

**Bank of Am., N.A. v Donohue**

2023 NY Slip Op 30980(U)

March 29, 2023

Supreme Court, New York County

Docket Number: Index No. 153301/2019

Judge: Debra A. James

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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. DEBRA A. JAMES**

**PART 59**

*Justice*

-----X

BANK OF AMERICA, N.A.

Plaintiff,

- v -

PATRICK T DONOHUE,

Defendant.

-----X

INDEX NO. 153301/2019

MOTION DATE 03/29/2023

MOTION SEQ. NO. 002 003

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 002) 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER).

The following e-filed documents, listed by NYSCEF document number (Motion 003) 49, 50, 51

were read on this motion to/for EXTEND - TIME.

ORDER

Upon the foregoing documents, it is

ORDERED that to the extent of seeking an extension of time, to serve and file, nunc pro tunc, his response to plaintiff's motion for summary judgment, the motion of defendant (motion sequence number 003) is granted; and it is further

ORDERED that to the extent that it seeks dismissal of the counterclaim for breach of the Trust Agreement, the motion of plaintiff for summary judgment is granted, and such counterclaim is dismissed; and it is further

ORDERED that to the extent that it seeks summary judgment on its claim of breach of credit card agreement, the motion of

plaintiff for summary judgment is granted on the issue of liability only pursuant to CPLR 3212(c); and it is further

ORDERED and ADJUDGED that the issue of damages to be assessed against defendant Patrick T. Donohue is referred for a hearing and determination pursuant CPLR § 4317(b) to a Special Referee; and it is further

ORDERED that within sixty (60) days from the date of this Order the plaintiff shall cause a copy of this order with notice of entry, including proof of service thereof, to be filed with the Special Referee clerk (Room 119M, 646-386-3028 or [spref@nycourts.gov](mailto:spref@nycourts.gov)) to arrange a date for a reference to determine pursuant to CPLR 4317 (b); and it is further

ORDERED and ADJUDGED that pursuant to CPLR § 4319, the Clerk is directed to enter judgment in favor of plaintiff BANK OF AMERICA, N.A. and against defendant PATRICK T. DONOHUE in accordance with the report of the aforementioned Special Referee without any further application.

#### DECISION

Plaintiff has demonstrated no prejudice by defendant's late service of responsive papers, which were filed on the return date of plaintiff's motion for summary judgment, particularly in light plaintiff's having declined an opportunity to reply. See Dinnocenzo v Jordache Enterprises, Inc., 213 AD2d 219 (1<sup>st</sup> Dept 1995).

Defendant submits no evidence, including any provisions of the subject Trust Agreement that he claims was breached, in either his counterclaim, which, in any event, is not verified by defendant, or in his opposition to plaintiff's motion to dismiss. Given the absence of such factual allegations, his counterclaim fails. See Berdych v Bell Aerospace Corp., 19 AD2d 582 (4<sup>th</sup> Dept 1963). Moreover, the affirmation of defendant's attorney is inadmissible as evidence that raises any issue of fact that counters plaintiff's affidavit that it performed all of its obligations under the Trust Agreement. Therefore, plaintiff is entitled to a judgment dismissing the counterclaim.

Plaintiff has not prima facie established its entitlement to summary judgment on an account stated, as it has furnished neither documentary evidence of any invoices nor other proof as to precisely when and whether such invoices were properly addressed and mailed. As plaintiff has not prima facie established damages based on an account stated, it may not recover on such cause of action. See Morrison Cohen Singer & Weinstein, LLP v Brophy, 19 AD3d 161, 161-162 (1<sup>st</sup> Dept 2005). However, as defendant raises no issue of fact with respect to the prima facie evidence that plaintiff submits demonstrating that defendant breached the credit card agreement, plaintiff is entitled to summary judgment as to liability and an assessment of damages by way of an evidentiary hearing. See Northway Mall

Associates v Bernlee Realty Corp, 90 AD2d 739 (1<sup>st</sup> Dept 1982) and  
Lloyd v Imperial Auto Collision, Inc, 120 AD2d 354, 354-355 (1<sup>st</sup>  
Dept 1986).

*Debra A. James*

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3/29/2023

DATE

DEBRA A. JAMES, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE