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Civil Court of the City of New York
County of Queens
Part 32C

FIA CARD SERVICES, N.A.,

Plaintiff,

against

SIDNEY CAMILLE,

Defendant.

Index Number CV25442/14
Motion Cal # 4,5 Motion Seq. # ____
Papers Submitted to Special Term on: 4/28/15

DECISION/ORDER

Recitation, as required by CPLR §2219 (a), of the papers considered in the review of this Motion

Papers	Numbered
Notice of Motion and Cross-Motion and Affidavits Annexed……..	1, 2
Order to Show Cause and Affidavits Annexed…	
Answering Affidavits……..	3,4, 4a
Replying Affidavits……..	5
Exhibits……	
Other….....	

Upon the foregoing cited papers the decision on the plaintiff's motion for summary judgment pursuant to CPLR 3212 and the defendant's cross motion to dismiss or compel discovery is as follows:

The plaintiff's motion for summary judgment is denied and defendant's cross-motion is granted to the extent that plaintiff is directed to respond to defendant's demand for interrogatories and documents and questions #1, 2, 3, 12 and 13 of defendant's Notice to Admit dated December 2, 2014 within thirty days of the date of this Order served with notice of entry. Plaintiff's failure to timely comply with this Order will result in its preclusion at the time of trial. The Court finds that the admissions which were sought by Camille in questions 4, 5, 6, 7, 8, 9,10 and 11 were improper and the Court grants plaintiff a protective order as to those questions sought. The parties are granted leave to renew their motions for summary judgment before any Judge presiding in Special Term at the completion of discovery.

This is an action for breach of a credit card agreement and for an account stated. The plaintiff, FIA Card Services ("FIA") a credit card company, filed a Summons and Complaint on or about September 25, 2014 seeking $19,905.37 along with costs and disbursements. Its first cause of action alleges that the parties entered into a revolving credit agreement which was breached. FIA's second cause of action alleged an account stated. The defendant, Sidney Camille ("Camille") served and filed a Verified Answer with counterclaims on November 6, 2014. In his answer Camille denied the allegations and alleged the following affirmative defenses; lack of jurisdiction; plaintiff failed to properly plead a default of the alleged credit card agreement; the amount , if any, is disputed; FIA lacked standing; failure to name a necessary party; plaintiff lacked capacity to maintain the action; statute of limitations; the agreement is unconscionable; unjust enrichment; estoppel; laches; waiver; and, plaintiff's interest rates are prohibited by New York law. Camille alleged as counterclaims that the plaintiff intentionally

caused defective service of the summons and complaint, which resulted in abuse of process; violation of 42 USC §1983; plaintiff hired a process server who engages in "sewer service"; deceptive business practices under NY GBL section 349; filing of a false affidavit of service and commencing this action without proof which constitutes fraud; the real party in interest is not disclosed; and violation of Fair Debt Collection Practices Act.

In support of the motion, in addition to the pleadings and the attorney affidavit, FIA submitted a letter dated July 9, 2007 from Bank of America ("BANA") to Camille and various account statements from BANA, December 2011 to December 2013; copy of blank checks with Camille's name and address; a letter from Office of the Comptroller of the Currency dated October 1, 2014 and Assistant Secretary's Certificate Bank of America dated October 8, 2014; a BANA account agreement, copyright 2006; and the sworn affidavit of Joe Shanahan ("Shanahan"), an officer of Bank of America.

In his affidavit dated January 5, 2015, Shanahan attested that he had personal knowledge of BANA's record keeping and business practices. He stated that "BANA is a wholly-owned subsidiary of Bank of America Corporation and the successor in interest to FIA Card Services, N.A. ("FIA"). FIA was merged into and under the charter and title of BANA effective October 1, 2014." He stated that the parties entered into an agreement about July 9, 2007. The last payment made by Camille was on October 9, 2013 in the amount of $400.00. According to Shanahan, BANA has exchanged documents requested by Camille's counsel, including account billing statements and the agreement, which he certified as being true and correct copies of the originals. According to Shanahan, Camille owed a charge-off balance of $19,905.37.

The proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering admissible evidence to eliminate any material issues of fact from the case. (*Alvarez v Prospect Hospital*, 68 NY2d 320 [1986].)

Despite the fact that FIA failed to establish the Assistant Secretary's Certificate of Bank of America, National Association document dated October 8, 2014 as a business record pursuant to CPLR 4518 (*see* FIA's ex. "D"), the Court will refer to it because it is pertinent to the Court's decision. Paragraph 4 of the document states "[e]ffective October 20, 2006, Bank of America, National Association (USA), Phoenix, Arizona, Charter Number 22106 merged into and under the charter and title of FIA Card Services, National Association, Wilmington Delaware, Charter Number 22381." Paragraph 5 states "effective October 1, 2014, FIA Card Services, National Association, Wilmington Delaware, Charter Number 22381, merged into and under the charter and title of Bank of America, National Association, Charter Number 13044."

FIA has failed to establish its prima facie case against Camille. Although FIA's affiant Shanahan attested that FIA merged with BANA on October 1, 2014, the documents he attested to, specifically the alleged agreement, letter sent to Camille and statements were all documents created by BANA, not FIA, and they were created before this matter was filed, dating back to the year 2007. Thus, the Court is not sure why FIA is the plaintiff and not BANA and why a merger in 2014 between the banks would have any relevancy. Here, where lack of standing has been alleged, FIA must show proof of its standing in order to be granted its requested relief (*see generally Unifund CCR Partners v Youngman*, 89 AD3d 1377 [2011]). Moreover, if FIA is the original creator of the business records, Shanahan failed to lay the proper foundation to demonstrate how documents received from FIA were incorporated into BANA's business records or relied upon the records in day to day operations (*see generally Palisades Collection, LLC v Kedik,* 67 AD3d 1329 [2009]).

Therefore, the plaintiff's motion for summary judgment is denied and the Court need not consider the sufficiency of Camille's opposition papers (*Coscia v 938 Trading Corp*., 283 AD2d 538 [2001]).

Turning now to the merits of Camille's cross-motion, Camille seeks to dismiss this case for various reasons, including lack of standing and the fact that FIA did not respond to his discovery demands. In support of the cross-motion, Camille submitted an attorney affirmation; the pleadings; his affidavit in support; letter from FIA's counsel to Camille's counsel dated December 9, 2014; affidavit of Shanahan and account agreement, BANA letter dated July 9, 2007, account statements and copy of blank checks with Camille's name which were submitted by FIA in support of the motion.

Camille attested in his affidavit that he is not responsible for any debts in this case and he did not sign any agreement; FIA did not loan him any money; FIA sells its debts to Qualified Special Purpose Entity Trusts; FIA lacked standing; he had never seen the documents submitted by FIA in support of the motion including the account agreement, which is not dated or signed; he had never seen the blank checks document which contained his name and address; he did not recall any transactions on the statements or that they were mailed to him; Shanahan did not establish how FIA's documents were created or mailed; and, discovery is outstanding therefore summary judgment is not appropriate.

Regarding the portion of Camille's application to compel discovery, Camille served discovery demands, including a Notice to Admit, Interrogatories and a Request for Production of Documents on December 2, 2014. In Camille's Notice to Admit, he requested admissions as to the following:

1. The Defendant did not request that the Plaintiff issue a credit card in connection with the Revolving Credit

agreement referred to in the Plaintiff's Complaint.

2. The Plaintiff is not a merchant.

3. The Plaintiff is not an acquiring bank.

4. The Plaintiff does not have in its possession a cardholder agreement executed by the Defendant.

5. The Plaintiff has no personal knowledge of any point-of-sale transactions involving the Defendant and the credit card account referenced in the Complaint.

6. The Plaintiff did not authorize Fedwire to debit its account in an amount equal to the amount referenced in the Complaint in order to settle the charges referenced in the complaint.

7. The Plaintiff did not sell or deliver any goods to the Defendant as alleged in the Complaint.

8. The Plaintiff did not suffer any damages as a result of any breach of payment by the Defendant.

9. The Plaintiff did not lend the Defendant an amount equal to the amount allegedly owed to the Plaintiff, referenced in the Complaint.

10. The Plaintiff has no evidence that the Defendant promised to pay the Plaintiff as alleged in the Complaint.

11. The Defendant did not receive from the Plaintiff the amount equal to the amount alleged to be owed in the Complaint.

12. The Plaintiff transferred the receivable arising from the credit card account to BA Account Master Credit Card Trust II.

13. The Plaintiff received from BA Account Master Credit Card Trust II, in exchange for transfer of the receivable arising from the credit card account, an amount equal to the sum allegedly owed by Defendant to Plaintiff.

FIA had twenty days from the date of service of the notice to admit, demand for interrogatories and request for documents to respond. Camille seeks to have the questions which were not responded to by FIA in the Notice to Admit deemed admitted. FIA objected to the Notice to Admit as palpably improper on December 9, 2014, but did not respond to Camille's demand for interrogatories or request for documents. Instead, on January 14, 2015, FIA moved for summary judgment. Although Camille referred to depositions which have not been held, Camille did not submit a demand for depositions in support of the cross-motion.

FIA submitted an attorney affirmation and additional affidavit of Shanahan in opposition to the cross-motion. He discussed FIA's record keeping and mailing practices. He stated that Camille applied online for a Gold Option

Line of Credit with FIA which was granted. "Pursuant to Defendant's request, Plaintiff deposited $27,690.00 into Defendant's JP Morgan Chase Bank Account ending 5869, $1855.00 paid to Defendant's MBNA Loan Product Account ending 0332 and $20,455.00 to Defendant's MBNA America Bank Account ending 9501." Shanahan stated that the line of credit account nor the receivables were "securitized" and the account was not a part of a "qualified special interest entity trust". Shanahan also stated that Camille's account before charge off ended in 9702 and after charge off ended in 5740. There were no additional documents attached to the papers as alleged by Shanahan. FIA, by its counsel alleged that questions asked in the Notice to Admit were palpably improper. FIA did not state why the other discovery demands were not responded to prior to making the motion.

A Notice to Admit is a disclosure device (CPLR §§3102; 3123). A Notice to Admit should not be used in place of other existing discovery devices which should be used under the CPLR (see CPLR Art. 31; *Singh v G & A Mounting & Die Cutting, Inc., etal*, 292 AD2d 516 [2002]; *Jonas v Liberty Lines Trans., Inc*., 142 AD2d 554 [1988]). It cannot be used to get a party to admit to issues which are in dispute for which a trial is required (*126 Newtown St., LLC. v Allbrand Commercial Windows & Doors, Inc.,* 121 AD3d 651 [2014]; *Priceless Custom Homes v O'Neill,* 104 AD3d 664 [2013]; *Tolchin v Glaser*, 47 AD3d 922 [2008]). A Notice to Admit which basically designed to make the party upon which it was served admit to the core issues of the case is improper (*Alberto v Jackson*, 118 AD3d 733 [2014]; *DaSilva v Rosenberg*, 236 AD2d 508 [1997]).

Pursuant to CPLR § 3103, the Court can, in its discretion, grant a protective order relating to any discovery device which is burdensome or improper (*see generally Diaz v City of New York*, 117 AD3d 777 [2014]). The Court finds that the admissions which were sought by Camille in questions 4,5, 6, 7,8,9, 10 and 11 were improper and although the plaintiff did not respond, this should not be deemed an admission and the Court grants plaintiff a protective order as to these sought admissions (*see generally Williams v City of New York*, 125 AD3d 767 [2015]; *Jet One Group, Inc. v Halcyon Jet Holdings, Inc*., 111 AD3d 890 [2013]). However, the Court finds that FIA should have responded to questions #1,2,3,12 and 13 and grants FIA thirty (30) days from the date of this Order served with notice of entry to respond.

Camille has demonstrated that granting summary judgment to either party would be premature since discovery is still outstanding (CPLR 3212 [f].) Therefore, FIA is directed to respond to defendant's demand for interrogatories and documents within thirty days of the date of this Order served with notice of entry.

Based on the foregoing, the plaintiff's motion for summary judgment is denied. Defendant's cross-motion is granted to the extent aforementioned. Plaintiff's is directed to serve a response to questions 1, 2, 3, 12 and 13 of

defendant's Notice to Admit and defendant's demand for interrogatories and documents within 30 days of the date of this Order served with notice of entry. The failure of plaintiff to timely comply with this Order will result in its preclusion at the time of trial. The Court grants plaintiff a protective Order as to the defendant's Notice to Admit dated December 2, 2014 as to questions 4, 5, 6, 7, 8, 9, 10 and 11. The parties are granted leave to renew their motions for summary judgment before any Judge presiding in Special Term at the completion of discovery.

The foregoing constitutes the Decision and Order of the Court.

/s/

Dated: June 23, 2015

HON. CHEREÉ A. BUGGS
Judge of the Civil Court of the City of New York
County of Queens