

Merchant Store Inc. v Schloesser

2012 NY Slip Op 31928(U)

July 17, 2012

Supreme Court, Suffolk County

Docket Number: 30202-2011

Judge: Emily Pines

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

COPY

Present:

Hon. Emily Pines
Justice Supreme Court

Motion Date: 05-10-2012
Submit Date: 05-15-2012
Motion No.: 001 MD

[] Final
[x] Non Final

_____ X
THE MERCHANT STORE INC.,

Plaintiff,

-against-

KENT A. SCHLOESSER,

Defendant.

_____ X

Attorney for Plaintiff
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ORDERED that the motion by plaintiff for summary judgment in its favor is denied; and it is further

ORDERED that the parties are directed to appear at a preliminary conference on Monday, September 10, at 11:00 a.m. in Supreme Court, Part 46, located at the Alan Oshrin Building, One Court Street, Courtroom Two, Second Floor, Riverhead, New York; and it is further

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ORDERED that the plaintiff's counsel shall serve a copy of this Order with Notice of Entry upon counsel for the defendant pursuant to CPLR 2103(b)(2) or (3) within twenty (20) days of the date hereof and thereafter file the affidavit of service with the Clerk of the Court.

In this breach of contract action, the plaintiff, The Merchant Store, Inc., seeks to recover chargebacks in connection with a credit card processing contract with United Advantage, in the amount of \$467, 387.40, from Kent Schloesser, who allegedly personally guaranteed the contract. The action was commenced on September 28, 2011. Issue was joined on December 1, 2011, wherein the defendant asserted a general denial with counterclaims. The plaintiff now moves for summary judgment in its favor.

A party moving for summary judgment must make a prima facie showing of entitlement as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact. **Winegrad v New York Univ. Med. Ctr.**, 64 NY2d 851, 487 NYS2d 316 (1985); **Zuckerman v New York**, 49 NY2d 557, 427 NYS2d 595 (1980)]. Of course, summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue. **Stewart Title Ins. Co. v Equitable Land Servs.**, 207 AD2d 880, 616 NYS2d 650 (2d Dept 1994). Once a prima facie showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish material issues of fact which require a trial of the action. **Alvarez v Prospect Hosp.**, 68 NY2d 320, 508 NYS2d 923 (1986).

“A guarantee is an agreement to pay a debt owed by another which creates a secondary liability and thus is collateral to the contractual obligation.” **Brewster**

Transit Mix Corp. v McLean, 169 AD2d 1036, 1037, 565 NYS2d 316 (3d Dept 1991), quoting **Shire Realty Corp. v Schorr**, 55 AD2d 356, 359-360, 390 NYS2d 622 (2d Dept 1977).

In support of the motion, the plaintiff submits, *inter alia*, the pleadings, the personal affidavit of Peter Estep, a copy the Merchant Account Application by United Advantage, and copies of an invoice and Merchant Search Results. Peter Estep avers that he is the president of the plaintiff The Merchant Store, Inc. He states that the defendant personally guaranteed the obligations of United Advantage in connection with a credit card processing contract between United and Merchant Services, Inc. He further states that United incurred liability to the plaintiff and defendant Schloesser has failed to pay pursuant to the personal guarantee. Pursuant to a contract, dated October 12, 2010, between the plaintiff and United, United is fully liable to the plaintiff for all chargebacks. Estep avers that the defendant, in his capacity as owner and officer of United, executed a contract on behalf of United, doing business as both United and SGS Consulting Group, LLC, whereby the plaintiff agreed to provide credit card processing services for United. On October 12, 2010, the defendant executed a personal guarantee of the United contract whereby the defendant guaranteed the full performance of United's obligations. Estep states that beginning in March 2011 through January 2012 many of United's customers have charged back the cost of United's products and/or services to their credit card issuers, which were passed on to the plaintiff. However, pursuant to the contract, the merchant ultimately bears the responsibility for the loss incurred by the plaintiff for a customer's chargeback. The defendant had the opportunity to dispute 250 of the chargebacks resulting in 110 successful challenges. The remainder of chargebacks which the plaintiff claims that the defendant owes amounts to \$467,387.40. Despite due

demand, the defendant has failed to reimburse the plaintiff for the cost of United's customers' chargebacks.


The defendant failed to demonstrate its entitlement to judgment as a matter of law. Upon review of the Merchant Account Application, the defendant's obligation is not that of a guarantor as the writings did not make United the primary obligor, with the defendant's liability secondary to that of United, accruing only after default on the part of United, regardless of the self-serving allegations contained in the affidavit submitted by the plaintiff. **Brewster Transit Mix Corp v McClean**, *supra*. This is not to say that Scholesser is not a co-obligor under the contract who may be personally liable thereunder. **Yellow Book of NY, LP v DePante**, 309 AD2d 859, 766 NYS2d 44, (2d Dept 2003); **Star Video Entertainment, LP v J & I Video Distrib., Inc.**, 268 AD2d 423, 702 NYS2d 91 (2d Dept 2000); **Florence Corp. V Penguin Constr. Corp.**, 227 AD2d 442, 642 NYS2d 697 (2d Dept 1996). In any event, there are issues of fact regarding the amount of chargebacks and fees which are allegedly owed to the plaintiff.

Since the plaintiff failed to satisfy its burden as the party moving for summary judgment, it is unnecessary to analyze the sufficiency of the defendant's opposition. **McArthur v Muhammad**, 27 AD3d 532, 810 NYS2d 352 (2d Dept 2006); **Valdez v Aramark Servs., Inc.**, 23 AD3d 639, 804 NYS2d 811 (2d Dept 2005); **Nationwide Property Casualty v Nestor**, 6 AD3d 409, 774 NYS2d 357 (2d Dept 2004). Accordingly, summary judgment is inappropriate and the plaintiff's motion is denied. *See generally*, **Zuckerman v City of New York**, *supra*.

The parties are directed to appear at a preliminary conference in Supreme Court, Part 46, One Court Street, Riverhead, New York on Monday, September 10, 2012 at 11:00 a.m.

This constitutes the *DECISION* and *ORDER* of the Court.

Dated: July 17, 2012
Riverhead, New York



Emily Pines
J. S. C.

Final
 Non Final