

**American Express Bank FSB v Dominguez**

2010 NY Slip Op 33395(U)

October 29, 2010

Supreme Court, Nassau County

Docket Number: 5448/09

Judge: F. Dana Winslow

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SCAN

**SHORT FORM ORDER  
SUPREME COURT - STATE OF NEW YORK**

**Present:  
HON. F. DANA WINSLOW,**

**Justice  
TRIAL/IAS, PART 5  
NASSAU COUNTY**

**AMERICAN EXPRESS BANK FSB,**

**Plaintiff,**

**INDEX NO.: 5448/09**

**- against -**

**MOTION DATE: 8/19/10**

**JOHN DOMINGUEZ and J.D. TILE/MARBLE,**

**MOTION SEQ. NO.: 001**

**Defendants.**

**The following papers read on this motion (numbered 1):**

**Notice of Motion.....1**

The Court automatically adjourns all motions that are submitted, without opposition for one month, to determine whether or not there was either an administrative delay or excusable neglect. Such adjournment is made without prejudice to the moving party to have the merits of such an adjournment considered in the event that there is a subsequent submission.

This action arises out of defendants' alleged breach of a business credit card agreement. Plaintiff alleges that defendants were the holders of a Tri Bus Mgmt Card (the "Tri Card") enabling defendants to charge items to a Tri Bus Mgmt Card Account (the "Tri Card Account") and that there is due from defendants an amount of \$27,297.90. Plaintiff now moves for a default judgment pursuant to **CPLR §3215** based upon the failure of defendants to answer or appear within the requisite statutory time period. The motion is determined as follows.

The Complaint alleges that by accepting and using the Tri Card, defendants agreed to all the terms and conditions set forth in the Agreement between the Tri Card member and American Express Bank FSB. In the Complaint, plaintiff alleges causes of action in breach of contract, account stated and unjust enrichment. In its Notice of Motion, however, plaintiff waives its causes of action for account stated and unjust enrichment and its claim for attorneys' fees.

In support of its motion, plaintiff has submitted (i) a copy of the Summons and Complaint filed with the County Clerk on March 24, 2009; (ii) an 'Affirmation of Facts in Support' (although in affidavit form) of J. Hartje, an 'Assistant Custodian of Records,' for the American Express Litigation Unit, sworn to on March 1, 2010 (the "Hartje Affidavit"); (iii) standard form of a Business Credit Card Agreement; (iv) Business Management Account Agreement; (v) statement of account, dated February 27, 2009, showing a previous balance of \$26,713.89 and current balance of \$27,297.90; and statements of account dated March 31, 2009, April 30, 2009 and May 30, 2009 showing previous and current balances of \$27,297.90; (vi) Membership Rewards Express Monthly Statements and Program News ("Rewards Statements") for the periods January 1, 2009 to January 31, 2009 and February 1, 2009 to February 28, 2009 and (v) an affirmation of plaintiff's counsel attesting to defendants' failure to answer or appear.

Plaintiff has also submitted (i) an affidavit of service, sworn to on April 7, 2009, attesting to service on April 4, 2009 of the Summons and Complaint upon defendant JOHN DOMINGUEZ ("DOMINGUEZ") at "97 Shore Rd - Private House, Glen Cove, NY 11545" (the "Glen Cove address") pursuant to **CPLR §308(2)** by serving " 'Jane' Dominguez, wife of the Defendant" described as a person of suitable age and discretion, with a follow-up mailing to the Glen Cove address referred to as the "last known residence address of the defendant" (the "Dominguez Affidavit of Service"); (ii) an affidavit of service, sworn to on April 7, 2009, attesting to service of the Summons and Complaint upon defendant J.D. Tile/Marble ("J.D.") at the Glen Cove address purportedly pursuant to **CPLR §311(a)(1)** by serving " 'Jane' Dominguez, Managing Agent" (the "J.D. Affidavit of Service"); (iii) affidavits of additional mailing of the summons, sworn to on April 21, 2009, attesting to additional mailings of the summons and complaint by first class mail to defendants at the Glen Cove address on that date; and (iv) an Affidavit of Non-Military Service together with a Department of Defense military status report.

Upon the foregoing, the Court finds that there are multiple deficiencies in plaintiff's application which preclude the granting of the relief requested. Such deficiencies include the following.

(1) The Dominguez Affidavit of Service fails to indicate if the process server spoke with " 'Jane' Dominguez, wife of the Defendant" to ascertain whether the Glen Cove address was DOMINGUEZ's actual place of business, dwelling place or usual place of abode. The process server's notation in the attestation of additional mailing that said address is defendant's last known residence is insufficient to satisfy **CPLR**

§308(2). It is not clear to the Court, therefore, that the Summons and Complaint were served at the proper address;

(2) The J.D. Affidavit of Service provides no basis to for the process server's claim that 'Jane' Dominguez is a managing agent of J.D. In addition, the process server describes said 'Jane' DOMINGUEZ as Age: 47, while in the Dominguez Affidavit of Service, the same process server describes 'Jane' DOMINGUEZ as Age: 37. The Court notes that it did a search on the NYS Department of State Department of Corporations Corporation and Business Entity Database website which revealed that no business entities were found for J.D. Tile/Marble which calls into question the credibility of the J.D. Affidavit of Service.

(3) The Affidavit of Non-Military Service, together with the Military Status Report generated from the Department of Defense - Manpower Data Center, constitute insufficient proof of DOMINGUEZ's non military status. The Military Affidavit and the Status Report are both dated May 17, 2010 whereas DOMINGUEZ's default purportedly occurred in or about March 2009 and the summons and complaint filed on March 24, 2009. Furthermore, it strains credulity that the Department of Defense had no information indicating the status as to all branches of the Uniformed Services of an individual with a common a name as JOHN DOMINGUEZ. This calls into question the quality of the information provided by plaintiff to the Department of Defense. In the Military Affidavit, Jewel Russell purportedly a representative of plaintiff, states in the most conclusory fashion, that she provided the Department of Defense, Defense Manpower Data Center with "pertinent information" about defendant, which included "the date of birth and/or social security number." Plaintiff has failed to provide the Court with any evidence that demonstrates the accuracy of the information provided the Department of Defense. See the Court's decision in **American Express Centurion Bank v. Andrew Black** (Winslow, J), dated August 31, 2010; and

(3) The submitted proof of liability has failed to satisfy the Court as to the prima facie validity of the uncontested cause of action. **Joosten v. Gale**, 129 AD2d 531. Most fundamentally, the form of Business Credit Card Agreement submitted is dated "7/09" whereas plaintiff proffers statements of account dated prior thereto (February, March, April and May of 2009), and all four statements show the balance claimed due and owing. These statements, without more, fail to establish evidence of an active account. There is no indication whether there was use of the Tri Card or payments made on the account, other than the one payment of \$584.01 set forth in the statement dated February 27, 2009, leaving the Court to speculate as to when the default occurred. The Court also notes that there is an indication on an "Open Savings

Summary” attached to a Rewards Statement that there was a Delta flight purchase on May 15, 2009 but there is no such purchase reflected on the statement of account dated May 31, 2009. The affirmation of plaintiff’s counsel stating that the statute of limitations has not expired and the Hartje Affidavit stating that \$27,297.90 is due and owing on the Tri Card Account as of March 24, 2009, do not in the context of this motion, sufficiently establish the default date. *See American Express Centurion Bank v. Andrew Black, supra.*

On the basis of the foregoing, it is

ORDERED, that plaintiff’s motion for default judgment pursuant to CPLR §3215 is denied.

Plaintiff shall serve (1) defendant JOHN DOMINGUEZ pursuant to CPLR §308(1) or §308(2), with a copy of this Order with notice of entry, and if pursuant to (2), the affidavit of service shall identify the person of suitable age and discretion and his or her relationship to the person being served; and (2) defendant J.D. TILE/MARBLE by personal service, pursuant to the CPLR section applicable to such entity, with a copy of this Order with notice of entry. Plaintiff shall submit proof of such service in any subsequent submission.

This constitutes the Order of the Court.

Dated: *October 27* 2010

*[Handwritten Signature]*  
J.S.C.

**ENTERED**  
DEC 06 2010  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE