FULL TEXT OF OPINIONS

American Express Centurion Bank v. John LaRose

Superior Court at New London
No. KNL CV 136016109S
Memorandum Dated December 12, 2013

Contracts – Actions – Account Stated – Opinion Suggests that the "Account Stated" Doctrine Is More an Evidentiary Tool for Proving the Outstanding Balance Due on an Open Account, Rather Than an Independent Cause of Action. This opinion suggests that the concept of an "account stated" cause of action is more a rule of evidence than an independent cause of action. The complaint in the case seeks recovery of a balance due on a credit card account. The first count is for breach of contract and the second count seeks alternate relief under an "account stated" theory of recovery. The evidence offered at trial consisted of a "cardmember agreement" between the parties, copies of 24 monthly statements delivered by the plaintiff to the defendant over a two-year period, and an affidavit from an agent of the plaintiff attesting to the validity of the agreement and the balance owed. The opinion grants summary judgment on the breach of contract count because the existence of a contract is established by the cardmember agreement and the amount of damages is established by the affidavit. However, the opinion denies relief under the alternate, "accounts stated" count because as pleaded the second count is based solely on the monthly statements. While those statements provide evidence of the amount due on an open account, they do not by themselves provide evidence of an underlying agreement between the parties. In other words, the "account stated" doctrine, at least as advanced in this case, is an evidentiary tool for proving the amount owed on an open account but the doctrine does not prove the existence of an underlying contract. When relying on the doctrine, therefore, care should be taken to offer more evidence than statements alone to establish the existence of a contractual agreement.

COLE-CHU, LEELAND J., J. On January 22, 2013, the plaintiff, American Express Centurion Bank, filed a three-count complaint against the defendant, John LaRose. Count one claims default on an open-ended credit plan; count two is entitled "Account Stated"; and count three claims unjust enrichment. On February 4, 2013, the defendant filed an answer claiming insufficient knowledge of the material allegations of the complaint and raising the prospect of bankruptcy as a special defense.

On June 24, 2013, the plaintiff filed its motion for summary judgment together with (1) an affidavit of Linda Salas, an assistant custodian of records for the plaintiff, (2) a copy of the "Cardmember Agreement" between the parties, and (3) copies of monthly statements of the defendant's credit card account from October 28, 2010, through October 28, 2012. These documents show the following relevant facts. On or about May 29, 2007, the defendant opened an American Express credit card account (account number ending 51002) with a $17,200 credit limit. The defendant charged purchases and made payments on the subject account. The last payment made by the defendant on the account was for $200.00 on July 12, 2012. As of the plaintiff's October 28, 2012 statement, and still as of May 23, 2013, the outstanding balance of the account was $11,452.47.

The defendant filed no opposition to the plaintiff's motion—nor anything else since his answer. The motion was submitted in open court on August 19, 2013, at which time the defendant could have orally opposed the motion but was not present.

DISCUSSION

The purpose of summary judgment is to resolve litigation without the delay and expense of trial when pleadings, affidavits, and any other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *Grenier v. Commissioner of Transportation*, 306 Conn. 523, 534-35, 51 A.3d 367 (2012). The party seeking summary judgment has the burden of submitting evidence that proves the nonexistence of any genuine issue of material fact. *Ramirez v. Health Net of the Northeast, Inc.*, 285 Conn. 1, 10-11, 938 A.2d 576 (2008). Although the court views the evidence in the light most favorable to the opposing party, once the movant has met his burden, the opponent may defeat the motion only by presenting evidence that reveals a material, factual dispute. *Id.*, 11.

The plaintiff's motion seeks summary judgment upon count one for "Default Open End Credit Plan"—essentially breach of contract. The affidavit of Linda Salas includes all the essential facts to establish the contract—the "Cardmember Agreement," which is attached to the affidavit—breach of the contract and the requested damages. The motion is unopposed and no fact in the affidavit is disputed by the defendant. The plaintiff is entitled to summary judgment on count one in the amount of $11,452.47.

The plaintiff also claims to have established liability "under the 'account stated' theory of liability" (plaintiff's brief at p. 8), which is separately pleaded as count two of the complaint. "An account stated cause of action has been recognized for over one hundred years. See *Zacarino v. Pallotti*, 49 Conn. 36, 38 [(1881)]. ('An account stated is an agreement between persons who had previous transactions, fixing the amount due in respect to such transactions and promising payment.')"[1] *Oliver Painting & Construction, LLC v. Vassilowitch*, Superior Court, judicial district of New Haven, Docket No. CV-11-6018911-S (October 27, 2011, Wilson, J.). However, as pleaded in this case, "account stated" is more properly regarded as an evidentiary principle akin to estoppel than as a cause

of action. The interpretation of pleadings is always a question of law for the court. *Boone v. William W. Backus Hospital*, 272 Conn. 551, 559, 864 A.2d 1 (2005).

Our Appellate Court has recently discussed "account stated" when it has been presented as a theory of liability. In *Credit One, LLC v. Head*, 117 Conn.App. 92, 977 A.2d 767, cert. denied, 294 Conn. 907, 982 A.2d 1080 (2009), as in the present case, count one of the complaint was for "default on an open end credit account." *Id.*, 97-98 n.6. In *Head*, the Appellate Court affirmed the entry of summary judgment "on count two . . . sounding in account stated"; *id.*, 97; and found it unnecessary to address count one. *Id.*, 97-98 n.6. In *Citibank (South Dakota), N.A. v. Manger*, 105 Conn.App. 764, 766-67, 939 A.2d 629 (2008), the suit "sound[ed] in account stated;" *id.*, 765; but was not resolved on that theory. The main appellate issue in *Manger* was whether there was a material issue of fact as to the allegation that the defendant was extended credit. *Id.*, 766. There was no evidence to contradict the plaintiff's affidavit that the defendant " 'utilized $12,777.29 in convenience checks' and, as a result, became indebted to the plaintiff." *Id.*, 767. (The Appellate Court in *Head* described *Manger* as "summary judgment . . . where defendant failed to make payments in accordance with credit card agreement." *Credit One, LLC v. Head, supra*, 117 Conn.App. 98.) In *Citibank (South Dakota), N.A. v. Evvard*, 128 Conn.App. 843, 18 A.3d 682 (2011), the Appellate Court describes the theory of account stated in a footnote; *id.*, 844 n.2; but the issue on appeal was standing. *Id.*, 844.

Head, *Manger* and *Evvard* all cite *General Petroleum Products, Inc. v. Merchants Trust Co.*, 115 Conn. 50, 160 A. 296 (1932), for the basic elements of an account stated. "The delivery by the bank to the plaintiff of each statement of the latter's account, with the canceled checks upon which the charges against it were based, was a rendition of the account so that retention thereof for an unreasonable time constituted an account stated which is prima facie evidence of the correctness of the account. Such account stated can be opened and impeached upon proof of mistake or fraud, but the plaintiff's silence as to the correctness of the account rendered puts upon it the burden of proving that the account, as stated, was the result of such fraud or mistake." *Id.*, 56; see *Credit One, LLC v. Head, supra*, 117 Conn.App. 91-92; *Citibank (South Dakota), N.A. v. Manger, supra*, 105 Conn.App. 766 n.2; *Citibank (South Dakota), N.A. v. Evvard, supra*, 128 Conn.App. 844 n.2. For present purposes, *General Petroleum Products, Inc. v. Merchants Trust Co.*—which concerned a checking account, not a loan account—only holds that an account stated is prima facie, rebuttable "evidence of the correctness of the account."

In this case, count two incorporates the eleven paragraphs which precede it, including all of count one, which is for breach of the credit agreement. Count two then alleges, in essence, that the plaintiff sent the defendant monthly statements detailing all debits and credits to the account and the amount due (para. 13) and that the defendant did not timely object to any of those statements (para. 14).[2] Count two is based on the cardmember agreement alleged in count one. Count two does not allege any different "agreement between persons who had previous transactions, fixing the amount due in respect to such transactions," let alone any promise by the defendant of payment other than that in the cardmember agreement. See *Zacarino v. Pallotti, supra*, 49 Conn. 38. Therefore, though the evidentiary value of "account stated" appears well to support entry of summary judgment on count one, the court does not regard count two as well pleading a cause of action different from count one. "An account stated only determines the amount of the debt where a liability exists, and cannot be made to create a liability per se where none before existed . . . In other words, an account stated is merely a form of proving damages for the breach of a promise to pay on a contract." (Citations omitted; internal quotation marks omitted.) *Dreyer Medical Clinic v. Corral*, 227 Ill.App.3d 221, 226, 591 N.E.2d 111 (1992).

The plaintiff's motion for summary judgment is granted as to count one and judgment shall enter against the defendant in the sum of $11,452.47 plus costs.

[1]The quoted language from *Zacarino v. Pallotti* is, in turn, a quotation from *Abbott's Trial Evidence*, at p. 458.

[2]Paragraph 15 of count two states a conclusion of law that the plaintiff "has established an account stated for the balance due and owing in the amount reflected on the final account statement . . ." Count two then needlessly repeats the substance of four of the first eleven paragraphs.

Patrick Wood v. Club, LLC et al.

Superior Court at Stamford
No. FST-CV-13-6016946S
Memorandum Filed November 29, 2013

Torts – Negligence – Indemnification – Common-law Claim for Indemnification in Tort Cannot Be Brought by a Party Charged with an Intentional Tort. A claim for common-law indemnification in tort cannot be based on a first-party claim that asserts an intentional tort. This opinion holds that an insurer sued for intentional misrepresentations during the course of an early action brought against an insured cannot bring a third-party complaint against the plaintiff's counsel in the original matter for negligently failing to uncover the alleged misrepresentations. The opinion reasons that it would violate public policy to allow a party who is guilty of an intentional tort to obtain indemnification from a party guilty of only negligent conduct.