SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
CIVIL TERM - IAS PART 34 - QUEENS COUNTY
25-10 COURT SQUARE, LONG ISLAND CITY, N.Y. 11101

P R E S E N T : **HON. ROBERT J. MCDONALD**
Justice

- x

AMERICAN EXPRESS BANK, FSB,

Plaintiff,

- against -

ELIAS KATSIHTIS,

Defendant.

Index No: 9833/2011

Motion Date: 01/24/2013

Motion Cal. No.: 4

Motion Seq. No.: 1

- X

The following papers numbered 1 to 16 were read on this motion by the plaintiff, AMERICAN EXPRESS BANK, FSB, for an order pursuant to CPLR 3212 granting summary judgment in favor of the plaintiff in the amount of $34,626.19; or in the alternative striking the defendant's answer or compelling the defendant to respond to the plaintiff's discovery demands:

Papers Numbered

Notice of Motion-Affidavits-Exhibits.....1 - 7
Affirmation in Opposition-Affidavits.....8 - 13
Reply affirmation.....14 - 16

This is an action commenced by the plaintiff to obtain a money judgment in the amount of $34,626.19 with interest against the defendant for breach of a credit agreement. Plaintiff also asserts causes of action for account stated and for unjust enrichment. The action arose out of the defendant's alleged default in paying the balance due on a business credit card account provided to him by American Express.

The plaintiff commenced this action by filing a summons and complaint on April 21, 2011. Issue was joined by service of defendant's verified answer dated June 15, 2011.

Plaintiff now moves for summary judgment. In support of the motion plaintiff submits a copy of the Credit Card Agreement,

copies of statements in the name of Elias Katsihtis and Waterworld Mech Corp. from October 2007 through October 2009. Plaintiff also submits an affidavit from one, Danielle Nichols, Assistant Custodian of Records for American Express dated September 20, 2012. Ms. Nichols states that the defendant was the holder of an American Express Bank credit card that enabled him to charge items to American Express. She states that defendant was the basic cardmember on the account and was responsible for paying all amounts charged to the account. She states that defendant made application to American Express to open an account and thereafter a credit card together with a copy of the agreement was sent to the defendant at the address provided by the defendant. The agreement states that the cardmember is bound by the terms of the agreement once the cardmember uses the card. Subsequently, monthly statements were mailed to the defendant and the defendant acknowledged receipt of the statements by making partial payments towards the balance due on the account. According to the complaint the defendant breached the agreement by failing to make full payment on the account. The statements submitted indicate that there was a balance due and owing to the plaintiff of $34,626.19. as of October 2009.

Plaintiff's counsel, Jonathan P. Cawley, Esq., also submits an affirmation stating that on August 9, 2011 the plaintiff served the defendant with a Request for Interrogatories and Notice to Admit. Counsel states that since that time the defendant has failed to serve plaintiff with a response to its discovery demands. Counsel now moves for an order pursuant to CPLR 3126 striking the defendant's answer for willful failure to disclose the requested information or in the alternative for the court to issue an order directing the defendant to respond to plaintiff's discovery demands.

In opposition to the motion, defendant's counsel, Robert C. Buckley, Esq., asserts that the motion fails to establish a prima facie case against the defendant. Counsel asserts that the plaintiff has not produced a contract that obligates the defendant individually to the credit card company. Counsel asserts that the corporate entity, Waterworld Mechanical Corp., is the account holder and defendant did not sign an agreement in which he personally guaranteed the corporate card account. In that respect counsel argues that plaintiff may not assert a claim against him for any debts of the Corporation absent proof of a personal guarantee or a claim to pierce the corporate veil. Counsel contends that in the absence of a contract signed by the defendant in any capacity, plaintiff has failed to establish that there was a contract between the parties.

In addition, counsel asserts that the motion to strike the defendant's answer for failing to comply with discovery demands should be denied as the plaintiff has failed to demonstrate that such failure was willful (citing Rose v Different Twist Pretzel, Inc., 2011 NY Slip OP 31380U). Counsel also asserts that the plaintiff has failed to file an affirmation of good faith pursuant to 22 NYCRR § 202.7(a) demonstrating its effort to resolve the underlying discovery dispute (citing Natoli v Milazzo, 65 AD3d 1309 [2d Dept. 2009]; Quiroz v Beitia, 68 AD3d 957 [2d Dept. 2009]).

In support of the opposition, defendant Elias Katsihits submits his own affidavit dated November 30, 2012, stating that he is the President of Waterworld Mechanical Corp. and that he started an account for credit with American Express which is the subject of the instant action. He states that it was his understanding that this was a business account for Waterworld Mechanical Corp. and that he would therefore have no personal liability for any of the debts associated with that account. He states that his understanding was that the debts would be the responsibility of Waterworld Mechanical Corp. He states that he never signed as personal guarantor of that account nor did he ever have any intent of serving as a personal guarantor of that account. He states that he applied for credit solely in his capacity as a representative of the corporation. Mr. Katsihits states that at no time was he ever informed by American Express that he would be personally liable for the account at issue.

In reply, the plaintiff states that the contract is formed by the use of the card. Citing Feder v Fortunoff, Inc., 123 Misc 2d 857 [Sup Ct., Nassau Cty. 1984], counsel contends that in the absence of a binding credit agreement the issuance of the credit card constitutes an offer of credit and the use of the credit card constitutes the acceptance of the offer of credit. Counsel also asserts that the card agreement sets forth specific language holding the defendant personally liable for he charges made with the card.

Upon review and consideration of the plaintiff's motion, defendant's opposition and the plaintiff's reply thereto, this court finds that the plaintiff's motion for summary judgment is denied. Here, it is clear that the plaintiff was issued a credit card by plaintiff pursuant to its "American Express SimplyCash Business Credit Card Agreement." This agreement was not signed by the defendant but states that by using the business card the cardholder agrees to the terms of he agreement including the promise to pay all charges. Plaintiff states that the terms of this agreement provide that the defendant is personally liable for

the balance on the account. The plaintiff submits copies of bills with both the name of Elias Katsihtis and Waterworld Mechanical Corporation showing that there was a balance due and owing $34,626.19 as of 10/16/09. Mr. Katsihtis admits that he started the account in question however, he states that he opened the account in his capacity as President of Waterworld as a business account and states that it was his understanding that he would have no personal liability for the debts associated with the account and that the debts would be the responsibility off Waterworld Mechanical Corp. He states that he never signed as a personal guarantor of the account.

Ms. Nichols of American Express states that prior to the issuance of the account the defendant made an application to the plaintiff requesting that an account be opened. However the plaintiff has not produced a copy of that application or contract or any other document clearly stating that the defendant would be personally liable for the charges on the account. In the absence of such document this court finds that the plaintiff has failed to present sufficient evidence to demonstrate, prima facie, that the defendant is personally liable on the business account in question (see Yellow Book of N.Y., Inc. v Shelley, 74 AD3d 1333 [2d Dept. 2010][an agent who signs an agreement on behalf of a disclosed principal will not be held liable for its performance unless the agent clearly and explicitly intended to substitute his personal liability for that of his principal]; also see Yellow Book Sales & Distrib. Co., Inc. v On Call Plumbing & Heat, 99 AD3d 896 [2d Dept. 2012]). "A corporate officer who executes a contract acting as an agent for 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" (Stamina Prods., Inc. v Zintec USA, Inc., 90 AD3d 1021 629 [2d Dept. 2011] quoted in Ho Sports, Inc. v Meridian Sports, Inc., 92 AD3d 9152d Dept. 2012]).

As the plaintiff has not provided "clear and explicit evidence" of the individual defendant's intention to be personally bound by the credit agreement and based upon the evidence submitted there is a triable issue of fact as to whether the defendant may be held personally liable (see Ho Sports, Inc. v Meridian Sports, Inc., supra; Yellow Book of NY, LP v DePante, 309 AD2d 859 [2d Dept. 2003]; Star Video Entertainment v J & I Video Distrib., 268 AD2d 423 [2d Dept. 2000]).

That branch of the plaintiff's motion for an order striking the answer of the defendant pursuant to CPLR 3126 for failing to respond to outstanding discovery is denied. The defendant failed to provide an affirmation of good faith stating that defendant made diligent efforts to resolve the discovery dispute (see 22

NYCRR 202.7[c]; 22 NYCRR 202.7[a][2]; Mironer v City of New York, 79 AD3d 1106 [2d Dept. 2010]; Natoli v Milazzo, 65 AD3d 1309 [2d Dept. 2009]; Walter B. Melvin, Architects, LLC v 24 Aqueduct Lane Condominium, 51 AD3d 784 [2d Dept. 2008]; Amherst Synagogue v Schuele Paint Co., Inc., 30 AD3d 1055 [2d Dept. 2006]; Cestaro v Mun Yuen Roger Chin, 20 AD3d 500 [2d Dept. 2005]). Moreover, plaintiff has not demonstrated that the defendant's failure to comply is willful, contumacious or in bad faith (see Estaba v Quow, 956 NYS2d 143 [2d Dept 2013]; Orgel v Stewart Tit. Ins. Co., 91 AD3d 922 [2d Dept. 2012]; Commisso v Orshan, 85 AD3d 845 [2d Dept. 2011]; Rock City Sound, Inc. v Bashian & Farber, LLP, 83 AD3d 685 [2d Dept. 2011]; Kyung Soo Kim v Goldmine Realty, Inc., 73 AD3d 709 [2d Dept. 2010]; Hutchinson v Langer, 71 AD3d 735 {2d Dept. 2010])).

However, it is hereby,

ORDERED, that the defendant shall respond to all outstanding discovery within 20 days of service of a copy of this order with notice of entry thereof. Should defendant fail to respond within the time imposed, sanctions may be imposed (see Rice v Vandenebossche, 185 AD2d 336 [2d Dept. 1992]; Casiano v New York Hospital-Cornell Med. Center, 169 AD2d 806 [2d Dept. 1990]).

Dated: February 19, 2013
Long Island City, N.Y.

_____
ROBERT J. MCDONALD
J.S.C.