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| <b>Cach, LLC v Ardsley Luncheonette Ltd.</b>   |
| 2016 NY Slip Op 32698(U)   |
| March 6, 2016  |
| Supreme Court, Westchester County  |
| Docket Number: 55381/2014  |
| Judge: Charles D. Wood   |
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| This opinion is uncorrected and not selected for official publication.   |

To commence the statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF WESTCHESTER**

-----X  
**CACH, LLC,**

Plaintiff,

-against-

**ARDSLEY LUNCHEONETTE LTD, and  
PARAMJIT AHUJA, as Guarantor,**

Defendants.

-----X  
**WOOD, J.**

**DECISION & ORDER  
Index No. 55381/2014  
Sequence No. 1**

The following documents were read in connection with plaintiff's motion for summary judgment and default judgment:

- Plaintiff's Notice of Motion, Counsel's Affirmation, Huber's Affidavit, Exhibits.
- Defendants' Affidavit in Opposition.
- Plaintiff's Counsel Reply.

Plaintiff moves for an order pursuant to CPLR 3212 granting summary judgment in its favor, against defendant Paramjit Ahuja, and default judgment against Ardsley Luncheonette LTD, in the amount of \$48,965.49, together with costs and disbursements, and the individual defendant having appeared in this action, and having interposed an opposition to the instant motion, and corporate defendant has not, and

Based upon the foregoing, the motion is decided as follows:

On February 19, 2008, Wachovia Bank, NA issued a business credit line account to corporate defendant, with individual defendant as guarantor pursuant to a guaranty agreement. In 2008, Wells

Fargo Bank, N.A. acquired Wachovia Corporation. Defendant's account then became property of plaintiff. A Bill of Sale memorializes that assignment (Ex F). Defendants received purchases, advances, cash, merchandise and/or credit on the line. Defendants have failed to make payments on this credit line, and there is a balance due and owing, together with costs and disbursements.

Plaintiff commenced this action on April 10, 2014. On May 16, 2014, individual defendant by counsel, filed and served an answer. Plaintiff, who is the assignee of this debt, seeks summary judgment against defendants on the basis of breach of contract and an account stated.

It is well settled that a 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 N.Y.U. Med. Ctr., 64 NY2d 851, 853 [1985]), "Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers" (Alvarez v Prospect Hosp., 68 NY2d 320, 324 [1986]). Once the movant has met this threshold burden, the opposing party must raise a triable issue of fact (Zuckerman v New York, 49 NY2d 557, 562 [1980]). In deciding a motion for summary judgment "the party opposing the relief is entitled to the benefit of every favorable inference that may be drawn from the pleadings, affidavits and competing contentions of the parties" (Nicklas v Tedlen Realty Corp., 305 AD2d 385, 386 [2d Dept 2003]; Brown v Outback Steakhouse, 39 AD3d 450, 451 [2d Dept 2007]).

In support of its motion, plaintiff offers the affidavit of Peter Huber, authorized agent and custodian of records for plaintiff who attests that based upon the documentation he reviewed, defendants never disputed the validity of the balance owed or notified plaintiff of any recognizable defenses, claims, offsets or counterclaims to the balance due and owing, and as such, an account

stated was created. Huber confirms that \$49,965.49 is due and owing by defendants to plaintiff together with costs and disbursements of this action.

Individual defendant argues that the action must be dismissed since the relief is limited to arbitration. However, plaintiff's counsel argues that the Agreement make it clear that arbitration provision is permissive and that one party or another has to elect Arbitration in order for the provision to become effective. Neither party has ever elected to use the Arbitration provision.

Defendant also argues that his name does not appear on the Wells Fargo Business Line Customer Agreement, effective January 1, 2008, and thus, cannot be cause of action for breach of contract. However, this is belied by the record as the Application (Ex C) denotes the date of Agreement, Maximum Credit Limit and the borrower listed is the corporate defendant, along with the guaranty of the individual defendant. While it is true that the Agreement offered by plaintiff is in a general form - unsigned, and containing no information that links it to the particular account in question, upon review of plaintiff's submissions, copies of the monthly statements submitted by plaintiff are evidence of an active account. No credible reasons were offered why these records should not be viewed as reliable and trustworthy. They appear regular on their face, and in a format conforming to the type of statements with which financial institutions customarily supply their customers. Based upon the foregoing, the court finds that plaintiff has demonstrated prima facie entitlement to judgment on liability as a matter of law on its breach of contract cause of action, and defendant has failed to raise a triable issue of fact. In light of the foregoing, plaintiff establishes a breach of contract action by demonstrating the existence of a contract between the parties, performance by the plaintiff, breach by defendants and damages resulting from the breach (JP Morgan Chase v J.H. Elec. of New York, Inc., 69 AD3d 802, 803 [2d Dept 2010]).

Further, “an account stated is an agreement, express or implied between the parties to an account based upon prior transactions between them with respect to the correctness of account items and balance due on them” (Citibank (S.D.) N.A. v Cutler, 112 AD3d 573 [2d Dept 2013]). “An agreement may be implied where a defendant retains bills without objecting to them within a reasonable period of time, or makes partial payment on the account” (Citibank (South Dakota), NA. v Brown-Serulovic, 97 AD3d 522 [2d Dept 2012]).

As hereinabove mentioned, plaintiff submitted an affidavit from a custodian of its records, which records included the books and records of the original creditor, who averred that the account statements were mailed to defendants advising them of their delinquencies and demanding payment, and defendants never challenged or disputed the validity of the amount owed. This evidence, together with the account statements was sufficient to establish plaintiff's prima facie entitlement to judgment as a matter of law on the complaint (Cach, LLC v Aspir, 137 AD3d 1065, 1066 [2d Dept 2016]). In opposition, defendants failed to raise a triable issue of fact.

Accordingly, for the stated reasons, it is hereby

ORDERED that the motion is granted and plaintiff is awarded summary judgment against defendant Paramjit Ahuja, and pursuant to CPLR 3215(d) directing the entry of default judgment against defendant Ardsley Luncheonette LTD, in the amount of \$48,956.49, together with costs and disbursements as computed by the clerk of this court, and plaintiff shall have execution thereof; and it is further


ORDERED that plaintiff shall, upon notice to defendants, submit a copy of this Order and judgment with a bill of costs to the Westchester County Clerk for entry; and it is further

ORDERED, that plaintiff is directed to serve a copy of this Decision and Order, with notice of entry, upon defendants within 10 days of such entry and file proof of service within five (5) days of service pursuant to the protocols of NYSCEF; and it is further

ORDERED, that the Clerk shall mark his records accordingly.

All matters not herein decided are denied. This constitutes the Decision and Order of the court.

**Dated: March 6, 2016**  
**White Plains, New York**



**HON. CHARLES D. WOOD**  
**Justice of the Supreme Court**

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