

LVNV Funding, LLC v Demasi
2024 NY Slip Op 35104(U)
December 4, 2024
Supreme Court, Dutchess County
Docket Number: Index No. 2022-51075
Judge: Christi J. Acker
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To commence the 30-day statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF DUTCHESS**

-----X
LVNV FUNDING, LLC,

Plaintiff,

-against-

PATRICIA A. DEMASI,

Defendant.

-----X

ACKER, J.S.C.

DECISION AND ORDER

Index No.: 2022-51075

The Court considered NYSCEF Doc. #s 5-14, 18-19, 27-30 and 33 in connection with Plaintiff LVNV Funding LLC’s (hereinafter “Plaintiff”) motion for summary judgment against Defendant Patricia A. Demasi (hereinafter “Defendant”).

This is an action by Plaintiff seeking to collect on a credit card debt allegedly owed by Defendant. The Complaint alleges that Defendant entered into a credit card agreement with Citibank, N.A. (“Original Creditor”) and that under the terms of that agreement, Defendant made purchases and was obligated to repay same. The Complaint also lists the “chain of title” by which Plaintiff came to own the debt, with the date of sale/assignment as follows:

- Citibank, N.A., February 22, 2022 [original creditor and date of sale/assignment]
- Resurgent Acquisitions LLC February 22, 2022 [debt seller and date of sale/assignment]¹

Plaintiff maintains that it is owed the sum of \$7,533.80, with interest from September 19, 2018, together with costs and disbursements. The Complaint asserts two causes of action, one

¹ Although not specified in the Complaint, according to Plaintiff’s motion submissions, Resurgent Acquisitions LLC sold Defendant’s debt to Plaintiff on February 22, 2022.

for breach of the agreement and one for an account stated. *Pro se* Defendant submitted a letter dated April 25, 2022 stating her “answers” to the lawsuit, which, in essence, assert that she does not owe any money to Plaintiff.

Plaintiff moved for summary judgment on or about June 12, 2023. In compliance with CPLR 3212(j), the *pro se* Defendant was mailed an “Important Notice: Motion for Summary Judgment” (NYSCEF Doc. #10). That Notice advised Defendant that she must appear on July 17, 2023 in order to oppose Plaintiff’s motion. While Defendant did not appear on that date, she did appear on the adjourned date of August 31, 2023 and the parties were thereafter ordered to mediation. When mediation proved unsuccessful, the Court issued an Order dated December 20, 2023, which provided for discovery to be completed no later than March 5, 2024 and that after said date, any further discovery would be deemed waived.

A conference was held on March 13, 2024, at which time the Court issued a briefing schedule for Plaintiff’s pending summary judgment motion and set a settlement conference for August 14, 2024. Defendant did not oppose the motion prior to the return date, but made multiple submissions after the motion had been fully submitted. Given Defendant’s *pro se* status, the Court directed Plaintiff to submit a reply to the Defendant’s belated opposition. The motion is now fully submitted.

In support of its motion, Plaintiff provides an “Affidavit of Facts and Sale of Account of Original Creditor” by Christina Robinette (“Robinette Affidavit”), who states that she is an employee of Citibank, the Original Creditor. According to the Robinette Affidavit, the Original Creditor sold a pool of defaulted/charged off accounts to Resurgent Acquisitions LLC (“Debt Buyer”), including Defendant’s Account. Robinette avers that the Original Creditor and

Defendant were parties to a credit agreement (“Agreement”) and annexes a 10 page Agreement that is undated and does not reflect Defendant’s name.² The Robinette Affidavit further indicates that at the time of sale, Defendant owed the amount set forth in the exhibits annexed thereto. These exhibits include Defendant’s account statements from on or about October 19, 2017 through a final statement with a closing date of September 19, 2018. This last statement shows a balance due of \$7,533.80, which is the amount sought in the Complaint.

The motion also includes an “Affidavit of Purchase and Sale of Account by Debt Seller,” sworn to by Dianna Yocom (“Yocom Affidavit”). Yocom avers that she is an employee of Resurgent Capital Services and an authorized representative of Resurgent Acquisitions LLC (“Debt Seller”). Based upon her review of and personal knowledge of the books and records of the Debt Seller, she confirms that Defendant’s Account was sold to Plaintiff on February 22, 2022. Plaintiff further submits an “Affidavit of Facts and Purchase of Account by Debt Buyer Plaintiff” sworn to by Arlah Klugh (“Klugh Affidavit”). Klugh is an employee of Resurgent Capital Services, who is the servicer for Plaintiff. The Klugh Affidavit provides similar assertions to that of the Robinette Affidavit, including that Defendant and Original Creditor were parties to a Credit Agreement, under which Defendant agreed to pay the Original Creditor. Klugh avers that Defendant defaulted on the Account and at the time of the sale, a demand for payment had been made and the outstanding balance remained due and owing. While Klugh states that a copy of the Agreement or document(s) evidencing the Agreement are annexed, the only annexed document is a copy of one of Defendant’s account statements, with a closing date of September 19, 2018, showing a balance due of \$7,533.80.

² The purported Agreement is prefaced with a “Fact Sheet” that contains Defendant’s name, but that document indicates that it is “Page 2 of 2” and there is no corresponding “Page 1 of 2.”

In opposition, Defendant provides multiple copies of various letters and “answers” that were previously submitted, including handwritten notations on pages from Plaintiff’s motion papers and affidavits. As will be discussed below, the Court did not need to consider these submissions in deciding this motion.

The movant for summary judgment “bears the initial burden of demonstrating its prima facie entitlement to the requested relief.” *Roos v. King Constr.*, 116 NYS3d 344, 346 [2nd Dept. 2020], citing *Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 851, 853. Failure to make the initial showing “requires denial of the motion, regardless of the sufficiency of the opposition papers.” *Junger v. John V. Dinan Assoc., Inc.*, 164 AD3d 1428, 1429 [2nd Dept. 2018], citing *Winegrad, supra*.

The Complaint asserts causes of action for an account stated and for breach of contract. “An account stated is an agreement between parties, based upon their prior transactions, with respect to the correctness of the account items and the specific balance due.” *Citibank, N.A. v. Abraham*, 138 AD3d 1053, 1056 [2d Dept. 2016]. “In order to establish a prima facie case to recover on an account stated, the plaintiff must establish that it submitted invoices and that the defendant received and retained the invoices without objection for an unreasonable period of time.” *Bank of Am., N.A. v. Ball*, 188 AD3d 974 [2d Dept. 2020]. However, “[a]bsent evidence that the billing statements were mailed to the defendant, the plaintiff fail[s] to establish its prima facie entitlement to judgment as a matter of law on the cause of action to recover on an account stated.” *Id.* at 975.

Despite submitting three separate Affidavits, Plaintiff offers no proof that billing statements were mailed to Defendant and were retained without objection. Indeed, while the

Robinette Affidavit includes a paragraph specific to a claim for an account stated, that box is not checked. As such, Plaintiff's reliance on *Cach, LLC v. Aspir*, 137 AD3d 1065, 1066 [2d Dept. 2016] is misplaced. There, the plaintiff submitted "an affidavit from a custodian of its records, which records included the books and records of the original creditor, who averred that the account statements were mailed to the defendant advising him of his delinquencies and demanding payment, and the defendant never challenged or disputed the validity of the amount owed." As Plaintiff here provides no such proof, it fails to establish its *prima facie* entitlement to judgment as a matter of law on the cause of action to recover on an account stated. *Bank of Am., N.A. v. Ball, supra*.


Moreover, Plaintiff's submissions do not contain evidence that amendments to the credit card agreement were mailed to Defendant. As such, Plaintiff similarly fails to establish its *prima facie* entitlement to judgment as a matter of law on its breach of contract cause of action. *Id.* Having failed to make its *prima facie* showing, Plaintiff's motion is denied regardless of the sufficiency of the opposing papers. *Martinez v. Orange Reg'l Med. Ctr.*, 203 AD3d 910, 913 [2d Dept. 2022]. Therefore, it is

ORDERED that Plaintiff's motion for summary judgment is DENIED; and it is further

ORDERED that the parties shall appear for a settlement conference on January 17, 2025 and trial is scheduled for March 24, 2025 at 11:00 a.m.

The foregoing constitutes the Decision and Order of the Court.

Dated: Poughkeepsie, New York
December 4, 2024


CHRISTI J. ACKER, J.S.C.

To: Plaintiff's counsel via NYSCEF
Via Regular Mail

Patricia A. DeMasi
1214 Beekman Road
Hopewell Junction, 12533