

Autovest, LLC v Coleman

2015 NY Slip Op 32226(U)

November 19, 2015

Supreme Court, New York County

Docket Number: 152075/2015

Judge: Cynthia S. Kern

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 55

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AUTOVEST, LLC,

Plaintiff,

Index No. 152075/2015

-against-

DECISION/ORDER

CAROLE COLEMAN,

Defendant.

-----X

HON. CYNTHIA KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	<u>1</u>
Answering Affidavits.....	<u>2</u>
Replying Affidavits.....	<u>3</u>
Exhibits.....	<u>4</u>

Plaintiff commenced the instant action seeking a money judgment against defendant to recover on a note and security agreement. Plaintiff now moves for summary judgment on its first cause of action for breach of contract and on its second cause of action seeking to recover attorney's fees. For the reasons set forth below, plaintiff's motion is granted with respect to its first cause of action and denied with respect to its second cause of action.

The relevant facts are as follows. On or about October 31, 2007, defendant signed a note which was secured by a security agreement (the "Agreement") with non-party Wells Fargo Financial New York, Inc. ("Wells Fargo") to finance the purchase of a vehicle for \$23,200.00 with an annual interest rate of 17.74% from February 24, 2009. Plaintiff alleges that defendant failed to make payments as required under the Agreement. The vehicle was repossessed and, on or about

January 14, 2009, Wells Fargo mailed to defendant a notice of its plan to sell the vehicle at a private sale. On or about February 23, 2009, Wells Fargo mailed to defendant a statement of defendant's "deficiency balance" following the sale, which took place on February 18, 2009. Defendant allegedly owed Wells Fargo \$13,530.48, \$12,828.48 of which consisted of the unpaid balance on the vehicle and \$702.00 of which consisted of costs associated with the repossession and sale of the vehicle. On or about April 30, 2011, Wells Fargo assigned the Agreement to plaintiff in a written, undated instrument signed by Darren Kazich, who is termed an "Agent" of Wells Fargo in the signature block. On or about March 3, 2015, plaintiff commenced the instant action against defendant for breach of contract seeking the sum of \$12,014.66 plus interest at the rate of 17.74% per year from February 24, 2009, through the entry of judgment and interest at the statutory rate following the entry of judgment, in addition to the sum of \$742.50 for costs and disbursements incurred in attempting to recover the sum allegedly due and owing by defendant. Plaintiff now moves for summary judgment pursuant to CPLR § 3212.

On a motion for summary judgment, the movant bears the burden of presenting sufficient evidence to demonstrate the absence of any material issues of fact. *See Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986). Summary judgment should not be granted where there is any doubt as to the existence of a material issue of fact. *See Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980). Once the movant establishes a *prima facie* right to judgment as a matter of law, the burden shifts to the party opposing the motion to "produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim." *Id.*

To sufficiently state a cause of action for breach of contract, a complaint must allege (1) the existence of a contract; (2) the plaintiff's performance under the contract; (3) the defendant's breach

of the contract; and (4) damages as a result of the breach. See *JP Morgan Chase v. J.H. Electric of NY, Inc.*, 69 A.D.3d 802 (2^d Dept 2010). Further, where a defendant raises the issue of standing, the plaintiff must show that it has standing by proving that the contract was validly assigned to plaintiff. See *U.S. Bank, N.A. v. Collymore*, 68 A.D.3d 752, 753-54 (2^d Dept 2009).

In the present case, plaintiff has established its *prima facie* right to judgment as a matter of law against defendant on its breach of contract cause of action by submitting evidence establishing the existence of a contract, plaintiff's assignor's performance under the contract, defendant's breach of a contract and plaintiff's damages as a result of the breach. Plaintiff has submitted the affidavit of Christina M. Dunn, Records Manager for plaintiff and a person with knowledge of the material facts, who testified to the existence of the Agreement, the assignment of the Agreement by Wells Fargo to plaintiff, defendant's default by failing to make timely payments under the Agreement and plaintiff's damages as a result of the breach.

Defendant has failed to raise a material question of fact in opposition to plaintiff's *prima facie* showing. Initially, to the extent that defendant contends that Wells Fargo did not validly assign the Agreement to plaintiff, such argument is unavailing. Defendant argues that, because the written instrument assigning the Agreement is undated and was signed by Darren Kazich, whom plaintiff did not prove is an authorized agent of Wells Fargo, plaintiff has failed to prove that the assignment occurred and therefore plaintiff lacks standing. "No special form or language is necessary to effect an assignment as long as the language shows the intention of the owner of a right to transfer it." *Bank of N.Y. v. Silverberg*, 86 A.D.3d 274, 280-81 (2^d Dept 2011). In the present case, the written instrument assigning the Agreement showed the intention of Wells Fargo to transfer its rights under the Agreement to plaintiff. Defendant has not produced any evidence that

