

B.B. Jewels, Inc. v Neman Enters., Inc.

2011 NY Slip Op 31251(U)

May 10, 2011

Supreme Court, New York County

Docket Number: 602258/09

Judge: Judith J. Gische

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY
HON. JUDITH J. GISCHE

PRESENT: _____ J.S.C.

PART 10

Index Number : 602258/2009
B.B. JEWELS INC.
VS.
NEMAN ENTERPRISES INC
SEQUENCE NUMBER : 001
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. 001
MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

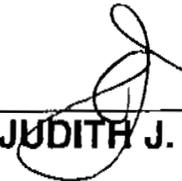
**motion (s) and cross-motion(s)
decided in accordance with
the annexed decision/order
of even date.**

FILED

MAY 11 2011

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 5/10/11


HON. JUDITH J. GISCHE J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S): _____

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 10**

-----x
B.B. Jewels, Inc.

Plaintiff (s),

-against-

Neman Enterprises, Inc. and
Rozeta Neman,

Defendant (s).
-----x

DECISION/ORDER

Index No.: 602258/09
Seq. No.: 001

PRESENT:

Hon. Judith J. Gische
J.S.C.

FILED

MAY 11 2011

*Recitation, as required by CPLR 2219 [a], of the papers considered in the review of this
(these) motion(s):*

NEW YORK
COUNTY CLERK'S OFFICE

Papers

Numbered

Pltf's n/m (3212) w/MF affirm, SB affid, exhs, AOS 1

Upon the foregoing papers, the decision and order of the court is as follows:

This is an action brought by plaintiff to recover the sum of \$62,800.00 from defendants Neman Enterprises, Inc ("NEI") and Rozeta Neman ("Ms. Neman" sometimes "principal") (collectively "defendants") based upon a bounced check which defendants provided to the plaintiff for goods sold and delivered.

The defendants have answered the complaint but only asserted several boilerplate defenses, such as there is no justiciable controversy, lack of service, lack of jurisdiction and lack of specificity. Notably, however, they admit in the answer to having provided the subject check to the plaintiff and that it was signed by Ms. Neman, the principal of the corporation.

Plaintiff seeks summary judgment. The motion is unopposed. Since summary

judgment relief is available once issue is joined, this motion will be decided on the merits (CPLR § 3212 [a]; Myung Chun v. North American Mortgage Co., 285 AD2d 42 [1st Dept 2001]).

On a motion for summary judgment, the movant must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case " [Winegrad v. New York Univ. Med. Ctr., 64 N.Y.2d 851, 853 [1985]]. Once met, this burden shifts to the opposing party who must submit evidentiary facts to controvert the allegations set forth in the movant's papers. However, if the motion is unopposed, then the movant's allegations may be deemed admitted and summary judgment may then be granted as there are no triable issues of fact (see, Kuehne & Nagel, Inc. v. F.W. Baiden, 36 N.Y.2d 539, 544 [1975]). n demonstrate the existence of a triable issue of fact (Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 324 [1986]; Zuckerman v. City of New York, 49 N.Y.2d 557 [1980]).

Both defendants have defaulted in opposing plaintiff's motion for summary judgment, though there is due proof of service on them, not only through the attorney who filed the answer on their behalf, but also upon Ms. Neman personally. Thus, applying the foregoing legal principals, there are no triable issues of fact, the court only has to decide whether plaintiff has set forth its *prima facie* case.

Arguments Presented

It is un-refuted that the parties entered into an agreement for goods and services to be provided by plaintiff, which were delivered to and accepted by defendants. Defendants wrote plaintiff a check for \$62,800, dated October 18, 2008 ("check"), as payment for the goods and services. Plaintiff deposited the check but it was later

dishonored because the account upon which it had been drawn was closed. The account is in the name of "Neman Enterprises, Inc." and the check is signed by "Rozeta Neman." Eventually, defendants made some payments, reducing their total indebtedness to \$52,800, the amount that plaintiff seeks summary judgment for.

In addition to the general denials In their answer (supra), Ms. Neman contends that she only signed the check in her "official capacity as _____ of Defendants Neman Enterprises, Inc." Plaintiff claims that Ms. Neman is personally liable as an indorser of the check of the check and, therefore, both defendants are jointly and severally liable for the debt because Ms. Neman's signature on the check was unqualified with any titular designation.

Discussion

One who signs a negotiable instrument without indicating that his or her signature is made in an agency capacity will ordinarily be personally obligated upon the instrument (UCC § 3-403[2][a]), unless the immediate parties to an instrument have otherwise agreed that the signatory will not be held individually responsible (UCC § 3-403[2][b]; Rotuba Extruders v. Ceppos, 46 N.Y.2d 223 [1978]). Thus, to come within the exception, a signatory of a dishonored check who has failed to indicate on the face of the check that s/he signed in a representative capacity may only escape personal liability where there is an understanding, implicit in the course of dealing between the parties, that s/he was acting in a representative capacity (Gunduz USA, LLC v. Pirolo, 78 A.D.3d 460 [1st Dept 2010]).

Plaintiff has proved that they proved goods and services and that defendants

accepted them without any reservation of rights. They paid for the goods with an NEI check signed by Ms. Newman and the check bounced. These facts, which are unrefuted, easily satisfy plaintiff's burden on this motion in proving its claims against NEI and plaintiff is entitled to summary judgment against NEI without any further analysis.

Having defaulted in opposing this motion for summary judgment, which seeks to hold her personally liable for a debt paid by a corporate check, Ms. Neman has admitted that she signed an NEI corporate check which she sent to plaintiff to pay for the goods that were delivered. She has also admitted that she did not indicate on the check that she was only signing it in a representative capacity (Gunduz USA, LLC v. Pirolo, supra; Arde Apparel v. Matisse Ltd., 240 A.D.2d 328 [1997]). The parties did have an understanding, nor was it implicit in their course of dealing, that the parties did not intend for Ms. Newman to be personally liable for the corporate debt. Thus, under UCC § 3-403[2][a], Ms. Neman is personally obligated for the debt (Gunduz USA, LLC v. Pirolo, supra; Arde Apparel v. Matisse Ltd., supra). It is simply not enough for Ms. Neman to have asserted as an affirmative defense in her answer that she had no intention of being bound personally without offering any factual support for those claims.

Plaintiff has proved the material elements of its claims against each of the defendants on its first and 2nd causes of action and against Ms. Neman on its third cause of action. There are no triable issues of facts. Therefore, plaintiff's motion is granted. The clerk shall enter a money judgment against the defendants jointly and

severally in the principal amount of \$52,800 plus interest from October 18, 2008, together with the costs and disbursements of this action, as taxed by the court. The affirmative defenses are hereby dismissed and the answer is stricken.

Conclusion

In accordance with the foregoing,

It is hereby

ORDERED that the motion by plaintiff B.B. Jewels, Inc. for summary judgment is granted on default on its first and second causes of action against both defendants and on its third cause of action against Rozeta Neman; and it is further

ORDERED that the clerk shall enter judgment in favor of plaintiff B.B. Jewels, inc against defendants Neman Enterprises, Inc. and Rozeta Neman, jointly and severally, in the principal amount of Fifty Two Thousand Eight Hundred (\$52,800), plus interest from October 18, 2008, together with the costs and disbursements of this action, as taxed by the court, and plaintiff shall have execution thereof; and it is further

ORDERED that the affirmative defenses are dismissed and the answer is stricken; and it is further

ORDERED that any relief requested but not addressed is hereby denied; and it is further

ORDERED that this constitutes the decision and order of the court.

Dated: New York, New York
May 10, 2011

So Ordered:

FILED

MAY 11 2011



Hon. Judith J. Gische, J.S.C.