

**American Express Travel Related Servs. Co., Inc. v
Homestyle Dining, LLC**

2019 NY Slip Op 30065(U)

January 4, 2019

Supreme Court, New York County

Docket Number: 653369/2018

Judge: Joel M. Cohen

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. JOEL M. COHEN PART IAS MOTION 45

Justice

INDEX NO. 653369/2018

AMERICAN EXPRESS TRAVEL RELATED SERVICES COMPANY, INC. MOTION DATE 11/05/2018

Plaintiff, MOTION SEQ. NO. 001

- v -

HOMESTYLE DINING, LLC,

Defendant.

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number (Motion 001) 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18

were read on this motion for

JUDGMENT - SUMMARY

Upon the foregoing documents, it is

Plaintiff American Express Travel Related Services Company, Inc. seeks summary judgment against Defendant Homestyle Dining, LLC in this credit card collection action. Specifically, Plaintiff seeks an Order granting it \$126,205.91 to which it claims to be entitled. There is no apparent dispute that Defendant failed to pay outstanding credit card charges. For the following reasons, Plaintiff's motion for Summary Judgment is Granted with respect to its claims for breach of contract and account stated and Denied with respect to its duplicative claim for unjust enrichment.

To obtain summary judgment, the moving party must make a prima facie showing of entitlement to judgment as a matter of law, through admissible evidence, eliminating all material issues of fact. CPLR. §3212(b); Smalls v. AJI Indus., Inc., 10 N.Y.3d 733, 735 (2008); JMD Holding Corp. v. Congress Fin. Corp., 4 N.Y.3d 373, 384 (2005); Giuffrida v. Citibank Corp., 100 N.Y.2d 72, 81 (2003). If the moving party meets this standard, the burden shifts to the

opposing party to rebut that *prima facie* showing by producing evidence, in admissible form, sufficient to require a trial of material factual issues. *Morales v. D & A Food Serv.*, 10 N.Y.3d 911, 913 (2008); *Hyman v. Queens County Bancorp, Inc.*, 3 N.Y.3d 743, 744 (2004).

Plaintiff seeks summary judgment on its three causes of action against Defendant:

Breach of Contract; Account Stated; and Unjust Enrichment.

Breach of Contract

To establish a claim for breach of a contract, plaintiff must show the existence of a contract, that plaintiff performed, that defendants breached the contract, and that defendants' breach caused plaintiff to sustain damages. *Harris v. Seward Park Hous. Corp.*, 79 A.D.3d 425, 426 (1st Dep't 2010). Here, plaintiff has made a satisfactory *prima facie* showing of these four elements through the Affidavit of Richard Keir, Plaintiff's Assistant Custodian of Records. In his Affidavit, Mr. Keir provides business records showing that Defendant opened an American Express Corporate Card account in March 2014. In doing so, Defendant (through its Chief Financial Officer, Brian Ripley) signed an Application and Corporate Services Commercial Account Agreement. *Keir Affidavit*, ¶6; NYSCEF 13. Defendant used this card to make various purchases and/or take out cash advances. *Keir Affidavit*, ¶7. Plaintiff performed its obligations under the Agreement by extending credit to Defendant and billed Defendant each month for charges incurred. *Id.* at ¶7, 9; *Reply Memo* at 5-6. Defendant failed to comply with its obligations under the Agreement, which states: "All payments must be made in accordance with the instructions on the company's billing statement...". NYSCEF 13.¹

¹ Defendant takes issue with Plaintiff's submission of Mr. Keir's Affidavit. (Def. Memo in Opp at 2-3). Defendant argues that because Mr. Keir based his Affidavit on his review of the files maintained by American Express as opposed to his personal knowledge, Mr. Keir's Affidavit is inadmissible to lay a foundation for the introduction of the Cardholder Agreement and invoices. That is incorrect. A custodian of records is not required to have personal

Defendant fails to raise a triable issue of fact. It does not dispute that it entered into an Agreement with Plaintiff, that it incurred charges of \$126,205.91, or that it failed to repay this amount to Plaintiff.² Plaintiff has satisfactorily demonstrated its entitlement to judgment on its cause of action for breach of contract. See *MBNA Am. Bank, N.A. v Brenner*, 239 A.D.2d 566 (2nd Dep't 1997) (summary judgment awarded when no *bona fide* issue of fact found to exist that the defendant and his wife applied for and were issued the subject credit card or that the balance accrued on the account was due to unauthorized use of the card.)³

Account Stated

To state a cause of action for account stated, the plaintiff must prove that an invoice was rendered showing a balance and that the receiving party failed within a reasonable time to dispute the account. *Morrison Cohen Singer & Weinstein, LLP v. Ackerman*, 280 A.D.2d 355, 356 (1st Dep't 2001) (defendant's receipt and retention of law firm's retainer and monthly invoices without objection gave rise to an actionable account stated). "The rule that an account

knowledge of documents, their history, or specific content to satisfy the requirements for the documents to be admissible as business records. *Deleon v. Port Auth. Of N.Y. & N.J.*, 306 A.D.2d 146, 146 (1st Dep't 2003) ("[i]t is well settled that a business entity may admit a business record through a person without personal knowledge of the document, its history or its specific contents where that person is sufficiently familiar with the corporate records to aver that the record is what it purports to be and that it came out of the entity's files"). This court has previously found affidavits offered by Mr. Keir in similar circumstances to be acceptable for the purposes of introduction of documents. See, e.g., *American Express Travel Related Services Co., Inc. v. Munilla Construction Management, LLC*, 2018 N.Y. Slip Op 33264(U), 2018 WL 6586999 (Sup. Ct. N.Y. Co. 2018); *American Express Travel Related Services Co. v. Hallmark Capital Group, LLC*, 2017 NY Slip Op 31369(U), 2017 WL 2778461 (Sup. Ct. N.Y. Co. 2017); *American Express Centurion Bank v. Weiss*, 2013 N.Y. Slip Op 32611(U), 2013 WL 5717122 (Sup. Ct. N.Y. Co. 2013);

² Defendant seems to dispute only the reliability and admissibility of the Affidavit offered by Richard Keir, and not the facts asserted therein. See *supra* n.1.

³ Plaintiff also seeks dismissal of Defendant's Affirmative Defenses as conclusory and insufficient to defeat a motion for summary judgment. *S. J. Capelin Associates, Inc., v. Globe Manufacturing Corp.* 34 N.Y.2d 338, 342 (1974). Defendant does not address the merits of argument in its opposition and, therefore, it is deemed conceded. *Gary v Flair Beverage Corp.*, 60 AD3d 413, 413 (1st Dep't 2009).

which has been rendered and to which no objection has been made within a reasonable time should be regarded as admitted by the party charged as prima facie correct assumes that there exists some indebtedness owing between the parties or an Express agreement between the parties to treat the statement as an account stated although such statement may encompass amounts not yet due if there remain no further obligations to be performed by the party claiming payment.” *Gurney, Becker & Bourne, Inc. v. Benderson Dev. Co.*, 47 N.Y.2d 995, 996 (1979) (internal citations omitted).

Here, the record shows, and Defendant does not dispute, that Defendant was sent monthly invoices since it opened its Corporate Card with Plaintiff in March 2014. The total outstanding balance owed to Plaintiff as of August 28, 2018 (comprised of unpaid invoices issued from July 28, 2017 through July 2018) is \$126,205.91. *Keir Affidavit*, ¶9; NYSCEF 14.

In opposition, Defendant offers only an attorney affirmation stating that Mr. Keir’s affidavit should not be considered and purports to lay out what Plaintiff “has not established”. It is black letter law that an affirmation of counsel who lacks personal knowledge of the facts is insufficient to raise a triable issue of fact to preclude summary judgment. *Grupo v. London*, 25 A.D.3d 486, 487 (1st Dept 2006). In order to defeat a motion for summary judgment, the opposing party must show facts sufficient to require a trial and “must make his showing by producing evidentiary proof in admissible form.” *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980). Defendant fails to make such a showing.

Moreover, Defendant’s attorney affirmation does not deny receipt of the invoices nor does it state that Defendant objected to the invoices. *Coudert Brothers v. Sylvia de Cuivas*, 247 A.D.2d 266, 267-67 (1st Dep’t 1998) (summary judgment was properly granted to plaintiff on its cause of action for account stated where Defendant failed to object to invoices sent by plaintiff)

Therefore, Defendant has failed to refute Plaintiff's *prima facie* showing of entitlement to summary judgment on its claim for Account Stated.

Unjust Enrichment

Plaintiff's claim for unjust enrichment stems from the same transactions as its claim for breach of contract and seeks the same monetary damage. There is no dispute that a valid contract exists which governs Plaintiff's entitlement to recovery and Defendant's obligation to pay for its credit card usage. Accordingly, Plaintiff's claim for unjust enrichment is duplicative and must be dismissed. *Corsello v Verizon New York, Inc.*, 18 N.Y.3d 777, 790 (2012) (an unjust enrichment claim is not available where it simply duplicates, or replaces, a conventional contract or tort claim).

Therefore, it is:

ORDERED that Plaintiff's Motion for Summary Judgment on its First Cause of Action for Breach of Contract is Granted; it is further

ORDERED that Plaintiff's Motion for Summary Judgment on its Second Cause of Action for Account Stated is Granted; it is further

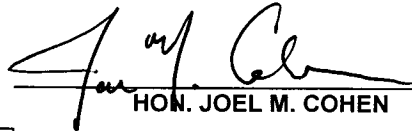
ORDRED that Plaintiff's Motion for Summary Judgment on its Third Cause of Action for Unjust Enrichment is Denied;

ORDERED that Plaintiff's Motion for Summary Judgment dismissing Defendant's Affirmative Defenses is Granted; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment in favor of Plaintiff and against Defendant in the amount of \$126,205.91 together with interest at the rate of 9% per

annum from the date of this order is entered until the date the judgment is satisfied, together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs.

1/4/2019
DATE


HON. JOEL M. COHEN

CHECK ONE:	<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	NON-FINAL DISPOSITION
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/> DENIED	<input checked="" type="checkbox"/> GRANTED IN PART
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		<input type="checkbox"/> OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT
				<input type="checkbox"/> REFERENCE