

American Express Centurion Bank v Kalantzis

2014 NY Slip Op 32421(U)

September 15, 2014

Supreme Court, New York County

Docket Number: 152939/13

Judge: Donna M. Mills

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
 COUNTY OF NEW YORK: IAS PART 58

-----X
 AMERICAN EXPRESS CENTURION BANK,

Plaintiff,

-against-

Index No.

JOANNE KALANTZIS,

152939/13

Defendant.
 -----X

DONNA MILLS, J. :

Plaintiff moves for summary judgment. Defendant cross-moves for dismissal or, alternatively, for a continuance pending the completion of discovery.

Plaintiff is a bank which issues credit cards. Defendant entered into a credit card agreement (agreement) with plaintiff and received a credit card in her name. Plaintiff commences this action against defendant to recover overdue charges. The complaint alleges that defendant used the card to obtain goods and services pursuant to her account, and eventually reached a balance of \$61,247.54. According to plaintiff, all of defendant's charges were reported in monthly statements of account and were mailed to the address she provided to plaintiff. Plaintiff argues that the alleged balance remains fully unpaid to date.

The complaint alleges three causes of action, breach of contract, account stated and unjust enrichment. Plaintiff seeks summary judgment on each cause of action, arguing that it has an undisputable right to such relief.

On the breach of contract claim, plaintiff contends that defendant breached the agreement where she failed to make payments pursuant to its terms. The agreement specifically provides under the heading "Payments" that: "Payment is due upon your receipt of the billing statement."

Plaintiff asserts that defendant failed to make payment. Therefore, plaintiff seeks judgment on this cause of action.

On the account stated claim, plaintiff argues that there was an account rendered monthly, which showed a balance due, and defendant, as the receiving party, failed to dispute the accounts. Therefore, plaintiff claims that defendant, through her conduct, ratified the account and must pay the outstanding balance.

On the unjust enrichment claim, plaintiff argues that defendant was enriched at the expense of plaintiff and, out of principles of equity and conscience, defendant is obligated to pay back plaintiff. Plaintiff notes that the defenses in the answer include laches, unclean hands and equitable estoppel. Plaintiff avers that these defenses should be dismissed as a matter of law because they are, at best, conclusory.

Defendant opposes the motion for summary judgment and cross-moves for dismissal of the complaint. Defendant raises some issues that she claims would preclude judgment. She refers to a provision in the agreement under "Governing Law:" "Utah law and federal law govern this Agreement and your Account. They govern without regard to internal principles of conflicts of law." (Exhibit "1," Part 2, at 7). She states that Utah law has more stringent provisions for permitting or granting summary judgment motions than New York law. However, she avers that under both Utah and New York law, the action would be dismissed on the ground that plaintiff failed to abide by a "condition precedent" in the agreement before resorting to litigation here. She refers to a provision in the agreement: "Sending a Claim Notice- Before beginning a lawsuit, mediation or arbitration, you and we agree to send a written notice (a claim notice) to each party against whom a claim is asserted, in order to provide an opportunity to resolve the claim

informally or through mediation.” (Exhibit “B,” Amendment to Arbitration Section, at 7).

Defendant contends that plaintiff failed to comply with this provision before commencing this suit and, thereby, breached the agreement. Moreover, she states that a copy of a claim notice is not attached to plaintiffs’ moving papers. She argues that this is a sufficient reason to deny summary judgment and to dismiss the complaint.

Defendant also raises an issue of fact, namely that her estranged husband had charged items on her card without her authorization, and that he had the billing address changed so that she did not receive invoices at her actual address. Defendant contends that she never received the monthly statements from plaintiff because they were sent to the address of her estranged husband.

Defendant claims that her defenses are not conclusory and have merit. She states that the defense of laches is valid, as she has been prejudiced by this action. She argues that there is a question as to why plaintiff waited so long to notify her as to her lack of payment to the point that her balance currently exceeds \$60,000. Defendant also argues that plaintiff’s alleged decision to allow the charges to continue, and then arbitrarily decide to stop authorizations for further credit to her detriment, constitutes estoppel and unclean hands.

Defendant argues that, as an alternative to dismissal, the court should grant a continuance so that she can depose plaintiff, claiming that discovery was incomplete prior to the motion for summary judgment. Defendant cites CPLR 3212 (f) (5) and section 56 (f) of the Utah Rules of Civil Procedure, which allegedly grant the court discretion to allow continuance in such situations.

Plaintiff opposes the cross motion, claiming that it lacks merit. By mailing defendant an

attorney demand letter on January 31, 2013, several months before the commencement of this action, plaintiff avers that it met its condition precedent. Plaintiff argues that defendant is responsible for paying the charges as the account is in her name, not her estranged husband's name. Plaintiff also argues that defendant brought discovery demands over seven months after the action was commenced, and on the day plaintiff moved for judgment, accusing her of trying to delay the motion.

In reply, defendant argues that plaintiff has attempted to ignore the merits of her arguments. She states that the attorney demand letter, which is not included in plaintiff's papers, is not the equivalent of a claim notice, pursuant to the agreement. She also states that she made the discovery demand before plaintiff's motion was made, and that there is no attempt to delay this action. Defendant claims that plaintiff has not addressed her statements concerning her defenses.

"It is axiomatic that summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of factual issues." *Birnbaum v Hyman*, 43 AD3d 374, 375 (1st Dept 2007). "The substantive law governing a case dictates what facts are material, and '[o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment [citation omitted].'" *People v Grasso*, 50 AD3d 535, 545 (1st Dept 2008). "Where a defendant is the proponent of a motion for summary judgment, it has the burden of establishing that there are no material issues of fact in dispute and thus that it is entitled to judgment as a matter of law." *Flores v City of New York*, 29 AD3d 356, 358 (1st Dept 2006). "Once the defendant demonstrates its entitlement to summary judgment, the burden then shifts to the plaintiff to present facts, in admissible form, demonstrating that

genuine, triable issues exist precluding the granting of summary judgment.” *Id.*

As defendant has brought a cross motion for dismissal after the joinder of issue, the court shall treat this as a motion for summary judgment.

With respect to the breach of contract cause of action, defendant has raised a choice of law provision in the agreement, which plaintiff failed to address in its opposition papers. This is an unambiguous provision to which the parties assented upon the execution of the agreement. Pursuant to the agreement, the court shall apply Utah law. However, defendant has raised procedural issues when referring to Utah law, discussing the standards of summary judgment and continuance. “[U]nder common-law rules, matters of procedure are governed by the law of the forum [citation omitted].” *Goldman v Rio*, 104 AD3d 729, 730 (2d Dept 2013). Thus, all procedural matters are subject to New York law.

One pertinent matter is the condition precedent argument. The interpretation of contracts is substantive, and thus, is subject to Utah law. “When interpreting a contract, a court first looks to the contract’s four corners to determine the parties’ intentions, which are controlling.” *Bakowski v Mountain States Steel, Inc.*, 52 P3d 1179, 1184 [Utah 2002]. “If the language within the four corners of the contract is unambiguous, ... a court determines the parties’ intentions from the plain meaning of the contractual language as a matter of law [citations omitted].” *Id.*

Parties to a contract must act in good faith to satisfy any condition precedent to performance. See *Bastain v Cedar Hills Inv. & Land Co.*, 632 P2d 818, 821 (Utah 1981). The notice of claim provision in the agreement was amended and added to the agreement after its initial execution. Since the amended provision was in effect prior to the commencement of this suit, it is a valid provision. The terms of the provision indicate a condition that must occur

before any litigation or arbitration is to be commenced. There is no definitive proof that any notice of claim exists. At this time, the attorney demand letter, not provided herein, may or may not be the equivalent of such a notice.

The court finds that the plaintiff's failure to comply with the notice of claim provision of the agreement would be a violation of the agreement. However, the absence of the attorney demand letter in the papers raises an issue of fact as to whether a proper notice of claim was sent by plaintiff and received by defendant. For this reason, summary judgment shall be denied for this cause of action.

Plaintiff seeks summary judgment on its other causes of action, account stated and unjust enrichment. "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 the balance due [citations omitted]." *Ryan Graphics, Inc. v Bailan*, 39 AD3d 249, 250 (1st Dept 2007). "[E]ither retention of bills without objection or partial payments may give rise to an account stated." *Morrison Cohen Singer & Weinstein, LLP v Waters*, 13 AD3d 51, 52 (1st Dept 2004).

In opposition to summary judgment, defendant argues that here are issues of fact concerning the unauthorized use of her card by another person, her spouse, who is allegedly responsible for the huge debt incurred. Defendant also argues that the monthly statements were sent to the wrong address and that she did not receive the statements. These arguments are made in defendant's affidavit. She also avers that she has been prejudiced by plaintiff due to the alleged delay in finally bringing this action against her.

Contrary to plaintiff's assertions, defendant contends in her affidavit that she never received any of its billings. Plaintiff has failed to produce evidence that defendant even received

them or that her husband was authorized to use the card, making the invoices mailed to him valid. In the absence of evidence that indicates defendant's receipt and retention of plaintiff's monthly invoices, there is no account stated. See e.g. *Geron v Amritraj*, 82 AD3d 404 (1st Dept 2011). The court shall dismiss the account stated cause of action.

The last cause of action is for unjust enrichment. "The essential inquiry in any action for unjust enrichment or restitution is whether it is against equity and good conscience to permit the defendant to retain what is sought to be recovered ...[citation omitted]."⁷ *Manufacturers Hanover Trust Co. v Chemical Bank*, 160 AD2d 113, 117 (1st Dept 1990). Since there is an express contract alleged by plaintiff, there can be no quasi-contract claim. See *Scavenger Inc. v GT Interactive Software Corp.*, 289 AD2d 58, 59 (1st Dept 2001). The unjust enrichment cause of action is dismissed.

Defendant's alternative request for a continuance has been rendered moot. The parties can proceed with the discovery process on the breach of contract cause of action.

Accordingly, it is

ORDERED that plaintiff's motion for summary judgment is denied; and it is further

ORDERED that defendant's cross motion for summary judgment is granted to the extent that plaintiff's second cause of action, account stated, and third cause of action, unjust enrichment, are dismissed; and it is further

ORDERED that defendant's cross motion for a continuance pending further discovery is denied as moot.

DATED: 9/15/14

ENTER:

Donna M. Mills

DONNA M. MILLS, J.S.C.
J.S.C.