthly statements detailing outstanding balances, as well as purchases made and payments received, and that defendant was sent such monthly statements).

Moreover, defendant does not sufficiently dispute the accuracy of the charges or that they were not incurred by her. Although defendant argues that each charge was not particularized in this action, she does not specify any particular item that she claims is not an appropriate charge. Plaintiff contends – and defendant does not dispute – that the charges were never objected to or challenged in any way when the statements were sent to defendant. In addition, pursuant to the Fair Credit Billing Act, 15 USC § 1666, defendant had 60 days to dispute any billing errors with the card issuer, and there is no contention that she did so. Further, the charges list sufficient information for defendant to have been able to object.

As plaintiff has established its account stated claim, the court need not reach the merits of plaintiff's breach of contract and unjust enrichment claims.

DECISION

Accordingly, it is

ORDERED that the motion for summary judgment is granted and the Clerk of the Court is directed to enter judgment in favor of plaintiff and against defendant Annette Simon in the amount of \$34,918.94, together with interest as prayed for allowable by law from the date of October 20, 2010, until the date of entry of judgment, as calculated by the Clerk, and thereafter at the statutory rate, together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs; and it is further

ORDERED that, within 30 days of entry of this order, plaintiff shall serve upon defendant, a copy of this order, with notice of entry.

Dated:

7/10/14



DORIS LING-COHAN, J.S.C.

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Check if Appropriate: DO NOT POST

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