

American Express Natl. Bank v McGarry
2024 NY Slip Op 35402(U)
March 6, 2024
Supreme Court, Albany County
Docket Number: Index No. 905076-23
Judge: Susan M. Kushner
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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY**

AMERICAN EXPRESS NATIONAL BANK,

Plaintiff,

-against-

**DECISION and ORDER
Index No. 905076-23**

**ANNEMARIE MCGARRY
a/k/a ANNEMARIE M. MCGARRY,**

Defendant.

APPEARANCES:

FOR PLAINTIFF: **Anthony J. Migliaccio, Esq.**

FOR DEFENDANT: **Paul Ryan, Esq.**

Before the Court is Plaintiff's Motion for Summary Judgment. (NYSCEF #7). The Plaintiff commenced this action by filing a Summons and Complaint on June 13, 2023. (NYSCEF # 1). Defendant was served on June 20, 2023 and Proof of Service was filed on June 26, 2023. (NYSCEF #4). Defendant filed an Answer on July 10, 2023. (NYSCEF #6). The Motion for Summary Judgment was returnable December 19, 2022. Defendant failed to respond to the Motion.

Plaintiff contends the Defendant breached the terms of a credit card agreement by failing to pay \$16,368.97 that was due and owing. Plaintiff also maintains the amount claimed is based upon an account stated. Finally, Plaintiff contends even in the absence of a contract or account stated, it should have recovery against Defendant due to unjust enrichment. (NYSCEF #10)

For Plaintiff to meet its initial burden, it must present evidence admissible in form demonstrating the essential elements of its cause of action for breach of contract. Specifically, Plaintiff must show, "the existence of the contract, the performance of its obligations under the contract, the failure of the defendant to perform its obligations and damages resulting from defendant's breach." *GRJH, Inc., v. 3680 Properties, Inc.*, 179 AD3d 1177, 1178 (Third Dept., 2019).

With respect to credit card debt, Plaintiff must show the existence of an agreement between the parties, issuance of the credit card to Defendant's address, use of the credit card, mailing of the account statements to Defendant's address, retention by Defendant of the statements and payments on the account by the Defendant. *Citibank (S.D.), N.A. v. Roberts*, 304 AD2d 901, 902 (Third Dept., 2003).

Despite the absence of a written credit agreement, Plaintiff may prove the existence of an agreement by demonstrating the issuance of a credit card to Defendant, which is an offer of credit. Defendant accepts the offer of credit and establishes the existence of a contract and the requirement to repay the utilized credit when he or she makes use of the card. *Citibank (South Dakota) N.A., v. Brown-Serulovic*, 97 AD3d 522, 524 (Second Dept., 2012), citing *Feder v. Fortunoff, Inc.*, 114 AD2d 399 (Second Dept., 1985). Defendant breaches the agreement by failing to repay the debt incurred using the credit card.

In the instant action, Plaintiff has the burden of presenting proof in admissible form to demonstrate the absence of a triable issue of fact. Plaintiff has failed to do so. Plaintiff fails to include an agreement signed by Defendant. Plaintiff has attached a copy of the Card agreement, but it was not attached to the Plaintiff's employee's Affidavit of Facts. (NYSCEF #11). Thus, no foundation for its admissibility has been laid. In addition, Plaintiff fails to provide evidence demonstrating when the credit card was mailed to Defendant.

Plaintiff provides 2 billing statements, the one dated August 20, 2023 is clearly referenced in the Employee's Affidavit of Facts. (NYSCEF #17, ¶4). Based on the Affidavit, this statement is admissible. However, it only establishes the amount Plaintiff alleges Defendant owes. The other statement dated February 17, 2023 (NYSCEF #16), is not specifically mentioned in the Employee's Affidavit and because it is not attached to that Affidavit, is inadmissible. It may demonstrate use of the card and payments by Defendant. Had this statement been filed in admissible form, it may have established the existence of a contract. Because Plaintiff's Motion for Summary Judgment fails to present admissible evidence on each element of its breach of contract claim, it must be denied.

On the "account stated" cause of action, the legal elements are:

An account stated is an agreement, express or implied, between the parties to an account based upon prior transactions between them with respect to the correctness

of account items and a specific balance due on them. An agreement may be implied where a defendant retains bills without objecting to them within a reasonable period of time, or makes partial payment on the account. *Citibank (S.D.) N.A. v. Cutler*, 112 AD3d 573, 574 (Third Dept., 2013) (internal citations omitted).

An "account stated" may apply to an unpaid credit card balance. *Citibank (South Dakota), N.A., v. Keskin*, 121 AD3d 635, 636 (Second Dept., 2014)

Here, Plaintiff has failed to demonstrate the existence of the account and that periodic billing statements were sent to Defendant and that Defendant made payments on the account. As noted above, Plaintiff submitted only 2 Billing Statements, one from August 2023 and one from February 2023 and only the August 2023 Statement is admissible. Plaintiff has not shown Defendant regularly used the credit card, received and retained the monthly billing statements without objecting to them and made regular payments thereon. Plaintiff has failed to establish an account stated. (See *Citibank (South Dakota), N.A., v. Keskin, supra*). Plaintiff having failed to offer sufficient proof demonstrating an account stated is not entitled to summary judgment on that ground.

Plaintiff also seeks recovery on the ground of unjust enrichment. Unjust enrichment is a quasi-contract action which only operates in the absence of an actual contract on the theory that it would be unjust for Defendant to retain that which is sought to be recovered. "No claim lies 'where the parties have entered into a contract that governs the subject matter' in dispute". *Colgate Inn, LLC v. Eberhardt, LLC*, 206 AD3d 1197, 1200 (Third Dept., 2022), *Clark-Fitzpatrick, Inc. v. Long Is. R. R. Co.*, 70 NY2d 382, 388-9 (1987). In this matter, Plaintiff alleges it has a contract with Defendant. Plaintiff failed to provide the necessary proof to warrant summary judgment. Plaintiff is not entitled to summary judgment for unjust enrichment because it failed to establish the existence of said contract and breach thereof for the purposes of the instant motion. Plaintiff is not entitled to summary judgment as a matter of law on its unjust enrichment claim.

Now, therefore, it is

ORDERED that the Plaintiff's Motion for Summary Judgment is denied.

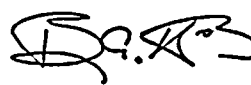
This constitutes the Decision and Order of the Court. The original Decision and Order shall be e-filed by the Court; this shall constitute entry. Plaintiff shall serve Notice of Entry on Defendant.

DATED: March 6, 2024

ENTER



SUSAN M. KUSHNER, A.J.S.C.



03/08/2024

Papers considered:

- (1) *Summons and Complaint filed June 13, 2023. (NYSCEF #1)*
- (2) *Affidavit of Service (NYSCEF # 4)*
- (3) *Answer filed July 10, 2023. (NYSCEF # 6)*
- (4) *Motion for Summary Judgment with Supporting Papers filed November 14, 2023. (NYSCEF # 7-12, 15-20).*