

**Markowitz v Chase Bank USA, N.A.**

2014 NY Slip Op 32501(U)

September 25, 2014

Sup Ct, New York County

Docket Number: 151148/12

Judge: Anil C. Singh

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 61

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JOSEPH MARKOWITZ,  
  
Plaintiff,

DECISION AND  
ORDER

-against-

Index No.  
151148/12

CHASE BANK USA, N.A.,  
  
Defendant.

-----X

HON. ANIL C. SINGH, J.:

Plaintiff moves for summary judgment pursuant to CPLR 3212, contending that defendant bank wrongfully stopped payment on a check issued to reimburse plaintiff for alleged unauthorized charges that were billed to plaintiff's credit card. Defendant opposes the motion and cross-moves for summary judgment dismissing the complaint.

Defendant Chase Bank USA, N.A., issued a corporate credit card to plaintiff Joseph Markowitz.

In June 2011, someone used plaintiff's credit card to purchase goods and services valued at \$67,700. When plaintiff received the monthly statement from defendant, he paid off the entire balance of the credit card bill promptly as soon as he received it. According to plaintiff, he paid the balance in full without

scrutinizing or reviewing the statement for unauthorized charges or inaccuracies. Because he failed to look at the bill carefully, he paid off the entire outstanding balance, and he did not notify defendant that there were any alleged unauthorized charges on the statement.

Six months later, plaintiff notified defendant that the charges were fraudulent and unauthorized. He lodged a dispute with defendant. Defendant reversed and credited the account for the full amount of the alleged unauthorized charges, resulting in a balance in favor of plaintiff totaling \$67,700. Plaintiff demanded a refund.

On March 7, 2012, defendant mailed a refund check to plaintiff. Plaintiff endorsed the check and presented it to his bank for payment.

On March 15, 2012, defendant issued a “stop payment” order regarding the check.

On March 23, 2012, plaintiff commenced the instant action by filing a summons and verified complaint, asserting causes of action for breach of contract, conversion, unjust enrichment, monies had and received, and punitive damages. The complaint sought compensatory damages in the amount of \$67,700, punitive damages in excess of \$500,000, plus reasonable attorneys’ fees.

At the outset, the Court notes that Delaware law applies to the substantive

issues in the instant matter based upon a choice-of-law clause in the credit card agreement. New York law applies to procedural issues.

The standards for summary judgment are well settled. “The 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 eliminate any material issues of fact from the case” (Winegrad v. New York University Medical Center, 64 N.Y.2d 851, 853 [1985]). Despite the sufficiency of the opposing papers, the failure to make such a showing requires denial of the motion (See Id.) Summary judgment is a drastic remedy and should only be granted if the moving party has sufficiently established that it is warranted as a matter of law (See Alvarez v. Propect Hosp., 68 N.Y.2d 320, 324 [1986]). Moreover, summary judgment motions should be denied if the opposing party presents admissible evidence establishing that there is a genuine issue of fact remaining (See Zuckerman v. City of New York, 49 N.Y.2d 557, 560 [1980]). “In determining whether summary judgment is appropriate, the motion could should draw all reasonable inferences in favor of the nonmoving party and should not pass on issues of credibility” (Garcia v. J.C. Duggan, Inc., 180 A.D.2d 579, 580 [1<sup>st</sup> Dept., 1992], citing Assaf v. Ropog Cab Corp., 153 A.D.2d 520, 521 [1<sup>st</sup> Dept., 1989]). The court’s role is “issue-finding, rather than issue-determination” (Sillman v. Twentieth Century-Fox Film

Corp., 3 N.Y.2d 395, 404 [1957] (internal quotations omitted)).

The parties to this action are clearly bound by the terms of the written Business Card Agreement setting forth the terms and conditions for using the credit card. The agreement states in part as follows:

You hereby waive any and all right to dispute, return, refund or reversal of any payment received by us, whether by check, electronically or otherwise, unless, within forty-five (45) calendar days after the statement was mailed, transmitted or made available to you, we receive a written dispute from you stating that the payment was not authorized by you, the dollar amount of the payment disputed and the date the disputed payment posted to your account.

...

If you do not timely provide us the written notice(s) required under this paragraph you are forever barred from bringing any claims of any kind against us that relate in any way to any unauthorized transactions or inaccuracies in debits, credits or computations or any other errors, discrepancies or irregularities in any monthly statement or in any way relating to the non-receipt of a monthly payment.

(Affidavit of Diane Henn, exhibit A, p. 1).

Plaintiff admits that he failed to dispute the charges in a timely manner within the 45-day window specified in the agreement. Nevertheless, he asserts that defendant's issuance of the refund check constituted a waiver by defendant of its right to enforce the agreed-upon 45-day notice provision.

In response, defendant exhibits the sworn affidavit of Diane Henn, who states that she is a custodian of records employed by defendant. She states that

defendant's records reflect that plaintiff contacted defendant on February 1, 3, 21, 22 and 23, 2012, requesting a refund. According to Ms. Henn, there were multiple notations in defendant's records that no credit should be given on the account. Upon discovering that the refund check had been mailed to plaintiff by mistake, defendant stopped payment.

A copy of defendant's business records showing account notes is annexed to the affidavit as exhibit D. Ms. Henn asserts that the records were made by, or from information transmitted by, a person with knowledge of the event described therein or a computerized record system recording the information at or near the time of the event described, and are kept in the ordinary course of the regularly conducted business activity of such person or computerized system and defendant, and it is the regular practice of that business entity to make such records. The records may be considered by the Court as business records pursuant to CPLR 4518(a).

The account notes state in part as follows:

Do not issue any credit refund on this account without first checking  
with business card investigator

...

Do not issue any credit refund on account, case is under fraud review,  
need to contact investigator at ext 7568, for any refund or adjustments

...

Processed debit adjustment \$67,700.00 previous fraud adjustment,  
case still under review

...

ILREC SUP review... This credit balance is still under review and should not be sent to the customer. FRA to transfer credit back to the original account until the review can be completed to show the validity of the sales of the validity of the credit balance. Requested stop payment for the refund check just issued.

(Henn Affidavit, exhibit D).

#### Discussion

The written agreement expressly states in clear and unambiguous language that a delay by defendant in enforcing its rights under the agreement does not constitute a waiver of its rights. It states:

We can delay enforcing or not enforce any of our rights under this agreement without losing our right to enforce them in the future.

(Affidavit of Diane Henn, exhibit A, p. 2).

Despite the above clause, plaintiff contends that defendant's issuance of the refund check is tantamount to a waiver of defendant's right to enforce the agreement.

As we noted above, this case is governed by Delaware law. In Arnold v. Society for Sav. Bancorp, 650 A.2d 1270 [Del, 1994], the Supreme Court of Delaware wrote:

[T]he standard for finding waiver under Delaware law is quite exacting. Waiver is the voluntary and intentional relinquishment of a known right.... It implies knowledge of all material facts and intent to

waive. Moreover, the facts relied upon must be unequivocal in nature.

(Arnold, 650 A.2d at 1289).

The Superior Court of Delaware addressed waiver in the context of a motion for summary judgment in Darvaes v. H.W. Booker Constr. Co., 1980 Del. Super.

LEXIS 148. There, the Court wrote:

The party asserting waiver has the burden of proving the facts on which he relies to establish waiver. Courts will not presume acquiescence in the loss of basic rights and privileges. Where the evidence concerning waiver, or an element or requisite thereof is disputed, or where more than one reasonable inference may be drawn from the evidence, the issue is generally held to be a factual question and inappropriate for summary adjudication. Only where the facts and circumstances permit but one reasonably drawn inference can waiver be determined as a matter of law.

(A copy of the Darvaes opinion is appended to defendant's memorandum of law).

The Court finds that defendant has made out a prima facie case in its favor based on the sworn affidavit of Diane Henn and the undisputed facts. On its face, the agreement states clearly that where, as here, the cardholder failed to timely provide written notification, the cardholder is "forever barred from bringing any claims of any kind against us that relate in any way to any unauthorized transactions...." The agreement states further that a delay by defendant in enforcing its rights is not a waiver of its rights. Although defendant arguably delayed enforcing its rights until the last minute by stopping payment on the check it had

already issued, nevertheless the agreement states clearly that defendant can delay enforcing its rights without losing its right to enforce them. Finally, the affidavit of Ms. Henn establishes that defendant did not have an unequivocal intent to waive its rights, for the defendant's corporate records reflect that the check was mailed by mistake.

Finally, the Court finds further that plaintiff has failed to demonstrate the existence of any genuine issues of material fact or otherwise rebutted defendant's prima facie case.

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, and the complaint is dismissed with costs and disbursements to defendant as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

The foregoing constitutes the decision and order of the court.

Date: *Sept. 25, 2014*  
New York, New York

  
\_\_\_\_\_  
Anil C. Singh

**SEP 25 2014**

**HON. ANIL C. SINGH  
SUPREME COURT JUSTICE**