

Barclays Bank Del. v Fasciglione
2025 NY Slip Op 35513(U)
January 22, 2025
Supreme Court, Westchester County
Docket Number: Index No. 58026/2024
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
BARCLAYS BANK DELAWARE,

Plaintiff,

-against-

DECISION & ORDER

Index No. 58026/2024

Mot. Seq. No. 1

MICHAEL FASCIGLIONE,

Defendant.

-----x
QUINN KOBA, J.

By notice of motion (the "Motion"), plaintiff seeks an order, pursuant to CPLR 3212, granting summary judgment in favor of plaintiff and against defendant for the relief sought in the complaint, and for such other and further relief as this Court may deem just and proper. The Motion is unopposed.

The following papers were considered on the Motion:

PAPER

NYSCEF Doc. No.

Notice of Motion,	7-15, 17-18
Statement of material facts,	
Affirmation in support,	
Exhibits 1-3,	
Memorandum of law in support,	
Affidavit of facts,	
Affirmation of service,	
RJI	

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

RELEVANT FACTUAL AND PROCEDURAL BACKGROUND

On or about March 5, 2024, plaintiff commenced this action by filing a summons and a complaint seeking recovery of \$4,842.38, the outstanding balance allegedly due on defendant's credit card account (Ex. 1). Issue was joined when defendant filed his answer on April 16, 2024 (Ex. 3). Plaintiff now brings the Motion.

As a preliminary matter, the Court observes that the affirmation,

affidavit, and memorandum of law submitted in support of 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 is advised that compliance with this Rule is expected for all future motions.

The Court also observes that the affirmation and memorandum of law submitted in support of the Motion are rendered ineffective and not properly sworn because they fail to substantially comply with the required form language in CPLR 2106 (see *Matter of Grandsard v Hutchison*, 227 AD3d 491 [1st Dept. 2024]; see generally, *Matter of Sweet v Fonvil*, 227 AD3d 849 [2d Dept. 2024]). Counsel is advised that compliance with this Rule is 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]).

CPLR 3212(j) imposes an additional notice requirement on a plaintiff seeking summary judgment in an action to collect a debt arising from a credit transaction where the consumer is an unrepresented defendant. Such additional notice must be sent to the clerk, along with a stamped, unsealed envelope addressed to the defendant, in the form prescribed by CPLR 3212(j)(1). In the absence of a showing of compliance with CPLR 3212(j), "[s]ummary judgment shall not be entered based upon defendant's failure to oppose the motion" (CPLR3212[j][2]). Here, plaintiff failed to demonstrate compliance with CPLR 3212(j).

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]).

Although the memorandum of law submitted in support of the Motion indicates that plaintiff is seeking recovery of the outstanding balance due on defendant's credit card account based upon an account stated, the complaint does not allege such cause of action (see Ex.1).

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 has made no showing of the existence of a credit card agreement and has therefore failed to meet its *prima facie* burden entitling it to judgment as a matter of law on this claim.

All other arguments raised on the Motion and evidence submitted in connection therewith 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 before the Hon. Nancy Quinn Koba, J.S.C., in courtroom 1602, on February 21, 2025, at 9:30 a.m.

The foregoing constitutes the decision and order of this Court.

Dated: White Plains, New York
January 22, 2025

ENTER:



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

To All Counsel Via NYSCEF

VIA FIRST CLASS USPS MAIL TO:

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