

Citibank, N.A. v Kam Ho
2022 NY Slip Op 31130(U)
April 6, 2022
Supreme Court, New York County
Docket Number: Index No. 155227/2021
Judge: Sabrina Kraus
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. SABRINA KRAUS PART 57TR

Justice

-----X

CITIBANK, N.A.

Plaintiff,

- v -

KAM HO,

Defendant.

-----X

INDEX NO. 155227/2021

MOTION DATE 03/16/2022

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

were read on this motion to/for

JUDGMENT - SUMMARY

BACKGROUND

Plaintiff commenced this action, against defendant, seeking \$30,302.04, plus interest and costs, based on the allegation that defendant failed to make payments due on a credit card issued by Plaintiff

The summons and complaint were filed on May 28, 2021.

On August 16, 2021, defendant, by counsel, filed an answer denying the allegations, and asserts breach of duty of good faith and fair dealing, unclean hands, usury, rescission and lack of jurisdiction as affirmative defenses.

On March 16, 2022, plaintiff moved pursuant to CPLR § 3212 seeking an award of summary judgment as against defendant. Defendant submitted opposition, the motion was submitted, and the court reserved decision.

DISCUSSION

In order to prevail on a motion for summary judgment the movant must show no material issues of fact exist (*Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 851, 853).

The following facts are established by the moving papers. Defendant resides in Queens County. Defendant had a credit card issued by plaintiff ending in account numbers 1034. As of February 2021, there was a balance due on the account of \$30,302.04.

Defendant was sent monthly statements on said accounts through and including February 2021. Defendant made monthly payments during this period, which were credited to defendant's account. The last payment made by defendant was made in April 2020, in the amount of \$760.82. Defendant made a payment of \$15,000.00 in July 2020, however the same was returned by the bank for insufficient funds. The balance sued for is the amount due as of February 2021, less payments made.

A true and accurate copy of the agreement governing the account was annexed to the moving papers. (NYSCEF Doc13)

The proponent of 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, Zuckerman v. City of New York*, 49 N.Y.2d 557, 562, 427 N.Y.S.2d 595, 404 N.E.2d 718; *Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395, 404, 165 N.Y.S.2d 498, 144 N.E.2d 387). Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Matter of Redemption Church of Christ v.*

Williams, 84 A.D.2d 648, 649, 444 N.Y.S.2d 305; *Greenberg v. Manlon Realty*, 43 A.D.2d 968, 969, 352 N.Y.S.2d 494).
N.Y. Univ. Med. Ctr., 64 N.Y.2d 851, 853, (1985).

To establish a claim for breach of contract, plaintiff must establish by evidence in admissible form that there was a credit card agreement, which the defendant accepted by using the credit card and making payments thereon, and that the agreement was breached by the defendant when he failed to make required payments (*American Express Bank FSB v Scali* 142 AD3d 517).

To establish a cause of action for account stated, plaintiff must demonstrate, with evidence in admissible form, that it generated statements for the defendant in the regular course of business, mailed those statements to the defendant on a monthly basis, and that the defendant accepted and retained those statements without objection for a reasonable time prior to the commencement of the action (*Id* at 518).

Here plaintiff has satisfied these requirements by providing documents in admissible form that establish a cause of action for breach of contract and account stated. “Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action [Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 324, (1986) citing *Zuckerman v. City*

of New York, supra, 49 N.Y.2d at p. 562, 427 N.Y.S.2d 595, 404 N.E.2d 718).].”

In opposition to the motion, defendant failed to raise any triable issues of fact. The papers submitted in opposition failed to include an affidavit of defendant disputing that he obtained and used the credit card issued by plaintiff, or that he received and retained, without objection, monthly statements setting forth the balance due on the account. The affirmation in opposition submitted by defendant’s counsel, merely argues that the statements provided fail to show evidence of defendant making significant charges or using the account in a significant way.

However, the court disagrees. Plaintiff has submitted monthly statements mailed to defendant from January 2019 thru and including February 9, 2021, showing both payments and purchases made on the account. Specifically, the statement dated March 2019 shows charges in the amount of \$854.91 for a stay at Camelback Resort in Pennsylvania. The statement dated April 2019 shows a payment in the amount of \$3367.76, as well as charges to JetBlue and Walt Disney World, in the amount of \$3436.58. The statement dated June 2019 shows additional charges of \$4537.97 made in Walt Disney World. The statement dated January 2020 shows charges in the amount of \$3725.88 for airline tickets and other various travel expenses. The statements provided by plaintiff evidence substantial use of the credit card by defendant.

The affidavit submitted by plaintiff in support is from Paula Craven, a Document Control Officer, employed by plaintiff. The affidavit states that she has personal knowledge of plaintiff’s

books and records, including those of defendant and that she has personal knowledge of the procedures for creating and maintaining plaintiff's business records. This type of affidavit has been held to be legally sufficient to establish the admissibility of plaintiff's business records on a motion for summary judgment, [*Capital One Bank v Koralik*, 51 Misc. 3d 74 (App Term, 1st Dept, 2016)].

Based on the forgoing, plaintiff has established entitlement to a judgment as a matter of law.

CONCLUSION

Wherefore, it is

ORDERED plaintiff's motion for summary judgment is granted; and it is further

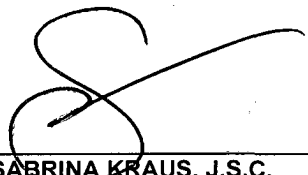
ORDERED plaintiff is awarded a judgment as against Kam Ho, in the amount of \$30,302.04, plus interest from May 28, 2021, plus costs and disbursements as taxed by the Clerk; and it is further

ORDERED the Clerk shall enter judgment accordingly; and it is further

ORDERED that, within 20 days from entry of this order, plaintiff shall serve a copy of this order with notice of entry on defendant, and on the Clerk of the General Clerk's Office (60 Centre Street, Room 119); and it is further

ORDERED that such service upon the Clerk shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the “E-Filing” page on the court’s website at the address www.nycourts.gov/supctmanh); and it is further

This constitutes the decision and order of the court.

<u>4/6/2022</u> DATE	 _____ SABRINA KRAUS, J.S.C.			
CHECK ONE:	<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	NON-FINAL DISPOSITION
	<input checked="" type="checkbox"/>	GRANTED	<input 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"/>	REFERENCE
			<input type="checkbox"/>	DENIED
			<input type="checkbox"/>	SUBMIT ORDER
			<input type="checkbox"/>	FIDUCIARY APPOINTMENT