

Primedia Inc. v SBI USA LLC

2007 NY Slip Op 34276(U)

January 2, 2007

Supreme Court, New York County

Docket Number: 0602572/2006

Judge: Richard B. Lowe

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

PRESENT: _____

PART 56

Index Number : 602572/2006

Justice

PRIMEDIA

vs

SBI USA

Sequence Number : 001

DISMISS ACTION

C

INDEX NO. 602572/06

MOTION DATE 11/29/06

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were filed in _____ 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

FILED
JAN 17 2007
NEW YORK
COUNTY CLERK'S OFFICE

RICHARD D. LOWERY

Dated: 1/02/07

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

WHICH/CASE IS REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 56

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PRIMEDIA INC., PRIMEDIA WORKPLACE
LEARNING, LP., and PRIMEDIA DIGITAL
VIDEO HOLDINGS, INC.,

Index No: 602572/06

Plaintiffs

- against-

DECISION AND ORDER

SBI USA LLC.,

Defendant

FILED
JAN 17 2007
NEW YORK
COUNTY CLERK'S OFFICE

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RICHARD B. LOWE III, J:

Plaintiffs Primedia, Inc., Primedia Workplace Learning LP (“Workplace Learning”), and Primedia Digital Video Holdings, LLC (“Digital Video”) (collectively, “Primedia”) brings this action against defendant SBI USA LLC. (“SBI”) for breach of a guarantee. In the instant motion, SBI seeks dismissal pursuant to CPLR 3211 for lack of capacity to bring an action in New York. The Plaintiffs cross-move pursuant to CPLR 3212 for summary judgment.

BACKGROUND

Primedia is a targeted-media corporation organized under Delaware Law with its principal place of business in New York. It is Workplace Learning and Digital Video’s parent company. Workplace Learning and Digital Video are both incorporated under Delaware law.

Workplace Learning has its principal offices in Austin, Texas; Digital Video's office is located within Primedia's offices in New York.

In April 2005, Primedia sold certain Workplace Learning assets to Trinity Learning Corporation. Pursuant to the sale agreement, Trinity agreed to "assume and pay, perform, comply with and discharge or otherwise satisfy, as and when due" Primedia's liabilities and obligations under certain lease agreements. (*Fraser Aff'd at page 2, paragraph 4*) The first lease agreement is between TIG Development Property Account I, Inc and Workplace Learning for the use and occupancy of a building in Texas. The second lease agreement is between Workplace Learning and Panamsat Corporation for the use of a satellite. Primedia remains secondarily liable under the leases.

SBI is an investment firm incorporated under California law with an office in Newport Beach, California. SBI entered into a guarantee agreement with Primedia whereas SBI "irrevocably, absolutely, and unconditionally" guaranteed Trinity's payment obligation under the sale agreement. (*Id, Ex D at page 1, Section 2*)

Beginning in December 2005, Trinity allegedly began to default on its repayment obligations. In the instant action, Primedia alleges that SBI is in breach of Section 2 of the agreement because it has not remitted payment to Primedia; in breach of Section 5 because it has not provided its financial statements to Primedia; and in breach of Section 6 because it failed to accelerate its payment obligation after it failed in its obligations under Sections 2 and 5. SBI has yet to answer Primedia's complaint.

In the instant motion, SBI moves pursuant to CPLR 3211 seeking to dismiss the action because Workplace Learning is not registered to do business in New York, and allegedly cannot

bring an action here. Primedia cross-moves pursuant to CPLR 3212 seeking summary judgment, arguing that there is no dispute that SBI is in breach of the guarantee agreement.

DISCUSSION

I. Motion for Dismissal

After oral arguments, the motion to dismiss was denied. This Court's reasoning for the motion's denial can be found in the record.

II. Cross-Motion for Summary Judgment

A. Summary Judgment before Issue Has Been Joined

SBI argues that the summary judgment motion is premature because the issue has not yet been joined, and this Court therefore cannot decide the motion's merits. Indeed, "any party *may move* for summary judgment in any action *after* issue has been joined." (CPLR 3212(a)) However, Primedia moves for summary judgment in a *cross-motion* to SBI's motion for dismissal pursuant to CPLR 3211. CPLR 3211(c) provides that

Upon hearing of a motion under subdivision (a) or (b), either party may submit evidence that could . . . be considered on a motion for summary judgment. *Whether or not issue has been joined*, the court, after adequate notice to the parties, may treat the motion as a motion for summary judgment.

Furthermore, the notice requirement under CPLR 3211(c) is satisfied when the parties, in their motion papers, "chart a course for summary judgment." (See *Fourth Avenue Owners Corporation v David Geshwind*, 228 AD 2d 370 [1st Dept 1996].) Here, SBI had notice of the summary judgment motion because it stipulated to a briefing schedule with Primedia for the

former's motion to dismiss and the latter's summary judgment motion. Additionally, SBI drafted an opposition to the motion, averring that material issues of fact exist to warrant its defeat.¹

The summary judgment motion is not premature, and SBI had adequate notice of the motion's pleading. Accordingly, this Court can continue to entertain Primedia's request for judgment as a matter of law and SBI's opposition to the motion.

B. The Motion's Merits

To obtain summary judgment, the movant must establish its cause of action "sufficiently to warrant the court as a matter of law in directing judgment" in its favor (*CPLR 3212 [b]*), and it must "set forth evidence that there is no factual issue" requiring an adjudication on the facts (*Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 315 [2004]). To defeat a summary judgment motion, the opposing party must "show facts sufficient to require a trial of any issue of fact" (*CPLR 3212 [b]*). Primedia alleges that SBI is in breach of three guarantee-agreement sections. SBI raises as a factual issue/affirmative defense an allegation that Primedia fraudulently induced it to provide the guarantee. SBI is precluded from raising this defense. This Court's analysis is therefore focused on whether Primedia proffers sufficient evidence that no factual dispute is in existence. Each section that is allegedly in breach will be addressed in turn.

¹ See, *infra*.

i. Section 2/Guarantee of the Leases

Primedia alleges that SBI is in breach of Sections 2 because Trinity defaulted on the leases, and SBI did not remit payment. SBI denies that there was “any default that would trigger its obligations under the guarantee.” (*Memo in Opp’n at 1*)

The Workplace Learning-Panamsat Corporation/Satellite Lease

Primedia avers that Trinity defaulted on its lease for the satellite use. In support of its allegation, it proffers the affidavit of Christopher A Fraser, Primedia’s Vice President and General Counsel, who attests that Trinity failed to make the payments “to the best of [his] knowledge.” (*Fraser Aff’d at page 4, paragraph 13*). But Fraser does not possess first-hand knowledge as to whether Trinity is in default, nor does he state with certainty that it is.

Primedia fails to “set forth evidence that there is no factual issue” (*Forest, supra*) Rather, it offers an *allegation* that Trinity is in default rather than facts that would warrant this Court to conclude as a matter of law that Trinity indeed defaulted on the satellite-lease payments. Accordingly, a factual dispute exists as to whether Trinity defaulted on these payments, and the motion for summary judgment as to this lease is denied.

The Workplace Learning-TIG Development Property/Building Lease

Primedia alleges that Trinity reneged on its payments for the building’s lease. (*DeClercq Aff’d at page 2, paragraphs 6-9*) John H. DeClercq, the Chief Operating Officer of LALPI/Shaw LLC, the owner of the building, attests in his affidavit to this. SBI simply avers that it has no knowledge as to whether Trinity defaulted.

Unlike Primedia, SBI does not offer an affidavit from someone with personal knowledge as to whether Trinity defaulted. Accordingly, SBI's does not proffer evidence "sufficient to require a trial" on the issue of Trinity's default for the building lease (*CPLR 3212 [b]*).

In addition, it is uncontested that SBI guaranteed these payments. (*Fraser Aff'd, Ex D*) Furthermore, SBI does not deny the fact that it failed to remit payments to Primedia in satisfaction of Trinity's debt. Therefore, there is no issue of material fact that SBI is delinquent in its responsibility for the building lease's payments pursuant to the agreement.

As is here, once the movant establishes its prima facie showing that it is entitled to summary judgment, the burden then shifts to the non-moving party. It is now incumbent upon SBI to come forward with evidence to demonstrate a material issue of fact that requires resolution by a fact-finder. (*See Zuckerman v City of New York*, 49 NY 2d 557 [1980].)

The Fraudulent Inducement Factual Dispute/Affirmative Defense

With the burden now on SBI, it must "show facts sufficient to require a trial of any issue of fact" in order to defeat Primedia's summary judgment motion for the building lease. (*CPLR 3212 [b]*). SBI will not succeed if it simply proffers "mere conclusions" or "expressions of hope" that a factual dispute exists. (*See Zuckerman, supra*)

SBI's sole defense to the motion is its allegation that it was fraudulently induced into guarantcing Trinity's payment obligations. Primedia argues that the fraudulent-inducement defense is impermissible because SBI unconditionally guaranteed the loan.

"Fraud in the inducement of a guarantee. . . is not a defense to an action on the guarantee when the guarantec recites that it is absolute and unconditional. . ." (*Citibank, N.A. v Plapinger*,

66 NY 2d 90 [1985].) When a guarantee provides that it is “absolute, unconditional, and unlimited. . . fraud in the inducement is not a valid defense.” (*BNY Financial Corporation v Clare*, 172 AD 2d 203 [1st Dept 1991].)

In support of its argument that it can raise this defense, SBI cites to *Goodridge v Fernandez*, 121 AD 2d 942 [1st Dept 1986]. There, the First Department stated, *in dicta*, that when an unconditional guarantee agreement does not contain a specific disclaimer of defenses, a fraudulent inducement claim can be raised.² SBI argues that since the SBI-Primedia guarantee agreement also did not contain a specific disclaimer, the fraudulent-inducement defense is viable. This Court is not convinced.

First, SBI relies on *dicta*, not a Court’s *holding*, for support. When “the court’s comments are dicta”, it is not “binding preceddnt.” (*Universal Packaging Corp v New York State Div of Human Rights*, 683 NYS 2d 735 [1998].) Second, in *Goodridge’s* parallel case, the United States District Court for the Southern District of New York rejected the First Department’s discussion concerning the specific disclaimer of defenses. The Court held that “. . . the distinction is unpersuasive given the broad and unconditional nature of the language of the guarantcc. . .” (*Goodridge v The Harvey Group et al*, 728 F Supp 275 [SDNY 1991].) Third, controlling precedent case law guides this Court to hold that the defense is unavailable to SBI. (See *Citibank, supra*; *BNY Financial, supra*; *Graubard v Edelstein*, 173 AD 2d 230 [1st Dept 1991]; *International Credit Corporation v Roth*, 169 AD 2d 635 [1st Dept 1991].)

² The question before the Court was whether the action should be stayed pending the resolution of a parallel federal action.

SBI executed an agreement where it “irrevocably, unconditionally, and absolutely” guaranteed Trinity’s obligation. Accordingly, it is precluded from asserting a fraudulent-inducement defense to its failure to abide by the agreement. Primedia’s motion for summary judgment on the building-lease issue is therefore granted.

In addition to its assertion of an affirmative defense/factual issues, SBI requests that if this Court grants Primedia’s motion, it be allowed pursuant to CPLR 3212(f) to conduct additional discovery. CPLR 3212(f) provides that

Should it appear from affidavits submitted in opposition to the motion that the facts essential to justify opposition may exist but cannot then be stated, the court may deny the motion or may order a continuance to permit affidavits to be obtained or disclosure to be had and may make such other order as may be just.

Here, even if, *arguendo*, SBI satisfied CPLR 3212(f)’s requirements by proffering affidavits indicating the existence of evidence not yet available, it nevertheless cannot avail itself of the statute. The only defense SBI raises in its opposition to Primedia’s motion is one in which it is precluded from asserting. Its request therefore must be denied.

ii. Section 5/Submission of SBI’s Financial Statements

Section 5 of the guarantee agreement provides that “Guarantor shall provide the Seller with annual financial statements. . .and quarterly financial statements certified by Guarantor’s Chief Financial Officer. . .” (*Fraser Aff’d, Ex D at page 2, Section 5*) Fraser, Primedia’s Vice President and General Counsel, attests with personal knowledge that SBI failed to submit its financial statements and that “[he] notified SBI of its failure to deliver the financial statements and certifications required by the Guarantee.” (*Id at page 4, paragraph 14*) SBI does not proffer

evidence that they provided the statements, which would have raised a question of fact to be determined by a fact finder.

“Once [movant] made a prime facie showing. . .it was incumbent upon [the opposing party] to lay bare its proof establishing a triable issue of fact.” (*Arc-Com Fabrics, Inc v Robinson*, 149 AD 2d 311 [1st Dept 1989].) Here, Primedia made its showing that SBI failed to provide its financial statements as required by the agreement. SBI did not contest that showing. A factual dispute was therefore not presented to this Court, and summary judgment for the breach of Section 5 is granted.

iii. Section 6/Accelerated Payments

Section 6 of the agreement provides that SBI must “immediately pay over to [Primedia] by wire transfer. . .the Obligation Limit [\$10 million]” when it “fails to fulfill its obligations under Section 2” or when it “fails to deliver any financial statements required to be delivered under Section 5.” (*Fraser Aff’d, Ex D at page 2, Section 6*). Here, there is no factual issue as to whether SBI breached Section 2 regarding the building lease and whether it breached Section 5 by failing to submit its financial statements to Primedia. Accordingly, since it failed to meet its obligations under Sections 2 and 5, it also failed to meet its obligations under Section 6. The motion for summary judgment for the breach of section 6 is granted.

CONCLUSION

For the foregoing reasons, it is hereby

ORDERED that the motion for summary judgment for default on the satellite lease is denied; and it is further

ORDERED that the motion for summary judgment for default on the building lease is granted; and it is further

ORDERED that the motion for summary judgment for the breach of Section 5 is granted; and it is further

ORDERED that the motion for summary judgment for the breach of Section 6 is granted.

This shall constitute the decision and order of the Court.

Dated: January 2, 2007

ENTER:


RICHARD B. LOWE, III

RICHARD B. LOWE, III, J.S.C.

FILED
JAN 17 2007
NEW YORK
COUNTY CLERKS OFFICE