

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF MONTGOMERY

File No. 1374031

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JPMORGAN CHASE BANK, N.A.,

Plaintiff,

AFFIRMATION IN SUPPORT

- against -

MS DIANE L COMPANI,

INDEX NO. EF2021-3

Defendant.

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NATALIE DONALDSON, an attorney at law duly admitted to practice in the State of New York, an associate of the firm of RUBIN & ROTHMAN, LLC, attorneys of record for Plaintiff, hereby affirms the following to be true under penalty of perjury:

1. This affirmation is submitted in support of the instant application of Plaintiff for an Order pursuant to CPLR §3212, granting summary judgment to Plaintiff as against Defendant MS DIANE L COMPANI (hereinafter "Defendant") for the breach and default upon a revolving credit agreement entered into between Plaintiff and Defendant.

2. As is set forth in the annexed affidavit of Amy Wingo ("Wingo Aff."), Plaintiff seeks recovery of money due on a credit card account. Plaintiff's affiant sets forth she is employed by Plaintiff as an Authorized Signing Officer. In this capacity, her employment duties include reviewing Plaintiff's records and specifically those records for accounts in default and in litigation.

3. This action was commenced by service of a Summons and Complaint upon Defendant, a copy of which is attached to this affirmation ("Donaldson Affirmation") as Exhibit "E".

4. Defendant appeared in this action by service of an answer by way of attorney, a copy of which is annexed to the Donaldson Affirmation as Exhibit "F". Defendant's answer is bereft of any factual details that support a meritorious defense to this action. The court administratively reviewed the action and approved it for a default judgment, however, in good faith we are treating the answer as if it was timely filed with the court.

5. The facts supporting Plaintiff's claim and the balance presently due are set forth in Plaintiff's affidavit and the exhibits.

6. In support of its motion for summary judgment, Plaintiff submits Defendant's account statements for the period of August 28, 2017 to closing date August 27, 2020 in which the balance due is the sum of damages demanded in the complaint - \$34,442.99 (See Wingo Aff., Exhibit "D").

7. The monthly account statements set forth the activity on the account, including, payments, purchases, charges and credits, and the monthly amount due. These statements also reflect the Defendant's eventual failure to pay the minimum monthly amount due and Defendant's breach of the Cardmember Agreement.

8. The Cardmember Agreement (Wingo Aff., Exhibit "B") sets forth the terms of the contract, including the annual percentage rates, penalty fees and how the minimum monthly amount due is calculated (See Wingo Aff., Exhibit "B", Page 6). The Cardmember Agreement also includes the default clause found on Page 4, which sets forth the subject account would be deemed in default if the consumer failed to pay at least the minimum monthly amount due, exceeded the credit limit, or failed to comply with other provisions of the Cardmember Agreement. Additionally, annexed hereto with the Wingo Aff. as Exhibit "A" is a copy of the electronic record of Defendant's credit card application submitted to Plaintiff at the time she applied for the subject account.

9. Pursuant to the Cardmember Agreement, the consumer's default requires payment in full of the unpaid balance immediately and expressly allows the creditor to begin collection activities and to enforce its rights under the agreement.

10. The monthly account statements, which have been redacted so as to comply with N.Y. Ct. Rule § 214.12(1) to protect Defendant's confidential information, support Plaintiff's cause of action.

11. Courts in the First Department have held that monthly credit card billing statements are self-authenticating. See *Portfolio Recovery Assoc., LLC v. Lall*, 127 AD3d 576 (1st Dept

2015). Citing *Portfolio*, the First Appellate Term held in *Capital One Bank (USA) v. Koralik*, 2016 WL 635774 *1:

"The statements of Defendant's credit card account, which referenced, inter alia, Defendant's name, address, account number, any transaction for the relevant period, the balance owed and the payments received, were self-authenticating".

12. In support of the instant motion, Plaintiff annexes Defendant's monthly account statements for a period of three years. In *Citibank (South Dakota), N.A. v. Cutler*, 112 A.D.3d 573, 976 N.Y.S.2d 196 (2nd Dept 2013) the court held that the affidavit of the plaintiff's document control officer and less than two years of billing statements attached as exhibits was sufficient to lay the prima facie proof necessary for an award of summary judgment:

"...in support of its motion for summary judgment the Plaintiff submitted monthly billing statements from January 2007 through March 2008, and an affidavit from a document control officer who averred that the billing statements were sent to the Defendant at his home address, that the Defendant accepted and retained those statements without objection, and that he made partial payments on the account until on or about December 2007 when payments ceased. This evidence was sufficient to establish the Plaintiff's entitlement to judgment as a matter of law on the cause of action for an account stated..."

13. This honorable court must determine whether there is a genuine issue of material fact in this matter. If not, Plaintiff is entitled to judgment as a matter of law. In *Citibank (South Dakota) N.A. v. Keskin*, 121 A.D.3d 635, 993 N.Y.S.2d 343, 344 (2nd Dept 2014) it was determined that the plaintiff was entitled to

judgment as a matter of law for both a breach of contract cause of action and an account stated cause of action. That court provided the following explanation:

"The Plaintiff made a prima facie showing of its entitlement to judgment as a matter of law on its cause of action to recover damages for breach of contract by tendering sufficient evidence that there was an agreement, which the Defendant accepted by his use of a certain credit card issued by the Plaintiff and payments made thereon, and which was breached by the Defendant when he failed to make the required payments (see *Citibank [S.D.], N.A. v. Brown-Serulovic*, 97 A.D.3d 522, 523-524, 948 N.Y.S.2d 331; *Citibank [S.D.] N.A. v. Sablic*, 55 A.D.3d 651, 652, 865 N.Y.S.2d 649; *Feder v. Fortunoff, Inc.*, 114 A.D.2d 399, 399, 494 N.Y.S.2d 42). The Plaintiff also established its prima facie entitlement to judgment as a matter of law on its cause of action to recover on an account stated by tendering sufficient evidence that it generated account statements for the Defendant in the regular course of business, that it mailed those statements to the Defendant on a monthly basis, and that the Defendant accepted and retained these statements for a reasonable period of time without objection, and made partial payments thereon (see *American Express Centurion Bank v. Gabay*, 94 A.D.3d 795, 795, 941 N.Y.S.2d 863; *Landa v. Blocker*, 87 A.D.3d 719, 721, 928 N.Y.S.2d 779; *LD Exch. v. Orion Telecom. Corp.*, 302 A.D.2d 565, 565, 755 N.Y.S.2d 630; *Jovee Contr. Corp. v. AIA Env'tl. Corp.*, 283 A.D.2d 398, 400, 724 N.Y.S.2d 455)."

14. As to the question of whether an offer and acceptance of an agreement exists, the court in *Eze v. JP Morgan Chase Bank, NA*, 2010 WL 3189813 (E.D.N.Y.) declared:

"'The issuance of a credit card constitutes an offer of credit, and the use of the card constitutes acceptance of the offer. The terms of the contract are the credit card agreement. A contract will be interpreted in accordance with the intent of the parties as expressed in the language of the agreement.' (citing *Greenfield v. Philles Records, Inc.*, 98 N.Y.2d 562, 750

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