

HSBC Bank USA, NA v Idox, Inc.

2016 NY Slip Op 31129(U)

June 14, 2016

Supreme Court, New York County

Docket Number: 651423/12

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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HSBC BANK USA, NA,

Plaintiff,

Index No. 651423/12

-against-

DECISION and ORDER

IDOX, INC. and JOSEPH BISTRICER,

Defendants.

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Robert R. Reed, J.:

Plaintiff's motion is GRANTED in part and DENIED in part.

Plaintiff bank moves for default judgment, pursuant to CPLR 3215, against defendant Idox, Inc., and for summary judgment, pursuant to CPLR 3212, against Idox and defendant Bistricer, upon its claim that defendants breached their obligations in connection with a business credit application and business lending agreement. The business lending agreement included a revolving line of credit provision, purportedly obligating Idox, and an unconditional guaranty provision, purportedly obligating Bistricer. Plaintiff alleges that defendants have breached their respective obligations under the business lending agreement, inasmuch as payments thereunder have not been made when due. Idox has failed to answer or appear. Bistricer has

answered, has attempted unsuccessfully to obtain discovery from plaintiff, and now opposes summary judgment, denying that the signature appearing on the business credit application is his.

Summary judgment is a "drastic remedy" (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503). "[T]he 'proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case'" (*Meridian Mgt. Corp. v Cristi Cleaning Serv. Corp.*, 70 AD3d 508, 510, quoting *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853). Once the proponent of the motion meets this requirement, "the burden then shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of a material issue of fact that precludes summary judgment and requires a trial" (*Ostrov v Rozbruch*, 91 AD3d 147, 152, citing *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324). If there is any doubt as to the existence of a triable issue of fact, summary judgment must be denied (*Rotuba Extruders v Ceppos*, 46 NY2d 223; *Grossman v Amalgamated Hous. Corp.*, 298 AD2d 224). If the movant fails to present a prima facie case for summary judgment, the motion must be denied, regardless of the sufficiency of the opponent's evidentiary

showing (see *Vanderhurst v Nobile*, 130 AD3d 716, 717).

Bistricer in opposition to the summary judgment motion (1) asserts that, in general, he never signs personal guarantees, (2) specifically denies that the signature on the business credit application is his, (3) attests that he does not use the title "Dr." when signing documents, as is done in the signature appearing on the business credit application, and (4) attests that he does not use his middle initial, as is done in the signature appearing on the business credit application. The court notes, additionally, the presence of certain initials appearing to the right of guarantor's signature in the credit application - and the lack of any explanation in the moving papers as to the purpose of such markings. The court observes as well that the signature in the business credit application is not notarized and that no copy of Bistricer's driver's license, passport, or other government-issued identification card is appended to such application. Additionally, the court observes that Bistricer's signature on his opposing affidavit is, by appearance, markedly distinct from that of the signature appearing in the credit application. Finally, it may be noted that plaintiff includes in its moving and reply papers no copies of what it claims to be known exemplars of Bistricer's

signature.

As Bistricer also points out, moreover, nothing in the moving papers would suggest that plaintiff's affiant on the motion actually witnessed Bistricer affixing his signature to the business credit application or that such affiant has any actual personal knowledge of the execution of the relevant documents or of the creation of the alleged subject obligation at all. Bistricer, indeed, in his discovery, it seems, has sought to probe plaintiff regarding its proofs - and plaintiff's response has been largely to ignore Bistricer's notices and demands. This discovery status alone would suggest that summary judgment is inappropriate pursuant to CPLR 3212(f).

Under the combined circumstances of this action, summary judgment as against Bistricer certainly is unwarranted - whether it be for (a) a failure to establish a prima facie case regarding the creation of the alleged guaranty obligation, (b) the existence of issues of fact with respect to the actual execution of the said guaranty, or (c) the need on Bistricer's part for discovery with regard to persons with knowledge as to the creation of the alleged guaranty obligation. To the extent plaintiff seeks summary judgment against Idox, such relief is inappropriate, given that issue has not been joined by that

defendant.

Regarding plaintiff's motion for default judgment pursuant to CPLR 3215, Idox's failure to appear has left it vulnerable to the relief plaintiff seeks, even though plaintiff's motion is manifestly untimely [see CPLR 3215(c)]. Law office failure, as asserted by plaintiff, is considered a sufficient excuse for failure to move for default within one year (see *Lovisa Construction Co., Inc. v. Facilities Dev. Corp.*, 148 AD2d 913). As such, plaintiff is entitled to entry of default judgment as against Idox in the sum of \$96,133.03.

According, it is hereby

ORDERED that plaintiff's motion for default judgment, pursuant to CPLR 3215, against defendant Idox, Inc., is granted in favor of plaintiff and against defendant Idox, Inc. for the sum of \$96,133.03, plus interest thereon at the statutory rate from May 24, 2012, together with costs and disbursements as taxed by the Clerk, and the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that the portion of plaintiff's action that seeks reasonable attorney's fees is severed and shall continue, and an assessment thereof is directed, and it is further

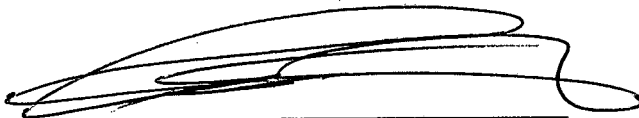
ORDERED that, within 30 days from entry of this order,

plaintiff shall serve a copy of this order with notice of entry, a note of issue and statement of readiness upon the defaulting defendant Idox, Inc., by first class mail, and, by e-filing, upon the Clerk of the Trial Support Office, and shall pay for the appropriate fees, if any, and said Clerk shall thereupon place this action on the appropriate calendar for the assessment hereinabove directed; and it is further

ORDERED that plaintiff's motion for summary judgment, pursuant to CPLR 3212, against defendants Idox, Inc., and Bistricher is denied; and it is further

ORDERED that the parties by their counsel shall appear for a preliminary conference in Part 43 of this court at 111 Centre Street, Room 581, New York, New York at 9:30 a.m. on August 25, 2016.

Dated: June 14, 2016



ROBERT R. REED, J.S.C.