

<b>American Express Bank, FSB v Schaefer</b>
2019 NY Slip Op 30784(U)
March 22, 2019
Supreme Court, New York County
Docket Number: 157287/2017
Judge: Nancy M. Bannon
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. NANCY M. BANNON PART IAS MOTION 42EFM

Justice

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INDEX NO. 157287/2017

AMERICAN EXPRESS BANK, FSB

MOTION DATE 03/20/2019

Plaintiff,

MOTION SEQ. NO. 001

- v -

PHILIP SCHAEFER,

DECISION AND ORDER

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22

were read on this motion to/for JUDGMENT - SUMMARY

In this action to recover an unpaid credit card account balance upon theories of breach of contract and for an account stated, the plaintiff moves (1) pursuant to CPLR 3212, for summary judgment on the complaint, and (2) pursuant to CPLR 3025, to amend the caption to change its name to American Express National Bank. The motion is granted.

It is well settled that the movant on 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." See Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 (1985); see CPLR 3212. Once the movant meets its burden, it is incumbent upon the non-moving party to establish the existence of material issues of fact. See Vega v Restani Constr. Corp., 18 NY3d 499 (2012); Alvarez v Prospect Hosp., 68 NY2d 320 (1986).

In support of its motion, the plaintiff submits, inter alia, the summons and verified complaint, and a sworn affidavit of Raquel Hernandez, an Assistant Custodian of Records for the plaintiff, who states that the defendant opened an account (ending in -2006) in August 2002, and thereafter used the account to purchase various goods and services and made partial

payments on the account, that the plaintiff mailed monthly account statements to the defendant at the address provided by the defendant, and that the defendant defaulted in payment, accruing an outstanding balance of \$21,500.00. The plaintiff also submits a copy of a credit card agreement dated July 14, 2011 and referable to the defendant and the subject account, as well as copies of monthly account statements dated from February 23, 2015, through May 26, 2017, the latter statement showing a balance of \$21,500.00

By this proof the plaintiff has demonstrated, by proof in admissible form, a *prima facie* claim for breach of contract in that there was "formation of a contract between the parties, performance by the plaintiff, the defendant's failure to perform, and resulting damage." Flomenbaum v New York Univ., 71 AD3d 80, 91 (1<sup>st</sup> Dept. 2009); see Clearmont Prop., LLC v Eisner, 58 AD3d 1052, 1055 (3<sup>rd</sup> Dept. 2009). Even if the subject agreement were not annexed, a breach could be established. "The issuance of a credit card constitutes an offer of credit which may be withdrawn by the offeror at any time prior to acceptance of the offer through use of the card by the holder." Feder v Fortunoff, 114 AD2d at 399 (2<sup>nd</sup> Dept. 1985). The credit card account statements submitted by the plaintiff show that the defendant accepted the plaintiff's offer by using the credit card to make purchases and by making partial payments on the account. See Citibank (South Dakota) N.A. v Brown-Serulovic, 97 AD3d 522 (2<sup>nd</sup> Dept. 2012); FIA Card Services, N.A. v Polley, 68 AD3d 1759 (4<sup>th</sup> Dept. 2009); Citibank (South Dakota) N.A. v Sablic, 55 AD3d 651 (2<sup>nd</sup> Dept. 2008). The defendant breached the credit card agreement by failing to pay the balance. See Citibank (South Dakota) N.A. v Sablic, *supra*.

The proof also established a *prima facie* claim for an account stated in that it shows that the defendant "received [and] retained without objection" the statements annexed to the moving papers. Scheichet & Davis, P.C. v Nohavicka, 93 AD3d at 478 (1<sup>st</sup> Dept. 2012), *quoting Gamiel v Curtis & Reiss-Curtis, P.C.*, 60 AD3d 473, 474 (1<sup>st</sup> Dept. 2009). It is well settled that a cause of action for an account stated may be established by demonstrating either partial payment or retention of bills without objection. See Morrison Cohen Singer and Weinstein, LLP v Waters, 13 AD3d 51 (1<sup>st</sup> Dept. 2004); M&R Constr. Corp. v IDI Constr. Co., 4 AD3d 130 (1<sup>st</sup> Dept. 2004). Both are shown here.

The defendant, who submits only an attorney's affirmation in opposition, has failed to raise any triable issue of fact. Since counsel claims no personal knowledge of the underlying facts, his affirmation is without probative value or evidentiary significance on this motion. See Zuckerman v City of New York, 49 NY2d 557 (1980); Trawally v East Clarke Realty Corp., 92 AD3d 471 (1<sup>st</sup> Dept. 2012); Thelen LLP v Omni Contracting Co. Inc., 79 AD3d 605 (1<sup>st</sup> Dept. 2010). Notably, there is no denial by the plaintiff or his attorney that the plaintiff opened the subject account, accrued the balance now sought, and has failed to make payment.

The branch of the motion which seeks to amend the caption to change the plaintiff's name to "American Express National Bank" is granted as the plaintiff has demonstrated entitlement to that relief, and the affirmation of the defendant's counsel submitted in opposition is silent on the issue.

Accordingly, and upon the foregoing papers, it is

ORDERED that the branch of the plaintiff's motion seeking summary judgment pursuant to CPLR 3212 is granted as to both causes of action of the complaint, and it is further,

ORDERED that the Clerk shall enter judgment in favor of the plaintiff and against the defendant in the sum of \$21,500.00, plus costs and statutory interest from May 26, 2017, and it is further,

ORDERED that the branch of the plaintiff's motion seeking to amend the caption pursuant to CPLR 3025(b) to change the name of the plaintiff to "**American Express National Bank**" is granted, without opposition, and it is further,

ORDERED that the plaintiff shall serve a copy of this order with notice of entry upon the defendant within 30 days, and it is further,

ORDERED that the plaintiff shall serve a copy of this order upon the Trial Support Office (Room 158) and the County Clerk, who shall mark the court records to reflect to amendment to the caption.

This constitutes the Decision and order of the court.

3/22/2019  
DATE

  
NANCY M. BANNON, J.S.C.

**HON. NANCY M. BANNON**

CHECK ONE:

CASE DISPOSED

GRANTED

DENIED

APPLICATION:

SETTLE ORDER

NON-FINAL DISPOSITION

GRANTED IN PART

OTHER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

SUBMIT ORDER

FIDUCIARY APPOINTMENT

REFERENCE