

**American Express Travel Related Servs. Co., Inc. v
Preferred Mart Corp.**

2020 NY Slip Op 30331(U)

January 6, 2020

Supreme Court, New York County

Docket Number: 656481/2018

Judge: Louis L. Nock

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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. LOUIS L. NOCK PART IAS MOTION 38EFM

Justice

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AMERICAN EXPRESS TRAVEL RELATED SERVICES
COMPANY, INC.

Plaintiff,

- v -

PREFERRED MART CORP.,

Defendant.

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INDEX NO. 656481/2018

MOTION DATE 08/22/2019

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

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, 23, 24, 25, 26

were read on this motion to/for SUMMARY JUDGMENT.

Upon the foregoing documents, the motion of plaintiff American Express Travel Related Services Company, Inc. ("Plaintiff") for summary judgment against defendant Preferred Mart Corp. ("Defendant") 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, in accord with the following memorandum decision.

Background

Plaintiff commenced this action to recover the sum of \$382,234.28, representing the collective amount due on two commercial credit card accounts that Plaintiff issued to Defendant. The complaint alleges causes of actions for breach of contract, account stated, and unjust enrichment. Defendants answered the complaint, asserting eleven affirmative defenses. Plaintiff now moves for summary judgment in its favor to recover the sum of \$364,234.28, representing

the sum set forth in the complaint less \$18,000 in payments made during the pendency of the action.¹ Defendants oppose.

Discussion

On a motion summary judgment, the moving party must tender sufficient evidence to demonstrate the absence of any material issue of fact and entitlement to judgment in its favor as a matter of law (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Once the movant has met its initial burden, the burden then shifts to the party opposing the motion to submit evidentiary proof sufficient to create material issues of fact requiring a trial (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Mere conclusions and unsubstantiated allegations are insufficient to create material issues of fact requiring a trial (*Id.*).

To establish a claim for breach of a contract, a plaintiff must show the existence of a contract, performance by the plaintiff, a breach by the defendant, and proof that the breach caused the plaintiff to sustain damages (*Harris v. Seward Park Hous. Corp.*, 79 A.D.3d 425, 426 [1st Dept 2010]). Here, Plaintiff has met its *prima facie* burden by submitting the affidavit of Richard Keir (“Keir”), Plaintiff’s Assistant Custodian of Records, and attachments thereto. Annexed to his affidavit, Keir provides business records that demonstrate Defendant opened an American Express Corporate Card account in November 2017, and in doing so, agreed to the terms of a Corporate Services Commercial Account Agreement (the “Cardmember Agreement”) (*Id.* ¶ 6, 4). Defendant then utilized the account and made various charges, for which Plaintiff extended Defendant credit and billed it each month accordingly (*Id.* ¶ 7). Defendant then defaulted by failing to make the payments due on the account (*Id.* ¶ 8).

¹ Plaintiff also notes in the motion that it has discontinued its claim for attorney’s fees.

Defendant does not dispute that it opened the account or agreed to the terms of the Cardmember Agreement, but contends that Plaintiff should not be granted summary judgment on its claim for breach of contract because Plaintiff breached the agreement itself by imposing delinquency charges that are not provided for in the Cardmember Agreement (Opp. Mem. 2-3). Nonetheless, the fees in question are clearly outlined by section 17.4 of the Cardmember Agreement, which provides for a late fee of \$39.00 for the first statement with a missed payment and both late fees and delinquency charges to be assessed as the greater of \$39.00 or 2.99% of the balance subject thereto for each additional missed payment (Keir Aff. Ex. A). Defendant also contends that Plaintiff failed to credit the account for a \$15,000 payment it made in January 2019. In opposition, Plaintiff submits the affirmation of Benjamin R. Blum (“Blum”), wherein its counsel affirms that its office received both the \$15,000 payment and an additional \$3,000 payment from Defendant and remitted these to Plaintiff, who credited the amounts to the account (Blum Aff. ¶¶ 5-13). In accord with these events, the amount sought on summary judgment is \$364,234.28, which is \$18,000 less than the \$382,234.28 sought in the complaint. Defendant therefore fails to raise any material issues of fact with respect to either of these points and Plaintiff is entitled to summary judgment on its cause of action for breach of contract.

To state a cause of action for account stated, a 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 Dept 2001]). Defendant’s conclusory allegation that the monthly account statements “are not consistent with the terms of the Contract” fails to raise any material issue of fact with respect to this cause of action. Furthermore, several New York courts have reviewed this issue and held that monthly credit card account statements of the type presented here are sufficient

proof for a cause of action for an account stated (see *American Exp. Travel Related Services Co., Inc. v Munilla Const. Management, LLC*, 2018 NY Slip Op 33264(U) [Sup Ct, NY County]; *American Exp. Travel Related Services Co. Inc. v. Hallmark Capital Group LLC*, 2017 NY Slip Op 31369(U) [Sup Ct, NY County 2017]).

Finally, Plaintiff's claim for unjust enrichment stems from the same transactions as its claim for breach of contract and seeks the same monetary damage. Because there is no dispute that a valid contract exists that governs the agreement between the parties, 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]).

Accordingly, it is

ORDERED that Plaintiff's motion is granted as to the first and second causes of action for breach of contract and account stated, and denied as to the third cause of action for unjust enrichment; and it is further

ORDERED that the Clerk is directed to enter judgment in favor of Plaintiff and against Defendant in the amount of \$364,234.28, together with interest at the statutory rate from the date of entry of this order until the date that the judgment is satisfied, together with costs and disbursements as taxed by the Clerk upon submission of an appropriate bill of costs.

Louis L. Nock

1/6/2020
DATE

LOUIS L. NOCK, J.S.C.

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