

Civil Court of the City of New York
County of Queens

Index Number CV- [REDACTED]-11-QU
Motion Cal. # 3,4 Motion Seq.#

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FIA CARD SERVICES, N.A.,

Plaintiff,

-against-

[REDACTED]

Defendant.

Civil Court
of the
City of New York
OCT 22 2012
ENTERED
QUEENS COUNTY

DECISION/ORDER

Recitation, as required by CPLR §2219 (a), of the
Papers considered in the review of this Motion:

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	1-2
Order to Show cause and Affidavits Annexed.....	
Answering Affidavits.....	3
Replying Affidavits.....	4
Exhibits.....	
Other.....	

Defendant [REDACTED] ("Defendant") brought a Motion to Strike and/or Compel Discovery to either strike the complaint of Plaintiff FIA Card Services, N.A. ("Plaintiff") or to direct it to respond to outstanding discovery demands. Plaintiff, in turn, brought a Cross-Motion seeking summary judgment under CPLR §3212.

Upon a full review of all papers submitted, the Court finds as follows: the defendant's Motion to Strike and/or Compel is granted to the extent that plaintiff is directed to respond to all questions in Defendant's First Set of Interrogatories, with the exception Questions 10 and 13 within forty-five (45) days of the decision herein.

The Court finds Question 10 (requesting all dates of communications from the plaintiff to the defendant, and vice versa, either written or verbal) to be overly broad, and finds that Question 14 (inquiring as to Plaintiff's policies for determining an applicant's creditworthiness) is not germane to the action. Those questions are therefore stricken, "but do not necessitate vacating [defendant's] interrogatories or document demands in their entirety, and [plaintiff] is directed to

otherwise comply therewith" (*Albert v Time Warner Cable*, 255 AD2d 248 [1998]; see also *Peppers v Peppers*, 266 AD2d 193 [1999]).

Further, the plaintiff's Motion for Summary Judgment is denied. The Court notes that it is unclear what plaintiff's first cause of action is: breach of contract is not specifically pleaded, nor is a Cardmember Agreement provided anywhere in the papers. A statement in the supporting affidavit that "Defendant opened an account with FIA Card Services, N.A....for the purpose of obtaining an extension of credit and did thereafter use or authorize the use of the account for the acquisition of goods, services, or cash advances in accordance with the customer agreement ..." is insufficient to establish the existence of such an agreement, and by extension, a cause of action for breach of contract. Even if plaintiff intended to plead unjust enrichment, it would appear that the sole evidence of such unjust enrichment would be monthly statements, which plaintiff's affiant fails to state were sent to the defendant.

As to the second cause of action of account stated, as previously indicated, the plaintiff's affiant failed to state that monthly statements were sent to the defendant and retained without objection, requirements to establish an account stated cause of action. (*See American Express Travel Related Services v Felix*, 29 Misc3d 134 [App Term, 2d, 11th and 13th Jud Dists 2010].)

The proponent of a summary judgment motion must make a *prima facie* showing of entitlement to summary judgment as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact (*see Zuckerman v. City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]; *Winegrad v. New York University Medical Center*, 64 NY2d 851, 487 NYS2d 316 [1985]). Here, plaintiff has failed to meet the standard required for summary judgment, and its motion must therefore be denied.

The foregoing constitutes the Decision and Order of the Court.

Dated: October 19, 2012



CHEREÉ A. BUGGS
Judge, Civil Court of the City of New York
County of Queens