

Principis Capital LLC v B2 Hospitality Servs. LLC

2016 NY Slip Op 31132(U)

June 15, 2016

Supreme Court, New York County

Docket Number: 652782/2012

Judge: Ellen M. Coin

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: I.A.S. PART 63

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PRINCIPIS CAPITAL LLC,

Plaintiff,

- against -

B2 HOSPITALITY SERVICES LLC d/b/a BRIAN
SCOTTS AMERICAN RESTAURANT and BRIAN
BURNER,

Defendants.
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Index No. 652782/2012
Subm. Date: March 30, 2016
Motion Seq.: 002

DECISION & ORDER

ELLEN M. COIN, J.:

Plaintiff Principis Capital LLC moves pursuant to CPLR 3212 for summary judgment in the amount of \$31,155.78 with interest from February 1, 2012 on its first and second causes of action, and requests that its third cause of action for attorneys' fees be severed for an inquest.

This is an action for breach of a financing agreement and a personal guaranty. On June 7, 2011, plaintiff and defendant B2 Hospitality Services LLC d/b/a Brian Scotts American Restaurant (Restaurant) entered into a "Purchase and Sale of Future Receivables Agreement" (the Agreement). Pursuant to the Agreement, plaintiff paid the Restaurant \$25,500 to purchase \$35,572 in future credit card receivables generated by the Restaurant. The Agreement provides for plaintiff to collect the credit card receivables by debiting on a daily basis the Restaurant's designated bank account via ACH (automated clearing house) an amount equal to 20% of the Restaurant's credit card sales until the \$35,572 is collected.

The owner of the restaurant, Brian Burner, signed the Agreement on behalf of the Restaurant and separately executed a personal guaranty of the Restaurant's "performance and satisfaction of all the covenants, representations, and warranties set forth in Section 3 of the

Agreement.” Section 3 contains a covenant by the Restaurant not to revoke its ACH authorization to plaintiff or otherwise take any measures to interfere with plaintiff’s ability to collect the daily collection amount from the Restaurant’s bank account and not to change the bank account where the authorized credit card processor deposits the credit card sales to another account without plaintiff’s written consent (Agreement, § 3 [l], [m]).

According to the complaint, verified by plaintiff’s president Christopher Nassauer (Nassauer), on or before February 1, 2012, defendants refused to allow plaintiff to collect the Daily Collection Amount via ACH from the Restaurant’s bank account (Cmplt., ¶ 11). It is further alleged that pursuant to section 3 (j) of the Agreement, plaintiff made a demand upon the Restaurant to furnish copies of its bank statements for the account to which proceeds from the Restaurant’s sales were deposited, and that this request was ignored (*id.*, ¶¶ 12-14). The complaint alleges that plaintiff collected only \$4,416.72 pursuant to the Agreement, leaving a balance owed of \$31,155.78 (*id.*, ¶ 15). The complaint asserts three causes of action for (1) breach of the Agreement; (2) breach of Burner’s personal guaranty; and (3) attorney’s fees pursuant to both the Agreement and the personal guaranty.

In support of its motion for summary judgment, plaintiff submits an affidavit from Nassauer in which he repeats the allegations of the complaint, but also submits a copy of the Agreement and a letter dated February 1, 2012 from his counsel addressed to defendants at 90 North County Road, Miller Place, New York 11674. In this letter, counsel for the plaintiff declares the Agreement in default, demands immediate repayment of the accelerated amount due thereunder, and also demands copies of the Restaurant’s banking statements for the bank account identified in the Agreement and any other bank account into which sales proceeds were

deposited. Defendants did not respond to this letter, and now deny its receipt. No other business records are offered to support plaintiff's claim of a default under the Agreement.

In opposition to the motion, Burner submits an affidavit in which he avers that the Restaurant's business declined to a point at which it was no longer profitable and was running at a deficit each month (Burner aff, ¶ 6). The Restaurant ultimately went out of business on or about December 1, 2011, at which time there were no further credit card purchases (*id.*, ¶¶ 9, 10). He further avers that from June 7, 2011, when the Agreement was signed, through the date that the Restaurant closed its doors, plaintiff had access to the bank accounts pursuant to the terms of the Agreement and was being paid directly from the bank each day it was entitled to payment (*id.*, ¶¶ 7, 11). Burner submits copies of bank statements from an account the Restaurant maintained at Suffolk County National Bank (account no. xxx5464) for the months of June, July, August and September 2011 (*id.*, Ex. B). These bank statements appear to show that payments were made to plaintiff during those three months totaling over \$10,800. The statements also show that numerous payments to plaintiff were reversed starting on July 18, 2011. No explanation is offered for these credit adjustments. The account was closed on September 2, 2011. No further banking records are offered to show that the Restaurant continued to meet its payment obligations under the Agreement from August 31, 2011 until the date the restaurant closed. Finally, Burner denies receiving the February 1, 2012 letter from plaintiff's counsel (*id.*, ¶ 16), although defendants have admitted in their interrogatory responses that the address to which the letter is addressed was the mailing address of the Restaurant through December 31, 2012 (*see* Sussman reply affirmation, Ex. G).

In reply, Nassauer avers that in early September 2011, the Restaurant advised that it had switched to, or began to also utilize, an account at the People's United Bank, account no.

xxx6564 (*see* Nassauer reply aff, ¶ 8 & Ex. F). However, he claims that during the ensuing period, while the Restaurant continued to process credit card transactions, plaintiff's debits to this account for its portion of the receivables were repeatedly returned (*id.*, ¶ 9). Allegedly, plaintiff then made demands on the Restaurant on September 22, 2011, September 27, 2011 and November 18, 2011, to provide plaintiff with the bank statements for all accounts into which its sales receipts were being deposited (*id.*, ¶ 10). When these demands were ignored, plaintiff retained its present counsel who sent the February 1, 2012 letter, which was also ignored. Significantly, Nassauer does not challenge Burner's claim that plaintiff received more than the \$4,416.72 it claimed in the complaint and moving papers.

On a motion for summary judgment, it is the movant's burden to present sufficient evidence to demonstrate the absence of any material issue of fact (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Failure to make such *prima facie* showing warrants a denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). However, if the proponent of summary judgment meets its burden, it is then up to the opposing side to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

At the very least, there is a triable issue of here as to how much plaintiff is owed under the Agreement. In addition, plaintiff has not met its burden of presenting sufficient evidence of a default under the Agreement. The lack of documentary support for this motion is palpable. For example, although the Agreement provides that plaintiff was to receive daily reports regarding the Restaurant's credit card sales from the authorized credit card processor directly, plaintiff offers no such reports to establish what credit card sales were made by the Restaurant after

August 31, 2011. Nor does plaintiff offer any business records to prove that its debits to the People's United Bank account were returned. Pursuant to the Agreement, plaintiff was authorized to obtain information regarding the Restaurant's bank accounts directly from the approved credit card processor, and yet offers none of these records. Plaintiff also claims that defendants ignored its numerous demands in the Fall of 2011 to turn over its bank records, but again offers no documentary support to establish that these demands were sent and ignored. Even assuming that the February 1, 2012 letter from plaintiff's counsel was received and ignored, it was sent after the Restaurant purportedly closed. If the Restaurant legitimately closed its doors due to unprofitability, this would not be a default under the terms of the Agreement.

Defendants' proof is equally deficient. Burner fails to offer sufficient proof to support his claim that plaintiff had access to the Restaurant's bank accounts pursuant to the terms of the Agreement and was being paid directly from the bank each day it was entitled to payment (Burner aff, ¶¶ 7, 11). While Burner claims he "cannot locate most of the business records" (*id.*, ¶ 20), he fails to offer any explanation for why this is so and fails to explain why he or his counsel have not been able to obtain the Restaurant's banking statements for September-December 2011. With respect to the banking records that are offered, defendants fail to explain the credit adjustments reversing numerous payments to plaintiff in July and August 2011.

For these reasons, numerous issues of fact warrant the denial of plaintiff's motion for summary judgment.


In accordance with the foregoing, it is hereby

ORDERED that plaintiff's motion for summary judgment pursuant to CPLR 3212 is denied.

This constitutes the decision and order of this Court.

Dated: June 15, 2016

ENTER:



Ellen M. Coin, A.J.S.C.