STATE OF MICHIGAN

SIXTEENTH JUDICIAL CIRCUIT COURT

AMERICAN EXPRESS NATIONAL BANK,

Plaintiff,

vs. Case No. 2019-1253-CB

PATRICK W. BALLEW, and
RSL GROUP, LLC,

Defendants,
_____/

OPINION AND ORDER

Plaintiff American Express National Bank ("American Express") moved for summary disposition under MCR 2.116(C)(9) and (10) on its Complaint.

I. Background

On April 2, 2019, American Express filed its Complaint alleging a single count, in four paragraphs, which refer to both breach of contract and open account. Specifically, American Express alleges that Patrick W. Ballew ("Mr. Ballew") and RSL Group, LLC (together as "Defendants") owe an unpaid debt.

In its motion, American Express more fully states, as a basis of its claim, that it allegedly entered into a contractual agreement for a credit card account with Defendants, Defendants agreed to the card member agreement, and that it subsequently used the card over the course of a year to make numerous purchases and payments. American Express claims that at the time the account closed, Defendants owed a balance of $31,585.53.

Defendants filed a Response on August 1, 2019. The Court heard oral argument on August 19, 2019 and took the matter under advisement.

II. Standards of Review

Summary disposition under MCR 2.116(C)(9) is proper if a defendant fails to plead a valid defense to a claim. *Nicita v Detroit (After Remand),* 216 Mich App 746, 750; 550 NW2d 269 (1996). A motion under MCR 2.116(C)(9) tests the sufficiency of a defendant's pleadings by accepting all well-pleaded allegations as true. *Lepp v Cheboygan Area Schools,* 190 Mich App 726, 730; 476 NW2d 506 (1991). If the defenses are so clearly untenable as a matter of law that no factual development could possibly deny plaintiff's right to recovery, then summary disposition under this rule is proper. *Id.,* quoting *Domako v Rowe,* 184 Mich App 137, 142; 457 NW2d 107 (1990). A court may look only to the parties' pleadings in deciding a motion under MCR 2.116(C)(9). MCR 2.116(G)(5).

A motion under MCR 2.116(C)(10) tests the factual support of a claim. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). In reviewing such a motion, a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties in the light most favorable to the party opposing the motion. *Id.* Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. *Id.* The court must only consider the substantively admissible evidence actually proffered in opposition to the motion, and may not rely on the mere possibility that the claim might be supported by evidence produced at trial. *Id.* at 121. Indeed, "an adverse party may not rest upon the mere allegations or denials of his or her pleadings, but must, by affidavits or as otherwise provided in this rule, set forth specific facts showing that there is a genuine issue for trial." MCR 2.116(G)(4).

III. Arguments, Law and Analysis

A. MCR 2.116(C)(9)

American Express first argues that Defendants fail to state a defense because "Defendants failed to plead any specific facts to support that he did not default on the Account . . ." or "provide any valid proof. . ." However, American Express misapplies MCR 2.116(C)(9) to somehow shift the burden to Defendants to support that it did not default on the Account. This view is wrong.

First, since the Court looks only to the pleadings under MCR 2.116(C)(9), American Express' argument that Defendants failed to "support" their defense is incorrect. MCR 2.116(G)(5). Further, Defendants in fact asserted approximately 12 affirmative defenses in their answer. American Express cites *Badalow v Evenson*, 62 Mich App 750, 751; 233 NW2d 708 (1975) for the proposition that general statements do not support a meritorious defense, but that case concerns setting aside a default, not analysis under MCR 2.116(C)(9). Therefore, American Express' position is both legally and factually without merit.

Second, a categorical denial of a claim is a sufficient defense to withstand a motion under MCR 2.116(C)(9). See *Lepp v Cheboygan Area Sch*, 190 Mich App 726, 730–31; 476 NW2d 506 (1991); *Nasser v Auto Club Ins Ass'n*, 435 Mich 33, 48; 457 NW2d 637(1990). Here, Defendants denied essential elements of American Express' claim. Therefore, Defendants have no obligation under MCR 2.116(C)(9) "to plead specific facts" denying a claim nor do they have any obligation to support such facts. As a result, American Express' motion for summary disposition under MCR 2.116(C)(9) is denied.

B. American Express' Arguments Under MCR 2.116(C)(10)

American Express also argues that no question of fact exists as to liability under the Agreement. American Express argues that the documentary evidence shows that Defendants opened an account, made purchases, made payments on the account, and failed to pay the balance owed.

As an initial matter, American Express does not clearly allege the elements of either breach of contract or open account, though it mentions both in its Complaint and throughout its Motion. American Express also does not distinguish between co-defendants. Occasionally, American Express refers to "Defendant", ignoring that it has named two defendants in this lawsuit.

To establish a breach of contract, the plaintiff must show that "(1) there was a contract (2) which the other party breached (3) thereby resulting in damages to the party claiming breach." *Miller–Davis Co v Ahrens Constr, Inc*, 495 Mich 161, 178; 848 NW2d 95 (2014).

An open account[1] is traditionally defined as: 1) an unpaid or unsettled account. 2) [a]n account that is left open for ongoing debit and credit entries and that has a fluctuating balance until either party finds it convenient to settle and close, at which time there is a single liability. *Fisher Sand & Gravel Co v Neal A Sweebe, Inc*, 494 Mich 543,

[1] American Express provided no allegations or argument regarding the similar claim of account stated, which "is a contract based on assent to an agreed balance, and it is an evidentiary admission by the parties of the facts asserted in the computation and of the promise by the debtor to pay the amount due." *Id.* at 557. An "account stated requires the manifestation of assent by both parties to the correctness of the statement of the account between them." *Id.*

553–54; 837 NW2d 244 (2013). An open account consists of a series of transactions and is continuous or current, and not closed or stated. *Id.*

In this case, American Express has not established the elements of an open account claim because there is no evidence that the account remains open. To the extent American Express intends to allege a claim for breach of contract, it must first establish that a contract exists.

1. Defendant Mr. Ballew

American Express does not produce a written contract signed by defendant Ballew but instead relies on account documents and statements as evidence of the existence of an agreement. Specifically, American Express' attaches as its Exhibit A, a "Cardmember Agreement" containing boilerplate account details and listing both Defendants' under cardmember names at the top. As its Exhibit B, American Express relies on two account statement summaries from 2018, issued to Defendants. As a supplement, American Express also submits additional such statements.

Mr. Ballew denies that he entered a contract with American Express and argues that American Express attaches no credit application or signed credit agreement. Mr. Ballew also argues that he is not personally responsible for any purchases made as an authorized user on a corporate account.

American Express relies on the Retail Installment Sales Act, MCL 445.862, to argue that Mr. Ballew signed the charge agreement by operation of law. Specifically, American Express argues that Defendants opened an account, made purchases on the account, made payments, and failed to pay the balance. MCL 445.862(a) states in relevant part,

> A retail charge agreement[2] shall be in writing and signed by the buyer or the authorized representative of the buyer. A retail charge agreement shall be considered signed and accepted *by the buyer* if after a request for a retail charge account the agreement or application for a retail charge account is in fact signed by the buyer or if the retail charge account is used by the buyer or by another person authorized by the buyer.

The Retail Installment Sales Act defines "buyer" as "a person that buys or agrees to buy goods or obtain services or agrees to have services rendered or furnished from a retail seller." MCL 445.852(h). In addition,

Few cases interpret MCL 445.862(a). However, by its own terms, the statute first requires retail charge agreements to be written and signed. The Statute then provides for an operation of law whereby the retail charge agreement is considered signed upon use. Importantly, however, the Act clearly specifies that the agreement shall be considered signed "by the buyer" if used by the buyer or by another person authorized by the buyer. The statute distinguishes between a buyer and a person authorized by the buyer. The statute does not say the agreement is deemed signed by the 'person authorized by the buyer', but instead, it is deemed signed 'by the buyer.'

Consequently, the Court finds no basis in the language of the Retail Installment Sales Act to presume a signature from a person authorized by the buyer. To the extent American Express seeks to conclude that Mr. Ballew, as an authorized user on a corporate account, signed an installment agreement by operation of law, its conclusion has no support from MCL 445.862(a). Therefore, American Express has not shown, as a matter of law, that Mr. Ballew entered a written and signed retail charge agreement.

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[2] "Retail charge agreement means an instrument prescribing the terms of a secured or unsecured retail installment transaction that may be made under the instrument from time to time and under the terms of which a time price differential is to be computed in relation to the buyer's unpaid balance from time to time." MCL 445.852(i).

2. Defendant RSL Group, LLC

As stated above, American Express did not distinguish its analysis between defendants. Accordingly, it relies on the same evidence of account statements and payments described above. Contrary to the Court's conclusion relating to Mr. Ballew above, MCL 445.862(a) could operate by law to satisfy the signing requirement with regard to RSL Group, LLC, to the extent it was "the buyer" under the act.

For the purposes of establishing a breach of contract claim, by producing statements that span over a period of time, and evidence of the terms of a cardmember agreement, American Express has produced evidence to support its claim regarding the existence of a contract. American Express Exhibits A, B.

American Express also produced an Affidavit of Robert J. Rebhan, assistant custodian of records for American Express, stating that Defendants opened an American Express credit card account in February 2016, Defendants did not assert a valid, unresolved objection to the balance shown due and owing on monthly statements, Defendants failed to make payments and the account was closed. Consequently, as of February 26, 2019, a balance is due of $31,585. American Express Exhibit C.

At oral argument, Defendants equivocated, at best, and did not categorically deny the existence of an agreement between American Express and RSL Group, LLC. In its Response, RSL Group, LLC argues that American Express fails to support its motion.

However, even assuming *arguendo* that with regard to defendant RSL Group, LLC, American Express established the first prong of a breach of contract claim—that a contract exists—American Express has not submitted sufficient evidence to permit the

Court to determine any question of breach. "Michigan law requires a party claiming a breach of contract to prove the existence and terms of a contract . . ." *Van Buren Charter Twp v Visteon Corp*, 319 Mich App 538, 554; 904 NW2d 192 (2017), app den 503 Mich 960; 923 NW2d 266 (2019) citation omitted, emphasis added. Without attaching a copy of the contract to its Complaint, or otherwise presenting the alleged agreement to the Court, American Express has not established the terms of the alleged contract. Therefore, at this time, American Express has not satisfied the second prong of a breach of contract action—that defendant breached the terms.

For these reasons, American Express' motion is denied.

IV. Conclusion

For the reasons set forth above, American Express' motion is DENIED.

In accordance with MCR 2.602(A)(3), this *Opinion and Order* neither resolves the last pending claim nor closes this case.

IT IS SO ORDERED.

Date: SEP 20 2019

Kathryn A. Viviano

Hon. Kathryn A. Viviano, Circuit Court Judge

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