

Bank of Am., N.A. v Donohue

2023 NY Slip Op 31001(U)

March 30, 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**

<p>PRESENT: <u>HON. DEBRA A. JAMES</u></p> <p align="center"><i>Justice</i></p> <p>-----X</p> <p>BANK OF AMERICA, N.A.,</p> <p align="center">Plaintiff,</p> <p align="center">- v -</p> <p>PATRICK T DONOHUE,</p> <p align="center">Defendant.</p> <p>-----X</p>	<p>PART 59</p> <p>INDEX NO. <u>153301/2019</u></p> <p>MOTION DATE <u>03/29/2023</u></p> <p>MOTION SEQ. NO. <u>002 003</u></p> <p>ORDER - AMENDED (MOTION RELATED)</p>
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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, 52 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, 53 were read on this motion to/for EXTEND - TIME.

ORDER

ORDERED that the Order dated March 29, 2023, resolving motion sequence number 003 and 004 (NYSCEF Document Numbers 52 and 53), is VACATED, RESETTLED AND CORRECTED, pursuant to CPLR § 5019(a), as follows:

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, 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) 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

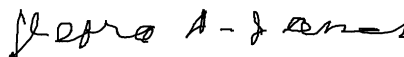
Plaintiff has demonstrated no prejudice by defendant's late service of responsive papers, which were filed on the

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 (1st Dept 1995).

Defendant submits no evidence, including any provision 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 (4th 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 (1st Dept 2005). However, as defendant raises no issue of fact with respect to

the prima facie evidence that plaintiff submits of the breach by defendant of the credit card agreement, in failing to pay monies he borrowed thereunder, plaintiff is entitled to summary judgment as to liability and an assessment of monetary damages, upon proof submitted at an evidentiary hearing. See Northway Mall Associates v Bernlee Realty Corp, 90 AD2d 739 (1st Dept 1982) and Lloyd v Imperial Auto Collision, Inc, 120 AD2d 354, 354-355 (1st Dept 1986).



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<u>3/30/2023</u>			<u>DEBRA A. JAMES, J.S.C.</u>	
DATE				
CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION
	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	GRANTED IN PART
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	SUBMIT ORDER
			<input type="checkbox"/>	FIDUCIARY APPOINTMENT
			<input checked="" type="checkbox"/>	REFERENCE
			<input type="checkbox"/>	OTHER