

Citibank, N.A. v Divona
2017 NY Slip Op 32358(U)
October 19, 2017
Supreme Court, Suffolk County
Docket Number: 12146/2015
Judge: William G. Ford
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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 38 - SUFFOLK COUNTY

COPY

PRESENT:

HON. WILLIAM G. FORD
JUSTICE of the SUPREME COURT

Motion Submit Date: 03/16/17
Motion Seq #: 001 MG

CITIBANK, N.A.,

Plaintiff,

-against-

DANA DIVONA,

Defendant.

PLAINTIFF'S COUNSEL:

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60 Motor Parkway
Commack, NY 11725

DEFENDANT'S COUNSEL:

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Upon the following papers read on plaintiff's unopposed motion for summary judgment pursuant to CPLR 3212; Notice of Motion & Affirmation in Support dated February 14, 2017; Affidavit in Support dated October 19, 2016 and supporting papers; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that plaintiff's motion seeking entry of an order of summary judgment on liability as against defendant pursuant to CPLR 3212 on its claims of breach of contract and account stated having been fully considered and weighed is hereby granted in accord with the following discussion

Factual Background

This consumer credit card transaction/breach of contract action is presently pending before the Court on plaintiff Citibank, N.A.'s motion for summary judgment. According to its complaint, defendant Dana Divona was a consumer credit cardholder who had agreed pursuant to a standard credit card account agreement to render timely monthly payments as called for by monthly account billing statements. Plaintiff alleges that defendant utilized her account, making charges via her credit card for the purchase of various goods and services. Despite having agreed by the agreement and being noticed of amounts due and owing on a monthly basis, defendant breached her obligation to render timely monthly payment. Thus, plaintiff has brought the instant action seeking recovery of a money judgment representing the amount due and owing on defendant's credit card account debt in the amount of \$27,196.45.

Procedural History

Plaintiff commenced this action filing a summons and complaint with the Suffolk County Clerk on June 15, 2015. Defendant joined issue filing an answer serving as a general denial on August 24, 2015.

Standard of Review

It is well settled that summary judgment is a drastic remedy which should not be granted when there is doubt as to the existence of a triable issue of fact. Where, however, one seeking summary judgment tenders evidentiary proof in admissible form establishing its defense sufficiently to warrant the court as a matter of law in directing judgment in its favor, the burden falls upon the opposing party to show, also by evidentiary proof in admissible form, that there is a material issue of fact requiring a trial of the matter (*see Zuckerman v. City of New York*, 49 NY2d 557, 562, 427 NYS2d 595 [1980]). The evidence presented on a motion for summary judgment must be scrutinized in the light most favorable to the party opposing the motion (*see Goldstein v. Monroe County*, 77 AD2d 232, 236, 432 NYS2d 966 [1980]).

The proponent on a motion of summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923 [1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]).

If the moving party fails in meeting this burden, the motion must be denied. If, however, this burden is satisfied, then the burden shifts to the opposing party to establish the existence of material issues of fact requiring a trial (*see Zuckerman, supra*). The function of the court in determining a motion for summary judgment is issue finding, not issue determination (*Pantote Big Alpha Foods, Inc. v Schefman*, 121 AD2d 295, 503 NYS2d 58 [1st Dept. 1986]).

The burden then shifts to the party opposing the motion which must produce evidentiary proof in admissible form sufficient to require a trial of the material issues of fact (*Roth v Barreto*, 289AD2d 557, 735 NYS2d 197 [2d Dept. 2001]; *Rebecchi v Whitmore*, 172 AD2d 600, 568 NYS2d 423 [2d Dept. 1991]; *O'Neill v Fishkill*, 134 AD2d 487, 521 NYS2d 272 [2d Dept. 1987]). The law is well-established that summary judgment is a drastic remedy to be granted only when there is clearly no genuine issue of fact to be presented at trial (*see Andre v Pomeroy*, 35 NY2d 361, 362 NYS2d 131 [1974]; *Benincasa v Garrubo*, 141 AD2d 636, 529 NYS2d 797 [2d Dept. 1988]).

Where a defendant fails to oppose a motion for summary judgment, there is, in effect, a concession that no question of fact exists, and the facts as alleged in the moving papers may be deemed admitted (*Kuehne & Nagel v Baiden*, 36 NY2d 539, 369 NYS2d 667 [1975]).

Discussion

Plaintiff seeks summary judgment as a matter of law finding defendant liable to it for breach of contract and/or account stated premised on her breach of obligations to make timely payment pursuant to her credit card account agreement. Once liability is established, plaintiff seeks entry of an order awarding it money damages for the monies due and owing flowing from defendant's breach of her contractual obligations.

In support of its argument of *prima facie* entitlement to judgment as a matter of law, plaintiff has annexed to its moving papers a copy of the pleadings, monthly credit card account billing statements for defendant's account for the period of April 25, 2013 to April 27, 2015, a copy of defendant's credit card account agreement, and the affidavit sworn by Sherry Van Hooser, Document Control Officer for plaintiff dated October 19, 2016.

It is well settled that the elements of a cause of action to recover damages for breach of contract are (1) the existence of a contract, (2) the plaintiff's performance under the contract, (3) the defendant's breach of the contract, and (4) resulting damages (*see JP Morgan Chase v. J.H. Elec. of N.Y., Inc.*, 69 AD3d 802, 803, 893 NYS2d 237; *Furia v. Furia*, 116 AD2d 694, 695, 498 NYS2d 12; *Palmetto Partners, L.P. v AJW Qualified Partners, LLC*, 83 AD3d 804, 806, 921 NYS2d 260, 264 [2d Dept 2011]).

"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 a specific balance due on them" which is "independent of the original obligation" (*Citibank [S.D.] v. Cutler*, 112 AD3d 573, 573–574, 976 NYS2d 196). A cause of action for an **account stated** has been described as "an alternative theory of liability to recover the same damages allegedly sustained as a result of the breach of contract" (*A. Montilli Plumbing & Heating Corp. v. Valentino*, 90 A.D.3d 961, 962, 935 N.Y.S.2d 647).

"An account stated is an agreement between parties to an account based upon prior transactions between them with respect to **578 the correctness of the account items and balance due" (*Jim-Mar Corp. v. Aquatic Constr.*, 195 A.D.2d 868, 869, 600 N.Y.S.2d 790; *see M & A Constr. Corp. v. McTague*, 21 A.D.3d 610, 800 N.Y.S.2d 235). "The agreement may be express or ... implied from the retention of an account rendered for an unreasonable period of time without objection and from the surrounding circumstances" (*Fleetwood Agency, Inc. v Verde Elec. Corp.*, 85 AD3d 850, 851, 925 NYS2d 576, 577–78 [2d Dept 2011]).

An essential element of an account stated is that the parties came to an agreement with respect to the amount due (*see Raytone Plumbing Specialties, Inc. v. Sano Constr. Corp.*, 92 A.D.3d 855, 856, 939 N.Y.S.2d 116). "[W]hile the mere silence and failure to object to an account stated cannot be construed as an agreement to the correctness of the account, the factual situation attending the particular transactions may be such that, in the absence of an objection made within a reasonable time, an implied account stated may be found" (*Interman Inds. Prods. v. R.S.M. Electron Power*, 37 NY2d 151, 154; *Episcopal Health Services, Inc. v Pom Recoveries, Inc.*, 138 AD3d 917, 919, 31 NYS3d 113, 114–15 [2d Dept 2016]).

Second Department precedent clearly establishes that a bank such as plaintiff makes the proper *prima facie* demonstration of entitlement of judgment as a matter of law for breach of a credit card agreement entitling it to a judgment of liability and damages with a proffer of competent evidence in admissible form evidencing the credit card account holder's breach (see e.g. *Citibank (S. Dakota) N.A. v Sablic*, 55 AD3d 651, 652, 865 NYS2d 649, 650 [2d Dept 2008][plaintiff bank made out *prima facie* showing of entitlement to judgment as a matter of law by tendering sufficient evidence that defendant cardholder breached agreement to pay the credit card debt, and otherwise failed to produce any evidence in admissible form sufficient to establish the existence of a triable issue of fact]; but see *Citibank (S. Dakota), N.A. v Brown-Serulovic*, 97 AD3d 522, 523, 948 NYS2d 331, 332 [2d Dept 2012][plaintiff bank not awarded summary judgment where it failed to submit sufficient evidence to establish that the defendant retained the account statements without objecting to them within a reasonable period of time. Even though an employee reviewed the plaintiff's records and testified by affidavit that the credit card statements were mailed to the defendant on a monthly basis, she failed to aver that the defendant retained these statements for a reasonable period of time without objecting to them]).

Having reviewed plaintiff's moving papers and having received no opposition to them from the defendant, the Court finds that plaintiff has sufficiently carried its *prima facie* burden of demonstrating entitlement to judgment as a matter of law.

Here, plaintiff has proffered a copy of the relevant and pertinent credit card agreement fixing defendant's obligations to render timely monthly payments on her account. Plaintiff has also annexed to its papers copies of the monthly billing statements for the time period in question. Lastly, by affidavit of its records custodian who swears direct, personal and firsthand knowledge of the administration and maintenance of defendant's account, the affiant Ms. Van Hooser supplies sworn testimony that as a part of her regular and routine business duties became familiar with defendant's billing history. Accordingly, she testifies that defendant made charges to her account, evidenced by monthly billing statements sent to defendant without objection which detailed principal, interest, fees, payments made, credits allowed, and total amount of debt due and owing. Further, affiant testifies that defendant breached her monthly obligation to render timely payment for her debt. Plaintiff moreover notes that it has not at any time received any objection or dispute to the debt owed by defendant or any part payment of the same. Nor has defendant ever come forward with any justification whatsoever for her default in obligation to render payments.

Conclusion

Based on the foregoing, plaintiff has satisfied the Court with its showing of entitlement *prima facie* to judgment as a matter of law. More importantly, given defendant's failure to provide any argument in opposition, defendant has correspondingly failed to demonstrate the existence of any triable issue of fact warranting precluding entry of summary judgment.

Accordingly, it is

ORDERED that plaintiff's unopposed motion for summary judgment pursuant to CPLR 3212 is hereby **GRANTED**; and it is further

ORDERED that plaintiff serve defendant with a notice of entry and a copy of this decision and order via counsel forthwith.

Plaintiff's proposed Order and Judgment has been simultaneously signed in connection with the entering of this decision and order.

The foregoing constitutes the decision and order of this Court.

Dated: October 19, 2017
Riverhead, New York



WILLIAM G. FORD, J.S.C.

___ FINAL DISPOSITION

X NON-FINAL DISPOSITION