

Aicco, Inc. v My Way Car Serv., Inc.

2007 NY Slip Op 30855(U)

April 16, 2007

Supreme Court, New York County

Docket Number: 0602982/2006

Judge: Judith J. Gische

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: **JUDITH J. GISCHE, J.S.C.**

PART _____

Index Number : 602982/2006

AICCO, INC.

vs

MY WAY CAR SERVICE

Sequence Number : 001

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on 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/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

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

FILED

APR 23 2007

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 4/16/07

J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

REFERENCE

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

-----X
AICCO INC.,

Plaintiff,

-against-

MY WAY CAR SERVICE, INC., MRM LEASING
CORP., ONE RING AMBULETTE SERVICE
CORP., and COVEREX CORPORATE RISK
SOLUTIONS, INC.,

Defendants.

Decision/Order

Index No.: 602982

Seq. No. : 001

Present:

Hon. Judith J. Gische

J.S.C.

FILED

APR 23 2007

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

Papers

Numbered

Pltf's motion [sj/mt] w/CS affirm in support, JS aff, exhs, memo of law 1

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

The underlying action is for breach of loan agreements. Plaintiff Aicco Inc. ("Aicco") moves for summary judgment: (1) on the first cause of action against defendants My Way Car Service, Inc. ("My Way") and MRM Leasing Inc. s/h/a MRM Leasing Corp. ("MRM") for breach of contract; (2) on the second cause of action for attorneys fees against My Way and MRM; (3) on the third cause of action for breach of contract against defendant One Ring Ambulette Service Corp. ("One Ring"); and (4) on the fourth cause of action for attorneys fees against One Ring. Plaintiff does not move with respect to the remaining causes of action in the complaint.

The instant motion was served on all defendants on February 13, 2007. None of the defendants have cross moved or otherwise opposed the instant motion. Therefore

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this motion has been submitted on default. Since issue has been joined, but note of issue has not yet been filed, summary judgment relief is available. Brill v. City of New York, 2 N.Y.3d 648 (2004). The court's decision follows.

Discussion

On a motion for summary judgment, it is the movant's burden to set forth evidentiary facts to prove its *prima facie* case that would entitle it to judgment in its favor, without the need for a trial. Only if this burden is met, must the party opposing the motion then demonstrate, by admissible evidence, the existence of a factual issue requiring a trial of the action, or tender an acceptable excuse for his/her failure so to do. CPLR § 3212; Winegrad v. NYU Medical Center, 64 N.Y.2d 851 (1985); Zuckerman v. City of New York, 49 N.Y.2d 557, 562 (1980). Where, however, the proponent fails to make out its *prima facie* case for summary judgment, then the motion must be denied, regardless of the sufficiency the opposing papers. Alvarez v. Propect Hospital, 68 N.Y.2d 320 (1986); Ayotte v. Gervasio, 81 N.Y.2d 1062 (1993). When issues of law are the only issues raised in connection with a motion for summary judgment, the court may and should resolve them without the need for a testimonial hearing. Hindes v. Weisz, 303 A.D.2d 459 (2nd Dept. 2003).

The elements of a cause of action for breach of contract are: (1) formation of a contract between the parties; (2) performance by plaintiff; (3) defendant's failure to perform; and (4) resulting damage. Furia v. Furia, 166 A.D.2d 694 (2nd Dept. 1990).

Plaintiff's motion is supported by the affirmation of Clifford Schwartz, Esq. and the sworn affidavit of Joan Stratton. Aicco holds two Premium Finance Agreements. The first was entered into by itself and defendants My Way and MRM on September 7,

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2005. The second agreement was entered into by itself and defendant One Ring, also on September 7, 2005.

The My Way/MRM Agreement obligated: (1) Aicco to pay insurance premiums, in the amount of \$82,072.00, on behalf of My Way and MRM; and (2) My Way and MRM to unconditionally repay Aicco the moneys advanced on its behalf for payment of the insurance premiums. The One Ring Agreement obligated: (1) Aicco to pay insurance premiums, in the amount of \$27,552.00, on behalf of One Ring; and (2) One Ring to unconditionally repay Aicco the moneys advanced on its behalf for payment of the insurance premiums. Aicco contends that My Way, MRM and One Ring defaulted under the respective agreements, and now moves for summary judgment against these defendants for a sum certain plus legal fees.

On September 13, 2005, Aicco paid to defendant Coverex Corporate Risk Solutions, Inc. ("Coverex") the premiums in the amount of: (1) \$82,072.00 for remittance to AIU Insurance Company ("AIU"), on behalf of My Way and MRM; and (2) \$27,552.00 for remittance to AIU on behalf of One Ring.

Aicco has submitted loan account histories for each loan. Neither My Way nor MRM made the initial payment on time, which was due on September 22, 2005. One Way also failed to make its initial payment timely, which was due on October 1, 2005. After late fees were assessed, as provided for in the agreement, these entities then submitted a payment on each respective loan. However, the payment was returned unpaid by said defendants' respective banks. Further fees were assessed. The defendants failed to make any other payments, and were therefore in default under the agreements. As a result, the financed policies were cancelled.

* 5]

Aicco was able to and did offset the balance due on each loan by recovering unearned premiums from AIU. My Way and MRM currently owe Aicco \$86,867.45 under its agreement which also provides interest to accrue at 8.19% annually. One Ring currently owes Aicco \$22,984.44 under its agreement which also provides interest to accrue at 7.95% annually.

Absent any opposition and given the showing made by plaintiff on its motion, there are no issues of fact. The above claims establish the elements of a *prima facie* cause of action for breach of contract and Aicco is therefore entitled to summary judgment with respect to the first and third causes of action against My Way, MRM and One Ring, respectively.

With respect to the second and fourth causes of action, Aicco contends that it is entitled to recover its reasonable attorney's fees and costs incurred in this action pursuant to the terms of the aforesaid agreements. Schwartz has submitted an affidavit detailing the legal fees Aicco has incurred. Schwartz states that his hourly billing rate is \$200.00 and that Aicco has incurred legal fees and disbursements in the total amount of \$3,735.03, as of January 31, 2007.

While My Way, MRM and One Ring are all liable for Aicco's legal fees and disbursements and the motion is unopposed, the court is unable to determine what portion of fees charged is attributable to the work related to each defaulting defendant. My Way, MRM and One Ring are contractually obligated to pay. Accordingly, plaintiff is entitled to summary judgment on the issue of liability on the second and fourth causes of action against defendants My Way, MRM and One Ring respectively.

Since Aicco's damages can only be ascertained at a hearing, the court directs

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that there be an inquest on the issue of damages with respect to the second and fourth causes of action. The inquest shall be before a Special Referee who shall hear and determine the amount plaintiff may recover from defendants My Way, MRM and One Ring for its reasonable attorneys fees. Plaintiff shall serve a copy of this order on the Office of the Special Referee, 60 Centre Street, Room 119, so that this matter may be scheduled and assigned.

Conclusion

In accordance herewith, it is hereby:

ORDERED that plaintiff Aicco's motion for summary judgment against defendants My Way Car Service, Inc. and MRM Leasing Corp. on the first cause of action is hereby granted; and it is further

ORDERED that the Clerk shall enter a money judgment in favor of Aicco Inc., plaintiff in this action, against defendants My Way Car Service, Inc. and MRM Leasing Inc. s/h/a MRM Leasing Corp. in the amount demanded on the first cause of action, totaling Eighty Six Thousand Eight Hundred Sixty Seven 45/100 Dollars (\$86,867.45), together thereon with prejudgment interest at the rate of Eight 19/100 (8.19%) per annum from September 22, 2005; and it is further

ORDERED that plaintiff Aicco's motion for summary judgment against defendants My Way Car Service, Inc. And MRM Leasing Corp on the second cause of action is hereby granted on the issue of liability; and it is further

ORDERED that plaintiff Aicco's motion for summary judgment against defendant One Ring Ambulette Service Corp. on the third cause of action is hereby granted; and it

is further

ORDERED that the Clerk shall enter a money judgment in favor of Aicco Inc., plaintiff in this action, against defendant One Ring Ambulette Service Corp in the amount demanded on the first cause of action, totaling Twenty Two Thousand Nine Hundred Eighty Four 44/100 Dollars (\$22,984.44), together thereon with prejudgment interest at the rate of Eight 19/100 (7.95%) per annum from October 1, 2005; and it is further

ORDERED that plaintiff Aicco's motion for summary judgment against defendant One Ring Ambulette Service Corp. on the fourth cause of action is hereby granted on the issue of liability; and it is further

ORDERED that there be an inquest before a Special Referee who shall hear and determine the amount plaintiff may recover from defendants My Way, MRM and One Ring, on the second and forth causes of action, for its reasonable attorneys fees. Plaintiff shall serve a copy of this order on the Office of the Special Referee, 60 Centre Street, Room 119, so that this matter may be scheduled and assigned.

Any relief not expressly addressed herein has nonetheless been considered by the Court and is denied.

This shall constitute the decision and order of the Court.

Dated:


New York, New York
March 16, 2007

FILED

APR 23 2007

NEW YORK
COUNTY CLERK'S OFFICE

So Ordered:


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