

Wein v JMJ Films, Inc.
2016 NY Slip Op 30992(U)
May 31, 2016
Supreme Court, New York County
Docket Number: 652468/14
Judge: Robert R. Reed
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 43

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MARC WEIN and MURRAY HILL STUDIOS, INC,

Index No. 652468/14

Plaintiffs,

- against -

DECISION/ORDER

JMJ FILMS, INC., JAMES MOSKOVITZ, JOYCE
MOSKOVITZ and KENNETH ADELBERG

Defendants.

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ROBERT R. REED, J.:

Motion by plaintiffs GRANTED in part and denied in part; cross-motion by defendants JMJ Films, Inc., James Moskowitz and Joyce Moskowitz DENIED.

Plaintiffs move for summary judgment, pursuant to CPLR 3212, granting judgment against defendants Joyce Moskowitz and Kenneth Adelberg in the amount of \$415,385.53, together with interest, costs and disbursements, based upon a guaranty those defendants signed in support of a certain settlement agreement entered into by defendants JMJ Films, Inc. ("JMJ") and James Moskowitz with plaintiff Murray Hill Studios, Inc. ("MHS"), dated October 26, 2005 (the "Settlement Agreement"). Defendants JMJ, James Moskowitz and Joyce Moskowitz cross-move for summary judgment dismissing the first, second, fourth and fifth causes of action of the complaint. The third cause of action relates only to defendant Kenneth Adelberg, who opposes plaintiffs' motion, but does not cross-move. Of note, in the complaint plaintiffs "demand judgment against the Defendants in the sum of \$116,809.20, with interest thereon from October 26, 2005, together with any and all related attorney's fees, which fees amount to at least \$50,000

for past fees and is to be more accurately determined in the future, as well as the costs and disbursements associated with this action.”

Plaintiffs here establish that on October 26, 2005 defendants JMJ and James Moskovitz did enter into the Settlement Agreement with plaintiff MHS to resolve a then-pending lawsuit between and among those parties (see Index No. 115666/04). In the then-pending suit, plaintiff MHS asserted claims against defendants JMJ and James Moskovitz “in the sum of \$278,013.81, plus attorneys’ fees in the sum of \$50,000, with interest, costs and disbursements.” Under the Settlement Agreement, defendants JMJ and James Moskovitz agreed to pay plaintiff MHS a compromise amount of \$210,000.00 -- \$15,000.00 of which was to be paid upfront, with the \$195,000.00 balance to be paid in quarterly installments, with interest at a rate of six percent per annum, pursuant to particular terms and provisions. Defendants JMJ and James Moskovitz further agreed that, in the event of their default in payment of any installment and upon the failure to timely cure any such default after due notice thereof, plaintiff MHS would be entitled “to enter Judgment ... as demanded in the complaint, with costs and interest as provided by law, giving credit for all payments made prior to the default.” The Settlement Agreement specified that, “as additional security for payment of the Settlement Amount,” defendants JMJ and James Moskovitz would provide a confession of judgment, as well as personal guarantees by defendants Adelberg and Joyce Moskovitz, neither of whom was party to the then-pending suit. The court notes that the Settlement Amount is a defined term in the Settlement Agreement, that is, “\$210,000.00.”

Plaintiffs further establish that on October 26, 2005 and November 7, 2005 defendants Joyce Moskovitz and Adelberg, respectively, executed personal guarantees in the form and for

the purpose referenced in the aforementioned Settlement Agreement. In executing the guarantees, defendants Joyce Moskowitz and Adelberg acknowledged that it “was in [their] direct financial interest and to [their] benefit to induce [plaintiff MHS] to enter the [Settlement Agreement] and to discontinue the [then-pending lawsuit] by executing and delivering [such guarantees].” Under the guarantees, defendants Joyce Moskowitz and Adelberg “guarantee[] the full and prompt satisfaction, payment and the performance of all liabilities and obligations of [defendant] JMJ to [plaintiff Murray Hill] under the [Settlement Agreement].”

Plaintiffs establish that, while defendants JMJ and James Moskowitz made quarterly payments more or less in accordance with the schedule set forth in the Settlement Agreement, those defendants defaulted under the accord in that they did not make the payment due on February 15, 2014, and did not timely cure such default thereafter. Plaintiffs establish that notice of the default was given to each of defendants herein in the manner prescribed in the Settlement Agreement and/or applicable guarantees. Although defendants JMJ and James Moskowitz attempted to make payments after the cure period had expired, such efforts would not affect the event of default or plaintiff MHS’s right to seek the relief provided for in the Settlement Agreement.

“At the time of the default,” the affidavit of MHS’s president, plaintiff Marc Wein, attests, “the balance due as set forth in the payment schedule was \$48,795.23.” (Wein Aff., para. 8) None of defendants contest the accuracy of that figure – only asserting that they should be given credit for the additional payments that were attempted to be made after the expiration of the cure period. Thus, there is no factual dispute that \$48,795.23 of the defined Settlement Amount remained to be paid as of February 15, 2014.

Plaintiffs find no support in the Settlement Agreement for any calculation that defendants Joyce Moskowitz and Adelberg as guarantors owe plaintiff MHS either \$415,385.53, as requested on the motion, or \$116,809.20, as demanded in the complaint. In the Settlement Agreement, those defendants guarantee only the \$210,000.00 Settlement Amount defined therein, with interest, costs, disbursements and attorneys' fees in connection with the recovery of that amount, from the date of its inception. The confession of judgment, executed separately by defendants JMJ and James Moskowitz, under the index number of the then-pending action is distinct and has a different purpose, with a different onset for the calculation of interest, costs, disbursements and attorneys' fees. The guarantees of defendants Joyce Moskowitz and Adelberg do not, by their own plain language or by the plain language of the Settlement Agreement in which they are referenced, purport to guarantee the performance of the obligations manifested in the confession of judgment.

Defendants JMJ, James Moskowitz and Joyce Moskowitz cross-move for summary judgment, based upon arguments of waiver and failure to mitigate. These arguments are not substantive, and merit no discussion.

Finally, the court observes that neither the Settlement Agreement nor the guarantees nor the confession of judgment, for that matter, appear to accord plaintiff Marc Wein any rights as an individual. The court, thus, is confused regarding his presence as a party to this litigation – and, therefore, would ask counsel to consider whether there is any non-frivolous purpose to such individual's continuing involvement as a party as the proceedings herein progress.

Accordingly, it is hereby:

ORDERED that plaintiffs' motion for summary judgment is granted in part and denied in part to the extent that plaintiff Murray Hill Studios, Inc. *only* shall have judgment in its favor against defendants Joyce Moskowitz and Kenneth Adelberg, jointly and severally, in the amount of \$48,795.23, with interest from February 15, 2014, together with costs and disbursements, and that the Clerk shall enter such judgment; and it is further

ORDERED that the cross-motion by defendants JMJ Films, Inc., James Moskowitz and Joyce Moskowitz is denied; and it is further

ORDERED that to the extent plaintiff Murray Hill Studios, Inc. seeks recovery of its attorneys' fees against defendants Joyce Moskowitz and Kenneth Adelberg such claims are hereby severed; and it is further

ORDERED that the parties by their attorneys shall appear for a preliminary conference in Part 43, in Room 581 at the Courthouse located at 111 Centre Street, New York, New York 10013 on July 14 at 9:30 a.m.

Dated: May 31, 2016

ENTER:



ROBERT R. REED
J.S.C.