

Capital Bus. Credit LLC v Schanker

2008 NY Slip Op 30154(U)

January 17, 2008

Supreme Court, New York County

Docket Number: 0603306/2007

Judge: Jane S. Solomon

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

PRESENT.

SOLOMON

PART 55

Index Number : 603306/2007

CAPITAL BUSINESS CREDIT LLC

VS.

SCHANKER, DANIEL

SEQUENCE NUMBER : # 001

SUMMARY JUDGMENT IN LIEU OF COMPLAINT

Justice

INDEX NO. 603306-07

MOTION DATE 12/11/07

MOTION SEQ. NO. #001

MOTION CAL. NO. _____

were read on this motion to/for _____

PAPERS NUMBERED

1-6

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 is decided in accordance with the annexed memorandum decision and order.

FILED

JAN 22 2008

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 1-17-08

[Signature]

JANE S. SOLOMON
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate DO NOT POST REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 55

-----X

CAPITAL BUSINESS CREDIT LLC,

INDEX NO. 603306/2007

Plaintiff,

-against-

DANIEL SCHANKER and
MARGARET RUSSO-TRASTOY,

DECISION and ORDER

Defendants.

-----X

JANE S. SOLOMON, J.

Plaintiff Capital Business Credit LLC ("Capital") moves under CPLR § 3213 for summary judgment in lieu of complaint against defendants Daniel Schanker ("Schanker") and Margaret Russo-Trastoy, for \$37,690.77 plus interest and attorneys fees. Defendants have not appeared. The motion is granted as follows.

Capital is a Delaware limited liability company engaged in factoring and commercial finance, with its principal place of business at 1700 Broadway in Manhattan. Non-party D. Schanker, LLC (the "Company") is a New York limited liability company with its principal place of business at 1385 Broadway in Manhattan.

On or about May 9, 2005, Capital (then known as Capital Factors, LLC) and the Company entered into a written Factoring Agreement (the "Factoring Agreement"), pursuant to which the

Company, among other things, sold and assigned its accounts receivable to Capital, in exchange for cash advances payable on demand. Also on May 9, 2005, each defendant executed a guarantee, jointly and severally unconditionally guaranteeing any and all obligations of the Company to Capital arising under the Factoring Agreement (the "Guarantee").

The Guarantee states that defendants provided the Guarantee in order to induce Capital to enter into the Factoring Agreement, and that defendants "waive all presentments, demands, notices of nonperformance, protests, notices of acceptance of" their guarantee or the Company's "incurring of new or additional indebtedness, and any other formality that might otherwise be a condition of [their] absolute liability" thereunder. The Guarantee also provides that in "the event of a breach or termination of, or default under, the [Factoring Agreement], or any occurrence that would allow [Capital] to terminate the Agreement without notice, all of the indebtedness of [the Company] and [defendants'] obligations and liabilities to [Capital] shall, at the option of [Capital], become immediately due and payable and shall be paid and performed forthwith by [them]." The Guarantee further states that defendants "agree to pay [Capital's] reasonable attorney's fees and expenses incurred

... in seeking to enforce [its] obligations hereunder for any and all obligations and indebtedness arising under the Agreement."

Capital contends that since the inception of its factoring relationship with the Company, it has rendered monthly account statements to the Company detailing all advances, credits and other charges, as well as current outstanding accounts receivable and deductions/chargebacks. On or about August 1, 2007, Capital sent the Company an account statement for July 2007, which states that the Company then owed Capital \$37,690.77, plus interest accruing on and after August 1, 2007. Capital states that it has not received any written objection from the Company or defendants with regard to this account statement.

On or about August 16, 2007, Capital sent Schanker a letter and all monthly account statements for the period between December 31, 2006 through July 31, 2007. The letter states that Capital expected Schanker to resolve any questions about the matter within 30 days, and expected his full payment of all amounts then owed. Capital's vice president William J. Ezzo Jr. states that he spoke to Schanker on the phone, and that Schanker acknowledged receipt of the letter and account statements, but that Capital did not receive payment or any objection to the letter in any form within the 30 days requested.

Accordingly, Capital contends that as of August 1, 2007, the Company owed Capital \$37,690.77, plus interest and attorneys fees. On July 27, 2007, Capital's counsel sent written notice to each defendant demanding payment from them, pursuant to the Guarantee, of the amount then owed by the Company, no later than August 1, 2007. To date, no payment or objection to the amount listed in the account statements has been made.

Discussion

A guarantee of payment is an "instrument for the payment of money only" susceptible to a motion for summary judgment in lieu of complaint pursuant to CPLR § 3213. See Kornfeld v. NRX Technologies, Inc., 62 N.Y.2d 686 (1984). Capital is entitled to summary judgment in lieu of complaint against defendants because it has presented documentary evidence of their guaranteeing the Company's payments under the Factoring Agreement, unchallenged recitation of consideration provided in exchange for their guarantee, and defendants' failure to make payments according to the Guarantee. See Council Commerce Corp. v. Paschalides, 92 A.D.2d 579 (2nd Dep't 1983). Moreover, the amount owed to Capital has been established as \$37,690.77, plus interest at the statutory rate from August 1, 2007, because neither defendants nor the Company timely objected to the account

statements provided to them by Capital. See I Appell Corp. v. Crocker Commercial Servs., Inc., 146 A.D.2d 472 (1st Dep't 1991).

Capital has also moved for costs and expenses, including reasonable attorneys' fees, to which it is entitled under the Guarantee. It has requested that the amount be determined at a separate inquest; therefore, the calculation shall be submitted to a Special Referee.

Accordingly, it hereby is

ORDERED that Capital's motion for summary judgment in lieu of complaint against Daniel Schanker and Margaret Russo-Trastoy is granted, and Capital is entitled to judgment under the Guarantee in the amount of \$37,690.77, together with interest at the statutory rate from August 1, 2007; and it further is

ORDERED that the issue of how much defendants owe Capital for reasonable attorneys' fees, costs and expenses is referred to a Special Referee to hear and report with recommendations; and it further is

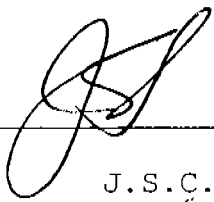
ORDERED that this motion shall be held in abeyance pending the report and recommendations of the Special Referee and a motion pursuant to CPLR § 4403; and it further is

ORDERED that a copy of this order with notice of entry shall be served by hand within 45 days of entry on the Judicial Support Office (Room 311) to arrange a date for the reference to

a Special Referee, failing which the Clerk is directed to enter judgment in favor of Capital and against defendants for \$37,690.77 plus interest at the statutory rate from August 1, 2007, together with costs and disbursements as taxed.

Dated: January 17, 2008

ENTER:



J.S.C.
JANE S. SOLOMON

FILED
JAN 22 2008
NEW YORK
COUNTY CLERK'S OFFICE