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Capital One Bank USA NA v Joseph
2013 NY Slip Op 51697(U)
Decided on October 7, 2013
District Court Of Nassau County, First District
Ciaffa, J.
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Decided on October 7, 2013

District Court of Nassau County, First District

<p>Capital One Bank USA NA, Plaintiff(s),</p> <p>against</p> <p>Wayne M. Joseph, Defendant(s).</p>

CV-008157-13

Solomon and Solomon, P.C., Attorneys for Plaintiff, Box 15019, Columbia Circle, Albany, New York, 12212-5019, 518-456-8100; Akbar A. Asharia, Esq., Attorney for Defendant, 66 West 82nd Street, No. 1A, New York, New York 10024.

Michael A. Ciaffa, J.

The following papers have been considered by the Court**on this motion: submitted October 2, 2013**

Papers Numbered

Notice of Motion, Affirmation & Exhibits Annexed.....	1 - 2
Affirmation in Opposition.....	3
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Plaintiff moves for summary judgment upon a claimed credit card debt. Defendant opposes the motion.

Under well settled standards governing motions for summary judgment in consumer debt matters, the plaintiff must submit "evidentiary proof in admissible form" in order to demonstrate its entitlement to judgment as a matter of law. *See CACH, LLC v Fatima*, 2011 NY Slip Op 51510 (Dist Ct Nassau Co.); *see also American Express v Badalamenti*, 2010 NY Slip Op 52238 (Dist Ct Nassau Co.); *Citibank v Martin*, 11 Misc 3d 219 (Civ Ct NY Co. 2005). Once again, plaintiff's moving papers fail to establish its *prima facie* entitlement to judgment as a matter of law against the defendant. *See, e.g. Capital One Bank v Cavallo*, index no. 20634/12, decision dated August 29, 2013 (Dist Ct [*2] Nassau Co.); *Capital One Bank v Alonzo*, index no. 14136/11, decision dated May 28, 2013 (Dist Ct Nassau Co.); *Capital One Bank v Rodgers*, index no. 5244/12, decision dated May 3, 2013 (Dist Ct Nassau Co.). In the absence of adequate proof, in proper evidentiary form, establishing plaintiff's entitlement to judgment as a matter of law, the motion must be denied without regard to the sufficiency of defendant's opposing papers. *See Winegrad v NYU Med. Center*, 64 NY2d 851 (1985).

Notably, the complaint in this case contains only a single cause of action, seeking judgment upon an alleged "account stated." In order to make out such a claim, the movant must "demonstrate that plaintiff mailed defendant a statement of account and that defendant retained such a statement for an unreasonable period of time without objecting

thereto." *Discover Bank v. Williamson*, 2007 NY Slip Op 50231 (App Term, 2d Dept). The moving affidavit of Wandi Chamberlain fails to make such a demonstration.

The affidavit, on its face, has the look and feel of a "robo-signed affidavit" that was prepared in blank, in advance, without knowing the identity of the person who would be asked to sign it. This fact, by itself, gives the Court pause. *See American Express v Badalamenti, supra*. More importantly, according to Ms. Chamberlain's affidavit, her employment as a "Litigation Support Representative for Capital One Services, LLC" commenced just two months before the date of her affidavit (May 17, 2013). Given her limited tenure with the company, she is hardly in a position to attest to the actual mailing of the statements in question, which bear dates between November 2008 and November 2011. Nor has she demonstrated her personal knowledge of plaintiff's standard office practices and procedures for mailing account statements to credit card customers during the time period covered by the statements.

In the context of no-fault matters, the Appellate Term has often held that similar affidavits from recently employed claims representatives are insufficient, *per se*, to prove mailing of required forms on dates predating the person's employment. *See, e.g. South Nassau Orthopedic Surgery & Sports Medicine, PC v Auto One Ins. Co.*, 2011 NY Slip Op 51300 (App Term 2d Dept); *Friendly Physician, PC v GEICO*, 2010 NY Slip Op 51770 (App Term, 2d Dept). Similarly, here, since the affidavit of Ms. Chamberlain admits that she began working for the company several years after the account statements were allegedly mailed to defendant, and since plaintiff did not otherwise establish the actual mailing of the statements or its standard office practices and procedures for the mailing of the statements during the pertinent time period, defendant's proof failed to establish a necessary factual predicate for an account stated claim.

In the absence of competent proof of mailing of the account statements to defendant, plaintiff's moving papers are insufficient, as a matter of law, to "shift the burden to defendant" respecting the merits of the account stated claim. *See Discover Bank v Williamson, supra*. Consequently, plaintiff's motion for summary judgment upon the "account stated" cause of action must be DENIED.

Finally, to the extent that plaintiff's moving papers can be read as seeking summary [*3] judgment on grounds of breach of contract, the Court notes that the complaint does

not plead such a breach of contract cause of action. While the Court retains the discretion to grant summary judgment upon an unpleaded cause of action if "the proof supports such a claim and if the opposing party has not been misled to its prejudice," *see Kramer v Kanalis*, 49 AD3d 263, 264 (1st Dept 2008), plaintiff's moving papers fail to submit sufficient "evidentiary proof in admissible form" establishing plaintiff's entitlement to judgment as a matter of law upon grounds of breach of a credit card agreement.

Among other defects, plaintiff's motion makes no effort to tender proof of the terms of all applicable credit card agreements during the period when charges were incurred. This is a fundamental and necessary element of a claim for breach of a credit card agreement. *See Citibank v. Martin, supra; see also Capital One Bank v Cavallo, supra; Capital One Bank v Peterson*, index no. 3722/13, decision dated August 22, 2013 (Dist Ct Nassau Co.); *Capital One Bank v Savarese*, index no. 2413/11, decision dated June 21, 2012 (Dist Ct Nassau Co.); *Citibank v Zaharis*, index no. 20670/10, decision dated October 18, 2011 (Sup Ct Queens Co.). Nor do plaintiff's papers address the often complex issue of its entitlement to interest upon unpaid balances at rates which appear to exceed New York's usury limits. [Compare Chase Bank v Fisher, 28 Misc 3d 440](#) (Dist Ct Nassau Co. 2010), with [Citibank v Hansen, 28 Misc 3d 195](#) (Dist Ct Nassau Co. 2010).

For all these reasons, plaintiff's motion is DENIED, and the merits of plaintiff's claim are reserved for trial. To move the matter forward, plaintiff is directed to serve full and complete responses to defendant's discovery requests within 30 days. Upon completion of discovery, the matter will be scheduled for trial through the filing of a notice of trial by counsel for either party.

So Ordered:

District Court Judge

Dated: October 7, 2013

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