

Midland Funding LLC v Naughton
2025 NY Slip Op 35409(U)
January 2, 2025
Supreme Court, Westchester County
Docket Number: Index No. 67929/2017
Judge: Nancy Quinn Koba
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To commence the 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 WESTCHESTER

-----X
MIDLAND FUNDING LLC,

Plaintiff,

-against-

DECISION & ORDER

Index No. 67929/2017

Mot. Seq. No. 1

ERICA NAUGHTON,

Defendant.

-----X
QUINN KOBA, J.

By notice of motion (the "Motion"), plaintiff seeks an order, pursuant to CPLR 3212, directing entry of summary judgment for plaintiff upon the causes of action set forth in the complaint, together with such other and further relief as this Court may deem just and proper. Defendant opposes the Motion.

The following papers were considered on the Motion:

PAPER

NYSCEF Doc. No.

Notice of Motion, 5-14
Statement of material facts,
Affirmation in support,
Proposed order,
Exhibits A-D,¹
Affirmation of mailing,
RJI

Affirmation in opposition, 15-18
Affidavit in opposition,
Response to Plaintiff's Statement
of material facts,
Affirmation of service

Reply Affirmation, 19-21
Exhibit F,

¹Exhibit E was grouped together with Exhibit D under NYSCEF Doc. No. 12. Documents are not to be grouped to together under a single exhibit pursuant to this Court's Individual Part Rules (see Individual Part Rules of Hon. Nancy Quinn Koba at III[A][6]). Counsel is advised that compliance therewith is expected on future motions.

Affirmation of mailing.

Upon consideration of the foregoing, the Motion is determined as follows:

RELEVANT FACTUAL AND PROCEDURAL BACKGROUND

On October 25, 2017, plaintiff commenced this action by filing a summons and a complaint seeking recovery of the sum of \$4,929.60 as and for the outstanding balance allegedly due on defendant's credit card account based upon account stated and breach of contract claims (Ex. A). Issue was joined when defendant filed her answer on December 11, 2017 (Ex. C). Plaintiff now brings the Motion.

As a preliminary matter, the Court observes that the affirmations and affidavit submitted in support of, and in opposition to, the Motion do not contain a certificate of compliance regarding length and word count as required by the Rules for New York State Trial Courts that went into effect on February 1, 2021 (see 22 NYCRR § 202.8-b). Although these omissions will be overlooked in this instance, counsel are advised that compliance with this rule is expected for all future motions.

The Court further observes that the affirmation submitted in opposition to the Motion does not contain the form language required by CPLR 2106. Compliance with this Rule is likewise expected on all future motions.

ANALYSIS

"On a motion for summary judgment, the facts must be viewed in the light most favorable to the non-moving party. Summary judgment is a drastic remedy, to be granted only where the moving party has tender[ed] 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. The moving party's failure to make a prima facie showing of entitlement to summary judgment requires a denial of the motion, regardless of the sufficiency of the opposing papers" (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012] [internal quotations and citations omitted]). Once a prima facie showing has been made, the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution or tender an acceptable excuse for the failure to do so; mere expressions of hope are insufficient to raise a genuine issue of fact (see *Zuckerman v City of New York*, 49 NY2d 557, 404 N.E.2d 718, 427 N.Y.S.2d 595 [1980]).

"It is not the function of a court deciding a summary judgment motion to make credibility determinations or findings of fact, but rather to identify material triable issues (or point to the lack thereof)" (*Vega v Restani Constr. Corp.*, 18 NY3d at 505 [internal citation omitted]). "[I]n deciding a motion for summary judgment, issue-finding, rather than

issue-determination, is the key to the procedure" (*id.* [internal quotation marks and citation omitted]). Summary judgment is not warranted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility (*see Karel v Pizzorusso*, 215 AD3d 738 [2d Dept 2023]).

Account Stated

"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 (internal quotation marks and citation omitted). The agreement may be express or implied where a defendant retains bills without objecting to them within a reasonable period of time, or makes partial payment on the account (citations omitted). 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 (internal citation omitted)" (*Bank of Am., N.A., v Ball*, 188 AD3d 974, 974 [2d Dept 2020]).

Breach of Contract

"The essential elements of a cause of action to recover damages for breach of contract are the existence of a contract, the plaintiff's performance pursuant to the contract, the defendant's breach of its contractual obligations, and damages resulting from the breach (internal quotation marks and citations omitted)" (*Pare v Aalbue*, 222 AD3d 769, 773 [2d Dept 2023]). To be entitled to summary judgment in a consumer credit card transaction matter, a plaintiff must establish: (1) the existence of a credit card agreement, (2) the defendant accepted the credit card agreement by using the credit card and making payments thereon, and (3) the cardmember agreement was breached by the defendant when he or she failed to make the required payments (*see American Express Natl. Bank v Belciu-Kern*, 227 AD3d 646 [2d Dept 2024]).

Here, plaintiff did not tender sufficient evidence establishing its *prima facie* entitlement to judgment as a matter of law to recover on its account stated and breach of contract claims. Nor did plaintiff eliminate triable issues of material facts. In support of the Motion, plaintiff primarily relies upon the affidavit and supplemental affidavit of Hailee Miller, a legal specialist employed by plaintiff, each sworn to on March 8, 2024 (collectively, the "Miller Affidavits"). The Motion must be denied because the Miller Affidavits are silent as to whether the affiant had personal knowledge of the delivery method(s) used to send the subject credit card agreement or billing statements, whether defendant objected to any of the statements, and whether the affiant had personal knowledge of a standard office practice and procedure designed to ensure that items were properly addressed and mailed (*see Alliance Natl. Ins. Co. v Hagler*, 219 AD3d 1393 [2d Dept 2023]).

Due to plaintiff's failure to make a *prima facie* showing, the burden does not shift to defendant and the Court need not address the

sufficiency of defendant's opposition submissions.

All other arguments raised, and evidence submitted, by the parties in connection with the Motion have been considered by this Court, notwithstanding the specific absence of reference thereto.

Accordingly, it is hereby

ORDERED that plaintiff's motion for summary judgment, pursuant to CPLR 3212, is DENIED; and it is further

ORDERED that the parties are directed to appear, **in person**, for a Preliminary Conference in courtroom 1602, on February 7, 2025, at 9:30 a.m.

The foregoing constitutes the decision and order of this Court.

Dated: White Plains, New York
January 2, 2025

ENTER:



HON. NANCY QUINN Koba, J.S.C.

To All Counsel Via NYSCEF