

Discover Bank v Ryan
2014 NY Slip Op 32290(U)
August 27, 2014
Supreme Court, Wyoming County
Docket Number: 45016/12
Judge: Michael M. Mohun
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At a term of the Supreme Court held in and for the County of Wyoming, at the Courthouse in Warsaw, New York, on the 27th day of August, 2014.

PRESENT: **HONORABLE MICHAEL M. MOHUN**
Acting Supreme Court Justice

STATE OF NEW YORK
SUPREME COURT: COUNTY OF WYOMING

DISCOVER BANK,

Plaintiff,

v.

**DAWN RYAN,
TIMOTHY RYAN,**

Defendants.

DECISION AND ORDER
Index No. 45016/12

The above-named plaintiff, having moved for an order pursuant to CPLR 3212 granting it summary judgment against the defendants for the relief demanded in the complaint, and said motion having duly come on to be heard.

NOW, on reading the complaint and answer herein, and on reading and filing the notice of motion dated March 26, 2014, supported by the affirmation of Ronald J. Ferraro, Esq., attorney for the plaintiff, dated March 26, 2014, and the affidavit of Joshua Frazier, Litigation Support Specialist for DB Servicing Corp., reportedly the servicing affiliate for the

plaintiff, sworn to on February 4, 2014, together with annexed exhibits, the responding affirmation of J. Kirby Colling, Esq., attorney for the defendants, the joint affidavit of the defendants, sworn to on June 5, 2014, together with the annexed exhibit, the reply affirmation of Ronald J. Ferraro, Esq., dated June 24, 2014, together with the annexed exhibits, and joint responding affidavit of the defendants, sworn to on July 8, 2014, due deliberation having been had, the following decision is rendered.

In this action, the plaintiff seeks to collect monies allegedly owed in connection with the use of a credit card. The complaint advances two causes of action: breach of contract and an account stated.

Upon a motion for summary judgment, the moving party bears the initial burden to put forward evidence in admissible form establishing a prima facie case that he or she is entitled to judgment as a matter of law (CPLR 3212[b]; Friends of Animals, Inc. v. Associated Fur Mfrs., 46 N.Y.2d 1065, 1067 [1979]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (Winegrad v. New York University Medical Center, 64 N.Y.2d 851 [1985]).

The plaintiff has submitted with its motion papers copies of monthly credit card statements addressed to the defendants. It has also submitted copy of set of credit card terms and conditions. Basing his assertions upon the knowledge he has gained from his "access to the

business records of the plaintiff" and his "familiarity with the customary business procedures and processes of the plaintiff," Mr. Frazier states in his affidavit that "Defendant" applied to the plaintiff for a credit card "on or before May, 1991." Thereafter, the plaintiff "opened a credit card account and delivered to Defendant the credit card and a copy of the terms and conditions of the account which set forth the obligations of the parties with respect to the account." According to Mr. Frazier, the plaintiff subsequently "sent monthly statements of transaction history to the defendant," and the defendants made payments upon the outstanding balances. The last payment was received by the plaintiff on January 3, 2010, at which time the plaintiff's records showed a remaining, unpaid balance of \$10,019.34 – the amount sought in the complaint. The defendants deny applying for or receiving the credit card. They also deny receiving the monthly statements and a statement of terms and conditions relating to the card. They state that they never made any charges or payments on the account.

Due to the deficiencies described below, the Court finds that the plaintiff has failed to meet its burden upon the motion to establish, prima facie, that it is entitled to judgment as a matter of law. First, with respect to the breach of contract cause of action, the Court notes that Mr. Frazier fails to state in his affidavit that the credit card terms and conditions submitted with the motion are, in fact, the terms and conditions allegedly delivered to

the defendants with the card. In addition, although Mr. Frazier purports to lay a foundation for the admissibility for the monthly statements as business records, he does not do so with respect to the terms and conditions.

Consequently, the plaintiff's submissions are not sufficient to show the actual agreement that allegedly existed between the parties, and the Court is therefore unable to conclude upon the plaintiff's motion papers that a breach of the agreement occurred.

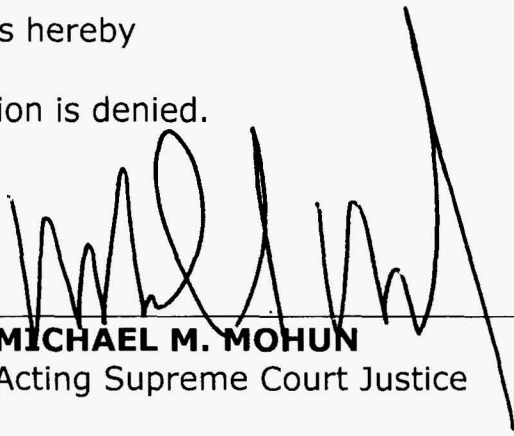
Second, with regard to the account stated claim, in order to establish a cause of action for an account stated, a plaintiff must show that the defendant has retained bills without making objection within a reasonable period of time, or has made partial payment on the account (American Express Centurion Bank v. Cutler, 81 A.D.3d 761, 762 [2nd Dept., 2011]; J.B.H. v. Goodinez, 34 A.D.3d 873, 874-785 [3rd Dept, 2006]). Here, the plaintiff rests his claim upon the copies of the monthly statements submitted. The monthly statements do not, by themselves, establish that the defendants retained the bills without objection, however. For that, the plaintiff must supply some evidence that the defendants received the monthly statements and failed to object to them within a reasonable time afterwards (Simplex Grinell v. Manor, 59 A.D.3d 610 [2nd Dept., 2009]). For instance, the plaintiff might have accomplished through the submission of an affidavit from an employee of the plaintiff with personal knowledge of the

account and of the company's mailing procedures. That person could have established that one or more of the statements were, in fact, mailed to the defendants and that no objection was received within a reasonable time thereafter – thereby providing some basis for a presumption of receipt and retention without objection (see Morrison Cohen Singer & Weinstein v. Brophy, 19 A.D.3d 161, 161-162 [1st Dept., 2005]). Mr. Frazier's conclusory assertion that the monthly statements were "sent" to the defendants is not enough to allow the Court to conclude this.

NOW, THEREFORE, it is hereby

ORDERED that the motion is denied.

DATED: August 27, 2014
Warsaw, New York



MICHAEL M. MOHUN
Acting Supreme Court Justice

