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SHORT FORM ORDER **INDEX NO.: 45421/2010**

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 38 - SUFFOLK COUNTY

PRESENT:

HON. WILLIAM G. FORD
JUSTICE SUPREME COURT

Motion Submit Date: 06/01/17
Motion Seq 001 MG

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CAPITAL ONE BANK (USA), N.A.

Plaintiff,

-against-

GLORIA J. TOMASELLI & JOHN B. TOMASELLI,

Defendants.

---x

PLAINTIFF'S COUNSEL:
Malen & Associates, PC
By: Dana Arrick, Esq.
123 Frost Street
Westbury, NY 11590

DEFENDANT'S COUNSEL:
Goner & Associates, PC
By: Richard D. Goner, Esq.
1350 Maxess Road
Melville, NY 11747

Upon the following papers read on plaintiff's unopposed motion for summary judgment pursuant to CPLR 3212; Notice of Motion & Affirmation in Support dated April 28, 2017; Affidavit in Support dated December 14, 2010 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 Capital One Bank, National Association's motion for summary judgment.

According to its complaint, defendants Gloria J. Tomaselli and Richard B. Tomaselli were consumer credit cardholders 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 further alleges that defendants utilized their 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 their 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 $18,267/37.

Procedural History

Plaintiff commenced this action electronically filing a summons and complaint with the Suffolk County Clerk on December 23, 2010. Defendant joined issue filing an answer serving as a general denial on February 16, 2011.

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 defendants liable to it for breach of contract and/or account stated premised on their breach of obligations to make timely payment pursuant to their 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, a copy of the credit card agreement between plaintiff and defendants, monthly credit card account billing statements for defendant's account for the period of November 2008 to November 2010, and the affidavit sworn by plaintiff's records custodian James Negley, dated December 14, 2010.

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; ***Furia v. Furia***, 116 AD2d 694, 695; ***Palmetto Partners, L.P. v AJW Qualified Partners, LLC***, 83 AD3d 804, 806 [2d Dept 2011]). An account stated claim "exists where a party to a contract receives bills or invoices and does not protest within a reasonable time" (***Russo v Heller***, 80 AD3d 531, 532 [1st Dept 2011], ***Bartning v. Bartning***, 16 A.D.3d 249, 250, 791 N.Y.S.2d 541 [2005]).

"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 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 Specialities, 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]).

The Second Department has clearly determined that a motion for summary judgment on the claim properly lies where movant establishes entitlement to judgment as a matter of law via submission of evidence in admissible form, that it generated statements for the defendant in the regular course of business and mailed those statements to the defendant on a monthly basis, that defendant accepted these account statements and retained them without objection for more than one year prior to the commencement of the action, and each statement indicated a balance due

(***Am. Exp. Centurion Bank v Williams***, 24 AD3d 577, 577, 807 NYS2d 612, 613 [2d Dept 2005]).

Moreover, Second Department precedent also 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, in support of its application plaintiff has submitted 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 Mr. Negley supplies sworn testimony that as a part of her regular and routine business duties became familiar with defendant's billing history. Accordingly, he 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.

The foregoing constitutes the decision and order of this Court.

Settle judgment on notice.

Dated: February 7, 2018
Riverhead, New York

WILLIAM G. FORD, J.S.C.

_____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**