

Athena Ent. Corp. v Me & Her, Inc.

2008 NY Slip Op 31240(U)

April 18, 2008

Supreme Court, Nassau County

Docket Number: 0777-07/

Judge: Stephen A. Bucaria

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEPHEN A. BUCARIA
Justice

ATHENA ENT. CORP.,

Plaintiff,

-against-

ME & HER, INC., JOHN W. SINON, as
Temporary Administrator of the Estate of
VINCENT GIORDANO and JAMES GIORDANO,

Defendants.

TRIAL/IAS, PART 4
NASSAU COUNTY

INDEX No. 10777/07

MOTION DATE: Feb. 28, 2008
Motion Sequence # 001

The following papers read on this motion:

- Notice of Motion..... X
- Affirmation in Opposition..... X
- Reply Affirmation X
- Memorandum of Law..... X

This motion, by plaintiff, for an order striking the answer of defendant David J. Gugerty as Temporary Administrator of the estate of Vincent Giordano, directing the entry of summary judgment in favor of the plaintiff and against defendant David J. Gugerty for the relief demanded in the first and second causes of action of the complaint, upon the ground that there is no defense to the cause of action alleged in the complaint and that the defense has no merit, and granting default judgment against defendants Me & Her, Inc. and James Giordano, and for such other and further relief as may be just, proper and equitable, is determined as hereinafter set forth.

FACTS

On August 16, 2005, Athena Ent. Corp., plaintiff, sold a meat, poultry and provisions route to Me & Her, Inc (the "company"). Vincent Giordano and James Giordano were the sole owners and operators of the company. The sale included a customer list, two vehicles, equipment and goodwill. The sale price of the route was in the amount of \$239,000.00 of which \$100,000.00 was paid in cash, and the balance, in the amount of \$139,000.00, was financed through the execution of a promissory note. The terms of the promissory note specify equal monthly payments of \$2,687.26 for a period of 60 months. The company issued sixty (60) post dated checks payable to Angelo Poukamisas as payment on the promissory note and payable on the due date of each installment.

In either January or March of 2006 the company failed to make a payment on the promissory note. On March 30, 2006, Michael Demetriou, Esq., dispatched a letter to all defendants by which he advised them of the default and demanded payment of the principal sum together with interest, late fees and attorney's fees.

Vincent Giordano died intestate in September 14, 2006. By a petition for letters of limited administration dated November 8, 2006 filed in the Nassau County Surrogate's Court, Angelo Poukamisas sought the appointment of the public administrator as limited administrator of decedent's estate. David J. Gugerty, public administrator of Nassau County, was appointed limited administrator of the estate of Vincent Giordano by limited letters of administration on June 6, 2007. By a certificate of appointment dated December 19, 2007, John W. Sinon was appointed as public administrator of Nassau County, replacing David J. Gugerty, effective January 2, 2008. By an order of substitution of the Honorable John B. Riordan dated December 20, 2007, the names of "John W. Sinon" is substituted for, and appear in the place and stead of, "David J. Gugerty" as public administrator of Nassau County, in all papers and proceedings.

James Giordano died intestate in April 10, 2007. As of the commencement of this instant action, there has been no appointment of a representative of the estate of James Giordano.

On or about June 15, 2007, plaintiff commenced this action against the company, and David J. Gugerty as limited administrator of the estate of Vincent Giordano and James Giordano to collect sums due and owing. Issue was joined with respect to the

estate of Vincent Giordano on or about July 27, 2007, when public administrator of Nassau County served its answer. On or about November 28, 2007, plaintiff commenced this instant action.

PLAINTIFF'S CONTENTIONS

Plaintiff avers that the first three affirmative defenses interposed by defendant Sinon, limited administrator of the estate of Vincent Giordano, that plaintiff failed to provide defendant with a payment history, notice of default and notice of acceleration of the note, are without merit. Plaintiff submits that it has already complied with these requirements and that the documentary evidence has been established annexed to its affidavit will establish this.

Further, Plaintiff avers that the fourth and fifth affirmative defenses, alleging that plaintiff has not provided a copy of the security agreement securing the note, and that it is further obligated to enforce the security agreement before commencing this action on the note, is incorrect. Plaintiff asserts that it is entitled to enforce the promissory note and guarantees both in law and under the terms of the security agreement. Plaintiff contends that the promissory note expressly incorporates the terms of the security agreement and that the terms of the security agreement permits enforcement of the promissory note and guarantees without obligation to foreclose on the security agreement. Additionally, plaintiff contends that under the law and case law, a creditor is not required to proceed first against security before seeking to enforce the terms of the note.

DEFENDANT'S CONTENTIONS

In opposition to the motion, defendant avers that plaintiff has not obtained personal jurisdiction over James Giordano and Me & Her, Inc. and as such this action must be dismissed without prejudice or, in the alternative, stayed pending the appointment of a personal representative of the estate of James Giordano.

With respect to James Giordano, defendant asserts that the service of the summons and complaint was defective. Defendant contends that delivery-and-mail service of the summons and complaint was not attempted until more than two months after James Giordano's death. Further, defendant contends that service has not been completed within the 120 days as prescribed by the CPLR.

With respect to Me & Her, Inc., defendant asserts that the personal service of the summons and complaint was defective. Further, defendant asserts that Vincent Giordano, died intestate in September 14, 2006, James Giordano died intestate in April 10, 2007 and they were the only owners and operators of Me & Her, Inc.; and that the service of the summons and complaint could not have been made to an authorized representative of the corporation. Further, defendant contends that service has not been completed within the 120 days as prescribed by the CPLR.

PLAINTIFF'S CONTENTIONS IN REPLY

In response to the contentions of defendant, Plaintiff avers that the action against Me & Her, Inc. and Sinon as Limited Administrator of the estate of Vincent Giordano should not be dismissed or stayed due to the death of James Giordano.

With respect to James Giordano, the plaintiff consents to the discontinuance or stay of the action. Plaintiff intends to seek the appointment of a public administrator and commence a separate action against the estate of James Giordano based upon his liability as a guarantor of the promissory note.

With respect to Me & Her, Inc., the plaintiff avers that the affidavit of service upon the corporation serves as prima facie evidence that the summons and complaint was properly served. Further, defendant asserts that James Giordano's death has no affect upon this action against the corporation as the Me & Her, Inc. continues to exist.

With respect to Sinon, the limited administrator of the estate of Vincent Giordano, plaintiff avers that since defendant has not disputed liability the motion for summary judgment should be granted.

DECISION

With respect to that part of plaintiff's application which seeks summary judgment, it is well established that summary judgment will be granted only when movant has established sufficiently his cause of action to warrant the court as a matter of law to grant it in his favor, and he must do so by submission of admissible evidence (CPLR 3212(b); **Ferrante v American Lung Ass'n**, 90 NY2d 623, 1997; **S. J. Capelin Assocs., Inc. v Globe Mfg. Corp.**, 34 NY2d 338, 1974; **Krupp v. Aetna Life & Cas. Co.**, 103 AD2d

252, 2nd Dept., 1984). Conversely, a motion for summary judgment will be defeated when the opposing party demonstrates sufficient facts to require a trial on the issue of fact (CPLR 3212(b); Ferrante v. American Lung Ass'n, supra; S. J. Capelin Associates, Inc. v. Globe Mfg. Corp., supra; Krupp v. Aetna Life & Cas. Co., supra). The general rule, however, is more flexible for the opposing party, as contrasted with the movant, and the opposing party may be permitted to demonstrate an acceptable excuse for his failure to meet the strict requirements of production (Chrysler First Fin. Servs. Corp. v. De Premis, 225 AD2d 1003, 1996; Friends of Animals v Associated Fur Mfrs., 46 NY2d 1065, 1979). Moreover, summary judgment is not justified where the existence of essential facts depends upon knowledge exclusively within the possession of the moving party and which might well be disclosed by cross-examination or examination by trial. (CPLR 3212(f); Lee v YRM Ltd., 204 Ad2d 282, 2nd Dept., 1994; Krupp v Aetna Life & Cas. Co., supra; Siegel, NY Prac. § 281, at 464 4th ed).

This rule is especially appropriate here where there are likely to be defenses that depend upon knowledge in the exclusive possession of the plaintiff, which might be revealed during discovery. This action arises from the sale, by Athena Ent. Corp, plaintiff, of a meat, poultry and provisions route to Me & Her, Inc. Vincent Giordano and James Giordano were the sole owners and operators of Me & Her, Inc. Vincent Giordano died intestate in September 14, 2006 and James Giordano died intestate in April 10, 2007. As of the commencement of this instant action, only the limited administrator for the estate of Vincent Giordano had been appointed. Thus far, plaintiff has failed to provide the limited administrator with copies of the parties' payment history, required notice of default and notice of acceleration of the note and security agreement securing the note.

Additionally, Plaintiff, himself, raises a question of fact as to the actual date of the alleged breach. In the complaint, plaintiff avers that defendant defaulted in making payment due pursuant to the promissory note by its failure to make an installment payment due on January 16, 2006 while conversely averring in it motion papers that defendant defaulted by failing to make an installment payment due on March 16, 2006.

Accordingly, summary judgment is **denied** in regards to defendant Sinon, the limited administrator of the estate of Vincent Giordano, without prejudice to renew after the conclusion of discovery.

With respect to that part of this application which seeks a default judgment against

defendants Me & Her, Inc., as a general rule when personal jurisdiction is challenged an affidavit of service containing sufficient factual details and descriptions is sufficient to establish **prima facie** evidence of service, but when competent evidence is offered contesting personal jurisdiction than the affidavit is rendered inconclusive and the party asserting jurisdiction must demonstrate service by a fair preponderance of the evidence. (**Rox Riv 83 Partners v Ettinger**, 276 AD2d 782, 2nd Dept., 2000; **OCI Mortg. Corp. v Omar**, 232 AD2d 462, 2nd Dept., 1996). Personal service upon a domestic corporation must be made by delivering the summons "to an officer, director, managing or general agent, or cashier or assistant cashier or to any other agent authorized by appointment or by law to receive service (CPLR 311(a)(1)). As such, delivery of process to an unauthorized person does not satisfy the statutory requirements and personal jurisdiction is lacking (C.P.L.R. 311(a)(1); **Todaro v Wales Chemical Co.**, 173 AD2d 696, 2nd Dept., 1991; **Gleizer v American Airlines, Inc.**, 30 AD3d 376, 2nd Dept., 2006).

Plaintiff's affidavit of service, with regard to Me & Her, Inc., (submitted not by movant but by defendant's counsel) avers that the summons and complaint was served upon the company by personal service on "Anthony Doe", as agent for Me & Her, Inc., on 2nd day of July 2007 at 10:58 AM. The company was solely owned and operated by the defendants, Vincent Giordano and James Giordano, and they had pre-deceased this service. Moreover, plaintiff has failed to meet its burden and demonstrate that personal service was effectuated by a fair preponderance of the evidence on a statutorily authorized representative of the corporation.

With respect to that part of this application which seeks a default judgment against defendant James Giordano, plaintiff concedes that this Court lacks personal jurisdiction over the defendant James Giordano, the action against him is discontinued.

Accordingly, this instant action is **dismissed** in regard to defendants, Me & Her, Inc. and James Giordano.

A Preliminary Conference has been scheduled for June 5, 2008 at 9:30 a.m. in Chambers of the undersigned. Please be advised that counsel appearing for the Preliminary Conference **shall** be fully versed in the factual background and their client's schedule for the purpose of setting **firm** deposition dates.

Kindly mark your calendars accordingly.

Dated APR 18 2008

Stephanie...
ENTERED
 J.S.C.
 APR 22 2008
 NASSAU COUNTY
 COUNTY CLERK'S OFFICE