

**Signature Bank v Dilos, LLC**

2014 NY Slip Op 33553(U)

August 26, 2014

Supreme Court, Queens County

Docket Number: 701058/2013

Judge: Allan B. Weiss

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64 NY2d 851 [1985]; *Zuckerman v City of New York*, 49 NY2d 557 [1980]). Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Alvarez v Prospect Hosp.*, 68 NY2d at 324; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d at 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557).

Plaintiff has failed to set forth sufficient proof in its moving papers to warrant granting summary judgment against defendant. Plaintiff submitted proof, by means of the affidavit of Martine Lamarre, plaintiff's manager of Small Business Loans assistant vice-president, and copies of the "Business Profile and Account Application" and the "Limited Liability Company Banking Agreement" (Application and Agreement) executed by Demetrios Dilos on behalf of defendant limited liability company on June 8, 2012, that defendant opened two checking accounts, and agreed to maintain them in accordance with the terms set forth in plaintiff's "Account Agreements and Disclosures for Business" document ("Account Agreement"). By the Account Agreement, plaintiff is authorized to honor the check and allow an overdraft to cover an obligation properly payable from those accounts (*see* Plaintiff's Exhibit "G," pp 7-8; *see* UCC 4-401[1]). The Account Agreement permits plaintiff to charge interest (at a rate as achieved pursuant to the terms set forth therein), on the overdraft balance until sufficient funds in the bank deposit account became available to cover the payment of the check, and requires defendant to pay all losses, costs and expenses, including without limitation, attorneys' fees incurred by the bank relating to defendant's bank deposit account as a result of defendant's failure to comply with the agreement (*see* Plaintiff's Exhibit "G," Account Agreement, p 12; *see* UCC 4-401[1]). The agreement also permits plaintiff to use all deposits and credits, when available, to pay the amount of the overdraft and accrued interest thereon before being added to defendant's bank deposit account as a positive balance (*see* Plaintiff's Exhibit "G," Account Agreement, p 8).

According to the affidavit of Mr. Lamarre, checks were written and debits taken against defendant's two checking accounts at a time when there were insufficient funds in the accounts and plaintiff created overdrafts. Plaintiff, however, has failed to present supporting documentary evidence or an explanation as to how the total amounts claimed to be due and owing plaintiff with respect to the overdraft for each checking account were calculated. The affidavit of Mr. Lamarre does not specifically address when the overdrafts occurred, whether any deposits or credits were applied to the overdrafts and the rates of interest charged, and plaintiff has failed to present any supporting documentation setting forth the outstanding overdraft amounts and interest thereon, and whether any deposits or credits were applied to the overdrafts. Thus, plaintiff has failed to satisfy its initial burden of showing how the total amounts claimed to be due and owing it were calculated (*see RBS Citizens, N.A. v Dynamic Biz, Inc.*, 80 AD3d 868 [3d Dept 2011]; *First Am. Bank of N.Y. v L.V. Lowden, Inc.*, 197 AD2d 774, 775 [3d Dept 1993]; *HSBC Bank USA v IPO, LLC*, 290 AD2d 246, 246 [1<sup>st</sup> Dept 2002]).

In addition, the affidavit of Mr. Lamarre contains no facts showing that defendant retained the checking account statements for an unreasonable period of time without objecting to them, or made any partial repayment of the funds advanced by plaintiff to honor the checks written and debits taken against the accounts when there were insufficient funds in the accounts (*see American Exp. Centurion Bank v Cutler*, 81 AD3d 761 [2d Dept 2011]). Plaintiff cannot rely on the various account statements for the two checking accounts submitted for the first time in reply papers in support of its motion to meet its prima facie burden (*see id.* at 763; *GJF Constr. Corp. v Cosmopolitan Decorating Co., Inc.*, 35 AD3d 535, 535 [2d Dept 2006]; *Voytek Tech. v Rapid Access Consulting*, 279 AD2d 470, 471 [2d Dept 2001]). Nor can plaintiff rely upon the theory of unjust enrichment to the extent it asserts the parties' relationship is governed by their written agreement (*see Marc Contracting, Inc. v 39 Winfield Associates, LLC*, 63 AD3d 693 [2d Dept 2009]).

That branch of the motion by plaintiff for summary judgment against defendant is denied.

That branch of the motion by plaintiff to dismiss the sixth affirmative defense asserted by defendant based upon lack of subject matter jurisdiction is granted. The Supreme Court is a court of original, unlimited and unqualified jurisdiction (*see Kagen v Kagen*, 21 NY2d 532, 537 [1968]; NY Const., art VI, § 7) and is competent to entertain all causes of action unless its jurisdiction has been specifically proscribed (*Thrasher v United States Liab. Ins. Co.*, 19 NY2d 159, 166 [1967]). The court has the competence to adjudicate the claims asserted by plaintiff herein.

That branch of the motion by plaintiff to dismiss the fourth affirmative defense asserted by defendant based upon lack of personal jurisdiction is granted. Defendant failed to move to dismiss the complaint upon such ground within 60 days of service of a copy of his answer, and has made no application to extend the period of time upon the ground of undue hardship (CPLR 3211[e]). As a consequence, such defense is deemed waived (CPLR 3211[e]; *see Dimond v Verdon*, 5 AD3d 718 [2d Dept 2004]).

That branch of the motion by plaintiff to dismiss the first affirmative defense asserted by defendant based upon failure to state a cause of action is denied. “[N]o motion by the plaintiff lies under CPLR 3211(b) to strike the defense [of failure to state a cause of action], as this amounts to an endeavor by the plaintiff to test the sufficiency of [its] own claim” (*Butler v Catinella*, 58 AD3d 145, 150 [2d Dept 2008]; *see* CPLR 3211 [a][7]; *Mazzei v Kyriacou*, 98 AD3d 1088 [2d Dept 2012]).


That branch of the motion by plaintiff to dismiss the second and seventh affirmative defenses asserted by defendant based upon waiver and failure to join a necessary party is

granted. Defendant has failed to allege or prove any facts supporting these defenses (*see* CPLR 3018[b]; *Glenesk v Guidance Realty Corp.*, 36 AD2d 852 [2d Dept 1971], *abrogated on other grounds by Butler v Catinella*, 58 AD3d 145; *MacIver v George Braziller, Inc.*, 32 Misc 2d 477 [Sup Ct NY County 1961]).

That branch of the motion by plaintiff to dismiss the third and ninth affirmative defenses based upon lack of standing and the statute of frauds is granted. Plaintiff has demonstrated that it and defendant are in a contractual relationship pursuant to the Application and Agreement and it made advances on behalf of defendant under such Application and Agreement. Defendant has failed to rebut such demonstration.

That branch of the motion by plaintiff to dismiss the eighth affirmative defense asserted by defendant based upon the expiration of the applicable statutes of limitations is granted. The first and fifth causes of action based upon breach of contract are governed by a six-year statute of limitations, which is measured from the time of the breach (*see* CPLR 213 [2]; *Ely-Cruikshank Co. v Bank of Montreal*, 81 NY2d 399, 402 [1993]). The second and sixth causes of action for unjust enrichment also are governed by a six-year statute of limitations and begin to accrue upon the occurrence of the wrongful act giving rise to a duty of restitution (*see* CPLR 213[1]; *Coombs v Jervier*, 74 AD3d 724 [2d Dept 2010]; *Reiner v Jaeger*, 50 AD3d 761, 761 [2d Dept 2008]). The statute of limitations for the third and seventh causes of action for an account stated is six years (*see* CPLR 213[2]; *Erdheim v Gelfman*, 303 AD2d 714 [2d Dept 2003]; *Stewart v Stuart*, 262 AD2d 396 [2d Dept 1999]), and it accrues on the date of the last transaction in the account (*see Elie Intern., Inc. v Macy's West Inc.*, 106 AD3d 442 [1st Dept 2013]). The statutory claims asserted in the fourth and eighth causes of action based upon UCC article IV are governed by a three-year statute of limitations (*see* CPLR 214[2]; *Banca Commerciale Italiana, New York Branch v Northern Trust Intern. Banking Corp.*, 160 F3d 90, 95 [2d Cir 1998]). Here, plaintiff alleges that defendant defaulted under the Account Agreement "on or about and between July 13, 2012 and August 16, 2012," and this action was commenced on March 28, 2013, within the relevant limitations periods.

Dated: August 26 2014

  
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J.S.C.