

SLM Capital Corp. v Hemmitt D5H, LLC

2009 NY Slip Op 30065(U)

January 9, 2009

Supreme Court, New York County

Docket Number: 603821/07

Judge: Richard B. Lowe

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

PRESENT: _____

PART 56

~~HON. RICHARD B. LORIE, J.~~
Justice

Index Number : 603821/2007

SLM CAPITAL CORP.,

vs.

HEMMITT D5H, LLC

SEQUENCE NUMBER : # 001

SUMMARY JUDGMENT

INDEX NO. 603821-07

MOTION DATE 5/15/08

MOTION SEQ. NO. #001

MOTION CAL. NO. _____

are 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

FILED

JAN 15 2009

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION
COUNTY CLERK'S OFFICE
NEW YORK

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

Dated: 1/9/09

~~HON. RICHARD B. LORIE, J.~~

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: IAS PART 56

-----X
SLM CAPITAL CORP.,

Plaintiff,

Index No.
603821/07

-against-

HEMMITT D5H, LLC; RUDOLPH HEMMITT, SR.;
RUDOLPH HEMMITT, JR.; DEBBIE J. HEMMITT;
EUGENE CARVIS HEMMITT; RANDLE MATTHEW
HEMMITT; and RONALD WAYNE HEMMITT,

Defendants.
-----X

Richard B. Lowe, III:

Plaintiff SLM Capital Corp. (SLM) moves for an order: (1) pursuant to CPLR 3215 (b), directing the entry of a default judgment in its favor and against defendants Hemmitt D5H, LLC (D5H), Rudolph Hemmitt, Sr. (Hemmitt Sr.), Rudolph Hemmitt, Jr., Debbie J. Hemmitt, Eugene Darvis Hemmitt and Ronald Wayne Hemmitt, jointly and severally, in the amount of \$995,590.94, plus per diem interest of \$497.80 beginning March 1, 2008, together with attorneys' fees, costs and disbursements in an amount to be determined by the court at an inquest; (2) pursuant to CPLR 3212, granting summary judgment in SLM's favor as against Hemmitt Sr., if the court determines that he has answered the complaint and the court does not grant a default judgment against him; (3) pursuant to CPLR 3215 and 50 USC App § 521 (d), severing and continuing the action as against defendant Randle Matthew Hemmitt; and (4) directing a hearing for the court to determine the reasonable attorneys' fees and expenses to be awarded to SLM.

SLM's attorney submits an affirmation in support of the instant motion. The only affidavit offered in support of the instant motion is submitted by Donald W. Barrick

(Barrick), president of Resource Management Partners, Inc. (RMP), which Barrick describes as an agent for SLM. RMP is not a party to the instant action.

SLM states that it is a New York corporation that provides accounts receivable financing and other types of financing to small- and medium-sized businesses. According to the complaint, upon information and belief, D5H is a licensed contractor that provides commercial grass mowing and litter removal services.

In July 2004, SLM entered into a series of agreements with D5H for accounts receivable financing. Hemmitt Sr., as president of D5H, executed the following documents in connection with the financing: (a) a July 1, 2004 Line of Credit Agreement, as well as a July 16, 2004 amendment thereto (collectively, the Credit Agreement); (b) a July 1, 2004 Revolving Credit Note, and a July 15, 2004 amendment thereto (collectively, the Note); (c) a July 1, 2004 Security Agreement (collectively with the Credit Agreement and Note, the Loan Agreements).

Through the Loan Agreements, SLM initially extended a line of credit to D5H in the amount of \$250,000, which was increased on July 15, 2004 to \$400,000 (the Credit Line). SLM asserts that it agreed to make periodic advances to D5H, upon its request, in accordance with the terms of the Credit Agreement.

SLM contends that, pursuant to the Note, D5H was obligated to make monthly payments of 1/36th of the principal amount for each advance made under the Credit Agreement, plus interest accrued thereon. Upon the maturity of the Note on July 1, 2005, all the then-outstanding principal amounts, plus all accrued and unpaid interest, became due and payable.

SLM alleges that, if D5H defaulted under the Note, SLM could declare all of

D5H's obligations thereunder immediately due and payable, and SLM would have the rights of a secured party. According to the complaint, the Security Agreement grants SLM a security interest in all of D5H's assets (the Collateral), including all accounts receivable due and owing to D5H.

SLM contends that, in connection with the Loan Agreements, Hemmitt Sr., Rudolph Hemmitt Jr., Debbie J. Hemmitt, Eugene Darvis Hemmitt, Randle Matthew Hemmitt and Ronald Wayne Hemmitt (collectively, the Guarantors) each executed a Guaranty Agreement on July 1, 2004, which was re-affirmed on July 15, 2004 (the Guaranty), pursuant to which they guaranteed D5H's obligations to SLM.

SLM asserts that D5H defaulted under the Loan Agreements by failing to make the payments due under the Note and failing to pay the entire principal and interest due on the July 1, 2005 maturity date. According to SLM, by July 1, 2005, D5H owed SLM the principal sum of \$575,650.47 for advances made under the Loan Agreements, plus interest as specified therein.

SLM contends that all sums due under the Loan Agreements are now due and payable, and that, in a January 27, 2006 letter, it informed D5H and the Guarantors of D5H's defaults and demanded immediate payment of all sums due. According to SLM, neither D5H nor the Guarantors have made any payments to SLM.

The first cause of action, as against D5H, seeks damages in the amount of \$905,127.69 (including interest in the amount of \$329,477.22), plus interest at the rate provided in the Loan Agreements from November 1, 2007, together with costs, disbursements, fees and other expenses, including reasonable attorneys' fees.

In the second cause of action, SLM seeks a judgment and order against D5H

enforcing SLM's security interest rights in the Collateral. In the third cause of action, SLM seeks a judgment and order of replevin as to the Collateral as against D5H.

The fourth cause of action, brought as against D5H, sounds in unjust enrichment, and seeks damages of \$575,650.47, plus interest from July 1, 2005, plus costs, fees and other expenses.

The fifth cause of action, brought against the Guarantors, seeks \$905,127.69, including interest, plus interest at the rate provided in the Loan Agreements from November 1, 2007, together with other charges and expenses.

The sixth cause of action is brought as against all of the defendants, pursuant to the Note and the Guaranty, and seeks attorneys' fees and expenses incurred in connection with collection of amounts due under the Loan Agreements and Guaranty.

SLM maintains that, due to accruing interest, defendants had a loan balance of \$995,590.94 on February 29, 2008, and the interest thereon continues to accumulate at the rate of \$497.80 per day.

SLM explains that it commenced this action by filing the summons and complaint on November 16, 2007, and that it served the complaint upon each defendant, except for Randle Matthew Hemmitt who, upon information and belief, is stationed in Iraq. On December 27, 2007, SLM filed the affidavits of service with the court.

On December 12, 2007, Hemmitt Sr., proceeding pro se, served responsive papers. He asserted that those papers were submitted on behalf of all of the defendants. SLM argues, however, that Hemmitt Sr., who is not an attorney, cannot represent defendants other than himself in this action. SLM also contends that the responsive papers failed to answer the allegations in the complaint. SLM informed Hemmitt Sr. that

it rejected his papers and that all defendants remained in default for failure to appear or to answer the complaint.

SLM now seeks a default judgment against all defendants other than Randle Matthew Hemmitt. It requests that the court schedule an inquest to hear evidence on and determine SLM's reasonable attorneys' fees, costs, and disbursements.

SLM further requests, pursuant to 50 USC App § 521 (d), that the court sever and continue the instant action as to defendant Randle Matthew Hemmitt, due to his current military service.

SLM contends that the court should grant a default judgment against Hemmitt Sr. It argues that his responsive papers were deficient, even in light of his status as a pro se defendant, such that he is in default in answering the complaint. SLM contends that Hemmitt Sr.'s papers consist of four meritless defenses, none of which are relevant to the allegations in the complaint. The four claims in Hemmitt Sr.'s answer are: that venue is not proper in New York, "double jeopardy," that RMP engaged in a "false misleading and deceptive act" by hiring a company that was barred by the State of Texas and by starting a dummy company with funds that were for the defendants, and tortious interference.

SLM states that there are also seven attachments to Hemmitt Sr.'s papers, the relevance of which is indeterminable. SLM explains that, even though its attorneys advised Hemmitt Sr. that his papers were rejected as deficient, he failed to submit amended papers. Thus, according to SLM, the court should issue a default judgment against Hemmitt Sr. pursuant to CPLR 3215.

SLM asserts that, if the court determines that Hemmitt Sr.'s responsive papers are

a sufficient pleading, summary judgment should be granted against him, pursuant to CPLR 3212.

Pursuant to CPLR 321 (a), with limited exceptions that do not apply in the instant action, a party may “defend a civil action in person or by attorney, except that a corporation ... shall appear by attorney.” Thus, Hemmitt Sr., a non-attorney, can represent himself, but he cannot appear or defend on behalf of either D5H or the other individual defendants. Therefore, Hemmitt Sr. is the only defendant who has appeared or responded in the instant action.

CPLR 3215 (f) states, in part:

On any application for judgment by default, the applicant shall file proof of service of the summons and the complaint, or a summons and notice ... and proof of the facts constituting the claim, the default and the amount due by affidavit made by the party Where a verified complaint has been served, it may be used as the affidavit of the facts constituting the claim and the amount due; in such case, an affidavit as to the default shall be made by the party or the party’s attorney.

The complaint in this action is verified by SLM’s attorney rather than by SLM. This is permitted, pursuant to CPLR 3020 (d), on the ground that SLM resides outside the county of its attorney’s practice. SLM’s attorney also submits an affirmation in support of the instant motion. The only other affidavit submitted in support of the instant motion is from Barrick, who describes himself as “the President of [RMP], as agent for [SLM].”

RMP is not a party to the instant action. Although Barrick describes RMP as SLM’s agent, there is no proof of such agency. In fact, one of the documents submitted with the moving papers is a July 1, 2004 Contractor Services Agreement between D5H and RMP (the Contractor Agreement).

According to section A of the Contractor Agreement, RMP is “in the business of

procuring and arranging, on behalf of borrowers, certain receivable financing and other financing accommodations from third party lenders, and providing certain services for each borrower in connection therewith.” Section 3.2 of the Contractor Agreement is entitled “Agent of Contractor” and states, in part: “D5H acknowledges and agrees that (a) RMP is acting solely on behalf of D5H in connection with such procurement and arrangement of the Line of Credit and the administrative services in connection with the Advance requests, and not on behalf of Lender”

It is unclear and unexplained how RMP went from being D5H’s agent under the Contractor Agreement to now allegedly being SLM’s agent in the instant lawsuit.

In discussing the requirements to establish entitlement to a default judgment, the First Department has held that “a complaint verified by counsel amounts to no more than an attorney’s affidavit and is therefore insufficient to support entry of judgment pursuant to CPLR 3215” (*Mullins v DiLorenzo*, 199 AD2d 218, 219 [1st Dept 1993]). “In the absence of either a verified complaint or an affidavit by the party, the entry of judgment by default is erroneous and deemed a nullity [internal citation omitted]” (*id.* at 220). Thus, SLM, which has neither submitted an affidavit in support of the instant motion nor verified the complaint, is not entitled to a default judgment as against defendants.

As to Hemmitt Sr., while the papers he submitted are difficult to follow and to understand, and he may want to consider amending and clarifying his answer, given his pro se status, they are sufficient to qualify as his appearing in the instant action. Thus, the issue is whether D5H is entitled to summary judgment as against him.

“[T]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to

demonstrate the absence of any material issues of fact” (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). “Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers” (*Id.*).


As stated above, SLM has not submitted an affidavit in support of the instant motion. Furthermore, the Loan Agreements lack important information, including the interest rates on advances from SLM to D5H, and the rates to be applied after maturity of the Note. In addition, the Security Agreement does not indicate what property of D5H’s comprises the Collateral. Thus, at this stage in the action, SLM has not set forth a prima facie case of entitlement to summary judgment.

Accordingly, it is

ORDERED that the motion is denied.

Dated: January 9, 2009

ENTER:


HON. RICHARD B. LOWE, II
J.S.C.

FILED
JAN 15 2009
COUNTY CLERK'S OFFICE
NEW YORK