

<b>Citibank, N.A. v Wheeler</b>
2021 NY Slip Op 32054(U)
September 29, 2021
Supreme Court, Broome County
Docket Number: EFCA2020002614
Judge: Eugene D. Faughnan
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At a Motion Term of the Supreme Court of the State of New York held in and for the Sixth Judicial District at the Broome County Courthouse, Binghamton, New York, on the 16<sup>th</sup> day of July, 2021, on submission

PRESENT: HON. EUGENE D. FAUGHNAN  
Justice Presiding

STATE OF NEW YORK  
SUPREME COURT: COUNTY OF BROOME

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CITIBANK, N.A.,

Plaintiff,

-vs.-

DECISION AND ORDER

Index No. EFCA2020002614

RONALD C. WHEELER,

Defendant.

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APPEARANCES

Counsel for Plaintiff:

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**EUGENE D. FAUGHNAN, J.S.C.**

This matter is before the Court upon the motion of Plaintiff, Citibank, N.A., for summary judgment, pursuant to CPLR 3212. Defendant, Ronald C. Wheeler, has filed opposition to Plaintiff's motion. The motion was given a return date on July 16, 2021, and the Court directed the motion would be "on submission". After due deliberation, this Decision and Order constitutes the Court's determination with respect to the pending motion.<sup>1</sup>

**BACKGROUND FACTS**

This is a credit card collection case. Plaintiff commenced the action by the filing of a summons and complaint on December 17, 2020 alleging that Defendant was the holder of a credit card and that he has defaulted in payments required under the credit card contract. The complaint alleges that the unpaid balance on the credit card is \$12,723.12. The complaint further stated that the account was originally opened as a Sears Gold Mastercard by Sears National Bank in September 1984, and Plaintiff acquired substantially all those credit card accounts in November 2013. The complaint claims breach of contract and account stated. Defendant was served with the summons and complaint and then filed an Answer on March 24, 2021.

Plaintiff filed the instant motion for summary judgment on June 17, 2021. In support of the motion, Plaintiff submitted an affidavit from Kylie Riley, a document control officer with Citibank, attesting to the creation of the account, and enclosing a copy of the credit card agreement and account statements and verifying Defendant's default in payments. Plaintiff also submitted an attorney Statement of Facts setting forth the procedural history, as well as a Memorandum of Law. In opposition, Defendant submitted an attorney affirmation.

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<sup>1</sup> All the papers filed in connection with the motion and opposition are included in the NYSCEF electronic case file, and have been considered by the Court.

## LEGAL DISCUSSION AND ANALYSIS

When seeking summary judgment, “the movant must establish its prima facie entitlement to judgment as a matter of law by presenting competent evidence that demonstrates the absence of any material issue of fact.” *Lacasse v. Sorbello*, 121 AD3d 1241, 1241 (3<sup>rd</sup> Dept 2014) citing *Alvarez v. Prospect Hosp.*, 68 NY2d 320, 324 (1986) and *Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985) (other citation omitted); see *Amedure v. Standard Furniture Co.*, 125 AD2d 170 (3<sup>rd</sup> Dept. 1987); *Bulger v. Tri-Town Agency, Inc.*, 148 AD2d 44 (3<sup>rd</sup> Dept. 1989), *app dismissed* 75 NY2d 808 (1990). Such evidence must be tendered in admissible form. *Zuckerman v. City of New York*, 49 NY2d 557 (1980); *Friends of Animals, Inc. v. Associated Fur Mfrs.*, 46 NY2d 1065, 1067-1068 (1979). Once this obligation is met, the burden shifts to the respondent to establish that a material issue of fact exists. *Dugan v. Sprung*, 280 AD2d 736 (3<sup>rd</sup> Dept. 2001); *Sheppard-Mobley v. King*, 10 AD3d 70, 74 (2<sup>nd</sup> Dept. 2004) *aff’d as mod.* 4 NY3d 627 (2005); *Alvarez v. Prospect Hosp.*, 68 NY2d 320, 324; *Winegrad v. N.Y. Univ. Med. Ctr.*, 64 NY2d 851, 853. “When faced with a motion for summary judgment, a court’s task is issue finding rather than issue determination (see, *Sillman v. Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]) and it must view the evidence in the light most favorable to the party opposing the motion, giving that party the benefit of every reasonable inference and ascertaining whether there exists any triable issue of fact.” *Boston v. Dunham*, 274 AD2d 708, 709 (3<sup>rd</sup> Dept. 2000); see, *Boyce v. Vazquez*, 249 AD2d 724, 726 (3<sup>rd</sup> Dept. 1998). The motion “should be denied if any significant doubt exists as to whether a material factual issue is present or even if it is arguable that such an issue exists.” *Haner v. De Vito*, 152 AD2d 896, 896 (3<sup>rd</sup> Dept. 1989) (citation omitted); *Lacasse v. Sorbello*, 121 AD3d 1241; *Asabor v. Archdiocese of N.Y.*, 102 AD3d 524 (1<sup>st</sup> Dept. 2013). It “is not the function of a court deciding a summary judgment motion to make credibility determinations or findings of fact.” *Vega v. Restani Constr. Corp.*, 18 NY3d 499, 505 (2012) (citation omitted).

Plaintiff’s action is for breach of contract and account stated. A plaintiff makes a *prima facie* showing of entitlement to summary judgment in a breach of contract case by showing an agreement, which “defendant accepted by his use of the credit card and payments thereon, which was breached by defendant when he failed to make the required payments.” *Citibank (South*

*Dakota), N.A. v. Keskin*, 121 AD3d 635, 636 (2<sup>nd</sup> Dept. 2014). Riley’s affidavit states that she reviewed Citibank’s business records, including account information concerning this credit card including the account history, the acquisition of this account from the original bank, the credit card agreement and the fact that defendant has failed to make payments on the account, leaving a balance owed of \$12,723.03<sup>2</sup>. She also noted that the records were created and maintained by Citibank in the regular course of business and that it is the regular practice of Citibank to create and maintain such information, at the time of the transaction or shortly thereafter. By these submissions, Plaintiff has shown prima facie its entitlement to summary judgment.

The burden was thus shifted to Defendant to raise a triable issue of fact. Defendant submitted an affirmation of his attorney, claiming that Plaintiff failed to establish an entitlement to summary judgment through competent evidence. “The affirmation of defense counsel ... was not based upon personal knowledge and was of no probative value.” *Bank of Am., N.A. v. Reed*, 2018 NYMisc LEXIS 1198 (App Term 2<sup>nd</sup> Dept. 2018), citing *Target Natl. Bank v Sokoloff*, 51 Misc 3d 131[A], 36 N.Y.S.3d 50 (App Term, 2d Dept, 9th & 10th Jud Dists 2016). Further, the affirmation failed to refute Plaintiff’s claims pursuant to a breach of contract claim. Defendant does not dispute usage of the credit card or failure to pay per the terms of the agreement. Therefore, Defendant has not raised a triable issue of fact with respect to breach of contract.

In an account stated, Plaintiff must show “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.... The agreement may be implied by the retention of an account statement for an unreasonable period of time without objection.” *Citibank (S.D.) N.A. v. Jones*, 272 AD2d 815, 815 (3<sup>rd</sup> Dept. 2000) (internal quotation marks and citations omitted). In this case, Riley’s affidavit referenced, and incorporated, monthly account statements from 8/23/18 to 9/21/20, which show defendant made payments on the credit card and continued to use it for the purchase of goods and services. Further, Riley averred that the account statements were sent to defendant, and that “Defendant was provided periodic billing statements for the Account ... which detailed the changes on the Account, along with interest, fees, payments, credits and the amount due on

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<sup>2</sup> There is a \$.09 differential between the amount sought in the complaint, and the amount noted in this motion. Plaintiff attributes the difference to a credit being applied to the account after the action was commenced. Therefore, the amount sought on this motion is the lower figure.

the account” Defendant never disputed the validity of the balance owed. Plaintiff sufficiently made out a prima facie case for an account stated.

Again, in opposition to the motion, defendant has only submitted an attorney affirmation, not based on personal knowledge and therefore, insufficient to rebut the prima facie showing. In any event, the affirmation does not deny that Defendant made purchases with the credit card, nor does it deny he received the monthly statements showing charges, payments or amount due. It also does not aver that he ever objected. Based upon this, Defendant has failed to raise a triable issue of fact.

**CONCLUSION**

Based on the foregoing discussion, it is hereby

ORDERED, that Plaintiff’s motion for summary judgment is GRANTED.

THIS CONSTITUTES THE DECISION AND ORDER OF THIS COURT.

ENTER:

Dated: September 29, 2021  
Binghamton, New York

  
HON. EUGENE D. FAUGHNAN  
Supreme Court Justice