

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: Honorable, ALLAN B. WEISS IAS PART 2
Justice

QING ZHANG,

Plaintiff,

-against-

HIRSHLEFERS¹ OF MANHASSET and CHASE BANK,

Defendants.

Index No: 11435/12

Motion Date: 6/25/14

Motion Seq. No.: 2, 3

The following papers numbered 1 to 20 read on this motion by defendant, Chase Bank, for an Order dismissing the complaint pursuant to CPLR 3211(a)(1) and (7) or pursuant to CPLR 3211(c) converting this motion to one for summary judgment and granting summary judgment dismissing the complaint insofar as it is asserted against it.

	<u>PAPERS NUMBERED</u>
Seq.#2 Notice of Motion-Affidavits-Exhibits	1 - 6
Memorandum of Law in Support of Dismissal....	7 - 8
Answering Affidavits-Exhibits.....	9 - 12
Replying Memorandum of Law.....	13 - 14
Seq.#3 Notice of Motion-Affidavits-Exhibits	15 - 18
Answering Affirmation-Hirschlefers.....	19 - 20

Upon the foregoing papers it is ordered that the defendant's motion for summary judgment (Seq.#2) dismissing the fourth cause of action asserted against it is granted pursuant to CPLR 3211(c) and 3212.

Defendant's motion (Seq.#3) to vacate the Note of Issue is denied as academic.

Inasmuch as the action as against the Defendant Hirshlefers of Manhasset was dismissed by Order dated June 17, 2014, the complaint is dismissed in its entirety.

¹The correct name of the defendant s/h/a Hirshlefers of Manhasset is Hirschleifers, Inc.

This action arises out of the plaintiff's purchase of a Chanel alligator handbag on December 9, 2011 at Hirshlefers of Manhasset (Hirshlefers) for which her Chase Visa credit card account was charged \$34,020.00, including a \$20 delivery fee, although she believed, based on the alleged fraudulent acts and misrepresentations of employees of Hirshlefers, that the price of the handbag was \$3,400.00. Plaintiff commenced this action against Hirshlefers for, inter alia, fraud and fraudulent inducement, and against Chase Bank (Chase) for breach of contract.

The elements of a cause of action for breach of contract are the formation of a contract between plaintiff and defendant, performance by plaintiff, defendant's failure to perform and resulting damages (see generally Furia v. Furia, 116 AD2d 694, 695 [1986]). In addition, a complaint alleging breach of contract must set forth the terms of the agreement upon which liability is predicated by making specific reference to the relevant portions of the contract or by attaching a copy of the contract to the complaint (see Chrysler Capital Corp. v. Hilltop Egg Farms, Inc., 129 AD2d 927, 928 [1987]; accord Valley Cadillac Corp. v. Dick, 238 AD2d 894, 894 [1987]).

The fourth and only remaining cause of action asserted in the complaint, alleges that Chase breached the terms and conditions of the contract, Cardmember Agreement, between the plaintiff and Chase in increasing the \$12,700.00 credit limit of the Credit Card without plaintiff's consent when it approved, rather than declined authorization for the purchase. The complaint alleges that had Chase declined authorization for the charge at the time of the purchase, plaintiff would have known that the true cost of the handbag was \$34,000.00.

Chase moves for summary judgment dismissing the fourth cause of action relying upon, inter alia, various documents including copies of the applicable Cardmember Agreement (the Agreement), and the affidavit of Evelyn Ford authenticating the Agreement, a copy of one of plaintiff's credit card statements, Chase Credit Card Autopay Authorization Form, dated August 26, 2010, the plaintiff's admissions in response to Chase's demand and the Hirshlefers invoice and credit card receipt both signed by the plaintiff.

Defendant has established, prima facie, its entitlement to summary judgment based upon, inter alia, the Cardmember Agreement, which demonstrated that the plaintiff did not breach the contract in that it did not increase the plaintiff's "credit limit" when it accepting the charge for the handbag since she did not have a "spending limit" attached to her Account.

The Agreement provides in pertinent part as follows:

"Credit Access Line:We may also call this a revolving line. We will assign a credit access line to your Account. Amounts over your credit access line may be referred to as a non-revolving line. The credit card access line is the maximum amount upon which you may defer payment on your Account, subject to the Minimum Payment Due. Your statement will show the amount of your credit access line as of the date of the statement. There is no pre-set spending limit for your Account. Instead, each charge is evaluated based on the spending and payment patterns on the Account, your other relationships with us, information from credit reports * * *. You are responsible for balances on your Account including amounts charged in excess of your credit access line.* * *" [emphasis added]

It is well settled that absent a violation of law or public policy, people are free to enter into contracts, making whatever agreement they wish, no matter how unwise the agreements may seem to others (see Rowe v. Great Atlantic & Pacific Tea Company, Inc., 46 NY2d 62 [1978]). The court's role is to enforce the agreement in accordance with its terms rather than reform it (see Grace v. Nappa, 46 NY2d 560 [1979]). In order to enforce the agreement, the court must construe the contract in accordance with the intent of the parties (see Vermont Teddy Bear Co., Inc. v. 583 Madison Realty Company, 1 NY3d 470, 475 (2004); Greenfield v. Philles Records, Inc., 98 NY2d 562 [2002]). "Whether a contract is ambiguous is a question of law and extrinsic evidence may not be considered unless the document itself is ambiguous" (South Rd. Assoc., LLC v. International Bus. Machs. Corp., 4 NY3d 272, 278[2005]). However, courts may not by construction add, remove or distort the meaning of terms, thereby making a new contract for the parties under the guise of interpreting the contract (see Vermont Teddy Bear Co., Inc. v. 583 Madison Realty Company, 1 NY3d 470, 475; Reiss v. Financial Performance Corp., 97 NY2d 195, 199 [2001]).

In opposition, plaintiff submitted the affidavit of her friend who was present on the day of the purchase and her own affidavit and her attorney's affirmation which are insufficient to raise a triable issue of fact. Plaintiff's counsel contends that the terms "credit access line" and "pre-set spending limit" are ambiguous, and issues of fact exist with respect to their interpretation which the plaintiff understood to mean that her spending limit is confined to her access credit

limit. The plaintiff's affidavit, however, did not contain any reference to her understanding of the terms of the agreement. There is nothing ambiguous about the terms "credit access line" and "pre-set spending limit" as used and explained in the agreement. "Mere assertion by one that contract language means something to him, where it is otherwise clear, unequivocal and understandable when read in connection with the whole contract, is not in and of itself enough to raise a triable issue of fact" (Bethlehem Steel Co. v. Turner Constr. Co., 2 NY2d 456, 460 [1957]; see Kasowitz, Benson, Torres & Friedman, LLP v. Reade, 98 AD3d 403 [2012]; Vesta Capital Management LLC v. Chatterjee Group, 78 AD3d 411[2010]).

Dated: August 26, 2014
D# 50

.....
J.S.C.