

Amos Financial, LLC v Brockmyer

2014 NY Slip Op 30303(U)

February 3, 2014

Sup Ct, Wayne County

Docket Number: 75068/2013

Judge: Daniel G. Barrett

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This opinion is uncorrected and not selected for official publication.

At a Term of the Supreme Court held in and for the County of Wayne at the Hall of Justice in the Village of Lyons, New York on the 20th day of November, 2013.

Present: Honorable Daniel G. Barrett
Acting Supreme Court Justice

SUPREME COURT STATE OF NEW YORK
COUNTY OF WAYNE

AMOS FINANCIAL, LLC,

Plaintiff

-vs-

BRYAN J. BROCKMYER,
a/k/a BRYAN J. BROCKMYRE,

Defendant

DECISION
Index No. 75068

2013

The Plaintiff, Amos Financial, LLC, has brought this application seeking summary judgment against the Defendant, Bryan J. Brockmyer a/k/a Bryan J. Brockmyre. The Defendant, Bryan J. Brockmyre, has cross-moved requesting that the Plaintiff's summary Judgment motion be denied and that summary judgment be granted in his favor. Counsel have submitted motion papers in support of their client's claims and have presented their oral arguments to this Court.

The first issue to evaluate is whether the Plaintiff, a foreign corporation, should be allowed to prosecute this action against the Defendant in New York. At the time the action was commenced, November 20, 2012, the Plaintiff was not registered with the Secretary of

State. The Defendant has provided a statement from the New York State of Department of State reflecting that the Plaintiff filed with the Secretary of State on December 24, 2012. Professor Siegel points out (see Siegel, N.Y. Prac. § 30 (5th Ed.)) that BCL § 1312 is a revenue producing measure and non-compliance is not jurisdictional. Thus, if a corporation is in breach of the statute when it begins an action but complies while the action is pending, the action may proceed unhindered. (See Oxford Paper Co. v. S.M. Liquidation Co., 45 Misc. 2d 612, 257 N.Y.S. 2d 395.

The next issue is whether the failure of the Plaintiff to publish pursuant to N.Y. Ltd. Liab. Co. Law § 206(6), within 120 days of filing from filing the Notice of Formation of the limited liability company will result in a suspension of the LLC's authorization to do business within the state. The Defendants sent a letter of inquiry to the New York Department of State requesting confirmation of such publication. As of the date of oral argument the Defendant had not received a response to this inquiry.

The Plaintiff has alleged that it is authorized to do business in New York State and it is registered with the Secretary of State. At the time of the argument of the motion the Defendant had not produced evidence to the contrary so we do not have to deal with this issue. The Plaintiff is allowed to proceed with this action.

FIRST CAUSE OF ACTION

The Plaintiff's first cause of action alleges that the Defendant is a promissor on a promissory note and that he defaulted on this note. In the Plaintiff's moving papers there is an Affidavit which was to be signed by Key Bank employee, Laurie Zacarias, which specifies that the Defendant executed a retail installment contract and they secured the Agreement. It goes onto specify that the Defendant defaulted on this retail installment contract and security agreement. The deficiency with the first cause of

action is that the testimony of Laurie Zacarias is critical. Despite the fact that the Notary Public, Sandra Boyle, signed her name and affixed her seal does not remedy the fact that the Affidavit was not signed. Consequently, it is a fatal defect with respect to the prosecution of the first cause of action.

An Affidavit was submitted by Brian Donegan, general counsel to the Plaintiff. As Mr. Donegan based his Affidavit upon personal knowledge and documentation provided by Key Bank. As Plaintiff's general counsel, Mr. Donegan does not have personal knowledge of Key Bank's business practices, therefore the proof is insufficient to establish a proper foundation for the documents provided by Key Bank.

There is also an issue with a Bill of Sale and Assignment signed by John Jensen, Senior Vice President, analytics and collection strategy. The Bill of Sale and Assignment refers to Exhibit A which is described as all of assignor's right, title and interest in and to each of the accounts identified in the account schedule attached as Exhibit A. However, Exhibit A which is attached to the Bill of Sale and Assignment in this application simply has one account which bears the Defendant's name and other information as well as an original balance of \$69,050.00. The Court appreciates that in the oral presentation that counsel for Plaintiff indicated that he changed the Exhibit but counsel does not have personal knowledge of the workings of Key Bank, either. In addition, the lawsuit is seeking \$26,537.83 in damages. Mr. Donegan is not in a position to provide this information based upon personal knowledge. "Submission of the underlying statements, in proper evidentiary form, is required in an assigned debt case, like this one" (DNS Equity Group, Inc. v. LaVallee, 2010 N.Y. Slip Op 50298 [U]; see also PRA III, LLC v. Gonzalez, 54 A.D. 3d 917, 864 N.Y.S. 2d 140).

SECOND CAUSE OF ACTION

The second cause of action seeks damages on the theory of account stated. Clearly, there was no direct business relationship between the Plaintiff and the Defendant. Since this direct relationship is missing this cause of action fails.

THIRD CAUSE OF ACTION

The Plaintiff seeks to recover from the Defendant on the equitable theory of unjust enrichment. A Plaintiff must show that “ (1) the other party was enriched, (2) at the party’s expense, and (3) that ‘it is against equity and good conscience to permit [the other party] to retain what is sought to be recovered’” (Citibank, N.A. v. Walker, 12 A.D. 3d 480, 481, 787 N.Y.S. 2d 48; Baron v. Pfizer, Inc., 42 A.D. 3d 627, 629-630, 840 N.Y.S. 2d 445.

The Plaintiff’s unjust enrichment claim fails for the lack of allegations that would indicate a relationship between the parties. Privity is not required for an unjust enrichment claim, but a claim will not be supported if the connection between the parties is too attenuated (see Sperry v. Crompton Corp., 8 N.Y. 3d 204, 831 N.Y.S. 2d 760, Mandarin Trading Ltd., v. Wildenstein, 16 N.Y. 3d 173, 919 N.Y.S. 2d 465.

The Plaintiff’s claim for recovery is denied.

DEFENDANT’S MOTION FOR SUMMARY JUDGMENT

Because of the drastic nature of the summary judgment motion, a rule has arisen that occasionally permits the Court to consider incompetent evidence, i.e. evidence that would be inadmissible at a trial, but only if it tends to defeat the motion. (It will not be considered in support of the motion.) (see Siegel N.Y. Practice § 281 5th Ed.).

As pointed out in the discussion of the first cause of action, the inadmissible purported Affidavit of Ms. Zacarias will protect the Plaintiff from a dismissal of the first cause of action. Therefore, the Court will not grant the Defendant's application for summary judgment against the Plaintiff on the first cause of action.

The Court grants summary judgment to the Defendant dismissing the second and third causes of action pleaded by the Plaintiff.

This constitutes the Decision of the Court. Counsel for Plaintiff to prepare an Order consistent with this Decision.

Dated: February 3, 2014
Lyons, New York



Daniel G. Barrett
Acting Supreme Court Justice

WALTER T. JONES
SUPREME AND COUNTY COURT
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