

Hertz Equip. Rental Inc. v Modern Concrete Corp.

2009 NY Slip Op 32423(U)

October 14, 2009

Supreme Court, Suffolk County

Docket Number: 09284-2009

Judge: Emily Pines

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SHORT FORM ORDER

INDEX NUMBER: 09284-2009

SUPREME COURT - STATE OF NEW YORK
COMMERCIAL DIVISION, PART 46, SUFFOLK COUNTY

Present: **HON. EMILY PINES**
J. S. C.

Original Motion Date: 07-21-2009
Motion Submit Date: 07-29-2009
Motion Sequence No.: 001 MG

_____ X

HERTZ EQUIPMENT RENTAL INC.,

Plaintiff,

-against-

**MODERN CONCRETE CORP., and
MARIA DELLAVEDOVA, individually
and d/b/a MODERN INDUSTRIES,**

Defendants.

_____ X

Attorney for Plaintiff
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Mineola, New York 11501

Attorney for Defendants
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ORDERED, that the motion (motion sequence number 001) by plaintiff to dismiss defendants' affirmative defense and for summary judgment is granted; and it is further

ORDERED, that a hearing on counsel fees is scheduled for December 7, 2009 at 9:30 a.m. before the undersigned.

This is an action by plaintiff to recover for breach of contract, an account stated and fraud. Plaintiff commenced this action by the filing of a Summons and Verified Complaint on or about March 12, 2009 and issue was joined by defendants' service of an Answer on or about May 14, 2009. The action arises out of an equipment rental and credit agreement between plaintiff and "Modern Industries" which was personally guaranteed by defendant Maria DellaVedola ("DellaVedola") who represented on the agreement that she was the president. The gravamen of the Complaint is that defendants failed and

refused to pay for the rental of equipment from plaintiff, defendants' tender of checks which were returned for insufficient funds and Dellavedola's failure to pay upon the guarantee. Plaintiff claims the amount due and owing is on the breach of contract and account stated claims is \$51,646.04 plus interest at the rate of 1.5% per month (18% per annum) plus costs of collection, court costs and attorneys' fees pursuant to the terms of the agreement. Plaintiff also seeks recovery on the fraud causes of action in the amount of \$10,000.00, representing the total of the checks tendered by defendants which were returned for insufficient funds.

Defendants' Answer asserts essentially general denials and also affirmative defenses of lack of plaintiff's capacity to sue and the statute of frauds.

Plaintiff now moves for an Order dismissing the affirmative defenses and granting summary judgment on the ground that there is no genuine issue of fact warranting a trial. In support of the motion, plaintiff submits an affirmation of counsel, an affidavit of Bessie Williams, credit and customer service manager of plaintiff, a copy of the agreement and invoices, the pleadings and searches of the New York State Department of State website. Initially, plaintiff asserts that the affirmative defense of lack of capacity to commence the action must be dismissed because plaintiff is a foreign corporation authorized to do business in New York and annexes a copy of the New York State Department of State listing to their motion papers. Next, plaintiff argues that the affirmative defense of statute of frauds is also without merit as the underlying action is based upon the written agreement between the parties and the credit application signed by DellaVedova. Thus, plaintiff urges the Court to dismiss these affirmative defenses.

Plaintiff then notes that the account agreement and rental agreements listed the business entity of "Modern Industries" and states that its research has determined that this is not a registered business entity. Instead, the federal taxpayer identification number provided by DellaVedova on the credit application belongs to defendant Modern Concrete Corp. Thus, plaintiff argues that DellaVedova was doing business as Modern Industries and should be held liable personally for any debts incurred on behalf of the entity "Modern Industries". Additionally, plaintiff argues, DellaVedova is personally liable under the unconditional personal guarantee contained in the account agreement.

In her affidavit in support of the motion, Williams states that on or about May 25, 2006, DellaVedova entered into the subject agreement wherein plaintiff agreed to furnish construction equipment for defendants' use at construction projects and DellaVedova agreed to pay plaintiff the sums set forth in a series of subsequently issued rental agreements (annexed to the moving papers). DellaVedova personally and unconditionally guaranteed payment of the indebtedness of "Modern Industries", including interest at the rate of 18 % per annum, attorneys' fees and collection costs. Williams states that the sum of \$51,646.04 is due and owing from the construction equipment rentals and DellaVedova has failed and refused to make payment. She further states that plaintiff sent invoices to DellaVedova and that DellaVedova retained such invoices without objection. Finally, Williams states that Modern Concrete tendered checks to plaintiff, signed by DellaVedova, totaling \$10,000.00, which were returned for insufficient funds.

Based on the foregoing, plaintiff seeks an Order, *inter alia*, dismissing the affirmative defenses and granting summary judgment on the Complaint.

Defendants oppose the motion solely by an affirmation of counsel. Essentially, counsel argues that the motion is premature because it had served discovery demands which plaintiff did not respond to prior to making the motion for summary judgment. Additionally, counsel states that it interposed the affirmative defenses because it did not have any documents prior to the service of an Answer, but seemingly acknowledges that these defenses are without merit. Counsel argues that there are issues of fact which preclude summary judgment.

Plaintiff submits a reply wherein it notes that defendants have conceded that the affirmative defenses are not valid. Additionally, plaintiff argues that there are no genuine issues of fact, that counsel's affirmation is insufficient to defeat a motion for summary judgment and no additional discovery is required. Therefore, plaintiff urges the Court to grant the motion in its entirety.

It is well settled that to obtain summary judgment, the moving party must make a prima facie showing of entitlement to judgment as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact. *Goldberger v. Brick & Ballerstein, Inc.*, 217 A.D.2d 682, 629 N.Y.S.2d 813 (2d Dept. 1995) (internal citations omitted).

The burden then shifts to the party opposing the motion to come forward with proof in admissible form demonstrating there are genuine issues of material fact which preclude the granting of summary judgment. *Zayas v. Half Hollow Hills Cent. School Dist.*, 226 A.D.2d 713, 641 N.Y.S.2d 701 (2d Dept. 1996). An affirmation of counsel, not based upon personal knowledge of the facts and without supporting documentation is insufficient to defeat a motion for summary judgment. *Mobil Oil Corp. v. Penna*, 139 A.D.2d 501, 526 N.Y.S.2d 849 (2d Dept. 1988). *See also, Demacos v. Demacos*, 142 A.D.2d 546, 529 N.Y.S.2d 904 (2d Dept. 1988).

In an action to recover for an account stated, a plaintiff/creditor meets its prima facie burden by demonstrating that the defendant received and retained the account statements without objection and made partial payment on the accounts. *See, e.g., Schneider Fuel Oil, Inc. v. DeGennaro*, 238 A.D.2d 495, 656 N.Y.S.2d 668 (2d Dept. 1997).

Generally, the signer of a written instrument is "conclusively bound by its terms unless there is a showing of fraud, duress or some other wrongful act on the part of any party to the contract." *Dunkin' Donuts v. Liberatore*, 138 A.D.2d 559, 526 N.Y.S.2d 141 (2d Dept. 1988). *See also, Chrysler Credit Corp. v. Kosal*, 132 A.D.2d 686, 518 N.Y.S.2d 162 (2d Dept. 1987). Where a guarantee clearly indicates that the signatory would "unconditionally guarantee" the performance of the corporation and is unambiguously identified as a "guaranty" it will be enforceable against the guarantor. *Suffolk Cement Products, Inc., v. Empire Concrete Enterprises, Inc.*, 234 A.D.2d 447, 650 N.Y.S.2d 801 (2d Dept. 1996); *Dunkin Donuts, supra*. Such broad guarantees are not limited by the fact that the corporation only sought a minimum credit line. *Colonial Plumbing Corp. v. Gallagher*, 217 A.D.2d 764, 629 N.Y.S.2d 128 (3d Dept. 1995).

Finally, while CPLR §3212(f) permits a party a motion for summary judgment to obtain further discovery under certain circumstances, such is not available where the party fails to demonstrate that the discovery being sought is "anything more than a fishing expedition." *Greenberg v. McLaughlin*, 242 A.D.2d 603, 662 N.Y.S.2d 100 (2d Dept. 1997). This section generally applies where the party opposing the motion has not had a reasonable time to obtain disclosure prior to the submission of the motion for summary judgment. *Aurora Loan Services, LLC*

v. LaMattina & Assoc., 59 A.D.3d 578, 872 N.Y.S.2d 724 (2d Dept. 2009). *See also, Canarick v. Cicarelli*, 46 A.D.3d 587, 847 N.Y.S.2d 641 (2d Dept. 2007)(motion for summary judgment was not premature where plaintiff failed to demonstrate that additional discovery might lead to relevant evidence or that the facts necessary to oppose the motion were exclusively within the knowledge and/or control of defendants.).

Dated: October 14, 2009
Riverhead, New York



EMILY PINES
J. S. C.