

Bank of Am. N.A. v Kagan
2022 NY Slip Op 31835(U)
June 9, 2022
Supreme Court, New York County
Docket Number: Index No. 156743/2022
Judge: Lyle E. Frank
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. LYLE E. FRANK PART 11M

Justice

-----X

BANK OF AMERICA, N.A.

Plaintiff,

- v -

HOWARD KAGAN,

Defendant.

-----X

INDEX NO. 156743/2022

MOTION DATE 04/07/2022, 05/12/2022

MOTION SEQ. NO. 001 002

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, 27, 28, 29, 30, 31, 32, 33, 34

were read on this motion to/for DISMISS

The following e-filed documents, listed by NYSCEF document number (Motion 002) 35, 36, 37, 38, 39, 40, 41, 42, 43, 44

were read on this motion to/for MISCELLANEOUS

This action arises out of allegations of a breach of contract in a consumer credit transaction. Plaintiff brings two motions and defendant opposes and cross-moves for alternate relief. The Court will discuss each motion in turn.

Motion Sequence 001

Plaintiff moves to dismiss defendant's counterclaims on various grounds, defendant cross-moves to dismiss the complaint. It must be noted that the parties entered a stipulation of settlement regarding another action commenced in Civil Court, New York County. See NYSCEF Doc. 28. It is undisputed that in that prior action plaintiff sought to recover \$19,378.26 owed by defendant for a consumer credit debt. The stipulation entered by the parties was for the total amount sought in that complaint.

Preliminarily, the Court will address defendant's cross-motion to dismiss the complaint, and plaintiff's motion dismiss the first counterclaim for breach of contract simultaneously.

In considering a motion to dismiss pursuant to CPLR 3211 (a) (7), the court must accept the facts as alleged in a complaint as true, “accord plaintiff the benefit of every possible inference and determine only whether the facts as alleged fit within any cognizable legal theory” (*see Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 409, 414 [2001]).

“In a motion to dismiss pursuant to CPLR 3211 (a) (1), the defendant has the burden of showing that the relied-upon documentary evidence resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim” (*Fortis Fin. Servs., LLC v Fimat Futures USA, Inc.*, 290 AD2d 383, 383 [1st Dept 2002] internal quotations and citations omitted).

Plaintiff moves to dismiss the first counterclaim for breach of contract on the grounds that the contract referenced does not encompass, nor was intended to encompass, the amount due and sought in the instant action. In opposition and in support of its cross-motion to dismiss, defendant contends that the stipulation of settlement conclusively disposes of plaintiff's claims in the instant action. Defendant contends that the plain reading of the stipulation of settlement in the prior matter that “plaintiff agrees to take no further legal action against the defendant (s)” is unambiguous and the initiation of the instant action is a clear breach of that stipulation of settlement.

While the Court disagrees with defendant's position that the stipulation of settlement conclusively resolves the issue raised in this action, the Court finds that this allegation alone, in the form of defendant's counterclaim is sufficient at this stage of the litigation to survive plaintiff's instant motion to dismiss. Similarly, as the Court must for the purposes of the instant motion assume all facts in the complaint are true, plaintiff has pled sufficient facts to state a cognizable claim. Accordingly, plaintiff's motion to dismiss defendant's first counterclaim is denied and defendant's cross-motion to dismiss the complaint is denied.

Plaintiff seeks to dismiss defendant's second counterclaim, that plaintiff violated the Federal Fair Debt Collection Practices Act (FDCPA) on the grounds that as the original creditor, the FDCPA is not applicable. Moreover, plaintiff cites to case law that the original creditor may not be found vicariously liable for the actions of a debt collector, here plaintiff's counsel. The Court finds that plaintiff is the original creditor of the debt and defendant has not rebutted that showing. Defendant has failed to articulate any viable argument to sustain this counterclaim, accordingly the second counterclaim is dismissed.

As to defendant's third and sixth counterclaim, alleges violation of the New York State Consumer Protection Act, plaintiff avers that this statute does not create a private right of action *see Citibank N.A. v Sablic*, 55 AD3d 651, 653 [2d Dept 2008]. Defendant's papers are silent as to this point, as such those counterclaims are dismissed without opposition.

Defendant's fourth counterclaim of unjust enrichment and seventh counterclaim, alleging negligence, are dismissed for failure to state a claim upon which relief can be granted. Moreover, defendant has not substantively opposed that portion of plaintiff's motion.

Defendant's fifth counterclaim alleges breach of the implied covenant of good faith and fair dealing. "In order to plead successfully a breach of an implied covenant of good faith and fair dealing, the plaintiff must allege a specific implied contractual obligation, a breach of that obligation by the defendant, and resulting damage to the plaintiff" (*Tuscan/Lehigh Dairies, Inc. v Beyer Farms, Inc.*, 136 AD3d 799, 802 [2d Dept 2016] internal citations omitted), Defendant has failed to adequately plead that counterclaim, and has not identified any implied contractual obligation by plaintiff that was breached. Accordingly, the motion to dismiss defendant's fifth counterclaim is granted.

Motion Sequence 002

Plaintiff moves, pursuant to CPLR § 3103, to strike defendant's notice to admit.

Defendant cross-moves to compel compliance with the same as well as responses to previously served discovery demands. In reply, plaintiff affirms that questions 1 through 5 in the notice to admit are not the subject of the motion, rather plaintiff contests questions 6 through 8.

The Court finds that question 6 of defendant's notice to admit is an improper question for a notice to admit. The Court finds, as plaintiff contends, that defendant may obtain that information through other discovery devices, such as depositions or interrogatories. Accordingly, question 6 is stricken.

The Court finds question 7 on defendant's notice to admit palpably improper. While the Court makes no determination as to defendant's right to the information sought, the knowledge of plaintiff's counsel at the time a stipulation was negotiated, it is clearly an ultimate issue in dispute in this underlying matter and as such an improper question on a notice to admit.

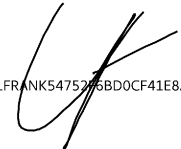
During oral argument, counsel for defendant agreed that a notice for discovery and inspection was a more appropriate mechanism for the discovery sought with respect to question number 8 on the notice to admit. Therefore, question number 8 on plaintiff's notice to admit is hereby stricken as an improper. As to defendant's cross-motion to compel compliance with previously served discovery demands, defendant has not established that good faith attempts were made to resolve outstanding discovery issues. Accordingly, and based on the reason set forth above it is hereby

ORDERED that plaintiff's motion (motion seq 001) is granted in part to the extent that defendants second, third, fourth, fifth, sixth and seventh counterclaims are dismissed; and it is further

ORDERED that defendant’s cross-motion to dismiss complaint is denied; and it is further

ORDERED that plaintiff’s motion (motion seq 002) is granted in that questions 6, 7, and 8 in plaintiff’s notice to admit are hereby stricken, and that the remaining questions in the notice to admit shall be responded to within 20 days after service of this order with notice of entry; and it is further

ORDERED that plaintiff’s cross-motion to compel compliance with previously served discovery demands is resolved in that the parties are to appear for a virtual preliminary conference via Microsoft Teams on August 16, 2022 at 9:30 am.


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6/9/2022
DATE

LYLE E. FRANK, J.S.C.

CHECK ONE:

CASE DISPOSED
GRANTED DENIED
SETTLE ORDER
INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION
GRANTED IN PART
SUBMIT ORDER
FIDUCIARY APPOINTMENT

OTHER
REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: