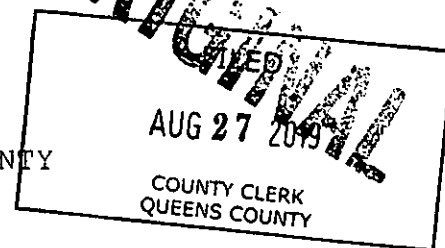


Bank of Am., N.A. v Dale
2019 NY Slip Op 32904(U)
August 26, 2019
Supreme Court, Queens County
Docket Number: 717735/2018
Judge: Denis J. Butler
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE DENIS J. BUTLER
JusticeIAS Part 12-----x
BANK OF AMERICA, N.A.,

Plaintiff(s),

-against-

DANIELLE DALE,

Defendant(s).

Index

Number: 717735/2018

Motion Date:

July 23, 2019Motion Seq. No.: 001
-----x

The following papers were read on this motion by plaintiff for an order, pursuant to CPLR 3211 (a) (7), dismissing defendant's counterclaim; and cross-motion by defendant for an order, pursuant to CPLR 3211 (a) (7), dismissing plaintiff's complaint or, pursuant to CPLR 3124, compelling plaintiff to respond to all outstanding discovery and, pursuant CPLR 3025 (b), granting leave to amend the answer to add a counterclaims.

Papers

Numbered

Notice of Motion, Affirmation, Exhibits..... E7-14

Notice of Cross-Motion, Affirmation, Affidavit.... E18

Affirmation In Reply and in Opposition to

Cross-Motion..... E19

Reply Affirmation..... E20

Upon the foregoing papers, it is ordered that the motion and cross-motion are determined as follows:

Plaintiff commenced this action sounding in breach of contract. In its complaint, plaintiff alleges that defendant used a credit card issued by plaintiff and agreed to make payments for goods and services and/or cash advances made upon such card. Plaintiff further alleged that defendant failed to make the payments due to such agreement, and \$31,170.49 is now due and owing

to plaintiff from defendant. Defendant answered with a counterclaim alleging "unfair debt collections."

Plaintiff now moves to dismiss defendant's counterclaim for unfair collection practices, contending that the Federal Fair Debt Collection Practices Act is inapplicable, as plaintiff is the original creditor, and New York State's Debt Collection Procedures Act set forth in New York General Business Law, article 29-H, does not create a private cause of action.

Defendant contends that she and plaintiff had entered into an oral modification agreement on September 9, 2015. According to the alleged agreement, defendant was to "get the account current" and plaintiff would then accept a lump sum to close out the account in order to avoid a charge off. Defendant further contends that, between September 9, 2015 and September 30 2017, in reliance upon this alleged agreement, defendant paid plaintiff \$18,907.00, but plaintiff still refused to settle the account.

Under well-established principles, on a motion to dismiss for failure to state a cause of action, pursuant to CPLR 3211 (a) (7), the pleading is to be liberally construed, accepting all the facts alleged in the complaint to be true and according the plaintiff the benefit of every possible favorable inference" (*Jacobs v Macy's E., Inc.*, 262 AD2d 607, 608 [2d Dept 1999]; see *Leon*, 84 NY2d 83), and the court must determine only whether the facts alleged fit within any cognizable legal theory (*1455 Washington Ave. Assoc. v Rose & Kiernan, Inc.*, 260 AD2d 770 [3d Dept 1999]). "Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss" (*EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005]; see *Stukuls v State of New York*, 42 NY2d 272 [1977]). Such a motion will fail if, from its four corners, factual allegations are discerned which, taken together, maintain any cause of action cognizable at law, regardless of whether the plaintiff will ultimately prevail on the merits (see *Given v County of Suffolk*, 187 AD2d 560 [2d Dept 1992]). The plaintiff may submit affidavits and evidentiary material on a CPLR 3211 (a) (7) motion for the limited purpose of correcting defects in the complaint (see *Rovello v Orofino Realty Co., Inc.*, 40 NY2d 633 [1976]; *Kenneth R. v Roman Catholic Diocese of Brooklyn*, 229 AD2d 159). Dismissal is warranted only if the documentary evidence contradicts the claims raised in the complaint (see *Jericho Group, Ltd. v Midtown Dev., L.P.*, 32 AD3d 294 [1st Dept 2006]).

Neither the Federal Fair Debt Collection Practices Act nor the expanded protection afforded under New York State's debt collection regulation apply to an original creditor collecting its own debts

and they do not apply to the collection of business debts (see 15 USC 6 1692 [a] [6]); *Citibank (S.D.) N.A. v Jones*, 184 Misc 2d 63 [District Ct, Nassau County 2000]; see also *Bank of Boston Intl. of Miami v Arguello Tefel.*, 644 F Supp 1423 [ED NY 1986]). Moreover, a violation of article 29-H of the General Business Law does not create a private cause of action (see General Business Law § 602 [2]; *Varela v Investors Ins. Holding Corp.*, 81 NY2d 958 [1993]).

Accordingly, plaintiff's motion to dismiss defendant's counterclaim alleging unfair debt collections is granted.

Turning to the cross-motion, defendant seeks, inter alia, to dismiss plaintiff's complaint, pursuant to CPLR 3211 (a) (7), for failure to state a cause of action for breach of contract.

Initially, the sole criterion to dismiss a complaint is whether the pleading, and the factual allegations contained within its four corners, manifests any cause of action cognizable at law (see *Gaidon v Guardian Life Ins. Co. of Am.*, 94 NY2d 330 [1999]). The court must find plaintiff's complaint to be legally sufficient if it finds that plaintiff is entitled to recovery upon any reasonable view of the stated facts (see *Hoag v Chancellor, Inc.*, 246 AD2d 224 [1st Dept 1998]).

The elements of a cause of action for breach of contract are a contract, performance of the contract by one part, breach by the other party, and resulting damages (*Trafigura Beheer B.V. (Amsterdam) v South Caribbean Trading Ltd.*, 7 Misc 3d 1010 (A) [Sup Ct, NY County 2004]). Here, plaintiff has sustained its burden insofar as its complaint adequately states a cause of action for breach of contract. Defendant has improperly sought to reach the merits of the complaint on this mere CPLR 3211 (a) (7) motion (see *Stukuls v State of New York*, 42 NY2d 272 [1977]; *Jacobs v Macy's E. Inc.*, 262 AD2d 607 [2d Dept 1999]).

Accordingly, the branch of defendant's cross-motion to dismiss the complaint is denied.

The branch of the cross-motion, pursuant to CPLR 3124, to compel plaintiff to respond to all outstanding discovery is also denied, as moot, in light of the preliminary conference order (Butler, J.) dated June 28, 2019.

Turning to the branch of the cross-motion to amend the answer to include additional counterclaims, it is well settled that leave to amend pleadings shall be freely given in the absence of prejudice to the opponent (see CPLR 3025 [b]; *Edenwald Contr. Co.*

v City of New York, 60 NY2d 957 [1983]); *Norman v Ferrara*, 107 AD2d 739 [2d Dept 1985]; see also *Nissenbaum v Ferazzoli*, 171 AD2d 654 [2d Dept 1991]; *DeGuire v DeGuire*, 125 AD2d 360 [2d Dept 1986]). The merits of a proposed amendment will not be examined on the motion to amend unless the insufficiency or lack of merit is clear and free from doubt (see *Noanjo Clothing, Inc. v L & M Kids Fashion, Inc.*, 207 Ad2d 436 [2d Dept 1994]). In opposition, plaintiff has failed to establish that prejudice or surprise would result from the granting of this motion.

Accordingly, the branch of defendant's cross-motion to amend the answer to include additional counterclaims is granted, and defendant is directed to serve plaintiff with the amended answer, in the form annexed to the cross-motion, within thirty (30) days of entry of this order.

The clerk is directed to fax a copy of this decision to counsel for all parties.

This constitutes the decision and order of the court.

Dated: August 26, 2019



Denis J. Butler, J.S.C.

