American Express Natl. Bank v Taylor
2024 NY Slip Op 35574(U)
March 26, 2024
Supreme Court, Columbia County
Docket Number: Index No. E012021016687
Judge: Richard L. Mott
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF COLUMBIA

AMERICAN EXPRESS NATIONAL BANK,
Plaintiff,

-against-

MICHAEL TAYLOR a/k/a MICHAEL RAYMOND TAYLOR, Sr. a/k/a MICHAEL RAY,
Defendant.

DECISION/ORDER

Index #: E012021016687

Richard Mott, J.S.C.

Motion Return Date: March 19, 2024

APPEARANCES:

Plaintiff:
Krista Rose, Esq.
Rausch Sturm, LLP
250 N. Sunnyslope Road, Suite 300
Brookfield, WI 53005

Defendant:
Richard C. Miller, Jr., Esq.
Law Offices of Richard C. Miller, Jr., PLLC
8 Airline Drive, Suite 201
Albany, NY 10965

Mott, J.

In this action based upon alleged breach of contract, Defendant, Michael Taylor, moves to strike the Note of Issue filed by Plaintiff, American Express National Association (hereinafter "American Express"). Additionally, both parties move for summary judgment.

BACKGROUND

This action arises from an alleged breach of a credit card agreement. Taylor applied for an American Express card on behalf of his limited liability company, Creative Sports Concepts, LLC ("CSC"). He believed he was signing the Cardmember Agreement only in his capacity as member of CSC, not as an individual. American Express seeks to hold Taylor liable in his individual capacity, relying upon certain language in the Cardmember Agreement. In the section entitled, "Words we use in the Agreement", it defines the words "you' and "your" as "the Basic Cardmember and the Company". The Agreement adds, "You agree, jointly and severally, to be bound by the terms of this Agreement". When an alleged default occurred, American Express brought this action against Taylor in his individual capacity, claiming that he is jointly and severally liable for CSC's debt under the above-quoted terms. Taylor relies on General Obligations Law § 5-701(a)(1) for the proposition that he cannot be held individually liable because he only signed the Cardmember Agreement in his capacity as member of CSC.

PLAINTIFF'S CONTENTIONS

American Express seeks to hold Taylor personally liable, in breach of contract and/or for an account stated, as he agreed to be jointly and severally liable along with CSC under the definition of "You" and "Your" as described in the Cardmember Agreement. The Cardmember Agreement states that "[W]hen you…use the Account (or sign or keep a card), you agree to the terms of the Agreement". Thus, American Express asserts that Taylor agreed to be personally liable because he used the Account upon the stated terms and conditions. American Express has submitted the contract, evidence of its performance and the breach of contract through default in payment. Additionally, it demonstrates that an account was rendered to Taylor to which Taylor failed to object. Consequently, it seeks summary judgment as to both causes of action.

American Express opposes the motion to strike its Note of Issue claiming it was appropriately filed by the Court's deadline. The Note of Issue inadvertently named CSC as a party therein, and American Express provides a proposed amended Note of Issue which does not include CSC. Additionally, American Express asserts that Taylor's submissions are procedurally defective for failure to include a Statement of Material Facts.

DEFENDANT'S CONTENTIONS

Taylor asserts that it was not clear to him from the single sentence in the definitions portion of the Cardmember Agreement that he was agreeing to be personally liable for the debts of his limited liability company. He argues that he electronically signed the Cardmember Agreement only in his capacity as member of CSC. American Express did not offer a second signature line, wherein he could sign as an individual or acknowledge becoming a guarantor of CSC's debt. Taylor notes that a party seeking to impose personal liability on a corporate agent, who signs an agreement in a representative capacity, must demonstrate that the agent had the clear and explicit intent to be personally bound by the agreement. See, *Savoy Record Co. v Cardinal Export Corp.*, 15 NY2d 1 (1964). Additionally, GOL § 5-701(a)(1) requires that an agreement which, by its terms is not to be performed within one year, is void unless in writing and subscribed by the party to be charged. Taylor claims the Cardmember Agreement is one that is not intended to be performed within one year and he did not subscribe it in his individual capacity. Accordingly, the Cardmember Agreement is void as to Taylor personally.

Taylor contends that he was not obligated to provide a Statement of Material Facts because there has been no specific direction from this Court, pursuant to 22 NYCRR § 202.8-g(a), to provide a Statement of Material Facts.

DISCUSSION/SUMMARY JUDGMENT STANDARD

The proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact. *Alvarez v Prospect Hosp.,* 68 NY2d 320, 324 (1986). Failure of the moving party to make such *prima facie* showing requires denial of the motion, regardless of the sufficiency of the opposition papers. Id., *Winegrad v New York Univ. Med. Ctr.,* 64 NY2d 851, 853 (1985). Once this showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action. Id.; *Zuckerman v City of New York,* 49 NY2d 557, 562 (1980).

"When considering a motion for summary judgment, courts must view the evidence in a light most favorable to the nonmoving party and accord that party the benefit of every reasonable inference from the record proof, without making any credibility determinations. Furthermore, summary judgment can only be granted when the moving party has tendered sufficient evidence to demonstrate the absence of any material issues of fact and then only if, upon the moving party's meeting of this burden, the non-moving party fails to establish the existence of material issues of fact which require a trial of the action" (*American Food & Vending Corp. v Amazon.com, Inc.*, 214 AD3d 1153, 1154-1155 [3d Dept., 2023]; *Davis v Zeh*, 200 AD3d 1275, 1278 [3d Dept., 2021]; *Stanhope v. Burke*, 220 A.D.3d 1122, 1123 [3d Dept., 2023]).

DISCUSSION/BREACH OF CONTRACT

The elements of a breach of contract claim are the existence of a contract, performance by the plaintiff, breach by the defendant and resulting damage. *McCormick v Favreau*, 82 AD3d 1537, 1541(3d Dept., 2011); *Genger v Genger*, 663 Fed. Appx. 44, 48 (2d Cir., 2016); *Adult Beverage Co., LLC v Reinhardt*, 2017 N.Y. Misc. LEXIS 1438 (Sup. Ct., NY Co., 2017). Here, the submissions by American Express establish those elements and thus it has met its initial burden of demonstrating entitlement to judgment as a matter of law, shifting the burden to Taylor to demonstrate an issue of fact.

Taylor cites to *Y.B. Assoc. Group, LLC v Rubin*, 216 AD3d 851, 853 (2d Dept., 2023), which holds that an agent executing a contract on behalf of a disclosed principal "is not liable for a breach of the contract unless it clearly appears that he or she intended to bind himself or herself personally" and to *Salzman Sign Co. v Beck*, 10 NY2d 63, 67 (1961), wherein the Court of Appeals noted that where individual responsibility is demanded, the "nearly universal practice is that the officer signs twice - once as an officer and again as an individual". The *Salzman* Court stated, "[T]here is great danger in allowing a single sentence in a long contract to bind individually a person who signs only as a corporate officer". The Court added, "[W]e think the better rule is…that the statement in the contract purporting to bind the signing officer individually is not sufficient for Statute of Frauds purposes without some direct and explicit evidence of actual intent". Id. Likewise, in *Savoy Record Co. v Cardinal Export Corp.*, 15 NY2d 1, 4 (1964), the Court of Appeals held that there must be clear and explicit evidence of "the agent's intention to substitute or superadd his or her personal liability for, or to, that of his or her principal". The *Savoy Record* Court explained, "Designed to safeguard against false claims of agreement, that statute is based upon the sound consideration of policy that, in a situation such as the present, an agent should be protected against the plausible claim, which might often be falsely asserted, that he engaged to insure his principal's performance". Id, at 6. That Court noted that the obligation of a guarantor is a heavy one, and instructed courts to "refrain from foisting such an obligation upon a party…who simply signs as an agent, absent the clear and unequivocal evidence, to be gathered from the writing itself, that he intended to assume such a liability". Id, at 6-7. See also, *Ridgeline Constructors, Inc. v Elmira Glass Technology Corp.,* 183 AD2d 1041, 1044 (3d Dept., 1992).

Under the terms of the Cardmember Agreement, a signature is not required to bind the individual, as use of the Account, or signing or keeping a card, is sufficient to trigger the personal liability of the agent. Courts have held this sufficient to bind the agent. See, *American Express Bank, FSB v Dechon*, 41 Misc.3d 1226(A) (Sup. Ct., Queens Co. 2013); *American*

Express Bank v Costas Katsifas ND Kafka Constr., Inc., 2018 N.Y. Misc. LEXIS 29795 (Sup. Ct., Queens Co., 2018). In *American Express Bank, FSB v Weiss*, 188 AD3d 632, 633-634 (2d Dept., 2020), under similar circumstances, the Appellate Division upheld the grant of summary judgment to American Express but did so because the defendant's affidavit in opposition was deemed conclusory, failing to provide "the necessary evidentiary details to raise a triable issue of fact as to whether the individual defendant was personally liable for the monies due…". *Weiss*' motion opposition relied upon the allegation that he had applied for the American Express card solely as an employee and therefore should not be personally liable. He averred that no bills had ever been sent to his home address, as would be expected for a personal debt. He did not dispute using the card.[1]

Here, Taylor's affidavit recites that his intent was to apply for a credit card for CSC. He avers that he read the Cardmember Agreement to understand the terms and conditions related to this account and found no language which created an individual obligation under a personal guaranty, nor a separate signature line to sign as personal guarantor. In previous loan applications, Taylor had been asked to sign a loan agreement twice, once as agent and another indicating his agreement to personal liability. He signed this Cardmember Agreement only as member of CSC[2]. Taylor points out that the Cardmember Agreement is 11 pages of single-spaced, small font print. He avers that even had he read the sentence which says, "You agree, jointly and severally, to be bound by this agreement", he would not have understood it to impose a personal obligation. This is the only place in the entire Agreement that addresses his personal liability. No effort is made by American Express to highlight this section or make it stand out by

[1] *American Express Bank, FSB v Weiss,* et al., Dutchess County Index # 2017-50657.
[2] Neither side has submitted a copy of the online application for the card. The Court notes that Taylor had made a discovery demand for a copy of said application. American Express did not provide same in response, instead it "reserve[d] the right to supplement or amend [its] response at a later date".

using bolder type, larger font, or all capital letters. Consequently, he faults American Express for intentionally declining to use a clear and conspicuous method, such as a second signature line, for his failure to appreciate the obligation of personal liability ascribed to him by the Cardmember Agreement. To the extent that the Cardmember Agreement's imposition of personal liability is ambiguous, any ambiguity in a contract must be construed against the drafter. See, *White Knight Constr. Contrs., LLC v Haugh*, 216 AD3d 1345, 1348 (3d Dept., 2023); *Uribe v Merchants Bank of N.Y.*, 91 NY2d 336, 341 (1998).

Taylor's averments are sufficient to distinguish this matter from *American Express Bank, FSB v Weiss,* supra, and create an issue of fact as to Taylor's intent to be personally bound, and whether the Statute of Frauds is applicable herein. Cf., *Delly v Arvy Realty*, 2023 N.Y. Misc LEXIS 23557 (App. Term, 2d Dept., 2023); *166-20 Union Tpk. LLC v Tavak LLC*, 2023 N.Y. Misc. LEXIS 11985 (Sup. Ct., Bronx Co., 2023), (wherein the Court declined to hold the agent of a LLC personally liable, noting that the factors to be considered include whether the guaranty is a separate document, whether the guaranty refers to the individual and whether the signature line indicates that the signatory is signing in his or her individual capacity).

DISCUSSION/ACCOUNT STATED

An account stated is an agreement between parties to an account based upon prior transactions between them with respect to the correctness of the account items and balance due. *Whiteman, Osterman & Hanna, LLP v Oppitz,* 105 AD3d 1162 (3d Dept., 2013). The agreement may be express or implied from the retention of an account rendered for an unreasonable period of time without objection and from the surrounding circumstances. *Jim-Mar Corp. v. Aquatic Constr.,* 195 A.D.2d 868, 869 (3d Dept., 1993). American Express' submissions are sufficient to demonstrate its entitlement to judgment, shifting to Taylor the burden of showing the existence of an issue of fact.

A defendant opposing a motion for summary judgment must tender evidence of circumstances tending to show a contrary inference. Id., at 870. An account stated cannot be used to create liability where none exists. See, *Gurney, Becker & Bourne, Inc. v Benderson Dev. Corp.,* 47 NY2d 995, 996 (1979); *M. Paladino, Inc., v J. Lucchese & Son Contr. Corp*., 247 AD2d 515, 516 (2d Dept., 1998). Based on Taylor's submissions, the Court has determined that an issue of fact exists as to whether Taylor may be held personally liable, consequently summary judgment cannot be granted on the account stated cause of action.

DISCUSSION/PROCEDURAL DEFECTS

Taylor's objection to the Note of Issue is that it names CSC as a party, which is not true, and that it indicates "waived" next to "Discovery proceedings now known to be necessary completed". Taylor served various discovery demands on September 19, 2023, in compliance with the discovery schedule set forth in this Court's Preliminary Conference Stipulation and Order issued on September 5, 2023. Responses to those demands were directed to be served by October 19, 2023. No responses were served at that time. Counsel for Taylor did not contact Plaintiff's counsel regarding same until two months later, on December 20, 2023. Plaintiff's counsel advises that she was hired and trained only recently, and then made every effort during the holiday period to provide responses to Taylor's demands. She then filed the contested Note of Issue by the January 4, 2024, deadline. The Preliminary Conference Stipulation and Order directed counsel to appear for a pre-trial conference on January 9, 2024. Counsel for Taylor failed to appear. The Court could have granted a default judgment to American Express pursuant to 22 NYCRR § 202.27(a) but did not. Had Taylor appeared, he could have requested time to conduct further discovery. Upon his failure to appear, the Court set a trial date of May 8, 2024. Because Taylor waited two months to contact Plaintiff's counsel regarding the outstanding discovery, and because he failed to appear at the pre-trial conference, the Court declines to strike the Note of Issue and will accept, *nunc pro tunc*, the proposed Amended Note of Issue submitted by American Express.

Finally, this Court's Individual Rules of Practice require a Statement of Material Facts on any motion for summary judgment, or a responsive Statement of Material Facts in opposition to a summary judgment motion. Thus, Taylor was required to submit such Statement in support of his motion and in opposition to American Express' motion. While failure to submit the Statement of Material Facts is a sufficient ground for denial of Taylor's motion and/or the granting of American Express' motion, it is clear from Taylor's submissions that Taylor did not intend to default on the motion. The Court perceives the failure to file a Statement of Material Facts as a misunderstanding and will excuse the lack of same in this instance.

Any other contentions of the parties have been considered and are found to be without merit or rendered academic.

Accordingly, it is hereby

ORDERED, that the motion to strike the Note of Issue is denied; and it is further

ORDERED, that American Express is directed to file forthwith the proposed Amended Note of Issue which the Court accepts, *nunc pro tunc*; and it is further

ORDERED, that the motions for summary judgment are denied in their entirety.

This matter remains scheduled for a non-jury trial commencing on May 8, 2024.

This shall constitute the Decision/Order of the Court. The Court is e-filing this Decision/Order, satisfying the provisions of CPLR §2220 regarding filing and entry thereof, but that does not relieve the parties relative to service upon opposing counsel with notice of entry thereon.

ENTER

Dated: March 26, 2024
Hudson, NY

Richard Mott, J.S.C.

Papers considered:

1. Notice of Motion dated January 19, 2024; Affirmation of Richard C. Miller, Jr., Esq., in Support, dated January19, 2024, with Exhibits A-L.
2. Affirmation of Krista M. Rose, Esq., in Opposition, dated January 23, 2024, with Exhibits A-C.
3. Reply Affirmation of Richard C. Miller, Jr., Esq., dated February 8, 2024.
4. Notice of Motion dated February 19, 2024; Affidavit of Facts of Sean P. Hamilton in Support, dated February 16, 2024; Affirmation of Krista Rose, Esq., in Support dated February 19, 2024, with Exhibits A-C; Memorandum of Law in Support and Statement of Material Facts.
5. Notice of Motion dated February 20, 2024; Affidavit of Facts of Michael Taylor dated February 16, 2024, with Exhibits A-B; Affirmation of Richard C. Miller, Jr., Esq., in Support, dated February 20, 2024, with Exhibits A-B; and Memorandum of Law in Support.
6. Affirmation of Krista Rose, Esq., in Opposition, dated March 5, 2024; and Memorandum of Law in Opposition.
7. Affidavit of Michael Taylor in Opposition, dated March 5, 2024, with Exhibits A-B; and Attorney's Affirmation in Opposition of Richard C. Miller, Jr., Esq., dated March 5, 2024.
8. Reply Affirmation of Krista M. Rose, Esq., dated March 11, 2024.
9. Reply Affirmation of Richard C. Miller, Jr., Esq., dated March 11, 2024.