

Merchants Advance LLC v Mendez 1 Inc.

2008 NY Slip Op 30305(U)

January 24, 2008

Supreme Court, Nassau County

Docket Number: 1157-07/

Judge: Leonard B. Austin

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INDEX
No. 11157-07

SUPREME COURT - STATE OF NEW YORK
IAS TERM PART 12 NASSAU COUNTY

PRESENT:
HONORABLE LEONARD B. AUSTIN
Justice

Motion R/D: 9-7-07
Submission Date: 10-29-07
Motion Sequence No.: 001/MOT D

_____ x
MERCHANTS ADVANCE LLC,

Plaintiff,

- against -

COUNSEL FOR PLAINTIFF
Reisman, Peirez & Reisman, LLP
1305 Franklin Avenue
P.O. Box 119
Garden City, New York 11530

MENDEZ 1 INC. d/b/a MERCHANT
STREET SMOKEHOUSE and
JONATHAN MENDEZ,

Defendants.

COUNSEL FOR DEFENDANTS
John Nacca, Esq.
1200 Jefferson Road, Suite 300
Rochester, New York 14623

_____ x

ORDER

The following papers were read on Plaintiff's motion for summary judgment:

- Notice of Motion dated August 27, 2007;
- Affirmation of Jerome Reisman, Esq. dated August 23, 2007;
- Affidavit of David Goldin sworn to on August 23, 2007.

Plaintiff, Merchants Advance LLC, moves for summary judgment against the
Defendants.

MERCHANTS ADVANCE LLC v. MENDEZ 1 INC., *et al.*
Index No. 11157-07

BACKGROUND

Plaintiff, Merchants Advance LLC (“Merchants”), is engaged in the business of providing working capital to businesses through the purchase of future credit card accounts receivable.

On March 16, 2007, Merchants entered into a written agreement (“Agreement”) with the Defendant Mendez I Inc. d/b/a Merchant Street Smokehouse (“Smokehouse”) pursuant to which Smokehouse agreed to sell to Merchants \$96,135 in future credit card accounts receivable. Merchants paid \$88,300 to acquire these future credit card accounts receivable.

Under the terms of the Agreement, Merchants was to receive 23% of each future credit care receivable due to Smokehouse until Merchants had been paid in full.

The Agreement required Smokehouse to enter into a credit card processing agreement with a credit card processor (“Processor”), which was acceptable to Merchants. The Processor was to be given all of Smokehouse’s credit card receipts and would process them. The money received would then be deposited into a deposit account with a bank acceptable to Merchants. Merchants would then withdraw the funds from the deposit account and distribute those funds in accordance with the Agreement until Merchants had been paid in full.

The Agreement prohibited Smokehouse from changing its arrangements with the Processor or the banking institution in which the deposit account was maintained in any way that would adversely affect Merchants.

MERCHANTS ADVANCE LLC v. MENDEZ 1 INC., *et al.*
Index No. 11157-07

The Agreement provided that Smokehouse would be in default if it failed to use a Processor acceptable to Merchants or failed to direct that all payments relating to credit card receivables be made into the deposit account.

The Agreement contained provisions pursuant to which the Defendant, Jonathan Mendez ("Mendez"), personally guaranteed Smokehouse's obligations under the Agreement including the payment of all sums due and owing to Merchants thereunder.

The Agreement provides that, in the event Smokehouse breached the Agreement, Smokehouse shall pay all costs incurred by Merchants in enforcing the Agreement including legal fees, costs and disbursement.

Smokehouse defaulted under the Agreement on April 10, 2007 by entering into an agreement with a credit card processor which was not approved or accepted by Merchants and by failing to pay the balance due on the Agreement; to wit: the sum of \$89,188.10.

Merchants' complaint alleges four causes of action. The first cause of action alleges breach of the Agreement. The second cause of action alleges an action on an account stated. The third cause of action seeks to recover against Mendez on his personal guaranty. The fourth cause of action seeks to recover legal fees.

Defendants unverified answer denies all the relevant allegations in the complaint. The answer does not plead any affirmative defenses or counterclaims. Defendants do not oppose this motion.

MERCHANTS ADVANCE LLC v. MENDEZ 1 INC., *et al.*
Index No. 11157-07

DISCUSSION

The party seeking summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law. Alvarez v. Prospect Hosp., 68 N.Y.2d 320 (1986); and Zuckerman v. City of New York 49 N.Y.2d 557 (1980).

Merchants establishes a *prima facie* entitlement to judgment as a matter of law on its breach of contract action by proving the existence of a contract between it and Smokehouse, consideration, performance by the Plaintiff, breach by the Defendant and damages resulting from the breach. Furia v. Furia, 116 A.D.2d 694 (2nd Dept. 1986).

Once Merchants established a *prima facie* entitlement to judgment as a matter of law on its breach of contract action, the burden shifted to Smokehouse had to come forward with proof in evidentiary form establishing the existence of triable issues of fact or must demonstrate an acceptable excuse for its failure to do so. Zuckerman v. City of New York, *supra*; Davenport v. County of Nassau, 279 A.D.2d 497 (2nd Dept. 2001); and Bras v. Atlas Construction Corp., 166 A.D.2d 401 (2nd Dept. 1991).

Merchants established a *prima facie* entitlement to judgment as a matter of law on Mendez' guarantee by establishing the existence of the underlying obligation, the guarantee and the failure of the prime obligor to make payment in accordance with the terms of the obligation. Royal Commercial Corp. v. Kotrulya, 304 A.D.2d 742 (2nd Dept. 2003); and E.D.S. Security Systems, Inc. v. Allyn, 262 A.D.2d 351 (2nd Dept. 1999).

Once Merchants established a *prima facie* entitlement to judgment as a matter of law on the guarantee, Mendez was obligated to establish through admissible evidence

[* 5]
MERCHANTS ADVANCE LLC v. MENDEZ 1 INC., *et al.*
Index No. 11157-07

the existence of a triable issue of fact or the existence of a viable defense to the action on the guarantee. Federal Deposit Ins. Co. v. Jacobs, 185 A.D.2d 913 (2nd Dept. 1992).

Merchants established a *prima facie* entitlement to judgment as a matter of law on both the breach of contract and guarantee causes of action.

The Agreement was a contract between Merchants and Smokehouse. Merchants performed under the contract by paying money to Smokehouse to purchase its future credit card accounts receivable. Merchants payment of the money and Smokehouse repayment obligations are consideration. Smokehouse breached the Agreement by entering into a credit card processing agreement with a Processor not approved or accepted by Merchants and by failing to repay the amount due. Merchants sustained damages in that it has not been repaid the \$89,188.10 due and owing.

The party opposing the motion must lay bare their proof to demonstrate the existence of triable issues of fact. Hernandez-Vega v. Zwanger-Pesiri Radiology Grp., 39 A.D.3d 710 (2nd Dept. 2007); and Chance v. Felder, 33 A.D.3d 645 (2nd Dept. 2006). Defendants have failed to do this. They have not submitted any papers in opposition to the motion. They offer no explanation as to why they did not oppose the motion. The general denials contained in their unverified answer are insufficient to establish the existence of triable issues of fact. Marine Midland Bank, N.A. v. Idar Gem Distributors, Inc., 133 A.D.2d 535 (3rd Dept. 1987); and Fairbanks Co. v. Simplex Supply Co., Inc., 126 A.D.2d 822 (3rd Dept. 1987).

MERCHANTS ADVANCE LLC v. MENDEZ 1 INC., *et al.*
Index No. 11157-07

Therefore, Plaintiffs are entitled to summary judgment on the causes of action for breach of contract and guarantee.

The Agreement also provides that Smokehouse will pay the all reasonable expenses incurred should it be required to bring an action to enforce its rights thereunder. Mendez as a guarantor of Smokehouse's obligations on the Agreement is liable for these fees.

Such contractual provisions are valid and will be enforced. Arent, Fox, Kinter Plotkin & Kahn PLLC v. Lurzer GmbH, 297 A.D.2d 590 (1st Dept. 2002).

Legal fees are awarded on a *quantum meruit* basis and cannot be determined summarily. Simoni v. Time-Line, Ltd., 272 A.D.2d 537 (2nd Dept. 2000); and Borg v. Belair Ridged Development Corp., 270 A.d.2d 377 (2nd Dept. 2000). A hearing is, thus, required to determine the reasonable attorney's fees for Plaintiff's attorney in regard to this matter.

Based on the foregoing, the Court need not reach the question of summary judgment on the account stated.

Accordingly, it is,

ORDERED, that Plaintiff's motion for summary judgment is **granted**: and it is further,

ORDERED, that the motion is respectfully referred to Special Referee Frank Schellace on March 19, 2008 at 9:30 a.m. to hear and determine all issues relating to Merchant's reasonable legal fees; and it is further,

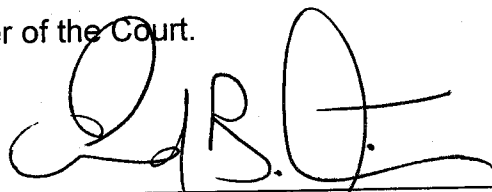
MERCHANTS ADVANCE LLC v. MENDEZ 1 INC., *et al.*
Index No. 11157-07

ORDERED, that Plaintiff is directed to serve a copy of this order with notice of entry and a Note of Issue and Certificate of Readiness upon the attorney for the Defendants and file same with the Clerk of this Court and pay all required fees by February 29, 2008; and it is further,

ORDERED, that the County Clerk, Nassau County is directed to enter a judgment in favor of the Plaintiff, Merchants Advance LLC and against the Defendants Mendez 1 Inc. d/b/a Merchant Street Smokehouse and Jonathan Mendez in the sum of \$89,188.10 together with interest at the statutory rate from April 10, 2007 to the date of entry of judgment, legal fees in the amount as determined by the Special Referee and costs and disbursements and taxed by the Clerk.

This constitutes the decision and Order of the Court.

Dated: Mineola, NY
January 24, 2008



Hon. LEONARD B. AUSTIN, J.S.C.

ENTERED
JAN 30 2008
NASSAU COUNTY
COUNTY CLERK'S OFFICE