

Ricatto v Bank of Am., N.A.

2015 NY Slip Op 30978(U)

May 26, 2015

Supreme Court, Queens County

Docket Number: 707158/14

Judge: Howard G. Lane

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE HOWARD G. LANE
Justice

IAS PART 6

MICHAEL RICATTO,

Plaintiff,

-against-

BANK OF AMERICA, N.A.,

Defendant.

Index No. 707158/14

Motion
Date March 31, 2015

Motion
Cal. No. 144

Motion
Sequence No. 1

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FILED
MAY 28 2015
COUNTY CLERK
QUEENS COUNTY

Upon the foregoing papers it is ordered that this motion by defendant, Bank of America, N.A. pursuant to CPLR 3211(a)(1) and (7) for an order: dismissing the Complaint of plaintiff, Michael Ricatto is hereby decided as follows:

This action arises out of an alleged breach of a credit card agreement. Plaintiff, Michael Ricatto asserts one cause of action for breach of contract and a second cause of action for violations of the Fair Credit Billing Act. Moving defendant now moves to dismiss the plaintiff's Complaint against it.

A. CPLR 3211(a) (1)

That branch of moving defendants' motion to dismiss plaintiff's Complaint pursuant to CPLR 3211(a)(1) is denied.

CPLR 3211 provides in relevant part: "(a) Motion to dismiss cause of action. A party may move for judgment dismissing one or more causes of action asserted against him on the ground that: 1. A defense is founded on documentary evidence ***". In order to prevail on a CPLR 3211(a)(1) motion, the documentary evidence submitted "must be such that it resolves all the factual issues as a matter of law and conclusively and definitively disposes of the plaintiff's claim ***" (*Fernandez v. Cigna Property and Casualty Insurance Company*, 188 AD2d 700, 702; *Vanderminden v. Vanderminden*, 226 AD2d 1037; *Bronxville Knolls, Inc. v. Webster Town Center Partnership*, 221 AD2d 248). "However, dismissal is warranted if the documentary evidence contradicts the claims raised in the complaint" (*Jericho Group, Ltd. v. Midtown Development, L.P.*, 32 AD3d 294 [1st Dept 2006][internal citations omitted]).

"To some extent, 'documentary evidence' is a 'fuzzy' term, and what is documentary evidence for one purpose, might not be documentary evidence for another" (*Fontanetta v. John Doe 1*, 73 AD3d 78 [2d Dept 2010]). However, it is well-established law that affidavits and deposition testimony are not documentary evidence, and deeds and contracts are documentary evidence (*Id.*) "[T]o be considered 'documentary', evidence must be unambiguous and of undisputed authenticity" (*Id.*)(*internal citations omitted*).

The documentary evidence submitted in the instant matter consists of: plaintiff's Credit Card Agreement with defendant, and various letters of correspondence. This evidence is insufficient to dispose of the Complaint. The documentary evidence that forms the basis of a 3211(a)(1) motion must resolve all factual issues and completely dispose of the claim (*Held v. Kaufman* 91 NY2d 425 [1998]; *Teitler v. Max J. Pollack & Sons*, 288 AD2d 302 [2001]). Here, the Credit Card Agreement and the correspondence letters are insufficient to dispose of the Complaint, as factual issues remain, including whether plaintiff timely notified plaintiff to stop payment to a vendor which vendor issued defective merchandise. Accordingly, this branch of the motion is denied.

B. CPLR 3211 (a) (7)

That branch of defendant's motion which is for an order pursuant to CPLR 3211(a)(7) dismissing the complaint against defendant for failure to state a cause of action is hereby decided as follows:

"It is well-settled that on a motion to dismiss a complaint for failure to state a cause of action pursuant to CPLR 3211(a)(7), the pleading is to be liberally construed, accepting all the facts alleged in the complaint to be true and according the plaintiff the benefit of every possible favorable inference ***" (*Jacobs v. Macy's East, Inc.*, 262 AD2d 607, 608; *Leon v. Martinez*, 84 NY2d 83). The court does not determine the merits of a cause of action on a CPLR 3211(a)(7) motion (see, *Stukuls v. State of New York*, 42 NY2d 272 [1977]; *Jacobs v. Macy's East, Inc.*, *supra*), and the court will not examine affidavits submitted on a CPLR 3211(a)(7) motion for the purpose of determining whether there is evidentiary support for the pleading (see, *Rovello v. Orofino Realty Co., Inc.*, 40 NY2d 633). Such a motion will fail if, from its four corners, factual allegations are discerned which, taken together, maintain any cause of action cognizable at law, regardless of whether the plaintiff will ultimately prevail on the merits (*Given v. County of Suffolk*, 187 AD2d 560 [2d Dept 1992]). The plaintiff may submit affidavits and evidentiary material on a CPLR 3211(a)(7) motion for the limited purpose of correcting defects in the complaint (see, *Rovello v. Orofino Realty Co., Inc.*, *supra*; *Kenneth R. v. Roman Catholic Diocese of Brooklyn*, 229 AD2d 159).

"The elements of a cause of action for breach of contract are the formation of a contract between plaintiff and defendant, performance by plaintiff, defendant's failure to perform, and resulting damages." (*Beheer B.V. (Amsterdam) v. South Caribbean Trading Ltd.*, 801 NYS2d 243 [Sup Ct, NY County 2004][internal citations omitted]).

The Court finds that plaintiff has adequately stated a cause of action for breach of contract via inter alia, paragraphs Sixteenth and Seventeenth of the Complaint, wherein plaintiff alleges that defendant breached its credit card agreement with plaintiff, and as a result of the breach, plaintiff has suffered financial damages.

In order to state a claim under The Fair Credit Billing Act, 15 USC § 1666 the plaintiff must allege: "(1) the existence of a billing error; (2) plaintiff's timely notification of the billing

error, and (3) failure of the card issuer to comply with the procedural requirements of Section 1666." *Rigby v. FIA Card Services*, 2012 US App. LEXIS 19681 (11th Cir. 2012), citing *Beaumont v. Citibank (S.D.) N.A.*, No. 01 Civ. 3393, 2002 US Dist LEXIS 5276, 2002 WL 483431 at *3 (S.D.N.Y. Mar. 28, 2002).

The Court finds that plaintiff has not adequately stated a cause of action for violation of the Fair Credit Billing Act. As no "billing error" has been alleged, the Complaint fails to state a cause of action under the Fair Credit Billing Act.

Additionally, defendant has improperly sought to reach the merits of the Complaint on this mere CPLR 3211(a) motion (see, *Jacobs v. Macy's East, Inc.*, 262 AD2d 607, 608 [2d Dept 1999] [internal citations omitted]; *Leon v. Martinez*, 84 NY2d 83).

This constitutes the decision and order of the Court.

Dated: May 26, 2015


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Howard G. Lane, J.S.C.

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